

**THE ROLE OF PUNISHMENT IN THE ADMINISTRATION OF CRIMINAL JUSTICE
IN ZAMBIA.**



BY

MWAMBA, GILBERT.K.

(26116227)

**An Obligatory Essay submitted to the school of Law of the University of Zambia in partial
fulfillment of the requirements for the award of the Degree of Bachelor of Laws (LLB).**

The University of Zambia

School of Law

P.O.Box 32379

Lusaka.

April 2010

DECLARATION

I Mwamba, Gilbert. K, of computer number 26116227, do hereby declare that the contents of this Dissertation are entirely based on my own findings and that I have not in any respect used any person's work without acknowledging the same to be so.

I therefore bear the absolute responsibility for the contents, errors, defects and any omissions herein.

Date.....01/04/2010.....

Signature..........

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

I recommend that this Obligatory essay prepared under my supervision

BY

MWAMBA, GILBERT.K.

(26116227)

Entitled

**THE ROLE OF PUNISHMENT IN THE ADMINISTRATION OF CRIMINAL JUSTICE
IN ZAMBIA.**

**Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the
requirements relating to the format as laid down in the regulations governing Directed
Research Essays.**

Supervisor.....

Date.....

RTD.JUDGE K.C. CHANDA

Abstract

This dissertation considers the Role of Punishment in the Administration of Criminal Justice in Zambia. In approaching the subject matter of the research, the essay starts by examining the controversies surrounding the justification for punishment and its desirability in criminal justice administration. Moreover, the essay enquires into specific roles played by punishment in Zambia and makes an observation as to whether the objectives of employing punishment are being realized. Thirdly, the essay examines the factors which affect proper and effective employment of punishment in Zambia.

The dissertation, through research and interviews found that, punishment, as an aspect of criminal justice administration is not being employed properly and effectively, with the effect that most of its objectives are not being realized. Hence, the gradual loss of its recognition and value in contemporary criminal justice administration. According to the findings of this research, lack of judicial independence and neutrality answer to this undesirable trend. Lack of judicial independence and neutrality can be attributed to lack of political will on the part of government.

As such, this essay recommends the cultivation of political will by government which will eventually result in judicial independence and neutrality which will, in turn, ensure proper and effective employment of punishment. Once punishment is properly and effectively employed, its role, in the administration of criminal justice, will become more pronounced and recognized.

ACKNOWLEDGEMENTS

First and foremost, I would like to thank Jehovah God my loving creator and Father for being my strength and source of wisdom. Without your love and guidance, I would not have reached this far.

A lot of thanks also go to my supervisor, Rtd Judge K.C. Chanda for his guidance, patience, and efficiency in the way he guided me through the research. To him I say 'You are a legal Jurist Par excellence and it was, and still is, an honour to have been taught and supervised by you.' May Jehovah God richly bless you.

Many thanks also go to Mr. M. Malila, former Attorney General, for having spared time from his busy schedule to talk to me over my research.

Finally, I would like to thank all those who, though not expressly mentioned above, contributed in one way or another in making this research a reality, and its successful completion imminent.

DEDICATION

To my father, Joseph Kaemba, mother, Idah Mbewe and uncle, David Mbewe. Thank you for always teaching me that I can achieve all I want in life through hard work. I can never thank you enough, but whole-heartedly wish you Jehovah's blessings.

TABLE OF STATUTES

Penal Code Chapter 87 of the Laws of Zambia

Criminal Procedure Code Chapter 88 of the Laws of Zambia

Juveniles Act Chapter 53 of the Laws of Zambia

TABLE OF CASES

Gregg v. Georgia 428 US 153 (1976)

The people v. Emmanuel Phiri (1982) ZR 77

Furman v. Georgia US Supreme Court (1972) Unreported

Jutronich, Schutte and Lukin v. The People (1965) ZR 9

R v. Ball (1951) 35 Cr Appl Rep. 144

Kalenga v. The People (1968) ZR 165. (H.C)

Kabongo and Another v. The People (1974) ZR 83 SC

The People v. Stephen Hara (2004) HJ/07/2004 Unreported

LIST OF ABBREVIATIONS AND ACCRONYMS

Afronet- African Network for Human Rights and Development

DEC- Drug Enforcement Commission

ACC- Anti- Corruption Commission

SC- Supreme Court of Zambia

HC- High Court for Zambia

TABLE OF CONTENTS

	PAGE
Cover page.....	i
Declaration.....	ii
Supervisor’s signature page.....	iii
Abstract.....	iv
Acknowledgments.....	v
Dedication.....	vi
Table of statutes.....	vii
Table of cases.....	viii
List of Abbreviations	ix
Table of contents.....	x

CHAPTER ONE

1.1 General Introduction.....	1
1.2 Introduction.....	1
1.3 Statement of the problem.....	2

1.4 Definition of Concepts.....3

1.5 Purpose of the Study.....4

1.6 Methodology.....5

1.7 Limitations of the Study.....6

CHAPTER TWO

JUSTIFICATION FOR PUNISHMENT

1.8 Introduction.....7

1.9 Justification for State’s Authority to punish.....8

1.10 Theoretical Justification for punishment.....11

1.11 Retributive theory.....13

1.12 Forms of Retributive theory.....14

1.13 Punishment as an expression of censure.....16

1.14 Utilitarianism.....19

1.15 Deterrence.....20

1.16 Individual Deterrence.....20

1.17 General and Educative Deterrence.....21

1.18 Rehabilitation.....21

1.19 Mixed theories.....22

1.20 Conclusion.....23

CHAPTER THREE

THE ROLE OF PUNISHMENT

1.21 Introduction.....24

1.22 The Concept of Punishment and the meaning attributed to it.....24

1.23 The Perception of Punishment by Zambia’s Criminal Justice System.....27

1.24 Criminal Punishment and its Role in Zambia.....28

1.25 The efficacy of Punishment in Zambia.....34

CHAPTER FOUR

**FACTORS AFFECTING PROPER AND EFFECTIVE EMPLOYMENT OF
PUNISHMENT IN ZAMBIA**

1.26 Introduction.....38

1.27 Factors discussed.....39

1.28 Conclusion.....47

CHAPTER FIVE

RECOMMENDATIONS

1.29 Introduction.....48

1.30 Recommendations.....48

1. 31 Conclusion.....51

Bibliography.....53

Chapter One

INTRODUCTION

1.1 General Introduction

This chapter covers the basic aspects of the research. These being the introduction, statement of the problem, definition of concepts, research questions, methodology and purpose of the study.

1.2 Introduction

Zambia, like many other countries in the world, is not immune to the scourge of crime. This, as Mbao argues, is largely because of the unfavorable social and economic conditions prevailing in the country.¹ Many people go hungry everyday because they cannot afford food and other basic necessities of life.² Consequently, they are compelled to engage in various criminal activities which are intended to cushion the hardships.³ However, their attempt to cushion these economic hardships occasions harm to others.

Notably, it is at this stage that Criminal Law occupies a very central position in every society. Evidently, Criminal Law draws its strength from Punishment or alternatively negative sanctions in

¹ M.L. Mbao. Legal Aspects of Uncontrolled and Unplanned Urban Settlement in Zambia: A Comment on the Housing (Statutory and Improvement Areas) Act, 1974. (Zambia Law Journal, Vol. 15, 1983).

² F. Chigunta et. al. Will the Poor Always Be with Us? (Committee against Poverty, Lusaka, 1998) p.10

³ M.L. Mbao. Legal Aspects of Uncontrolled and Unplanned Urban Settlements in Zambia: A Comment on the Housing (Statutory and Improvement Areas) Act, 1974.(Zambia Law Journal, Vol. 15, 1983).

the sense that Punishment dissuades people from conducts prohibited by law.⁴ Without it, Criminal Law would be nothing but a dead instrument. In this regard therefore, this essay shall attempt to demonstrate the relevance of Punishment in the administration of Criminal Justice in Zambia. Moreover, the essay shall endeavor to show the importance of having a Criminal Justice System that is enlightened and appreciates the role of punishment as an aspect of Criminal Justice administration.⁵ Finally, the essay shall recommend mechanisms (The mechanisms will be discussed in Chapter five) which would enhance effective use of punishment so as to achieve the object of its employment.

1.3 Statement of the Problem

The intimate relationship between Orders and Punishment in Criminal Law cannot be overemphasized. The effectiveness of the former depends on the existence of the latter.⁶ The attachment of sanctions to orders results in obedience of the latter.⁷

Admittedly, each Criminal Justice System has its own object for inflicting punishment on the offenders. In order to realize the object of employing punishment in the administration of Criminal Justice, there is need to establish a Criminal Justice System which is enlightened and appreciates the role of punishment.⁸ Lack of appreciation of the role of punishment between and among officers of the Criminal Justice System tends to negatively affect the very fabric on which Criminal Justice System is premised. It is alleged that lack of appreciation of the role of punishment by some judicial

⁴J.D. McClean and J.C. Wood. Criminal Justice and Treatment of the offenders. (Sweet & Maxwell, London, 1969) p.80-81

⁵ Ibid

⁶ H.L.A, Hart. Law and Morality. (Oxford Press, London, 1966) p.20

⁷ Ibid

⁸ J.D. McClean and J.C. Wood. Criminal Justice and Treatment of the offenders. (Sweet & Maxwell, London, 1969) p.50

officers has resulted into corruption which has equally resulted into acquittals of offenders in an unexplainable circumstances, there by evading punishment. Worse still, instead of inflicting punishment on the offenders, innocent people are, in most cases, the object of punishment.⁹ This in its entirety may lead to the miscarriage of justice. Therefore, there is need to deal with factors which affect the proper and effective use of punishment in the administration of Criminal justice in Zambia. Among other factors to be considered include, lack of appreciation of the role of punishment by most officers of the Criminal Justice System (Police officers in particular), unfavorable conditions of service, technicalities in court procedures and lack of political will. It is hoped that the study will recommend mechanisms which will ensure that punishment is properly and effectively employed to achieve its purpose.

1.4 Definition of Concepts

Criminal Justice System: The collective institutions through which an accused offender passes until the accusations have been disposed of or the assessed punishment concluded.¹⁰

Criminal Law: The body of law defining offences against the community at large, regulating how suspects are investigated, charged, and tried, and establishing punishments for convicted offenders.¹¹

Criminal: One who has committed a criminal offence or one who has been convicted of a crime.¹²

⁹ C. Kumwenda. Theories of Punishment and Zambian Legal Order. Obligatory Essay submitted to the School of Law in partial fulfillment of the award of Bachelor of Laws Degree, (1978) p.5

¹⁰ B.A, Garner (ed) Black's Law Dictionary. 8th ed. (St Paul Thompson West Publishing Co. 2004)

¹¹ Ibid

¹² Ibid

Criminal Justice: The methods by which a society deals with those accused of having committed a crime.¹³

Crime: An act that the law makes punishable, the breach of a legal duty treated as the subject matter of a criminal proceeding.¹⁴

Punishment: A sanction, such as a fine, penalty, confinement or loss of property, right, or privilege-assessed against a person who has violated the law.¹⁵

1.5 Purpose of the Study

The pertinence of the study cannot be overemphasized. Generally speaking, the study has come at the right time in view of the economic problems the country is currently faced with. Owing to the financial meltdown, people are having serious difficulties to meet their basic needs. Consequently, criminal activities, particularly theft, have ravaged almost all sections of the society, be it public or private sectors. To cite but just one example, the recent revelations of theft by public servants involving billions of Kwachas have sparked anguish both among donor countries and civil society.¹⁶ In fact most donor countries have opted to stop giving aid to the Zambian government not until the culprits are brought to book and punished. Crimes of this nature have indeed become a cause of concern among various groupings, especially non-governmental organization which have argued that such individuals should be punished severely. A legal system that is devoid of effective mechanisms

¹³ Op. Cit

¹⁴ Ibid

¹⁵ Ibid

¹⁶ The Post, May 20th, 2009. The Post reported that K27 Billion was stolen in the Ministry of Health alone. Henry Kapoko, a former Human Resources Manager in the said ministry, and others are alleged to have misappropriated the said amount. Following these revelations, Kapoko and the colleagues are being Prosecuted.

for ensuring that the perpetrators of crime are adequately dealt with, will undoubtedly, lose peoples' trust and confidence. This may have the effect of destabilizing the country as the people will be frustrated and discontented with the failure of the institutions responsible for dispensing justice in society. Hence the study will thus help explain the role of punishment and how best it can be employed in the administration of Criminal Justice, and ultimately prevention and reduction of crimes of this nature.

Research Questions

1. What is the role of punishment in the administration of Criminal Justice?
2. Is punishment being employed effectively and properly? If not;
3. What are the factors that negatively affect the effective and proper employment of punishment in the administration of Criminal Justice in Zambia?
4. What should be done to ensure and encourage effective and proper employment of punishment in the administration of Criminal Justice in Zambia?

1.6 Methodology

The research was done mainly by desk research. Relevant published and where necessary, unpublished works were consulted. Case law as well as other relevant pieces of legislation was consulted. However, conducting direct interviews with criminal law and judicial officers proved difficult.

1.7 Limitations of the Study

Although the primary source of information for the study was desk research, two interviews were conducted. However, it proved logistically and financially difficult to conduct a lot of interviews with both law enforcement officers and judicial officers. Further, although adequate information on Criminal Justice Systems of other jurisdictions was obtained from available literature and internet sources, it proved difficult to access information on other jurisdiction through these means. Nevertheless, this did not affect the quality of the study.

Chapter Two

JUSTIFICATION FOR PUNISHMENT

1.8 Introduction

The general principle underlying the operation of the Criminal Justice System in all mature legal systems is that it is desirable, and within limits, possible to ensure that those convicted of crimes are punished fairly in accordance with rules explicitly designed to satisfy society's purposes, most particularly that of social control.¹⁷

Commenting on the principle underlying the operation of the Criminal Justice System Sianyabo¹⁸ observes, and quite rightly so,

Where an act or omission is committed, or an event or state of affairs occurs, which is prohibited by the criminal law of a country or state and the perpetrator is successfully prosecuted by, or in the name of the State, punishment of the perpetrator is a natural consequence.

Notably, theories of punishment have been developed with the view to justifying this premise. This chapter attempts to examine their overall cogency. It is hoped that this examination will provide answers to questions such as 'why are offenders punished?' and 'what is the justification for punishment?' among others.

¹⁷ W. Wilson, Criminal Law: Doctrine and Theory. (Sweet & Maxwell, London, 2003) p.47

¹⁸ J.N, Sianyabo, Alternatives to Imprisonment As Punishment for Less Serious Criminal Offences in Zambia. Obligatory Essay submitted to the School of Law in partial fulfillment of the award of Bachelor of Laws Degree, (2007) p.5

1.9 Justification for State's Authority to Punish

Before the justification for State's authority to punish can be given, it is equally vital, if not necessary, that the definition of punishment is given.

Suggesting an answer to the question, 'what is punishment?' Professor Ndulo says, Punishment is simply the infliction of some form of pain or deprivation on the person of another, in this instance, by the Criminal Justice System.¹⁹

A comprehensive definition of punishment has been given by professor Hart. He defines punishment in terms of the following elements;

- I. It must involve pain or other consequences normally considered unpleasant;
- II. It must be for an offence against legal rules;
- III. It must be of an actual or supposed offender for his offence;
- IV. It must be intentionally administered by human beings other than the offender;
- V. It must be imposed and administered by a legal system against which the offence is committed.²⁰

What is apparent from the definition of punishment given by professor Hart is that it draws a distinction between punishment administered by a formal legal system, from those of pre-modern societies or those punishments for breach of moral codes which, albeit would involve pain or be

¹⁹ J. Hatchard and M. Ndulo, Readings in Criminal Law and Criminology in Zambia. (Multimedia Publications, Lusaka, 1994) p. 120

²⁰ H.L.A, Hart. Punishment and Responsibility. (Oxford Press, Oxford, 1968) pp. 4-5

unpleasant to an actual or supposed offender, and be intentionally administered, may not be against established legal rules by a mature legal system.

For instance, promiscuity may be considered a moral wrong, rendering anyone involved amenable to pain or an unpleasant feeling via negative public opinion and rejection in social intercourse, this being intentionally administered by members of society, although not against legal rules imposed and established by an authority constituted by a legal system against which the offence is committed as envisaged by professor Hart.

From the foregoing, what emerges is that punishment is that which is a consequence of a crime committed by violation of criminal legal rules enacted by a legislative body, recognized by courts administering the legal rules by finding an accused innocent or guilty, and if guilty, met out the appropriate punishment, as part of the legal rules. This is pursuant to the principle of law expressed by the Latin maxim '*Millem Crimen nulla poena sine lege*' which means 'no crime or punishment without law.'

Theoretically speaking, serious difficulties do arise in attempting to harmonize the apparent traditional conflict, in a democratic society, between the State's power or authority to punish and the avowed individual autonomy. Admittedly, State's authority or power to punish cannot be justified, for reasons of avowed individual autonomy, on grounds of paternalism or the relative power of the State vis-à-vis the individual. The involvement of the harm to another person simply because their behavior is unacceptable has rendered the practice profoundly problematic.

Attempting to resolve the above controversy and inadvertently providing the justification for State's authority to punish offenders, Pollock observes,

The rationale and justification for punishment lies on the social contract theory. Under this theory people enter into an agreement with the State so that the State can provide protection. People yield their otherwise power to deal with deviants in society. Hence the State has the right to punish any wrong doer.²¹

Notably, the nature of authority under a political system is generally held to derive from the consent or complicity of adult individuals in their subjection to the rule of law. Admittedly, though, the concept of consent is fictional. However, by agreeing to a system of enforceable norms, citizens are treated as consenting to the right of State to govern and punish. Therefore, the existence of a social contract binding the State and individual is a necessary premise for the justification of the State's authority to govern and punish.

Understandably, the above explanation does not bring to the fore the justification offered for punishment. Interestingly, though, there are a number of theories which, for centuries now, have competed for mastery in an attempt to provide not only instrumental reasons but also moral reasons as to why punishment should follow wrong doing.

These theories seek to claim that punishment is the 'right response' to wrong doing. Concerning this claim, Wilson²² argues that it is an ambitious one. This is because all that punishment does is to substitute two harms for one. This, he further argues, is conceded in cases of severe punishment, execution would be the prime case.

Shedding light on how the State ought to exercise the power to punish offenders in severe cases, Mr. Justice Brennan observes,

²¹ J.M.P, Pollock, Ethics and Crime. (Wadsworth, New York, 2007) p.289

²² W. Wilson, Criminal Law: Doctrine and Theory. (Sweet & Maxwell, London, 2003) p.47

the primary moral principle is that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings- a punishment must not be so severe as to be degrading to human dignity.....The fatal constitutional infirmity in the punishment of death is that it treats 'members of the human race' as non humans, as objects to be toyed with and discarded. It is thus inconsistent with (that moral principle).....Justice of this kind is obviously no less shocking than the crime itself, and the now 'official' murder, far from offering redress for the offence committed against society, adds instead a second defilement to the first.²³

In the case of less serious offences, which attract lesser punishment, the basic question, namely; 'what is the justification for punishment?' remains unresolved. What makes State punishment for harm a morally preferable state of affairs to harm?

The theories of punishment, about to be considered will, hopefully, provide the answers to the above questions.

1.10 Theoretical Justifications for Punishment

Liberal theory offers a number of theories of punishment, each of which places punishment within a general theory of the State.²⁴ Implicit in each, is the conviction that State punishment is a necessary feature of a freedom-respecting society since it supports the rights and freedoms of individuals to pursue their life plan with minimum of interference from others; an expectation that each and every rational person in society is deemed to want. This premise requires, regard being had to the qualifications described earlier, State interference to be kept to a minimum so as not to erode those same expectations.

²³ Gregg v. Georgia 428 US 153 (1976)

²⁴ T. Honderich, Punishment: The Supposed Justifications, (Harmondsworth, Penguin, 1984) p.22

Wilson²⁵ observes that theories of punishment fulfill a number of functions. In the first place, they may explain how punishment is ever morally justified. Secondly, they may set out the conditions governing responsibility in individual cases and the level of punishment. Moreover, they may enable the subjection of criminal law rules to effective critical scrutiny.

In terms of history, theories of punishment fall into one of the two categories. The first category holds that whether an action, for instance punishment, is good or not can be decided by reference to its intrinsic worth, whatever the consequences. Thus moral reasoning within this paradigm will hold that people should keep their promises because keeping promises is intrinsically a 'good thing'. The second holds that whether an action is good or not is not something which can be decided in isolation from the consequences. Thus keeping a promise is good if the consequences which will flow from keeping it are better than those which will result from breaking it.

Evidently, the primary consequentialist theory is utilitarianism. A utilitarian might contend, for instance, that a promise to a dying man to hand over all his money to his son should be kept if the son was poor and would benefit from it but could and should be broken if more good could be done by giving it to his poverty-stricken daughter.

On the contrary view, the primary non-consequentialist theory of punishment is retributivism. While recognizing that punishment may have useful functions or consequences as it were, such as deterrence, incapacitation and denunciation, the only possible justification for punishment is that it is the right, natural and logical response to wrong doing; a position favored and preferred by this essay. The credence of each of these opposing views of punishment will now be examined.

²⁵ W. Wilson, Criminal Law: Doctrine and Theory. (Sweet & Maxwell, London, 2003) p.48

1.11 Retributive Theory

The classic philosophical exposition of retributivism is to be found in the words of Kant. He observes,

Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime.....he must first be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizen.²⁶

Clearly, therefore, retributive theorists contend that punishment is either right or wrong in itself. It is further contended by retributivists that there is a natural link between a person choosing to cause harm and punishment, in the same way that there is a natural link between choosing to do well and suffering praise or reward.

Supporting the retributivist, Wilson argues,

Punishing people for their crimes shows society's respect for the choices a person has made. By punishing, we treat them as a human being. To err is human. If, lacking divinity we cannot forgive, we can at least punish with justice. In so doing we can facilitate the offender's return to the human fold as soon as the relevant retributive function is effected.²⁷

Admittedly, this theory assumes a desert approach to punishment. This approach is characterized by one major assumption namely, that all cases of rule-breaking are automatically cases of wrong doing

²⁶ I. Kant, The Metaphysical Elements of Justice, (Indianapolis: Bobbs – Merrill, 1965) pp. 33- 7 and 105

²⁷ W. Wilson, Criminal Law: Doctrine and Theory. (Sweet & Maxwell, London, 2003) p.49

sufficient to justify censure and punishment. Unfortunately, the assumption is rebuttable. An instant case would be that of breaking evil rules. Breaking evil rules may itself be a matter of moral obligation in extreme circumstances such as would destroy any presumptive State right to punish.²⁸ Recognition of the truth of this charge underpins a version of desert theory which holds that while desert is necessary for punishment, it does not necessitate it. It insists simply that punishment without blame cannot possibly be deserved; a sentiment most people would agree with and actually supported by this essay.

1.12 Forms of Retributive theory

There are two forms of retributive theory. The first form holds that punishment may justly be imposed (only) upon a person who deserves to be punished and that the level of punishment must also reflect their desert. A common version of this form is the '*lex talionis*' of the Bible. This is generally credited to be a primitive form of retribution based on the natural justice of vengeance.²⁹ The *lex talionis* is the only superficially plausible basis for determining an offender's desert since the offender loses what they have claimed; the eye for the eye, the tooth for the tooth. However, this approach is of less help since relatively few crimes can be paid for in this way. Moreover, it fails to provide an explanation as to why harm suffered by the victim demands a penal rather than a compensatory response (a question outside the scope of this study).

The second limb or form of retribution theory, a fairly recent and most widely accepted basis for desert in punishment, is that the rule breaker has gained an unfair advantage over rule followers.

A. Norrie, Simulacra of Morality in R.A. Duff, (ed), Philosophy and Criminal Law, (Cambridge: CUP 1998) pp.106 -

M. Radin, Cruel Punishment and Respect Persons: Super Due Process for Death. 535 Cal LRev 1143.

Under this limb, it is contended that since all people in a particular society benefit from rule-following, when a rule is broken the rule-breaker obtains the benefit of others' self-restraint without bearing their own corresponding share of the burden. Therefore, punishment offers to redress this unfair advantage, thus restoring society's destabilized moral equilibrium.³⁰

The conception of punishment as a means of eradicating an unfairly won advantage can be illustrated by reference to the social rule of queuing. People, who push in say a queue for payment of meal allowances, take a short cut to the satisfaction of their needs. In so doing they, undoubtedly, gain an unfair advantage over rule-followers. Assuming there was a rule that all people who pushed in would be immediately taken out of the queue and placed at the end of the now much longer queue (where they belonged) it could hardly be argued that such a response was morally unjustified. In the circumstances, the response to the queue jumper is so appropriate to the offence that it almost loses the character of punishment. It becomes simply the right thing to do and remains so even if everybody was in no way discouraged by what the latter did because it was a lovely, hot, sunny day.

However, the theory of unfair advantage is less plausible in cases which are beyond its scope of applicability. Wilson³¹ observes, and quite rightly so, that it would surely be missing the point, for instance, to base the justification for punishing a rapist or murderer upon the fact that the offender has cut corners to personal satisfaction while the rest have exercised restraint. Paradoxically, desert must derive from the wickedness of the deed itself rather than some purely notional and hypothetical unfair advantage a person is thought to have obtained by breaking the rule.

³⁰ H. Morris, Persons and Punishment. (The Monist 475, 1968) p.52

³¹ W. Wilson, Criminal Law: Doctrine and Theory. (Sweet & Maxwell, London, 2003) p. 51

As if it is not enough, the other limitations characterizing the unfair advantage theory is that it does not explain how one would quantify the amount of unfair advantage in issue. Whereas with some offences such as traffic violations and tax evasions, the fine is an apt method of restoring equilibrium through its indirect ability to redistribute benefits gained and burdens suffered, practical difficulties are encountered when this theory (unfair advantage) is analogously extended to offences such as rape, murder and dangerous driving. The difficulties of systematic quantification would seem intractable. Admittedly, even if this could solve the problem, what the offender would have to give up to restore the equilibrium might be more than justice demands.

It is the realization of these potential dangers associated with this theory that desert theorists have begun to espouse proportionality as the basis for assigning the proper level of punishment.³² Under proportionality, the argument is that if it is impossible to say with accuracy, what the deserved level of punishment is for a given crime,³³ at least an attempt can be made to ensure that the general minimum and maximum levels of appropriate punishment are fixed and punishment for one type of offence is not disproportionate to that given for another. Such a stance is at its most attractive when articulated in the context of a denunciatory account of desert in punishment.

1.13 Punishment as an expression of censure

Denunciation is often presented as a justification for punishment separate from that of retribution or utilitarianism. Here it is claimed that the offender is punished because the public or the victim or his relatives disapprove of the offence committed. In other words, the infliction of punishment on the offender affords a socially necessary mechanism for the channeling of public outrage. The effect this

³² A. von Hirsch, Past or Future Crimes. (Manchester University Press, Manchester, 1985) p. 33

³³ Ibid

has is that it serves an educative and therefore reductive function. It may also promote social cohesion by vindicating the stance of the law abiding and helping them make sense of the world one in which order and stability are seen as a good thing rather than to be traded off against personal goals.³⁴

The most persuasive basis upon which to justify punishment as an offender's desert is that it serves to express people's moral condemnation of the offender's behaviour. Denouncing wrong doing, as is seen in everyday practice, is an essential aspect of blaming, itself a natural response to wrongdoing.³⁵

This sentiment was reflected in the Memorandum of the Royal Commission on Capital Punishment in 1949. It reads in part

Punishment is the way in which society expresses its denunciation of wrongdoing; and in order to maintain respect for law, it is essential that the punishment inflicted for grave crime should adequately reflect the revulsion felt by the great majority of citizens for them.

This seems to be the approach that was taken by the court in the case of **The people v. Emmanuel Phiri**.³⁶ Expressing the object of punishment the court had this to say,

We agree, we must point out that rape is a very serious crime which calls for appropriate custodial sentence to mark the gravity of the offence, to emphasize public disapproval, to punish offenders, and above all, to protect women.

³⁴ E. Durkheim, The Division of Labour in Society, (MacMillan, London, 1984)

³⁵ A. von Hirsch, Past or Future Crimes. (Manchester University Press, Manchester, 1985)

³⁶ (1982) ZR 77.

Through different forms and degrees of punishment blame may then be expressed proportionately according to the degree of wrong doing.³⁷

Much as this theory is appreciated, it has its own inherent defects. While condemnation is easily seen as a natural and deserved response to wrong doing, it is difficult to comprehend why State punishment is necessary to convey this response. In order to account for these, recourse must be had to consequentialist reasoning. Under this one, the argument is that the State's right to punish is justified to the extent that it prevents indiscriminate retaliation which may lead to disorder in society.

What is remarkable about this approach is that while punishment is acknowledged as having both an expressive and preventative purpose the account remains retributivist in character since both the occasion and amount of punishment must always be fixed by reference to desert rather than prevention. It is not justifiable, on preventive grounds, to give more punishment than that necessary to express society's condemnation.³⁸ As a matter of safe guard, all punishment should be anchored on a baseline of conventionally rights-respecting expressive punishment.³⁹

Notwithstanding this change of emphasis, denunciation as the sole determinant of quantum in punishment remains problematic. If quantum is determined simply by what is necessary to express proportionate condemnation, symbolic and shaming punishment which do not involve the deprivation of liberty or financial penalty would appear to be equally effective disincentive to wrongdoing.⁴⁰

³⁷ A. von Hirsch, Past or Future Crimes. (Manchester University Press, Manchester, 1985)

³⁸ P. Robinson, Hybrid Principles for Distribution of Criminal Sanctions, (North Western Law Review 82, 19, 1987)

³⁹ A. von Hirsch, Past or Future Crimes. (Manchester University Press, Manchester, 1985)

⁴⁰ D. Kahan, What do Alternative Sanctions Mean? (63 U – Chic Law Review 591 1996).

Notably, retributive condemnation does not seem to capture what State punishment is for. In the circumstances therefore, the alternative seems to be utilitarianism theory.

1.14 Utilitarianism

Utilitarianism is said to be a unified political, economic and moral theory. In its simplest classical form it holds that human action is justified to the extent that it promises to maximize human happiness or welfare. Thus, individual action is justifiable if more units of happiness are produced by doing it than not doing it or doing something else. Similarly, a political or economic act of government is justifiable if it would be of overall benefit to the community.

When applied to punishment utilitarianism holds that punishment is justified to the extent that it promises to produce better results than a failure to punish. Wilson⁴¹ notes that at the heart of this theory lies the premise that punishment, since it inflicts harm upon the punished, is a *prima facie* wrong which can only be justified if some benefit accrues from punishing which will outweigh the misery inflicted. To utilitarianists, society's wellbeing is the basis for justifying the existence of rules, the following of rules, and punishment for the infraction of rules.

The broad thrust of utilitarian penal philosophy is concerned with crime reduction, a necessary adjunct to the advancement of social welfare. Punishment, under utilitarianism, offers to reduce crime in a number of ways: (1) It may deter the individual offender (individual deterrence); (2). It may deter others who might be minded to commit a similar offence (general deterrence); (3) It may fulfill an educative function by reminding the public of the norms by which their society is organized; (4) it may reform or rehabilitate the individual offender, where punishment takes the form of educating him

⁴¹ W. Wilson, Criminal Law: Doctrine and Theory. (Sweet & Maxwell, London, 2003) p. 51

to understand the positive reasons for rather than the negative reasons against bad behavior; (5) by removing the offender from society and thus their capacity to commit crime, it may fulfill a protective role for society.

1.15 Deterrence

Concurring with the opinion of the court in the case of **Furman v. Georgia**,⁴² Mr. Justice White had this to say,

..... most important, or major goal of the criminal law - to deter others by punishing the convicted criminal - would not be substantially served where the penalty is seldom invoked that is ceases to be the credible threat essential to influence the conduct of others. For the present purpose I accept that morality and utility of punishing one person to influence another.

Here the Judge was referring to the deterrent theories of punishment regardless of the fact that he also refers to morality and utility of punishment.

1.16 Individual Deterrence

Under this type of theory the aim is to discourage offenders from committing a second, or a third offence. Here the aim is that the experience of punishment will be unpleasant that the offender will not repeat the commission of the offence bearing in mind that he/she had gone through a tough time while serving the jail sentence.

The task of the court inflicting the penalty is to look to the future and select the most appropriate sentence which will impact positively on the offender and make him think twice in case he ventures

⁴² US Supreme Court (1972), Unreported.

to commit another offence. However, there is no strong argument and evidence to support the contention that after a first conviction, the offender is forever deterred from committing another offence.⁴³

1.17 General and Educative Deterrence

By inflicting severe punishment on offenders, the members of the community become aware of the dangers of committing offences. Over a period of time, this awareness of severity of punishment works on members of the community and makes them refrain from committing offences. If, for instance, someone is severely punished by stoning to death for adultery, the public become aware that adultery is heinous and will be strengthened so that the habit of not committing adultery is valued and the sense of apprehension that adultery will lead to stoning to death will deter them from committing that offence.

1.18 Rehabilitation

Within the utilitarianism conception is rehabilitation. One consequence of adopting the rehabilitation theory is that it has seen an enlargement of State concerns. The State's interests now embrace not only the offender's conduct but his soul, his motives, his history and his social environment.

Under this theory, emphasis is placed on strengthening the bond between courts and prisons service. On the one hand the sentence must strive to improve the character of the offender while he or she is serving the prison term. On the other, the prisons must ensure that they provide the needed rehabilitation on this offender so that he can once again come back to the human fold from which he strayed.

⁴³ J. Adeneas, The General Preventive Effects of Punishment. (114 U Pa LR 949, 1966)

Despite being a very good theory in so far as justification of punishment is concerned, Utilitarianism is equally characterized by its own limitations. Critics have contended that in an attempt to achieve social welfare or greatest happiness for the greater number the autonomy of the offender is eroded under the guise of social interests. It is further argued that if good results were all that mattered, then disproportionate sentencing of individuals can be justified to encourage others to be law abiding.

These limitations precipitated the development of another category of theories.

1.19 Mixed theories

This is an attempt to react to the impending questions raised against the two major theories of punishment considered above. Foremost amongst mixed theories is that of H.L.A. Hart. Hart attempts to separate the question as to what punishment is for, from the questions who shall be punished and how much. According to Hart, punishment can only be justified on utilitarian (reductionist) grounds. This is termed as the general justifying aim of punishment.⁴⁴ As to the question who shall be punished, an answer is to be found in the retributivist. According to Hart, a moral licence to punish is needed by society.⁴⁵ Involved in this paradigm, is the moral right not to be punished unless one has done a wrong and the right not to be punished excessively; moral considerations considered earlier on in this essay. In nutshell, this approach argues that institutions of punishment can only be justified on utilitarian grounds, but that individual instances of punishment can only be justified if the individual concerned deserves their sentence.

The obvious limitation characterizing Hart’s notion of desert confines punishment to those who have voluntarily broken the law. He does not stretch his analytical net to instances where the breaking of

⁴⁴ H.L.A. Hart, Punishment and Responsibility. (Oxford Press, Oxford, 1968) pp.180 -181

⁴⁵ Ibid

the law is involuntary. His general conclusion is that unless a man has the capacity and fair opportunity to adjust his behavior to the law, its penalties ought not to be applied to him.

1.20 CONCLUSION

From the foregoing, it is apparent and undoubted, that punishment has a point to it. What is clear is that punishment is deserved, as it is a natural consequence and practice, by those who breach the prescriptive behavioral pattern established and accepted by a particular society. The amount of punishment due cannot be fixed by retributive criteria alone except by ensuring as far as possible that like cases are treated alike and that coherent criteria of proportionality are adopted based upon the gravity of the harm occasioned and the mens rea accompanying it. The precise level of punishment, therefore, must be responsive to utilitarian criteria such as deterrence and incapacitation. In order to ensure that punishment does not become simply an instrument of social control, a policy of maximum restraint in sentencing should always be considered as a starting point. Policies of deterrence should be geared towards the individual offender rather than society as a whole. Incapacitation should be the exception rather than the rule and be limited to cases of violence and sexual offending as was stated by the court in the case of **Emmanuel Phiri v. The people**.⁴⁶

⁴⁶ (1982) ZR 77

Chapter Three

THE ROLE OF PUNISHMENT

1.21 Introduction

A discussion of the subject of punishment, as an inherently essential feature of every criminal justice system in all mature legal systems, raises pertinent and inescapable questions which beg honest answers. Among other questions raised include: What is punishment? ; What is its role in the administration of criminal justice? ; How successful has punishment been in realizing the object of its employment?

This chapter endeavours to carefully attend to the questions raised above. In so doing, considerable attention will be given to an evaluation of the *Zambian Criminal Justice System* in light of the above raised questions.

1.22 The Concept of Punishment and the Meaning Attributed to it.

It must be admitted, if intellectual honest is to be upheld, that the concept of punishment has aroused a lot of controversies regarding its meaning and definition. In more precise terms, one would argue, and quite rightly so, that punishment appears to have defied any universal definition and meaning. Various views about punishment have been advanced by different scholars belonging to different

schools of thought.⁴⁷ This segment will consider two main competing views and endeavour to give a definition of the term punishment which harmonizes these opposing views.

The first view holds that the term punishment envisages the infliction of some legally prescribed degree of pain or form of deprivation, by the criminal justice system, on the one who has engaged or engages in conduct prohibited by legal rules.⁴⁸ In fact, this view well represents the traditional conception of the term punishment. This view, it must be observed, is more predominant among retributivist scholars who regard punishment as a necessary evil.⁴⁹ To scholars who subscribe to the ensuing view, a disposition (to a person who has been adjudged guilty of an offence) that is devoid of any pain or deprivation cannot properly be said to constitute punishment. Under this view, therefore, punishment can be defined only as a form of treatment that is intended to be an evil.⁵⁰

On the other hand, the second view holds that restricting the meaning of punishment to an evil disposition is to narrowly construe the concept. It must be mentioned at the very outset that this view originates in and is influenced by Utilitarian school of thought. Under this view, a disposition need not necessarily be evil for it to constitute punishment.⁵¹ It is contended that even such dispositions as psychological treatment in reformatory centers as well as probations are punishments provided they are executed against the will of the offender.⁵² To scholars who subscribe to this view, the most

⁴⁷ H.L. Packer, The Limits of the Criminal Sanction. (Stanford University Press, Stanford, 1969) p.18

⁴⁸ Ibid

⁴⁹ For a detailed discussion of the views about punishment held by retributivists, see Chapter Two of this essay.

⁵⁰ H.L. Packer, The Limits of the Criminal Sanction. (Stanford University Press, Stanford, 1969) p.32

⁵¹ Utilitarian theory has been discussed at length in Chapter Two.

⁵² H.L. Packer, The Limits of the Criminal Sanction. (Stanford University Press, Stanford, 1969) p.35

important characteristic of any form of punishment is compulsion; that is to say that punishment should be inflicted on the offender against their will.

The following excerpt summarizes the above apparent conflict:

Is it an essential element of punishment that it should be an evil? From the point of view of the offender, the answer to the latter question has to be in the negative since individual views as to what constitutes an evil are too different to be met by comparatively limited choice of penalties. Punishment can therefore be defined only as a form of treatment that is intended to be an evil. Certain modern methods of treating offenders, such as probation or psychological treatment, which are intended to be purely beneficial, can, strictly speaking, no longer be brought under the conception of punishment.⁵³

From the foregoing, it is clear that a disposition that is intended to be hurtful is punishment, and a disposition that is intended by those who prescribe and administer it to be beneficial is treatment. In the circumstances, what then, would be a more neutral definition of punishment? It is suggested that punishment would best be defined as that which is a consequence of crime committed by the violation of criminal legal rules enacted by a legislative body, which is intended to prevent offences against legal rules or exact retribution on offenders or both.

The definition given above serves to embrace the two opposing views of punishment: namely, the involvement of pain or evil and the non involvement of pain in reacting to the offence committed. This, at any rate, is the sense in which the concept of punishment is being used in this essay.

⁵³ Chamber's Encyclopedia (New Revised Edition, 1967), XI 362

That having been said, there remains one question unanswered. This question relates to the determination of which of the two opposing views discussed above characterizes the **Zambian Criminal Justice System**.

1.23 The Perception of Punishment by Zambia’s Criminal Justice System

In attempting to discern the perception of punishment by Zambia’s Criminal Justice System, it is suggested that recourse must be had to the definition of the term punishment given by Ndulo⁵⁴, which definition is more or less domesticated. He defined punishment in the following terms:

Punishment is simply the infliction of some form of pain or deprivation on the person of another, in this instance, by the Criminal Justice System.

This definition does, to a large extent, provide a cue as to what is the perception of criminal punishment by the **Zambian criminal justice system**.

Notably, Ndulo’s definition appears to have been heavily influenced by the view that for a disposition to properly constitute punishment, it must involve pain or some deprivation. Invariably, a disposition that is devoid of any pain or deprivation does not constitute punishment. Interestingly, he goes on to enumerate some of the familiar forms of punishment in Zambia: namely, imprisonment or payment of fines.⁵⁵ These forms of punishment, in themselves, involve some degree of pain or deprivation. In Zambia, the most predominant form of punishment is imprisonment.

⁵⁴ M. Ndulo, Bigamy and An African Society. (Zambia Law Journal, Vol. 6, 1994) p.68

⁵⁵ Ibid

Therefore, it can be argued that the view of punishment held by the Zambian criminal justice system is that it must involve some degree of legally prescribed pain or deprivation. In other words, Zambian criminal justice system believes that the most effective reaction to a criminal offence should be hurtful on the part of the offender so as to let the offender realize that society does not approve of his conduct and also to sound a warning to the public at large.

Admittedly, though, this seemingly overriding view has an exception, though not in the absolute sense. Section 72 of the Juveniles Act⁵⁶ provides for the restriction of punishment of juveniles. Notwithstanding the restriction in sections 72 and 73, section 73(3) plainly provides that nothing in section 73 shall be construed as restricting the power of the court to pass any sentence or a combination of sentences with which it is empowered to pass under any other written law. This, as the word restriction itself suggests, does not mean that punishment (in the sense of Ndulo's definition) has completely been ruled out in juvenile justice administration. Rather, it entails that its employment is somewhat regulated in public interest.

In the result, what emerges is that the conception and perception of punishment in Zambia is as it has been rightly observed by the learned author, Professor Ndulo. In other words, the word punishment, when it is called to mind by any ordinary Zambian, connotes some degree of pain or deprivation.

1.24 Criminal Punishment and its Role in Zambia

Writing on the role of punishment, Packer⁵⁷ observes that punishment plays one or both of the two main roles: namely, the prevention of undesired conduct, and retribution for perceived wrong doing. Another commentator further argues that the role of punishment is neither to torment and afflict a

⁵⁶ Chapter 53 of the Laws of Zambia

⁵⁷ H.L. Packer, *The Limits of Criminal Sanction*, (Stanford University Press, Stanford, 1969) p.32

Therefore, it can be argued that the view of punishment held by the Zambian criminal justice system is that it must involve some degree of legally prescribed pain or deprivation. In other words, Zambian criminal justice system believes that the most effective reaction to a criminal offence should be hurtful on the part of the offender so as to let the offender realize that society does not approve of his conduct and also to sound a warning to the public at large.

Admittedly, though, this seemingly overriding view has an exception, though not in the absolute sense. Section 72 of the Juveniles Act⁵⁶ provides for the restriction of punishment of juveniles. Notwithstanding the restriction in sections 72 and 73, section 73(3) plainly provides that nothing in section 73 shall be construed as restricting the power of the court to pass any sentence or a combination of sentences with which it is empowered to pass under any other written law. This, as the word restriction itself suggests, does not mean that punishment (in the sense of Ndulo's definition) has completely been ruled out in juvenile justice administration. Rather, it entails that its employment is somewhat regulated in public interest.

In the result, what emerges is that the conception and perception of punishment in Zambia is as it has been rightly observed by the learned author, Professor Ndulo. In other words, the word punishment, when it is called to mind by any ordinary Zambian, connotes some degree of pain or deprivation.

1.24 Criminal Punishment and its Role in Zambia

Writing on the role of punishment, Packer⁵⁷ observes that punishment plays one or both of the two main roles: namely, the prevention of undesired conduct, and retribution for perceived wrong doing. Another commentator further argues that the role of punishment is neither to torment and afflict a

⁵⁶ Chapter 53 of the Laws of Zambia

⁵⁷ H.L. Packer, *The Limits of Criminal Sanction*. (Stanford University Press, Stanford, 1969) p.32

sensitive being, nor to undo a crime already committed. Rather, it is to prevent the criminal from inflicting new injuries on its citizens and to deter others from similar acts.⁵⁸

That having been said, it remains to be determined whether or not the foregoing reflects the position in Zambia. In order to discern the role of criminal punishment in Zambia, a perusal and an analysis of a few selected Zambian criminal law cases is inevitable.

The first case to be considered in line with the foregoing is the case of **Jutronich, Schutte and Lukin v. The People**⁵⁹. The three appellants in this case, John Vincent Jutronich, Tom Schutte and Lionel Edmond Lukin, were convicted by the Senior Resident Magistrate's Court, Kitwe, on five counts of theft of goods in transit contrary to sections 243 and 247 (c) of the then Penal Code (Cap. 6).⁶⁰ The concurrent sentences passed on these counts aggregated four years' imprisonment with hard labour and were subject to High Court confirmation. The appellants appealed to the High Court against their convictions and sentences but abandoned their appeals against conviction.

What is interesting about this case and perhaps relevant to this discussion, is the way the appellate court prefaced its decision. A close examination of the preface reveals that the court was actually explaining the role of punishment as a composite aspect of criminal law. The court cited with approval the words expressed by Mr Justice Hilbery in the case of **R v. Ball**⁶¹. In this case the court had this to say,

⁵⁸ Beccaria on Crimes and Punishment, Translated by P. Henry. (1963) Bobbs Merrill Co. New York.

⁵⁹ (1965) ZR. 9 (C.A)

⁶⁰ The Penal Code, now in force, is Chapter 87 of the laws of Zambia.

⁶¹ (1951) 35 Criminal Appeal Reports 164

In deciding the appropriate sentence a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it.

Dismissing the appeal and upholding the decision of the court below, the appellate court cited, with approval, the relevant part of the trial court's decision which read as follows,

You stand convicted on five charges, each of which carries a maximum punishment of seven years' imprisonment with hard labour, charges of theft in transit of great quantities of copper, a valuable metal which is vital to the economy of this country. Thefts of, and the receiving of, stolen copper are, as I know from experience in this court, prevalent offences on the Copperbelt, and in the past year this court has given several public warnings which have been published in the press that offenders would be severely punished. I have no doubt that I would be failing in my public duty if I do not impose severe sentences.

In the above case, the court expressed the object of punishment in no uncertain terms; namely, the protection of public interest by supporting the rights and freedoms of individuals to pursue their life plan with the minimum interference from others. What emerges, from the foregoing, is that the two main overriding roles and objectives of punishment are to punish and prevent crime. Arguably, the prevention of crimes is only attainable if there are severe punishments in place, especially for more prevalent offences such as theft by public servant, sexual offences, and aggravated robbery, among others.

The above considerations seem to have influenced the decision of the court in the case of **Kalenga v. The People**⁶². In this case the forty-year-old appellant was convicted on his own confession of charge

⁶² (1968) ZR. 165 (H.C)

of theft by public servant, contrary to sections 243 and 248 of the then Penal Code.⁶³ Between 1st November, 1967, and 22nd February, 1968, he stole K82 of Government money while he was employed by the Government as a clerk in an office of the Ministry of Education at Mankoya. On 24th April, 1968, he was sentenced by the learned Senior Resident Magistrate to eighteen months' imprisonment with hard labor and to pay a fine of K82; in default, six months' simple imprisonment, and the fine, if paid, to be remitted to the Chief Education Officer as compensation.

After considering the whole appeal, the appellate court made the following observation,

In all the circumstances of the crime and of the appellant, I do not consider the sentence of imprisonment to be excessive; indeed it errs on the side of leniency. This offence carries a maximum punishment of seven years imprisonment with hard labor; it is one which is appallingly prevalent throughout Zambia and a matter of grave public concern. It involves a gross breach of trust, and the appellant was not entitled to the leniency normally accorded to a first offender because he was convicted in January, 1964, of theft by servant. In my view, all thefts by public servants will continue to merit severe punishment until the present spate of such offences abates. I note that the learned Senior Resident Magistrate observed, when sentencing the appellant, that he dealt with over seventy cases of this nature in the Barotse Province last year. Deterrent sentences are clearly called for in the public interest.”

In this case, the court was emphasizing the need and importance of imposing severe punishments in form of long term sentences so as to deter the ‘would be offenders’ and also to punish the offenders themselves. The above jurisprudence was reiterated in the case of **Kabongo and Another v. The People**.⁶⁴ In this case the appellants were convicted of aggravated robbery, in the course of which two

⁶³ Chapter 6 of the Laws of Zambia

⁶⁴ (1974) ZR. 83. (S.C)

shots were fired injuring two persons. The trial court imposed the minimum sentence of fifteen years' imprisonment with hard labor. They were, now, appealing against the sentence.

After a thorough consideration of the merits of the appeal, the court dismissed the appeal and stated thus,

This type of offence is very prevalent. This court does not consider that such a crime in which a weapon such as a rifle or a revolver is used comes within the lowest category of the crime of aggravated robbery. We wish to make it quite clear to all persons who use weapons of this nature that they risk the chance of a very long sentence of imprisonment. We are determined to do what we can to see to it that weapons are not used for the purpose of robbery. We consider that the sentence in this case was inadequate and we quash the sentence of fifteen years' hard labor and substitute a sentence of twenty years with hard labor in each case.

In the two previous cases considered, there is one major role of criminal punishment which emerges: namely, that punishment is used to abate prohibited conduct. In other words, one would argue, from the foregoing, that the perception of punishment by the Zambian courts is that it is an instrument of what may be referred to as social hygiene; that is to say it protects society from the criminal. The view that punishment protects the society was well adumbrated in the case of **Emmanuel Phiri v. The people**.⁶⁵ The appellant was convicted of rape by Subordinate Court and sentenced to two years' imprisonment with hard labor. On appeal the sentence was enhanced to five years. He appealed further against conviction on grounds of mistaken identity and against the sentence as being too severe.

⁶⁵ (1982) ZR. 77. (S.C)

Dismissing the appeal and at the same time stating the multiple roles of punishment, the court observed thus,

We must point out that rape is a very serious crime which calls for appropriate custodial sentences to mark the gravity of the offence, to emphasize public disapproval, to serve as warning to others, to punish the offenders, and, above all, to protect women.

Clearly, the role of criminal punishment in Zambia is a composition of several purposes. Modern sentencing, as Sianondo submits, has assumed a hybrid character of other purposes of punishment.⁶⁶ Sianondo's observation is well reflected in the dictum cited above.

Zambia's position on punishment, as established above, has not changed. This is evident from contemporary decisions. One of such decisions is to be found in the case of **The People v. Stephen Hara**.⁶⁷ The accused was charged with defilement of a girl under the age of sixteen years contrary to section 138(1) of the Penal Code Cap 87 of the Laws of Zambia. He pleaded guilty to the charge and was convicted accordingly by the Subordinate Court of the First at Lundazi.

Confirming the sentence and conviction, as committed to it (High Court) pursuant to section 217(1) of the Criminal Procedure Code Cap 88 of the Laws of Zambia, Justice Kajimanga lamented,

I have considered the record and the mitigation given by the accused. I agree with the lower court that although the accused is a first offender and readily admitted the charge and therefore deserves lenience, the offence he committed is very serious and there is need to exclude him from society for a longer period. I consider that a man of thirty nine years to defile a young girl of eleven years causing pain to her private parts is an abominable act in our

⁶⁶ C.M. Sianondo, Criminal Justice, Can the reflection of Customs make the Penal Code more adaptable to Zambia? Obligatory Essay submitted to School of Law in partial fulfillment of the award of Bachelor of Laws Degree, (2005)p.10

⁶⁷ (2004)HJ/07/2004 (Unreported)

society which must be condemned in the strongest terms possible. Such a condemnation would be meaningless if the accused is not given a custodial sentence which is commensurate with his barbaric act. I accordingly sentence Stephen Hara to twenty-five years imprisonment with hard labor.

Indeed, it is reasonable and justifiable in view of the cases reviewed, for one to aver that punishment in Zambia is employed to ensure that the offender is punished, to sound a warning to the ‘would be offenders’, to bring about social sanity in society and above all, to protect society.

1.25 The efficacy of Punishment in Zambia

Under this head, the inquiry is concerned with determining the effectiveness of punishment as an aspect of criminal justice administration. It must be submitted at the very outset that in determining whether or not punishment in Zambia has been effective, recourse must be had to the response of offenders and non offenders to punishment. In other words, are offenders responsive to punishment by realizing that they had strayed from the societal norms and consequently abandon their bad course? Are people (non offenders) in society deterred from committing offences due to the existence of punishment? If the answers to these questions are in the affirmative, then it can, rightly, be said that punishment in Zambia is efficacious.

According to the information given by Mr. Zulu⁶⁸, Zambia has inherited an archaic penal system wrought with oppressive colonial laws that almost indiscriminately prescribe imprisonment as punishment for all crimes. In other words, Mr. Zulu’s observation is that imprisonment is the most predominant and common form of punishment that Zambia’s criminal justice system has ever known

⁶⁸ Assistant Superintendent, Zambia Police Service and former Officer-In-Charge Garnaton, Kitwe. This was an oral interview conducted on 14th December, 2009.

and appreciated. From his experience, he observed that while some convicts repented and changed into responsible citizens following the severe punishment inflicted on them, still others turned into hardcore criminals.

The danger that this state of affairs poses is as it has been rightly observed by the President of the American National Council on Crime and Delinquency, Milton G. Rector, as he then was:

Incarceration of the non-dangerous is inappropriate for a number of reasons. First, prisons do not reform such inmates; indeed such reform as is possible may come more readily through other means. Secondly, prisons are among the costliest institutions in the world to build, operate and maintain. To punish by imprisonment is to punish the public as well. Third, prison criminalizes many inmates far beyond their condition before incarceration. Fourth, brutalizing an offender through caging somehow subtly makes all of us brutal. A society that uses violent means of assuring tranquility finds that tranquility strangely elusive.⁶⁹

These concerns reflect an unfortunate reality which presently holds true because although deterrence and rehabilitation of prisoners are important aspects of the prisons, many prisoners argue that this is not the case. For instance, Never Spoiler Kapenda, who was serving a long term sentence for a series of capital offences stated:

Prisons as we understand them should be centers where criminals are made to realize the evils of their criminal activities. I have been in here (prison) for 18 years and what reformation have I got? There are no proper facilities for skills training, the emphasis is on punishment: what sort of reformation is this that lasts for 18 years without any results to show for it? The laws as they stand are unsuitable for today's situation. The government has a responsibility to see that we are reformed and not transformed into hardened criminals. When we were on the outside we had many friends, after this we

⁶⁹ C.R, Dodge, A World Without Prisons. (Lexington Books, Toronto, 1979) p.54

will not have any, because our friends have probably advanced while we will walk out of here without anything to show for it.⁷⁰

Talking of the rampant sexual offences, particularly defilement, Mr. Zulu observes that despite the courts inflicting long and severe sentences on offenders, these cases seem to continue escalating. This situation has compelled some criminal law jurists to take a stern position against imprisonment. For instance, Mueller argues thus:

If it is clear that prison is all that detrimental, why then was it invented? Prisons appeared convenient to those who had to deal with deviants. While not in mass use in the Middle Ages, prison did prove useful then in detaining captured merchants for ransom, and for pressuring recalcitrants into submission. Above all, in the era of relative enlightenment in matters of penal policy, the nineteenth century prison seemed more humane than mutilation or infamous death. But those examples were in times long past. Why are prisons still in use? Three answers offer themselves:

- (1) Prisons convey the illusion of justice and safety.
- (2) Prisons offer safety from infinitesimally small portion of the prison population which in fact is dangerous to the population at large, but above all:
- (3) As long as society is incapable of coping with its deviants in any other manner, it will resort to imprisonment. Prison, then is nothing but evidence of the lack of progress of citizens and scientists alike in dealing with deviancy in a rational cost-beneficial and humane manner: just as a physician will quarantine a seemingly infectious patient whose illness cannot be diagnosed (because of lack of skill or undeveloped information base) so society will imprison deviants. It cannot cope in any way until enlightenment and skill in dealing with deviance will have significantly increased.

Prison, thus, is nothing but the response of a frightened society unable, and as yet unwilling to cope with deviancy in a rational manner.⁷¹

⁷⁰ Zambia Human Rights Report 1997, pp 46-47 (Afronet: Lusaka).

⁷¹ G.O.W, Mueller, Sentencing Process and Purpose. (Charles C. Thomas, Illinois, 1977) pp.115-116

Much as Mueller's argument and observation is helpful in highlighting the failures of imprisonment, it renders itself susceptible to criticism for intimating that imprisonment, as a form of punishment, should be abolished altogether. His argument ignores the fact that imprisonment is a necessity where the protection of the public, from criminals involved in serious offences such sexual offences, armed robberies and murder, is concerned. There is no other way of adequately dealing with such offences other than by imprisonment alone.

Despite these apparent shortcomings of punishment, particularly imprisonment as the predominant form of it in Zambia, punishment plays a very important role, namely to make society a better place. The apparent ineffectiveness in it cannot and should not remove the point of punishment. Punishment is a logical requirement of a coercive order. It is the signal that norms must be treated as obligatory. No society could survive without it.

Chapter Four

FACTORS AFFECTING PROPER AND EFFECTIVE EMPLOYMENT OF PUNISHMENT IN ZAMBIA

1.26 Introduction

It is generally agreed that the attainment of justice, in any given country or state, is entirely dependent on an effective and efficient criminal justice system. Thus, the overriding role and purpose of a criminal justice system is to expose and punish the wrong doers fairly but effectively. To this end, Utilitarianists argue, and quite rightly so, that punishment by the state is justified if it brings about a reduction in incidences of crime and consequently respect for the law in society.⁷²

Admittedly, though, the achievement and realization of the various roles and objectives of punishment, as theorized by various schools of thought, is contingent on an enabling environment for the uniform and general application of it (punishment). In fact, generality and uniformity are an established virtues identified with the concept of law. Emphasizing the importance of generality and uniformity as virtues of any good law, Kapacha argues, and quite rightly so, that any attempt to disregard general and uniform application of punishment to wrong doing will, no doubt, result in punishment not being able to effectively control and reduce crime.⁷³

Various factors answer to the apparent ineffective role of punishment as an instrument of controlling and preventing crime in Zambia. This chapter endeavors to consider factors which affect effective and proper employment of punishment in the fight against crime in Zambia.

⁷² Utilitarianism as a theory has been discussed at lengthy in Chapter Two of this essay.

⁷³ C.R, Kapacha. The Role of Punishment in the Fight Against Corruption. Obligatory Essay submitted to School of Law in partial fulfillment for the award of Bachelor of Laws Degree, (2005)p.33

1.27 Factors discussed

a) Lack of Independence of the Judiciary and Investigative Agencies

An effective and impartial response to criminal activities by the courts and the investigative agencies, regardless of the status of the person involved, can only be guaranteed if the courts and investigative agencies themselves are neutral and independent. By neutrality and independence, what is meant is that the judiciary and the investigative agencies must be free from any possible influence in regard to their operations. If there is pressure, then these institutions are as good as not being there.⁷⁴

Admittedly, the judiciary in Zambia appears to have been caught up in this unfortunate and undesirable situation. It has to be noted that this predicament is as old as the judiciary itself. For a long time now the judiciary in Zambia has operated under intense fear of the executive. In other words, the judiciary in Zambia has rarely enjoyed independence and neutrality. There is overwhelming evidence to support this argument.

The first evidence is to be found in ancient case of **Feliya Kachasu v. The Attorney General**⁷⁵. In this case, the validity of regulations requiring school children to sing the national anthem and salute the national flag were challenged on grounds of unconstitutionality; that the applicant, a Watchtower follower, was denied the right to enjoyment of freedom of conscience and religion. The regulations under the Education Act, which appeared to hinder that enjoyment, were upheld on the ground that the applicant had not established that the regulations in question had gone beyond what was reasonably required in the interest of public safety or public order. The court was of the view that in order to ascertain national security, it was essential to have national unity. Blagden C.J, presiding at

⁷⁴ C.R, Kapacha. The Role of Punishment in the Fight Against Corruption in Zambia. Obligatory essay submitted to School of Law in partial fulfillment for the award of Bachelor of Laws Degree, (2005)p.34

⁷⁵ (1967) ZR 145.

the time, nevertheless recognized the violation of the fundamental right by the state as enshrined in the constitution. However, he unashamedly alluded to some repercussions that might ensue if he decided otherwise.

Moreover, in the case of **Nkumbula v. Attorney General**,⁷⁶ Baron J.P's remarks, when he said he could not tell what consequences would ensue if he had decided otherwise, clearly showed that he was apprehensive of the executive. From the foregoing, one gets the impression that when courts are seized with a matter in which the government has interest, their conscience (court's), as Blagden C.J once observed, is put to its severest test. This in itself, is a tacit acceptance by the courts themselves that they are pressured to decide in favour of the executive. In such a situation, neutrality and independence hardly exist. The effect this has is denial of justice to people who deserve it.

The situation as it obtained then is not any different from today's. The judiciary has continued to suffer from executive pressure in its daily operations. Here, the Chiluba case is illustrative of executive pressure on the operations of courts in Zambia. Chiluba, F.T.J, Zambia's second Republican President was prosecuted for alleged theft by public servant, involving millions of United States Dollars. Despite the existence of overwhelming and strong evidence to secure a conviction, he was acquitted in unexplainable circumstances.

What is more is that his post acquittal period was characterized by political statements both from the president, Mr. Rupiah Bwezani Banda and individual ministers supporting the acquittal, on the premise that some people ought not to be jailed, regard being had to their social standing in society.

⁷⁶(1972) ZR 111

Mr. Mike Mulongoti, the then Minister of Works and Supply was reported to have stated that it was going to be too costly to jail Chiluba.⁷⁷

This, in itself, is a tacit admission on the part of the government that a prima facie case against the accused, in fact, did exist and was established. However, for reasons best known to the government, it was not desirable that he be jailed. No doubt, in order to see to it that Chiluba is not jailed, the executive did intervene in the judicial process, which for sure, saw the accused acquitted. In the light of the above circumstances, one can argue, and quite rightly so, that the judiciary in Zambia is far from being independent and neutral.

This executive fear does not only manifest itself in the judiciary but also in investigative institutions such as the police. The contemporary and prime case which supports this proposition is the case of **The People v. Chansa Kabwela**⁷⁸. This case was prosecuted following the directive from the President, who felt that the accused was guilty of the offence of publishing and circulating obscene materials. Since the charge brought against the accused was frivolous and vexatious, the accused was acquitted by the subordinate court. It is such abuse of public institutions and judicial process which ends up eroding the confidence of the public in these very institutions.

What is more disheartening is that the executive branch of government tends to use institutions like the police to suppress and punish innocent individuals who seem to be opposed to its ideas. Such use of punishment by the executive is improper and unacceptable in a constitutional democracy where rule of law and separation of powers are unreservedly embraced. Truly, such use of punishment cannot bring about reduced incidences of crime. Above all, justice is compromised.

⁷⁷ The Post, 24th November 2009

⁷⁸ Unreported

That having been said, one would wonder whether or not the Zambian constitution does, at all, guarantee the independence of the judiciary and other equally important constitutional offices. The answer is an emphatic yes. However, it ought to be borne in mind that guaranteeing is one thing and practicing is another. Concerning this factor Musonda observed thus,

The independence of the judiciary and security of tenure of judges is guaranteed in many constitutions of nations. However, in reality and practice, this independence is far from being realized and is destroyed by problems within such areas as organization 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 judges' authority, status and salaries are guaranteed and where such salaries are commensurate with the high economic expectations of the judges' social positions.⁷⁹

Furthermore, Sichinga argues that poor salaries to magistrates make it easy for officers to be tempted when litigants offer gratification to them; hence magistrates' low salary is a recipe for corruption. Notably, corruption has entangled officers in criminal justice system. For instance, on October 10th, 2000, an officer from Anti- Corruption Commission was reported to have appeared before the magistrates court charged with fraud of K500, 000 obtained during the course of investigations which were being conducted in February, 2000.⁸⁰

Another serious and perhaps embarrassing incident is the one which involved the then Chief Justice, M.M.S.W. Ngulube. He was alleged to have been involved in some corruption activities and hence, he was pressured to resign.

⁷⁹ F.X, Musonda. The Effective Administration of Criminal Justice for the Prevention of Corruption by Public Officials. (Legality Journal, UNZA, Lusaka, 1998) p.24

⁸⁰ Times of Zambia, 10th October, 2000.

Clearly, such activities in the most important institution of criminal justice administration have the effect of greatly compromising the process of dispensation of quality justice. Consequently, the importance of the institution of punishment in the prevention and control of crime is watered down.

b) Lack of Political Will

Simply put, political will refers to the desire, determination and commitment by the government to ensure that public institutions charged with specific duties, in this case, the criminal justice system, performs and discharges its duties without unnecessary constraints and impediments.

Admittedly, the various governments that Zambia has had since independence have lamentably failed to exhibit political will in most matters of public importance and concern; corruption is the prime case. Lack of political will by the Zambian government has been manifested by its failure to prosecute corrupt suspects uniformly. It is on record that the then president of Zambia, F.T.J Chiluba, used the Attorney General at least on two occasions, to stop the Anti-Corruption Commission from prosecuting erring government officials.⁸¹

Moreover, out of 14 cases involving ministers and 54 cases involving senior officials which were investigated in 1999, none resulted into conviction.⁸² The Report notes that lack of conviction was attributed to interventions by cabinet ministers. In other words, one would argue, and quite rightly so, that the then government lacked the desire to see to it that the perpetrators of the vice (corruption) are punished for their misdeeds.

⁸¹The Post, 2nd September, 1994.

⁸² ACC Report, (1999).

In another separate incident, it is reported that the Attorney General intervened in the case which involved a permanent secretary who was charged with abuse of office.⁸³ The Attorney General acted pursuant to Article 56(7) of the Republican Constitution which allows him to give instructions to the Director of Public Prosecutions in matters involving general considerations of public policy.

Each of the instances cited above suggests that the government of the Republic of Zambia has failed to exhibit political will by abusing public institutions and officers. In other words, the government has continued to manipulate public institutions and officers in order to gain political mileage and cling on to power.

Worse still, the government deliberately underfunds most key institutions, such as the Police, ACC, DEC and the judiciary so that they are unable to efficiently execute their respective duties. It is believed that once these institutions are handicapped financially, they cannot perform their duties professionally.

The recent and most controversial issue which blatantly shows government's lack of political will is the case of **The People v. Chiluba**.⁸⁴ As earlier alluded to, Chiluba was prosecuted for alleged theft by public servant in subordinate court. However, he was acquitted in unexplainable circumstances. Following his acquittal, the prosecutor put up a notice of appeal, which notice was later on withdrawn at the instance of the DPP who argued that the appeal had no merit. It must be noted that all this happened after political statements had been by the president and some ministers to the effect that Zambians needed to accept the decision handed down by the subordinate court; the implication being that there was no need for the government to appeal against the decision.

⁸³ Auditor General's Report, (1997).

⁸⁴ Unreported

sure, government's position on the matter has prevailed in the sense that people's wishes to have decision appealed against have been thwarted with impunity. The results? Efforts of the professionals involved in the prosecution of this case have been frustrated; the development of Zambia's jurisprudence has been constricted; a person, who, going by the circumstances and evidence available, rightly deserved punishment, has escaped it; and above all, the due process of the law and justice dispensation, has greatly been compromised.

No doubt, where individuals who commit offences of similar magnitude and severity are punished selectively and sparingly, the institution of punishment is not only undermined but also rendered ineffective, with the effect that incidences of crime in society are not reduced to what one may call acceptable levels; regard being had to the fact that crime can never be completely wiped out in human societies.

Technicalities in and Cumbersome Court Procedures

Technicalities in and cumbersome court procedures often than not, result in prolonged and protracted trials or court proceedings as it were. In Zambia, this phenomenon is more predominant in corruption cases whose rate, unfortunately, is ever increasing. The potential or actual dangers associated with this phenomenon are quite severe.

One of the dangers of having prolonged periods of trials is that accused persons may have enough time to adulterate the evidence, with the effect that the prosecution may not be able to secure a conviction. In extreme circumstances, key witnesses may die mysterious deaths, thereby leading to the acquittal of accused persons. Moreover, if cases take long to a point where people lose track of the proceedings, people would not appreciate the role of punishment. This trend affects the effectiveness of the role of punishment in the control and prevention of crimes. Expeditious or prompt disposition

of cases (a virtue dependent on simplicity in court procedures) signifies that a criminal justice system is effective.⁸⁵

d) Lack of Qualified Personnel in the Criminal Justice System

Most often than not, officers employed in key institutions involved in criminal justice administration, such as the Police are not well qualified to perform some duties. They are there by default. For instance, almost all Police Public Prosecutors are not qualified Lawyers. This is because the conditions of service in Zambia Police are not attractive to Lawyers. Hence, they have no option but to use Police officers to prosecute cases. Admittedly, these ill-qualified officers find it hard to argue with qualified Lawyers. In fact, the former Attorney General, Mr. Malila alluded to the fact that most accused persons in the subordinate court get acquitted on technicalities. He cited the example of a case where he himself was appearing before a magistrate with an ill-qualified prosecutor on a charge of theft. Upon using a Latin maxim, the police officer was at a loss, and that is how the accused was acquitted.⁸⁶

As indicated by the foregoing, this trend is disastrous in the sense that people who ought to suffer punishment escape. The result is that incidences of crimes are always on the increase; and people shift the blame on the ineffectiveness of punishment when in fact punishment is not actually employed or is employed improperly.

e) Abuse of Constitutional Powers vested in the DPP

⁸⁵ C.R, Kapacha. The Role of Punishment in the Fight Against Corruption. Obligatory essay submitted to School of Law in Partial fulfillment for the award of Bachelor of Laws Degree, (2005) p.48

⁸⁶ This was a narration by Mr. Malila, former Attorney General, Republic of Zambia.

The *Zambian Constitution*⁸⁷ does, in Article 56(7), confer on the DPP powers whose exercise shall not be subject to the direction or control of any other person or authority. Such conferment of seemingly unfettered power opens up the possibility of abuse as the power say to enter a *nolle prosequi* can be exercised in an arbitrary manner.⁸⁸ Again, the *Chiluba* case is illustrative of the possible abuse of this constitutional power by the DPP. In this case, the DPP, who like any other constitutional office bearers in Zambia, lack practical neutrality and independence, was apparently directed by the executive to discontinue the appeal against the subordinate court's decision.

Where such power is used to shield some individuals, there by playing favorite games in the applicability of punishment, the result is that the role of punishment in the fight against crime is grossly undermined. In fact, this sets a very bad precedent to people who may start to think that punishment can easily be dispensed with. This, no doubt, would be damaging to society.

1.28 Conclusion

What is evident from the discussion above is that the success of punishment as an institution of crime control and prevention is contingent on a plethora of factors. Unless these conditions exist, realizing the objectives of employing punishment will be an illusion and perhaps, a far-fetched dream. However, critical to the success of punishment is political will on the part of government. This is because most, if not all, factors are subsumed within this large bracket.

⁸⁷ Chapter one of the *Laws of Zambia*

⁸⁸ C.R, Kapacha. *The Role of Punishment in the Fight Against Corruption*. Obligatory essay submitted to School of Law in partial fulfillment for the award of Bachelor of Laws Degree, (2005) p.45

Chapter Five

RECOMMENDATIONS

1.29 Introduction

This study set out to unveil the role of punishment in the administration of criminal justice in Zambia. It has been noted that punishment in Zambia plays a multiple of roles. However, the attainment of all of its objectives is somewhat difficult, if not impossible, because of the absence of requisite conditions. This segment, therefore, provides suggestions on how the situation might be improved.

1.30 Recommendations

i) Cultivating Political Will: this aspect is extremely important in every government's effort to fight crime. If the government of the day is committed and willing to ensuring that the perpetrators of offences are punished accordingly, it will not interfere with the operations of the institutions charged with duty of ensuring social justice. Non interference with the operations of the institutions like the Judiciary, Police, ACC, DEC and Prisons will ensure that there is professional execution of the duties by these institutions. Consequently, justice and order will prevail in society. Moreover, the neutrality and independence of these institutions will build confidence in people or the society at large.

Political will on the part of government becomes an issue of prime importance when it comes to funding these institutions to ensure that they operate effectively and efficiently with minimum

constraints as far as is practically possible. Adequate funding to these institutions will ensure that they have qualified human resource which is fit to discharge its duties. Moreover, adequate funding will enable the institutions pay their staff attractively; hence motivate them to work whole-heartedly. In fact, if the staffs are well paid, incidences of corruption involving staffs are reduced significantly. What is more is that if these institutions are adequately funded, they will find it easier to conduct refresher courses for their staff so that they are up to date with what is expected of them, taking into account the fact that society is dynamic. All this can only exist if there is political will on the part of the government of the day. Hence, it is important that this element is cultivated in political leaders as they are the people who form government.

ii) Securing the Independence of the Judiciary and Investigative Agencies: admittedly, this aspect is usually subsumed within the larger bracket of political will. However, it is desirable that it be discussed independently. To ensure that the due process of the law is not constrained, these institutions must always be kept free from executive pressure. In other words, these institutions should not receive instructions from the government on how to execute their duties. Rather, they should be allowed to follow the law that governs their operations as well as exercise professionalism. Political interference in the process of dispensing justice often has the tendency of eroding justice itself. This is clear from the controversial case of **The People v. Chiluba**⁸⁹, where the accused was shielded by the government of the day. Selective employment of punishment renders the institution of punishment irrelevant. Therefore, the judiciary and investigative agencies must be independent from the executive if quality justice is to be guaranteed in the administration of criminal justice.

⁸⁹ Unreported

iii) Expeditious disposition of cases: much as it is appreciated that rapid adjudication has its own disadvantages, it is desirable that criminal cases are disposed of expeditiously. The danger of having protracted court proceedings is that evidence and in some instances witnesses might disappear leading to unjustifiable acquittals. This trend is undesirable as it defeats the whole essence of initiating the proceedings. Worse still, it becomes a sheer waste of resources which would have been employed in other productive sectors. In order to achieve expedience, there is a corresponding need to eliminate and avoid cumbersome court procedures.

iv) Improving Conditions of Service for employees engaged in Criminal Justice Administration

People employed in these institutions are equally humans who face the same challenges as those faced by other people. This means that they are by no means immune to the common vices in society. The most common vice which has ravaged all sections of society is corruption. Most often than not, the media have carried stories of corruption involving police officers, DEC officers and ACC officers. Among other factors causing this undesirable state of affairs is poor conditions of service. Most of these officers are not well paid. Hence they are prone to corruption. Therefore, the government should manifest political will by adequately funding these institutions and improving the conditions of service for the employees so as to reduce the incidences of corruption within these institutions.

v) Establishing a vibrant and independent press and civil society : this is important in the sense that it complements the efforts of government in educating the general public on the importance of obeying the law. It must be stated that respect for the law is critical in the fight against crime. If people generally develop an attitude of having respect for the law, the issue of punishment cannot

arise. Therefore, it is important to have an educated citizenry which appreciates the value of obeying and respecting the law. This can only be achieved by disseminating information to the people.

Moreover, the media and civil society play a vital role in exposing cases of corruption and abuse of authority. In order to do this, the media and civil society require freedom of speech. Hence, a statutory regulated media is undesirable and ought not to be accepted. This explains why media houses are against the idea of enacting legislation to regulate their operations.

vi) Protection of whistle blowers: guaranteeing protection for the whistle blowers will encourage the general public to report cases of corruption, abuse of authority to relevant authorities for appropriate action to be taken. This will equally encourage willingness on people to volunteer to be witnesses, there by securing convictions.

vii) Ensuring that prisons have necessary educational facilities: it has often been argued that prisons are a bleeding ground for hardcore criminals. This is because convicts tend to advance from bad to worse while in prison. Despite the severe punishment inflicted on them, they do not seem to change. This is attributed to the absence of educational facilities which should be used to teach these prisoners on the importance of respecting the law. Therefore, it is important that prisons have educational facilities so that prisoners can be helped to come back to the human fold as responsible citizens.

1.31 Conclusion

In conclusion, as this essay has attempted to show, punishment in Zambia plays a number of roles. However, its successful employment is hampered by a number of factors. As a result, punishment does not seem to be effective and efficient. Efforts have been made to ensure that the institution of

punishment remains relevant in the administration of criminal justice but have failed because the reformers have failed to appreciate that the major impeding factor is lack of political will on the part of government. Unless and until the government manifests political will, the role of punishment in the administration of criminal justice shall remain an illusion.

BIBLIOGRAPHY

- Adeneas, J. (1966) The General Preventive Effects of Punishment. 114 U Pa LR 949
- Chigunta et. al. (1998) Will the Poor Always Be with Us? Committee Against Poverty, Lusaka.
- Dodge, C.R. (1979) A World Without Prisons. Lexington Books, Toronto.
- Durkheim, E. (1984) The Division of Labour in Society, MacMillan, London, (1984).
- Garner, B.A. (2004) (ed) Black's Law Dictionary. 8th ed. St Paul Thompson West Publishing Co.
- Hart, H.L.A. (1966) Law and Morality. Oxford Press, London.
- Hatchard, J and Ndulo, M. (1994) Readings in Criminal Law and Criminology in Zambia. Multimedia Publications, Lusaka.
- Hirsch, A.V. (1985) Past or Future Crimes. Manchester University Press, Manchester.
- Honderich, T. (1984) Punishment: The Supposed Justifications, Harmondsworth, Penguin.
- Kahan, D. (1996) What do Alternative Sanctions Mean? 63 U – Chic Law Review 591
- Kant, I. (1965) The Metaphysical Elements of Justice, Indianapolis: Bobbs – Merrill.
- Kumwenda, C. (1978) Theories of Punishment and Zambian Legal Order. Obligatory Essay submitted to the School of Law in partial fulfillment of the award of Bachelor of Laws Degree.
- Mbao, M.L. (1983) Legal Aspects of Uncontrolled and Unplanned Urban Settlement in Zambia: A Comment on the Housing (Statutory and Improvement Areas) Act, 1974. Zambia Law Journal, Vol. 15.
- McClean, J.D and Wood, J.C. (1969) Criminal Justice and Treatment of the offenders. Sweet & Maxwell, London.
- Morris, H. (1968) Persons and Punishment. 52 The Monist 475
- Mueller, G.O.W. (1977) Sentencing Process and Purpose. Charles C. Thomas, Illinois.

Musonda, F.X. (1998) The Effective Administration of Criminal Justice for the Prevention of Corruption by Public Officials. Legality Journal, UNZA, Lusaka.

Ndulo, M. (1994) Bigamy and An African Society. Zambia Law Journal, Vol. 6 (1994) p.68

Norrie, A. (1998) Simulacra of Morality in Duff, R.A. (1998) (ed), Philosophy and Criminal Law, Cambridge.

Packer, H.L. (1969) The Limits of the Criminal Sanction. Stanford University Press, Stanford.

Pollock, J.M.P. (2007) Ethics and Crime. Wadsworth, New York.

Radin, A.M. Cruel Punishment and Respect Persons: Super Due Process for Death. 535 Cal LRev 1143.

Robinson, P. (1987) Hybrid Principles for Distribution of Criminal Sanctions, North Western Law Review.

Sianondo, C.M. (2005) Criminal Justice, Can the reflection of Customs make the Penal Code more adaptable to Zambia? Obligatory Essay submitted to School of Law in partial fulfillment of the award of Bachelor of Laws Degree.

Sianyabo, J.N. (2007) Alternatives to Imprisonment As Punishment for Less Serious Criminal Offences in Zambia. Obligatory Essay submitted to the School of Law in partial fulfillment of the award of Bachelor of Laws Degree.

The Post, May 20th, 2009.

The Post November 24th, 2009.

Wilson, W. (2003) Criminal Law: Doctrine and Theory. Sweet & Maxwell, London

OTHER PUBLICATIONS

ACC Report, (1999).

Auditor General's Report, (1997).

Beccaria on Crimes and Punishment, Translated by P. Henry. (1963) Bobbs Merrill Co. New York.

Chamber's Encyclopedia (New Revised Edition, 1967), XI 362

Zambia Human Rights Report 1997, pp 46-47 (Afronet: Lusaka).

