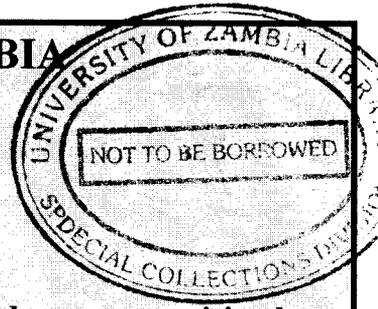


**THE UNIVERSITY OF ZAMBIA**

**SCHOOL OF LAW**



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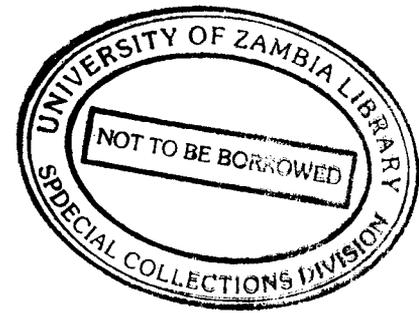
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**CRIMINAL JUSTICE: CAN THE REFLECTION OF CUSTOMS MAKE THE PENAL CODE  
MORE ADAPTABLE TO ZAMBIA?**



**BY**  
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**NOVEMBER 2005.**

**A directed research essay submitted to the school of law of the University of Zambia  
in partial fulfillment of the requirement for the award of Degree of Bachelor of  
Laws (LLB).**

**“Customs, even the most foolish and most cruel, have always their source in the real or apparent utility of the public.” Claude Adrien Helvetius, *Del’esprit* (1758).**

## **DEDICATION**

**“DO NOT EXPLOIT THE POOR BECAUSE THEY ARE POOR AND DO NOT CRUSH THE NEEDY IN COURT, FOR THE LORD WILL TAKE UP THEIR CASE AND WILL PLUNDER THOSE WHO PLUNDER THEM.”**

**Proverbs 22: 22-23**

**TO MY LATE FATHER ADAM MBONE SIANONDO AND MORE SO MY LATE UNCLE WEBSTER SIAMBO. MY MOTHER WHO ALWAYS LIFTED ME TO SEE THE EXTRAORDINARY OUT OF THE ORDINARY.**

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When the will of man corporate with the will of God, man becomes omnipotent.

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## CHAPTER ONE

### THE MEANING OF CUSTOM, ITS STATUS AND THE CONCEPT OF CRIMINAL LAW

#### 1.0 INTRODUCTION

This work is intended primarily to establish as to whether the inclusion of African customs and Zambian customs in particular should be regarded in as far as criminal justice is concerned. This is being it in the defense, sentencing and other aspect of criminal law that would make the penal code more effective. Accordingly, we will look at the definition of the principal legal terms in the field being examined. In looking at the topic in issue, the work will seek to establish that once the customs are fully appreciate in the field of criminal justice, a sense of justice would really be felt by the people intended to be served by that law and hence the law would be owned by society.

According to Webster's New Millennium Dictionary of English, criminal justice is "the system of law enforcement, the bar, the judiciary, corrections, and probation that is directly involved in the apprehension, prosecution, defense, sentencing, incarceration, and supervision of those suspected of or charged with criminal offenses." and criminal justice system is "a series of organizations involved in apprehending, prosecuting, defending, sentencing, and jailing those involved in crimes - including law enforcement, attorneys, judges, courts of law, prisons."<sup>1</sup> The pursuit of criminal justice is, like all forms of justice or fairness or process, essentially the pursuit of an ideal. Thus, criminal justice is a process through which each offender passes from the police to the courts, and back unto the streets.

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<sup>1</sup> [www.criminal-justice-degree.com](http://www.criminal-justice-degree.com).

A penal code can be defined as that portion of a state's laws that deal with defining the elements of particular crimes and specifying the punishment for each crime. Other parts of the laws of a given state can also define crimes and punishments, such as a traffic code or a building safety code, or laws addressing environmental resources by regulating hunting, fishing, or forestry.<sup>2</sup> Others have also described the penal code as, "The written set of criminal laws enacted by legislature, the elements making up the offenses, and the punishment for crime."<sup>3</sup>

One other important aspect of the criminal justice is the need of the observance of the criminal procedure being used. The principal act for such purpose in Zambia is the criminal procedure code<sup>4</sup>. This deals amongst others the questioning of witnesses, bringing of the accused to court by the state and the final disposition of such a case. Criminal procedure has been defined as, "the process used in dealing with violation of criminal law. Like most aspects of the law it often works differently in jurisdictions that follow the civil tradition and common law. The majority of civil law jurisdictions use procedures that has developed based upon the inquisitorial system of fact finding in which judges who are trained undertake an active investigation of the facts through interviewing the various witness and examining the evidence."<sup>5</sup> Therefore criminal procedure code can be described as the law that deals with the process of prosecuting a criminal case.

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<sup>2</sup> En.wikipedia.org.

<sup>3</sup> www.legalterms.html

<sup>4</sup> The Criminal Procedure Code CAP 88 of the Laws of Zambia

<sup>5</sup> En.wikipedia.org/wiki/criminal\_procedure

In criminal matters, actions are taken by the state against an individual for a violation of a law. A criminal matter can result into a sentence such as a fine, probation or time jail. The sentence is imposed upon a defendant who pleads or is found guilty to keep him from acting in the same manner in the future and also to deter others from acting in a similar manner. Since a criminal matter can result in the state taking away a person's freedom, there are additional constitutional protections built into the rules of criminal procedure. This was exhibited in the case of **The People v Michael Chilufya Sata**<sup>6</sup> in which the accused was charged of espionage. Looking at section 123(4) of The criminal Procedure Code which states that, "notwithstanding anything in this section contained, no person charged with an offence under the State Security Act shall be admitted to bail, either pending trial or pending appeal, if the Director of Public Prosecutions certifies that it is likely that the safety of the Republic would thereby prejudiced."<sup>7</sup> The High Court instructed that this section was unconstitutional as it violated Article 13 of the Constitution.

In civil matter, the controversy is between two or more people. People can include individuals, businesses or government agencies. Most often, the result is an award of money to be paid by one party to the other. The judgment is imposed to make the aggrieved person "whole" for the harm that has been caused by the other. A judgment in civil matter does not include the imposition of a criminal sentence. It would be apt to say that the rules of civil procedure are different from those of criminal procedure because proceedings are different.

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<sup>6</sup> Unreported

<sup>7</sup> Section 123(4) of The criminal Procedure Code.

This aspect of the difference between the civil and criminal law and procedure is not only known to the English law as alleged by other scholars<sup>8</sup> but also this is also live and known to the African mind. This was emphasized by O. Elias<sup>9</sup> who has strongly attacked the view that there was no distinction made between civil and criminal wrongs. It does appear preferable to regard any division as being between those acts which affect the safety of the community e.g. witchcraft and those where satisfaction could be obtained by way of compensation between the parties. Therefore there is need to give and pay due regard to the way the particular community administers, in this respect, the criminal justice which includes the problem and effect of crime, the punishment and other aspects which go with the aspect of criminal justice.

### **1.1 MEANING OF CUSTOM**

Before discussing the administration and ascertainment of customary criminal law, and the problems arising from its co-existence and conflict with other laws, it is necessary to be clear in our own minds what we mean by custom which makes "customary Law". The principal problem is the extent to which we are to recognize modern rules of customary law as still being customary law; it is not merely a question of finding the correct term to use. There is a broader point too to consider. How does one distinguish legal rules from those norms which are merely social, moral or religious?

In a period where the habits of the people are changing rapidly and the law as administered in the African courts is changing with them, the difficulty is to know which

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<sup>8</sup> Gullen Gouldsbury, *Great Plateau of Northern Rhodesia*, (London: Arnold: 1961) p564

<sup>9</sup> T.O. Elias, *The Nature of African Customary Law* (London: Manchester University Press, 1962) p.110-119

of the new practices to select as having the force of law behind them, and which to reject as not yet being sufficiently well established or recognized as to be enforceable in the courts. This puts into perspective some of huddles which have to be over come when considering the inclusion of custom into the criminal justice.

Thus, the first and the most prolific sources of traditional legal rulings in customary criminal law are in customs which has been defined in Halsburys Laws of England as follows:

“ A custom is a particular rule which has existed either actually or presumptively from time immemorial, and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm. As regard the matter to which it relates, a custom takes the place of the general common law within the particular locality where it obtains. Custom is unwritten law peculiar to particular localities.”<sup>10</sup>

Thus custom is defined in the everyday sense of “usual practice,” though it has too an ethical value, that it ought to be followed.

Further, a custom exists in a particular locality only in respect of some particular matter; other matters within the same locality are governed by the general common custom. For example in the case of **Martha Mwiya v Alex Mwiya**<sup>11</sup> when discussing the sharing of property the court held that there is no Lozi custom which upon divorce compels a husband to share property acquired during the existence of the marriage. This was only looked at with reference to a particular custom of the Lozi people.

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<sup>10</sup> Halsburys Laws of England 4<sup>th</sup> Ed.

<sup>11</sup> (1977) ZR 113

Once a custom spreads over a wide area it becomes the custom of the realm; and in English law today custom is usage in a particular local community existing from time immemorial.

Thus, custom and customary law in Africa general and Zambian context in particular which we are now discussing, is the law of the people, and is therefore similar to the custom of the realm rather than the local custom or usage; though it does in fact usually obtain within a defined locality like that in **Martha Mwiya v Alex Mwiya**<sup>12</sup>

As noted above, the practice of the people is changing very rapidly in many fields and criminal law is not an exception. The criminal law as administered by the courts, just like the customs and customary law, need to keep pace with the changes in practice, though one may find in some areas that there is a time lag or a variation. The problem in this circumstance may be which law then one ought to follow in such circumstances. Is it the traditional law or the modern evolved law? One may seek guidance from the authority of the Privy Council decision of **Elecko v Officer Administering Government of S. Nigeria**<sup>13</sup> constantly followed by the courts in Africa, that courts may apply modified law if it has won the general assent of the native community subject to it. In the legislation of Ghana, "customary law" is defined as "rules fortified by established usage."<sup>14</sup>

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<sup>12</sup> Ibid

<sup>13</sup> (1931) A.C 662 at 673

<sup>14</sup> A.N.Allot, The Future of Law in Africa, (London: Butter worth and co Ltd, 1960) p.3

Custom in the words of Edgar Bodenheimer has come to be defined as, “habits of actions or pattern of conduct in which are generally observed by classes of people.”<sup>15</sup> Further, custom has also been attributed as to mean, “A rule of conduct, obligatory on those within its scope, established by long usage and more so that a valid custom has the force of law. The requisite therefore to make the custom legally binding are four in number, namely that the custom is reasonable, has been long established, has been uniformly observed and is certain”<sup>16</sup>

Thus, the important customs need to have continued from immemorial antiquity where they are derived from. Many of these customs are, in fact, moral rules. They may relate to rites surrounding important events of life, such as marriage or death.

There exist customs in every society which are concerned with the aspects of social life.<sup>17</sup> However, well-established customs are observed in most activities of most and particular communities. When a custom of this type is violated, society usually react and rightly so by showing social displeasure or disapproval; and if the norm of social intercourse are repeatedly or constantly violated by same person, he or she may soon find himself or herself out side the pale of society.

There is substantial agreement among legal experts that customary criminal laws are to a large extent based on customs which are not promulgated by a legislator or formulated in

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<sup>15</sup> Edgar Bodenheimer, Jurisprudence, The Philosophy and Methods of Law. (Delhi: Universal Law Publishing Co. Pvt. Ltd, 200) P.300

<sup>16</sup> Mulele Margaret Munalula, Legal Process: Zambian Cases, Legislation and Commentaries (Lusaka: UNZA Press, 2004) p.45

<sup>17</sup> James C. Carter, Law: Origin, Growth, and Function, (New York: 1907) p.120

written form by professionally trained judges.<sup>18</sup> It could therefore be apt to regard customary criminal laws as arising as soon as certain usage and customs felt to be legally obligatory are generally and continually observed among members of the society. In this view, law in early society arose out of the non-litigious custom of everyday life which was approved by public opinion. Thus, it is not conflict that initiates rules of legal observance, but the practice of every day directed by the give and take consideration of reasonable intercourse and social cooperation.

Having attempted to establish what custom is, it can safely be stated that it is the base upon which customary criminal law is built. Thus, customary law is the eldest form of law known to humankind. As seen above, defining customary has generated controversy among jurists. In discussing true factors and the definitional problems of what customary law is, A. N. Allot and M Gluckman have observed that

“If we are to investigate the customary law of an African people, when and where do we find it? Is it in the traditional or ancient laws, or the modern (traditionalist might say a perverted) law, infected as it is by non African ideas, administered by non customary courts, studied by jurists, challenged by young generation of those allegedly subjected to it, and recorded in a form which may fundamentally alter its whole character and style (whether the form be the technical language of the anthropologists) <sup>19</sup>

This observation puts into context the problem with which the student of African customary law must grapple. Despite the difficulties with the definition, customary law

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<sup>18</sup> Paul Vinogradoff, “Custom and Law,” in Anthropology and Early Law, ed. L. Krader (New York, 1966), p.19.

<sup>19</sup> Liyoka Kakula, The Law of Marriage and Divorce Among the Malozi of Western Province of Zambia LLM Thesis. University of Zambia, 1982, P4

has been flourishing everywhere, fighting through the colonial period and it is flourishing still throughout Africa and it will remain of vital importance for many decades in directing the lives of society in Zambia.

## 1.2 STATUS OF CUSTOMARY LAW

The question of ultimate place of customary criminal law in Africa general and Zambian legal system in particular, have to be answered before any meaningful plans could be made with regard to the ultimate shape of Zambian legal system.

The position of customary law has been reported from Chipata, by Dr .J. A Barnes when he stated that, "The courts are required by the administration to follow tribal customs and people know that the courts are bound in this way. In fact, however, the courts have continually to deal with new situations and to make decisions which are unprecedented."<sup>20</sup>

Further, the recognition of customary law by the court was exhibited in the case of **Angu v Attah**<sup>21</sup> where their Lordships of the privy council laid down in this Ivory Coast case that, "as is with the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular custom have, by frequent proof in the courts, become notorious that the courts will take judicial notice of them."

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<sup>20</sup> History in a Changing Society, Rhodes Livingstonia Journal, XI (June 1957) pp.56

<sup>21</sup> (1916) P.C 14-28.

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<sup>20</sup> History in a Changing Society, Rhodes Livingstonia Journal, XI (June 1957) pp.56

<sup>21</sup> (1916) P.C 14-28.

This dictum was proved in the later case of **Amissa v Krabah**<sup>22</sup>. The court reasoned that, these witnesses must be knowledgeable about the custom. In the same case just above, the judicial committee when approving this rule observed that.

“Their Lordship have not been informed of any customary law so established (by Judicial notice); and they may observe that it may be convenient if the court in suitable cases would rule as to the native customs of which they think it proper to take judicial notice, specifying, of course, the tribe and taking steps to see that these ruling are reported in a readily accessible manner.”<sup>23</sup>

It is therefore submitted that a judge is not entitled to rely on his own personal knowledge of a rule of customary law, if unsupported by oral testimony or other proof. This was emphasized in the Zambian case of **Kanika v Jairus**<sup>24</sup> where the court citing the case of **Chitamabala v R** reasoned that:

“We could not take judicial notice of African customary law for the court to acquaint itself with customary law would either have to sit with African assessors and seek their advice or receive the evidence of witnesses expert in African customary law or both.”

This shows that the customary law is recognized as part of the Zambian legal system therefore, it deserves to be recognized when dealing with criminal cases.

In the case of **Mphumeya v R**<sup>25</sup> the court held that according to the Chewa customary criminal law the appellant must be regarded as capable of stealing from the complainant,

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<sup>22</sup> (1936) 2 W.A.C.A 30

<sup>23</sup> Ibid

<sup>24</sup> (1967) ZR 71

<sup>25</sup> (1956) R. &N. 240

who is her husband. This is despite the position under the English legal system that the wife is incapable of stealing from the husband. Thus the courts in Zambia recognize customary criminal law. And this may justify the recognition of customs in criminal law as the cases will be dealt with the laws which people are acquainted with.

Further, the Local Court Act has recognized the customary law under section 12 and it states that, "subject to the provision of this Act, a Local court shall administer

- (a) The African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice, morality or incompatible with the provision of any written law."<sup>26</sup>

The recognition of the customary law has been extended to the Subordinate Courts and it says, " subject as hereafter in this section provided nothing in this Act shall deprive the Subordinate Court of the right to observe and to enforce the observance of, or shall deprive any person of the benefit of, any African customary law, such African customary law not being repugnant to justice, equity, or good conscience...."<sup>27</sup> This appreciates the fact that the customary law should be administered by the court not as a matter of privilege but as a matter of a right and to extend such benefits to the person who is rightly claiming it.

Apart from the recognition of customary law as exhibited above in the cases and the statutes, the constitution which is the supreme law of the land recognizes the validity of customary law even where the same is discriminatory. This is in accordance with Article

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<sup>26</sup> Local Court Act Chapter 29

<sup>27</sup> Subordinate Court Act, Cap 28

23(1) which states that, “subject to clause (4), (5) and (6), a law shall not make any provision that is discriminatory either of itself or in its effect.”<sup>28</sup>

Discrimination has been defined under Article 23(3) as to mean, “affording different treatment to different persons attributable, wholly or mainly to their respective description by race, tribe, sex, place of origin, marital status, political opinion, color or creed whereby persons of one such description are subject to disabilities or restrictions to which persons of one such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”<sup>29</sup>

Article 23(4) states that clause 1 (which outlaws any provision that is discriminatory) shall not apply to any law so far as that law provision-

(d) For the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any other law with respect to that matter which is applicable in the case of other person.”<sup>30</sup> Thus even when the customary law is discriminatory, the law still recognizes it as valid law.

Indirectly, the customary law has been recognized under Article 130 of the Constitution which establishes that, “there shall be a House of Chiefs for the Republic which shall be an advisory body to the government on traditional, customary and any other matter referred to it by the president.” More so, Article 131(c) is instructive on the status of

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<sup>28</sup> The Constitution of Zambia, Chapter 1 of the Laws of Zambia

<sup>29</sup> The Constitution of Zambia, Chapter 1 of the Laws of Zambia

<sup>30</sup> Ibid.

customary law and it exhibits that, “notwithstanding Article 130, the House of Chiefs may initiate, discuss and decide on matters that relates to customary law and practices.”<sup>31</sup>

Therefore, it is safe to state that the status of customary law and indeed customary criminal law is well recognized by the Zambian legal system and the court need to be alive to the that fact that customary law is not static but changes with time.

### **1.3 CONCEPT OF CRIMINAL LAW.**

The discussion of ways of dealing with wrongs in customary law has often proceeded along the lines that the conceptions, procedures and sanctions associated with them did not qualify them to be classified as crimes. This led Maine to claim that, “the citizens depend for protection against violence or fraud not on the laws of crime but on the law of Tort,” and that there was no “true criminal law” in early communities.”<sup>32</sup> Lord Hailey’s African survey led him to assert that, “the African practice was to compensate the injured party in such a way as to leave him no worse off that he was before; it did not embrace, except in special circumstances, the idea that an offence was committed against the state.”<sup>33</sup>

Similar claims have often been made about this characteristic of customary law, largely with a view to distinguishing the customary idea of criminal law from those in the modern communities. One such claim is by Goudsbury and Sheane in their work on the Bembas when they state that:

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<sup>31</sup> Ibid.

<sup>32</sup> Allen Milner, The Nigerian Penal System, (London: Sweet and Maxwell, 1972) p.43.

<sup>33</sup> African Conference on Ideal Courts and Customary Law 8<sup>th</sup>-18<sup>th</sup> September, 1963 under the Chairmanship of Ministry of Justice of Tanzania, Sheikh Amri Abedi, p.32

“The distinction between criminal law and civil law was not clear to the native mind except in so far that offences against the king were placed in an entirely different category and assigned different punishments from those meted out to similar offences of the common people against each other.”<sup>34</sup>

Thus, in circumstances where the tribe had no king, what would be considered would be the crimes against the leaders of the particular tribe.

Our concern here is to suggest not only that this view misrepresents the content and function of the customary law but also that it is basically misconceived and unhelpful. It is hard in any system of law to see a single policy motivating a particular sanction. Enough has been said by this time, however, to make it clear that some sanctions of customary law were never seen as being motivated by individual redress but rather by community welfare.<sup>35</sup> Thus, for the case to be motivated by community and not the individual, it means that there was a distinction between civil and criminal law. This is the more reason why Elias strongly attacked the view that there was no distinction made between civil and criminal wrongs it does appear preferable to regard any division as being between those acts which affect the safety of the community e.g. witchcraft and those where satisfaction could be obtained by ways of compensation between the parties.<sup>36</sup> And although the death penalty was sometimes carried out to satisfy the feelings of the kinship and not the general public, the public concern at murder was

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<sup>34</sup> John Hatchard and Muna Ndulo, Readings in Criminal Law and Criminology in Zambia, (Lusaka: Multimedia Publications, 1994) p.1.

<sup>35</sup> Allen Milner, The Nigerian Penal System, (London: Sweet and Maxwell, 1972) p.46

<sup>36</sup> John Hatchard and Muna Ndulo, Readings in Criminal Law and Criminology in Zambia, (Lusaka: Multimedia Publications, 1994) p.1.

commonly marked by only allowing the highest tribunal to hear the case, by public supervision.<sup>37</sup> The highest tribunal is the final stage where the case could be taken. This comes from a background where there are small 'court' dealing with cases.

If this exposition of the criminal concept in customary law is appreciated, the sanctions of criminal law may be more relevant to modern criminal problems if customs are considered than has usually been allowed. One area in which the customs of the people were to be considered to make the law effective is in the statutory offence of bigamy which in Zambia does not carry stigma as in the western world. Thus, if the customs were to be considered this act would have not been criminalized. This is evidenced by less number of prosecuted cases despite the offence being rampant as compared to other crimes.<sup>38</sup> The other aspect where customs can be of value is in the system of sentencing, which is also part of criminal justice system, where the convicts are given manual work which they normally do when they are in the community. Instead, they are given trades and accommodation and this may encourage other to go to prison for the sake of getting trades. Therefore, the customs must be considered so as to find an effective way of dealing with such problems.

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<sup>37</sup> Allen Milner, The Nigerian Penal System, (London: Sweet and Maxwell, 1972) p.47

<sup>38</sup> The number of cases reported are very few.

## CHAPTER TWO

### THE CAUSES OF CRIME, ITS EFFECT AND PREVENTION.

#### 2.0 THE CAUSES OF CRIME

One of the least understood topics in the fields of criminology and criminal justice today is that of rural crime where customs mainly regulate the life of people. The reason is simple. Mainly, research on rural crime remains sparse. Scholars and researchers have spent most of their efforts trying to understand urban patterns of crime.<sup>39</sup> Although crime has traditionally been seen as an urban concern, there are a number of reasons for considering perceptions and experiences of it in rural areas. These include the fact that crime may be rising in such areas, may be *perceived* to be rising, or may take forms which are specifically rural (e.g. poaching, farm crime or crimes against wildlife).<sup>40</sup>

Crime, so to say, is a shadow of civilization. Its size and shape depend upon the form of society and hence change with the growth and development of the system. Every age has its new and special problems of crime, although in so many ways, the crime problem is as old as human kind.

However, the perception of crime differs from each tribal grouping and this may cause a problem in defining it. Thus, "The distinction between criminal law and civil law was not clear to the native mind except in so far that offences against the king were placed

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<sup>39</sup> [www.thestationeryoffice.co.uk](http://www.thestationeryoffice.co.uk)

<sup>40</sup> Ibid

entirely in a different category and assigned different punishments from those meted out to similar offences of the common people against each other.”<sup>41</sup>

Moreover, the methods used to commit crime are new in the sense that they partake of modern knowledge and technique. The causes of crime in rural areas are similar in many ways to those in towns and cities. The reasons given for the increase in crime include unemployment, economic backwardness, over population, illiteracy and inadequate equipment of the police force. The increase in crime both national and transnational is generally regarded as the result of interplay between socio-economic changes.<sup>42</sup>

There is a change in the forms and dimensions of criminality with the changes in the living style of society and social values. There is the change in the form of criminality when society itself changes culturally and technologically. The relation between human behavior and societal change is the crucial factor in understanding not only crime but also development itself. Crime occurs and seems to increase with the acceleration of change and development, which in recent years has been specially associated with such crucial processes as industrialization, urbanization, social mobility and the development of technology.

Thus, in the problem and perspective of crime, countless people have been killed, maimed, impoverished and mentally maimed by criminals and people from all walks of

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<sup>41</sup> Gullen Gouldsbury, Great Plateau of Northern Rhodesia, London: Arnold: 1961.p78

<sup>42</sup>

life are living in constant fear of being robbed and killed.<sup>43</sup> Many crimes have increased for example, in the instance of defilement; statistics were in 1999 at 263 to 2002 they were ranked at 865 cases.<sup>44</sup> These statistics are based on the cases reported to the police. Thus the statistics could be greater than the ones reported and shown by the police. This is because some of the cases are not reported due to many reasons ranging from social to economic and even political.

As a result of this situation, many people and non-governmental organization throughout the country are calling for stiff punishment, harsh treatment and sentences to be meted against the perpetrators of such crimes which would have been mated had the level of crime not reached an alarming stage. These demands have also come from the law enforcement agencies and the general public<sup>45</sup>. This demand by the law enforcement agencies came in form of a complaint and it is aptly stated that, "police officers are properly taught how to use the penal code when enforcing the law. However, the major difficult they find is that the penal code has not been frequently amended, hence, there is very little differences contained there in that distinguish it from the Northern Rhodesia Penal Code."<sup>46</sup> The mischief which has arisen is that some new forms of crimes are being witnessed and the laws need to be alive to that so as to reflect the customs, which reflect people's way of life at that particular time.

This is not at all surprising for the public's attitude towards criminals which is an aggressive and defensive one; they show a desire for vengeance which stems from a

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<sup>43</sup> John Hatchard and Muna Ndulo, Readings in Criminal Law and Criminology in Zambia, (Lusaka: Multimedia Publications, 1994) p.67

<sup>44</sup> Joseph Daka, Sexual Offences in Zambia and How the Police Deal with them, (Lusaka: NP, 2004) p.141

<sup>45</sup> John Hatchard and Muna Ndulo, Readings in Criminal Law and Criminology in Zambia p.67

<sup>46</sup> Ibid. P.1

feeling of insecurity.<sup>47</sup> This can be attributed to lack of laws which adequately tackle the problem of crime. This is because of increase in the crime rate and without remedies which reflect the customs of the community. A great number of peaceful solutions were possible which include compensation in kind, restitution, mediation, community service work such as road repairs, and so on. In this judicial process, because of the collectivist nature of earlier Zambian society, the victim was certain of obtaining compensation. The probable insolvency of the person who caused the damage was mitigated by the certain contribution of every member of the group. This was where the principle of the individualization of criminal sanctions broke down. Experience has shown us that an uncle might take his nephew's place<sup>48</sup>. The law can only reach and save this purpose by including the customs of the people in the criminal justice system.

Having seen the cause of crime it can be stated that at present as well as at any other time the central issue in solving the crime problem lies not in legislation, nor in the juristic science, nor in the judicial decision, but in society and as such the customs of the society should be included in the penal code being the principal law which deals with criminal offences. For example, by way of an exception, bigamy should have no been criminalized as this is against the custom of society. This is because, "the average African does not fully accept the idea of a monogamous marriage"<sup>49</sup>. Thus, by its nature it cannot be said to command the same respect in a polygamous society as it does in a monogamous society. African society is generally polygamous. It is our conviction that the inclusion of these customs will improve the institutional approach to the problem of crime.

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<sup>47</sup> John Hatchard and Muna Ndulo, Readings in Criminal Law and Criminology in Zambia p.67

<sup>48</sup> see Chapter 2

<sup>49</sup> Muna Ndulo, Bigamy and an African Society, ZLJ, V6, 1974, p.131-32

The recognition of customs in the criminal justice system can be attained by making it explicit that include therein the relevant going practices and the manner of organization of the whole such as mediation and compensation in terms of damages.

## **2.1 THE EFFECT AND PREVENTION OF CRIME**

There is a need for crime prevention solutions which build on existing relationships within rural communities and between such communities and the police. At the same time, care should be taken to avoid promoting a 'siege mentality' in rural areas, since this may ultimately undermine further the capacity of local communities to deal with crime.

It is of course realized that planning for crime prevention, within the context of national socio-economic planning suffers from the vagaries of phenomena that are hard to control, such as population growth, labour migration, economic cycles, unemployment, national disaster as well as from the diminishing effectiveness of traditional social control, such as parental or community influences.<sup>50</sup> The transition from traditional to industrialized society poses a particular challenge in the area of crime prevention and criminal justice. Increased opportunities and the dwindling influence of established form of social control contribute to a rise in criminality with which an unprepared system of criminal justice cannot cope with.

The significance of crime prevention services is recognised not only in the promotion of social order and social justice but also in the productive and necessary protection of

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<sup>50</sup> [www.thestationeryoffice.co.uk](http://www.thestationeryoffice.co.uk)

commerce, industry and the economy. Any measures to be effective must cover not only the criminal justice system and development of police prisons, court, parole, probation and reformatory institutions as an integrated crime prevention mechanism in itself, but also, it must extend to those aspects of education, health, labour, welfare, agriculture, industry and other sector of economy that have obvious relevance for crime production and crime prevention.

Education, health, labours and social welfare programs are likely to have a crime prevention effect. Child care programs designed to reduce the personality defects that lead to potential delinquent behavior, family support programs designed to keep family united so as to foster better child care, educational programs to improve socialization, labour programs to reduce unemployment; and programs to improve mental health are all obvious requirements for effective crime prevention.

The more direct services, such as police, prison, court, probation, parole should have specific programs to deal with crime. These might include measures to increase the police efficiency, improve the training of police officers, and develop new technique in forensic science and crime detection. New building programs to avoid over crowding of prisons, better facilities for probation and parole so as to keep more people out of prison, new court procedures to expedite justice, perhaps programs to integrate and improve the entire justice system including the reform of the law itself if necessary.

Further, the common law system had its influence in the Nepalese judicial system especially in the matters concerning the substantive and procedural aspects of

administration of criminal justice. The principles evolved by the common law system as benefit of doubt, burden of proof and hearsay rule have been incorporated into the Nepalese judicial system.<sup>51</sup> Despite that the judicial system was exposed to the influence of common law system the prison system retained most of its indigenous characteristics. In many countries the responsibility to undertake the administration of prisons is entrusted to the police force or the authorities of similar nature. However in Nepal the practice till the recent time is different and the responsibility is entrusted to the civil servants. It is due to the indigenous mode of carrying out prison administration, the practice of parole, probation is not introduced in Nepal. The point to emphasise is that the way the African used to solve problems in the past (as discussed in chapter two) can be adopted in the current criminal justice system.

It true in the words of Rogers that, "it is often asserted that poverty causes crime. I suggest that crime causes poverty"<sup>52</sup> and it is in the hope to avoid poverty and its spouses that society take all the prudent measures to avoid crime and the effects.

Despite such prudent responses to the ever-lurking threats of victimization, many people are gripped with continuous uncertainty, chronic anxiety, tension and other psychological traumas.<sup>53</sup> Obviously crime victims are made worse off when they are burglarized or mugged or indeed visited by crime in whichever manner it may come.

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<sup>51</sup> [www.thestationeryoffice.co.uk](http://www.thestationeryoffice.co.uk)

<sup>52</sup> Rogers. A. Clites, Causes and Effects: Crime and Poverty (N.T: Freeman Publication, 1997 Vol. 47, No.

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<sup>53</sup> John Hatchard and Muna Ndulo, Readings in Criminal Law and Criminology in Zambia p.67

Thus, the whole society starts growing up under the condition and environment which cannot propagate a culture suspicion as every person is seen as a potential criminal and actually if not a criminal. In fact the majority of the people are more frightened by the possibility of being injured or killed in violence crime encounters than by the greater statistical dangers of death or injury in home or traffic accidents.<sup>54</sup>

Indeed, this fear is not from without, but it is being encountered on information of crime which flourish and which has developed roots in a particular society.

When life styles are altered as a result of crime and homes become "armed camps" the end result is disfigurement of a society and downgrading of the quality of life. Many people avoid leaving their homes unattended for fear that a burglar will ransack the house in their absence. People lock their homes at dusk, but are still fearful of robbers despite iron bars, guard dogs and massive lock on their doors and windows<sup>55</sup>.

The effect of these crimes apart from altering the life style of the people is that they derive business out of the community.<sup>56</sup> This eliminates both the availability of products and services as a source of jobs. Thus a significant and vital proportion of potential earnings or hard earned income of people is dissipated through the wastage of criminal offences. Businesses are discouraged because of low profit and high overhead cost from theft and pilferage.<sup>57</sup>

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<sup>54</sup> Ibid

<sup>55</sup> Ibid

<sup>56</sup> Rogers. A. Clites, Causes and Effects: Crime and Poverty, p.1

<sup>57</sup> Adam Podgorecki, Law and Society (London: Boston, Rutledge and K. Paul, 1974) p.27

The loss of productive activity by those who live by preying on others reduces the output of the area in which they live. Thus crime injures economically both direct victims and other in the crime-ridden neighborhood. The aspect of injury may occur because, "beleaguered businessmen (and business women (addition mine)) are often forced to shorten their business hours and absorb the rising costs of burglar alarms, window bars, iron gates and other security devices to thwart criminals. Extra men are employed to improve security at enterprises.<sup>58</sup> In fact, one third of Lusaka is guarded by one third of Lusaka (security guards) against the other third of Lusaka.<sup>59</sup> This shows how serious crime and its effect can be and therefore the need for society in which it happens to generate the laws to bring it to a halt.

Just as all people are better off in a society where a large portion of people are more educated and more productive, all people in crime infested areas become worse off than they otherwise would be.

It is not just other who are adversely affected by criminals, perpetrators themselves loose ground economically. A large portion of people charged with criminal activities is relatively young. Their criminal activities harm them in several ways. They may spend time incarcerated when they could have been gaining employment experiences. Their criminal records may hamper them in obtaining future employment. They develop attributes and habits that are detrimental to participation in the work place and society in which they reside. For this reason, many criminals condemn themselves to poverty than they would have been if they had not indulged themselves in such vices.

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<sup>58</sup> John Hatchard and Muna Ndulo, Readings in Criminal Law and Criminology in Zambia p.68

<sup>59</sup> Ibid.

In showing the detest for the effect which goes with crime Hilda and Leo Kupper in discussing the punishment in the early societies and among the Ibo tribe of Nigeria stated that:

“Punishment of theft depended on the mode and the object of stealing. Petty thieving in the compounds by women and unimportant men was punished on a first occasion by shaming; the offender was tied up in public to be ridiculed and degraded by the kin and neighbors of the victimized. Those found of persistence theft, and, in particular, of theft of crops from farms and the unguarded yams barns on farming path, lost the protection of their close kin who connived at their abduction, by the lineage which they had injured, for handing over to a slave trader.”<sup>60</sup>

The customary criminal law being dynamic does not allow slave trade, but the fact still remain that the society through the use of their customs are better placed to check the problem of crime and it's effect. Because of the inclusion of customs in the criminal justice, it would not be true to say that criminal pays with his life but that the criminal encounters not the society's lust for vengeance which blocks the rational treatment of the offender, but, instead public indifferences to the disturbance of important values of their customs. Thus the inclusion of customs into the criminal justice would take the interest of both the criminal and the society and this would promote the reformatory aspect of criminals hence reducing substantially the effect of crime in society.

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<sup>60</sup> Hilda Kupper and Leo Kupper, African Law Adaptation and Development, (Los Angeles: University of California, 1965) p.91

## CHAPTER THREE

### TRADITIONAL LEGAL SYSTEM VERSUS THE RECEIVED LAWS AND THEIR EFFECTIVENESS

#### 3.0 TRADITIONAL LEGAL SYSTEM VERSUS THE RECEIVED LAWS.

Almost every country on the African continent has a plurality of legal systems within the bounds of the individual state. Two or more distinct legal systems existing side by side and are clearly to be discerned in the states of Africa. Africa is certainly not the only continent presently possessing a plurality of legal systems, but it is clearly the one where this fascinating type of legal structure prevails. At the moment of contact with the Western world and during the subsequent period of rule by European powers, African people lived according to their own indigenous law and this was the situation obtaining in Zambia at that particular moment.

Therefore it must be noted that Zambia has a dual legal system made up of the general or statutory law and the tribe specific customary law. The general law was based on the English common law and the system.<sup>61</sup> This also includes the sphere of criminal law. This would entail that when the European colonialists came to Africa; they brought their laws with them. It must also be appreciated that, the English did not have a ready-made code to carry over to their territories in Africa.<sup>62</sup> Rather, they brought the common law, as supplemented by their own and territorial legislation. At the end of colonial period,

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<sup>61</sup> Mulele Margaret Munalula, Legal Process: Zambian Cases, Legislation and Commentaries (Lusaka: UNZA Press, 2004) p 52

<sup>62</sup> Seldman, Law and Economic Development in Independent, English-speaking sub-Saharan Africa in (ED) and Law, (Madison: The University of Windsor press, 1968), p. 10-12.

nearly all of Africans had felt the impact of European law.<sup>63</sup> Naturally, this imposition of foreign laws entails a clash with the existing order, that is, customary criminal law and sometimes with religion.

Having that in mind, customary law is merely one aspect of our culture. This is the aspect which employs the force of organized society, to regulate individual and group conduct and to prevent, redress or punish deviation from prescribed social norms.<sup>64</sup> The bringing of the English law has impinged upon African law in its modifying influences on those aspects of indigenous customary law which have so far survived the impact of British legal and cultural invasions.<sup>65</sup> While a greater degree of assimilation seems likely in the case of the African than that of Asian laws it is at least doubtful whether uniformity will ever be ordered by it with English law. A kind of legal *tertium quid* is the most likely phenomenon to emerge from the impact of English upon African legal ideas.<sup>66</sup>

Having regard to the fact that uniformity of the dual system is almost impossible, to live in uniformity it is important that all systems of law, whether their content and unique dynamics, must have some essential elements in common. Our first need, therefore, is to delineate the common elements. To do this we must have a look at society and culture at large in order to find the place of law within the total structure.<sup>67</sup> Criminal law is no exception. We must have some idea of how society works before we can have a full conception of what law is and how it works. Law must have its proper frame of reference.

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<sup>63</sup> A.N.Allot, The Future of Law in Africa, (London: Butter worth and co Ltd, 1960) pp 3-9

<sup>64</sup> S.P Simpson and Ruth, "Law and Social Sciences," *Virginia Law Review* 32, 858 (1946)

<sup>65</sup> T.Olawale Elias, The Nature of African Customary Law (Manchester: Manchester University Press, 1962) p.273

<sup>66</sup> Ibid

<sup>67</sup> E. Adamson Hoebel, The Law of Primitive Man, A Study in Comparative Legal Dynamics (Massachusset: Harvard University Press, 1964) p.5.

Our search is not for models of ideal perfection in law but rather the social reality of the law the community has produced. The law must not be torn from its context as an isolated phenomenon devoid of reference to the social matrix from which it naturally derives.

“Thus, the life of law has not been logic, it has been experience”.<sup>68</sup> It would be true to assert that, “the Indian on the prairie, before there was the white man to put him in the guardhouse, had to have something to keep him from doing wrong. Yes, the Indian on the prairie had a social order to maintain as has every society of man.”<sup>69</sup> Each people have its system of social control and regard should therefore be given if any criminal justice system has to be relevant in a particular society. By the same token of appreciation, that law need to evolve from the society. Accordingly, custom has regularity and so does law. Customs define relations, and so does law. Custom is sanctioned and so is law.<sup>70</sup> This gives justification that customs should be included into the penal code so as to make it more adaptable to the people who are intended to be saved by it.

So, in regard to any rule of law, one must ask whether it was designed solely for the place for which it was made, or whether it is suitable for application outside that place. In this case, the question would be whether English criminal justice system was suitably intended for the indigenous Zambia. For example, at present, the Penal Code and Criminal Procedure Code still in force are carbon copies of British statutes. The colonizers found that they had to prohibit some practices of customary law and the

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<sup>68</sup> O.W.Holmes, Jnr, The Common Law (Boston: n.p: 1881), 1

<sup>69</sup> E. Adamson Hoebel, The Law of Primitive Man, A Study in Comparative Legal Dynamics (Masschuset: Harvard University Press, 1964) p 4

<sup>70</sup> Ibid, p.270

application of that law anywhere in the country by instituting a system of written law. Thus, the scope of application of the customary law was sharply reduced, to the point that its existence became more virtual than real.

One such experience of absurdity in the wholesome application of English criminal system in Zambia was examined in case of **The People v Chitambala**<sup>71</sup> where the defendant was convicted of bigamy. In commenting on this case it was in the observation that, "it is our view that the judge should have taken into account the fact that in an African society, bigamy does not bear the same stigma as in the western society."<sup>72</sup> The average African does not fully accept the idea of a monogamous marriage.<sup>73</sup> Thus, by its nature it cannot be said to command the same respect in a polygamous society as it does in a monogamous society.

Professor Contrain observed that, "all customary law in Africa without exception allows a man to have as many wives as he pleases. The possession of several wives was regarded as a mark of importance and prestige."<sup>74</sup> In bigamy case in Nigeria the judge took this issue into consideration in **R v Bartholomew Prince Well**<sup>75</sup> where the accused married in a Christian ceremony and at that time he was Christian. He later became a Moslem, and being allowed to take up to four wives, he went through a form of marriage by Moslem law. On convicting the accused to one-month imprisonment, the court remarked as follows:

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<sup>71</sup> HC D No. H65/1967

<sup>72</sup> Muna Ndulo, *Bigamy and an African Society*, ZLJ, V6, 1974, p.131-32

<sup>73</sup> J. Collingwood, *Criminal law of East and Central African*, p.134

<sup>74</sup> E. Contain, "The Changing Nature of African Marriage" In *Family Law in Asia and Africa*. Edited by Anderson

<sup>75</sup> (1963) N.R.N.L.R, 54.

“It is very difficult to know what punishment is appropriate. I have sympathy for the accused. I think he told me the truth but ignorance of law is not, of course, an excuse. His wife had a child while they were separated.”

One cannot compare sentences in bigamy cases in the United Kingdom with those in Zambia. There is monogamy which is the only form of marriage recognized by law and it is in the interest of the public that the law be enforced. Here law does not only recognize polygamous marriages but great majority of marriages are polygamous. This was actually the first case of bigamy and there is less than ten (10) cases reported despite the practice being rampant. This shows that the practice in establishing the criminal law should have regard to the customs practiced in the community. They should also have taken into account the fact that the offence of bigamy is not prevalent in Zambia.<sup>76</sup> In taking customs into consideration, it should be done in the light that customary law is dynamic and any change in the way people live should be constantly be observed.

In another circumstance, thus not easy matter to the average African is the modern English law of larceny<sup>77</sup> with its bewildering variety of embezzlement, larceny by a servant and by a bailee, and fraudulent conversion, or the subtle and often perplexing distinction between larceny by trick, obtaining by false pretence, obtaining credit by fraud, and common law cheating. These and other similar instances is what render the criminal side of English law, so unlike its civil side, unsuitable in the total impact it

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<sup>76</sup> Muna Ndulo, Bigamy and an African Society p131-32

<sup>77</sup> As Embodied in the Larceny Act 1861 (Applicable to Zambia virtue of being in existence before 17<sup>th</sup> August, 1911 and the Penal code also reflected it as per section 254 and 265).

marks on African law.<sup>78</sup> It is not all that the idea of larceny or theft is alien to African conception, as indeed our earlier account of the concept of criminal customary law with which its incidence is everywhere vested under customary law will have shown. What is baffling to the indigenous, as also to the vast majority of English men is the wealth of detailed rules and subtle distinctions by which the English criminal law in particular is characterized.

T.O.Elias comments that, “ to the extent which many of the technical rule of English criminal law bears little relation to the norms of social behavior, as understood and practiced in a given African society, with their application to individual offenders therein seen artificial and probably also unjust. That a blatant criminal might and sometimes does go scot-free on the ground that the particular offence charged in the indictment has been called by the wrong titles, or that he is sometimes discharged on a technicality of substantive or procedural law, or again, that an innocent person should occasionally be punished for an offence of which he might only technically be held guilty, serves merely to widen the gulf between the African and “the white man’s law”.”<sup>79</sup> In both instances, no justice is attained and therefore justice in the interest of a particular society may not have been reached. Thus justice or law should take to consideration the customs of people if the criminal law is to be more effective because no technicality would be seen as an escape route for the criminals.

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<sup>78</sup> T.Olawale Elias, The Nature of African Customary Law (Manchester: Manchester University Press, 1962) p 284

<sup>79</sup> Ibid 285

“One other aspect of which law has become a challenge to traditional beliefs and customs is in the work of super natural powers or evil spirits”<sup>80</sup> in the cases of homicide. This needs to be examined in light of the claim of application of principles and rules of automatism. This fact was examined in Kenya in the case of **Muswi s/o Musele v. R** <sup>81</sup> where the accused under statute was convicted for having killed his wife believing that she was bitching him. The accused knew that it was illegal to do so but being confused as to the morality of the act. Milner in commenting on the case stated that, “it seems fairly clear that his confusion as to the rightness or wrongness of what he was doing provides him a defense.”<sup>82</sup> Even according to the English law he had no appreciation of his action, and the refusal above all of custom would really spur a sense of unjust because witchcraft is considered undesirable to society it must be admitted as a defense.

The courts of Sudan had occasions to deal with complex cases of homicide. In some of these cases the defendant mistook her victim for a ghost or witch, or supernatural being. In others, the accused claimed that she killed the victim because she was “possessed” by evil spirit which commanded her to kill the decedent.<sup>83</sup> The crucial issue is whether being “possessed” by a spirit or spirits at the time of the commission of the offence could be said to amount to disease of the mind,<sup>84</sup> or a kind of “somnambulism”<sup>85</sup> or similar trances. In the case of **Sudan Government v Mohammed Ahamed Mohammed Mohammedan**.<sup>86</sup> The accused, walking alone at night on a path between two villages believed to be haunted by ghosts saw a figure which he took as that of a man. The head

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<sup>80</sup> R v Burgess 2 W.L.R (1991) (C.A Criminal Division), Per Lord Lane C.J

<sup>81</sup> (1956), 23 E.A.C.A 622.

<sup>82</sup> Allan Milner, African Penal System, p334

<sup>83</sup> S.E Kulusika Penitential Redemption: Law as an Instrument of Change, ZLJ, V33, p.86

<sup>84</sup> R v Burgess 2 W.L.R (1991) (C.A Criminal Division), Per Lord Lane C.J

<sup>85</sup> D. Handerson and R.D. Gillespie, A Textbook of Psychiatry, 125, 191(7<sup>th</sup> Edition, 1950)

<sup>86</sup> (1948) AC CP. 1748; DP Maj. Ct 41.C3 48.

was wrapped and arms folded. He called a greeting and then asked who it was, but there was no reply. Frightened and thinking the figure might be or possibly was a ghost, the accused speared it and ran on to the next village where he told no one of his adventure. He found that he had killed a man. The accused was convicted of murder and sentenced to death by a major court presided over E. J Bickerrsteth, District Commissioner, sitting at Daein on 8<sup>th</sup> January, 1948. The court made a strong recommendation for mercy.

In supporting the recommendation for mercy G.D. Lampen. Governor of Darfur province wrote to the chief Justice on 29<sup>th</sup> January 1948:

“... Belief in ghosts is common, and perhaps universal amongst these people. The Maalia, (*tribe*) who are not Baggara, are reputedly rather a timid race. One has to consider the effect on a timid man, who has no doubt at all that ghosts do exist, meeting a silent figure after dark in a reputedly haunted spot.”

Govern Lampen reduced the sentence to six years, although Chief Justice Maclagan confirmed the finding of murder. The reader may wonder why the chief justice confirmed the conviction despite the fact that G.D. Lampen, Governor of Darfur province, made a strong case in support of the universal belief in ghost among the Maalia people.<sup>87</sup> This is because the belief in the ghost being established and accepted by the court should have entitled the accused to acquittal. Though this is not to encourage people committing murder under the influence of the spirits, the change must be gradual.<sup>88</sup>

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<sup>87</sup> S.E Kulusika Penitential Redemption: Law as an Instrument of Change, ZLJ, V33, p. 89

<sup>88</sup> See page 36 – 37 .

In another case of **Sudan Government v Adut Manyang**.<sup>89</sup> The accused killed her husband. The deceased moved with his wife and other members of the family from his own relatives to live among the relatives of the wife. From that time till the day of the murder, they appeared to have lived and cultivated in a normal way. From time to time they would call in the "man of god" to deal with sickness of the children consistence with the tribal customs.

On the fateful night the deceased lay down to sleep in their usual way, with the two older children between them. It was a dark, moonless night and there was no fire in the hut. In the middle of the night, the defendant got up made her way over to her husband, picked up his crab and hit him on the head. Then, as he crawled out of the door, she stabbed him from behind through his legs and up into his stomach. He died a few minutes later of the spear wound.

The accused was charged with murder. In defense she pleaded that at the time of killing she was possessed by one or all of the spirit or spirits of Garang, Abuk and Macardit, that she suffered from delusions of spirit possession. The other defense she raised was that some spirit suddenly came to her in the middle of the night and told her husband, that she had a brainstorm or similar seizure, in the grip of which not knowing fully what she was doing she killed her husband. The accused was tried by a major court presided over by J. M. Hunter of murder and sentenced to imprisonment for life. This is surprising as delusion or "possession" by evil spirit is a situation similar to mental disorder which the court could classify as insane automatism or non-insane automatism which in both cases

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<sup>89</sup> (1943) AC CP 311 43; EP Maj. Ct 41. C 22 43.

would have earned an acquittal. This is because it had been proved that the accused had a disease of the mind.

The above decision might have been arrived with the case of **Sudan government v Killo Butti and another**<sup>90</sup> where the two accused persons caused the death of a person by beating him with sticks and strangling him with a rope. The accused suspected the victim of bewitching the spirit of the first accused's dead son by sitting on his grave. The defendants were convicted of murder and sentenced to fifteen years imprisonment. The governor general confirmed the findings but altered the sentence on each accused to seven years, instead of five years imprisonment as recommended by Barclay Black, the acting governor of Mongolla province. In his recommendation, Barclay Black wrote to the chief justice as follows:

“I personally have had a regrettably large experience on such cases. As to whether the deceased believed to be a wizard ...you will notice that both accused said that he was a sorcerer. In such a case as this it matters little whether the suspected person has or has not a sinister reputation as regard sorcery. If an ordinary person un suspected of sorcery puts a piece of ostrich meat in another person's land or sits on a grave, it is quite sufficient to bring down upon him the charge of sorcery in the case concerned”

As regards to the sentence the governor stressed the duty of the government to employ law as an instrument of change among the so-called savages of the south Sudan, so as to prevent them from hiding behind the façade of traditional belief to commit heinous crimes. Barclay Black, in part, wrote,

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<sup>90</sup> (1928) AC CP 22428; Maj. Ct 41.C 14 28

“... I should have recommended that the sentence be reduced to five years...my reason being that sorcery is to these savages a very real and fearsome thing, and when they believe a case to have occurred, age long custom makes them kill the suspected person. I do not recommend lighter sentence as is our duty to impress on these people that such killings are not looked upon lightly by the government.”

The statement of the governor shows clearly that the aim of the administration justice was not only to deter the natives from relying too much on their beliefs regarding witches and evil spirits but also to emancipate from them age long custom. The two immediate cited cases illustrates the futility of government policy in combating traditional beliefs, when it is carried too far without regard to certain psychopathic factors under which the defendant was seized at the time of the commission of the offence. As a final observation it could be claimed that the sentences passed by the courts in the cases above may be called as unjustifiable because in most of them the defendants had been held to be reasonable as they satisfy the test of good faith and honest belief as in section 10 of the Penal Code of Zambia.

What is clear is that the courts had recognized that everyone, even the savages, should enjoy their right to remain free from punishment, and punishment should be imposed where culpability so justifies. In addition the courts were to fulfill a mission of breaking the hold of witchcraft and superstition which had corrupted the mind of indigenous people. It was believed that this break was necessary for fostering advancement towards a more affluent society enjoying the blessings, if any, of modernity. This requires delicate

balance between doing justice to tradition notion and striving to build a modern nation.<sup>91</sup> Transition from traditional society to modernity is a process that governmental policy must achieve step-by-step rather than by major leap, even if that leap measures only to a kind of a frog leap. What the cases above establish was the desire to major leap. This should not be the case more especially with an appreciation that custom is dynamic. Thus, as the society evolves in terms of its customs so should the criminal justice so that society may have a sense of the law being propagated.

### **3.1 THE PURPOSE OF PUNISHMENT UNDER THE ENGLISH LAW AND CUSTOMARY CRIMINAL LAW.**

It is obvious desirable that crime should be reduced, for the damages and distresses caused by criminal behaviour are enormous.<sup>92</sup> Attempts to bring about this desirable reduction can take many forms. We are primarily concerned with the generation of the penal system, that part of the official apparatus of society which deals with the offenders. The term reduction of crime is used because, "it is believed that since for the time being we cannot eradicate crime the real issue is containing it at a tolerable levels. Any discussion of punishment might as well introduce the subject by attempting to discuss what is meant or understood by punishment? 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."<sup>93</sup>

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<sup>91</sup> S.E Kulusika Penitential Redemption: Law as an Instrument of Change, ZLJ, V33, p 94

<sup>92</sup> See Chapter Two under the heading the effect of crime.

<sup>93</sup> Muna Ndulo, Bigamy and an African Society p 68

The punishment extended to that individual would mean that he has gone off the tangent of society norms. And the infliction of punishment being immoral on itself, there must be therefore a justification for exacting such a punishment. That is punishment is a less evil than evil it seeks to prevent, namely crime.

In exacting these sentences, the penal system operates in a number of styles. The enactment of criminal legislation, declaring and defining a number of prohibited acts, has a purpose and effect of its own. It indicates society's disapproval, and gives fair warning of the existence of criminal sanctions.<sup>94</sup> It is in recognition of this that the courts determines guilty or innocence, and selects the proper form of treatment for the guilty.<sup>95</sup> In selecting the sentences, and in the public commentary which often accompanies the pronouncement of sentences, the court also declares the policy of society where the crime takes place. This was exhibited in the case of **Emmanuel Phiri v The People**<sup>96</sup> where the court stated that, "We agree. We must point out that rape is a very serious crime which calls for appropriate custodian sentences to mark the gravity of the offence, to emphasize public disapproval, to punish offenders, and, above all, to protect women." Thus, the court declares the purpose and aim of sentencing.

The aims of sentencing are now considered to be retribution, deterrent and reformation<sup>97</sup> and modern sentencing policy reflects a combination of several or all of these Forms,<sup>98</sup> or purposes. The retributive element is intended to show public revulsion

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<sup>94</sup> American Law Institute's Model Penal Code S.102 (1)

<sup>95</sup> J.D. McClean and J.C. Wood, Criminal Justice and The treatment of Offenders, (London: Sweet and Maxwell, 1969), p 16

<sup>96</sup> (1982) ZR 77

<sup>97</sup> R v Sergeant (1974) 60 Cr App. Rep. 74

<sup>98</sup> Smith and Hogan, Criminal Law, 4<sup>th</sup> edition (London: Buttersworth, 1978) p.4

from the offence and to punish the offender for his wrong conduct.<sup>99</sup> Few people would base a justification of punishment on ideas of retribution, certainly not if this means vengeance. It is true that the thinking of criminal law is essentially concerned with the moral blameworthy and that acts are defined as criminal because they are seen as to be blameworthy.<sup>100</sup> In practice, retribution may have a part in sentencing but not all as the basis of the whole operation.<sup>101</sup> This is in appreciation that the modern sentencing is a hybrid of other purposes of punishment.

The deterrence purpose of punishment simply suggests that a criminal should be treated in such a way that others will be deterred from breaking the law. Thus, deterrent is based on the premises that, when punishment is harsh and severe, criminals and the would be criminals would be frightened and thus deterred from committing crimes.<sup>102</sup> Thus, the deterrent as a purpose of punishment aims at deterring not only the actual offender from further offences<sup>103</sup> but also potential offenders from breaking the law. The deterrent might be making the prison experience unbearable and therefore an object lesson. The public gains equal security whether the offender himself be amended by wholesome correction or whether he be disabled from doing further harm and if the penalty fails of both effect, as it may do, still the terror of his example remains as a warning to other citizens.<sup>104</sup>

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<sup>99</sup> Halsbury's Laws of England, 4<sup>th</sup>, Ed. Parag. 1188

<sup>100</sup> Peter Brett, An inquiry into Criminal guilt. (Sydney: Law Books Co. of Australia, 1962)P34

<sup>101</sup> Muna Ndulo, Bigamy and an African Society p 69

<sup>102</sup> R v Hall and Brown (1950) 2 Cr. App. Rep, 322

<sup>103</sup> Ibid.

<sup>104</sup> Commentaries on the Laws of England, (16<sup>th</sup> ed) V.4, Chapter 1, p 11-12.

The reformatory purpose of punishment sees in the readjustment of the offender to the demands of society as being the greatest need of the criminal justice system. It proceeds on the basis that the prisoner is a sick person.<sup>105</sup> The institutional treatment is now clearly seen as an opportunity for reformatory action, probation shown by the growing emphasis laid upon it by much modern legislation.<sup>106</sup> However, the protection of society is often overriding consideration.<sup>107</sup>

In the light of what has been discussed above, the single question would be how do we cure crime or if not, how do we reduce it? In answering this question, Lord Denning in his evidence to the Royal Commission on capital punishment said that, "the ultimate justification of any punishment is...the emphatic denunciation by the community of that crime."<sup>108</sup> This is true with having in mind that whatever punishment imposed on the criminal, he will eventually return to society and thus the customs of the people must be reflected in dealing with the criminal so that society can readily accept that person. In any way, it would be necessary when dealing with these punishments that society is dynamic and this demands that punishment should be looked in the evolving customs.

In view of this, the community is entitled to expect the courts to reflect its own disapproval of the crime, and punish accordingly<sup>109</sup> in light of their culture and customs. Therefore, the argument can certainly be put forward that the attitude of customary practices may be of use in criminal adjudication in these communities. This is true in that

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<sup>105</sup> Muna Ndulo, Bigamy and an African Society p 69

<sup>106</sup> The Introduction of country service Order.

<sup>107</sup> R v O'Driscoll (1980) 8 Cr. App. Rep. (s) 121

<sup>108</sup> Report, cmd. paragraph 63

<sup>109</sup> J.E. Hall Williams, The English Penal System in Transition, (London: Buttersworth, 1970) p, 13

habit and attitude cannot easily be legislated away<sup>110</sup> and as such the societies and their customs are better placed to deal with criminals. Thus if the custom, being the way of life of people, are included in the penal system, sanctions would be applied in such a way as to allow the community to resume its ordinary life as quickly as possible and with the minimum disturbance. The sanctions brought to bear by the community upon the criminals are designed to put pressure upon them to conform to the rule. If they are effective, and indeed are, Allan says that it does not matter very much whether we call them social or legal, or remedial or penal.<sup>111</sup>

There is much in the customary criminal law that is admirable and that could be included and be coped by the current penal code. These ideas do, after all reflect basic ideals and, though developed to meet the needs of communities far removed in nature from those today's cities, they may on examination give guides in the direction of penal policy and sentencing.

If we turn to the actual administration between English and customary criminal justice the difficult arises when there is no reflection of the way people live and deal with the criminals. The first and perhaps the most obvious one is the predominance of imprisonment as an almost invariable mode of punishing nearly all criminals. As Major G. St. J. Orde-Browne has rightly remarked:

“ European penology is still dominated by incarceration as the best, indeed almost the only way of dealing with the offenders, medieval ingenuity afforded alternatives of

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<sup>110</sup> Allan Milner, The Nigerian Penal System, (London: Sweet and Maxwell, 1970) p. 23

<sup>111</sup> Ibid

varying ghastliness, but these have been abandoned.”<sup>112</sup> For example, assessing the damages to be remedied was and is still done on the basis of the currency that is used in the society at the time: chickens, goats, cows, and so on.<sup>113</sup> Further punishment like banishment and sending into exile was more than a moral threat; it was actually used against certain stubborn and hardened individuals. Traditional Zambia laws are collectivists, and this collectivist character may be understood from the very nature of African and Zambian societies. Thus, prisons have inadequacies proceeding from the point view of the African. For example, if someone has been found guilty of manslaughter and is thrown into jail without at the same time made to pay the blood-money to his victim’s surviving relations as required by the customary law not only such deprives the relative but also the general public are infuriated by the procedure<sup>114</sup>. Imprisonment benefits the Zambian government by this providing it with another servant, while it does nothing to assuage personal grief of the family or satisfy the expectations of the community where the criminal would be expected to live when he serves his term. No doubt, the criminal may feel alien to the community and hence ostracized and this endangers the aspect of curing the crime in that person and even the community. Hence, customs should be included. There is nothing wrong with community service, but the family must be remedied first.

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<sup>112</sup> Jnl.Roy.Afr.Soc. Vol.32 No.127, April 1933, pp 148-59, at page 158

<sup>113</sup> Kalongo Mbikayi, "Individualisation et collectivisation du rapport juridique de responsabilité en droit privé zaïrois" in Annales de la Faculté de droit, Kinshasa, Presses universitaires de Zaïre, 1972, pp. 37-49 (Translation)

<sup>114</sup> T.Olawale Elias, The Nature of African Customary Law (Manchester: Manchester University Press, 1962) p 286

### 3.2 REMEDIES REFLECTING THE NORMS OF THE SOCIETY.

In punishing these offenders some punishments which are always seen as to correct the crime prevalent are not the same as is in Africa hence the change be called and the inclusion of customs in the penal code be effected. For example, "use of imprisonment as a form of punishment in African societies is that it does not have acquired proper appraisal of its aim and purpose. Indeed, instances have been quoted to show how prisons have at one time or another been regarded among certain Africans as worthy of being patronized on account of their superior living amenities and easier opportunities they often offer to the inmates to learn trade that are unavailable in their homes. Persons have been known to go out of their way deliberately to commit offences and parents have been reported as having incited their sons to do so, with the sole purpose of achieving such (to them) worthwhile ambitions.<sup>115</sup> This actually shows that the abandoning of the way people live, customs, may lead in supporting crime and not preventing it. It would therefore be suggested that the inclusion of customs being the way people live would in fact reduce the rate of crime, as you will be dealing with the root of the crime problem.

Again, the work prisoners do for the government outside the prisons consists mainly or necessary of public services like making or repairing roads, keeping certain public clean and tidy, and so on. These undertakings are by customary usages those always regarded as honorable and public-spirited for all able-bodied members of local community. It is therefore not surprising that those whose only punishment for important crimes is the participation in these praise worth public duties should take pride in their membership of a corporative labor unit that after all provides the traditional beer-drink in the new guise

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<sup>115</sup> Ibid, p.287

of food, living accommodation and, if cap it all, a vocation.<sup>116</sup> Looked at in this way, imprisonment in such an African societies would be seen to defeat its own ends and to save the very reverse of the purpose for which it is intended. Yet, this provides an avenue for the inclusion of custom so as to find the real cure to the problem unlike the cosmetic punishment being dished to the criminals.

In the various attempts to state the object of criminal punishment should be, five different views have been put forward namely, "to punish the criminal for his wrongdoings, to reform him and so turn him into a useful member of society, to deter others from wrong doing by showing him as a bad example, to make him attorney for his iniquity by a process of moral retribution, and to protect the public against an evil doer."<sup>117</sup> These can only be achieved if customs are included in the penal system, mainly the penal code being the principle criminal law. The examples given above make it admissible that the sanctions of customary criminal law may have much more relevance to modern criminal problem than has usually been allowed.

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<sup>116</sup> Ibid

<sup>117</sup> Ibid, p.288

## CHAPTER FOUR

### CONCLUSION PROPOSED REFORM AND RECOMMENDATIONS

#### 4.0 CONCLUSION

In earlier chapters we have outlined the custom in relation to criminal law, followed by the problem of crime and its effect, the remedies and how they may affect the individuals and society. It is inevitable that different opinions will be held on what the criminal justice system should be. The penal law is by no means perfect. Yet if there is one area where there should be a growing willingness to allow reforms is in the area of criminal justice system. This is in full appreciation that law cannot stand aside from the social changes around it.

Indeed, we live in a changing world, and one in which the pace of changes is becoming even greater. Neither the character nor the needs of any given society can become static, and if the law is to fulfill its proper function it must keep pace with the changes. This is not to say that the law must be a straw in the wind by changing even when there is no real need for change.

#### 4.1 PROPOSED REFORM AND RECOMMENDATION

##### **The role of the Judiciary and Lawyers in law reforms**

Further, it would be as wasteful of the still desperately scarce manpower resources to confine the lawyer to strict legal issues. One aspect self evident, is the function of the lawyer in his capacity as a member of society. Thus lawyers who understand effectively the implication of the law must make suggestions and recommendations in the fields in which they are specialists. Further, in interpreting the law, the judiciary should also be

responsive to the needs of the community. This is because a judiciary which is not in tune with society cannot its full part in the development of law. Therefore, the criminal justice system requires constant monitoring by every citizen. Each time a criminal defendant is on trial, the criminal justice system should be observed on how it operates. More importantly, we should look at and be critical of the working of the criminal system itself, whether it be investigation of the crime, the arrest, the interrogation, or the trial.

The law provides the framework for the administration of justice. It is therefore essential that a country's body of laws be adapted to its time and the context of the country. After all, every community must govern itself according to its idea of justice. What should be desired is, not by violence to change its institution, but by reason to change its ideas.

#### **The role of Law Development Commission**

Certain an un up-to-date laws should be modified. Punishments for crimes such as vagrancy reflects moral values often intended for the colonial era, or specifically retargets the most marginalized, in the society where they are not welcome. Yet, "Zambia is no longer a colonial territory; it is no longer ruled by a minority group. The law applicable in Zambia in the pre-independence days was, in the nature of things, a law applicable to that kind of society and although a certain amount has been done since 1964 in removing anomalies, this has really only scratched the surface, the real task of altering the law to the new Zambian society and the type of society Zambia aspires to be is only now beginning."<sup>118</sup> The Law Development Commission should be responsive to such needs of modifying or making new laws. This is so in as far as criminal justice system is concerned because of serious consequences it has on the victim's rights.

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<sup>118</sup> Dr. Kenneth Kaunda, The Functions of Lawyers in Zambia Today, ZLJ, Vol. 3 &4, No. 1 & 2, P.2

### **The needs for legislator to look to the way people live.**

Some minor offences reflect the values of those who instituted the law at that particular time rather than a hurt or loss to an objective victim. Others constitute anti-poor laws designed to limit the movement of poor people in a poor stricken countries.<sup>119</sup> Definitely these do not reflect the way people live in modern societies. If this is left unattended it can spur violence. Further, a sense of injustice amongst the people is inevitable. This of course would violate the principle that law is not something independent of the society it regulates and purports to preserve. It would therefore not be an exaggeration to mention that in the administration of law, there is a deep meaning in all-old customs. The administrators should therefore have this in mind. In Uganda

The offences of loitering, being a rogue, and vagabond, hawking or being an idle or disorderly person have been removed from the statutes books as directly contravening citizens freedom of movement. In Uganda, 50% of the young people in remand homes were charged with being idle and disorderly. Following the removal of the offence in 1999, the numbers of young persons on remand have fallen drastically.<sup>120</sup>

This is also a direct recognition and realization that by considering the way of life of the people, the problem of crime would be reduced. We can learn from the experience of Uganda.

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<sup>119</sup> Section 178. Of the Penal Code states:

(b) Every person wandering or placing himself in any public place to beg or gather alms, or causing or procuring or encouraging any child or children so to do; are deemed idle and disorderly persons, and are liable to imprisonment for one month or to a fine not exceeding sixty penalty units or to both.

<sup>120</sup> Promoting Law Reforms. [www.penalreforms.org](http://www.penalreforms.org). 1999.

The goal is to create a package of penal laws and a criminal justice system that is drawn upon the lessons learned in the past and is tailored to the exigencies of the community. Consequently, law should take into account factors that are often present, such as a lack of resources and personnel. Other than drawing from one legal system, the codes developed should represent a cross-cultural model inspired by a variety of customs in the locality.

The people of today feels alienated from the criminal justice because they have played little if any effective role in making the country's criminal laws and practically non in administering them, except in a highly subordinate role. Therefore, let penal law; if they have been sleeper of long, or if they have been grown unfit for the present time, be by legislator and wise judges confirmed in the execution.<sup>121</sup>

Thus, the judges and legislators must reform the law whenever need to do so arises.

By decriminalizing certain crimes or by reducing certain sentences, it could have a considerable impact on prison overpopulation and reduced congestion in the courts. Many prisons in Zambia are congested with offenders who fall foul of these provisions and are unable to pay the fine often levied by the court and so are ordered to serve a term of imprisonment in lieu.

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<sup>121</sup> Kaunda, Kenneth. The Functions of Lawyers in Zambia Today, ZLJ, Vol. 3 &4, No. 1 &2, p.4

## **How the prison officers should function in a criminal justice system**

Prisons authorities are often overly possessive in discharging their primary duty of keeping people sent to them by the courts in secure custody.<sup>122</sup> Amendments to the laws are required to provide prison officers with the means of drawing the attention of the court to the issue of overcrowdings. For example, an amendment to South Africa Criminal Procedure Act, allows prison heads to apply to court to authorize the release of people who have been granted small bail, but who have been unable to pay. This can be attained by making a deliberate policy for the police service to obtain the verdicts of the convicts. The release should be based on the discretion of the court. This is after considering the reasons advanced by the prison officer. This is how the laws should be responsive to the needs of the people.

More importantly, customary law should be taught at the university so as to give an insight to lawyers on how to implement polices and reveal the laws to suit the people intended.

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<sup>122</sup>Section 5(2) of Prison Act, "Every officer in charge shall supervise and control all matters in connection with the prison to which he is appointed, and shall keep or cause to be kept such records as the Commissioner may from time to time direct and shall be responsible to the Commissioner for the conduct and treatment of prison officers and prisoners under his control, and for the due observance by such officers and prisoners of the provisions of this Act and of all rules, directions and orders made or given thereunder."

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## APPENDIX

Problems of criminal justice have arisen in the generation since the receiving of the laws patterning to criminal justice and that of customs existing in the recipient customary groups in Zambia and this has required rethinking of the laws so as to reflect the customs, which as a result, would advance the efficacy of the criminal justice. Thus, the occupation of Zambia, by the British South African Company, came with an accompaniment of changes in the system of the laws and order. Prior to the arrival of the white settler, the indigenous population enforced customary laws through their own system of court. Though other scholars, like Gouldsbury and Sheen in their work on the Bemba state that:

“The distinction between criminal law and civil law was not clear to the native mind except in so far that offences against the king were placed entirely in a different category and assigned different punishments from those meted out to similar offences of the common people against each other.”<sup>123</sup>

O.Elias<sup>124</sup> has strongly attacked the view that there was no distinction made between civil and criminal wrongs. It does appear preferable to regard any division as being between those acts which affect the safety of the community e.g. witchcraft, and those where satisfaction could be obtained by way of compensation between the parties.

On the part of criminal justice system, the Penal Code remains the prime source of Zambian criminal law and has formed the basis ever since. In fact, in the fifty years since it's enactment, the code has been relatively little altered and in a number of cases, it serves as a reminder of English criminal law as it used to be, as the law in England itself has much changed since 1931.<sup>125</sup> For the Penal code to be a reminder of English criminal law, it means less of the way people used to handle their disputes was regarded in Zambia.

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<sup>123</sup> Gullen Gouldsbury, Great Plateau of Northern Rhodesia, London: Arnold: 1961.

<sup>124</sup> Elias, T.Olawale. The Nature of African Customary Law Manchester: Manchester University Press, 1962

<sup>125</sup> John Hatchard, and Muna Ndulo, Readings in Criminal Law and Criminology in Zambia, (Lusaka: Multimedia Publications, 1994.)p.54

## **STATEMENT OF THE PROBLEM**

Many customary practices followed by tribal groupings in Zambia as regard to criminal justice system, are not reflected in the present Penal Code, Chapter 87 of the laws of Zambia. For example Banishment was a threat that kept many people within the customarily tolerated limits. It was more than a moral threat; it was actually used against certain stubborn and hardened individuals.

Thus, to what extent will reflection of the customary practices, like the one mentioned above, make the Penal Code more adoptable to the Zambian situation?

## **OBJECTIVES**

The main objective of this research is to demonstrate how the inclusion and reflection of customary practices patterning to criminal justice practiced by various tribal groupings in Zambia will make the Penal Code more adaptable to the Zambian situation. The research would also show the extent of conflict between the Penal Code and customary law whose compromise would enhance the realization of a cogent system of criminal justice.

## **RESEARCH QUESTION**

Criminal Justice: Can the reflection of custom practices make the Penal Code more adaptable to Zambia?

## **LITERATURE REVIEW AND THE SIGNIFICANCE OF THE STUDY**

The history of criminal law and justice as it stands today in Zambia is characterized by the conflict between the received laws and the custom practices which the indigenous people hold so dear to their life. There have thus been a number of materials on the subject of criminal law to which reference has been made.

Among the works considered is the book by Joseph Daka<sup>126</sup>. In this work, he traces the traditional way of understanding defilement with the view of evaluating the effect it contributes to increases in the case of defilement. This essay will however explore how the criminal justice system would have been made more effective to combat the cases of criminal nature by the inclusion of traditional way of solving problems. This will be done with an eye that custom is not static but that it is dynamic and it changes with time to meet new challenges.

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<sup>126</sup> Joseph Daka, Sexual Offences in Zambia and How the Police Deal with them, (Lusaka: NP, 2004.756)

Another work is that of John Hatchard and Muna Ndulo<sup>127</sup> where they exhibited the importance of society in detecting crime and hence reduce the number of criminal activities in that particular society. They encourage the society to report the criminal activities within the criminal justice system which appears foreign to them. Thus, this research will extend to advocate for the incorporate the traditional way of resolving conflicts of the particular society. By this reform, it gives a sense of obligation to the society for which that particular legislation is intended and implementing of it does not become a matter of imposition and compulsion but as a voluntary duty.

Additionally, Bertha Musonda Chileshe has written in her essay themed, "Defilement as a Sexual Offence in Zambia: Why the Increases in Defilement Cases Today?" She maintains that customary law marriages contribute to the frequent occurrence of defilement cases. However, she did not address the fact that custom is progressive and not static. What a particular society considered best at a particular time will not be the same infinitum. Thus she like the previous author, Joseph Daka, also just merely states that custom contributes to the increase of the sexual offence. This approach is different to that of this essay whose approach is on the inclusion of customs in the criminal justice system and that the criminal justice system should be dynamic as customs change with time.

#### **METHODOLOGY (METHOD OF COLLECTING DATA)**

Research data will be collected largely by conducting desk research. This may be supplemented by conducting interviews in civic society.

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<sup>127</sup> Readings in Criminal Law and Criminology in Zambia, p.65

## **OUTLINE OF HOW TO COVER THE PROBLEM IDENTIFIED**

### **CHAPTER ONE**

#### **The meaning of custom, its status and the concept of criminal law**

1.0 Introduction

1.1 Meaning of custom.

1.2 Status of customary law.

1.3 Concept of criminal law

### **CHAPTER TWO**

#### **The causes of crime, its effect and prevention.**

2.0 The causes of crime

2.1 The effect and prevention of crime

### **CHAPTER THREE**

#### **Traditional legal system versus the received laws and their effectiveness**

3.0 Traditional legal system versus the received laws

3.1 The purpose of punishment under the English and Customary criminal law

3.2 Remedies reflecting the norms of the society

### **CHAPTER FOUR**

#### **Conclusion, Proposed reforms and Recommendations**

4.0 Conclusion

4.1 Proposed reforms and Recommendations