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COMPARISON STUDY OF BOTH TRADITIONAL AND MODERN PRINCIPLES
OF PUNISHMENTS.

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COMPARISON STUDY OF BOTH TRADITIONAL
AND MODERN THEORIES OF PUNISHMENT.

By

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An Obligatory Essay submitted to the University of
Zambia in partial fulfilment of the requirements
for the degree of Bachelor of Laws.

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DEDICATION

To my Mother, Father and my
young sister Maggie.

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Rarely does one write anything alone and in writing this essay I was no exception to the general rule.

In the course of writing this essay, I drew ideas from many people without whose help I would not have been able to write it. I am deeply grateful to all of them.

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I remain, of course, responsible for any errors and misrepresentations.

PREFACE.

This paper is about a problem that has an important legal dimension. This is a problem of trying to control anti-social behaviour by imposing punishment on people found guilty of violating rules of conduct which are generally found in the criminal statutes. This paper puts up several questions and attempts to answer them with reference to the Zambia situation and legal system.

It queries inter alia, the objectives of punishment; what is to be achieved by imposing such punishments as are found in our legal system? Of what effect are they? It is believed that we punish to reduce the incidence of crime to a minimum so as to protect society from anti-social acts.

This paper has endeavoured to bring out in the introduction the overview of the whole paper. The Nature, Definition and Justifications for punishment are discussed in the first chapter. Chapter Two will concern with the discussion on the forms of punishment that existed in the traditional Zambian community, with special reference to the Bemba, Tonga, and Lozi. Thereafter, the paper examines the common law theories of punishment in the third chapter. The last chapter will confine itself with the inheritance of these common law theories of punishment by the Zambian legal system. In summing up, the paper identifies some defects in the present Penal system and thereafter, advances some proposals to remedy the situation.

In order to achieve this, the paper employs both the primary and secondary methods of researching. The former will include statements obtained from interviews with some members of the legal profession and members of the public. On the other hand, the latter will mainly consist of reading standard text books, cases and any relevant material. In short, the methodology to be employed will take account of what is involved in fact-finding.

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INTRODUCTION.

In the first instance, it may be noted that the whole history of Human Evolution has been subjected to rule of conduct, and these have been aimed at controlling the anti-social behaviour of people in society.

For example, in the early Primitive Zambian Community, when a person was discovered or held to be a sorcerer, or when he killed another, he was banished from the village to go and settle any where but not in that village ever again.¹

It is also common to observe that when a child misbehaves in a home, parents will take appropriate disciplinary action against that child.

However, ours is a modern and sophisticated society and therefore, there is a need for more modernised system of punishing criminals. This explains why today whenever, a tort or crime is committed or where there is a breach of contract, a complaint will be taken to court where justice will take its own course.

Hence the principles of punishment generalise the distinct character of all primitive sanctions in this, as specified in the rules of criminal law.

In the light of the foregoing discussion the paper is going to consider the nature, definition and justifications of punishment. This will be contained in the first chapter. Chapter two will concern with the discussion on the forms of

punishment that existed in the traditional Zambian community, with special reference to the Bemba, Tonga and Lozi.

Thereafter, the paper examines the common law theories of punishment in the third chapter.

The last chapter will confine itself with the inheritance of these common law theories of punishment by the Zambian legal system.

In short, this will eventually give us the present Zambian law on punishment.

In summing up, the paper identifies some defects in the present Penal system and thereafter, advances some suggestions to remedy the situation.

In order to achieve this, the paper employs both the primary and secondary methods of researching. The former will include statements obtained from interviews with some members of the legal profession and members of the public. On the other hand, the latter will mainly consist of reading standard text books, cases and any relevant material. In short, the methodology to be employed will take account of what is involved in fact-finding.

CHAPTER ONE.

Nature, Definition and Justifications of Punishment.

(a) Nature:

No aspect of the administration of criminal justice is arousing as much concern today among both the members of public and the judiciary as the punishment.²

The nature of punishment is in part determined by reference to its purpose and functions. For example, if one purpose of punishment, in the sense of a reason for it, is that an offender deserves to be punished; punishment then has a moral significance which at least is quite different from that where it is viewed only as a painful experience imposed to deter potential offenders. So too, the latent functions of punishment, for example, the cohesion of the community's moral attitudes, maintenance of individual's sense of justice are additional factors which determine the nature of punishment.

(b) Definition:

Any discussion on punishment might as well introduce the subject by attempting to discuss what we mean or understand by punishment. Punishment might be roughly defined as the authoritative infliction of suffering for an offence.³ There are then three major elements involved in the notion of punishment. Firstly that it is imposed by someone in authority over the person punished. So, for example, a parent

may punish his child, but the child cannot be said to punish his parents for in this case the child's lack of authority over the parent would prevent his action being described as punishment.

Secondly, punishment involves the infliction of something unpleasant on the victim, whether consisting of positive physical pain or deprivation of something which the victim desires such as liberty. caring offenders with kindness, therefore, does not, by virtue of lacking this feature, qualify as punishment.

Third and most important, the notion of punishment entails the actual or supposed commission of an offence. This is one side of the retributive nature of punishment:- Punishment in the abstract is meaningless; punishment can only be inflicted for an offence. In the usual case the person punished and the offender are one and the same. There are, however, cases which diverge from the standard case and where the two are not identical, as in the case of Collective Punishment, the punishment of scapegoats, and cases of vicarious liability. But there is always this limit that anything to qualify as punishment, it must be inflicted on account of some actual or supposed offence committed by some one. Though one can punish an innocent man whom one wrongly imagines to have committed an offence, one cant logically punish a man when it is known that no offence whatever has been committed; for this would not qualify for the qualification of punishment.

As regards the aspect of punishment, namely, that it must be unpleasant, atleast two reasons may be advanced in support of it.

Firstly, there is obvious practical need to discourage criminal conduct. While the best cure for a man who persists in driving away cars without the owner's consent might positively encourage others to follow his example.

Undue emphasis on offenders tends to overlook the importance of potential offenders and obscures the ambivalent nature of punishment, which is concerned not only with the person in the dock, but with the rest of society also.

Secondly, there is the fact that pampering offender may result in injustice if he obtains advantages denied to those who are guiltless of crime. In the above example, even supposing the rest of citizen body were so honest as not to be spurred to emulate the "joy-rider" by seeing him provided with a free car, nevertheless the provision of a free to the offender would be unjust to all other citizens whose want of means had not led them to make free with the property of others.

The third feature of punishment is the requirement that it may only be administered for an offence. One system whereby potential offenders might be treated before actually committing offences is that the traditional system of punishment affords the citizen the maximum freedom, so long as he confines his activities within the rules laid-down and these he knows or can be find out - he is free from interference.

This freedom he forfeits by breaking the rules of society in

which he lives, where upon society may make use of him to prevent further crime. A system of social hygiene would deny the individuals the choice of accepting or ^ejecting society's terms and would leave quite uncertain whether he was liable to interference at any given moment.

(c) Justifications of Punishment:

It would appear that to inflict pain or deprivation of individual rights and freedoms, or to subject another to forced labour is inherently immoral. Hence, this implies that the use of punishment as a form of control must be justified. This may be in view of one view. For example, by Bertham when he said, "an offence spreads an alarm but its punishment re-establishes security."⁵

An attempt to justify state punishment is sometimes made on the ground that it is a retribution for wrong-doing. Here however, we must first distinguish the purpose societies, have for punishing and the purposes which might justify this activity. For punishment consists in the infliction of suffering, and this is an evil which needs to be justified. We must separate from the aims societies have, the aims which might justify the infliction on the victims of the misery which punishment entails.

The aims fall into two categories, according to whether they are connected with the protection of society or not.

One category comprises such aims as the exaction of retribution, the explanation by the criminal of his crime, and

the satisfaction of the demand of the members of society for justice.

The other category comprises the aim of protecting society and its individual members by preventing certain kinds of conducts. The infliction of punishment secures this aim by detering potential offenders, and sometimes by preventing an actual offender from further criminal activity.

Retributive Justification:

The first category of aims presents a difficult problem. The problem roughly is whether there can be any justification for punishment except in so far as it is aimed at the protection of society for preventing crime. It is sometimes urged that the state should punish in order to exact retribution, to preserve the balance of justice.⁶

The difficult with this suggestion is that of discovering the justification for this. If one man does some wrong or immoral act, it is not easy to see what right another man has to exact retribution for this.

If individuals have no moral right to exact retribution it is hard to see how a society or a group of individuals, can acquire such a moral right either.

What holds good of retribution likewise holds good of explanation and atonement. These idea of explanation and atonement is that the wrong doer by suffering pays the debt demanded by justice and owed to the authority inflicting the suffering, and so becomes reconciled once more with that authority.

It is sometimes said that punishment for crime enables the criminals to pay their due in the hard coinage of punishment. The difficulty of satisfying state measures aimed at making an offender pay such a debt is the difficulty of showing that this debt is owed to society. Just as it is hard to show that society any more than an individual is entitled to exact retribution, so it is difficult to show that society anymore than an individual has a right that the offender should make explanation and atonement to it for his wrong doing.

Yet another aim put forward to satisfy state punishment is the denunciation of the offence.

It is true that to prohibit an act without fixing a penalty for contravention would be an empty threat, and to fail to execute the punishment fixed would like wise reduce the law to an empty threat.

But is again hard to see what justification there can be for such denunciation unless the acts are denounced for the purposes of preventing their performance. The aim is infact part of the overal aim of protecting society.

We are left with the reason sometimes advanced as an important factor to be taken into account by any government:- the need to satisfy the demand for justice. The suggestion here is not that society, any more than its individual members, has a right to exact retribution for wrong-doing, but that if such retribution is not exacted, the public conscience will be so outranged as to take the law into its own hands, to riot, revolt, and so forth.

If negroes, it has been urged in some countries, are executed for raping, white women, the white population will resist to lynching.⁷

While, as a matter of practical politics, no government can remain oblivious to the feelings of the governed, the mere existence of a desire to see justice done in these cases to see those who commit certain acts suffer certain punishments does not automatically justify its gratification. Although the members of a society may be entitled to be assured that they are being protected against crime, there are many desires whose satisfaction at the cost of harming other people no one would seriously seek to justify, such as a lust for war, a greed for wealth, and so on, and the passion for justice carries with it no unique qualification for justification. Where an offender is punished and the aim of preventing crime is pursued, the claim for justice may be incidentally satisfied. But to punish merely in order to satisfy this demand, to sacrifice an offender to this passion for justice, is no more justified than to ill-treat one person in order to gratify the sadistic desires of another. Moreover, the popular passion for justice may like many other popular feelings, be based on error and prejudice. Further, it can lead to disproportionate penalties and the punishment of the innocent. Here the rules should lead, not be swayed by popular opinion.

The second category of aims is easier to support as justification of punishment. If individuals are justified in defending themselves against violence, attacks on their property, and

similar harm, it is not difficult to argue that a group of such individuals, society, is similarly entitled to protect its self and its members against such attacks. The problem which then arises is against what kinds of conduct societies and individuals are justified in protecting themselves. The misery entailed by punishment of certain conduct must be balanced against the misery involved in leaving the conduct unpunished. The misery resulting from punishing murderers would be agreed generally to be out weighed by the misery which would ensure if murder could be committed with impunity. The unhappiness caused by the punishment of prostitution and homo sexuality on the other hand may well out-weigh the unhappiness resulting from tolerating such conduct. At this level the retributive aspect of punishment plays an important role by limiting the pursuit of the aim of self-protection of society in different ways.

First, punishment may only be inflicted for an offence, as we have seen; and further it may be argued that it should only be inflicted on the offender, since he alone should be taken to have forfeited his right not to be interfered with. To personalize one person for another's offence is to make use of an innocent person for the greater good of the community, and human beings ought not to be used as mere means to an end in this way.

Secondly, the retributive aspect prohibits the infliction of punishment totally out of proportion to the offence. Death for speeding might end this sort of anti-social conduct, but the

price paid would be too great. But given the justification of the use of punishment to prevent crime, and given the requirement that it should be restricted to actual offenders and proportional to the offence, the major problem here is the practical one of deciding what type of punishment will best achieve this aim, whether deterrence, reclamation, or prevention offers the best prospects.

The Reductive Justification:

The problems which the reductive sentencer has to face are different. His general justifying aim is not to inflict deserved punishment for a past act but to do something that will reduce the future frequency of such acts. Like the retributive sentencer he is subjected to limitation. As a sentencer he can deal only with the offender:- he cannot reform society, abolish unemployment or remove temptation. He can deal with an offender who has been found guilty, only for the offence of which he has been found guilty, and only means of a sentence whose severity does not exceed certain maxima:- limitations which are imposed on him by the retributive tradition.

With these boundaries the "reducer" has some freedom of choice. In pursuit of his general reductive aim he may intend - although hope would be more realistic that his sentence will do one or more of the following things:-⁸

a. deter the offender himself, by means of experience of a Penalty, from committing similar offences, or if the sentencer is very optimistic from infringing any other part of the criminal law as well; this is usually called individual

deterrence.

b. influence the offender's desires or attitudes in such a way that deterrence a part - he will be less inclined to commit similar offences or again if the sentencer is very optimistic, more inclined to obey the criminal in general.

c. deter other people who might be tempted to do what the offender did, by instilling the fear of incurring a similar sentence. This is called general deterrence.

d. increase other people's moral disapproval of the offence, or respect for the prohibitions of the criminal law, by means of the message conveyed by the severity of the sentencer. This is known as denunciation.

e. make it more difficult for the offender to commit a similar offence, either by physical restraint such as incarceration or by prohibitions such as disqualification from driving a motor vehicle. This is called incapacitation.

CHAPTER TWO.

THE TRADITIONAL FORMS OF PUNISHMENTS AMONG THREE TRIBES
DURING PRE-COLONIAL PERIOD.

In looking at what forms punishment took during this era, the paper is going to consider the practices among the notable tribes in Northern Rhodesia. These are the Bemba of Northern Province, the Lozi of the Western Province, and the Tonga of the Southern Province. The aim of choosing different tribes is to try and see whether some uniformity can be found. Eventually, this will enable us to acknowledge the effects of the common law theories of punishment as they came to be applied on the natives of Northern Rhodesia and this will be discussed in the third chapter.

THE BEMBA:

Before the introduction of the Penal Code system by the British colonisers, the Bemba had a descending hierarch form of community. Within this context there was a Paramount chief at the bottom was occupied by the villagers. A limited number of councillors were chosen from the elders of community. These councillors were responsible for effecting punitive orders in an event committing either a serious or petty offence.

It is important to note from the outset that the gravity of punishment that was imposed on an offence committed depended on the seriousness of that offence. For example, a kind was demanded whenever a person failed to observe rituals and these were considered as part of customary law. Hence, such a failure amounted to the breach of the law. On the other hand if a more

serious offence was committed such as theft, the offender had his hands or fingers cut off.⁹ In an event of committing rape the male offender had his private parts cut off while the female accused had her vaginal area scalded.

Applying these to the common law theories of punishment, it is clear that such penalties served as deterrent measures both to the offender and the rest of community in that it was an indication of what will befall them if they committed the same offence. Furthermore, it can be observed that the cutting of some parts of the offender's body had the effect of reducing the prevalence of the crimes in society in that the members of that community would soon come to know and understand why such sanctions were imposed on him.

Where a more serious offence, such as murder, is committed a punishment proportional to the offence committed was imposed on the offender. In this case it was an eye for an eye in that the accused was killed and the parents were to be compensated in form of beads, bales of blankets or generally in goods. Once again such form of punishments had a retributive effect.

Banishment was also common among the Bemba. This happened where it appeared that more than one member of a family had committed theft at one time or another and it was thought that perhaps that criminal behaviour or deviant characteristics were common in the family. The whole family would be banished to another area and thereby detribalised from the Bemba tribe.

The paper has so far dealt with the forms of punishment that were imposed on the elder offenders. In case of a child offender,

leniency was exercised and the aim of it was to reform him or her. This reformation process, sometimes, involved waking up early in the morning to make fire for the elders. They regarded this as a way of learning good manners.

In addition to this deterrence theory was also applied to the juvenile offender. For example, if a child refuses to go and draw water for cooking ~~nsima~~ ^{nsima}, the parents would deny him or her the usual amount of food unless and until it was understood that he was repentant and would not offend again. This did not deter the offender only as even others would learn a lesson. One interviewee when commenting on the same had this to say, "The effect of this kind of punishment is that every one in the family becomes aware the consequences of refusing when sent by the elders. If one refused to draw water for cooking nsima, it was argued that by implication he had also refused to eat."¹⁰

The Bemba society progressed under belief that children became good tribesmen depending on whether they were taught the right moral principles by their parents so that those parents that failed to build proper moral standards into their children who, if not very young, were made to work for or serve the chief in his home as a punishment to his parents.

Finally it can be observed that the Bemba's forms of punishment were similar to the common law theories of punishment. They punished in order to deter not only the offender but also future offenders. This theory went with amputations.

Banishment among the Bemba acted as a Preventive measure and the view here was that restricted to a certain area, the offender(s)

would not "pollute" other people in the villages. The common law theory that the offender deserves the punishment (retribution) was also not an exception among the Bemba. To them it was an eye for an eye in that the killer was killed.

The children were expected to reform by keeping near the elders while, of course, undergoing punishment by waking up early in the morning to make fire. In the light of the foregoing discussion the Bemba managed to maintain some discipline.

(b) THE LOZI:¹¹

Like the Bemba, the Lozi had also a descending hierarchy form of community, with the Mtunga at the top. Historically the Lozi kingdom is regarded as the earliest and most centralised government during the Pre-colonial period. By the middle of eighteenth century they had already established a governmental political organisation including a hierarchy of courts which had power to enforce the decisions and pronounce punishment ^{of} offenders. These courts heard and "tried" both civil and criminal offences with no distinction between the two kind of offences.

In order to ascertain one's guilt or innocence, the person involved was made to drink "MWATI", as it was called. If he was innocent, he was expected to vomit while dying meant guilty. Where witchcraft was concerned, the suspected offenders was ~~asked~~ to dip or pass his or her hands in boiling water and the one ~~who~~ scalded was considered to be the offender.

Fines were also ordered among the Lozi and this way because every person was said to belong to the king; the Litunga. Hence, the killing of a person meant a wrong against the king.

The lozi are said to have been very harsh with the offenders and this took the form of deterrence. For example, when theft was committed, the offender had his fingers burnt. Sometimes, he or she would be asked to compensate the offended twice as much. This could take the form of cash or in kind, for example, a certain number of cattle. The harshness of the pain inflicted upon the offender did not only deter the offender but also those contemplating to commit the same or similare offences, as in the words of one interviewee, "this was because it acted as a warning to the public at large."¹²

(c) THE TONGA:¹³

It is important to note that the Tonga's community organisation was different from both the Bemba and the Lozi in that they had no descending hierarchy and they had no paramount chief. However, they had a group of elders who were responsible for imposing punishments on the offender. The punishment imposed depended on the nature of the crime. For example, when adultery was committed, the adulterer was asked to pay a certain number of cattle as a form of compensating the offended. Where theft was in question, two kinds of punishment were available. Either he or her was ordered to pay twice the number of cattle (when the cattle were stolen) or they could cut the offender's hands. The idea was to discourage her or him from committing the same or similar offences again. Essentially this had a deterrence effect on the offender himself as well as future offenders.

In certain incidences, the offender will be asked to work for the chief until such a time it was understood that he had

repented and reformed. Thereafter, he will be sent back to his village and the elders will be watching his conduct. If he commits the offence again, he would be treated very harshly and a more serious offence was expected, for example, cutting his legs. The argument here was that it were legs that made ^{him or her} _{to} commit crimes, hence, by making him or her immovable was going to reduce the prevalence of the offence in the area.¹⁴ This scared also others who were thinking doing the same (deterrence).

Where murder was concerned, the offender was regarded as a betrayer of the community as a whole. In such a situation he was considered to be useless to the society and therefore, the elders were empowered to sell him as slave. The parents received no compensation for this. This acted as a punishment to the parents and a lesson to them that it was their duties to instil good moral principles in their children.

Finally, it is clear from the preceeding discussion that although the form of punishment imposed on the offender might have been different from tribe to tribe, all the three tribes had the same if not similar aims for punishment in that they all punished in order to deter, reform, reduce the prevalence of the crimes and also to protect society by preventing the commission of such crimes again.

It may be argued that some measures such as amputations of legs and burning were morally wrong and hence they cannot be justified. However, it should be noted that such severe treatment was necessary in that society had to be protected and the chief to be protected and to be held in high esteem, he had to maintain discipline.

In the next chapter, it will be observed that the purposes of punishments in England were not different from those discussed above. Hence, it is perhaps because of this similarity in principles that the Africans were able to grasp the nature of the new system whereby they had lost all powers to preside over offences that in earlier times were theirs to decide on. The following chapter will deal with the common law theories of punishment as they existed in England.

CHAPTER THREE.

COMMON LAW THEORIES OF PUNISHMENT:-

EVOLUTION OF THESE THEORIES:-

The Penal policies of England seem to have passed through five main stages:-

(1) The first stage was a primitive one which punished Practically all crime with extremely harsh sanctions.

(2) In the second stage, doctrines of retribution for crime became popular, the slogan was to make the Punishment fit the crime. Originally, this doctrine was closely connected with the notion of natural rights. Even a criminal, it was held, had certain fundamental rights which inhered to him as an individual, which ought not to be forfeited merely because he had committed a crime. He therefore ought not to be punished more severely than merited by the crime committed.

(3) In the third stage, the eighteenth and early nineteenth century rationalists, led by Jeremy Bentham under the banner of utilitarianism, sought to derive principles of punishment from human nature holding that the basic objective of the criminal law was to deter potential criminals for example.¹⁵

These doctrines and their ethical implications are exemplified by the writings of the Reverend Sydney Smith, editor of the "Edinburgh Review" in the 1790s.

"In prisons which are really meant to keep the multitude in order, and to be a terror to evil-doers, there must be no sharing of profits, no visiting friends - no education - no

freedom of diet - no weavers' looms or carpenters' benches. There must be a great deal of solitude; coarse food..... a planned and regulated and unrelenting exclusion of happiness and comfort".¹⁶

Elsewhere he says that when a man has been proved to have committed a crime, it is expedient that society should make use of that man for the diminution of crime; he belongs to them for that purpose.

In its classical form, the potential harshness of the doctrine was alleviated by the principle that Pain was a social evil.¹⁷ In punishment, the refuse, the least pain was to be applied which was consistent with the objective of deterrence. Since man was viewed as a calculating animal, the punishment would have to be only a slighter greater pain, than the prospective enjoyment of the fruit of the crime was an anticipated pleasure. This may be called the objective of general deterrence.

Implicit in the notion of deterrence by example is the notion that if the criminal would not have been deterred himself, it is fruitless to punish him - the concept of special deterrence. This led to the neo-classical school of Penalogy, starting with the same notion of free will which characterised the classical utilitarians, the neo classical school made exceptions in the case of little children, the insane and others similarly situated.¹ To that extent, they suggested that the individual's will is not completely free, but at least to some degree determined by his environment and history.

A final stage in the development flowed from the concept of determinism. If the criminal and his crime are products, then he can not significantly be deterred by threat of punishment.¹⁹ The principle objective of criminal sanctions ought to be to reform the criminal. The battle-cry of the modern reformers has been to be make the punishment fit the criminal, not the crime (Reformation.)

Retribution:-

Historically, the objective of retribution as the principal end of punishment reached its greatest popularity in the 18th century. At that time, punishments for crime were uniformly harsh: In most cases, the punishment was death. To make the punishment fit the crime was therefore a principle which objectively necessarily tended to mitigate punishment. Two main arguments have been suggested to justify retribution as the end of punishment.

(1) There seems to be an instinctive feeling in most ordinary men that a person who has done an injury to others should be punished. Goodhart argues that if criminal law refuses to recognise retributive justice, then there is a danger that people will take the law into their hands.

This asserted instinct, it is claimed, arises because if a criminal escapes justice, the righteous member of the community feels wronged, for he says to himself, as it were: "If other people are punished unjustly, then my personal freedom is also in danger, or if another escapes the punishment which he deserves, why should I continue to conform?"²⁰ To put it in psycho analytical language

the failure to punish an offender means to us a threat to our own repressive trends.

(2) Secondly it is argued that without a sense of retribution we may lose our sense of wrong. Retribution in punishment is an expression of the community's disapproval of crime, and if this retribution is not given recognition, then the disapproval may also disappear. A community which is too ready to forgive the wrong doer may end by condoning the crime. This view sees in punishment the final expression of the intimate relationship between morality and the criminal law. Thus Stephen said: "I think it highly desirable that criminals should be hated, and the punishment inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it".²¹

It is unlikely that any judge would put forward views in these terms today. But it would be a mistake to assume that the attitude is dead.

Criticism Against Retribution:

The critics of the retributive position deny that it is self-evident that retribution is just, whether one believes in free will or in determinism. They ask what intuitive necessity there is, apart from a concern for future actions, that evil be repaid with punishment rather than ignored. Holmes contended that it will be seen on self-inspection, that this feeling of fitness of punishment

following wrongdoing is absolute and unconditioned only in the case of neighbours' and that it is only vengeance in disguise.

Throughout the history of thought it has been argued in various ways that human punishment is a creature of human law which is an instrument of the state; that the ultimate end of the state should be the welfare of its members and that both law and legal penalties should serve the same end; and that they are just precisely to the extent that they serve that end. Since punishment consists in the infliction of pain it is, apart from its consequences, an evil, consequently it is good and, therefore, just only if and to the degree that it serves the common good by advancing the welfare of the person punished or of the rest of the population. This is the position taken by Plato.

In modern times, it is argued that retribution is itself unjust since it requires some human beings to inflict pain upon others regardless of its effect upon them or upon the social welfare. In any event, it is urged that retributive theory is incapable of practical application. How is it more possible, moreover, to inflict pain upon the guilty without also inflicting pain upon their innocent relatives and friends? Since the retributive theory requires not only that the guilty be punished but also that the guiltless be not, how is it possible to avoid doing more retributive injustice than justice in any given case.

Deterrence:

Supporters of this theory, such as Bentham, argues that pain and pleasure are the great springs of human action.²² When a man

perceives or supposes pain to be the consequences of an act, he is acted upon in such a manner as tends, with a certain force, to withdraw him, as it were, from the commission of that act. If the apparent magnitude or rather value of that pain be greater than the apparent magnitude or value of the pleasure or good he expects to be the consequences of that act, he will be absolutely prevented from performing it. The mischief which would have ensued from the act, if performed will also by that means be prevented.

The observation of the rules of proportion between crimes and punishment, has been objected to as useless, because they seem to suppose, that a spirit of calculation has a place among the passions of men, who, it is said, never calculate.

But dogmatic as this proposition is, it is altogether false. In matters of importance every one calculates. Each individual calculates with more or less correctness, according to the degree of his information, and the power of the motives which actuate him, but all calculate. It would be hard to say that a madman does not calculate.

Criticism Against Deterrence:-

A number of arguments have been made questioning the efficacy of deterrence.

(a) The assumption that we are rational beings who always think before we act, and then base our actions and careful calculation of the gain and losses involved have long been abandoned in the social sciences. Amongst criminals, foresight and prudent calculation is even more conspicuous by its absence. In approved schools most of troubles the boys get into are just like running one's

head against a brick wall. In boys of very low intelligence, this is sometimes the result of a genuine inability to look ahead and it may reach a ramatic proportional with the boy who pushed his hand through a pane of glass to punch another boy.

(b) Historically, severe punishments have never reduced criminality to any marked degree.²³

(c) It is obvious that the argument for deterrence cannot logically be squared with the doctrine of the free moral agent upon which the whole notion of punishment is based. If a man is free to decide as to his conduct, and is not affected by his experience, he cannot be deterred from crime by the administration of any punishment however severe.

(d) Deterrence is effective, but not in the ways supposed. It works less through fear of punishment itself, than through fear of social disapprobation. The majority of people need the approval^{of} their fellows citizens. The conservative looks to the conservatives, the socialist looks to the socialists, the lawyer to lawyers, the husband to his wife, the criminal....?

Well, the criminal looks to other criminals. But the way to get prestige with other criminals is by being more daring in your criminal exploits, more persistent in pitting yourself against society and its rules.

Another factor on which the effectiveness of deterrence depends is the certainty of conviction. But according to the latest official criminal statistics (for the United Kingdom) only 48% of the offences known to the police are "cleared up" and many of the cases cleared up do not end in conviction.

Another factor may be the nature of the crime involved. In 1944, the Nazis deported the Danish Police, so that the country was without any police force for a time.²⁵ The result was that there was considerable increase in offences against property, but no comparable increase in either murder or sexual offences.

The deterrent effect of inflicting punishment on X operates in two ways:-

- (1) by influencing X to refrain from acting in the same way at future time (sometimes called special deterrence).
- (2) by influencing the rest of the community to refrain from committing similar acts to that of X by holding out to them the prospect of alike punishment if they do so (sometimes called general deterrence.)

Bentham and modern exponents of the same theory tend to oscillate between these two different aspects of deterrence.²⁶ Yet the two aspects do not necessarily produce the same results in a given case. If we think in terms of special deterrence, there is no justification for our punishing the lunatic. Yet if we think in terms of general deterrence, it is quite possible that the hanging of a lunatic for murder may serve to deter some would-be murderers

Restraint:

Our review of the long accustomed forms of punishment, all of them instituted mainly for deterrence, must be supplemented by the consideration of the methods of dealing with convicted offenders, which aim instead at seclusion or at reformation.²⁷ They are not intended for the average criminal, but for those who ^{are} either worse or better, less capable or more capable of reclamation than he.

In the reaction of the 19th century against penal severities, a theory arose that punishments should be solely directed to the reformation of the offender. But protracted experience has shown that noble aim to be far more difficult of achievement than this theory presupposes.²⁸ The great number of recidivists, a number now increasing in almost every country, sufficiently attests this. The great object of the criminal law is to prevent crime; hence if any particular offender has been convicted so frequently as to make it clear that he cannot be kept from crime through the medium of either reformation or deterrence. It remains only to effect that prevention in a direct way, by placing him in a seclusion where it will be impossible for him to repeat his offences. Unless so secluded, he will not only continue his offences but will also train others to offend, and will moreover transmit his aptitudes to a tainted posterity. At the same it has to be remembered that not all persistent offenders are incorrigible; it has been well said that so called incorrigible offenders are very often offenders whom no attempt has been made to correct.

Rehabilitation:

The most popular theory to day is that the proper aim of criminal procedure is to reform the criminal so that he may become adjusted to the social order.²⁹ A mixture of sentimental and utilitarian motives gives this view its greatest vogue. With the spread of human feeling and the wanning of faith in the old conception of the necessity for inflicting pain in the treatment of children and those suffering from mental disease, there has come a revulsion at the hard heartedness of the old retributive theory.

The growing believe in education and in the healing powers of medicines encourages people to suppose that the delinquent may be re-educated to become useful member of society. Even from the strictest economic point of view, individual men^{and} women are the most valuable assets of any society. Is it not better to save them for a life of usefulness rather than punish them by imprisonment which generally makes them worse after they leave than before they entered?

Criticisms Against Rehabilitation theory.

There are a number of highly questionable assumptions back of this theory which need to be critically examined.

We have already had occasion to question the assumption that crime is a physical or mental disease. We may now raise the question whether it is curable and if so at what cost to society?

Benevolent social reformers are apt to ignore the amount of cold calculating business shrewdness among criminals.³⁰ Some hot blooded ones may respond to emotional appeal; but they are also likely to backslide when opportunity or temptation comes along. Human beings are not putty that can be remoulded at^{what} will be benevolent intentions. The overwhelming majority of our criminals have been exposed to the influence of our school system which we have at great cost tried to make as efficient as possible. Most criminals are also religious, as prison chaplains can testify, yet with all our efforts school education and religion do not eliminate crime. It has not even been demonstrated that they are progressive minimising it. Nor does the record of our special reformatories for young offenders prove that it is always possible to reform even

young people so that they will stay reformed for any length of time. The analogy of the criminal law is to medicine break down. The surgeon can determine with a fair degree of accuracy when there is an inflamed appendix or cancerous growth, so that by cutting it out he can remove a definite cause of distress. Is there in the complex of our social system any ~~one~~ cause of crime which any social physician can readily remove on the similarity. Verifiable knowledge?

Finally, it may be stated that the paper having enlighten us on the common law theories of punishment, it will now discuss the adoption of such theories in the succeeding chapter, by the Zambian legal system.

CHAPTER FOUR.

ADOPTION OF THE COMMON LAW THEORIES OF PUNISHMENT.

COLONIAL ERA:

(1) The coming of the British colonialists brought a different and foreign in nature, legal system upon the indigenous people, who lost touch with the traditional way of punishing offenders. The new system which was brought was expressed in the form of a penal code. The penal code was conceived as a process against the excesses of physical cruelty in the eighteenth century which were meted out on convicted criminals in the name of expiation or retribution.³¹ Vengeance was no longer regarded as a proper aim of punishment, instead emphasis was laid on deterrence of crime. For this purpose, the penal code was designed in such a way that the pain of punishment would outweigh the pleasure to be had from the offence. The penal code provided for set of standards used to determine the relative gravity of crimes and it also contained laws providing additional penalties for reactivists.³² In effect, the penal code contained an elaborated classification of crimes with their corresponding penalties finely graded according to the seriousness of the crime.

This new legal system contained the law obtaining in England at that time.³³ These included death sentence, fine, forfeiture, imprisonment, probation, deportation, corporal punishment, etc. These forms of punishment ~~were~~ replaced the traditional ones and ~~became~~ became prevailing in Northern Rhodesia.

It is also equally important to note that the penal system had some impacts on the Traditional system. In the first place, group of elders were no longer responsible for determining the form of punishment to be imposed on the offender. This is because there now existed an hierarchy of courts, namely, the local courts, subordinate courts, the high court and the court of Appeal. Consequently, the only way by which the traditional law appeared to have made a contribution to the new system is through the institution of assessors. However, the operation of customary law was subject to the repugnancy classes which is still effective today.

The new system also brought a distinction between a civil and criminal wrong, which distinction never existed in the Traditional context. Under the old system, it all depended on the seriousness of the crime committed. Essentially, the effect was that what might have been regarded as serious under the old system may merely be considered as a civil wrong, for example, the offence of Adultery.

Notwithstanding these great changes the objectives of punishment remained more or less the same. Deterrence of the crime and to avenge the wrong done were still regarded as the basic aim of punishing the offenders. The only difference, therefore, lay in the manner of implementing these objectives. Deterrence under the new system took a different form in that an offender would be imprisoned for a certain period depending on the gravity of the crime. To achieve this, prisons and reformatory schools were

introduced. The former were used for custoding the offenders while the later was a learning ground for juvenile and even adults where they were taught how to conduct themselves as proper citizens.³⁴

THE PRACTICE OF PUNISHMENT UNDER COLONIAL PENAL SYSTEM.

The cardinal point to note on this is that the new penal system brought discrimination and segregation in its application. This^{is} evident in the fact that whites were fairly treated while their counterparts; blacks were punished severely, notwithstanding that the two (white and black) might have committed the same or similar offences.³⁵ To that extent the penal system application seem to have been in breach of the principle of justice which requires the equal treatment of equal persons in equal or essentially similar circumstances. However, it was an established general rule that Deterrent measures were to be applied mostly on adult offenders who were subjected to imprisonment and heavy fines in most cases. The term of imprisonment was fixed by the penal code and the magistrate was under an obligation not to exceed the maxim sentence. Failure to comply with this statutory requirement meant the squashing of the sentence on review. This view was taken up with approval in the case of R v Sikopo³⁶, in which the trial magistrate allowed himself to exceed the maximum penalty of seven years on the ground that there was a need to keep the accused in custody for as long as possible because of his character. On review the sentence was altered because judge Francis the trial magistrate had not addressed himself to the objectives of punishment by exceeding the maximum limit.

Corporal punishment was applied on juveniles and not adults. In R v Andreyi Chongo and others, it was stated that adults should only receive corporal punishment if there were special circumstances that warranted it. Chief Justice Law, while reviewing the same case of adults who were to be punished by caning quoted from an East African Commission of inquiry, that "we are unable to subscribe to the view that caning and flogging should be made legal as punishment for adults, whether generally or for natives for any but most serious crimes. Such a form of punishment must be damaging to self respect particularly to those Africans who have advanced to a certain stage of civilization and may even tend to brutalize its victims. Any extension of the use of corporal punishment we consider a retrogressive step which must be imposed."³⁷

Females were also not to be caned and further in their case, imprisonment was always to be simple without hard labour.

It appears from the above judicial decisions that discrimination does not seem to come out clearly with the adult cases. However, it is a case of juveniles that brings to light discrimination of prisoners at the lower level of subordinate courts so that in some cases whites were favoured by receiving milder sentences.

Generally it was law that where an offender was below the age of 18 years, caning was necessary to keep him out of prison, being a juvenile. This was the decision of the court in the case R v Subulwa³⁸ in which the accused was aged 16 years old.

If he was above 18 years and his offence arose from the infliction

of brutal injuries on his victim, the cane was considered, inappropriate and the "cat" was applied. If the juvenile was around the age of 10 - 12 years and was a first offender, it was right to bound him over on probation to reform before it was too late. These various forms of punishment were to be applicable to all be they blacks or whites.

However, in May 1946, in the case Returns there were cases of African Juveniles convicted of house breaking and theft, each of whom was awarded corporal punishment.³⁹ Also there was a case of one European juvenile whose parents were fined 40 shillings, the juvenile himself having escaped punishment by the court in this way. However, when the case of Five Europeans Juveniles came up, it was found that the European juveniles had been merely fined instead of being caned. This was totally defeating the purpose of punishing a juvenile. The reasoning behind such holdings was that it was below the dignity of white man to receive the same type of punishment as that which the black man received because it damaged his practice.

On reviewing, chief justice cox said "if a European whether adult or juvenile does not think it below his dignity to commit a criminal offence, it cannot be claimed for him that it is below his dignity to receive the proper punishment for what he has done. It may be true that the true imprisonment or corporal punishment of a European criminal damages his prestige in the eyes of the Africans. But the damage to the prestige was done when the crime was committed and to discriminate in favour of European criminals when passing

the sentence would discredit the Europeans far more than pass upon the criminal a just and normal sentence. Whatever their colour all men are equal before British law and must be treated as such.⁴⁰

It is seen, therefore that at the lower level it is not in all cases that Europeans got the same punishment as Africans. It is on review that most cases were rectified. But not all cases for example would go for review and to this effect discrimination cannot be said to have been absent. It may be stated that punishments were as harsh as provided in Chapter 6 of the laws as the penal code was called for the Africans.

Lastly, notwithstanding other theories of punishment such as retribution, it should be observed in the light of the above discussion that the Deterrence and reformatory theories dominated this colonial era. Consequently the creation of prisons and reformatory centres became inevitable.

INDEPENDENCE PERIOD:

Zambia got independence on 24th October, 1964. The granting of this independence meant change of sovereignty in that the independent Zambia succeeded Britain as the sovereign power. However, this did not mean the adoption of a new legal system; indeed what happened was that the penal system which had prevailed during the colonial era continued even after independence with minor modification. This is evidenced by the provisions of the English law (Extend of application) Act known as chapter 4 of the laws of Zambia. By virtue of this Act, the common law of England, doctrines of equity, the statutes in force in England on the 17th August, 1911

and those that applied to the Republic in 1964, would be applicable in Zambia.

What this meant in the final analysis is that the objectives of punishment, namely; retribution, deterrence, reformation and probation continued in the post-colonial era.

To that end, same rules relating to these theories continued to be applicable after Zambia attaining independence. For example, in a case of an adult offender, two punishments were available and it was either that he was sent to a prison for fixed term of period or when the court exercised leniency, he was only caned. On the other hand, as a general rule, juvenile offenders were never sent to prisons but instead they were just caned.

Independence and increase of crimes.

The fact that independence generally connotes freedom of liberty it followed that the granting of this independence brought a lot of expectations in the minds of Zambians. The majority of Zambians thought that since their oppressors (British colonialists) were leaving the administration of the country ~~and~~ to the indigenous people it meant that the economy of the country was going to improve. Hence with this anticipation, they expected their way of living to change in substance.⁴¹

Consequently, able bodied youths and in some cases even the elders deserted villages and ~~went~~ left for town life in the hope of finding employment or a better way of living. For example, a youth of this time expected life in cities to be very easy going and luxurious. However, these dreams never materialised in that they

soon discovered that the purported independence (freedom) did not bring them employment. The end result was that those who could not ^{found themselves in dubious} get employment, activities, in their struggle to survive. The
Zambian youth had very little choices at his disposal and due to pressing problems and hard conditions of living they were inclined to commit crimes in the hope of getting what they wanted. Records has shown that there has been a steady increase in the rate of crimes since 1964. For example, at independence 41924 persons were convicted of criminal offences in the courts and after ten years of independence, the figure of criminal convicts was estimated at more than 9,000 thousand a year.⁴²

On the other hand, notwithstanding that the rate of crimes increased and continued to increase steadily, there was however, no change in the nature of punishments to be imposed on the offenders. The same colonial punishments subsisted after independence. Moreover same rules of punishment were adhered to.

Practice of Punishments and their effect.

As stated above, the rules relating to the imposing of punishments on offenders were similar to the colonial era practice. Even after independence a child was never sent to prisons but caned and also that the question of caning an adult offender was still doubted.

In post colonial era, the imposition of punishment on a juvenile offender was regulated by the juvenile offender's Act; Chapter 214 of the laws of Zambia. Going by section 217 of the same no young person should be sentenced to imprisonment if he can suitably be dealt with in another manner. It is argued that prisons are

places for hard-core criminals and therefore the sending of juveniles to the same places can not be tolerated as this will make them hardened criminals. The purpose therefore is to reform the juvenile offenders by sending them to the reformatory centres. Whilst there^e they are expected to learn such skills as industrial techniques, carpentry, joinery, woodcutting, black smithing, furniture making and numerous other programmes. This is to ensure that after a sentence, a prisoner would find easier to return to normal life by exercising the knowledge gained while in such centre

Secondly, caning of the adults is held to be only justified if it is expedient in the interest of the community and if its primary aim is to deter the members of the community.

Caning of adults was introduced in 1970 as part of the minimum sentence in cases of stock theft. However, courts have been slow to order caning simply because of an increasing incidence of a particular kind of crime to the extent that it justifies the use of the word "prevalent". Thus, caning in the case of Malaya v. the People it was held that this should not be ordered to deal with exceptional outbreaks of crime. To impose caning because other forms of punishment have not succeeded in having the desired effect on the offenders has been said to be the wrong approach but that it is the deterrent effect on the community which is material. In this case, imprisonment was therefore substituted.

In Kalenga v. the People⁴⁴ in dismissing the appeal of a man who had been convicted of theft by public servants, judge Evans said that deterrent sentences are clearly called for in the public

interest. Theft by public servants, for example, had become in his lordship's words "one of the appallingly prevalent through Zambia and a matter of grave public concern."

Such offences merited severe punishment in the court's view unless the then present state of crimes abated. The accused was sentenced to imprisonment with hard labour.

But the court of Appeal's view was that even though a crime was prevalent and a person had a chain of convictions, he may not be punished twice as to get a harsh sentence because of his past convictions.

In *Chiwama v. the People*⁴⁵, for example, it was held that a person who was serving a period of deterrence in a reformatory, the object being reformation of his character, that whilst he is there to reform and point out to him the error of his ways, was^{not} to be given corporal punishment for his previous offence which he committed before he entered the reformatory but imprisonment was accepted.

With regard to murder convictions, death by hanging was a mandatory sentence and the view here was that the public must be protected from such menaces of the murderers. However, under the penal code (Amendment) No. 3 of 1990, death penalty is no longer mandatory. Section 201 (1) now provides that any person convicted of murder shall be sentenced to death or where there are extenuating circumstances, to any sentence other than death. In other offences where foreign offenders are concerned they are expected to serve their punishment and thereafter be deported.⁴⁶

As evidenced from the proceeding discussion, the punishment that

were meted out during the present period of independent Zambia, are therefore similar to those that were used during colonial rule and are along the same lines. This means that the judicial offences continued to impose heavy punishments if only that would have a check on the spate of crime and if it would afford society to be protected.

Finally, it is interesting to note that despite of these heavy punishments, the commission of crimes has continued to rise at a tremendous rate. Consequently, this leaves a room for questioning the effectiveness of the present penal system.

It is from this background that the succeeding chapter will consider the merits of both the Traditional and penal system and thereafter it will conclude with some positive proposals to remedy the present situation - That is the inability by the present penal system to meet the objects of punishment.

CHAPTER FIVE.

SHORT-COMINGS OF BOTH THE TRADITIONAL AND PENAL SYSTEM:

(1) THE TRADITIONAL SYSTEM:-

The Traditional System of punishment in its nature is unwritten in that there was ^{no} _A codified criminal law. What this means is that the administration of criminal justice was largely vested in the group of elders who had the powers to impose punishments on the offenders. The fact that this law was not written implies that it had a lot of uncertainties in that the administrators of criminal justice had no standard guiding measures. For example, there was no written prescription of offences and their respective sentences or penalties. This sometimes resulted in imposing punishments which did not suit the offence; as where the offender had his fingers or hands cut for stealing. Such types of punishments are quite inhuman and not fair, and cannot be tolerated by any civilised society.

Furthermore, since the law was unwritten, there was no precise way of determining the guilt of an accused. Most of the convictions and subsequent punishments were based on mere allegations and speculations. For example, when a person is accused of having murdered someone, his guiltiness will be proved by making the accused person drunk, in the case of Lozi people, "mwati". If he was guilty they expected him to die and vomiting meant innocence.⁴⁷

Therefore due to the inadequacy of such tests, it was common to find that a person might be punished for what he never did.

It is also equally important to note that the traditional system

did not draw a distinction between crime and a civil wrong. The infliction of a certain type of punishment depended wholly on the seriousness of the offence. This failure to draw the distinction meant that a person could get a criminal punishment for civil wrong. For example, where adultery was committed, the accused had his private parts cut in certain instances.⁴⁸

However, notwithstanding these shortcomings, the traditional system was very effective at that time and the commission of crimes was reduced to a certain extent - and some offenders were deterred from committing the same.⁴⁹

(2) THE PENAL SYSTEM:

In the first instance, it should be acknowledged that the introduction of penal system brought unity among the indigenous people of Northern Rhodesia, as then was, in that all the tribes were answerable to one written law. However, this is not^{to} say that this new system has no defects and these have contributed to its failure to achieve its intended goals, for example, deterrence and reformation.

Under the penal system, the arresting of the accused, institution of court's proceedings, convictions, the carrying out of the sentenced imposed have to conform with the law pertaining to the issue in question. This perhaps accounts for court's procedures being too technical and this has resulted in unnecessary acquittals. It is common to observe today that a person may be acquitted not because the court has failed to prove the commission of the crime but that certain procedures were not adhered to.

It is also undisputed fact that the present penal code is more or less the same as the colonial penal code. To this end it is argued that it is old and not update. It does not suit the prevailing circumstances in that the colonial penal code was intended for the society of that time. For example, the fines and compensations that are provided for under chapter 766 of the laws of Zambia, for offences of careless driving are inadequate and quite unrealistic. No reasonable ^{person} can imagine how a fine of, for example, K200 may deter someone not to commit the same offence when he can afford to pay even K1 million if so ordered.⁵⁰ The same arguments can be advanced, punishments imposed on offence of theft of motor vehicle, which at present stands at 5 years imprisonment. All these cases go to show that there is no proportion between the offence committed and the punishment inflicted. Further that the fees charged on admissions of guilty are not enough for all purposes of deterring the offender and those who might be contemplating to commit the same. Such fees as K4 or K10 are not workable in real life.

It is an established rule of law that in certain circumstances, a suspended sentence may be ordered. This is usually applicable to first offenders and the court may exercise leniency by discharging the accused on condition that he does not commit the same offence within a certain prescribed period, for example, within 2 years. However, experience has shown that the police do not bring back those who re-commit the same or similar offence for which that suspended sentence was imposed. Magistrates and judges feel that this is a great draw back in the administration of criminal justice.⁵¹

There are also limitations of not inflicting a certain type of sentence. A magistration of each class can only impose a sentence within his powers. For example, magistrate class three cannot impose a term of imprisonment exceeding 2 years; it is argued that since some crimes are more prevalent than others, they should be allowed to impose any reasonable sentence in certain circumstances where it is deemed fit. For example, if such sentence will not achieve the intended goals of deterrence.⁵²

This list of the inadequacy and irregularity of the penal code is endless. The foregoing discussion tends to justify the general view in Zambia today that the theories of punishment do not serve their intended purposes because the punishments are not punitive enough.

The point we have arrived at is that in Zambia deterrent sentences have failed. Imprisonment has been and is the most important type of punishment today⁵³ and if the rate of crime has been on the increase since 1964, the history will have proved that deterrent sentences do not deter. It has been demonstrated too in America, for example that even the severest form of punishment such as death penalty, does not deter murderers and most studies have proved that the death penalty has failed as a deterrent.⁵⁴

In Zambia one only has to recall numerous cases of murder in the local papers to be persuaded that even in this country, the same is applicable. It is undisputed fact that Zambia has one of the most severe means of punishing offenders in those circumstances. This is evident from the provisions of sections 201 (1) and 294 (2) of the penal code which make the offences of murder and aggravated robbery

respectively, punishable by death. However, as regard to murder, the death penalty is no longer mandatory. Section 201 (1) of the penal code (Amendment) No. 3 of 1990, provides that any person convicted of murder shall be sentenced to death or where there are extenuating circumstances, to any sentence other than death.

Hence, the answer as to why the rate of crime continues to rise does not lie even ⁱⁿ more punitive measures because Zambia has gone through just about the various stages of punishment.

It is also interesting to note that though imprisonment has been a means of punishing offenders and preventing them from escaping, committing new crimes, or causing harm to others, it has, however proved ineffective as deterrent rather in some instances it has contributed to recidivism. This is also evident from the increasing number of persons coming to prisons. For example, in 1964, the number was estimated at 868, in 1969, this came to 1,050 and in 1988 the figure shot up to 2,413.⁵⁵

Converse to this is an increase number of prisoners escaping the prison. Today one does not get surprised to hear that so many have escaped as this has become quite common. The foregoing discussion has shown that the increase of crime in the country is not necessarily due to inadequacy of punishments. (though this admittedly is the case in some circumstances), there should be other contributing factors. These factors may lie in the answers to the question why people do not obey conduct rules and thus commit crimes? It is only by finding suitable answers to this question that it can be hoped that crime rate will come down.

While it may be argued that the commission of crime is due to economic hardships, this is not true in all circumstances. Recent experience has shown that among the criminals are also well to do people. For example, the president who is accused of misappropriation of state funds. (the case of Aquino).

It is also equally true that some people do not commit crime not because they are afraid of prisons. This is because the crime rate can not continue to rise if this was the case. But it may be that that is the way they have been brought up by their parents. It may be that a person would not like to rape simply because he considers it to be morally wrong and unacceptable.⁵⁶ Hence, what should be done if the objectives of the penal system have to be achieved?

PROPOSALS.

Since the whole issue of punishment hinges on statutes such as the penal code which prescribes the minimum and maximum sentences to be imposed on the offender, it suffices to say that the first thing to do is to amend and update the penal code so that the punishment should suit the offence in all respects. This is in relation, especially, to sections dealing with fines and compensations as discussed above. In addition to this, the magistrates or judges should be allowed to exceed the maximum sentence if this will achieve the intended goals of deterrence or reformation.

It is also suggested that the police should make sure that those who commit the same or similare offence, while serving a suspended sentence are brought back before the court of law.

Furthermore the police's record of accused's previous conviction should be updated. This will improve the prosecution of cases and hence administer justice fast. This is because justice delayed is justice denied. The importance of this was emphasised by one interviewee, "we as magistrates are failing to perform properly because at times we can not find the accused's previous record....."⁵⁷

The prison department has expressed a concern on the need for more political education and trade training. By exposing the prisoners to the political education, they will be able to grasp their role of contributing to the national development rather than wasting time on committing crimes. While, through trade training they will acquire such skills as carpentry, plumbing, brickwork and farming. It is for this reason that the party and its Government have been called upon to work together with the police force in catching criminals and making sure that they are settled in these reformatory centres.

It is also herein suggested that if these reformatory centres have to achieve the intended goals, conditions of living prevailing in prisons should be improved? The idea of prisons is not to worsen the criminals, but to reform them. That is to make him realise the acceptable way of living in society.

Hence, it should be the imperative obligations of the party and its government, through prisons Department under the umbrella of the Ministry of Home Affairs, to see to it that prisoners are adequately fed, proper sanitations and beddings are provided, etc.

After serving their respective sentences, offenders should come back and continue leading an acceptable way of living. For this

reason society is urged to welcome and accept them as any human person. One magistrate expressed the fear of this rejection of criminals. "When these ex-convicts come back home, no one is prepared to listen to them, help them, eat with them, you find that even his members of the family are trying to run away from him...."¹⁵⁸ Hence, society should stop looking upon them as outcasts. Going by the philosophy of Humanism, man whether mad, criminal, normal or innocent is the centre of the Zambian community. It must be borne in mind that this rejection of ex-convicts as hopeless and fruitless citizens may operate on offender's mind and this might have some psychological effects which might just encourage him to commit more crimes. For this reason, employers are also urged to re-employ their employees if he or she has successfully served the sentence.

Notwithstanding the proceeding suggestions, there^{is} also enough evidence to support the view that even if such suggestions are implemented, crime rate will continue to rise to a certain extent. This is because there are many reasons why people commit crime. It is generally felt that some people would not commit crime on moral grounds. Therefore, criminals while serving their sentences in the reformatory centres, they should be exposed to moral rules. They should get convinced that it is not acceptable, for example, to commit incest, in any society which respects the dignity of human beings. Most often than else, these moral rules are taught by religious communities, be it the Hindus, moslems or christians. Indeed one does not have to be reminded of the fact that most of

criminal offences are expressed in form of religious rules. For example, section 200 of the penal code which provides for the offence of murder is similar to one of the ten commandments in the christian bible which says "thy shall not kill."

FOOTNOTES.

1. An interview with Mr. B. Chilufya - magistrate class III Boma Court Lusaka.
2. E. Green - Judicial attitudes in sentencing (Macmillan & Co Ltd., London, 1961) p. 1
3. P.J. Fitzgerald - Criminal law and Punishment (Clareundon Press, Oxford, 1962 p. 199
4. P.J. Fitzgerald - Ibid. opp cit p. 200
5. Bentham - The Theory of Legislation (ogden, 1950) p. 341
6. P.J. Fitzgerald - Ibid op cit p 203
7. P.J. Fitzgerald - ibid opp cit p 204
8. N. Walker - Sentencing theory, law and practice (Butter worths, London, 1985) p. 113.
9. An interview with Mr. Mwale Simson, the Presiding justice at the Boma Court in Lusaka on 20th May, 1991.
10. An interview with Mr. Mwale Simson, the Presiding justice at the Boma Court in Lusaka on 20th May, 1991.
11. An interview with Mr. M. Milupi, a court justice at Boma court in Lusaka on 21st May, 1991.
12. An interview with Mr. M. Milupi, a court justice at Boma court in Lusaka on 21st May, 1991.
13. An interview with Mr. B. Mudenda a court justice at Boma Court in Lusaka on 22nd May, 1991.
14. An interview with Mr. B. Mudenda a court justice at Boma Court in Lusaka on 22nd May, 1991.
15. Bentham Jeremy - the theory of legislation (Ogden, 1950) p 337
16. Seidman R. - A source book of criminal law of Africa (London, 1966) p. 3
17. Seidman R. - ibid opp cit p. 4
18. Seidman R. - ibid
19. Seidman R. - ibid opp. cit p 5

20. Seidman R. - ibid opp. cit p 6
21. Seidman R. - ibid
22. J.C. Smith & B. Hogan - Criminal Law (Butterworths, London 1973) p. 5
23. Seidman R. - ibid opp. cit p. 11
24. Seidman R. - ibid
25. Seidman R. - ibid
26. Seidman R. - ibid
27. Bentham Jeremy - ibid opp. cit p. 350
28. Kenny's - outline of criminal law (University press, Cambridge, 1958) p. 591.
29. Seidman R. - ibid opp. cit p. 21
30. Seidman R. - ibid opp. cit p. 23
31. Seidman R. - ibid
32. An interview with Mr. D. Chilufya, the Principal Resident Magistrate of Lusaka Chirkwa courts on 8th July, 1991.
33. An interview with Mr. D. Chilufya, the Principal Resident Magistrate of Lusaka Chirkwa Courts on 8th July, 1991.
34. An interview with Mr. D. Chilufya, the Principal Resident Magistrate of Lusaka Chirkwa Courts on 8th July, 1991.
35. An interview with R. Samakayi, the magistrate class II of Chirkwa courts in Lusaka on 9th July, 1991.
36. R v. Sikopo (1936) 1 NRLR 102
37. R v. Andreyi Chongo and others (1940) NRLR 93.
38. R v. Subulwa (1949) 5 NRLR 712
39. Return cases (1946) NRLR 60
40. The case of five European juveniles (1945 - 48) NRLR 31
41. An interview with Mr. W. Lewis, the Deputy Registrar of the Lusaka High Court on 10th July, 1991.

42. Annual Reports, Prisons Department, Ministry of Home Affairs for the respective years 1964 and 1984.
43. Malaya v. the people (1970) ZR 236
44. Kalenga v. the People (1968) ZR 45
45. Chiwama V. the People (1967) ZR 176
46. An interview with Mrs Beatrice Kabinga, magistrate class II of Lusaka Chirkwa courts on 11th July, 1991.
47. An interview with Mr. Nilupi, court justice of Lusaka Boma court no. on 21st May, 1991.
48. An interview with Mr. Mwale Simson, the presiding justice at Lusaka Boma Court No. 4 on 20th May, 1991.
49. An interview with Mr. Mwale Simson, the presiding justice at Lusaka Boma Court No. 4 on 20th May, 1991.
50. An interview with Mrs. Beatrice Kabinga, - magistrate class II of Lusaka Chirkwa courts on 11th July, 1991.
51. An interview with Mrs. Beatrice Kabinga, - magistrate class II of Lusaka Chirkwa courts on 11th July, 1991.
52. An interview with R. Samakayi - magistrate class II of Chirkwa courts in Lusaka on 9th July, 1991.
53. An interview with the D. Lewis, the Deputy Registrar of the High Court in Lusaka on 9th July, 1991.
54. R. Clark - Crime in America (1972) p. 201
55. Annual Reports, Prison Departments, Ministry of Home Affairs for the respective years 1964, 1969 and 1988.
56. An interview with the Deputy Registrar of the Lusaka High Court - Mr. D. Lewis on 10th July, 1991.
57. An interview with Mr. D. Chilufya, the Principal Resident magistrate of the Lusaka Chirkwa courts on 8th July, 1991.
58. An interview with Mr. D. Chilufya, the Principal Resident magistrate of Lusaka Chirkwa courts on 8th July, 1991.

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6. H.L.A. Hart - Punishment and Responsibility (Claredon Press, Oxford, 1968).
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8. J.C. Smith & B. Hogan - Criminal Law (Butterworths, London 1973)
9. Kenny's - Outline of Criminal Law (University Press, Cambridge, 1958)
10. Bentham J. - The Theory of Legislation (Ogden, 1950).