

THE ROLE OF PUNISHMENT IN THE FIGHT AGAINST CORRUPTION

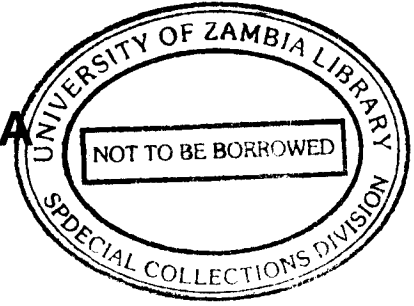
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**THE ROLE OF PUNISHMENT IN THE FIGHT AGAINST CORRUPTION
IN ZAMBIA**

**AN OBLIGATORY ESSAY (L 410) SUBMITTED TO THE UNIVERSITY
OF ZAMBIA IN PARTIAL FULFILLMENT FOR THE AWARD OF THE
DEGREE OF LAWS (LL.B)**

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DECLARATION

I declare that the contents of this dissertation are my conceived ideas, based on my extensive research findings.

However, I fully acknowledge the works of various scholars which contributed to the success of this work. Suffice to say, I remain the owner of this work, and accordingly, this work may not be used or reproduced in whole or in part without due permission or acknowledgement.

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DEDICATION

I dedicate my work to my late mother Ordirial Ntutuma Kapacha, my late brother Joseph Kapacha and late sister Sabina Kapacha. I wish they had lived to this point in order to have been part of my success. To my mother “your plans and my plans were not God's plans” Nonetheless, I sincerely thank God for all the years that I shared with you.

MYSRIP.

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In addition, I seek not to underplay the role played by my brothers , sisters and any other relatives in ensuring that I prosper in my studies.

I am equally grateful to all my colleagues whose names may not be exhaustively listed for their various contributions towards my success academically. I also pay great tribute to Mrs Mercy C Zulu of University of Zambia, Dean's Office, School of Engineering for her magnificent display of her expertise in typing skills which enabled me do the work according to my schedule.

Lastly, I wish to end my acknowledgements by stating that I remain solely accountable for any blame and shortcomings in this work, subject to the confines and limitations of the academic freedom of this university

PREFACE

This dissertation looks at the role of punishment in the fight against corruption in Zambia. The dissertation analyses the philosophical theories of punishment in relation to the control and prevention of crimes.

In addressing the subject matter of the essay, the paper critically looks at the mounting perplexities which surround the institution of punishment in relation to the control and prevention of corruption in Zambia. Furthermore, this essay looks at the broad concept of corruption, taking into account its causes, forms and effects. The paper further goes on to look at the legal framework of the institutions tasked to fight corruption in Zambia.

Lastly, but not the least, the essay looks at the factors affecting the effectiveness of the role of punishment in the fight against corruption in Zambia. The essay concludes by making recommendations on how to strengthen the role of punishment in the fight against corruption in Zambia.

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CHAPTER ONE

1.1 INTRODUCTION

The wish to control crime and the concern for the protection of individual rights are some of the primary purposes for punishing criminals. Justifications for the accounts given of the efficacy and morality of punishment by various theories of punishment seem still to be diverse. However, what seems clear is that the general practice of punishment by the state is only justified if it contributes to the reduction of crime and also to the promotion of respect for the law.

Philosophical theories of punishment have always taken punishment for crime as the paradigm instance of punishment. Some philosophers as well as some theorists with a different sort of intellectual base have approached the problems of criminal punishment differently, stressing the practical purpose to be served by this important social institution rather than pursuing immediately the implications of morally wrong conduct. Punishment may thus be defined as “any fine, penalty or confinement inflicted upon an offender by the authority of law and the judgement and sentence of the court, for some crime or offence committed by him, or for his omission of duty enjoined by law.”¹ It is from this premise in relation to the role of punishment in the control and prevention of crime that the main object of this essay is to provide a framework for a discussion of the mounting perplexities which now surround the institution of punishment in relation to the control and prevention of crime, with a bias towards the fight against corruption in Zambia.

¹ Blacks’ Law Dictionary.

1.2 THEORIES OF PUNISHMENT

So much has been written on the subject of punishment and its aims by eminent scholars. The Italian Writer, **Cesare Beccaria** (1738-94) reasoned that the end of punishment was not to make the offender miserable nor to compensate for the harm that had been done but was solely preventive."²

Punishment is thus, justifiable only on the ground that wrongful doings merits punishment. According to **DURKHEIM (1893)** "punishment is essentially a ceremonial reaffirmation of the societal values that are violated and challenged by crime. its general function is therefore that of enhancing social solidarity by strengthening the basic social values violated by the offender."³

On the other hand, **HATCHARD J** and **NDULO M**, define punishment as "simply the infliction of some form of pain or deprivation on the person of another in this instance by the criminal justice system."⁴

Punishment must be legally authorised for it to be administered or meted out. It is infact personal attaching on the individual for his transgressions. However, whichever approach punishment takes, its aims would be either retribution, prevention, deterrence, reformation or restitution. One thing to note is that it is sometimes difficult to distinguish some of these objects from one another, rather some of them are interrelated.

² Encyclopaedia Britannica, P. 283

³ Intrnational Encyclopaedia of Social Sciences, P. 220

1.2 (a) RETRIBUTION

The offender in this theory must be made to suffer in return for the wrong done and punishment should be in proportion to the evil. **JEFFRIE G. MURPHY** states that "A retributive theory of punishment is one which characterises punishment primarily in terms of the concepts of justice, rights and deserts, i.e, is concerned with the just punishment the criminal deserves , the punishment society has the right to inflict and the criminal has the right to expect."⁵ This gives psychological satisfaction to the victim by the offender undergoing suffering corresponding to that which he caused out of works of his evil conduct. Thus, the main thrust of retribution is the principle of proportionality, which is a sentence proportionate to the seriousness of the offence committed. It is sometimes used to mean revenge and refers to past conduct of the accused.

1.2 (b) PREVENTION

This is justifiable where the offender must be kept out of society for a substantial period due to the danger of his repeating the offence. Thus the custodian sentence protects the public from the offender for the period he is in prison or detention.

⁴ Hatchard J and Ndulo M. Reading in Criminal Law and Criminology in Zambia. P 118

⁵ Feinberg J. Gross H. Philosophy of Law, P. 622

1.2 (c) DETERRENCE

This sentence is assumed to work at two levels: firstly, it aims at deterring a particular offender from re-offending in future; (i.e, special or individual deterrence); secondly it aims at deterring other offenders (i.e, general deterrence). The rationale of this theory is that criminals and potential criminals should try and avoid punishment by remembering past experiences and weighing the possible consequences of committing the crime and being caught. This theory is dependent on certainty of detection and conviction. Thus where an offence has become prevalent, it is the duty of the court to impose deterrent sentences so as to deter would be offenders.

1.2 (d) REFORMATION

This theory seem popular and to have a lot of support from most people involved in modern penology. It aims at reforming criminals and argues that punishment is inconsistent with reformation if it's constructive treatment of offenders cannot be considered punitive. The assumption of this theory is that criminals are being reformed, thus it is a rehabilitation sentence aimed at resocialisation of the offender as the way to achieve prevention of crime. **MCRATH, W. T** states that "Reformation is directed towards the rehabilitation of the offender to the end that he may be responsible to the community as one capable of developing a personally satisfying method of living, as a constructive and productive member of society...."⁶

⁶ Mcrath, W. T . Crime and its treatment in Canada , p 2222

1.2 (e) RESTITUTION

This theory calls for the criminal to make good the damage or loss he has caused on the victim. This is somehow a compensation to the victim as a result of the effects of a crime. Thus justice needs to be done. **SIMALUWANI E. M.** states that "An offender should compensate the victim for the results and effects of his crime, if justice is to be done."⁷ Where the perpetrator cannot compensate his victim, it is also argued that the state should do so instead. Thus compensation and reconciliation are the underlying principles of restitution.

It is apparent that no single form of punishment is completely effective in protecting the public or society and even in deterring or reforming criminals. However, it is evident that it may require a combination of one or more of the theories of punishment to achieve the objects of punishment as a social tool to control and prevent crime. Whichever theory is adopted or whichever theories are combined to justify the objective of punishment, punishment must be seen to reduce crime and to promote respect for criminal law. Thus punishment must be applied consistently and without any discrimination. Hence, where punishment as a social institution for control and prevention of crime is compromised and undermined, the role of punishment in the control and prevention of crime, and in particular in the fight against corruption gets watered down and loses its effectiveness.

⁷ Simaluwani E. M. The Juvenile Justice System in Zambia. Pp 439

1.3 STATEMENT OF THE PROBLEM

One of the cardinal role of the criminal justice is to prevent and control crime. Thus one of the most important tasks of the criminal justice in Zambia is to expose criminal activities. Zambia, like any other country is experiencing rampant acts of corruption at various levels. Hence the need for the criminal justice system to curb and prevent such vices. However, in order to respond to the need to curb such crime effectively, there is need to ensure that punishment is made effective as far as possible, by not undermining the institution of punishment through inconsistency in the applicability of punishment. Effective punishment will only flourish where there is an independent and neutral investigative agency and also secured courts. The effective role of punishment in the control and prevention of crime, in particular in the fight against corruption in Zambia seem to be questionable in the light of the questionable neutrality of investigative agencies of corrupt practices and also the questionable neutrality of the courts of law with reference to political interference in judicial matters. It seems apparent that political interference seem to be at centre stage in dictating which cases to prosecute and to some extent seem to influence the direction of the outcome of the cases, thus watering down the effectiveness of the role of punishment in the control and prevention of crime in the eyes of the public which gets appalled with some of the court rulings and decisions passed by the investigative agencies of various crimes. This problem has been worsened by the lack of skilled investigative officers and lack of security for the would be witnesses in the cases to be prosecuted.

1.4.1 METHODOLOGY

The approach will require a more rationalistic method based on human reason in relation to punishment. This entails extensive literature review of authentic knowledge in order to grasp the different theories of punishment and its role in the fight of crime generally, before zeroing in to the fight against corruption in Zambia. Literature review of whatever has been published and which is relevant to this research topic would be essential to sharpen and deepen the theoretical framework of this essay.

1.4.2 ORGANISATION

Apart from Chapter one which is an introduction, the essay will have four more chapters:-

CHAPTER TWO: will look at the theoretical assumption for punishing offenders.

CHAPTER THREE: will look at the broad concept of corruption.

CHAPTER FOUR: will look at the factors affecting the effectiveness of punishment in the fight against corruption in Zambia.

CHAPTER FIVE: will look at recommendations, conclusions and bibliography.

CHAPTER TWO

THEORETICAL ASSUMPTIONS FOR PUNISHING CRIMINAL OFFENDERS

2.0 INTRODUCTION

In this chapter, an attempt will be made to give a detailed theoretical assumption for punishing criminal offenders. This will entail considering critically the philosophical theories of punishment which have always taken punishment for crime as the paradigm instance of punishment as stated by **Joel Feinberg** and **Heyman Cross**. They further go on to explain that “the various assumptions for punishing criminal offenders have resulted into some philosophers as well as some theorists with a different sort of intellectual base to approach the problems of criminal punishment differently, with some stressing the practical purpose to be served by this vital social institution rather than pursuing immediately the implications of the morally wrong conduct.”⁸ It is from this premise that this chapter will take into account the various objectives of punishing criminal offenders as propounded by the various philosophers and theorists.

2.1 OBJECTIVES OF PUNISHMENT

So much has been written on the subject of punishment and its aims by eminent scholars such as **G. J Murphy** on retribution, **Glover, Bentham** and **Rawls** on utilitarianism, **Cross** on deserts, **John Rawls** and **Herbert Morris** on rehabilitation and **H L A Hart** on responsibility. Some scholars have reasoned that the end of

⁸ Joel Feinberg & Heyman Cross (1986) *Philosophy of Law*, P 587

punishment was not to make the offender miserable nor to compensate for the harm that had been done but was solely preventive. On the other hand, **Durkheim** had viewed 'punishment' as "essentially a ceremonial reaffirmation of societal values that are violated and challenged by crime, with its general function being enhancing of social solidarity by strengthening the basic social values violated by the offender."⁹

Different forms of punishment have been used by different societies and at different times. However, whatever form of punishment it takes, it must be legally authorised, otherwise it will be prima facie tortious or criminal itself. An example of a criminal or tortious punishment is the action of an instant justice mob which beats up a pick pocket. It is also not authorised for police officers to beat up a suspect during interrogations. Therefore, punishment must be inflicted upon an offender by the authority of the law and the judgement and sentence of the court for an offence committed.

Punishment, as a social institution to control crime has had different objectives at different times and in different places. Earlier on, retribution had become the popular view whereby society wanted the punishment inflicted upon a person to fit the crime charged. Later, deterrence became a popular doctrine in sentencing criminal offenders. On the other hand, modern reformers have insisted on making punishment fit the criminal and not the crime. Thus modern thinkers like professors **Cross**, **Hogarth** and **Seidman** favour the principle that enough pain to achieve the purpose is justified but that anything beyond that point is cruel. Hence,

⁹ International Encyclopaedia of Social Sciences Volume 13, P 220

they criticise retribution because they are of the view that one can not produce good by repaying evil with evil. Therefore, they argue that other forms of punishment are more suitable.

What seems clear from all the assumptions for punishing criminal offenders is that the aims of punishment are retribution prevention, deterrence, reformation and restitution. However, it is sometimes difficult to distinguish some of the aims of punishment from one another as they are some how inter related.

Professor **PARKER H** in his book entitled **THE LIMITS OF THE CRIMINAL SANCTION** is quoted by **HYMAN CROSS** as stating that “punishment is justified only on the ground that wrongful doing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrong doing. That, a criminal should be punished follows from his guilt, and the severity of the appropriate punishment depends on the depravity of the act. The state of affairs where a wrong doer suffers punishment is morally better than one where he does not and is so irrespective of consequences.”¹⁰

It is evident from the various aims of punishment that a complete theory of punishment will not only specify the conditions under which punishment should and should not be administered but will also provide a general criterion for determining the amount or degree of punishment. Therefore, it is not only unjust to be punished undeservedly and to be let off although meriting punishment, but it is also unfair to be punished severely for minor offences or lightly for a heinous one. It is

¹⁰ Joel Feinberg & Hyman Cross (1986) Philosophy of Law, P 587, P 588

from this point of view that this chapter will critically look at some of the well established and recognised theories of punishment which create an impact on the assumptions for punishing criminal offenders.

2.2 THEORIES OF PUNISHMENT

The main aims of punishment are:-

- (a) Retribution
- (b) Prevention
- (c) Deterrence
- (d) Reformation
- (e) Restitution

Various scholars and philosophers have argued for and against the various aims of punishment as a social institution for the control of crime. The arguments have taken the following lines of thought:

2.2(A) RETRIBUTION

The classical advocates of this theory include **Ellis J Mc Taggart**¹¹ in his book entitled "Hegel's theory of punishment; **J. L Mackie**¹² in his book entitled "A test case for ethical objectivity" and **G. J Murphy** who says "A retributive theory of punishment is one which characterises punishment primarily in terms of the concepts of justice, rights and deserts , i.e concerned with the just punishment, the

¹¹ Ibid. P 613

¹² Ibid. P 623

punishment which the criminal deserves, the punishment which the society has a right to inflict.”¹³

A retributive theory of punishment is one in which punishment is primarily characterised in terms of the concepts of justice, rights and deserts. Punishment is viewed as an end in itself that the guilty should suffer pain. The primary justification of punishment is always to be found in the fact that an offence has been committed which deserves the punishment and not in any future advantage to be gained by its infliction. Thus, retribution is concerned with the just punishment which the criminal deserves and which the society has the right to inflict and the criminal has the right to expect. It is sometimes used to mean revenge, with the view that the offender should get his just deserts. It also refers to past conduct of the accused who should be punished for what he or she has done and is based on the fact that every crime demands payment in the form of punishment. Retribution has a relevance to modern penology because it gratifies the feelings of hatred and resentment which the accused's actions cause to the minds of the public. It is also justified on the ground that it tends to justify the victim's need for vengeance and also enables the victim to feel that the court has shared his misery or misfortune. In **R V WILLIAMS**¹⁴. The accused pleaded guilty to buggery of a sheep. When passing sentence, the judge said “I think the kindest thing I can do is to visit upon you the outrage which I think anybody with decent feelings would feel about it so that no body can say in your village that you have not paid for it....”

¹³ Ibid. P 630

¹⁴ (1974) Cr. L. 558

Retribution clearly shows that the offender should be made to suffer in return for the wrong done and the punishment should be in proportion to the evil. Professor **GOODHART** supports the view and states that “retribution is an expression of the community’s disapproval of a crime and if the retribution is not given recognition, then the disapproval may also disappear.”¹⁵ This may imply that a community which is too ready to forgive may end up condoning crime.

Retribution, like any other theory has not been spared from criticisms. **Seidman** opposes this theory by stating that “No one punishes the evil doer under motion, or for the reason that he has done wrong.

Only the unpleasant furry of a beast acts in that manner. Punishment must be inflicted to deter the offender.¹⁶ Modern thinking in penology views retribution as a matter of vengeance and advocates for its use only to the extent that it helps the accused or society and not merely for the sake of punishment. It is evident that the main objective of retribution is to prevent crime by making the possible criminal frightened at the punishment which will follow. It is a preventive system which checks crime and restrain persons who have already proved themselves criminals. It is also concerned more with the protection of the innocent rather than the improvement of the guilty. Therefore, the discouragement of crime is taken to be more important than the reform of the criminal. This theory may be more appropriate to apply in situations where a particular crime has become rampant in order to bring an end to such a crime.

¹⁵ Goodhart R. H (1953) English Law and the Rural Law, P 92

¹⁶ Ibid. 590

2.2(B) PREVENTION

Hegels is the leading proponent of this theory. He is quoted by **Feinberg** as stating that "it is superficial to regard punishment as protective to society or as deterring or as improving the criminal if it is not protective or threatening, we must surrender the theories which we have called the preventive and the deterrent."¹⁷

Another advocate of this theory is **Jeffrey G. Murphy**¹⁸ defines punishment in general as a means of ameliorating or of intimidating." Further, **Ferdinand D. Schoeman** states that "we should keep a person with a contagious and deadly disease confined as long as it takes to eliminate or reduce significantly the possibility of contagion."¹⁹

This theory is concerned with the protection of society from the offender. Thus it calls for the keeping of the offender in custody away from the society for a substantial time. An offender is viewed as a danger to society and capable of repeating the offence. Therefore, the public will be protected from the offender for the period he is in prison or detention. Prevention is similar to retribution and may permit crude and cruel sanctions and disproportionate sentences more severe than the offenders deserve. It is evident that the justification for the prevention theory of punishment is that the offender must be kept out of society for a substantial period due to the danger of his repeating of the offence.

¹⁷ Ibid - 631

2.2(C) DETERRENCE

Jonathan Glover²⁰ is one such advocate of this theory who calls for punishment to be for the means of future goods as correction of the offender, protection of society against other offences from the same offender and deterrence of other would be offenders.

This theory is assumed to work at two levels. Firstly, it is aimed at deterring a particular offender from re-offending in future (special or individual deterrence). Secondly, it is also aimed at deterring other offenders. (General deterrence).

Deterrence is one of the most vital aspect that a judge or magistrate takes into account when sentencing an offender. Indeed, when an offence has become prevalent, it is the duty of the court to impose deterrent sentences so as to deter would be offenders.

Deterrence play a vital role in society and many offences have been prevented because of it. In **R V BALL**²¹. The appellant was sentenced to five years imprisonment with hard labour for three burglaries. When passing sentence, the judge observed that "In deciding the appropriate sentence, a court should always be guided by certain considerations. The first and foremost is public interest.

The criminal law is publicly enforced, not only for punishing crime, but also in the hope of preventing it. A proper sentence passed in public serves the public

¹⁹ Ibid, P 590

²⁰ Ibid, 590

interest in two ways. It may deter others...it may induce a criminal from committing offences and then turn to honest living... The public interest is best served if the offender is induced to turn from criminal ways to honest living. In **KABONGO V THE PEOPLE**²², the appellants were convicted of aggravated robbery in the course of which two shots were fired injuring two persons. The trial court imposed the minimum sentence of 15 years; **I. H. L DOYLE C. J** who delivered the judgement dismissed the appeal and stated that "... we wish to make it clear to all persons who use weapons of this nature that they risk the chance of a very long prison sentence of imprisonment. We are determined to do what we can to see to it that weapons are not used for the purposes of robbery. He then increased the sentence to 25 years imprisonment with hard labour. This is plain clear that deterrence is aimed at preventing further crime both at individual and general level. In the **PEOPLE V JUTHRONICH, SCHUTTE & LUKIN**²³ A large quantity of copper was stolen by the accused persons. The trial magistrate when passing a sentence of four years with hard labour remarked, "... I have no doubt that I would be failing in my public duty where I am not to impose severe sentences..." This clearly shows that deterrent is used to prevent crime both at individual and general level. However, this theory is not completely free from criticisms as there are divided views in favour and against it. **SEIDMAN**²⁴ and **WALKER**²⁵ are some of the detractors of this theory and who contend that "a human being is a rational being with a free mind which is capable of thinking before it acts. They argue that the whole notion of punishment is based on the doctrine of free moral agent and a man who is responsible for his acts can not be affected by the imposition of a stiffer

²¹ (1931) 35 Cr. App. Rep 164

²² (1974) ZR 83

²³ (1965) ZR 9

²⁴ Seidman R. B (1976) A Source Book of Criminal Law of Africa. P. 18

sentence on other people. They regard it to be unfair to take someone who has broken the law and use him or her as a mere instrument to protect society and increase its welfare.

Despite criticism, deterrence theory has a rationale that criminals will try and avoid punishment by remembering past experiences and weigh the possible consequences of committing the crime and being caught. However, one thing that also comes out clear is that while deterrence is aimed at punishing the offender in order to discourage others by imposing a stiffer sentence upon him, it has also a disadvantage of passing a sentence based on the general deterrence which overlooks the mitigating factors of the accused, who in turn becomes a sacrificial lamb for the benefit of the community.

Besides that, deterrence is more dependant on certainty of detection and conviction, hence some criminals may still not be detected nor convicted. However, it is conclusive that there are two types of deterrence; general and individual deterrence. The later is aimed at preventing the offender from committing further offences. General deterrence is aimed at punishing the offender in order to discourage others by imposing a stiffer punishment upon him.

2.2 (D) REFORMATION

Modern criminology seem to support this theory which has become popular. Its essence is that criminals have to be reformed and punishment is inconsistent with

²⁵ Walker N (1976) Sentencing in Rational Society

reformation. Thus, proponents of this theory argue that constructive treatment of offenders cannot be punitive and any kind of punishment is not in anyway reformatory. **Herbert Morris** states that "we do not seek to deprive the person of something acknowledged as good, but seek rather to help and to benefit the individual who is suffering by ministering to his illness in the hope that the person can be cured."²⁶ Reformation assumes that criminals are being reformed, which in a way amounts to rehabilitation of the offender as a way to achieve prevention of crime. Positivists argue that people do not just commit offences for the sake of committing them, but that there are external and internal factors influencing their minds and so cause them to commit crimes. Other theorists have also contended that there are people who are born with a criminal mind, others are insane and some become criminals just because of the sociological conditions in which they are found. Cultural background also has an influence on the mind of a person towards committing crimes. It is therefore vital for a magistrate or a trial judge to take into account the various aspects and influences when sentencing an offender.

When a person does harm, he manifests a symptom of a pathological condition. The appropriate course, therefore is to correct what is wrong with him, or at least to keep him from infecting others. The logic of sickness implies the logic of therapy. Hence reformation is a treatment, probation and reformatory. This is evident that reformation is directed at rehabilitating of the offender to the end that he may be responsible to the community and capable of developing a personality satisfying a way of living benefiting the society. This theory is based on the assumption that although man has a free moral will and is responsible for his acts and should

²⁶ Op Cit P 622

therefore be punished for his criminal acts, nevertheless, crime in some instances is caused due to some mental disorder and other circumstances.

2.2 (E) RESTITUTION

This theory is aimed at the criminal compensating for his wrong as stated by **E. M. Simaluwani**.

This refers to the criminal making good the damage or loss he caused to his victim in form of compensation.²⁷ It is argued that an offender should compensate the victim for the results and effects of his crime if justice is to be done. It is further argued that where the perpetrator can not compensate the victim, the state should do so instead. Therefore, the underlying principle of this theory is compensation and reconciliation.

2.2.3 THE ROLE OF PUNISHMENT IN THE FIGHT AGAINST CORRUPTION

Mounting perplexities surround the institution of punishment in relation to the fight of crime. This has resulted into various scholars and theorists giving different justifications for the account on the efficacy and morality of punishing criminal offenders. Despite the theories of punishment being diverse, the general practice of punishment by the state is only justified if it has two objectives, that is, the reduction of crime and promotion of respect for the criminal law. Therefore, it is the role of the criminal justice system to prevent and control crime through the use of punishment. However, where the institution of punishment is undermined, its objectives will be watered down. Therefore, in order for punishment to be effective

²⁷ Simaluwani (1994) The Juvenile Justice System in Zambia. (Unpublished PhD Dissertation, Pp 439 –440)

in the control and prevention of crime, it must be applied without any discrimination on criminal offenders. In Zambia, one such crime which has become rampant is corruption. The question is posed as to what extent is punishment as an institution for control and prevention of crime is being used to fight corruption in Zambia. It is therefore, the rationale of this research to evaluate how punishment as an institution for control and prevention of crime may be undermined by weakening its effectiveness. It is evident that where the critical role that the criminal justice system plays in preventing and controlling crime is tampered with, the effectiveness of punishment in the control and prevention of crime will also become highly questionable. In Zambia, political interference seem to be at centre stage in dictating which cases to prosecute. This has resulted into certain sentences and acquittals passed by the courts being viewed as playing little or no part at all in eliminating corruption or as eroding confidence of the judiciary. The effectiveness of punishment is further worsened by the highly questionable neutrality of judges and magistrates in handling corruption cases. Lack of skilled investigative officers and security for would be witnesses in corruption cases also posse a threat to the effectiveness of punishment as a control measure in the fight against corruption. It is evident that in order to respond to corruption by public officials firmly, there is need to have an independent and neutral investigative agency and secured courts. However, it is also vital to look at the broad concept of corruption. Therefore, the following chapter will look at the broad concept of corruption.

In concluding this chapter, it must be emphasised that, which ever theory is adopted or which ever theories are combined to justify the objectives of punishment, punishment must be seen to reduce crime and to promote respect for criminal law. Above all, punishment when effected, must be applied without discrimination in order to avoid undermining the institution of punishment.

CHAPTER THREE

THE BROAD CONCEPT OF CORRUPTION

3.0 INTRODUCTION

Corruption is in varying magnitudes and types and found in many countries. It has existed for as long as man has lived. President of the Republic of South Africa, **Thabo Mbeki** stated that “perhaps we should take heart that corruption is not entirely new in government. If sin is as old as humankind, so too is corruption as old as government itself.”²⁸ Corruption ranges from large-scale involving politicians and big business or bureaucrate at both local and national level, to small-scale activities by low level government employees and individuals in their private capacity. Corruption can greatly weaken the economic and government structure of a country. Hence, the need to check it.

3.1 GENERAL DEFINITION OF CORRUPTION

It is difficult to have a universally agreed upon definition of corruption because of the different criminal justice systems, cultural values and beliefs as well as economic practices pursued by different countries. **Sutherland G. H** States that, “corruption is not easy to define and no standard definition can be said to exist.”²⁹ Corruption is a white collar crime which is a violation of criminal law. “It is a violation of criminal law by the person of upper socio economic class in the course

²⁸ Thabo Mbeki (1998) Speech on the Anti Corruption officials workshop on 10th November, 1998

²⁹ Sutherland G. H (1941) Crime and Business, P 217

of his occupational duties.”³⁰ This entails that corruption involves deliberate deceit and dishonesty in pursuit of personal gain and in defiance of the codes and laid down procedures to regulate such acts.

A Zambian Minister in the Second Republic referred to corruption as “the epitome of the exploitation of man by man. It is the exploitation of a public officer of the power entrusted to him by the people to be exercised for the common good.”³¹ Corruption breeds a feeling of distrust and unfairness among citizens. Corruption may involve bribery, embezzlement, tax evasion, forgery, fraud, theft and abuse of authority. Former Inspector General of Police, **Francis Xavier Musonda** explains that “whatever definition of corruption a particular country may give, two key elements of corruption may be identified, ie,;

- (i) Obtaining advantages for personal gain and
- (ii) Misuse of one’s official capacity.”³²

One thing that comes out clear is that corruption compromises the integrity and neutrality of public officials and adversely affects the governmental and economic structure of the country.

³⁰ Ibid. P 217

³¹ Zambia Parliamentary Debate No. 54. 29th July – 22nd August 1980. Column 1079

³² Francis Xavier Musonda (1998). The effective Administration of Criminal Justice for the Prevention of Corruption by Public Officials. Legality Journal 1998., P 18

3.2 CAUSES OF CORRUPTION

It is evident that corruption is a difficult crime to pursue because of the fact that both parties that are involved into it have vested interest. Therefore corruption seem to be on the increase in many countries due to various factors.

Corruption may be caused by lack of transparency in government actions, weak checks and balances in the government system, low salaries, falling moral standards and lack of political commitment. Whichever causes of corruption may be alluded to, the causes of corruption may be viewed from three dimensions, that is, the individual, society and culture. However, what is also evident is the fact that within each dimension, there are various factors influencing the degree and level of corruption activities.

Personal greed is one of the causes of corruption. The need and greed factor which are so closely associated with the material things greatly influence people's corrupt acts in an effort to respond to his external needs. Lower ranking officials are faced with corrupt acts based on needy, while the upper class people are faced with temptations of corrupt acts based on greedy. It is evident that people at various levels would indulge in corrupt practices in order to accumulate more of what they desire in life.

Francis Xavier Musonda states that "In society, there is a general overall tendency towards equilibrium and efficiency. When disequilibrium or inefficiency occurs due

to government interventions by way of taxes, tariffs, quotas, subsidies and rules and regulation, corruption often facilitates short term efficiency and equilibrium.”³³

Culture may also have an influence on the causes of corruption. Thus group interests , seniority over merits and loving kindness over justice may also provide a fertile ground for corruption.

This implies that cultural dimensions has great influence upon society’s view of corrupt behaviour. Francis further states that “The culture dimension has also some influence upon the level of tolerance and the individual’s decision making rationale.”³⁴

However, the cultural dimension is the most difficult and complicated dimension of corruption as it is difficult to have a universal quantifiable measure between acceptable and non acceptable corrupt behaviour.

Lack of political commitment is another cause of corruption. Therefore, where the government shows lack of political will to combat the scourge, corruption will escalate to higher levels as the people will tend to view corrupt acts as normal and beneficial.

Transparency International Zambia states that “If political leaders and top bureaucrats set examples of self enrichment or ambiguity over public ethics, lower

³³ Ibid. P 19

³⁴ Ibid. P 19

level officials may follow suit.”³⁵ This clearly implies that where the environment is politically and economically unstable, there is likely to be wide spread corrupt practices. The situation may be worsened where government shows no clear commitment to fight the scourge because it regards it as an incentive to the officials and others to be corrupted.

Lack of convictions of corruption cases may also increase the rate of corruption. Thus, where most of the cases which are prosecuted are lost in court, the situation may encourage more people to indulge in corrupt practices. Lack of adequate procedures and manuals for public officials may also provide for a fertile ground for corrupt practices. This may also call for simple legislation as opposed to complex and discretionary legislation which leaves room for corrupt acts under the umbrella of being in the course of duty.

Lack of democracy can also cause corruption where there are no checks and balances of government activities. This may lead to corruption mainly in form of appointments of public officials. This clearly implies that transparency is the corner stone of democracy as it subjects the public sector to public scrutiny.

3.3 VARIOUS FORMS OF CORRUPTION

Corruption is diverse and may take many forms. However, one thing that comes out clear is that corruption is undoubtedly an economic crime. However, it will be prudent to briefly look at some of the types of corruption.

³⁵ Transparency International Zambia, 2000 Report.

3.3 (a) **POLITICAL CORRUPTION**

Political corruption take the form of electoral corruption. This arises from conflict of interests in the struggle for political power. It also involves the use of discretionary powers in the manner that leads to suspicion of corruption. Political corruption may also relate to the use and distribution of national resources in a manner that may be intended to induce the beneficiaries line of thought politically.

3.3 (b) **BUREAUCRATIC CORRUPTION**

This form of corruption takes the form of bribery. Bribery is often initiated by the state officials rather than members of the public. This type of corruption is common among lower and middle level civil servants attributing such acts to the fact that poor salaries and wages are the major causes of corruption.

This type of corruption is not just in public and parastatal sectors, but also in private sectors where an inducement would be required in order for a person to be given what he or she wants by another person.

3.4 **EFFECTS OF CORRUPTION**

Corruption has several adverse effects. Although corruption is epidemic to every social system, it should not be left unchecked, least it destroys society's fabric system. **Director of Operations at Anti-Corruption Commission** stated that “

corruption is deeply rooted in our society but all efforts must be made to eradicate or reduce it.”³⁶ A Minister of Home Affairs in the second republic of Zambia, stated that, “corruption was a pervasive evil (in society) which if allowed to continue unchecked would destroy....the whole society of Zambia.”³⁷ This entails that corruption should not be unchecked to the point where it gains a foothold in society. It is evident that where small acts of corruption occur on a repetitive basis, the crime of corruption will get entrenched in society. Therefore, the most damaging form of corruption is not necessarily always the one which occurs on a large scale but the cumulative effect of the many small corrupt practices which in the end lead to gross misappropriations in due course.

Corruption may also occur where vested power for decision making in public officials is abused to waive laid down rules. Chris Heyman and Babara Liptze states that “corruption tends to fuel arbitrary rule, with dire implications because public trust declines and economic marginalisation takes hold.”³⁸ This entails that, where corruption becomes systematic, it becomes very difficult to identify and detect it. Chris and Babara further state that “if and when corruption remain unchallenged, it gains strong momentum and gets to be widely accepted as a common practice in society.”³⁹ This simply entails that corruption is a crime which should not be left unchecked.

³⁶ Report by the Anti-Corruption on managerial Accountability workshop for Immigration officials on 21st – 22nd June, 1998, Lusaka, P 4

³⁷ Zambia Parliamentary Debate Report of 29th July to 22nd August, 1980, No 54

³⁸ Chris Heyman & Babara Liptze (1999) Corruption and Development. Some Perspectives. P 18

3.5 PREVENTION AND CONTROL OF CORRUPTION

Corruption is in varying types and magnitudes ranging from small scale to large scale. Its main causes can be viewed from three dimensions, that is, individual, society and cultural level. Whichever level and whatever causes of corruption may be detected, corruption must nonetheless be curbed. Therefore, where corrupt practices are detected, it is the role of the criminal justice system to prevent and control the scourge.

This implies that one of important tasks of the criminal justice system is to expose the corrupt activities of corrupt people and to punish such culprits effectively and accordingly. In order to respond to the need to control and prevent corruption effectively, there is need to ensure that effective punishment is applied as far as possible. This may call for the non undermining of the institution of punishment. Therefore, punishment must be consistent in its applicability. This will call for an independent and neutral investigative agency and also secured courts. This also calls for political will and neutrality in the applicability of the law relating to corruption. It is evident that where political interference is at centre stage in determining which cases need to be prosecuted and in which direction the case must proceed, the effectiveness of punishment as a control of crime will adversely be watered down. It is from this premise that the following chapter will be dedicated to the role of the criminal justice system in the control and prevention of corruption. The chapter will also attempt to look at the factors that affect the

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³⁹ Ibid, P 19

effectiveness of punishment in the fight against corruption. The works of this chapter will be more inclined to the Zambian situation.

3.6 THE LEGAL FRAMEWORK AGAINST CORRUPTION IN ZAMBIA

As far back as 1980, the government of Zambia recognised that corruption was a problem which needed to be tackled urgently and effectively. As a response to this, the government enacted the corrupt practices Act No. 4 of 1980 which created the Anti-Corruption Commission (ACC) and also stipulated offences and their penalties. However, due to the ineffectiveness of the corrupt practices Act of 1980, the Anti-Corruption Commission Act No 42 of 1996 replaced the 1980 Act and became operational upon the publication of the Anti-Corruption Act (Commencement) Order of 1997 by the Statutory Instrument No. 33 of 1997. The 1996 Anti-Corruption Act was meant to be autonomous in its operations so as to curb the weakness and failures noticed in the 1980 corrupt practices Act. To that effect, Section 5 of the 1996 Anti- Corruption Act provides for the “creation of an autonomous and strengthened institution that is not to be subject to the direction or control of any person or authority.”⁴⁰ The 1996, Anti-Corruption Act thus changed the structure of the institution by converting the Anti-Corruption Commission which was a government department into an autonomous government institution and with its own Commission and Directorate. Section 4 of the 1996 Act provide that the commission shall be “a body corporate with perpetual succession ...to do all such things as a body corporate may, by law do or perform.”⁴¹ The Act provides wide powers of arrests and investigations for the Director General of the Anti Corruption Commission and other officers. Section 22 (1) provides that they can “arrest any

⁴⁰ Anti-Corruption Act of 1996 – Section 5

⁴¹ Ibid. Section 4

person without a warrant if they reasonably suspect that such a person has committed or is about to commit an offence under this Act.”⁴² Part IV of the 1996 Act covers the various offences, penalties and the related issues of gratification. On the other hand, part V of the 1996 Act recognises the powers of the Director of Public Prosecutions in the prosecution proceedings of cases under this law. Section 46 (1) reads that “no prosecution for an offence under part V shall be instituted except by or with the written consent of the Director of Public Prosecutions.”⁴³ This section is aimed at minimising the abuse of the judicial process to victimise perceived enemies. However, the same section can also be a hindrance in the fight against corruption where it is abused. Section 54 of the 1996 Act further gave powers to the Director of Public Prosecution to tender a pardon to a party who is directly or indirectly connected to the offence of corruption.

This is so in order to enable the prosecution to obtain the needed evidence from the pardoned person who on accepting the pardon becomes a state witness. It is evident that efforts have been made to curb the scourge of corruption. However, corruption still seem to be on the increase in Zambia. The Anti-Corruption Commission Act of 1996 considers the following to constitute corruption.

- ♦ For a public officer by himself or by or in conjunction with any other person to agree to accept or attempt to receive or obtain from any person for himself or for any other person, any gratification as an inducement or reward for doing or

⁴² Ibid. Section 22 (1)

⁴³ Ibid Section 46(1)

forbearing to do or for having done or forborne to do anything in return for any matter or transaction, actual or proposed, with any public body.”⁴⁴

- ♦ For any person to corruptly give promise or to offer any gratification to any public officer as an inducement or reward for doing or forbearing to do anything in relation to any matter or transactions, actual or proposed with which any public body is or may be concerned.”⁴⁵

It is evident that widespread corruption affects the whole culture of a country and hinders development in any country. It also undermines good governance and also removes competence and merit in appointments and promotions.

Therefore, there is need for the criminal justice system to control and prevent corruption. Hence the next chapter, as earlier alluded to, will look at the factors that affect the effectiveness of punishment in the fight of corruption in Zambia.

⁴⁴ Ibid Section 30 (1)

⁴⁵ Ibid. Section 30 (2)

CHAPTER FOUR

FACTORS AFFECTING THE EFFECTIVENESS OF PUNISHMENT IN THE FIGHT AGAINST CORRUPTION IN ZAMBIA.

4.0 INTRODUCTION

One of the most vital tasks of the criminal justice system is to expose the corrupt activities of corrupt people and to punish the wrong doers effectively. Therefore, punishment by the state is justified if it contributes to the reduction of crime and also to the promotion of respect for the law.

However, the objectives of punishment according to the various philosophical theories on punishment can only be attained where there is an enabling environment for the general application of punishment. Therefore, where the institution of punishment is undermined, punishment will not respond effectively to the need to control and prevent corrupt activities. In Zambia, various factors account for the seemingly ineffective role of punishment in the fight against corruption. Hence, this chapter will look at the factors that affect the effectiveness of punishment in the fight against corruption in Zambia.

4.1 THE ROLE OF THE CRIMINAL JUSTICE SYSTEM IN THE PREVENTION OF CORRUPTION

Imposition of sentences is one of the most important mechanisms through which society attempts to achieve its social goals, such as the control of crime and protection of individual rights in a bid to obtain a welfare state. It is on this premise

that the criminal justice system strives to punish offenders with the view of achieving either retribution, prevention, deterrence, reformation or restitution in relation to a particular crime. However, the attainment of such objectives are hindered by certain obstacles which eventually water down the importance of punishment in the control and prevention of corrupt practices. Such obstacles include the difficult to secure cooperation of the people involved in the case during investigation and trial, scarcity of personnel and material resources in the criminal justice system; laws limiting authorised methods of investigation, limited skills or low morale of the investigators, lack of independence of the judiciary, long period of trial, lack of security for whistle blowers, sentencing policies, low rate convictions, the Director of Public Prosecution and the exercise of the power to enter a nolle prosqui and the discretionary powers of judges and magistrates.

4.1 (a) INDEPENDENCE OF THE JUDICIARY AND INVESTIGATIVE AGENCIES.

In order to respond to corrupt activities by public officials firmly, the independence and neutrality of investigative agencies and the courts must be secured. The judiciary must be free from any possible influence in regard to its operations. Therefore, where political or other pressure are brought upon investigative agencies and courts, such institutions will be as good as not being there. It also entails having professionals in such institutions to ensure professional execution of obligations and duties in such institutions . Efforts must be made to prevent corrupt activities by criminal justice personnel who are not equally insulated from corrupt vices. Basically, independence and neutrality of the judiciary and the specialised anti-corruption agencies can be achieved by improving the functional

freedom and autonomy within such institutions. It will also do well to improve on the appointment of personnel, their working conditions, promotion prospects, job security and constitutional safe guards of personnel involved in the control and prevention of corruption. **Francis Xavier Musonda** states that “the independence of the judiciary and security of tenure of the judges is guaranteed in many constitutions of nations. However, in reality and practice, this guaranteed independence is far from being realised and is destroyed by problems within such areas as the organisational structure of the judiciary and a judge’s status. When such a situation prevails, the dispensation of justice is greatly compromised. Adequate justice can only be assured when the judges’ authority, status and salaries are guaranteed and where such salaries are commensurate with high economic expectations of the judges social positions.”⁴⁶ Robert Sichinga further states that “the judiciary must guard against corruption in its own ranks. Poor salaries to magistrates make it easy for officers to be tempted when litigants offer gratification to them, hence a magistrates’ low salary is a recipe for corruption”⁴⁷

Corrupt activities have not spared the investigative agencies of corrupt practices such as the police and the Anti-Corruption Commission. The Times of Zambia Press Report of 10th October 2000 carried a story in which an officer from the Anti-Corruption Commission is said to have appeared before a magistrate charged with fraud of K500,000.00 obtained during the course of investigations which were being conducted in February 2000. In 2002, the then Chief Justice Mathew Ngulube was requested to resign on corruption charges.

⁴⁶ Francis Xavier Musonda (1998) The Effective Administration of Criminal Justice for the Prevention of Corruption by Public Officials.

The ACC News Vol. 3 No. 9 (2002)⁴⁸ reported that, in 2001, a Matero Police Officer appeared before a magistrate charged with bribery. He is allegedly supposed to have asked for K100,000.00 bribe from a suspect so that he could release him from custody. It is clear that where there is corruption in the criminal justice itself, the dispensation of justice is greatly compromised to the point where the importance of the institution of punishment in the control and prevention of corruption is watered down.

4.1 (b) CONSENT OF THE DIRECTOR OF PUBLIC PROSECUTION

The Director of Public Prosecutions is a constitutional office created under Article 56 of the Republican constitution. Under the Criminal Procedure Code, the DPP can enter a nolle prosqui, issue facts and appoint prosecutors. All the prosecutors even those from the Anti-Corruption Commission and the Drug Enforcement Commission are appointed by the DPP. The DPP has the power to enter a nolle prosqui which is an entry made on the court record by which the prosecutor declares that he will proceed no further.

AFRONET: ZAMBIA HUMAN RIGHTS REPORT state that “The rule of practice in Zambia is that the court cannot inquire into the reasons for a nolle prosqui being entered. This opens up the possibility of abuse as the power to enter a nolle prosqui can be exercised in an arbitrary manner.”⁴⁹

⁴⁷ Sibalwa Mwaanga (2000) Mobilising Political Will to Fight corruption in Zambia.

⁴⁸ ACC News Vol. 3 No. 9 (2002), P 10

⁴⁹ AFRONET: (1998) Zambia Human Rights Policy.

Among the prominent cases in which the DPP has entered a nolle prosqui as reported by AFRONET include cases involving Dr Kenneth Kaunda, Princess Nakatindi Wina, the Late Dean Mung'omba and Rajan Mahtani.

However, recently, the exercise of the powers to enter a nolle prosqui by the DPP raised a lot of concern when the DPP earlier entered a nolle prosqui in a case involving a former permanent secretary in the Ministry of Health, Dr Kashiwa Bulaya for alleged corrupt practices. Seemingly, out of public pressure, the DPP rescinded the earlier decision to enter a nolle prosqui and re-opened the case for prosecution. Where such inconsistency in the use of a nolle prosqui is practised by the DPP, people will tend to view the law as being selective on which people to prosecute, thus showing disparities in the general applicability of punishment to control and prevent corruption.

It is clear that the DPP's power to enter a nolle prosqui may be abused to the extent of using some people as sacrificial lambs in corrupt cases. This in turn undermines the role of punishment in the fight against corruption in Zambia as certain people who seemingly deserve punishment over corrupt offences are made to remain unpunished for their corrupt offences simply because of their political affiliations. This sends a bad signal to the citizens who may start viewing punishment for corrupt practices as being not effective and easy to compromise.

4.1 (c) SENTENCING POLICIES

The gravity of the offence may be measured either in terms of the value of the property the accused has stolen or the manner in which the accused committed the

offence or the injuries he has inflicted on the victim. The fact that public officials are not like any other ordinary person in terms of power and authority that correspond to their responsibilities is enough basis to differentiate their treatment over corrupt practices from the rest of the people in so far as discipline and punishment for any wrong doing is concerned. Therefore, the punishment should be more severe when it comes to abuses committed by them. However, this is not the case, as evidence shows that public officials in lower ranks suffer severe punishment for corrupt practices than those in top leadership. In the **People V Mulwanda**⁵⁰. The accused, who was a senior civil servant was convicted of six counts of corrupt practices which involved the receiving of large bribes and was fined K1,000,00 on each count and the trial magistrate suspended the sentence of imprisonment. Upon review, Doyle C. J confirmed the K1,000,00 and sentenced the accused to 15 months imprisonment with hard labour in addition. This is because he regarded official corruption to be a very serious and grave offence. An **AFRONET Reader** on corruption reports that, A managing Director of the Flying Doctors Service was in 1993 arrested by the ACC for soliciting and receiving a 10% bribe as commission from a company that he had awarded a contract to supply aviation spare parts to Zambia Flying Doctors Service. The MD was prosecuted and in 1996, he was convicted and sentenced to 6 months imprisonment with hard labour suspended for 12 months. He was also fined K1,500,000.00.

Sentencing policies coupled with discretionary powers of judges and magistrates may to some extent put in question the effectiveness of punishment in the control

⁵⁰ (1994) ZR 46

and prevention of corruption. It is evident that some courts of law may pass or pronounce very lenient sentences which in turn portray a picture to the public that the judiciary seems to be paying little or no part at all in eliminating corruption. This also erodes the confidence of people in the judiciary. Furthermore, lack of evidence and prolonged periods of trial of corrupt cases tend to affect the effectiveness of the role of punishment in the control and prevention of corruption. Most corrupt cases tend to take too long to the point where the citizens even lose track of the case. This has a bearing on the degree to which people would tend to appreciate the role of punishment. Prolonged period of trial also tends to have a negative bearing on the evidence that may be vital to the case. This also insecures the whistle blowers and other would be witnesses in corrupt cases as the suspected offenders are left with enough time to temper with evidence and witnesses. The situation is further worsened by the low rate of convictions secured by the prosecution team. This adversely affects the role of punishment in the control and prevention of corruption as people tend to view corrupt practices as not being easily convictable cases. It is therefore vital for the criminal justice system to get rid of the clandestine nature of such activities that hinder the effectiveness of the role of punishment in the control and prevention of corruption.

4.2 LACK OF POLITICAL WILL

One of the basic rules of sociological jurisprudence is that law is part of society. Therefore, law is there to see to it that society's moral, cultures, customs and religious beliefs are preserved. Law also operates to reconcile selfish with unselfish purposes and to suppress the former when they clash with the latter. Political will simply refer to the desire , the determination, the commitment and the

willingness by the various groups to respond to the known perceived dangers of corruption in society.

Efforts to curb corruption may be in vein if there is no good will by the political leadership. This entails that political leaders need to be of high integrity. **Professor A. W Chanda** states that "lack of integrity among the politicians makes them to consider politics as a way of engaging themselves into activity that can pay them better than what they may be already engaged in"⁵¹ **Prof Chanda**⁵² further reports that evidence of gross misconduct by high ranking political leaders, such as the three government ministers and one member of parliament who were forced to vacate their seats when they were found guilty by the Judicial Tribunal of embezzling or attempting to embezzle public funds is available. Political will does not just concern the integrity of political leaders, but must also be exhibited by the budgetary allocation of resources to the government's watchdog institutions such as the Anti-Corruption Commission.

Lack of political will may be exhibited by the governments' failure to prosecute corrupt suspects uniformly. The Post News paper of September, 2nd 1994⁵³ reported that at least on two occasions President Chiluba used the Attorney General to stop the ACC from prosecuting erring government officials. The 1999 ACC report reported that out of 14 cases involving ministers and 56 cases involving senior public officials that were investigated in 1999, none resulted into conviction. Lack of convictions was attributed to Cabinet Ministers intervention in the investigations against senior civil servants. The Auditor General's Report of

⁵¹ Prof A. W Chanda (2002) Transparency International Zambia Report.

⁵² Ibid.

1997 reported that, the Attorney General intervened in the case in which a permanent secretary was being prosecuted for a case of abuse of office. He acted pursuant to Article 56 (7) of the Zambian Constitution which permits the Attorney General to give instructions to the DPP in matters involving general considerations of public policy.⁵⁴

Lack of political will in the fight against corruption may result into the application of punishment on the selected few offenders, mainly those in opposition to the government. Lack of political will, will also manifest itself in the manner corrupt practices benefiting the ruling party are embraced. Currently, there are a lot of questions surrounding the acquisition of 100 Mazda vehicles from Pilatus Engineering Company by the MMD government. Equally, there are a lot of questions unanswered in relation to the current MMD Chairman, Mr Micheal Mabenga and MMD Secretary General Dr. K Kalumba, both of who have been implicated in very serious corrupt charges involving constituency development funds and economical plunder respectively but who surprisingly have even gone further to even hold such senior positions in the ruling party. This has an adverse bearing on the effectiveness of the role of punishment in the fight against corruption as people tend to see the law on corruption as being discriminatory. The situation is even worsened by corrupt practices carried out by political parties with the ruling party normally being in the fore front in perpetrating the vice. Political will can also be seen in the legislature whose duty is to enact laws and to provide an over sight over the actions of the executive. Therefore, when the executive is very strong and over bearing as is the case in Zambia today, even

⁵³ The Post News paper Friday , September

⁵⁴ Auditor General Report (1997) pp 49 - 52

systems and legal provisions which are well meant, prove inadequate. Furthermore, lack of political will thrives in an environment where there is no citizen participation and sovereignty of the people, where there is no real equality before the law, where government is not based on the consent of the people, where there is no political tolerance, no accountability and no observance of the rule of law. Lack of democracy and poor conditions of service of officers in institutions fighting corruption are all manifestations of lack of political will. Recruitment and appointments of officers in institutions tasked to fight corruption based not on merit and coupled with poor funding to such institutions is also a clear indication of lack of political will on the part of the government to control and prevent corruption. Where such lack of political will is the order of the day, then the institution of punishment will not play its effective role in the fight against corruption. Lack of democracy lack of rule of law and lack of equality before the law coupled with lack of accountability will lead to arbitrary application of the law to suit the needs, desires and aspirations of the ruling party. This waters down the objectives of punishment as its application is inconsistent and discriminatory.

4.3 INSTITUTIONAL LEGAL FRAMEWORK OF THE ANTI-CORRUPTION COMMISSION.

In Zambia, the Anti-Corruption Commission is an institution established to deal in corrupt practices. The Autonomy of the commission in its operations is given under Section 5 of the Act. However, the autonomy of the ACC is still questionable as the appointment of Director General of the ACC is still done by the President pending ratification by parliament. The institution is however, poorly funded by the government for its operations. AFRONET reports that, if the fight

against corruption is to succeed in Zambia, the government has to provide adequate funding to the ACC, institute administrative and political reforms to minimise the opportunities for corruption and act firmly against public officers who are implicated in corruption.

Excessive power vested in the Executive wing of government adversely affects the government institutions established to fight corruption such as the police service, Anti-Corruption and the Electoral Commission of Zambia. Evidence shows that excessive executive power is abused and hinder the efforts of established institutions to fight corruption. Transparent International Zambia report states that "when the existing legal and institutional frameworks are faced with a lot of inadequacies such as insufficient power to enforce the laws, insufficient funding, insufficient manpower and a lack of autonomy, they will not be able to function effectively."⁵⁵ An effective institutional legal framework would ensure that there are laws establishing criminal and administrative sanctions for bribery and rules requiring political independence of the civil service. It will also ensure recruitments and career development based on merit. It will also ensure the independence of the Inspector General of Police, the Director General of the Anti-corruption Commission and the Chairman for the Electoral Commission of Zambia who all play vital roles in the fight against corruption. An effective legal institutional framework will ensure the independence of public prosecutors, an independent mechanism of handling high profile corrupt cases and encourage participation of the civil society in the fight against corruption. Proper organisational structures will also get rid of outdated and inadequate policies and procedures. This will also

⁵⁵ Transparency International Zambia Publication (2003)

ensure adequate supervision of officers tasked with the responsibility to fight corruption and ensure that policies and proceedings are being followed. A well organised legal structure of an institution established to fight corruption will also provide sufficient publicity to the people on the vice since it is a fact that ignorance is a fertile ground for corruption and that insufficient publicity of an institution's aims and procedures is a major cause of corruption. Public reaction to corruption is a vital point in the fight against corruption. The public perception of corruption plays a pivotal role in fighting corruption. This can only be attained where there is a well structured legal institutional framework which also promotes access to vital information on the fight against corruption. The institutional legal framework must be able to provide an enabling environment for the media to play its role in exposing cases of corruption. Where the legal framework of the institutions established to fight corruption is effective, the role of punishment in the control and prevention of corruption will also be effective. This will entail corrupt officials being exposed , prosecuted and convicted. Convictions and punishment of corrupt officials done within the established legal framework and uninhibited by any political interference will go a long way in making people to appreciate the role of punishment in the fight against corruption. A well established legal framework will ensure independence of the established institutions to fight corruption, call for adequate funding and recruitment of professional personnel to run such institutions, promote efficiency and professionalism in such institutions and above all promote the rule of law and equality before the law. All these factors if observed and taken into account will go a long way to enhance the role of punishment in the fight against corruption. It is a well known fact that where there is no well established legal institutional framework in organisations tasked to fight

corruption, inconsistency in the performance of such institutions obligations and responsibilities will be the order of the day. This results into disparities in the manner corrupt cases are handled. It is therefore vital to have well established legal institutional frameworks in order to apply punishment uniformly and avoid discrimination in punishing people found wanting on corrupt charges.

4.4 CONCLUSION

In conclusion, it should be stated that it is the duty of the criminal justice system to maintain law and order and ensure that the rule of law is upheld. The principle of equality before the law will be disregarded as those who corrupt law enforcement officers will not be arrested and prosecuted for their corrupt practices. The separation of powers needs to be strengthened, balanced and presidential powers reduced in relation to public watchdog institutions so as to enable them to operate more effectively and to hold the executive accountable. The ACC and other institutions established to fight corruption have the potential to do better if given the necessary support. The creation of the task force on economic plunder demonstrates the governments will to eradicate corruption. However, all these efforts will be in vain if the role of punishment in the fight against corruption is undermined by an exercise of mere capricious power which does not satisfy the general public on the conception of law. **Edgar Bodenheimer** states that " If the leaders subjective sense of justice produce uniform decisions in essentially similar cases, a normative content would in fact have been imparted to his adjudications and the standards of decisions followed by him would soon become known to the community. If on the other hand, the leader's subjective approach to the administration of justice resulted in irrational, whimsical and totally unpredictable

decisions, it is likely that the community would view this condition as the antithesis of an order of law."⁵⁶ This clearly shows that law is always a general statement which is also a standard by which justice and injustice are measured. Therefore, legal prescriptions are not made for individual persons, but have a general application.

Thus, the element of generality is an important ingredient of the concept of law. By applying a uniform standard of adjudication to an indefinite number of equal or closely similar situations, some measure of consistency, coherence and objectivity into the legal process which promotes internal peace and lays the ground work for a fair and impartial administration of justice is achieved. It is only under such conditions that the role of punishment in the fight against corruption in Zambia will be seen to be effective. It is evident that an ineffective criminal justice system, lack of political will and inadequate legal institutional frameworks can adversely affect the role of punishment in the control and prevention of corruption. The objectives of punishment will be an illusion where the institution of punishment is undermined.

The next chapter will look at the recommendations to strengthen the role of punishment in the fight against corruption. The chapter will also contain the bibliography of this research work.

⁵⁶ Edgar Budenheimer (2004) Jurisprudence, P 187

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSIONS

INTRODUCTION

One of the most vital tasks of the criminal justice system is to expose those who engage in corrupt practices and to punish them. However in order to attain the objectives of punishment in the fight against corruption, certain measures have to be put in place. Therefore, this chapter will make some recommendations to enhance the role of punishment in the fight against corruption in Zambia.

RECOMMENDATIONS

There is no single recommendation which can serve as a solution to the problem of corruption in Zambia. Hence, there is the need to highlight the multifacet strategies that may be used to address the problem of corruption which is complex issue. **Chris Heyman & Barbara Lipietz** acknowledge that "corruption is inevitably a complex and protracted activity because the causes are complex and rooted in the particular political and economic conditions of a specific society."⁵⁷ Therefore, this paper makes the following recommendations:

⁵⁷ Chris Hyeman & Barbara Lipetz (1997) Corruption and Development, Some Perspectives. P 25

- (i) A democratic society requires equality before the law. Therefore, punishment can only be seen to serve its purpose where there is equality before the law. This entails that the law on corruption must be applied on individuals who are alleged to have been involved in corrupt practices regardless of their status in society are.
- (ii) The rule of law which promotes the doctrine of the separation of powers must be seen to be in place in order to provide a conducive environment for the effectiveness role of punishment in the fight against corruption as it advocates for less interference in the obligations of the judiciary and the legislature by the executive. This entails that the rule of law will ensure predictability and consistence in the role of punishment in the fight against corruption. It will also promote equality before the law, thus making punishment more meaningful and effective.
- (iii) Sentencing of offenders is critical in ensuring the effectiveness of punishment in the fight against corruption. Therefore it is vital to ensure that sentencing does not appear to be undermining the institution of punishment. Hence culprits should be meted with the deserved punishment irrespective of their social status in society. Abuse of discretionary powers by the courts when sentencing the offender upon mitigation can be a lubricant to encourage corruption.
- (iv) Respect for the law is more important than punishment. Hence, a lot of efforts must be made to make people understand and respect the law

before resorting to the use of punishment. This entails having adequate legal and institutional framework with sufficient power to enforce the laws.

- (v) Prisons in Zambia need to have necessary educational facilities to educate convicted people on the importance of respecting the law and the need to give up for behavioural change in order to become good citizens. This implies that prisons should cease to be breeding places for would be hard core criminals.
- (vi) Public awareness of the evils of corruption and the type of punishment available for such vices need to be enhanced in order to accelerate the fight against corruption. Corruption must not be allowed to become a means for survival regardless of any prevailing circumstances.
- (vii) Anti-Corruption laws must be strengthened in order to make the vice a high risk and low pay off, crime. This calls for doing away with outdated and inadequate policies and procedures.
- (viii) Independence of the judiciary and agencies involved in the fight against corruption such as the Anti – Corruption Commission and the Zambia Police need to be guaranteed in order for such institutions to freely and effectively perform their duties. The principle of equality before the law will be disregarded where the judiciary is not independent. Equally , where the judicial system is corrupted, the judicial system distorts the upholding of the fountain of justice in a nation.

- (ix) Political will is critical in order for the government to deal firmly with the problem of corruption. This entails that leaders alleged to engage in corrupt practices as a means of sustaining themselves or protect themselves must be dealt with according to the law on corruption without any discrimination. This calls for the existence of high moral standing and integrity in public offices and amongst the players in the political scenario.
- (x) There is also urgent need to increase the capacity of institutions involved in the fight against corruption by funding them adequately and providing training opportunities for its officers in order to enhance professionalism in their work. This also requires sufficient supervision of such institutions to ensure that policies and procedures are being followed.
- (xi) A well elaborate legal framework must be put in place in order to ensure effective coordination of the necessary activities in the fight against corruption. This also calls for sufficient autonomy of institutions involved in the fight against corruption.
- (xii) Legislature must also play an important role in ensuring accountability of the executive branch by checking against abuse of the excessive powers vested in the executive wing of government which may hinder the efforts of the government institutions established to fight corruption.

- (xiii) A strong and independent press and civil society must be in existence in order to complement the work of government institutions in the fight against corruption and mal practices. This entails the provision for the existence of a law guaranteeing freedom of speech for the press and non censorship of the media. This also calls for the need for the existence of citizens groups to monitor government's performance in areas of service delivery. Lack of press freedom hamper or limit access to information vital in the fight against corruption . Therefore, the media must play a vital role in exposing cases of corruption.
- (xiv) Integrity in public life need to be promoted in order to enhance the fight against corruption. This entails increasing education and awareness programmes, setting of examples by politicians and senior officials, and formulation of codes of ethics and conduct for public officers. The ultimate goal of establishing an integrity system is to make corruption a high risk and low return undertaking. A good integrity system is one designed to prevent corruption from occurring in the first place, rather than relying on penalties after the event. This entails prescribing sufficient sanctions to punish offenders and making corruption a very serious offence. A national integrity system will also ensure that government functions in a way that guarantees that the public interest takes precedence over the private interests of bureaucrats and politicians. Integrity systems also ensures that institutions vested with watchdog functions are themselves held accountable for the manner in which they undertake their watchdog role.

- (xv) Zero tolerance for corrupt activities must be inculcated in the public. This entails intensifying public education about evils of corruption. The public must be made to understand the concept of punishment and its role in the fight against corruption.
- (xvi) The massive presidential powers on the work of government institutions involved in the fight against corruption need also to be checked in order to ensure autonomy of such institutions. This also calls for the putting of safe guards against abuse of the power to enter a nolle prosequi by the Director of Public Prosecution in criminal matters relating to corrupt practices.
- (xvii) Expeditious or prompt disposition of corrupt cases will signify an effective role of the criminal justice in the fight against corruption. Hence, there is an urgent need to avoid lengthy and cumbersome procedures of litigation of corrupt cases.
- (xviii) Law on corruption must be simple in order for the general public to understand fully the characteristics of corruption and its consequences. This entails the production of adequate manuals on the acts which constitute corruption and on the procedure of reporting corrupt activities.
- (xix) There is also need to protect the whistle blowers of corrupt practices. This will ensure a lot of willingness of would be witnesses in corrupt cases to

give evidence, which will lead to convictions and this in turn will promote the peoples confidence in the criminal justice system.

- (xx) Political parties aspiring to run the nation should have a clear position regarding corruption and accountability and must be concerned with the implications of corruption on the welfare of the citizens of Zambia and more especially on the programmes of poverty alleviation.

CONCLUSION

It is evident that the institution of punishment can play a vital role in the fight against corruption. Regardless of whichever theory of punishment is adopted, punishment is seen to prevent and control crime. People can be made to respect the law through punishment. This entails that those who are known to be involved in corrupt acts must be punished. However, in order for punishment to play an important role in the fight against corruption, certain measures have to be put in place. Firstly, there must be sufficient publicity against the vice since ignorance can be a fertile ground for corruption. Secondly, the judiciary and law enforcement agents must be neutral and free from excessive executive pressure. There must also be adequate legal and institutional framework with sufficient and adequate power to enforce the law. Public reaction is also critical in the fight against corruption as it imposes accountability and transparency on the government and also exposes government's lack of political will to curb the scourge. The Rule of Law which calls for equality before the law must be put in place in order to ensure predicability of the law on corruption. Corruption, if

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