CAN RESTORATIVE JUSTICE BE AN ALTERNATIVE FORM OF JUSTICE TO RETRIBUTIVE JUSTICE IN THE CRIMINAL JUSTICE SYSTEM IN ZAMBIA? A CRITICAL ANALYSIS OF SECTION 8 OF THE CRIMINAL PROCEDURE CODE, CHAPTER 88 OF THE LAWS OF ZAMBIA

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Abstract

In view of the growing prison population and the government's inadequate budgetary funding of the Prisons Service, various options have been explored to find solutions to the problem. This study focuses specifically on the failure by most Magistrates to effectively implement section 8 of the Criminal Procedure Code (CPC), Chapter 88 of the Laws of Zambia. The failure comes in the wake of the realization that the offence covered by section 8 of the CPC is a misdemeanour which allows for victim-offender reconciliation to avoid incarceration and consideration of other restorative justice (RSJ), alternative sentencing options like community sentences, suspended sentences and payment of compensation. Furthermore, although RSJ seems to be a new concept in Zambia, it has been identified worldwide as a new form of effective justice that promotes reconciliation as opposed to Retributive Justice (RTJ) that increases crimes of revenge. Currently, the United Nations Basic Principles on the use of RSJ are not binding on member countries. This means that any country can adopt these rules if it so wishes. Therefore, victims who decide to reconcile cannot enforce their choice in terms of any local or international law. In other words, their right to reconcile is not justiciable, i.e., not enforceable in any Zambian court of law. The writer studied samples of women (and some men) who have been victims of this law. Although several methodologies were employed, the women's law approach which emphasises those dynamics in the law that adversely affect women was instrumental. Data collected for the study include a review of the law, policy and literature on the subject and oral evidence obtained from interviews with respondents and key informants within the Criminal Justice System (CJS) and a non-governmental organization (NGO) working with the Zambia Prisons Service on Care and Counselling (PRISCCA) of prisoners. In essence, the study finds that: (1) Lack of effective implementation of section 8 of the CPC by Magistrates has defeated the spirit or the objective of this law; (2) Excessive reliance on custodial sentencing as opposed to other sentencing options has contributed to the rising prison population and women are the most affected because they usually commit minor offences which are more deserving of treatment according to the principles of Restorative rather than conventional Retributive Justice which governs the current Prison Service. Therefore, the writer's suggested solutions to this problem include mobilising the political will that is necessary to change policy and bring about law reform to incorporate principles of Restorative Justice in the Criminal Justice System for all minor offences, the direct benefit of which will be to reduce overcrowding in Zambia's prisons.

Declaration

I, Chrispin Mubango, certify that this dissertation is my original work; it is an honest and true effort of my personal research. I certify that the work has not been presented anywhere else before for any other thesis.

Signed .....
Date .....

This dissertation was submitted for examination with my approval as the University Supervisor, Professor Julie Stewart

Signed .....
Date .....

Signed .....
Date .....
Professor Julie Stewart
Director of the Southern and Eastern African Regional Centre for Women's Law, University of Zimbabwe (SEARCWL)

Dedication

I dedicate this work to my family for the support rendered to me from the beginning of this program at SEARCWL up to the end and for inspiring me to work hard, I say, God bless you all.

To all my classmates on this program and for your dedicated support, I say, thank you so much for this.

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To the SEARCWL staff and lecturers, for the wonderful assistance given to me whenever I needed it. To you all, I say, thank you so much for this.

List of abbreviations and acronyms

AOABH	Assault occasioning actual bodily harm
CJS	Criminal Justice System
CPC	Criminal Procedure Code, Chapter 88 of the Laws of Zambia
FGC	Family Group Conference
NGO	Non-governmental organisation
PRISCCA	Prisons Care and Counselling Association
RSJ	Restorative justice
RTJ	Retributive justice
SGB	Standard General Body
SEARCWL	Southern and Eastern African Regional Centre for Women's Law, University of Zimbabwe
TC	Traditional Court
TRCR	Truth and Reconciliation Commission Report
UN	United Nations

Currency Exchange Rate

US$1 to K11 (Zambian Kwacha)

List of human right instruments

Council of Europe Framework for the use of Mediation

Council of Europe Recommendation Number R (99) 19

European Commission Framework Decision on the Standing of Victims in Criminal Proceedings

European Directive on the Minimum Standards on the Rights, Support and Protection of Victims of Crime

International Covenant on Civil and Political Rights

United Nations Basic Principles on the use of Restorative Justice

United Nations Universal Declaration of Human Rights

List of legislation

Malawi

Sections 339 and 340 of the Criminal Procedure and Evidence Code, Chapter 8:01 of the Laws of Malawi

South Africa

Justice Bill B-49 of 2002

Plea and Sentencing Agreement Act in accordance with section 105A of the Criminal Procedure Code, No. 51 of 1977

Probation Services Act, No. 116 of 1991

Zambia

Anti-Gender Based Violence Act, No. 1 of 2011

Chiefs Act, Chapter 287 of the Laws of Zambia

Constitution of Zambia, Chapter 1, Bill of Rights

Constitution of Zambia, Chapter 1 (Amendment Bill No. 16 of 2016) of the Laws of Zambia

Criminal Procedure Code, Chapter 88 of the Laws of Zambia (CPC)

Penal Code, Chapter 87 of the Laws of Zambia

Prisons Act, Chapter 97 of the Laws of Zambia

Zambia Police Act, Chapter 107 of the Laws of Zambia

List of cases

Canada

R v Moses 11 C.R. (4th) 357, (1992) 3 C.N.L.R. 116, 71 c.c.c. (3d) 347

Malawi

Lawe v Rep (1997) 2 MLR 25

Rep v Tomasi (1977) 2 MLR 70

South Africa

State v Khumalo 1973 (3) SA 698

Zambia

Banda v The People (2002) AHRLR 260 (ZaHC 1999)

The People v Chigariro (1974) ZR (H.C.)

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Executive summary

The research is one of the minimum requirements for the partial fulfilment of the Masters Degree in Women's Law at the Southern and Eastern African Regional Centre for Women's Law, Faculty of Law, University of Zimbabwe (SEARCWL) in 2016. The research is an overview of the analysis of section 8 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia (CPC) and its implementation in relation to the need to consider restorative justice (RSJ) as an alternative form of justice to retributive justice (RTJ). Although the law in section 8 of the CPC is restorative in nature, there is no policy direction that compels its effective implementation and therefore it is not part of the justiciable rights to which a victim as a citizen can hold government accountable for denying the right to reconcile in exercise of the discretionary powers of a Magistrate who has denied the victim of such a right.

The research study was a case study of two forms of justices, i.e., the RTJ on which our Criminal Justice System is anchored and the RSJ which is being promoted as an alternative form of justice that should be adopted in the cases of minor offences. The main objective of the research was a critical analysis of section 8 of the CPC. The ultimate aim is to find intervention strategies that would promote reconciliation where women in general would benefit since it is usually they who commit the kinds of minor offences largely associated with offences falling under section 8 of the CPC. In arriving at the conclusion and intervention strategies, the focus was on the non-implementation of section 8 of the CPC by most Magistrates.

The second chapter focused on the theoretical framework of the law and policy that offers explanations for the non-implementation of the law in section 8 of the CPC. Particular attention was paid to the discretionary powers of Magistrates who unlawfully deny victims their application for reconciliation. The particular focus of this study was to ascertain how the non-implementation of this law contributes to the growth of the prison population. The high prison population shows how important diversion from RTJ to RSJ is for the realization of a justice system that should be more inclined to promoting reconciliation and the handing down of non-custodial sentences to offenders of minor offences in order to reserve prisons for the treatment of serious offenders only.

The third chapter focused on the methodological framework. This was important because it was imperative to explore the lived realities of women in view of the fact that section 8 of the CPC mostly affects women who usually commit minor offences. The women's law approach enabled this research to bring out the gaps between the Zambian law and the non-adoption of the United Nations Basic Principles on the use of Restorative Justice as an international instrument for RSJ. The research also uncovered how sex and gender determines and affects the plight of incarcerated women. The third chapter also shows the various methods employed to obtain the data from the various respondents and the limitations caused by the non-implementation of section 8 of the CPC.

The fourth chapter focuses on the main findings of the research. They include the nature of the law and its non-implementation. The findings also reveal why implementation is important as opposed to the application of RTJ on offenders of minor offences. The findings reflect upon the implications of the non-implementation of this law by the Judiciary through policy direction which includes overcrowding in prisons. The fifth and last chapter focuses on the various conclusions and interventions which arose out of this research. The interventions include law reform and policy implementation which should be in line with the RSJ initiatives which consider court diversions and non-custodial sentences on minor offences. The UN Basic Principles on the use of RSJ should be adopted as a guide to the formulation of a national policy on RSJ. Some solutions require political interventions and therefore government should facilitate joint efforts with other organizations advocating RSJ in line with international standards.

The summary is a brief review of the outcome of the research and how important it is for the implementation of section 8 of the CPC and the incorporation of RSJ in the Criminal Justice System to be realized for women who are perceived as being more inclined than men to commit minor offences falling under section 8 of the CPC.

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CHAPTER ONE

1.0 INTRODUCTION AND BACKGROUNDTO THE STUDY

1.1 Introduction

'Crime is devastating because it upsets two fundamental assumptions on which we base our lives; our belief that the world is an orderly, meaningful place and our belief in personal autonomy. Both assumptions are essential for wholeness'

(Zehr, 1999).

This quote is a true reflection of how crime is viewed by society and therefore calls for retribution as a way to restore order and create a meaningful place to achieve the desired personal autonomy in the world. Society's reaction to crime victims has not changed much. When a crime is committed, society's energies and resources are mobilized to find, catch and punish the offender. Very little is done to help the victim recuperate from the traumatic effects of victimization or recover the material losses incurred as a result of the crime. In this vein, Ezzat notes:

> 'The millions and millions of money society willingly spends on punishment and incarcerations are in sharp contrast to the token amount devoted to compensate the victims. Society has failed the victims of crime, has ignored, neglected and often mistreated those who are criminally victimized' (Ezzat, 1986: 1).

The emphasis of this study focuses on minor criminal offences which are committed by members of Zambian society and to whom its courts have continued to apply retributive justice (RTJ) without looking at other sentencing options which are restorative in nature. In Zambia, many offenders of minor criminal offences have ended up being imprisoned yet there is a law that can be implemented based on the principles of restorative justice (RSJ) as one method of decongesting prisons. The law would work greatly to the advantage of women offenders who are still perceived as being less threatening to society and less likely than men to engage in more serious, deviant behaviour. Women are less involved in crime than men. Most women offenders are petty criminals although some women are now involved in more

serious offences like murder, forgery, drug trafficking and others which are not the subject of this discussion (Ronald, 1987).

The official rhetoric from those working in the Criminal Justice System (CJS) with consistent emphasis on RTJ as an apparent concern for reducing crime coupled with the effectiveness of dispensing justice still remains questionable. This has led to the mushrooming of organizations that now advocate for restorative justice (RSJ) as an alternative form of justice to address this vice. It is the understanding of these advocates that once restorative justice (RSJ) becomes the alternative form of justice to RTJ, the human rights aspect of offending would also be addressed in line with the required international minimum standards.

1.2 Background of the study

The Criminal Justice System in Zambia follows a retributive and adversarial system of dispensing justice based on its colonial legacy. The background to this is that when the British colonized Northern Rhodesia now called Zambia, they came with their own laws and the idea of prisons modelled upon those in England (Hara, 1984/85). Before colonization, prisons were unheard of and the indigenous African tribes enforced customary laws through their own Traditional Courts using RSJ principles. Penalties in cases involving safety of the community, witchcraft and persistent offenders was death or exile and compensation redressed costs in cases of murder, assault and property. Penal sanctions were only invoked when the stability of the community as a whole was threatened (Clifford, 1960).

During the colonial era (and the period up to the present day Zambia), the deterrent theory of punishment was introduced and applied on offenders who committed prohibited acts in society. It had different theories about the nature and purpose of punishment which in turn had different implications for sentencing and for penal policy in general. It was reflected in four main approaches to the issue of punishment based on the ideas of retribution, deterrence, incapacitation and rehabilitation of the offender using punitive means (Elizabeth, 2006: 429).

1.3 Why I chose the topic

The choice of my topic has come from personal observational experience of the attitude of Magistrates in the way they handle minor offences in the criminal justice system. In 1984, I developed an interest in attending criminal court sessions at the Luanshya Subordinate Court

situated on the Copperbelt Province because of the large number of remandees that I used to see being escorted to court by the police every day. I observed that most of the offenders who used to appear in court were young and middle aged adults facing minor offences mainly for assault and petty theft. The majority of them were from shanty compounds found within the District. During their trials, I also used to observe that Magistrates never tolerated applications for withdrawing cases even if the victim was willing to reconcile with the offender. I also noticed that the common punishment of sentencing was for the offender to receive strokes of the cane. During school holidays, I could go to other Copperbelt towns and continued to attend court sessions and discovered that the trend was almost the same.

The interest developed further when a close friend of mine I had completed Secondary school with aged twenty years old then, was sent to prison for threatening violence at a bar in Luanshya. Although the victim whom he had threatened with violence had applied to the Court to stand down the matter in order for them to reconcile, the Trial Magistrate declined and proceeded to hear the matter leading to his conviction. In doing so, the Magistrate noted that 'although the offender was young and in his last grade of Secondary School, the offence he had committed was prevalent in the area and he had a duty to punish offenders so as to deter would-be offenders from committing similar offences.' He was sentenced to receive 12 strokes of the cane or to serve three months in default but since he was found to be medically fit, he had to be caned.

I came to understand later during my study of my law degree that section 24 then, of the Penal Code Chapter 87 of the Laws of Zambia, listed Corporal punishment as one of the legal punishments a court could impose on an offender and that section 27 of the same Act also gave powers to Magistrates to sentence people who committed assault cases and other offences falling under the 1st Schedule of the Penal Code to receive strokes of the cane. The maximum number of stokes the court could give to anyone of the age of 21 and below was 12 and any number to anyone above this age limit. The prison sentence would first be pronounced and then the court would in its discretion, order strokes to be administered in addition to or in substitution for such imprisonment. As for those who were found to be medically unfit to receive the strokes of the cane, they would be ordered to serve the sentence that was handed down by the Magistrate in default. This was the most preferred sentence among many Magistrates in Zambia then who felt that the best punishment to hand down to such offenders was one that was punitive and inflicted maximum pain as a way of

rehabilitating an offender. It was so retributive, degrading and cruel in its application but that was the law then. Section 27(5)(a - h) of the Penal Code listed the procedure of administering corporal punishment through caning as follows:

> 'That when a person is sentenced to undergo corporal punishment, such sentence shall be a sentence of caning and shall be in accordance with the following provisions as stated in (a – h).'

1.4 Procedure of administering the strokes

The law provided that once an offender has been found guilty of an offence under section 8 of the CPC or any other offence falling under the First Schedule of the Penal Code, the court normally would order caning. The offender would be taken to the hospital where the doctor would examine and give a medical certification to receive the strokes. The offender would then be taken back to prison where he would be made to strip naked and handcuffed on both arms and legs to avoid any unnecessary movements while lying down facing the ground. A cloth soaked in salt water would then be placed on the buttocks and the Prison Officer assigned to administer the strokes would then start whipping the offender. The idea of putting a cloth soaked in salt water was to ensure that as the buttocks started to crack, the salt would enter into the wounds and inflict more pain in the prisoner. After administering the strokes, the prisoner would then be taken to hospital if the wounds were severe for admission. This is the stage where relatives and friends like me would visit, see the wounds and hear the story of how the corporal punishment was administered. I came to realize later in life as I continued with my study of the law that despite corporal punishment being law in Zambia then, it used to contravene international instruments to which Zambia was a party including its own Constitution which in Article 15 states that:

> 'No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.'

Further, the United Nations Universal Declaration of Human Rights under article 5 states that:

> 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'

This Declaration is further supported by the International Covenant on Civil and Political Rights which in Article 7 states that:

> ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’

From experience, this punishment was always handed down to the underprivileged members of the society from shanty compounds. Affluent members of the society who used to commit similar or even more heinous crimes were never subjected to corporal punishment. This was a clear case of discrimination though the exclusion of women from being caned was acceptable because it was prohibited under the law. During the same period, I came to realize that the Constitution of Zambia under Article 23 (2) provides that:

> ‘A person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.’

In my opinion, these were serious human rights violations backed by law in a country predominantly declared a Christian nation that upholds Christian values (Constitution, Preamble).

In 1999, I read a landmark judgment passed by then High Court Judge Chuluwho outlawed the provisions of section 24(c) and 27 of the Penal Code on corporal punish and ruled that:

> ‘The said sections were barbaric, inhuman and degrading because they were in direct conflict with article 15 of the Cnstitution and declared them unconstitutional and ordered that they be severed from the Penal Code.’

Brief facts of the matter in this case were that police were patrolling Mulamba Street in Libala Stage 4B Township in their motor vehicle, a Jetta. They met and challenged the appellant, who was in the company of his friend to stop. They did not stop but ran in different directions. Police gave chase and apprehended the appellant. In the process of executing an arrest, the appellant became violent and broke the rear window of the police vehicle. This was a matter in which the victim could have been made to pay for the damage he caused to the vehicle and been given an alternative non-custodial sentence like a suspended sentence on condition that he does not commit a similar offence.

When I moved to Lusaka Province, I continued with the habit of attending Court sessions and noticed the same trend among Magistrates citing the same reasons of the offence being

prevalent in the area and trying to deter would-be offenders from committing similar offences. Their approach on sentencing following the repeal of sections 24(c) and 27 of the Penal Code changed. Most Magistrates started giving custodial sentences for minor offences they used to send offenders to receive strokes of the cane instead of giving alternative sentences like a suspended sentence or to allow reconciliation between victim and offender. I realized that our courts of laws that handle minor criminal offences concentrated on punishing the offender through custodial sentence which was punitive. Having explored this, led me to choose this topic in order to research more on the powers of the Magistrates and reasons as to why they exercise their judicial powers in that manner in relation to section 8 of the Criminal Procedure Code.

1.5 Statement of the problem

The spirit of the law in section 8 of the CPC is meant to promote reconciliation between the offender and the victim through restorative means. Although crime needs to be punished when it has been committed, where the two parties are receptive to reconciliation and the offence is minor, this law needs to be implemented to create harmony in communities. It provides for the Magistrate to stand down the proceedings and refer the matter for reconciliation. However, the discretion to decide whether to refer the matter for reconciliation or not lies with the Magistrate and this is where the problem is, as most Magistrates are usually reluctant to do so and would rather proceed to hear the case so that the offender is incarcerated.

In some parts of the world where RSJ is practiced, it has helped to heal victims of crimes and shamed offenders not to re-offend. This has become another way of decongesting prisons by considering other alternative sentencing options that are available. RSJ is more suited for women because most women usually commit minor criminal offences such that if implemented, it would benefit them greatly.

There is a need therefore to interrogate whether initiating judicial reforms would see the effective implementation of section 8 so as to compel Magistrates to first refer all minor criminal offences for mediation before deciding to proceed to hear the matter. There would be a further need to provide policy direction to compel Magistrates to ensure that other alternative sentencing options are considered that are restorative in character.

The research is about interrogating whether RSJ should be the alternative form of justice to RTJ since the law is already in place but just needs effective implementation.

1.6 Objectives of the study

The main objectives of my research were the following:

1 To interrogate the discretionary powers of the Magistrates under section 8 of the Criminal Procedure Code.

2. To establish reasons why Magistrates are in most cases reluctant to consider other alternative sentences on minor offences.
3. To establish why custodial sentences seem to be the preferred option for punishing offenders.
4. To establish whether RSJ can be an alternative form of justice to RTJ in the Zambian Criminal Justice System for minor criminal offences.
5. To explore whether communities can be incorporated into the Criminal Justice System in the dispensation of justice.
6. To establish whether there would be a need to provide policy direction and then law reform in implementing the law in section 8 of the CPC.
7. To establish how the reforms should be initiated and implemented.

1.7 Research assumptions

The following below underlined my research assumptions:

1. There is no government policy direction on restorative justice (RSJ) mechanisms in the Criminal Justice System.
2. The prison population has continued to grow in Zambia because of the Criminal Justice System which is retributive and adversarial in nature.
3. RSJ does not play a significant role when left under the discretion of the Magistrate as provided for under section 8 of the Criminal Procedure Code Chapter 88 of the Laws of Zambia.
4. The new Prison Reforms as announced by the government through the Commissioner-General of Prisons (CGP) have incorporated principles of RSJ.

5. That if RSJ was to be introduced as a model of addressing minor criminal offences, women will greatly benefit since they do not usually commit serious offences.
6. RSJ will empower and incorporate communities in the Criminal Justice System by addressing minor criminal offences that should generally be handled by the Conventional Courts and the Police.

1.8 Research questions

The following were the research questions:

1. Is there any government policy direction on restorative justice (RSJ) mechanisms in the Criminal Justice System?
2. Has the prison population continued to grow in Zambia because of the Criminal Justice System which is retributive and adversarial in nature?
3. Does RSJ play a significance role when it is left under the discretion of the Magistrate under section 8 of the CPC?
4. Have the new Prison Reforms announced by the government through the Commissioner-General of Prisons incorporated principles of RSJ?
5. Will women who usually do not commit serious offences greatly benefit if RSJ was to be introduced as a model for addressing minor criminal offences?
6. Will RSJ empower and incorporate communities in the Criminal Justice System by addressing minor offences that should generally be handled by the conventional courts and the police?

1.9 Background of the study area

The research was carried out at Lusaka Central Prison at the female section. In order to triangulate the data collected, it had to be extended to the male section at the same prison. Lusaka Central Prison is situated in Lusaka Province which is the capital city of Zambia. It was built in 1924 mainly to incarcerate freedom fighters who were advocating for independence and black majority rule then. It was a relatively small prison meant to accommodate a small number of male prisoners of about 160-200 (New York Times, 2010). The size of the prison has remained the same and now accommodates more than a thousand prisoners and at the time when the research was conducted in December 2015, there were 1,450 prisoners.

Over years, the number of female offenders started to grow and government had to turn one of the buildings which was a storeroom into a prison facility for women. There has been no further expansion made to this building and as the number of women being remanded and incarcerated increases, congestion becomes unbearable.

Women from all the surrounding districts where there are no prison facilities are incarcerated at this prison and this may explain why there is congestion. Women facing serious offences are transferred to Kabwe Maximum Prison situated in Central Province. Therefore, the female prisoners incarcerated at this prison suited the type of inmates this research was targeting hence its choice.

1.10 Limitation of the study

The main limitation of this research was that it was a case study of only one area within the Lusaka Central Prison which was the female section. So, the findings from this prison may not generally represent the whole outlook of the women in Zambian prisons facing similar problems. This may result in some inaccuracies in certain instances.

As already stated, although the concentration of the research was mainly on women offenders, male prisoners incarcerated at the same prison on similar offences were also targeted. Again, this does not capture other prisoners incarcerated for other minor offences not related to section 8 of the CPC and therefore, some of the other concerns were not captured. These could have a bearing on the women who still face incarceration for other minor offences not covered under section 8 of the CPC. The study concentrated on women incarcerated for minor offences falling under section 8 of the CPC thereby leaving out those with other minor offences and those with serious offences. The next chapters will discuss the findings and intervention strategies which have emerged from the research.

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CHAPTER TWO

2.0 RELEVANT FRAMEWORK: REVIEW OF THE LAW, POLICY AND THEORY

2.1 Introduction

Various scholars and other interest groups have written books and presented papers on the need to review and possibly shift judicial policy of the current penal system which is retributive to a more encompassing form of restorative justice (RSJ). These writings have concentrated on the rights and interests of both the victim and the offender to ensure that communities are healed through reconciliation. These measures are meant to ensure that communities themselves should have a bigger role to play in this system of criminal justice where conventional courts need to stand down cases and refer them for reconciliation between offender and victim. One headman in Chongwe District said:

> 'That if a case has been referred to us by the court to resolve or if someone within the Chiefdom has committed a minor criminal offence, we convene and sit to preside over the matter. The victim and offender are then reconciled and the victim compensated.'

Section 8 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia (CPC) is one of the laws that encompasses RSJ principles. Challenges arise over the issue of its implementation.

2.2 Discussion of section 8 of the Criminal Procedure Code (CPC)

In order to find the answer to the research question as to whether restorative justice (RSJ) can be an alternative form of justice to retributive justice (RTJ) in the Zambian Criminal Justice System lies in interrogating section 8 of the CPC which is being used as a case study. It states that:

> 'In criminal cases, a Subordinate Court may promote reconciliation and encourage and facilitate the settlement in an amicable way, of proceedings for assault or for any other offence of a personal or private nature, not amounting to a felony and not aggravated in degree, in terms of payment of compensation or other terms approved by such Court and may thereupon, order the proceedings to be stayed.'

The interpretation section under Part II of the Penal Code defines a 'misdemeanour' which is a minor offence to mean 'any offence which is not a felony' and is classified as such under the 1st Schedule of the Penal Code to which the offence of assault also falls. Section 248 of the Penal Code deals with Assault Occasioning Actual Bodily Harm (AOABH) which is a misdemeanour although it carries a maximum sentence of five years and it looks like section 8 of the CPC was legislated to deal mainly with this type of offence. This made me interrogate the exercise of the discretionary powers of Magistrates under this section.

2.3 Discretionary powers of the Magistrates

The law in section 8 of the CPC gives powers to the presiding Magistrate to decide whether to proceed with the matter or to allow for mediation to take place in order to promote reconciliation between the victim and the offender. Where the parties are ready in court to reconcile, that may be done in his/her presence but where the two may prefer to have a third party to mediate, the court can stand down the matter and adjourn it to a later date so that the court facilitates reconciliation after getting a report of the agreement. In the event that the Magistrate proceeds with the trial, the following issues have to be considered before sentencing and these are:

(a) Since the offence is a misdemeanour, it should not call for a harsh sentence. The Magistrate must always think of other alternative optional sentences like community sentence, suspended sentence, compensation or a fine and that imprisonment should be the last resort. This is also provided for in sections 339 and 340 of the Criminal Procedure and Evidence Code of Chapter 8:01 of the Laws of Malawi and under the principles of sentencing in Zambia.

(b) The court should look at the circumstances of the offender. Thus, in the case of *Lawe v Rep* (1977) 2 MLR 70, the High Court of Malawi held that:

> '...old and first offenders, where appropriate, should be diverted from prison to avoid them mixing with hard-core criminals and that the aim should be reform, and rehabilitation.'

(c) In circumstances where there is a guilty plea, the Magistrate should be obliged to take this as a demonstration of remorse and contrition on the part of the offender.

Thus, when handing down punishment, reference may be made to the case of *State v Khumalo* (1973) 3 (SA) 698 where the South African High Court held that:

> 'Generally, the punishment must fit the offence committed, the offender and also the society. It has to depend on what makes the offence a serious one (the aggravating factors) and also what makes it not a serious offence (mitigating factors).'

(d) Further reference may be made to the case of *Lawe v Rep* (1997) 2 MLR 25 where the High Court of Malawi held that:

> 'Maximum sentence should be reserved for the worst offender.'

These are good factors that are restorative in nature and provide guidance to Magistrates when interpreting the law.

2.4 Trial procedure in the Subordinate Courts

The common practice in the Subordinate Courts is that at the commencement of the trial on a case falling under section 8 of the CPC, the complainant who is the victim of the crime is supposed to make an application to the court willingly after discussing and giving reasons to the public prosecutor to withdraw the case. In some instances, discussions for reconciliation would have taken place with family members of both parties or the victim and the offender but this has to be formalized with the court by informing the Magistrate of the terms of agreement in order to end the case.

The prosecutor should then inform the Magistrate that the complainant has an application to make before Court. In line with the provisions of section 8 of the CPC, the Magistrate is then supposed to stand down the matter and refer it for mediation and reconciliation but in most instances, they reject the application and proceed to hear the matter. Reasons that are normally given are that:

(a) The Magistrate has discretionary powers to decide whether to stand down the matter and refer it for reconciliation or not.

(b) The offence is prevalent in the area and there is a need to punish the offender in order to deter other would-be offenders.

(c) Custodial sentence seems to be the best form of punishment because the offenders deserve to be incarcerated in prison. The offender should have thought seriously before committing the offence and should not expect leniency from the courts. The Senior Resident Magistrate as a key informant made this apt observation:

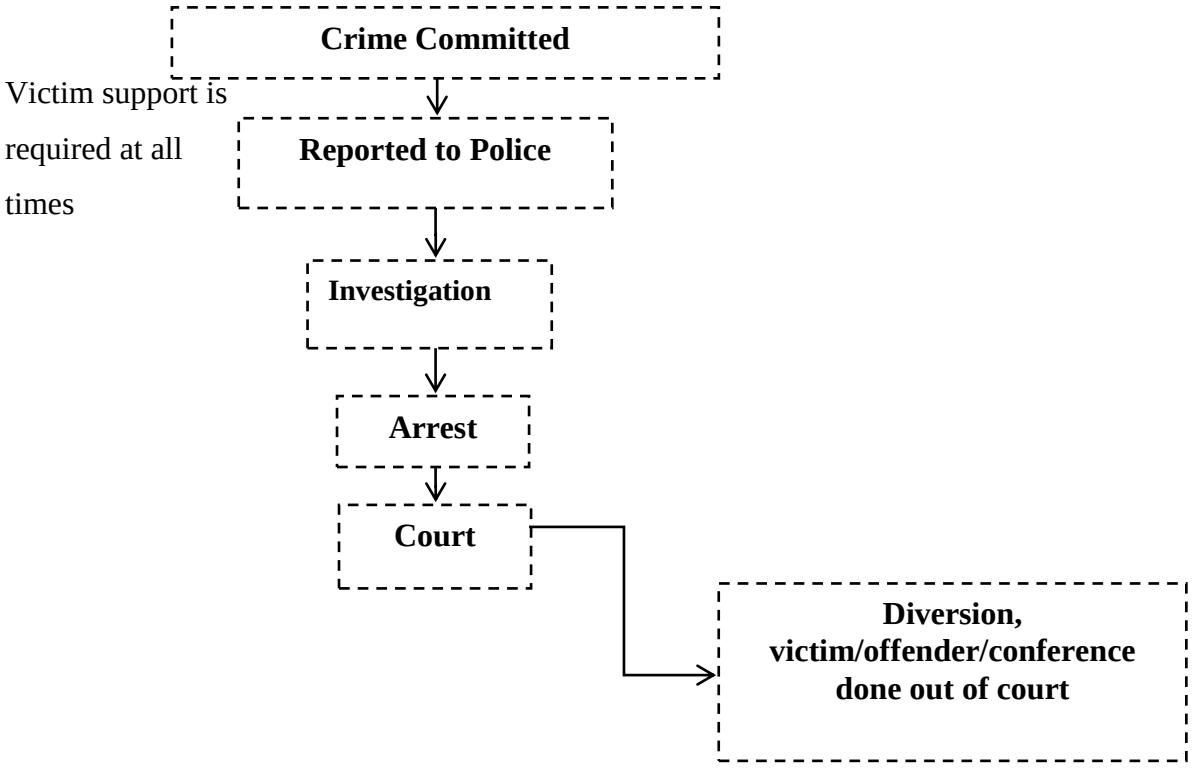
> 'Retributive justice still remains the best way to deal with criminal offenders falling under section 8. Incarceration is the only option to deter would-be offenders.'

However, a week later after he gave this interview, he was arrested on two counts of assault occasioning actual bodily harm (AOABH) and threatening violence to his wife contrary to section 248 of the CPC and detained in police custody. Mediation took place and he was reconciled with his wife which is the essence of section 8 of the CPC. With this kind of experience, it is the expectation of this research that magistrates should understand the value of reconciliation in minor criminal offences.

In some countries like South Africa, the police and courts have mandatory powers to encourage people to resolve certain disputes including those of a criminal nature bordering on minor offences through mediation either before arrest or before trial. Similarly, police led restorative justice processes positioned prior to trial are also evident in England and Australia (Morris *et al.*, 2001). In the South African case, diversion is already being used as an alternative remedy in criminal trials through prosecutors in making decisions that promote reconciliation. Some of the diversion options currently being utilized are restorative in nature and this is an area where there could be need for further development of the initiative. The prosecutor might decide not to take a matter to court but instead refer it to an alternative forum for a restorative dispute resolution process. The charge can be withdrawn once the parties have achieved agreement. Cases in which there is an identifiable victim, especially in crimes of violence like those falling under section 8 of the CPC, are the most suitable ones for restorative justice processes. If the intervention is one that involves a direct encounter such as the victim-offender conference or family group conference, the victim's willingness to participate is essential. The understanding of these processes is that they bring together all

the parties affected by an incident. The assessment of whether a case is suitable for invoking restorative justice options should focus not only on the seriousness of the offence but also on the circumstances surrounding the offence. The diagram in Figure 1 shows that RSJ can be used at different stages of the CJS.

Figure 1: Diagram showing the various ways the principles of restorative justice (RSJ) can be incorporated in the Criminal Justice System (CJS) before sentencing at the Police Station and the Court



Graph: Courtesy of the South African Institute for Security Studies

Furthermore, the Plea and Sentence Agreements in terms of section 105A of the South African Criminal Procedure Code (as amended) gives opportunities for consultation with the victim of the crime and provision for compensation. RSJ processes can therefore be part of the plea and sentence agreements and are likely to benefit both victims and offenders. In matters that go through the trial process, RSJ can be used as a method for arriving at an appropriate sentence. Mediators can use RSJ in the pre-sentence phase and report to the court on the outcome of such processes in their pre-sentence reports. Presiding officers can defer sentence by postponing cases to a date a few weeks ahead and refer the matter for a victim-offender conference or family group conference and then make the agreement part of the eventual court order and perhaps link it to either a postponed or suspended sentence.

Sentences of correctional supervision could be made more meaningful by adding RSJ elements to suitable cases. Through creating more varied options of alternative sentences, RSJ has the potential to relieve prison congestion particularly in relation to those offenders who are currently receiving sentences of relatively short duration for minor offences. Even in cases in which people convicted of crime have been sentenced to imprisonment, RSJ processes can be utilized whilst they are in prison. They can also be used prior to release on parole as part of their integration into society and healing work. Zambia can copy from this to enhance its justice dispensation.

The diagram in Figure 1 does not specifically reflect the possibility of referring an appropriate case from the CJS to a non-state justice system such as the traditional courts. As an area with scope for development in South Africa is the question of creating more linkages between the informal criminal justice system and the courts run by traditional leaders. Such courts may be a source of a more restorative approach to be followed in a wider range of cases. This could be achieved through referrals by the formal courts to traditional leaders' courts in some cases especially those which are minor. The details relating to which cases and at what stage such referrals could take place will have to be negotiated by the prosecuting authority, the judiciary, the traditional leaders and other relevant role players. In cases where matters go to trial, the diagram in Figure 2 illustrates graphically the various points in the system where RSJ may be applied in the CJS.

Figure 2: Diagram showing the various ways of applying restorative justice (RSJ) at different stages of the Criminal Justice System (CJS)

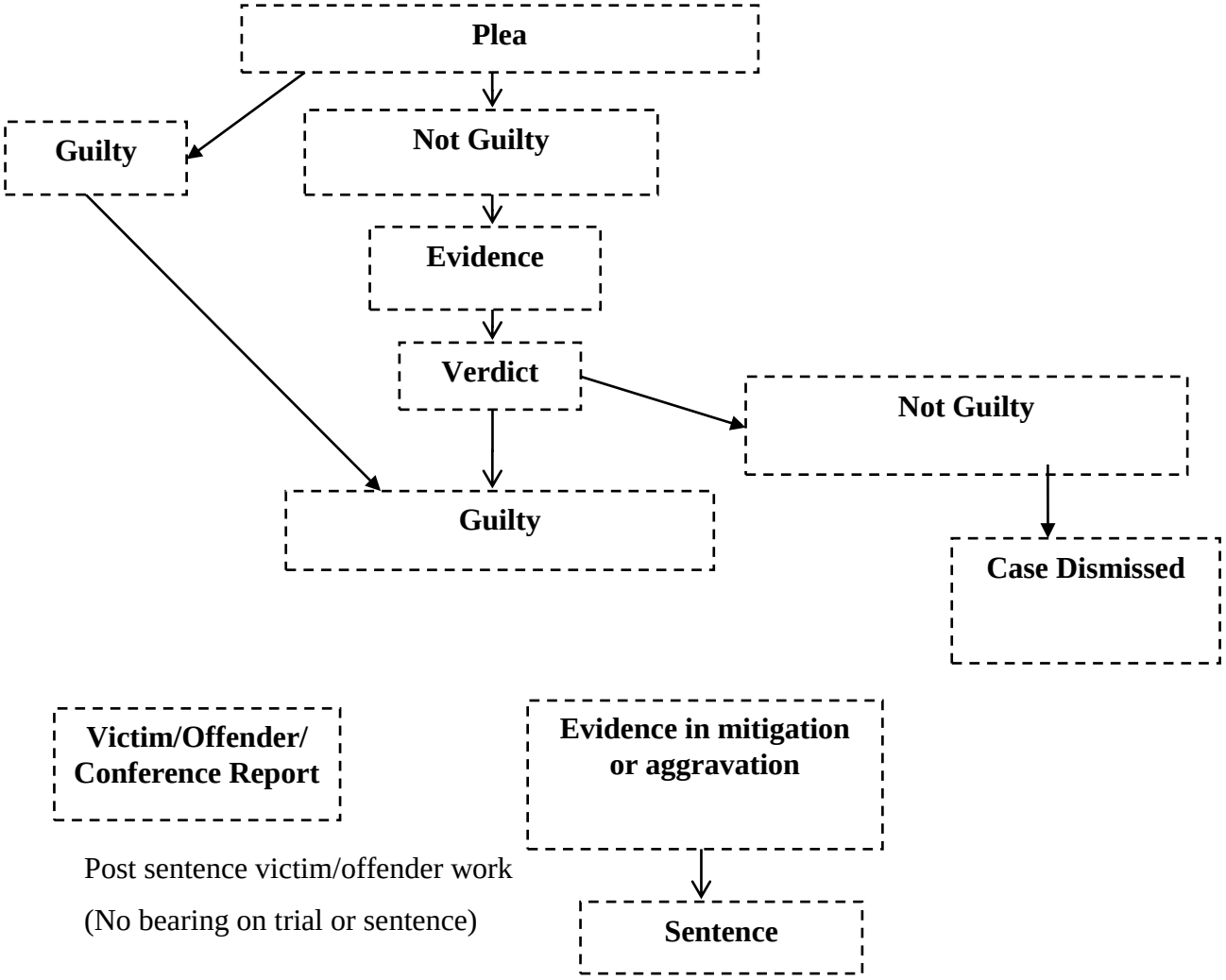
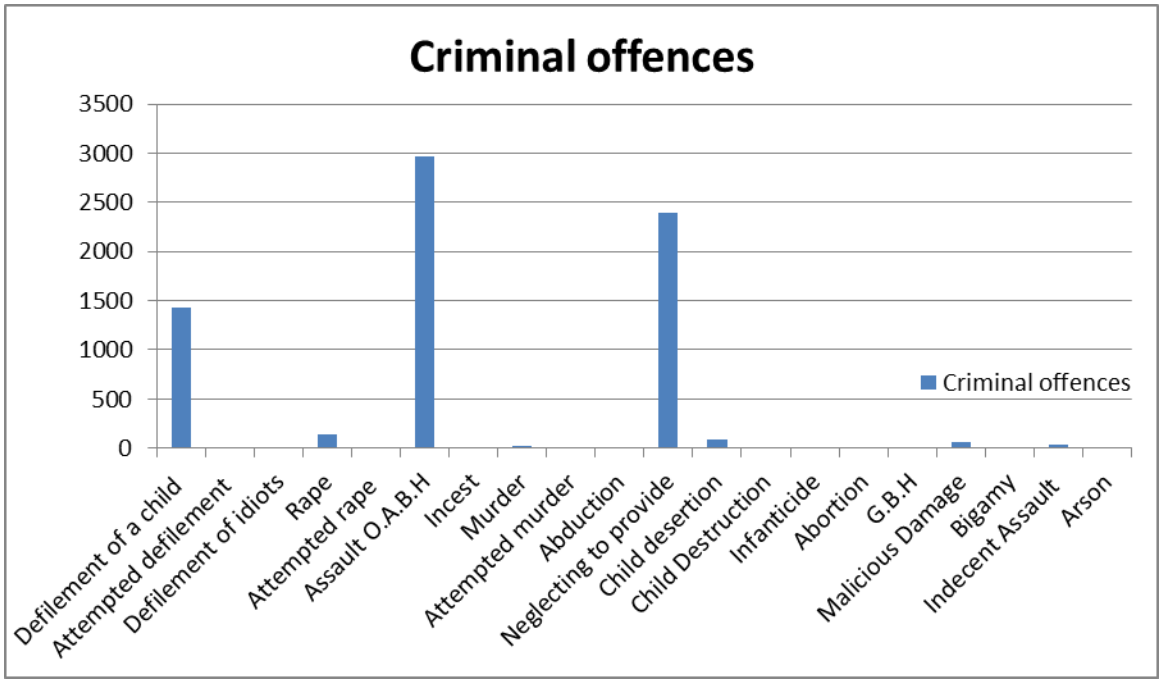


Diagram: Courtesy of the South African Institute for Security Studies

2.5 Implications for the non-implementation of section 8 of the CPC

Figure 3 shows a bar chart reflecting the crime of AOABH topping the list of violent crimes committed and reported to the Police in 2012 (Zambia Police statistics, 2012).

Figure 3: Bar chart showing Police statistics of the various violent crimes reported to the Police in 2012



In the same year, 2012, the only available data at the time of the research showed that more than 70 percent of offenders of minor criminal offences of Assault Occasioning Actual Bodily Harm (AOABH) who appeared in court were convicted (Zambia Police statistics, www.zambiapolice.gov.zm). The statistics reflected in Table 1 give a breakdown of the details of these AOABH cases in 2012.

Table 1: Showing details of Assault Occasioning Actual Bodily Harm (AOABH) cases forwarded to court for prosecution in 2012

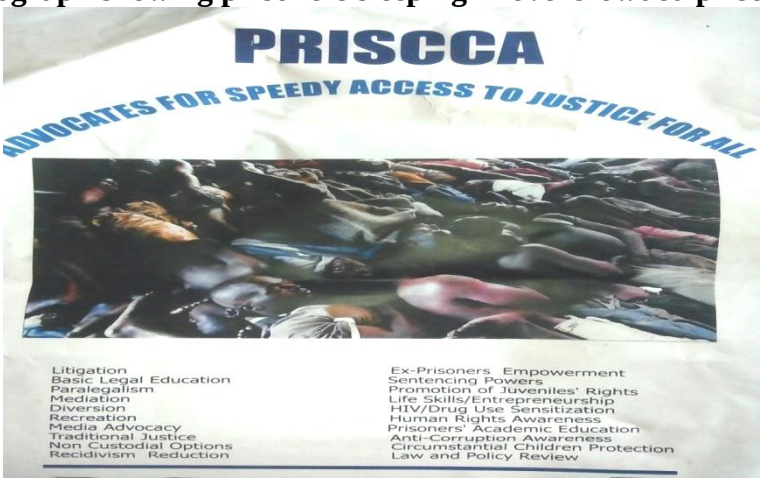
Total Number of Offenders	Total Number of convictions	Total Number of acquittals	Total Number of withdrawals
870	540	41	289

This means that there were more offenders of the crime of AOABH who were sent to prison in 2012 but who may have avoided being incarcerated had RSJ initiatives been applied.

The failure by Magistrates to implement section 8 of the CPC in line with RSJ initiatives has implications for the administering of the Criminal Justice System. In the first place, the Penal Code provides for various punishments some of which are restorative in nature and which most Magistrates are reluctant to look at in preference to custodial sentencing (Penal Code, section 24). These include suspended sentences, community sentences, compensation, fines, reparation and restitution. The result of the non-implementation of section 8 has contributed to the increase in prison population thus leading to overcrowding, a picture of which is shown in Figure 4. Most respondents observed that they are made to sleep on the floors of cells which are unfit for human habitation and are too small to accommodate the huge number of prisoners leading to overcrowding. The Chief Justice acknowledged the problem of overcrowding in prisons when she officiated at a symposium to commemorate the 20th Anniversary of the 'In But Free' Prison Project held in Lusaka in 2015 when she said:

> 'The Judiciary was concerned that the Zambian Prisons were now holding 20,000 prisoners in facilities built to hold 8,000 inmates. Each time Magistrates and Judges toured prisons; they always found prisoners living in heavily congested and unsanitary environments. It is particularly sad that out of the total number of prisoners held in our establishments, a considerable number of those are minor offenders waiting to appear before court or indeed those waiting to be sentenced' (Zambia Daily Nation Newspaper, 2015: Volume 3, Issue number 1189).

Figure 4: Photograph showing prisoners sleeping in overcrowded prison conditions



(Photograph: Courtesy of PRISCCA)

A key informant who is the duty officer at the Lusaka Central Prison observed that the failure by Magistrates to implement the law has contributed to an increase in the prison population and overcrowding of the prisons. Although the intended holding capacity of Lusaka Central

Prison is 160 for male prisoners, it was holding 1,150 male prisoners at the time the research was conducted. As for female prisoners, there were 80 female prisoners occupying a building that is supposed to hold only half of that number. Table 2 shows the number of both female and male prisoners incarcerated at Lusaka Central Prison as at December 2015.

Table 2: Showing a breakdown of the prison population in Lusaka Central Prison (December 2015)

Type of prisoner	**Female Prisoners**	**Male Prisoners**
Convicts	64	650
Remandees	16	650
Convicts of minor offences	64	520
On Transfer to Mukobeko or Mwembeshi Prisons	Nil	13
Total	**80**	**1150**

The above facts show how serious the problem of overcrowding is and needs to be addressed.

A key respondent, the Executive Director of an NGO dealing with Prison Care and Counselling, noted that reconciliation would help offenders avoid prison incarceration. Victims would also recover from the traumatic experience they are subjected to when a crime is committed against them as:

(a) They would directly participate in the decision about what will be done to repair the harm resulting from the offence committed and there is also a strong chance that the victims' actual needs for reparation would be met.

(b) Secondly, the very process of having a say in what happens about the offence promotes victim recovery. One of the reasons why being a crime victim is so traumatic is that it robs them of their sense of autonomy and control over their lives by being empowered in the process. This can help them to regain a sense of autonomy and personal power.

(c) Thirdly, meeting with the offender and being able to discuss the offence with them as victims and reach an agreement on what should be done about it brings a sense of closure to them which they do not obtain when their cases are dealt with through more conventional criminal justice procedures because it is the Magistrate who is in control and decides what he wants and not the victim.

2.5.1 Police Act, Chapter 107

The Zambia Police Act provides for among other things the general duties and manner of carrying out police duties. In addition, in practice the powers of Magistrates in terms of section 8 of the CPC are also exercised by the police when a crime is reported to them because it is the duty of the police to investigate. They can either facilitate mediation or send the victim and the offender back to the community for reconciliation. They can end the matter or forward the docket to court so that the offender is prosecuted despite the parties' willingness to end the matter. One respondent working as a Principal Public Prosecutor noted during an interview:

> 'We often hear people say, "I will beat you and compensate you later." People are maimed because the offender will be requested to pay compensation. So, as a deterrent measure, we proceed to prosecute and not allow reconciliation.'

However, where the parties are ready to negotiate and reconcile, there is a need for the police to facilitate the process.

2.5.2 Prisons Act, Chapter 97

The new amended 2016 Constitution provides for the change of name of the Service from Prison Service to Correctional Service which includes the rehabilitation of the offender (Zambia Amendment Bill Number 16 of 2016, section 225). To enhance RSJ in the Service, the practice has been that if the offender opts to reconcile with the victim, the Prison Officers will bring the victim to prison for reconciliation. This is meant to prepare the offender for easy acceptance and reintegration back into the society although the Auditor General's Report of July 2014 shows that there was no evidence of rehabilitation of any kind that was extended to prisoners (Executive summary, vii). This means that it is done by the prison Service as and when it is considered necessary and not as an obligation because of the many challenges it faces. Although this may not be very helpful to an inmate who is already serving and could have benefitted from the implementation of section 8 of the CPC at the trial

stage, as the process can still be applied while the prisoner is in prison. This is clearly the intention of the Auditor General's Report:

> 'Restoration is the reunion between the offender and the offended. It provides a platform for reconciliation of the offender and the offended and gives offenders an opportunity to show remorse for their wrongdoings. Restorative justice includes victims and communities and not government alone. Once the prisoner has served their sentence, the government treats the offender as a free person but not so with the victims and the community and hence the need for government to mediate. When prisoners are forgiven by the community, the community acceptance of the prisoner on discharge is high as the prisoner is given help by the community thereby facilitating smooth reintegration of the discharged prisoner into society. Restorative justice programs recognize the importance of community involvement and initiatives in responding to and reducing crime. Restorative justice also lowers the rate of re-offending and crimes of revenge' (Auditor General's Report, 2014: 11).

The problem is that in cases in which offenders agree to reconcile with their victims who live very far away from the prison, it is not possible for the Prisons Service to organize transport to bring this person because its resources are inadequate. One Prison Officer in the focus group discussion said:

> 'Although the change of the name of the Service to a Correctional Service sounds good, government needs to increase the budgetary allocation for the Prisons Service in order to enhance its operations.'

2.5.3 Practice rules within the Judiciary

Judiciary Practice Rule Number 1 of 2016 will provide guidance for Judicial Officers in their practice for the calendar year. However, there is no policy direction in the rules to compel Magistrates to effectively implement section 8 of the CPC to consider reconciliation as their first sentencing option. There is still a great danger of offenders being handed down heavy prison sentences because the offence of assault occasioning actual bodily harm carries a maximum sentence of 5 years even though it is classified as a misdemeanour. Although one may argue that this offence should be categorised as a felony, that is not the case, it is a misdemeanour and that is what the law provides at the moment and should be treated as such. To do otherwise would defeat the good intention of the law as it stands and the intention of the law maker at the time of its enactment.

2.5.4 Chiefs Act, Chapter 287

Before colonization, Traditional Courts presided over all cases in their chiefdoms where RSJ was the standard way of settling disputes. Section 11 of the Chiefs Act still empowers Chiefs to:

> 'Maintain peace and order in their chiefdoms.'

The interpretation of this section has seen Traditional Courts conduct sessions to try their subjects who misconduct themselves. They are tried and punished on any offence committed using RSJ Principles where the offender compensates the victim of crime to promote and encourage reconciliation thereby creating harmony among the subjects. Headmen interviewed felt that the application of customary law using RSJ in Chiefdoms requires legislative guidance to ensure that no miscarriages of justice occur by those who are privileged to preside over cases. The law must clearly stipulate how and what procedures such courts should in the spirit of RSJ.

2.5.5 Case law

Although statistics show that there have been many convictions in assault cases, very few have gone to the High and Supreme Courts on appeal and do not appear in the law reports. One of the reasons is that assault occasioning actual bodily is a misdemeanour and after they are convicted, most offenders usually opt to serve their sentences without appealing.

However, where the lower court has disregarded the provisions of section 8 of the CPC, the High Court has provided guidance as demonstrated in the case of *The People v Chigariro* (1974) ZR (H.C.). In this case, the accused appeared before a Subordinate Court of the 3rd Class charged with AOABH contrary to section 248 of the Penal Code. The Court purported to effect a reconciliation between the parties under section 8 of the CPC by ordering that the accused pay K30 (US$3.5, a lot of money at the time) as compensation to the complainant. Dissatisfied with the judgment of the lower court, the accused appealed to the High Court. The High Court overruled the decision of the Magistrate's Court and said the following concerning section 8:

(a) When reconciliation is effected under section 8 of the CPC in terms of payment of compensation or other terms approved by the Court, the Court should order that the proceedings be stayed.

(b) In such a case, there is no valid basis in law for an order that the accused be bound over and that a warrant of arrest should be issued in default of payment of compensation.

This case law clearly sets precedent and also demonstrates that a Magistrate is bound by law to follow the provisions as set out in section 8 of the CPC.

In other countries like South Africa, the Durban Institute of Technology has incorporated the Real Justice Model of conferencing into their Degree Course on child and youth care. Since 2003, the study of RSJ has been one of the requirements for a Degree in Criminology following the formulation of a unit standard on the concept in the Standards Generating Body (SGB) for Criminology. The SGB for probation and the SGB for Victim Empowerment are currently engaged in developing unit standards with RSJ. On 3 December 2005, the Department of Justice and Constitutional Development in South Africa hosted a 'colloquium' on RSJ at which it revealed a three year project for establishing a national RSJ program that would develop RSJ responses by government in partnership with civil society and this project started in 2006 with the government committing itself to ensuring the introduction of RSJ practice where appropriate (Pieter, 2005). These are clear examples of the positive attention RSJ has recently been receiving from areas of jurisprudence and legal discipline which embrace victim-offender reconciliation.

CHAPTER THREE

3.0 METHODOLOGICAL FRAMEWORK AND METHODS OF DATA COLLECTION

3.1 Introduction

In arriving at the research findings and intervention strategies, various methodologies and research methods were used. It was important to illustrate how the non-effective implementation of the law in section 8 of the CPC has affected women offenders, most of whom commit only minor offences. I also wanted to find out if there is any government policy or laws including international instruments in place that correspond to the actual reality on the ground. Also I wanted to ascertain whether the RSJ System that promotes reconciliation is a justiciable human right to which citizens may hold their government accountable.

3.2 Methodological framework

3.2.1 Women's law approach

In order to ascertain women's lived realities in relation to the implementation of section 8 of the CPC, I used the women's law approach. It was a useful tool as it was interactive and to triangulate the findings, male prisoners were also interviewed. It also helped me to find out how the non-effective implementation of the law on reconciliation in relation to retributive justice (RTJ) and restorative justice (RSJ) affect women in the dispensation of justice. The women's law approach:

> '… is used to examine and understand how women are considered in law and how the law corresponds to women's reality and needs' (Atkins and Hogget, 1984: 1).

This approach was essential for the study because it made me look at the gaps that currently exist in the Zambian law(s). This led me to interrogate how these gaps affect women offenders. The implementation of the law in section 8 of the CPC has a negative impact because it does not correspond with the lived realities of women. This approach enabled me to unearth the retributive and adversarial nature of the Zambian Criminal Justice in which:

> ‘Offenders seldom have opportunities which they can regard as a right to make amends when need arises’ (Martin Wright, 1991: 1).

From the interviews I had with Officers in the CJS who are supposed to facilitate the implementation of the law, it was clear that the problem lay with the exercise of the discretionary powers given by section 8 of the CPC to Magistrates on how they should implement is provisions since there exists no policy direction in the Judiciary to compel Magistrates to first consider the option of standing down matters for reconciliation of the parties as the law provides. In the field, women offenders were aware of the provisions of the law promoting reconciliation but attributed its lack of implementation to Magistrates who usually prefer to try cases with the intention of finally ordering custodial sentences. This revealed a failure to comply with the provisions of the law.

The women’s law approach helped me to identify the lack of clear protective legal provisions which may be relied upon by marginalized groups such as women who may commit minor criminal offences. The Constitution does not clearly spell out provisions of RSJ that victims and/or offenders may rely upon in the event of their desiring to reconcile. Currently, there is no international instrument on RSJ that binds member countries. As such, the implementation of RSJ is left to each member country to decide whether to apply the United Nations Basic Principles on RSJ or not. I found that although RSJ exists in some pieces of legislation in Zambia, its implementation is deficient because it is at the discretion of the Magistrate. Furthermore, there is no policy document that clearly defines RSJ and how to use it as a guiding principle in mediation and reconciliation in penal matters. As a result, there is no guarantee that when one appears in court, the Magistrate will automatically consider reconciliation as the first option. This should be considered in the context of one of my assumptions that no policy direction on RSJ exists and this increases the vulnerability of women to be imprisoned. The research found that the law’s lack of concern in supporting the option of reconciliation explains the neglect of Magistrates towards the issue and in turn undermines the parties’ interest and efforts to seek to its enforcement. To summarize:

> ‘Therefore, one of the purposes of the women’s law approach is to describe, explain and understand the legal position of women in law and in society’ (Dahl, 1998: 17).

3.2.2 Gender and sex analysis

Understanding the position of women in society helps to provide solutions to improving their position. Sex is understood to mean that men and women are normally born female and male, while gender is described as being socially constructed (Connell, 2002: 10). During my study, I became aware that women and men's gender roles determine a lot of issues including the differences between female and male offenders (insofar as what crimes they tend to commit and how) and male and female judicial officers (insofar as how they dispense justice). While women offend just like their male counterparts, minor offences were mainly prevalent among female prisoners. As for the women on the bench, the gender analysis was instrumental in my realization that the task of dispensing justice remains largely in the hands of male Magistrates who still dominate the bench. This may pose a problem as men unlikely to fully understand the problems women are faced with and prompt them to commit these minor criminal offences.

Although the statistics for Lusaka which was the area for the research shows that there are more women Magistrates on the bench than men, there are many other districts surrounding it where male far outnumber female Magistrates. Table 3 shows the number of female and male Magistrates in each Zambian Province as at December 2015. This means that more women appear before male Magistrates who may not really understand the common problems women experience and why they offend and as a result of this ignorance, they may end up sending them to prison on minor offences instead of facilitating the option of reconciliation.

Table 3: Showing the number of female and male Magistrates in each Zambian province as at December 2015

Province	**Female**	**Male**	**Total**
Central	06	12	18
Luapula	02	12	14
Southern	03	25	28
Northern	01	10	11
North Western	00	14	14
Western	02	12	14
Lusaka	16	14	30
Copperbelt	07	33	40
Eastern	06	12	18
Muchinga	02	12	14
Total	**45**	**156**	**201**

When I interviewed the Judicial Officer in his office at the Magistrates Court Complex, he was quite surprised by my research topic because it interrogates a piece of legislation which he thought was quite straight forward in its wording and interpretation and wondered how the exercise of discretionary powers by a Magistrate could be a controversial issue and warranted discussion. He observed that such powers help to determine whether the Magistrate can proceed with the matter or not depending on the assessment made. This approach made me realize that there is no consideration on what effect or bearing the sending of people to prison creates for the Prisons Service in terms of congestion. There is no consideration on how RSJ, if effectively implemented, would help to heal communities and reduce the number of criminal cases they handle so that they give more time hearing serious offences.

Women are generally responsible for taking care of a family's children. Sending a female offender to prison for a minor offence (instead of invoking the option of reconciliation with her victim) means that she has to go to prison with her children and if she is pregnant, she will end up giving birth whilst in prison. The other children left behind will have to find someone to fend for them because when this happens some husbands tend to shun their responsibilities. The living conditions in prison may not be conducive for both mother and child as their needs and basic amenities may not be available or meet the basic minimum prison standards. This scenario reflects the lived realities of women and the problems they encounter and have to endure. It therefore calls for a thorough understanding of their problems in order to help alleviate the afflictions they go through. Therefore, it is generally viewed that:

> 'Women bear the greatest burden of the world's scarcity and suffer the fundamental needs and amenities' (Immanuel, 1998: 16).

On the other hand, their male counterparts who could have been incarcerated for similar offences do not experience the burden of staying in prison with their children in prison. In fact, they receive consolation in form of visits from friends and relatives including their spouses. At Lusaka Central Prison I witnessed many men and women crowding the male section to pay them visits and bring food, whereas I rarely saw such numbers of visitors at the female section. One wonders whether the female prisoners do not also have relatives, friends and spouses to visit them and take them food. I also observed that female prisoners rarely came out but remained confined in prison while their male counterparts walk around doing all

sorts of manual work outside prison. There were so many activities which the Prison Officers have allowed at the male section like the various choir groups which sing throughout the day with various pastors preaching. They also play football while others remain busy doing mechanical work. Classes are also conducted but this is not the case at the female section. Women simply laze around plaiting each other's hair or bathe their children or, if they are pregnant, they sleep a great deal. This analysis tallies with the Auditor General's Report of July 2014 which reveals that:

> 'There were no education and skills training for female prisoners especially those incarcerated on minor offences and that most of them were not even aware that such programs exist' (Executive Summary, Page vii).

I drew the conclusion that even in prison, sex and gender roles are as evident as they are in open societies and that men are treated differently from their female counterparts. This perpetuates gender stereotypes of women in the Criminal Justice System. Dahl expresses this phenomenon as follows:

> 'The existence of biological, social and cultural differences between men and women are not regarded as the only main problem in women's lives but rather law and society's systematic under-valuation of female activities, values and characteristics are seen as the main source of women's subordination' (Dahl, 1987: 13).

This approach also entails looking at the differences between women and men when they are punished under the same law. The law provides that every accused person of a minor offence is entitled to bail (CPC, section 33[1]). However, although bail is a right for every accused person, women in most cases fail to meet bail conditions (unless it is a case of non-cash bail) due to their economic and social vulnerability; on the other hand, most men do manage to enjoy the benefit of obtaining bail because they have the economic means to do so. It means that even the implementation of section 8 of the CPC which is the subject of this research must take these factors into consideration and do what is in the interests of the women before looking at imposing a custodial sentence as the first option. One respondent at Lusaka Central Prison who was in remand on an assault case said:

> 'As women, even if you are granted bail, we most of the times fail to meet the conditions because of our vulnerability and remain in remand while men in most cases manage and have to come from home to attend court sessions.'

This shows how gendered perceptions play a role and how women react to certain situations in their lives, thus making the sex and gender analysis a useful tool to investigate the position of women in society (Sharon, 2012: 32).

3.2.3 The human rights approach

The human rights approach was an important aspect of the research as it links people to laid down human rights standards. Zambia is a member of the United Nations (UN) and party to some regional and international instruments to which the country is bound. From the onset of the research, I realized that although the research topic on RSJ is recognized worldwide, including the United Nations, it is still regarded as a relatively new idea. In Zambia, a lot has being done to promote RSJ. European Union support of non-governmental organizations (NGOs) advocating RSJ reform of the Criminal Justice System is likely to help bring about government policy and legislation that will expressly outline the operation of RSJ when handling minor offences.

3.2.3.1 Identified gaps in the enforcement of restorative justice (RSJ) practices

Authors of the book, 'Human rights of women: International Instruments and African Experiences' note that:

> 'Human rights over the past generation have been perhaps the most exhaustively developed body of international law and in no other area has the impact of the women's movement worldwide resulted in a more profound transformation. Today, the primary issue is no longer the better elaborate of human rights law but its enforcement' (Wolfgang *et al.*, 2002).

This explanation applies to Zambia, certain of whose laws and customary practices embrace the elements of RSJ but lack effective policy direction and implementation. Because of this, the effective use and enforcement of RSJ in criminal cases is still dependent on the exercise of the discretionary powers vested in Magistrates. There is no government policy document which exclusively incorporates RSJ tenets. Although the United Nations has realized that RSJ is essential and needs to be incorporated in the Criminal Justice Systems of member states, such implementation seems to be in its infancy. So far, the UN has formulated what are known as 'Basic Principles on the use of Restorative Justice' but these are not obligatory, only persuasive and designed to give guidance to member states. They are not designed to impose rules or standards on countries and there is no obligation to use RSJ Programs. What

the Basic Principles stipulate is to make it possible for countries considering RSJ to draw from the experience of other countries which implement them because they do not address RSJ at the level of vision, public policy or a comprehensive system but rather address particular programmatic expressions of RSJ. This means that the implementation of RSJ still remains a choice of an individual country to make and this may not compel such countries to move at the right speed to implement RSJ. Member states including Zambia may not consider RSJ an important concept in providing policy direction on RSJ's implementation and effective incorporation in the Criminal Justice System. This is an unfortunate stance to adopt since the speedy implementation of international instruments on RSJ would go a long way in providing healing solutions, reconciling communities and helping to improve the smooth delivery of justice in member countries. Enforcement will be enhanced as member countries will be expected to ratify and domesticate the Protocol into national law. This can be seen by the progressive proposed key words by Van Ness (2002) to the UN on RSJ where in section 1 of the Basic Principles, he has defined:

> 'Restorative justice programs to mean any program that uses restorative processes or aims to achieve restorative outcomes and these principles apply to the various forms of victim-offender mediation, conferencing and circles including restitution and community service obligations arising out of those restorative processes.
>
> 'Restorative processes to mean any process in which the victim and offender or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime often with the help of a fair and impartial third party (section 3).
>
> 'Restorative outcomes to mean an agreement reached as a result of a restorative process. Examples of restorative outcomes to include restitution, community service and any other program or response designed to accomplish reparation of the victim and community and reintegrate the victim and offender (section 4).
>
> 'In conclusion, the Basic Principles also propose that RSJ should generally be available at all stages of the criminal justice process (section 6).'

These are progressive proposals which, if actualized, would activate domestic laws that are restorative in nature but lack effective implementation mechanisms in order to be perfected. A guiding tool would be the way in which the Council of Europe has already adopted and is implementing these Basic Principles. For instance, in 1999, the Council set up an extensive

framework for the use of mediation by launching the first recommendation Number R (99) 19 of the Committee of Ministers to member states concerning the use of victim-offender mediation in penal matters. This was seen as a flexible, problem-oriented, participatory option complimentary or alternative to traditional criminal procedure. Since then, many European members and other international documents on this topic have been issued and adopted for implementation. Furthermore, the European Commission adopted the framework Decision on the Standing of Victims in Criminal Proceedings. It was then replaced in 2002 by the European Directive on Minimum Standards on the Rights, Support and Protection of Victims of Crime. Article 12 obliges member states:

> 'To take measures that will ensure that victims who choose to participate in Restorative Justice have access to safe and competent Restorative Justice System while Article 25 requires that Restorative Justice Services should work with trained staff following professional standards.'

The human rights approach has a lot of potential for influencing and improving the lives of offenders in the Criminal Justice System as it focuses on the deficiencies in the implementation of the law that undermines the capacity of the offenders who are deemed to be beyond reform outside prison unless they are incarcerated. Respondents at Lusaka Central Prison were made aware that there is a law that is not being effectively implemented and as a result, people with minor offences were in prison instead of people who re-offend and those with serious offences and pose a danger to society. The human rights approach hence enabled me to investigate the gaps in the UN and AU bodies where I discovered that no binding instrument on restorative justice (RSJ) is in place, apart from the UN's Basic Principles. In the case of Zambia, there is also no exclusive government document that guides and spells out RSJ Principles. It also unearthed gaps in section 8 of the CPC which undermines the right of victims who may choose to participate in RSJ but are denied the right to do so by Magistrates who exercise their discretionary powers to the contrary. The other gap which was unearthed was how the judiciary itself does not have a policy that makes it mandatory for Subordinate Courts to implement the provisions of section 8 of the CPC by considering reconciliation as priority. These gaps in the UN and the Zambian Justice System revealed breaches of the rights of victims and offenders who prefer to settle the matters between them by way of RSJ rather than RTJ methods. If the UN will eventually adopt the Basic Principles as an instrument which will bind member states, the human rights approach will then bridge the gap between the objectives of the human rights instrument and the lived realities of both

female and male offenders in the Criminal Justice System. This is because the UN Basic Principles have good and progressive provisions which should be mandatory and binding on member states to enhance the effective dispensation of justice by promoting healing and reconciliation among citizens.

3.2.5 Actors and structures

I used actors and structures as a tool of data analysis as one of my main assumptions was to establish how section 8 of the CPC was being interpreted by Magistrates and whether there was a policy that compels them to implement this law, especially for women who commit minor offences which is one of the objectives of this research. During the interview with the Officer from the Judiciary whom I asked if RTJ should be maintained in the Criminal Justice System, he answered in the affirmative though emphasizing that it should be for serious offences. When the respondents at Lusaka Central Prison were interviewed on why more offenders are sent to prison for minor offences, they attributed this to the retributive nature of the Criminal Justice System. This made me realize that reliance on RTJ, as opposed to RSJ, has contributed to the overcrowding of prisons as there is no corresponding response from the government to build more prisons. Female prisoners felt that a positive change in the attitude of Magistrates for the way in which they dispense justice for minor offenders will help solve the problem of the overcrowded prisons. Asked how effective the RTJ System is, the Senior Resident Magistrate said:

> 'The effectiveness of the system has been difficult to ascertain because notwithstanding its application, people still commit offences.'

This response made me think that the negative attitude in preference to RTJ by the actors was a major factor on how structures in the Criminal Justice System have failed offenders and victims on reconciliation and in the implementation of section 8 of the CPC. My logical conclusion was that although the Judicial Officer conceded that RSJ should be used mainly for serious offences that seemed not to be what happens in practice.

3.3 Overview of the research sites

The research was carried out in Lusaka, the capital city of Zambia, which is one of the ten provinces in the country. Players in the Criminal Justice System and the Traditional Court

were selected. These two systems preside over minor offences falling under section 8 of the CPC but they follow different modes of trial and disposal of cases.

3.4 The sample

Two representative groups of different focus group discussions, one from Lusaka Central Prison and the other from the Traditional Court in Chongwe District were interviewed. These were selected randomly. The interviews targeted mostly females as recipients of RTJ in the Criminal Justice System and victims/offenders as recipients of RSJ in the Traditional Court System. Although the sample captured equal numbers of female and male respondents, the focus of the research was on women who usually commit minor offences especially those falling under section 8 of the CPC. At the time of the interview, it was indicated by a key informant at Lusaka Central Prison that there were only 64 female prisoners convicted of minor offences that included assault cases as compared to 520 male prisoners convicted of similar offences. To allow for a broader range of opinions, men were also interviewed. Table 4 shows details of the respondents who participated in the study.

3.5 Data collection methods

3.5.1 In-depth interviews with key respondents

The key respondents were selected based on their experience and the conceptual skills they possessed. Focus was on the enhancement and implementation of section 8 of the CPC and RSJ as an alternative form of justice for victims and offenders. Data was collected as the respondents were conversant with the procedure and the provisions of section 8 of the CPC including key concepts like RTJ and RSJ coupled with the problems associated with the application of the law. This had the capacity to provide the desired information.

Table 4: Showing details of the respondents

Designation	Sex	Number
Prisoners	Male	**10**
Prisoners	Female	**10**
Prison Officers	Female	**6**
Prison Officers	Male	**4**
Prosecutors	1 Female, 1 Male	**2**
Judicial Officers	Male	**1**
Executive Director from PRISCCA	Male	**1**
Headmen/women	1 Female, 1 Male	**2**
Victims of crime from a Traditional Court	3Female, 3 Male	**5**
Offenders from a Traditional Court	3 Female, 2 Male	**5**
Total		**54**

3.5.2 Observation

During the time of the research, I attended several court sessions where matters falling under section 8 of the CPC were being heard before different Subordinate Court Magistrates. I observed that when an offender has committed an offence of assault, emotions on the part of the victims are usually high and they wanted the offender to be retributively punished. But when tempers have cooled down, victims tend to sober up and usually want to either forgive the offender or be compensated. The offender on the other hand also realizes his mistake and that there is a need to show remorse and account for the acts of their crime and compensate the victim. This is the opportunity that Magistrates are supposed to take advantage of and implement section 8 of the CPC in its totality because both parties are now ready and willing to reconcile and this kind of reconciliation is likely to be genuine because it has come in the aftermath of the commission of the crime. But instead, Magistrates find this stage to be an opportunity to punish the offender with incarceration, each time justifying their choice with the same two reasons, i.e., that the offence is rampant in the area and that there is a need to pass a custodial sentence in order to deter other would-be offenders and to remove such offenders from society. One key respondent said:

> ‘That it is generally agreed that a major emphasis should be reconciliation dealing with feelings and bringing healing. Though this includes money that

> should not be the only issue. It follows that, particularly for victims, mediation should be available in cases of violence because it is here where reconciliation is most needed in order to give them the opportunity to take ownership of their disputes, vent their anger and ask questions, gain emotional relief and be personally involved in deciding how to resolve matters.'

This technique as a tool for collecting data was selected because it allowed me to obtain information directly rather than through reports compiled by others, making it more reliable. Furthermore, observation as a method of data collection has strength in that it allows triangulation to confirm the accuracy of data.

3.5.3 Focus group discussions

Focus group discussions were held at Lusaka Central Prison because that is where the prisoners are imprisoned with their movements restricted and the Prison Officers who guard then were interviewed at the same place too. The other three focus group discussions were held at the Traditional Court in Chongwe District with the headmen/women, victims and offenders. The discussion areas were structured in the same way as the interview guide. The advantage that focus group discussions had over interviews was that issues were discussed at length and diverse opinions debated. I noted that men had different views from women insofar as the commission of crime was concerned. Women felt that it was unfair to treat them the same as men because the offence of assault is usually committed by women after they have been provoked, especially from men who include husbands, partners and boyfriends. Men commit assaults mostly as a result of their violent behaviour and as a way of exhibiting their masculinity. Women respondents complained that the continued incarceration of women for minor offences like assault does not make sense because most women are not usually violent by nature, but rather commit assaults after suffering provocation as a reaction to a situation and these are the factors courts should also take into consideration. These focus group discussions lasted quite a long time and I almost failed to contain them. This debate method had a special strength in that it brought out the value and depth of local understanding of issues relating to rights and entitlements.

3.6 Assessment of the methodology

I found the data collection methods discussed above effective. However, as an outsider to the Criminal Justice System, I felt, at times, that the respondents were modifying their answers to specific questions and diverting from the truth especially with the Senior Resident Magistrate

who felt the discretionary powers of the Magistrates were being challenged. It was the same with respondents at Lusaka Central Prison who thought I was at the prison to facilitate their release, while the Prison Officers maintained their grip on confidentiality of data and ended up modifying answers. An example was the question about how Magistrates were helping to reduce overcrowding in prisons since they were the ones who incarcerate offenders. The Magistrates said that they try to implement section 8 of the CPC depending on the circumstances and facts before court; but the key informants at the prison said that there were more prisoners serving their sentences for minor offences, especially for assault, and this accounted for the problem of the over-crowding in prisons. These were two different stories coming from Officers within the Criminal Justice System. The different stories were given so as to demonstrate that the situation was not as bad as the research wanted to establish as a fact.

A prison is a sensitive and restricted place so there was no time to make prior arrangements for the visits but I was allowed to commence the interviews after showing that clearance was given by the Ministry responsible for prisons. So, the sampling of the prison community was done as I entered the prison premises. I suspect that the presence of the Prison Officers (though they stood at a distance) and the intimidating atmosphere in prison could have compelled some respondents to dispute what other respondents had said, especially about the prison conditions and the attitude of the Magistrates, fearing that they would be reported to the authorities. However, despite the above limitations, the data collected remains valid as the possible biases were minimized by continuous triangulation to check the validity or otherwise of the data.

CHAPTER FOUR

4.0 USE AND APPLICATION OF SECTION 8 OF THE CPC ON RESTORATIVE JUSTICE: SO WHAT?

4.1 Introduction

'The larger portion of our Criminal Justice System in Zambia is not only centralized but retributively based. Almost all the entire Criminal Justice System and law enforcement are tailored to imprison people than to rehabilitate them'

(Executive Director, Zambia Prisons Care and Counselling Association).

This research was based on a set of assumptions which I had developed before the start of the field research. This chapter therefore will try to focus on the findings in the field and how they impacted on my assumptions. It will touch on the use and application of section 8 of the CPC on RSJ.

At the outset of the research, I wanted to find out why the law in section 8 of the CPC was not applied as it stands. My first assumption was that there is no government policy direction on RSJ mechanisms in the Criminal Justice System. This concern was at the back of my mind considering that the discretion to implement this law lies with the Magistrate. It was premised on the fact that most Magistrates are inclined to meting out custodial sentences as opposed to other alternative sentencing options. I also wanted to find out if there could be an alternative form of justice that can be more restorative. The findings confirmed that section 8 of the CPC is in fact restorative but that the problem lies with the implementation of the law as was held in the case of *The People v Chigariro* (1974) ZR (HC). The law provides for mediation which facilitates reconciliation of the parties where the Magistrate has to stand down the matter and facilitate this process. The law further compels the Magistrate not to attach any conditions that do not promote the spirit of reconciliation.

Despite the restorative nature of this law, the offence of AOABH which falls under section 8 is treated like any other offence where custodial sentence seems to be the most preferred option for most Magistrates. During a focus group discussion with female key respondents

from Lusaka Central Prison on why they were in prison for an offence that permitted reconciliation with their victims, they said that:

> 'Even if an application is made to the Magistrate through the Public Prosecutor by the victim (complainant) to stand down the matter for reconciliation, in many cases, Magistrates decline to grant the application and proceed to hear the matter and in most cases, a custodial is handed down. This is why most of us are here in prison.'

4.2 The retributive nature of the Criminal Justice System

This brings me to my second assumption which states that RSJ does not play a significant role when left to the discretion of the Magistrate as provided for under section 8 of the CPC. The attitude of the Magistrates raises concerns in that it is centred on retribution because the trial focuses on ensuring that the offender is prosecuted and found guilty and convicted. The offender deserves to be punished and must be sent to prison so that the custodial sentence serves as a deterrent to would-be offenders and would cause a reduction in the incidence of the crime. The idea behind this is to create fear and intimidation in the minds of the people. But from the Police statistics, records show that over the years most offenders commit the offence of assault occasioning actual bodily harm (AOABH) as opposed to other offences. So, in spite of the high number of convictions for AOABH, the crime continues to occur which means that increasing the conviction rate for the crime is not a solution to reducing the incidence of the crime.

4.3 Intentional pain infliction versus awareness of painfulness

'Punishing someone consists of visiting a deprivation (hard treatment) on him because he supposedly has committed a wrong…' (Von Hirsch, 1993: 9).

There is a need to understand how inflicting pain is part of retribution. Three elements are distinguished here and these are hard treatment, the intention of inflicting pain and the link with the wrong committed. Fatic notes that if one of these elements is lacking, there is no punishment. Intentionally inflicting pain which is not linked to a wrongful act is not punishment. Painful obligations which are not imposed with the intention to cause suffering are not punishments. Pain in punishment is inflicted for the sake of pain (Fatic, 1995: 197). However, the crux lies in the intention. Equating every painful obligation after a wrong is done with punishment is based on a mistaken 'psychological location' of the painfulness. The

key lies in the mind of the punisher and not in that of the punished. It is the punisher who considers an action to be wrong and who wants the wrongdoer to suffer for it.

As stated, RTJ targets the offender for punishment and therefore, the victim is not a factor in the whole trial process but is only usually needed to act as a witness to testify. The victim is not given the chance to interact one-to-one with the offender. Instead, the court just uses the victim to extract evidence that will help it to convict the offender. The victim is treated as a piece of evidence (Rossner and Wulf, 1984: 8). The offender is a passive spectator at the trial and the victim is left out of it altogether, except they may sometimes be called as a witness. After testifying, the victim of the offence will then be released and will never be consulted on what type of punishment is given to the offender. The victim is never consulted about whether to reconcile with the offender and be compensated because the Criminal Justice System assumes by law that the offender did not wrong the victim but the state which has an obligation to punish the offender. And so, the interests of the state take precedence over those of the victim since the offender is regarded as having breached state law. I then asked myself what justice the victim of crime will get if he/she does not take an active role in the process of the crime where decisions are left to the court to deal with the matter in its own style. One respondent put it as follows:

> 'We feel used by the Courts in this manner as in most cases you may not even know whether the offender was convicted or not. The courts do not even have the time of informing you as the court is in total control of the whole process up to the end.'

4.4 Why this retributive attitude by the Magistrates?

I once lived in a high density area in the Copperbelt Province for a long time and observed that the offence of AOABH was the most common offence committed in high density as opposed to low density areas. This was mainly due to the high illiteracy levels and ignorance of the law. The other reason was the indulgence in beer drinking by both men and women which was their main pre-occupation due to lack of employment. The trend was that anyone from the high density area who appeared in court would be convicted and received strokes of the cane which was the most likely way Magistrates dealt with this problem and that trend seems to have continued, although people still continued to commit offences. The discretionary powers of the Magistrates to decide to whether to proceed with a matter or not exacerbates the situation.

Section 250 (a),(b),(c),(d) and (e) of the Penal Code provide for the different kinds of assaults that constitute a felony and are punishable with custodial sentence. In recent years, new laws have been enacted in Zambia that deal with some offences falling under section 8 of the CPC. One of them is the Anti-Gender Violence Act, No. 1 of 2011 which, in its preamble, states, among other things, that:

> 'It is an Act to provide for the protection of victims of gender based violence…'

It is clear that section 8 of the CPC was enacted to take care of a certain kind of assaults that are provided for under the Penal Code in section 248 which are deemed as misdemeanours and subject to reconciliation. This means that when a Magistrate is dealing with a matter that falls under this section, the expectation of the parties to the case and who are willing to reconcile is that the preference for mediation must be the guiding principle and the Magistrate must therefore stay the proceedings. The fact that most Magistrates apply RTJ instead of RSJ which is reconciliatory defeats the essence of the spirit of this law.

Therefore, the findings have revealed that RSJ does not play a significant role when left to the discretion of Magistrates as provided for under section 8 of the CPC. This is because:

(a) most of the Magistrates tend to use their discretionary powers arbitrarily in order to punish the offender;

(b) Custodial sentence seems to be the preferred form of punishment for offenders;

(c) Most Magistrates feel that RSJ would encourage recidivism;

(d) Offenders deserve to be punished so as to let the sentence act as a deterrent measure to others.

4.5 Why not consider other alternative forms of punishments?

This made me look at the third assumption that the prison population in Zambia has continued to grow because of the CJS which is retributive and adversarial in nature. The

implementation of section 8 of the CPC seems to be more inclined to custodial sentence than promoting reconciliation despite the fact that the Penal Code provides several other forms of punishments which the Magistrate can consider because some of them are restorative in nature. Respondents who answered this assumption felt that lack of consideration for other alternative non-custodial sentencing options has seen a lot of offenders being incarcerated in prisons. Punishments like suspended sentence among others are more restorative to an offender because they make one reflect on how misconduct towards others affects them and stops recidivism. The manner in which the suspended sentence is carried out gives the offender the chance to be with their family and take care of its members whilst executing the sentence outside prison. One male prisoner keenly observed:

> 'The community directly benefits from your work as you are made to work in their locality or government premises. You are shamed and prepared for reintegrated and accepted by the community because you mingle with them as you work daily.'

To augment the comments above, the Prisons Amendment Act, No. 14 of 2000 which is supposed to be read together with the Prisons Act, Chapter 97 of the Laws of Zambia provides in section 135(1) that:

> 'Where in any declared area, a prisoner is committed to imprisonment for non-payment of any fine, compensation, costs or other sum adjudged to be paid under any written law, the court so sentencing or committing that person may, with the prisoner's consent, order that the prisoner shall perform public work in accordance with this part outside a prison for the duration of such imprisonment.'

Section 135A (1) continues by stating that:

> 'Where a Court makes an order for community service in accordance with the Penal Code and Criminal Procedure Code, the authorized Officer to whom the offender reports shall notify the offender or cause the offender to be notified of the hours, place, nature and any other necessary details of the community service to be performed by the offender.'

The above law gives dignity to offenders who commit misdemeanours falling under section 8 of the CPC because the punishment is restorative as opposed to a custodial sentence which is retributive in its nature and form. It is also clear (as shown) that there is legislation that can help Magistrates implement the provisions of section 8 of the CPC to avoid being retributive

and give a sense of dignity to the law and apply retribution on other offences which are felonies. There is no need for the Magistrates to misapply the discretionary powers vested in them by the law by inclining more towards RTJ because imprisonment does not help to heal the nation but instead produces hard core criminals who are prone to recidivism. This brings me to the next question of what happens when there is failure to implement the law.

4.6 Results of failure to effectively implement section 8 of the CPC

Failure to effectively implement section 8 of the CC creates the impression in the mind of a prisoner that incarceration is the only way society deals with delinquency although there are other ways which are more restorative. In this respect, Anne-Marie MacAllinden notes:

> 'These approaches (that is the other forms of justice like restorative justice) may provide a viable means of dealing with the offender's needs in terms of risk management and successful reintegration but also of addressing the concerns of victims and communities in terms of effective public protection.'

The prison population keeps on growing as those being incarcerated for these minor offences comprise the majority of the prison population. As stated, Lusaka Central Prison which was meant to accommodate 160 prisoners now has 1150 as at December 2015. It means that government has to find some means of coping with the problem of overcrowding in prisons. This includes among others:

(a) the need to build more prisons;

(b) the need to employ more Prison Officers to guard the prisoners;

(c) the need to provide sanitary pads for women whose biological make up require special attention. When asked whether the Prisons Service was able to provide this service, one key informant said:

> 'The budget for the prisons does not include such things but NGOs and individuals usually donate them. It means that if there are no donations made, the female prisoners have to endure with the problem because their confinement makes it difficult for them to secure them.'

Therefore, the findings confirmed the assumption as it was proved that the non-implementation of section 8 of the CPC has contributed to the continued increase in the prison population because of the retributive and adversarial nature of the Criminal Justice System to which Magistrates have made a huge contribution by virtue of the manner in which they dispense justice. These findings made me to move further and interrogate if there were prison reforms that address RSJ Principles.

4.7 Incorporation of restorative justice (RSJ) principles in the new prisons reforms

In 2015, the Commissioner-General of Prisons announced reforms in the Prisons Service which centred on turning the Prison Service into a Correctional Service. These were included in the new Amended Constitution passed in January 2016. This prompted me to come up with my fourth assumption which stated that the new Prisons Reforms announced by the government through the Commissioner-General of Prisons have incorporated principles of RSJ.

The Prisons Service has what they call 'The Zambia Prisons Service Standing Orders' issued by the Commissioner-General of Prisons and the latest edition was revised in 2007. Under Part II, Article 168(iii),(h) of the edition falling under the heading 'Duties of a Prison Social Welfare Officer' provides for RSJ and reads as follows:

> 'A Prison Social Welfare Officer shall facilitate Restorative Justice Initiatives through victim-offender reconciliation and victim-offender mediation programs.'

Although the edition does not provide any definition for RSJ, the fact that it states that the initiative involves reconciliation of the victim and offender through mediation means that it adopts the worldwide and most accepted definition that is more inclusive.

This is part of the prison reintegration of offenders into society as provided by Article 168 of the Standing Orders. I asked the key informants during a focus group discussion how RSJ is done. They explained that a prisoner may initiate mediation by asking them to go and bring the victim of the crime to prison for reconciliation and the Prison Officers will act as mediators. If the victim agrees, they are brought to prison where reconciliation is effected.

This means that when the offender is later released from prison, there will be harmony because the mediation and reconciliation will be genuine. The outcome of this reconciliation is used to make recommendations for a prisoner to be released early from prison through a presidential pardon. However, both key informants and respondents acknowledged that the initiative is difficult to implement because of the administrative and operational challenges involved.

I also noted that although the Commissioner-General unveiled these initiatives as part of broader reforms, these were not new reforms because they have been part and parcel of their daily administrative work contained in the Standing Orders which they have been revising from time to time but lacked legal backing until the passing of the new Constitution of 2016 that now provides that the Prison Service to become a Correctional Service. It is the hope and expectation of this research that practical steps will be taken to make RSJ a reality in the wake of the Auditor General's Report of July 2014 (page viii) which drew attention to the Service's glaring inadequacies as follows:

> 'Prisons have not effectively conducted Restorative Justice to reintegrate prisoners with their families.'

Therefore, I concluded that the findings confirmed the assumption in that the Prisons Service already has RSJ Initiatives in its Standing Orders which are persuasive in nature and are the guiding principle in effecting RSJ in the Service; they are not, however, being effectively implemented. Perhaps, the passing of the new Constitution coupled with the unveiling of the new Prison Reforms will now provide the necessary legal support which will enhance the status of women prisoners if implemented effectively.

4.8 Restorative justice (RSJ): What is it and so what?

4.8.1 Introduction

Having looked at RTJ and how it operates, the need arose to compare it with the RSJ System. The idea was to explore and establish whether RSJ can be an alternative form of justice in the Criminal Justice System in Zambia that would be used to address minor offences. If that was the case, I also wanted to find out whether women would greatly benefit from such a system since they do not usually commit serious offences. This is what constituted my fifth

assumption which stated that if RSJ was to be introduced as a model for addressing minor offences, women would greatly benefit since they do not usually commit serious offences.

4.8.2 Expectations of the legal process when crime is committed

I wanted to establish the link of diversion from RTJ to RSJ so as to see how effective RSJ can be in the legal system if well implemented. I started by asking a key respondent at the Police Public Prosecutions Divisional Office to explain the process that is followed when a crime has been committed and how the police react. He said:

> 'In Zambia, when a crime is committed in any contemporary community, we suppose that certain things will happen and these are:
>
> (a) The state authorities are expected to take charge of the process of dispensing justice. This means that the police should quickly arrest the offender, detain him and then slap the necessary criminal charges.
>
> (b) It is also assumed that, if possible, the offender should be tried in a court of law in order to assess the degree of offending.
>
> (c) It is also expected that if the accused is found guilty, fate will be determined in a court of law by the Magistrate.
>
> (d) It is also presumed that the offender will be subjected to some form of retributive (punitive) punishment.'

Another key informant at PRISCCA during an interview added that:

> 'These assumptions structure our thinking about criminal justice and that although there is much debate about the precise form of which criminal justice should take and about how its interventions can be justified, such debate tend to place amongst people who share these basic assumptions.'

Therefore, the Zambian Criminal Justice encourages us to see crime in a particular way that regards it as a wrong committed against an abstract entity such as the state or society. There is logic to this because the state lays down certain laws which basically say, 'this is the bottom line of what we, as a society will allow: we will not permit people to hit (assault) others as this will constitute a crime. So, crime is the behaviour which infringes these rules and since the rules are made by the state on behalf of society, we tend to define crime as a wrong committed against the state or society.' Therefore, in RTJ, to achieve justice in the

aftermath of a crime, the offender must be subjected to adequate punishment. As one key informant from the Police Public Prosecutions Divisional Office put it:

> 'We therefore tend to assume that when a crime is committed, it is the duty of the state to deliver on behalf of the society. We would certainly regard the state as failing to meet its responsibilities if it systematically failed to dispense justice in the aftermath of a crime and it would seldom occur to us to hold others responsible if a crime is not followed by the administration of justice.'

I also wanted to find out whether I could locate female prisoners who were in prison as a result of having committed assault cases falling under section 8 of the CPC. Furthermore, I wanted to establish how the women would benefit from such a Criminal Justice System.

I also wanted to look at the restorative punishments which the law under the Penal Code provides. I established that alternative sentencing optional sentences are available which can be imposed by the courts from which women would mostly benefit because, in most cases, they commit minor offences which mainly fall under section 8 of the CPC. I also discovered that although there were female prisoners who committed other offences including minor ones, the majority of them consisted of those who committed offences falling under section 8 of the CPC. This made me think that if RSJ had been applied to these women offenders through the implementation of section 8 of the CPC, the majority of them would not be in prison and this could have been one way of addressing the problem of overcrowding in prisons. This could also help decongest the courts in that such minor offences could be dealt with outside court which would free up Magistrates to concentrate their time and attention on more serious matters. This was confirmed by female prisoners in the focus group discussion, who agreed:

> 'This law (section 8 of the CPC) should be expanded to include all minor offences. It should not just be restricted to assault cases but any offence of a minor nature if the overcrowding and addressing of women offenders' issues are to be addressed wholesomely. The courts should impose other alternative sentences so that offenders can stay outside prison while doing their punishment and incarcerate the dangerous ones.'

4.8.3 Why women commit the offence falling under section 8 of the CPC

When I asked each one of them as to why they committed the offence of assault and the manner the offence was committed, I discovered that most of them were economically related offences in search of food for their children. One female prisoner narrated that:

> 'I picked a quarrel with my boyfriend who was failing to support our child and in the process of pulling and pushing each other, I assaulted him. The degree of injury was not grave.'

Although it was a matter which needed the court to reconcile the two since the victim was willing to go for mediation, the matter however, proceeded in court leading to her conviction. In order to triangulate this narration since men are also victims of this law, I also looked at the case of another 23 year old male prisoner who narrated his ordeal.

> 'My younger brother differed with a friend resulting into a fight and when I intervened to stop them, I was instead attacked by my brother's opponent and in trying to defend myself, I ended up punching him on the right cheek which got swollen leading to my arrest and incarceration.'

These are all offences falling under section 8 of the CPC in which the Magistrates should have exercised their discretion and stood the matters down the matters for reconciliation. Alternatively, the Magistrates should have considered other alternative punishments which are restorative in nature so that the two could have served their punishments outside prison.

4.8.4 How women would benefit from non-custodial sentences

Although women offend just like men, their offending is not as serious as men. They are largely involved in petty offences and common assaults which are minor in nature.

The argument still stands that custodial sentencing which seems to be the most popular punishment handed down by Magistrates is not helping to solve the problem of offenders of minor offences because people still re-offend and RTJ hardens the character of prisoners. If outside imprisonment became the main alternative sentencing option for minor offenders, female prisoners would benefit greatly as they would also have time to attend to their family responsibilities matters and fend for their children who in most cases are left without reliable family members to take care of them once their mothers are incarcerated. In some cases, the children are made to spend time with their mothers in prison when they are still young and

this is not an ideal situation. These problems could be addressed once offenders are given suspended sentences and this is only possible if the law is implemented accordingly.

My findings therefore proved that although women do offend just like their male counterparts, they are do not commit serious offences. They usually commit minor offences and that if the law was to be effectively implemented in line with the provisions of section 8 of the CPC, women would greatly benefit just as the study has shown.

4.8.5 The need to incorporate and empower communities in the Criminal Justice System

My sixth and last assumption was that RSJ will empower and incorporate communities in the Criminal Justice System by addressing matters that should be handled by the Courts and the Police. I realized that I needed to find a system that dispenses justice based on RSJ. This should be a system that first diverts suitable cases from the conventional court system to another form of justice where community members have to take charge of the proceedings involving the victim and the offender with other stake holders in order to find an amicable solution to the problem that is non-custodial. I wanted to see how Traditional Courts handled their cases in comparison with the conventional court system and see how effective the system was in solving minor offences without subjecting offenders to custodial sentences. I also wanted to find out how communities would benefit from such a system of justice and how it would benefit both the victim and the offender. These questions connected me to the key concept of RSJ that is anchored to the principles of justice which regulate the communities in which both victims and offenders live.

4.9 Restorative justice (RSJ) and how it works

Between the many definitions of RSJ that have been propounded, its advocates have struggled to agree how to define it and where to draw the line between the continuum of practices that fall within or beyond the restorative ideal (Tshehla, 2005). The most accepted and inclusive definition of RSJ is as follows:

> ‘Every action that is primarily oriented towards doing justice by repairing the harm that has been caused by the commission of the crime’ (Bezemore G. *et al.*, 1999).

South Africa has adopted RSJ that incorporates mediation as a model for settling matters. It tarted by first giving its own definition of RSJ in order to make mediation a factor in conflict resolution. For instance, the Truth and Reconciliation Commission Report (TRCR) defines RSJ as:

> ‘A process which,
>
> (a) Seeks to redefine crime from breaking laws to violations against human beings based on reparation as it aims at the healing and restoration of all concerned;
> (b) Encourages victims, offenders and the community to be directly involved in resolving conflict;
> (c) Supports a criminal justice system that aims at accountability of offenders and the full participation of victims and offenders.’
>
> (TRCR, 1998).

Furthermore, South Africa has incorporated the definition of RSJ into its national legislation (Probation Services Act, No. 116 of 1991). This Act has been amended and together with the Justice Bill B-49 of 2002 have both defined RSJ as:

> ‘The promotion of reconciliation, restitution and responsibility through the involvement of a child, a child’s parent, family members, victims and communities.’

It is important to note that African indigenous justice systems are now generally acknowledged to contain elements of RSJ and that these systems have influenced the modern conceptualization of RSJ (Tutu, 1999). Probably, the most recent significant statement in this regard was made by Nkosi Mzimela who is the Chairperson of the National House of Traditional Leaders. Referring to the retributive systems of justice of the colonial powers, he stated:

> ‘They were in contrast with our (traditional African Justice System) Restorative Justice System’ (Conference on Strategies to Combat Overcrowding in Prisons, 2005).

Skelton has identified nine features that African traditional justice processes and modern RSJ processes have in common (Skelton, 2005). The first three all relate to the value base and these are:

> (a) Both processes aim for reconciliation, the restoration of peace and harmony.
>
> (b) They promote a normative system that stresses both rights and duties.

(c) They greatly value dignity and respect.

The other six similarities are procedural in nature:

(d) Neither process makes a sharp distinction between civil and criminal justice.

(e) There is no rule of *stare decisis* (the forum is not bound by previous decisions).

(f) Both are typified by simplicity and informality of procedure.

(g) They encourage participation and ownership.

(h) They have a powerful process that is likely to bring about change.

(i) Both value restitution and compensation including symbolic gestures or actions.

This prompted me to find out from the respondents on what they felt could be the way to go on recidivism as this is the argument that has been advanced by those who are against Restorative Justice.

4.9.1 Restorative justice (RSJ) and recidivism

Restorative justice (RSJ) cannot be extended to people who keep on re-offending because that would defeat the interests of justice. People who are prone to recidivism may be subjected to RTJ but the punishment must take into account retributive principles. This is because in almost every legal context involving individual criminal matters, RSJ processes have only ever been applied to those offenders who have admitted to an offence and promised never to repeat offending. As such, it deals with the penalty phase of the criminal process for admitted offenders and not in the fact-finding phase. During a focus group discussion with female prisoners, I asked them what their opinion on recidivism was. I extended the same question to male prisoners in order to get a wider view of comments and this is what they had to say:

> 'It would be wrong and unacceptable for the criminal justice to be tailored in such a manner that entertains recidivism. The spirit of reconciliation should be to promote harmony and make an offender realize and reflect on his/her bad actions that offends others and accept the wrong committed with a view not to repeat the same bad behaviour.'

4.9.2 Diversion in restorative justice (RSJ)

The procedural aspect of RSJ has arisen from the fact that since the 1970's, criminal justice practitioners have been experimenting with new ways of intervening in the aftermath of a crime in which some and, perhaps, even all of these basic assumptions seem to be rejected. As Gerry notes:

> 'Just like it is with retributive justice, when a crime has been committed, it is expected that the offender must face justice. However, Restorative Justice takes a new different form of approach in that it encompasses a variety of practices at different stages of the criminal process including diversion from court' (Gerry, 2004).

As such it can be stated that diversion is an important stage which should deal with the penalty phase of the criminal process for admitted offenders and not in the fact-finding phase in order to give an offender a second chance. Therefore, key decisions on what to do about a crime are expected to be made outside court by a small group of ordinary citizens who may constitute themselves in form of a Traditional Court and this should include the victim and the offender. The focus is less on punishing offenders through custodial sentencing and more on persuading or requiring them to repair the harm they have caused through their criminal act. This aspect inspired me to find out what the procedure was like in a Traditional Court where RSJ takes centre stage. To this end, I conducted a study in Chongwe District which is situated about 45 km from Lusaka at the palace of Chieftainess Nkomeshya Mukamambo II of the Soli people in Lusaka Province. There I attended a Traditional Court session and observed it applying RSJ in the way a conventional civil court should apply section 8 of the CPC. Since the court is itself a mediatory body, it does not, like conventional civil courts (e.g., Subordinate Courts), refer to other independent mediation bodies for reconciliation.

Under customary law, Chiefs/headmen and women preside over minor criminal offences in which RSJ takes centre stage. The procedure of the Court starts by summoning the offender by means of a court summons (Figure 5) after receiving a complaint from the victim. Court sessions are held every Friday at the Chief's palace which is presided over by 10 headmen/women. The victim and the offender meet face-to-face in the presence of their supporters. The victim starts by narrating what her/his grievances are and is allowed to find out from the offender why he/she picked on her/him and indeed why that behaviour was exhibited. Thereafter she/he is subjected to cross-examination by the offender. The process is

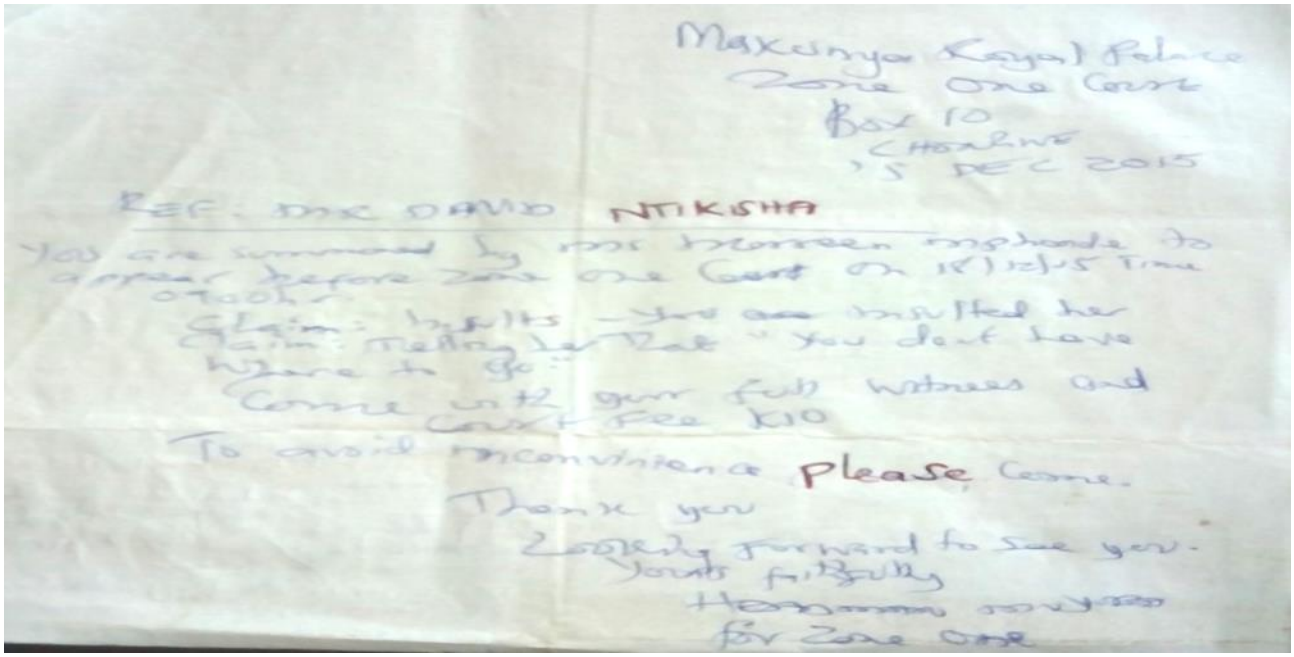
repeated again with the offender now being asked to testify and is later subjected to cross-examination by the victim. Both parties are allowed to bring their witnesses if they have any re-examination which is done by the headmen/women who thereafter reserve judgment and adjourn the proceedings to a later time at which they hand down their verdict having examined all the evidence. I was also allowed to attend the mini-session that sat to decide the verdict they would hand down. I observed that the 9 headmen and 1 head woman analyzed the evidence and discussed how they were going to shame the offender. After being found guilty, the offender was made to accept his bad misconduct and to show remorse and the court reconciled the parties. After the court session and during a focus group discussion, I asked the headmen and woman why they did not refer the matter to the police so that the conventional court could deal with the matter and they said:

> ‘We handle all minor offences including those of a criminal nature and the idea behind this is to ensure that we maintain harmony and peace in the chiefdom. We also would like to ensure that we unite everyone together by promoting reconciliation between and among our subjects who have differed or committed a crime. The punishments are meant to protect the victim through compensation and asking the offender to show remorse. This works well for our community.’

I also wanted to find out how the Traditional Court deals with people who show contempt by re-offending even after the court has tried to promote reconciliation. They had this to say:

> ‘The only time that a Traditional Court will divert from this customary practice is when there is re-offending on the part of the offender where retributive justice becomes the option. The Court ensures that the offender is arrested and taken to the police station so that the court can now handle the matter. A detailed letter is also written to the police explaining how the Traditional Court has tried to reform the offender and that he/she has continued to re-offend.’

Figure 5: Photograph of a call-out or summons addressed to an offender requiring them to attend a Traditional Court hearing



When I looked at section 8 of the CPC I realized that if a matter is sent to conventional court after a Traditional Court has failed to change the offender using RSJ Mechanisms, this should be the right time for the court to exercise its discretion in favour of RTJ by proceeding to hear the matter so that custodial sentence can be meted out if it is necessary. This should also be the time for the court to consider alternative punishments that still remain restorative and non-custodial. Its implementation becomes necessary because the court will not be trying to find other means of dealing with a person who is prone to recidivism. Headmen and headwoman as key informants noted during the interview that:

> 'Unlike in the conventional courts where policy direction on the operationalization of the law on assault and many others is needed, the application of customary law on restorative justice in chiefdoms requires legislation to ensure that there is no miscarriage of justice on the part of those privileged to preside over the matters.'

Having analyzed the court procedures in the conventional court and the Traditional Court and having looked at RTJ and RSJ, I wanted to compare how justice may be denied in one court while it may be granted in the other and this took me to the next subject matter below.

4.9.3 Comparison between receiving justice in a conventional and a traditional court

In the past, I have attended court sessions in Subordinate Courts where offences of common assaults involving threatening violence and AOABH have been presided over by Magistrates and where the court had declined to grant applications under section 8 of the CPC. I also attended Traditional Court sessions dealing with the same offences. For instance, one respondent in the focus group discussion at Lusaka Central Prison said that she fought with and assaulted her neighbour. The matter was reported to the police where a medical report was issued and this led to her arrest. She said:

> 'I was convicted for one year six months despite the victim having shown interest to withdraw the matter so that we reconcile. The biggest problem is our Magistrates who do not listen when such applications are made because their interest is custodial sentence.'

However, during the period of the research, I attended a session where a man appeared in a Traditional Court for threatening violence and assaulting a woman. He was found guilty and ordered to pay K250 (US$ 25) or to give the victim a goat.

In the first case, the Magistrate incarcerated the offender while in the second case in the Traditional Court, RSJ prevailed. If the same case presided over by the Magistrate were before the Traditional Court, compensation would have been the option as a way of promoting reconciliation which is the main essence of section 8.

Another key informant, the Duty Officer at Lusaka Central Prison felt:

> 'The failure by Magistrates to refer the bulk of assault cases for reconciliation has been one of the contributing factors to overcrowding in prison. Some of the prisoners especially those who committed minor offences should have been considered for other alternative punishments like suspended sentences or allow them to compensate those they offended. We want to keep prisoners who pose a real danger to society out there.'

The need to explore if there are any other restorative ways which can be utilized to achieve justice by giving priority to the interests of both the offender and the victim over the interests of the state as the wronged party led me to look at the following three most common practices that have attracted the label of RSJ.

4.9.4 Victim-offender mediation

RSJ is a different way of approaching justice. It sees crime as a violation of people and their relationships. Violations create obligations and the proper response is to first seek healing and restoration. Mediation is a restorative approach that seeks as far as possible to encourage participation, dialogue, mutual agreement and the exchange of information. RSJ encourages responsibility for past behaviour by focusing on the future, on problem solving, on the needs and obligations resulting from the offence. Reparation and restoration thus take precedence over punishment. During the interview, the key informant at PRISCCA outlined the vision the organization champions and hopes to be implemented in the Zambian CJS on mediation that promotes reconciliation and summarised it as follows:

> 'It should be one that offers victims of crime an opportunity to meet in a safe setting with the person who has harmed them. The meeting should be organized and structured by one or two trained mediators. Mediators should allow and encourage victims to tell offenders about how the offence affected their lives and to ask offenders questions which victims often have, such as why they were the target of the offence. Victims should be able to take part in developing a restitution or reparation plan, that is to say, a plan of action which the offender should undertake to help repair the damage they have caused and to reassure the victim that no further offences will be committed against them. Offenders should be given the opportunity to account for their behaviour by telling their story and to contribute to the construction of an action plan for repairing the harm they have caused.'

In advocating this kind of approach, PRISCCA added during a National Conference at Mika Lodge in Lusaka in 2015:

> 'The attitude of most Criminal Justice system Officers are anchored on spending more time on reasoning for incarceration than for non-custodial imprisonment. The presumption of innocent until proven guilty is opposite in Zambia. The conduct of some Police Officers and other law enforcement agents in the Criminal Justice System in Zambia promotes a culture of work based on how many arrests and convictions are earned in order to earn a promotion from their superiors. Restorative justice involving Victim-offender Mediation seems not to be their preference.'

4.9.5 Benefits of victim-offender mediation

Victim-offender mediation helps victims recover from the traumatic experience of being on the receiving end of a crime and attaches a high value to consistency. Those who are regarded as having a stake in a particular conflict are encouraged to construct an action plan which

meets their 'local needs'. In constructing an action plan, they may of course refer to public legal norms but these are clearly only one point of reference and not necessarily the only one. If one group of people decides that their needs are best served by giving the offender a part time job in the shop and another group of people feel that compensating the victim would the best punishment, then the final decision is negotiated and reached consensually. The fact that one group of people, confronted by a very similar situation, construct a very different action plan does not undermine the justice of the solution reached in another case. What is valued in RSJ is not consistency of outcome but rather consistency of process. But even this would involve a considerable shift in our assumptions about the values that we should bring to our assessment of criminal justice.

It is also interesting to note that advocates of this process still argue that this process has benefits for offenders as the key informant from PRISCCA puts it:

> 'The process enables the offender to learn about the real impact of their behaviour on fellow citizens, a learning process which can be painful but is ultimately beneficial. Also by giving the offender an opportunity to participate actively in deciding what should be done to repair the harm they have caused and above all, to let the offender to undertake reparative acts voluntarily thereby enabling the offenders to redeem themselves. Additionally, the process of victim-offender mediation enhances their chances of being accepted back into the community from which they have become separated as a result of their criminal behaviour.'

4.9.6 When does the process of mediation take place?

The process of victim-offender mediation can take place at any stage of a criminal justice process. It is often triggered by cases being referred to it by agencies in the conventional criminal justice process as part of some diversion scheme. For instance, the police might offer victims and offenders the option of victim-offender mediation as an alternative to sending an offender who has admitted involvement in an offence to court. Alternatively, it can be integrated with conventional forms of case 'disposal' where, for instance, a Magistrate might suggest that the victim-offender mediation occur as part of the probation order or it can take place alongside and in addition to conventional processes, like offenders serving prison sentences might take part in victim-offender mediation prior to being released. In other words, the Zambian Criminal Justice System must consider non-custodial sentences to imprisonment on minor offences, especially those falling under section 8 of the CPC as a way of promoting RSJ by emulating the processes discussed above in conformity with the law.

4.9.7 Family group conferencing

A second procedure of RSJ Practice is the Family Group Conference (FGC). Although this approach may be more effective in matters involving young offenders, it is still appropriate even for adults because the idea is to shame the offender in strong terms in a much more respectable manner by ensuring that the offender shows remorse. It was first developed in New Zealand in the late 1980s and then later in Australia and England. Moore notes:

> 'The FGC was first adopted in Australia in a variety of forms but the model mostly promoted elsewhere was developed in the WagaWaga Police Department. Although similar in many respects, it differs principally from the New Zealand model in that it uses Police Officers and school personnel to set up and facilitate meetings. It was refined to incorporate learning from reintegrative shaming theory resulting in a definite emphasis on changing offender behaviour through the wider collective involvement of the community' (Moore *et al.*, 1994).

This model also aims at facilitatingn a process of dialogue between the victim and the offender about the offence and to elicit an apology and perhaps an offer of reparation on the part of the offender. Response to crime should seek restoration and therefore, retributive punishment must be eschewed since they preclude restoration. It is similar in many aspects to victim-offender mediation, though, in conferencing the number of participants is extended to include family members, supporters of victims and family members and community contacts of offenders where they are interested in supporting the offender's reparation efforts. The term 'mediator' should then be replaced by 'facilitator'. There should be greater emphasis in family group conferencing on construction of an action plan which will help the offender change their way of life so that there are less chances of their re-offending. For instance, under criminal family conferencing, if a woman has been assaulted, the parties must first agree for intervention by family members. It matters first that the relevant facts be established at its first stage or during discussions that the conduct of the offender was criminal. Family group conferencing is heavily influenced by the theory of re-integrative shaming about which Braithwaite states that:

> '…it is a process in which facilitators of family group conferences are expected to attempt to steer the interaction between participants in such a way that strong disapproval of the offender's behaviour is expressed but in a context of respect as a person and followed by gestures of care and love. Such a process works extremely well as a form of social control as it puts crime off the "menu" for most people without subjecting them to any of the harsh,

> exclusive and punitive measures we currently rely upon to deter would-be-offenders' (Braithwaite, 1996).

RSJ will allow punitive outcomes so long as they do not exceed upper constraints imposed by the law nor abuse human rights. The evidence is at the same time that RSJ Conferences will help people become less punitive. Through Braithwaite's theory of integrative shaming, RSJ has also become associated with broader communitarian and republican theories which pursue non-domination in RSJ. These are situations where citizens cannot enjoy a republican form of freedom in a society where they are insecure or uncertain about the limits on state coercive power and few limits of this kind which could be more fundamental than precise limits on the length of prison terms. This brings me to the last mode of mediation in RSJ called the circle.

4.9.8 The circle

A third practice of RSJ is the sentencing or peace-making circle. In circles, the number of participants should be much larger than in a family group conference as many community residents, justices and social service personnel should take part. There should be some way of ensuring that everybody who wishes to speak gets at least one chance to do so. Participants should sit in a circle and be encouraged to speak when they are allowed to do so by the facilitators. The central philosophy of the support circle reflects one of the basic principles of RSJ which is encapsulated in the following phrase:

> 'That it is essential to the life of the community that it claims its role in dealing with criminal conflict, with victims and offenders' (MacCold, 1996: 90-96).

The emergence of RSJ as an objective of sentencing provides an opportunity to reflect both on the ability of the existing criminal justice system to pursue restorative means and achieve restorative outcomes and on the relation between RSJ and more traditional sentencing purposes. For instance in Canada, this relationship between restorative and retributive justice is a question of practical as well as theoretical significance. Courts have no alternative but to consider restorative objectives of sentencing within a statutory sentencing framework which privileges retributive sentencing by defining the fundamental principle that states that:

> 'Sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender' (Criminal Code, section 718.1).

The most well-known RSJ initiative in Canada and one that has attracted considerable international attention is the circle sentencing which began in 1992 with the much cited case of *R v Moses* 11 C.R. (4th) 357, (1992) 3 C.N.L.R. 116, 71 c.c.c. (3d) 347. Facts in this matter are that the 26 year old Phillip Moses approached a Police Officer while holding a baseball bat. The Police Officer drew his revolver, retreated to his vehicle and later arrested Moses charging him with the use of a weapon for the purpose of committing an assault. The court sent his case for sentencing circle though he did not qualify for this kind of mediation. After the sentencing circle, the court sentenced Moses to a very soft sentence and suspended it for two years. This was a clear indication of the effectiveness of the diversion system of involving the community in settling matters outside court. Much of the attention to circle sentencing in Canada has focused on the successes of this form of sentencing, cases in which the circle developed a consensual solution of benefit to the victim, the offender and the community to which both parties belong. The circle should be referred to as the circle sentencing because one of the functions should be to enable the community to recommend sentence to a Magistrate who had earlier on referred the matter to the community. As noted by the Executive Director of PRISCCA as a key informant that:

> 'Circles should have broader functions. For instance, their role should also include teaching people through respective dialogues about the right way to behave rather than punishing them for misbehaving. They should also be regarded as processes which should promote healing in the sense of reconnecting people with their community and hence with their true selves. Discussions should tend to be on much broader issues than what sentence the offender should receive. For instance, it should include discussions of matters such as:
>
> (a) Why people engage in the sort of behaviour like fighting, violent behaviour and insulting language which may lead them to be arrested and arraigned before court.
>
> (b) The discussions must also include concerns on what such behaviour is doing to the community.
>
> (c) It must also look at what the community can and should not do to help solve these social problems.
>
> (c) The circle must come up with a recommendation on the type of sentence to give and formulate an action plan with a broader plan of community action in order to tackle some problem(s) which may be perceived as debilitating the community.'

My findings have illustrated that RSJ will empower and incorporate communities in the Criminal Justice System by addressing matters that should be handled by the Courts and the Police. Diversion from the normal conventional court system to other traditional means that incorporate RSJ has the capacity to improve the criminal justice system in Zambia especially on minor offences.

Therefore, mediation, family group conferencing and circles must be promoted and encouraged in Zambia not simply as a better way of dealing with individual criminal cases but as a means of rebuilding a sense of community and using the community to resolve conflicts and tackle the underlying social problems. In this way, the notion of RSJ will become linked with the broader themes of community regeneration. The idea will be that by tackling their own problems, communities will become stronger and as they become stronger, their capacity to deal with their own problems will increase.

It is worth noting that mediation, family conference and circle as a form of RSJ may be tailored in such a way that it supports ex-offenders in their efforts to remain law-abiding community members through monitoring their behaviour. The basic principle should aim at ensuring that they are allowed to live safely in the community without re-offending while the community should also be allowed to safely live with these ex-offenders in their midst without any fear.

As I was having an interview with the Senior Resident Magistrate, I wanted to find out if he would be one of the Judicial Officers who would implement the provisions of section 8 and influence other Magistrates to do the same and ensure that reconciliation becomes priority in any matter before court and falling under this section now that we had discussed the subject extensively, he gave out the same answer that gives discretionary powers to the Magistrate and emphasized that as long as the law remains the same, nothing much will change. I looked around Lusaka Central Prison grounds at the female and male prisoners who were languishing in prison on minor offences in which if the law was applied in the spirit of reconciliation or if alternative sentencing options had been considered, perhaps none of them would even be there. It made me wonder why the attitude of Magistrates has remained so much in favour of custodial sentencing as a way of punishing such offenders yet they have a law at their disposal which they can implement. This is because of the fact that the professionalization of criminal punishment runs the risk of detaching the criminal justice

from the community. By being consigned to, and punished by the justice system, the offender may feel rejected by his society. For instance, in a circle, the presence of community members may foster a greater sense of solidarity or at least undermine the perception of social rejection associated with a traditional sentencing hearing particularly one which results in the incarceration of the offender. And of course, there is the question of simple numbers. Many offenders are represented by court-appointed counsel and appear without the support of other individuals. In a sentencing circle, the offender is supported by family members and/or friends. In short, whatever the nature of the relationship with the established sentencing process, circle sentencing represents a more communitarian response to offending. This brings me to my next chapter which discusses policy and law reform as possible alternative interventions to the implementation of the law under section 8 of the CPC.

CHAPTER FIVE

5.0 CONCLUSION AND INTERVENTIONS

The research has brought out the implications associated with the non-implementation of section 8 of the CPC by Magistrates who preside over minor criminal cases in Subordinate Courts. The research has also shown that RSJ can be an alternative form of justice in the Criminal Justice System in Zambia. This chapter will focus on the conclusion and possible interventions that need to address the concerns identified.

5.1 Conclusion

The research has shown the need to reform the law in section 8 of the CPC. Reconciliation should be considered as a guiding principle on minor criminal offences before incarceration is considered. The women at Lusaka Central Prison incarcerated on minor offences are a reflection of how Magistrates have failed to effectively implement the law by considering more progressive ways of administering justice. There is no need to allow the Criminal Justice System to remain retributive against offenders who commit minor criminal offences like assault which is not aggravated. Reconciliation can play a big role in promoting RSJ as an alternative form of justice.

The manner of dispensing justice in conventional and traditional courts calls for an immediate review to enhance the Criminal Justice System. These two situations need to be addressed so that section 8 of the CPC provides equal justice. The law should list all criminal offences that should qualify as minor offences and call for mandatory reconciliation. The court should only decline to stand down a matter and proceed to trial only if the parties cannot be reconciled or there is recidivism. There is a need to appreciate that most of the women who are in prison today could have been considered for other alternative restorative punishments or reconciled. As a result of this research, various intervention strategies emerged.

In its conclusion on page ix, the Auditor General's report of 2014 recommends that RSJ initiatives and programs should be encouraged, supported and documented and this

recommendation must include all players in the entire Criminal Justice System if the objective of the law is to be achieved.

5.2 Interventions

5.2.1 Short term interventions

(a) New policy directive: Mandatory mediation by Magistrates

Target: The Judiciary and Ministry of Justice

Activities:

Policy must be effected which should make it mandatory for any Magistrate presiding over a case falling under section 8 of the CPC to first stand down the matter and refer it for mediation where the sole purpose should be to reconcile the victim and the offender. Any means of mediation which may include family conferencing or circle may be used as long as the objective of this law is achieved. When the matter is brought back to court, the Magistrate must then facilitate the reconciliation where she/he can even counsel the offender not to re-offend and be a good citizen. The only time when the Magistrate should proceed to hear the case is when the victim or the offender is not willing to reconcile.

Potential outcome:

In this way, RSJ will be incorporated into the legal process and its objectives will be achieved.

(b) Magistrates to pass custodial sentences as a last resort after all RSJ alternatives fail

Target: The Judiciary and the Ministry of Justice

The new policy direction should consider how to go about punishing those who are convicted after reconciliation has failed, keeping in mind that a custodial sentence should be regarded as the very last option. Magistrates should keep at the forefront of their mind that imprisonment is not the best way to rehabilitate a person because more often than not it has the effect of turning small time offenders into a hardcore criminals who are prone to re-offending (recidivism); this in turn puts further pressure on the national treasury to increase the prison budget due to the increased number of incarcerated prisoners that will need to be cared for. For instance, government funding for the Zambia Prisons Service increased from K37 million (US$3,363,636) in 2009 by 35% (in 2010), by 29% (in 2011) and by 4.5% to K86 million ($7,818,181) in 2012 as shown in the Table 5.

Table 5: Showing funding to the Zambia Prison Service (2009 - 2012)

Year	Budgeted amount	Supplementary	Total Authorized Provision	Actual Releases	Overfunding	Annual growth of total authorized provision
K	K	K	K	K	K	%
2009	37,595,804 ($3,417,800)	-	37,595,804 ($3,417,800)	49,451,603 ($4,495,600)	11,855,798 ($1,077,799)	0.0
2010	52,421,251 ($4,765,568)	5,630,585 ($511,871)	58,042,836 ($5,276,621)	67,404,297 ($6,127,663)	9,361,460 (851,041)	35.2
2011	68,682,683 ($6,243,880)	14,000,000 ($1,272,727)	82,682,683 ($7,516,607)	89,375,420 ($8,125,038)	6,692,736 ($608,430)	29.8
2012	94,955,349 ($8,632,304)	-	86,553,879 ($7,868,534)	86,553,879 ($7,868,534)	-	4.5
Total	253,646,090 ($23,058,735)	19,630,585 ($1,784,598)	264,875,204 ($24,875,204)	295,785,201 ($26,889,563)	27,909,996 ($2,537,272)	

Courtesy of the Auditor General's report of July, 2014 with the exchange rate at US$1 to K11

This was supplemented by some income that was generated from agricultural production and other activities. The total income for the period under review was K8,550,492 (US$777,317) as seen in Table 6.

Table 6: Showing income generated from agricultural production and other activities by the Zambian Prison Service (2010-2011)

Source		2010 K	2011 K	Total K
Crop Production		4,386,330 ($398,757)	3,829,865 ($348,169)	8,216,195 ($746,926)
Industries				
Copperbelt				
	Carpentry	98,358 ($8,941)	-	98,358 ($8,941)
	Ceramics	5,113 ($464)	-	5,113 ($464)
	Tailor shop	905 ($82)	-	905 ($82)
	Metal fabrication	16,775 ($1,525)	-	16,775 ($1,525)
Lusaka			-	
	Carpentry	136,820 ($12,438)	-	136,820 ($12,438)
Central				
	Carpentry	51,687 ($4,698)	-	51,687 ($4,698)
	Tailor shop	24,638 (2,239)	-	24,638 ($2,239)
Total		4,720,627 ($429,147)	3,829,865 ($348,169)	8,550,492 ($777,317)

Courtesy of the Auditor General's report of July, 2014 with the exchange rate at US$1 to K11 The figures shown in Tables 5 and 6 show that despite the huge amounts of funding from the treasury and its own productive activities, the Prison Service has been unable to meet the high demands of its administrative and operational needs. This is because it is overwhelmed by its huge prisoner population. The answer lies in either increasing prison funding or forging a gradual but drastic shift in government policy that will reduce the prison population yet also meet the interests of social and individual justice without compromising public security.

Potential outcome:

Imprisonment outside prison will help to decongest prisons and the other problems associated with the huge prison population that include increase in government budgetary allocation to the Prisons Service to build more prisons and employ more Prison Officers to guard the prisoners. In this way, the Zambian Criminal Justice System will incorporate restorative justice and this will mark a gradual shift from RTJ.

5.2.2 Long term interventions

(a) Repeal of section 8 of CPC and its replacement with a suitable new law

Target: The Judiciary, Ministry of Justice and Parliament

Activities:

Once policy direction is put in place, it must be transformed into law. The new law should also include all minor offences which should be listed so that each time there is a case before court, RSJ should be the means of settling matters.

Potential outcome:

The courts will automatically be decongested as cases will be referred for mediation and the bodies which mediate will only report their resolutions to court for action. Furthermore, RSJ will effectively be part of Zambian law that will promote reconciliation and address the problem of prison congestion. Prison will be reserved for dangerous criminals who commit serious offences and those who keep re-offending.

(b) Early inclusion of the Police in restorative justice measures

Target: Police officers and Ministries

Activities:

The current state of affairs is that the police are able to effect reconciliation at the police station without taking the matter to court if the victim and the offender are willing to reconcile. This is how Police Officers promote RSJ at their level. However, they do need to

prosecute if there is evidence and facts that can secure a conviction and if the victim is not willing to withdraw the matter or the offender denies the offence. However, there is a need to have a law that can incorporate RSJ into performance of their duties and allow the police to bring it into effect through reconciliation. These were the sentiments of the key respondent from PRISCCA:

> 'There is now need to work towards the incorporation of restorative justice on all minor offences in our Criminal Justice System in Zambia by first harmonizing the justice system for a better Zambia. "The holier than thou" [attitude] has engulfed Zambia with dangerous stigma and discrimination. Some people are more interested in other people's specks forgetting their own planks in their eyes.'

Potential outcome:

This approach would empower the police to determine real cases that should proceed to court from those which do not and can be settled by meaningful mediation between and in the interests of victims, offenders and their communities. Furthermore, RSJ will be incorporated into the law where it will be implemented in the early stages of the commission of an offence.

(c) Domestication of the UN's basic principles of RSJ

Activities:

There is a need to adopt the UN Basic Principles on RSJ for inclusion in the Constitution so that it becomes part of justiciable rights to which a citizen can hold government accountable if not implemented. The Law Development Commission can refine RSJ further to suit the Zambian situation. This is what the South African Law Reform Commission did in 1997 when it issued a discussion paper on RSJ and defined it as:

> 'A way of dealing with victims and offenders by focusing on the settlement of conflicts arising from crime and resolving the underlying problems which caused it.'

Potential outcome:

The rights of the citizens will be enhanced through legislation and government and its agents in the Criminal Justice System will also be compelled to respect their human rights. The domestication of RSJ would also help in addressing the plight of female offenders.

(d) Political intervention

Activities:

The government will need to collaborate with other organizations to mainstream RSJ into their programs of operation which should include provisions of legal representation, literacy and advocacy. Advocacy is:

> '…an umbrella term that describes various strategies including campaigning, lobbying, research communication and alliance building that are used to influence decision-makers and policies' (AWID, 2003).

If need be the government could in the long run appoint a RSJ Commission that can move around Zambia collecting the views of its citizens on how they would like to see RSJ incorporated into and enforced by the country's justice delivery system. This should ensure that the will and opinions of Zambians are reflected in the laws they are promised they have a voice in moulding.

Potential outcome:

Citizens will be more enlightened on their rights and how to enforce them.

Bibliography

McAlinden A. (2007). The Shaming of Sexual Offenders: Risk, Retribution and Reintegration. North America. Hart Publishing.

Skelton A. and Batley M. (2006).Charting Progress, Mapping the Future: Restorative Justice in South Africa. Pretoria. Restorative Justice Centre.

Braithwaite J. (1996). Restorative Justice and a Better Future. Dalhousie Review 76 (1): 9 - 32

Dahl T.S. (1987).Women's Law: An Introduction to Feminist Jurisprudence. Oslo. Norwegian University Press.

D. Van Ness. et. Al., (2002).Restoring Justice. Cincinnati. Anderson Publishing Company.

Elizabeth, A. (2006). Oxford Dictionary of Law.University Press.

Ezzat A.F. (1986). From Crime Policy to Victim Policy.HongKong.The Macmillan Press Ltd.

Fatic A. (1995).Punishment and Restorative Crime-Handling. (Avebury, Aldershot)

Immanuel M. (1998). Women and Development. Ahmadabad, Kanavati Publication.

Martin W. (1991).Justice for Victims and Offenders: A Restorative Response to Crime. USA. Open University Press.

Marshall T., (1996). The Evolution of Restorative Justice in Britain. European Journal of Criminal Policy and Research 4(4): 21 – 23

Rossner D and Wulf R. (1984).Victim Oriented Criminal Justice: Principles and Proposals for Action in Practice and Legislation. Germany.

Skelton A. (2005). The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice.(LLD Thesis University of Pretoria). pp 239-248.
South African Institute for Security Studies, Beyond retribution: Prospects for Restorative Justice, Monograph 111, February, 2005, pp 137-138. Graph

Tutu D. (1999).Restorative Justice: Healing the Effects of Crime. Lyttleton.Ploughshares Publication.

Von H.et al., (1993).'Dominion and Censure. Chapter 3' in A Von Hirsch, Censure and Sanctions. Oxford. Clarendon Press. 20-8.

Walgrave L., (2000). 'How pure can a Maximalist Approach to Restorative Justice Remain? Or Can a Purist Model of Restorative Become Maximalist?' Contemporary Justice Review 3(4): 415–32.

Wolfgang et al., (2002.The Human Rights of Women: International Instruments and African Experiences. London. Zed Books.

Zehr H. (1999). Changing Lenses.USA.Herald Press. Scottsdale.

Bezemore G. et al., (1999). 'Restorative Justice: In Search of Fundamentals and an Outline for Systematic Reform,' In G. Bazemore and L. Walgrave (eds). Restorative Juvenile Justice: Repairing the Harm of Youth Crime. Pp. 45 – 75. Monsey. New York: Criminal Justice Press.

B. Tshehla, op cit; The Institute for Security Studies,Beyond Retribution; Prospects for Retributive Justice, Monograph 111, February 2005; Department of Justice and Constitutional Development, with the Restorative Justice Centre, booklet accompanying the documentary video Transforming Justice; The Restorative Option.

McCold P. (1996). Restorative Justice and the Role of the Community' in B Galaway and J Hudson (eds) Restorative Justice: International Perspectives (Monsey, NY, Criminal Justice Press).

Moore D. B. et al., (1994). Family Conferencing in WaggaWagga: A Communitarian Model of Justice. In C. Alder, & J Wundersitz (Eds), Family Conferencing and Juvenile Justice: The way forward or misplaced optimism? (pp. 45-86). Canberra: Australian Institute of Criminology.

Address by the Chief Justice at a Symposium to commemorate the 20th Anniversary of the 'In But Free' Prison Project held in Lusaka in 2015

Gerry J. (2004). InauguralLecture.University of Hull.

Hara, J. (1984/85). Imprisonment as a means of Rehabilitation in Zambia.Obligatory Essay.

National Conference held at Mika Lodge in Lusaka in 2015

Conference on Strategies to Combat Overcrowding in Prisons, 2005

Paper presented at the Conference on Strategies to Combat Overcrowding in Prisons, 15 September, 2005.

Sharon M. (2012). A Critical Analysis of Women's Right of Access to Water and Sanitation and Women's Work in the Informal Sector: A Case Study of Makoni Shopping Centre and Jambanja Markets in Chitungwiza, Zimbabwe, A Dissertation submitted in partial fulfilment of the requirements for a Master's Degree in Women's Law, Southern and Eastern African Regional Centre for Women's Law, University of Zimbabwe.

South African Law Reform Commission. (1997).Sentencing: Restorative Justice.

Report of the Auditor General on the Rehabilitation and Reintegration of Prisoners July, 2014

Truth and Reconciliation Commission of South Africa, Report, (1), 1998, p125.

Part II of the Interpretation section of the Penal Code

Pieter Du Rand (2005). Department of Justice and Constitutional Development, South Africa. Zambia Daily Nation Newspaper, Volume 3, Issue number 1189 of 19 November 15

Latest Police statistics of 2012 on reported cases of violent cases in Zambia as published in the book, 'Gender Based Violence: Victim Support Unit Experiences, Lusaka, Zambia.

Latest Police Statistics of 2012 on convictions of violent crimes in Zambia. Accessed onlinewww.zambiapolice.gov.zm on 5/04/16

Clifford, W. (1960).The Penal System in Zambia.http://dspace.unza.zm Accessed online on 03/04/16.

New York Times (2010).Report on the state of the Zambian Prisons.www.nytimes.comAccessed online on 6th April,2016.