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**CHALIMBANA UNIVERSITY**

***Integrity, Service and excellence***

**DIRECTORATE OF RESEARCH AND**

**POSTGRADUATE STUDIES**

**PRJ 4512: RESTORATIVE JUSTICE**

**FIRST EDITION 2019**

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**LUSAKA-ZAMBIA**

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# **Acknowledgement**

Chalimbana University, wishes to thank Chishimba Monford for producing this module. We hope you will be able to continue to render your services when called upon at any time.

# **Module Overview**

This module will provide an in-depth understanding of Restorative Justice. As such, focus is on the Justice that focuses on the needs of victims, offenders, as well as the community affected by the crime. It will also look at the voluntary process which fosters dialogue between victim and offender.

# **Rationale**

Restorative Justice contends that crime causes injury to people and communities; it insists that justice repair those injuries and that the parties be permitted to participate in that process. The programs in Restorative justice enable the victim, the offender and affected members of the community to be directly involved in responding to the crime. It views criminal acts more comprehensively rather than defining crime as simply law breaking and it involves more parties in responding to crime than giving key roles only to government and the offender. Therefore, this module has been written to equip you with vast knowledge in managing justice through the involvement of Victims, Offenders, the State and Community.

# **Aim**

The main aim of the module is to equip you with knowledge and skills in restorative justice that is required to repair the harm done to an individual or group of people by another individual or group of people resulting in restoring emotional and material losses of harmed parties through dialogue, negotiation and problem solving.

1. **Learning Outcomes**

Students should be able to:

* describe the historical and theological roots of restorative justice
* discuss the principles underlying the restorative and retributive models.
* explain the relationship between retributive and restorative justice, crime theories and crime prevention and treatment.
* discuss the philosophies and theories of punishment
* explain the science surrounding victimology
* discus the theories of penology and the alternative mode of punishing offenders
* discuss the criminal justice institutions in Zambia

1. summarySummary

***“Restorative Justice is about the involvement of Victims, Offenders and the community in criminal Justice process”***

This module has been designed to provide a framework for repairing the harm caused or revealed by criminal behaviour through involvement of all the stakeholders such as the Victims, Offender, State and the Community in the dispensations of criminal justice.

# Study Skills

I hope you will find this study material helpful as you start your studies. As a distance student you are very much encouraged to find time to interact with the module in order to achieve maximum benefit in your programme. I wish you all the best in the programme.

# TimeTime frame

The study material will be covered in two residential sessions; after which you will write a final examination. The programme includes course work assessments in form of assignments and tests.

# HelpNeed Help

You are encouraged to form discussion groups, for example a WhatsApp forum and other means available for interaction with your study partners and possibly your lecturer as a way of learning and supporting each other. Any other suggestion that supports your studies is welcome.

# **Assessment**

**Continuous Assessment 50%**

**2 Assignments**  (15%)

**Tests:** (35%)

**Final Examination 50%**

**Total 100%**

Table of Contents

# **UNIT 1**

**HISTORICAL AND THEOLOGICAL ROOTS OF RESTORATIVE JUSTICE**

1.2 Introduction to Restorative Justice

Welcome to the first unit in this module. We shall focus on the basic fundamentals key to help you understand and grasp the knowledge in this course. To begin with, a brief history of Restorative Justice and the Principle and Practices will be discussed. We shall also look at what restorative justice is and the importance of resolving criminal offences through dialogue and reconciliation as compared conventional criminal justice. I urge you to follow me on this exciting journey.

Learning Outcomes

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| Outcomes   * Describe the the principles underlying the Restorative and Retributive models. * Define Restorative Justice and Retributive Justice * Describe the effect of restorative justice practices on Victims, Offender and Community. * Identify the the philosophies and theories of punishment * Discuss the different ways of tackling crimes rather than court. |

Time Frame

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| TimeIn this unit you are expected to spend approximately   * 2 hours’ study time * 2 hours in class |

### Origin of Restorative Justice

Restorative justice is a new movement in the fields of victimology and criminology. It acknowledges that crime causes injury to people and communities; it insists that justice repair those injuries and that the parties be permitted to participate in that process. However, before we discuss the unit in depth, let us begin by looking at the history of Restorative Justice. We shall begin by looking at the broad perspective of the origin of restorative Justice with the view of determining the principles in restorative justice and conventional Justice. For the sack of clarity, conventional justice is the criminal process which envisages that the offender wrongs the state and not the victim. For example in Zambia, criminal cases the offender wrongs the state and therefore it is the state or the people against the offender.

1.2. Pre Modern origin of Restorative Justice

Restorative justice has been around from ancient days and also still being used as an indigenous practice employed in cultures all over the world, from Native American and First Nation Canadian to African, Asian, Celtic, Hebrew, Arab and many others (Sharma : 1998). Eventually modern restorative justice broadened to include communities of care as well, with victims’ and offenders’ families and friends participating in collaborative processes called conferences and circles. Conferencing addresses power imbalances between the victim and offender by including additional supporters (McCold, 1999).

In the modern context, restorative justice originated in the 1970s as mediation or reconciliation between victims and offenders. A Probation officer in 1974 by the name of Mark Yantzi, arranged for two teenagers to meet directly with their victims following a vandalism spree and agree to restitution. The positive response by the victims led to the first victim-offender reconciliation program, in Kitchener, Ontario, Canada, with the support of the Mennonite Central Committee and collaboration with the local probation department (McCold, 1999; Peachey, 1989). The concept subsequently acquired various names, such as victim-offender mediation and victim-offender dialogue, as it spread through North America and to Europe through the 1980s and 1990s (Umbreit & Greenwood, 2000).

The family group conference (FGC) started in New Zealand in 1989 as a response to native Maori people’s concerns with the number of their children being removed from their homes by the courts. It was originally envisioned as a family empowerment process, not as restorative justice (Doolan, 2003). In North America it was renamed family group decision making (FGDM) (Burford & Pennell, 2000). In 1991 the FGC was adapted by an Australian police officer, Terry O’Connell, as a community policing strategy to divert young people from court. The IIRP now calls that adaptation, which has spread around the world, a restorative conference. It has been called other names, such as a community accountability conference (Braithwaite, 1994) and victim-offender conference (Amstutz & Zehr, 1998). In 1994, Marg Thorsborne, an Australian educator, was the first to use a restorative conference in a school (O’Connell, 1998). The use of restorative practices is now spreading worldwide, in education, criminal justice, social work, counselling, youth services, workplace and faith community applications (Wachtel, 2013).

1.3. Restorative Justice in Africa

In line with the above, you should understand that there is nothing new about restorative justice. It has been around for hundreds, perhaps thousands of years in all but names of traditional and cultural practices. African has used restorative practices to resolve conflict and to bring about a justice that healed and accepted by both parties.

African jurisprudence is and was based on the Ubuntu which was taken as a platform for the implementation of restorative justice in Africa. According to brown (2004) Ubuntu denote elements of restorative justice that emphasise reconciliation, reparation, restoration and community harmony. While the term restorative justice may be foreign to Africa elders, its value and procedure accord with their own understanding of justice.

Figure 1

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| --- | --- |
| **Activity 1.0**   |  | | --- | | 1. Explain how contemporary criminal justice system can be improved taking restorative justice into account. | |

summary

Summary

In this unit we have looked at the historical roots of restorative justice. It was established that rrestorative justice has been around from ancient days and also still being used as an indigenous practice employed in cultures all over the world and that what is the gas is to incorporate the traditional system into the convention system of administration of criminal justice. In Unit 2 we shall focus on the restorative and retributive model in order for you to understand the concept of restorative and be able to differentiate it from retributive.

### **UNIT 2**

### **RESTORATIVE AND RETRIBUTIVE MODELS**

2.1 Introduction

Restorative Justice is a way of looking at criminal justice that emphasizes repairing the harm done to people and relationships rather than only punishing offenders (Zehr, 1990). On the other had Retribution involves the imposition of an appropriate sanction or punishment for violation of the penal law. Therefore, this unit will discuss in details what constitutes restorative justice and explain the difference between the two models.

**Learning Outcomes**

By the end of this unit, you are expected to;

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| --- |
| 1. Discuss the objectives for retributive and restorative justice? 2. Explain who are involved in both processes? 3. Define restorative justice 4. Does the Vitim healed from retributive or restorative justice processes? 5. Discuss whether the offender can be able to be reintegrated in the society? |

Time Frame

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| TimeIn this unit you are expected to spend approximately   * 2 hours’ study time * 2 hours in class |

2.2 Define Restorative Justice

According to Mashall (1999) Restorative justice (RJ) is a process whereby all parties with a stake in a specific offence come together to resolve collectively how to deal with the a stake in a specific offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future. You may submit that restorative justice encourages offenders to take responsibility for the harm they caused, and it addresses the needs of victims by giving them a voice in the justice process. It further encourages restorative through restitution, reparation, restitution and reintegration.

Miers, etal (2001) there are many terms that are used to describe the restorative justice movement. These include “communitarian justice”, “making amends”, “positive justice”, “relational justice”, “reparative justice”, “community justice” and “restorative justice”, among others.

You should understand that many different Restorative Justice Practices exist; however, typically they involve a meeting between the victim and the perpetrator, and perhaps also community representatives. The victim and the perpetrator then discuss, and agree on, the harm done, the values violated, and the compensation, restitution and/or punishment required (Wenzel et al., 2010).

There is a large body of literature on Restorative Justice ( Gavrielides, 2013), which has mostly focused on its effects on victims (for example, mental health) and offenders (for example, repeat offending). A considerably smaller body of literature Darley (2009) has explored when and why individuals or groups (victims, offenders, policy makers, communities, and third parties) may support or reject the use of RJ practices. However, in this model the focus will be much on the benefits of restorative Justice has an ideal alternative to dispute resolution.

### From the above, Restorative Justice is an ideal way of responding to criminal behaviour by balancing the needs of the community, the victims and the offenders. It is an evolving concept that has given rise to different interpretation in different countries, one around which there is not always a perfect consensus. Also, because of the difficulties in precisely translating the concept into different languages, a variety of terminologies are often used. You are required to analyse Figure 1 which explain how the focus is on the victim and the involvement of the community in dealing with crimes.

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From the above definitions, we can say that there are three central concepts or pillars of Restorative Justice involving the following; harms and needs, obligations and engagement.

* **Restorative Justice focuses on harm**

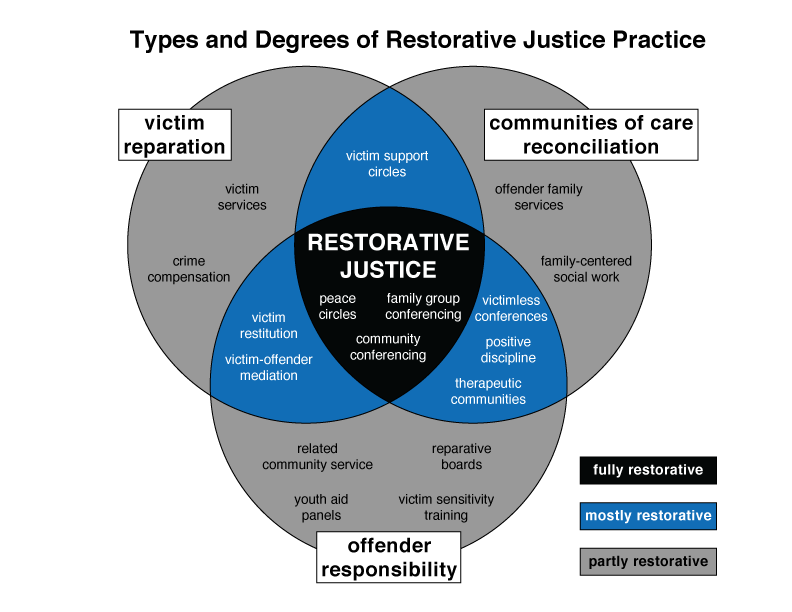
Restorative justice understands crime first of all as harm done to people and communities

* **Wrongs or harms result in obligations**

Restorative justice emphasizes offender accountability and responsibility

* **Restorative Justice promotes engagement or participation**

The principle of engagement suggests that the primary parties affected by crime – Victims, offenders, members of the community are given significant roles in the justice process.



Figure

Source: international institute for restorative practices.

### 2.3 Restorative and retributive justice paradigm.

In most countries the legal justice system provides for criminal punishment which stresses on the retributive as the principal justification with an emphasis on the degree of deprivation of liberty in correctional centres or prisons as a significant measure of the appropriate sanction. This approach has resulted in extended sentences for many offenders, as well as an increase in the population of incarcerated individuals in Correctional facilities or prisons. The Zambia Correctional facilities have a population of more than 22,000 inmates lodged in different facilities around the country against the holding capacity of 800. This means that the prisons are overcrowded by more than 200%.

The diagram below shows how people (Human beings) sleep in Zambia Correctional facilities. As a result of such justice failures, overcrowding is endemic in Zambian prisons. Children and adults, remand, immigration, and convicted detainees all are held together in spaces so tight that at some prisons, they are forced to sleep seated or in shifts. Food provided by the government is so inadequate that food has become a commodity traded for sex. Water is unclean, no soap is provided, and bathing facilities are squalid. Many prisoners are not provided with uniforms and wear rags. Blankets crawl with lice. (Malebeka : 2017)



Figure

Retributive justice has been related to the institution of criminal punishment. Retribution involves the imposition of an appropriate sanction or punishment for violation of the penal law. The state through prosecution before a judge must establish the guilt of a person for violation of the law. Following the determination of guilt, a judge imposes the appropriate sentence, which can include a fine, incarceration, and, in extreme cases, a penalty of death.

You should understand that, it is very difficult to submit that the restorative or retributive justice should be appalled or that the one is better than the other. There is, however, a firm basis for finding a complementary in the operation of these two processes, which ultimately have the same goal of Justice.

Activity

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| 1. Compare and contrast restorative justice and retributive justice? 2. What is your position about custodial and non-custodial sentences? |

summary

Summary

In this unit we have not at both the restorative and retributive model. If you have followed carefully the aforementioned discussion on the two models then you will be able to conclude that an integration of the current system of retributive justice, with a recently developed approach of restorative justice, offers promise to reduce the harshness of contemporary sentencing. Unit 3 will be the build-up on unit 2 because we shall look at the philosophes and theories of punishment.

# **UNIT 3**

**PHILOSOPHIES AND THEORIES OF PUNISHMENT**

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3.0 Introduction

Thus far we have examined issues of retributive and restorative justice and asked whether the two processes can complement each other or that the other one should or should not be considered in the dispensation of Justice. In this unit we shift to examine one of the essential features of criminal law. We will look at several theories of punishment in an attempt to answer questions such as: If a vice is a crime, then how should it be punished? What justifies punishment? What is the goal of punishment?

Learning Outcomes

By the end of this unit, you are expected to;

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| |  | | --- | | j0290885  Figure   * Describe the concept of crime and punishment * Elaborate the deterrent theory of punishment * Discuss the reformative theory of punishment * Differentiate between different theories of punishment * Attempt a comparative assessment of different theories of punishment | |

Time Frame

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| Time In this unit you are expected to spend approximately   * 1-hour study time * 2 hours in class |

### 3.2 The Philosophy of Punishment

The theories of punishment presuppose that punishment is an evil. Look at figure 5 you will be able to confirm that punishment is evil. You need to know that Punishment is imposed because sometimes some people do wrong and that it may be either legal or divine. In the legal context this is called crime or offence. It denotes only those offences against society which are recognized by natural law and these offences are liable for punishment. In Zambia you need to know that all criminal offences and there Penalties are enshrined in the Penal Code, Chapter 89 of the laws of Zambia. You may also find other offences provided for the different Acts of parliament.

Figure 5

All punishment like custodial sentences or fines deals with the legal process whereby the acts of violation of criminal law which is the penal code in case of Zambia are punished according to the provisions of law. On the other hand, in the theological (divine) context this is called sin or evil. A man is rewarded for his good deed and also punished for his evil deeds. Justification of punishment can be derived from two approaches. The first one is teleological approach and the second one is deontological approach. Teleological approach holds that any act or policy is judged by its consequences in terms of good produced by it. While, deontological approach holds that an act is good or right irrespective of its consequences. From deontological approach we can discuss the retributive theory. Again from the teleological approach we can describe the Deterrent and Reformative theory.

There are about five reasons why wrong doers or persons who commit an offence should be punished, namely;

**Incapacitation**

Incapacitation is a very pragmatic goal of criminal justice. The idea is that if criminals are locked up in a secure environment, they cannot go around victimizing everyday citizens. The weakness of incapacitation is that it works only as long as the offender is locked up. There is no real question that incapacitation reduces crime by some degree. The biggest problem with incapacitation is the cost. There are high social and moral costs when the criminal justice system takes people out of their homes, away from their families, and out of the workforce and lock them up for a protracted period. In addition, there are very heavy financial costs with this model. Very long prison sentences result in very large prison populations which require a very large prison industrial complex. These expenses have placed a crippling financial burden on many states.

**Rehabilitation**

Rehabilitation is a noble goal of punishment by the state that seeks to help the offender become a productive, noncriminal member of society. Throughout history, there have been several different notions as to how this help should be administered. When our modern correctional system was forming, this was the dominate model. We can see by the very name *corrections* that the idea was to help the offender become a non-offender. Education programs, faith-based programs, drug treatment programs, anger management programs, and many others are aimed at helping the offender “get better.”

Overall, rehabilitation efforts have had poor results when measured by looking at recidivism rates. Those that the criminal justice system tried to help tend to reoffend at about the same rate as those who serve prison time without any kind of treatment. Advocates of rehabilitation point out those past efforts failed because they were underfunded, ill-conceived, or poorly executed. Today’s drug courts are an example of how we may be moving back toward a more rehabilitative model, especially with first time and nonviolent offenders. The picture below shows the rehabilitation programs that the Zambia correction service impacts in the inmates.



**Retribution**

Retribution means giving offenders the punishment they deserve. Most adherents to this idea believe that the punishment should fit the offense. This idea is known as the doctrine of proportionality. Such a doctrine was advocated by early Italian criminologist **Cesare Beccaria** who viewed the harsh punishments of his day as being disproportionate to many of the crimes committed. The term **just desert**is often used to describe a deserved punishment that is proportionate to the crime committed.

### 3.3 Definition of Crime

The term ‘crime’ is commonly used has an offence against society which is recognized by the natural law. Latimer and Kleinknecht (2000) defined crime as a wrong against the state. It is not the case that all moral offences would be considered as crimes. For instance, rudeness is not a crime. Rather, it is considered as a sin because it cannot be punished by the natural law. On the other hand, stealing is a crime, because it is punishable by the natural law.

From the above, you should be able to understand that in Zambia crime may be defined as a violation of societal rules of behavior as interpreted and envisaged by the criminal law, which reflects public opinion, traditional values, and the viewpoint of people currently holding social and political power.

Considering that a crime is an offence against the state or society. Article 180 of the Zambia Constitution, Amendment Act No. 2 of 2016 gives powers to the director of public prosecution to prosecute an individual accused of having committed a crime. However, Barnett (2003) argues that the definition of crime fails to recognise the victim despite the fact that the victim experiences the actual harm caused by a crime. According to this Author restorative justice theory therefore advances a more victim centred definition of criminal behaviour wherein the harm or wrong is against the individual victim rather than the state.

According to Wright (1991), and Consedine (1999:11) considered crime to be a three-part definition: First, as ‘an act punishable by law’, second, as ‘an act forbidden by statute’, and third, as ‘an act injurious to the public welfare’. But as a society, Consedine (1999) argues that we focus exclusively on the first and second definitions neglecting the third thereby defining punishable offences arbitrarily.

Having defined crime, you may also need to understand the definition of punishment. Punishment may imply a deliberate fault, disobedience of command, violation of law or norm, or any act universally regarded as wrong. An evil doer is punished so that he/she can feel remorse or repentance for his action. On the other hand, Penalties are not considered as punishments.

A crime ought to be punished. A man should be rewarded according to his deeds. Similarly, a man should be punished for his evil deeds. If a man voluntarily violates a moral law, the authority of the moral law demands that he ought to be punished. This is the ethical justification of punishment. But the point that is we always see rules in case of inflicting punishment on a criminal. This leads to the different theories of punishment.

Activity

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| 1. Traffic fine and late fine of examination deposited by a student are not considered punishments. Discuss 2. What is a difference between crime and sin? 3. Do you think the term crime is used in narrow sense than sin |

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### 3.4 Theories of Punishment

We can discuss the theories of punishment under two general philosophies: utilitarian and retributive. The utilitarian theory of punishment seeks to punish offenders to discourage, or to deter future wrong doing. On the other hand, the retributive theory punishes the offenders because they deserve to be punished. The utilitarian argues that we should punish only when doing so would augment social utility on the other hand the retributivist contends that we must punish those who do wrong, even if doing so diminishes social utility, because justice demands that we punish. Utilitarians are consequentialists, always forward-looking, insisting that an action or a practice is justified only if its future benefits outweigh its future cost. Retributivists are not forward-looking in this way. That an action conforms to a principle of right or justice is, for the retributivist, usually sufficient justification for that action.

Both utilitarians and retributivists claim to give an account of why we punish, of the principle immanent in the existing practice. Both are in a position to be immanent critics: they can use their interpretation of the purpose of and principle immanent in the practice (to augment social utility, to mete out justice) to criticize the actual practice when it diverges from this principle or fails to live up to its purpose.

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| Activity 3.1   |  | | --- | | 1. Discuss the different types of punishment and evaluate the best theory of punishment that can best be used in your community in dealing with crime. | |

summarySummary

Unit 3 has looked at the philosophy and theories of punishment and evaluation of what constitutes a crime. In unit 4 we shall look at the victimization. I encourage you to continue reading on.

# **UNIT 4**

## **VICTIMOLOGY**

### 4.0 Introduction

An important part in restorative justice is to effectively understand among others the psychological, physical, emotional, and financial effect or harm the victim suffer because of criminal activities. In this unit, we shall look at the victims of the crime and their contributory role, if any, in the criminal justiceand the relationship between victims and offenders, the effect of the crime on the society, the interactions between victims and the criminal justice system that is the police, the courts and the correctional service

Learning Outcomes

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| |  | | --- | | Outcomes   * Discuss the psychological, physical, emotional, and financial effect or harm the victim suffers because of criminal activities. * Analyse the whether victimization may occur within the community or criminal justice system * Discuss how adult and juvenile Victims are handled at police and at court when giving evidence. | |

### Time Frame

In this unit you are expected to spend approximately

* 1 - Hours Study Time
* 2 – Hours in Class

### 4.1 Theories of Victimology

Victimology is the study of crime victims. It’s a subset of criminology which is the study of crime. (Asli : 2013) state that victimology is a field of study relating to victims of crime which has become a branch of criminal sciences. When studying victimology or victimization in this unit, we shall examine the psychological effects of crimes on the victims, the interactions between victims and the criminal justice system and the relationships between victims and offenders. Theories of victimology try to explain why some individual or group of persons are more likely than other to become victims of a crime.

According to the UNODC handbook of Restorative Justice (2016) the following are the three theories that explain the study of victimology:

**Victim Precipitation Theory**

The victim precipitation theory suggests that the characteristics of the victim precipitate the crime. That is, a criminal could single out a victim because the victim is of a certain ethnicity, race, and sexual orientation, gender or gender identity. This theory does not only involve hate crimes directed at specific groups of people. It might also involve occupations or activities. For example, someone who belongs to a particular political party may be attacked by the member of the other part. An employee may target a recently promoted employee if he or she believes they deserved the promotion.

**Lifestyle Theory**

Lifestyle theory suggests that certain people may become the victims of crimes because of their lifestyles and choices. For example, someone with a gambling or substance addiction could be as an “easy victim” by a con artist. Walking alone at night in a dangerous area, conspicuously wearing expensive jewelry, leaving doors unlocked and associating with known criminals are other lifestyle characteristics that may lead to victimization.

**Deviant Place Theory**

There is some overlap between the lifestyle theory and the deviant place theory. The deviant place theory states that an individual is more likely to become the victim of a crime when exposed to dangerous areas. In other words, a mugger is more likely to target a person walking alone after dark in a bad neighbourhood. The more frequently a person ventures into bad neighbourhoods where violent crime is common, the greater the risk of victimization.

There is also some overlap between the deviant place theory and socioeconomic approaches to victimization. Low-income households are more likely to be located in or near dangerous areas of town, and individuals from poor socioeconomic backgrounds are less capable of moving away from these dangerous areas.

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| Activity 4.1   * Compare and contrast with examples the different types of the theories of victimology. |

### Definition of victimology and Victim

Victimology is the study of the relationship between the victim, the offender and the community. For you to understand this concept, first, you must understand what the terms victim and offender mean. Although the term victim will be interrogated in the next sub unit, it is imperative to briefly define the victim as a person who has been harmed by an offender and that an offender is an individual who has committed the crime against the victim.

You must take note that in Zambia and most of other jurisdictions the law envisages that an offender or a criminal commits an offence against the state and not an individual.

According to (Asli : 2013) victimology can be defined into Individual and collective/group victimization. Wherein in individual victimization describes harm suffered by an individual victim through perpetrator whose conduct is proscribed by a criminal statute. Examples of individual victimization can be seen in offences against the person like murder and offences against property like theft, burglary and robbery. The offence under individual victimization the Victimisation of individuals is not prompted by their belonging to a given category or directed at them because of a group affiliation.

Below is a picture that shows Group/Collective victimization taken on March 22, 2019 showing skulls of victims of the Rwanda's 1994 genocide's at the Ntarama Genocide Memorial, in Kigali. - On April 7, 2019.



* Case study

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| **Isaac Musandabwe V The People** (Appeal No. 81/2018) ZMCA 346   |  | | --- | | Isaac Musandabwe V The People (Appeal No. 81/2018)ZMCA 346  The appellant Mr Issac Musadabwe was charged with and convicted by Magistrate sitting at Lusaka Subordinate Court, of one count of Defilement of a girl under the age of sixteen years, contrary to Section 138(1) of the Penal Code, Cap 87 of the Laws of Zambia as read with Act Number 15 of 2005. The particulars of the offence were that the appellant, on an unknown date, but between November, 2013 and February, 2014, at Lusaka, in the Lusaka District of the Lusaka Province of the Republic of Zambia, had unlawful carnal knowledge of a girl under the age of sixteen years. A trial was conducted and upon conviction, the appellant was committed to the High Court for sentencing. He was sentenced to fifteen years Imprisonment with Hard Labour.  The appellant appealled against conviction and sentence. The case for the prosecution relied on the evidence of PW 1, the prosecutrix, PW2, the prosecutrix's uncle; PW3, the prosecutrix's aunt, PW4, the medical doctor; and PW5, the arresting officer. The facts in brief are that sometime in November, 2013, the appellant gave the prosecutrix a lift in his car as he was taking his child to school. After the appellant dropped his child, he asked the prosecutrix if she had any serious lessons at school that day. She went into the school to check while the appellant waited for her. She returned and informed him that she had no lessons that day and he took her to a lodge in Kamwala South where he defiled her.  Thereafter, the appellant drove the prosecutrix back to Chilenje and dropped her at her home. On the way, he bought four tablets of cafemol which he gave to her and told her to drink the medicine as soon as she would get home.  The prosecutrix testified that subsequently, sometime in the month of November, 2013, the appellant went to her school and offered her a lift home which she accepted. However, on the way she noticed that he used a different route, and they ended up at a deserted place near the American Embassy in Ibex Hill, where the appellant defiled her in his motor vehicle. Thereafter, he drove her back home to Chilenje. The prosecutrix stated that she did not tell anyone what happened to her because she did not know how to approach anyone about such a thing. She stated that after the second incident, the appellant tried to communicate with her on a number of occasions but she ignored him. Sometime in January, 2014, the appellant sent a message to the prosecutrix, telling her that he missed her. She stated that at the time, her sim card was in her uncle's phone because hers was not working. Her uncle saw the message and asked her what was happening. She eventually told her uncle and aunt that she was defiled by the appellant. She was taken to Chilenje Police Station where she gave a statement and was referred to UTH for medical examination where she learnt that she was HIV positive. In cross-examination, the prosecutrix stated that the appellant defiled her at a lodge in Kamwala South sometime in November 2013.  The second prosecution witness, *Dexter Mwila,* the prosecutrix's uncle's testimony was that MM is his niece, and that she was born on 9th February, 1998. He identified a copy of her birth record in Court and it was marked ID 1. The prosecutrix's uncle testified that on 9th January, 2014, he got her sim card and put it in his phone since her phone was damaged.  Later that day, he received a message from the appellant's phone, which stated that "it was nice seeing you." The prosecutrix's uncle stated that he got worried and called the appellant to ask him what was going on between him and his niece. The appellant told him that he knew the prosecutrix from her school where he did some work with vulnerable children. This offended the prosecutrix's uncle and he asked his wife to inquire from the prosecutrix what was happening. Eventually, the prosecutrix opened up and told her uncle that the appellant defiled her twice. The witness reported the matter to Chilenje Police Station where he and other members of his family gave statements. The prosecutrix was issued with a medical report which he identified in Court as ID2. He stated that the prosecutrix was subsequently taken for medical examination at UTH where it was confirmed that she was defiled. The appellant was well known to him and his family. He would even visit their home and supply them with chickens.  The third prosecution witness, *Lydia Mwila* the prosecutrix's aunt testified that sometime in January, 2014, a message was received on her husband's phone, to the effect that the appellant wanted to be in a relationship with the prosecutrix. She stated that she inquired from her niece what was happening and she eventually told her that the appellant defiled her twice, in November, 2013.  The matter was reported to Chilenje Police Station and subsequently, the prosecutrix was taken to UTH where she was medically examined. The witness stated that the prosecutrix was born on 9 th January, 1998 and that she was aged 15 years in November,2013. The prosecutrix told her aunt that the appellant wanted to be in a relationship with her. She later told her that she had sexual intercourse with the appellant at a named lodge in Kamwala South which she even showed to the Police.  The evidence of the fourth prosecution witness, *Dr Sam Miti,* a pediatrician at the University Teaching Hospital was that he examined the prosecutrix on 10th February, 2014 and tested her for pregnancy as well as sexually transmitted diseases. He found that she had a tom hymen and was HIV positive. The witness identified the medical report that he issued and it was marked ID2.  The fifth prosecution witness, *Boas Moonga,* the arresting officer's testimony was that he investigated a case of defilement in which the prosecutrix was allegedly defiled. He apprehended the appellant who he later arrested for the subject offence. He tendered the prosecutrix's under five card, medical report and communication report from airtel in support of the prosecution's case.  The appellant gave sworn evidence in his Defence. He denied ever taking the prosecutrix out and stated that he worked for an organization that sponsored vulnerable children. As such, he would meet the prosecutrix at her school when he had assignments there. He stated that he knew the prosecutrix's uncle well as they lived in the same area. He admitted that he offered the prosecutrix a lift on her way to school on 23rd October, 2013 and left her there. He denied defiling her at a lodge or taking her to a place near the American Embassy. He stated that he was medically examined at Chilenje clinic where he was found to be HIV negative. The appellant admitted sending the prosecutrix a message which made her uncle attack him aggressively. He stated that he got to know the prosecutrix in 2000 and that her uncle is jealous of him because of his success. He maintained that he had no intimate relationship with the prosecutrix.  After evaluating the evidence in its entirety, the learned trial Magistrate found the appellant guilty as charged and convicted him accordingly. When the matter was committed to the High Court for sentencing, the appellant was sentenced to fifteen years Imprisonment with Hard Labour. The supreme court also upheld the conviction and sentence. | |

On the other hand Collective Victimization is related to number of victims, and not belonging to a given category. It denotes harm suffered by a group or groups of victims through perpetrators whose conduct is proscribed by internationally recognised norms of human rights. Collective victims, Bassiouni contended, are persons who belong to a certain group or collectivity. In other word, they are targeted because they are a member of a group. Collective victimisations are in most cases sanctioned by United Nations international human rights instruments. The instruments cover crimes like genocide, crimes against humanity and war crimes. In all such crimes, group victimization is linked to conduct of victimizers violating international human rights and humanitarian law.

* Case study

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| **Rwanda Genocide**  During the Rwandan genocide of 1994, members of the Hutu ethnic majority in the east-central African nation of Rwanda murdered as many as 800,000 people, mostly of the Tutsi minority. Started by Hutu nationalists in the capital of Kigali, the genocide spread throughout the country with shocking speed and brutality, as ordinary citizens were incited by local officials and the Hutu Power government to take up arms against their neighbors. By the time the Tutsi-led Rwandese Patriotic Front gained control of the country through a military offensive in early July, hundreds of thousands of Rwandans were dead and 2 million refugees (mainly Hutus) fled Rwanda, exacerbating what had already become a full-blown humanitarian crisis.  By the early 1990s, Rwanda, a small country with an overwhelmingly agricultural economy, had one of the highest population densities in Africa. About 85 percent of its population was Hutu; the rest were Tutsi, along with a small number of Twa, a Pygmy group who were the original inhabitants of Rwanda.  On April 6, 1994, a plane carrying Habyarimana and Burundi’s president Cyprien Ntaryamira was shot down over the capital city of Kigali, leaving no survivors. (It has never been conclusively determined who the culprits were. Some have blamed Hutu extremists, while others blamed leaders of the RPF.)  Within an hour of the plane crash, the Presidential Guard, together with members of the Rwandan armed forces (FAR) and Hutu militia groups known as the Interahamwe (“Those Who Attack Together”) and Impuzamugambi (“Those Who Have the Same Goal”), set up roadblocks and barricades and began slaughtering Tutsis and moderate Hutus with impunity.  The mass killings in Kigali quickly spread from that city to the rest of Rwanda. In the first two weeks, local administrators in central and southern Rwanda, where most Tutsi lived, resisted the genocide. After April 18, national officials removed the resisters and killed several of them. Other opponents then fell silent or actively led the killing. Officials rewarded killers with food, drink, drugs and money. Government-sponsored radio stations started calling on ordinary Rwandan civilians to murder their neighbors. Within three months, some 800,000 people had been slaughtered. |

Below is the diagram indicating the difference between victimology and criminology;

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| **VICTIMOLOGY** | **CRIMINOLOGY** |
| Viewed as an area of specialization within criminology | Embraces the scientific study of crimes, criminals, criminal laws and the justice system, societal reactions, and crime victims |
| Ask why certain individuals become involved in lawbreaking while others do not | Ask why some individuals, households, and entities are targeted while others are not, and why over and over again |
| Apply their findings to devise crime prevention strategies | Use patterns and trends to develop victimization prevention strategies and risk-reduction tactics |
| Boundaries are clear cut for criminology | Boundaries for victimology still unclear |
| Both criminologists and victimologists study how the criminal justice system actually works versus how it is supposed to work | |

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| Activity 3.4   |  | | --- | | The students are to read the case of Isaac Musandabwe V The People and answer the following questions;   1. Discuss whether the offence committed by Musandabwe affects the community or minor who was raped. 2. Discuss with the help of decided cases the difference between individual victimization and collective victimization. | |

3.6 The use of restorative approaches to the victim

Having discussed victimization, you should now be able to understand the use of Restorative approaches in dealing with the offender. According to (UNODC: 2016) restorative approach is any process in which the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.

**Underlying assumptions**

Restorative justice programmes are based on several underlying assumptions:

*(a)* that the response to crime should repair as much as possible the harm suffered by the victim;

*(b)* that offenders should be brought to understand that their behaviour is not acceptable and that it had some real consequences for the victim and community;

*(c)* that offenders can and should accept responsibility for their action;

*(d)* that victims should have an opportunity to express their needs and to participate in determining the best way for the offender to make reparation, and

*(e)* that the community has a responsibility to contribute to this process.

You should understand that within a criminal justice system there are four main points at which a restorative justice process can be successfully initiated: (*a)* at the police level (pre-charge); *(b)* prosecution level (post charge but usually before a trial), *(c)* at the court level (either at the pretrial or sentencing stages; and, *(d)* corrections (as an alternative to incarceration, as part of or in addition to, a non-custodial sentence, during incarceration, or upon release from prison.

Now you are presented with information on the main types of restorative justice programmes, including victim offender mediation programmes, community and family group conferencing, circle sentencing and reparative probation. You need to pay attention and try to understand the programmes because this without this programmes discussed in detailed below there can be no restorative justice. It also includes a discussion of indigenous and customary justice forums and the main characteristics of existing criminal justice programmes.

**Victim-offender mediation**

Victim-offender mediation programmes (also known as victim-offender reconciliation programmes) were among the earliest restorative justice initiatives. These programmes are designed to address the needs of crime victims while insuring that offenders are held accountable for their offending.

The programmes can be operated by both governmental agencies and not-for-profit organizations and are generally restricted to cases involving less serious offences. Referrals may come from the police, the prosecutors, the courts and probation offices. The programmes can operate at the pre-charge, the post-charge/pre-trial and post-charge stages, and involve the willing participation of the victim and the offender. The programmes can also offer a pre-sentencing process leading to sentencing recommendations.

When the process takes place before sentencing, the outcome of the mediation usually is brought back to the attention of the prosecution or the judge for consideration. The victim-offender mediation process can also be used successfully during the offender’s incarceration and can become part of his or her rehabilitation process even in the case of offenders serving long sentences.

Case study

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| Victim offender mediation  On 27th July, 2019 Iphone Phiri break him in his neighbour house of Mr. Bwalya Ndalama at night through the window with the intention of stealing a plasma TV worth Ten Thousand Kwacha. When he was in the house he failed to go through the window that he used because the TV he was hold in his hands was too big therefore he decided to destroy the door through which he managed to get out. Unfortunately before he could get out Naomi the 19 year old beautiful daughter of Mr Ndalama woke naked to get water in the Fridge. Upon seeing her nakedness Mr. Iphone Phiri dropped the TV because he could not resist from admiring the well-shaped body of Naomi. When she shouted he runs way.  After two hours of heated and emotional dialogue, the mediator felt that the Iphone Phiri ( the offender) and Mr. Bwalya Ndalama (victim) had heard each other's story and had learned something important about the impact of the crime and about each other. They had agreed that the offender would pay the sum of Twenty Thousand Kwacha K 20,000.00 in restitution for committing breaking and bauglary into the Victims house.  In addition, he would be required to reimburse the victims for the cost of a broken TV he had wanted to stole, estimated at K 10,000. A payment schedule would be worked out in the remaining time allowed for the meeting. The offender also made several apologies to the victim and indicated that he wanted to steal the TV because he did not have money to pay for his wife who was just discharged from the hospital. The victim, Mr Ndalama, said that he felt less angry and fearful after learning more about the offender and the details of the crime and thanked the facilitating mediation. |

**2.4 Community and family group conferencing**

This model in its modern form was adopted into national legislation and applied to the youth justice process in New Zealand in 1989, making it at the time the most systemically institutionalized of any existing restorative justice approaches. The majority of cases are handled by the police through “restorative caution” and by police-directed or court family group conferencing. It is based on the centuries old sanctioning and dispute resolution traditions of the Maori, the New Zealand aboriginal group. The model is now also widely used in modified form as a policeinitiated diversion approach in South Australia, South Africa, Ireland, Lesotho, as well as in cities in Minnesota, Pennsylvania and Montana. Each conferencing process has a convenor or facilitator.

The focus of the conferencing process is somewhat broader than that of regular mediation programmes. It involves bringing together the family and friends of both the victim and the offender, and sometimes also other members of the community to participate in a professionally facilitated process to identify desirable outcomes for the parties, address the consequences of the crime and explore appropriate ways to prevent the offending behaviour from reoccurring.

The mandate of family group conferencing is to confront the offender with the consequences of the crime, develop a reparative plan, and in more serious cases (in the New Zealand model), determine the need for more restrictive supervision and/or custody. In Australia and the United States, police officers generally serve as primary gatekeepers, while in South Africa it is the prosecutors. Because they involve a wider circle of concerned people, including individuals who may be in a position to work with and support the offender, these conferencing processes are particularly effective as a means of ensuring that the offender follows through on agreed outcomes. In fact, other members of the circle frequently have a continuing role to play in monitoring the offender’s future behaviour and ensuring that he or she complies with the rehabilitative and reparative measures that he or she has agreed to.

Community conferencing is also used sometimes as alternative measure programme to which an offender can be diverted from the criminal justice system. Such programmes tend to be managed by community groups or agencies, with or without financial support from the government. The circle usually consists of those most concerned about the offender and the victim and any other member of the community with an interest in the process (e.g. a school teacher in the case of a young offender, or an employer). The agency or community group to which the offender is referred is also responsible for monitoring the offender’s compliance with the terms of the agreement and may or may not function under the direct oversight of law enforcement or justice officials.

**Case study**

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| Family group conference  **After the offender, his mother and grandfather, the victim and the local police officer who had made the arrest had spoken about the offence and its impact, the youth justice coordinator asked for any additional input from other members of the group of about ten citizens assembled in the local school (the group included two of the offender’s teachers, two friends of the victim and a few others). The coordinator then asked for input into what should be done by the offender to pay back the victim, a teacher who had been injured and had a set of glasses broken in an altercation with the offender, and pay back the community for the damage caused by his crime. In the remaining half hour of the approximately hour long conference, the group suggested that restitution to the victim was in order to cover medical expenses and the costs of a new pair of glasses and that community service work on the school grounds would be appropriate.** |

**2.5 Circle sentencing**

Sentencing circles are conducted in many aboriginal communities in Canada. In circle sentencing all of the participants, including the judge, defence counsel, prosecutor, police officer, the victim and the offender and their respective families, and community residents, sit facing one another in a circle. Circle sentencing is generally only available to those offenders who plead guilty. Discussions among those in the circle are designed to reach a consensus about the best way to resolve the conflict and dispose of the case, taking into account the need to protect the community, the needs of the victims, and the rehabilitation and punishment of the offender. The sentencing circle process is typically conducted within the criminal justice process, includes justice professionals and supports the sentencing process.

Circle sentencing is perhaps the best example of participatory justice in that members of the community can become directly involved in responding to incidents of crime and social disorder. This is done through the formation of a Community Justice Committee (CJC) that may also include representatives from justice agencies. The common objective of the members of the CJC is to find more constructive ways to respond to conflict in their community. The CJC plays an integral role in the overall circle process, including liaising with criminal justice agencies, community organizations as well as with the various stakeholder groups in the community. Cases are referred to the CJC, generally from the police, prosecutors and judges, although cases may also come from the schools, victim services programmes and families.

There are four stages to the circle process:

Stage 1: Determining whether the specific case is suitable for a circle process

Stage 2: Preparing the parties that will be involved in the circle

Stage 3: Seeking a consensual agreement in the circle

Stage 4: Providing follow-up and ensuring the offender adheres to the agreement

The CJC is involved throughout the circle process, from determining the suitability of a case to ensuring that agreements are adhered to. The CJC also mobilizes community support for the victim and the offender throughout, and following the circle process.

The outcome of the circle is generally submitted to the judge, who may or may not have participated directly in the circle, and is not binding on the court. The court takes the plan developed through the circle very seriously, but it does not necessarily adopt or ratify it completely. The court may also adopt the plan in addition to another sentence that it may order.

Offenders who have their cases heard in a sentencing circle may still be sent for a period of incarceration; however, there are a wide range of other sanctions available, including restitution and compensation, probation, house arrest and community service.

The operation of the circle sentencing process is community-specific, meaning that it may (and should) vary between communities. In fact, the circle sentencing process relies heavily upon community volunteers for its success.

**Case Study**

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| **Sentencing Circle**  **The victim, the wife of the offender who had admitted to physically abusing her during two recent drunken episodes, spoke about the pain and embarrassment her husband had caused to her and her family. After she had finished, the ceremonial feather (used to signify who would be allowed to speak next) was passed to the next person in the circle, a young man who spoke about the contributions the offender had made to the community, the kindness he had shown toward the elders by sharing fish and game with them and his willingness to help others with home repairs. An elder then took the feather and spoke about the shame the offender’s behaviour had caused to his clan noting than in the old days, he would have been required to pay the woman’s family a substantial compensation as a result. Having heard all this, the judge confirmed that the victim still felt that she wanted to try to work it out with her estranged husband and that she was receiving help from her own support group (including a victim’s advocate). Summarizing the case by again stressing the seriousness of the offence and repeating the Crown Counsel’s opening remarks that a jail sentence was required, the judge then proposed to delay sentencing for six weeks until the time of the next circuit court hearing. If during that time the offender had: met the requirements presented earlier by a friend of the offender who had agreed to lead a support group and had met with the community justice committee to work out an alcohol and anger management treatment plan; fulfilled the expectations of the victim and her support group; and completed 40 hours of service to be supervised by the group, he would forgo the jail sentence. After a prayer in which the entire group held hands, the circle disbanded and everyone retreated to the kitchen area of the community centre for refreshments.** |

**2.6 Restorative programmes for juvenile offenders**

In most jurisdictions, restorative justice processes are most extensively developed for use with youth in conflict with the law. These programmes have often provided the basis for the subsequent development of programmes for adult offenders.

Restorative programmes offer some very real and effective alternatives to more formal and stigmatizing youth justice measures. In particular, because of their educational value, they are particularly useful for promoting diversionary measures and for providing alternatives to measures that would deprive a youth of his or her liberty. Many such programmes offer unique opportunities to create a community of care around youth in conflict with the law. Public support for restorative justice programmes for youth is usually relatively easy to garner.

In many countries, juvenile justice legislation provides specifically for the creation of diversion programmes for youth. Many of these programmes can be developed in line with restorative and participatory justice principles.

Furthermore, many programmes developed completely outside of the criminal justice system, in schools or in the community, can provide an opportunity for the community to provide an appropriate educational response to minor offences and other conflicts without formally criminalizing the behaviour or the individual. A number of programmes already exist in schools that facilitate a response (peer mediation, conflict resolution circles, etc.) to minor youth crime (e.g. fights, violent bullying, minor theft, vandalism of school property, extortion of pocket money) that may otherwise have become the object of a formal criminal justice intervention.

### summarySummary

Unit three has looked at Victimology which you have come to appreciate to be the study of victims and their contributory role to the criminal justice. The next unit will look penology.

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# **UNIT 5**

## **PENOLOGY**

### 5.0 Introduction

From the previous Unit, you learnt about victimology wherein we examined the critical role of the victim in criminal process. The focus was on the victim as a person who suffered harm. This unit will introduce Penology which is the study of punishment, correction and control of known offenders. Penology covers a very wide subject however this Unit will tends to focus on various dimensions of imprisonment. We shall examine some of the key issues associated with the use of correctional facilities or prisons in Zambia. We shall discuss on the use of Correctional facilities or prisons and various forms of detention; and provides a basic introduction to prison and parole law.

**Learning Outcomes**

By the end of this unit, you are expected to

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| 1. Discuss the correctional programmes that are offered to inmates 2. State the different types of punishments that are provided for in the laws of Zambia 3. Discuss different types of punishments that are provided for in restorative justice |

Penology comes from the Latin word poena which means punishment and it is concerned with an in-depth examination of the formal institutions of criminal justice such as police, courts and corrections. It is concerned with the process devised and adopted for punishment, prevention of crime and treatment of prisoners. Sentencing and punishment are currently increasing profile policy issues. They have generated debate and proposals for new procedures, criteria, social life.

This is a policy area that is also complex and issues of criminal justice practice and the administration are continually with the public domain. The modern society has attempted to address the problem of increased crime by building more and more prisons but the futility of incarceration is apparent, calling for renewed debate on how best to counter this. Sentencing and punishment are by no means mere academic matters. Policy and practice impact on actual and potential victims of crime if they fail to prevent or limit reoffending. They affect the offender and family and friends and also leads to a large expenditure on courts and prisons. These are also topics where they are strong personal and popular feelings about what should happen and how justice should be done. Policy and practice in this area are also contingent on and influenced by a very wide range of factors. Political, social and economic issues are not only of great importance in the broader development of penal policy but are also relevant to the particular circumstances of individual offenders and their experience of punishment.

Understanding factors influencing penal policy

1. Punishment can be distinguished from other forms of pains or sufferings which are not a response to our misdeeds e.g. painful medical treatment. Punishment rests on moral reasons and is the expression of moral condemnation in response to rule infringements. Feinberg J (1994) in an article called “The expressive function of punishment refers to censure or condemnation as to the defined feature of punishment “it has a symbolic significance. It is a conventional device for the expression of attitudes of resentment and indignation. A key feature of punishment is that it rests on a moral foundation expressing a moral judgment. It is reflective and based on reasons. It stems from an authoritative source usually the state. A key question that has been asked is why some acts are criminalized and not others and why society deals harshly with some wrong doing and lightly with others. the most common questions posed are:-

* What particular response is made to an action or behavior and why? I.e. what to punish.
* If the response is penal which particular penal option is selected? I.e. how to punish.
* What is the particular level of penal response? I.e. how much to punish.

1. Penology is also concerned with questions of equality, fairness and justice which must also be considered within the policy e.g. whether some groups are selected for harsher punishment or if apparently neutral policies have differential impact. e.g. discrimination against race(s) or economic means or the mentally disordered, women and children etc the notion of justice is not clear cut but embodies fairness to all members of the community including victims and offenders and sticking a balance between their competing interests. This is as the cornerstone of the current criminal justice system.
2. human rights have implication for both the theory and practice of punishment in justifying specific punishments in assuming the justice of punishment and in improving standards in penal institutions e.g. respect for sponsors, treatment of remand prisoners, bail, right for fair trial, presumption of innocence etc this principle may act as a control on judicial discretion and inhibiting disparities in sentencing.
3. There are also influences on penal policy which may reflect the political and ideological principles underpinning the penal policy. Political dimensions raises questions about power, how much power a government has to implement policy through enhancement of law. In economic terms, crime punishment is costly in financial terms and has a significant influence of penal policy. Cost of processing offenders is enormous, therefore there is increasingly a move to cut costs by introducing e.g. community penalties and when deciding what to punish, some offenses may be uneconomic to punish, such as minor infringement and sometimes it is better to use lighter sentences.
4. Influence of public opinion on penal policy. It is a key variable in shaping the response to crime and disorder. It can be expressed through electoral choice e.g. hanging, lethal injection, public opinion polls, letter of compliance and judges who see themselves as dispensing popular justice as representative of the public. For the criminal justice system to be effective, it must have legitimacy in the eyes of the republic. Sometimes, this causes a problem where a government’s response to moral panic by giving harsher sentences, which do not succeed in controlling crime. It is also sometimes difficult to identify accurately the public opinion on issues of crime and punishment.
5. Prison population: these are increasing in number and felt that there is a need for alternatives to custody such as community penalties and fines. However, this requires public awareness and information on crime levels, sentencing decisions and policies. The public has to be convinced that alternative to custody will be effective and to be aware that the greater use of imprisonment will only marginally affect crime rates.

Influence of theory on penal law and practice

1. **Principles from criminology and penology:** These principles are the justifications of punishment and they include; retribution, rehab, social protection and none recently restoration of social harmony. Together, they constitute the store of knowledge regarding what is theoretically the best response in dealing with offenders, because theorists from oppressing conditions may agree that punishment is necessary but different in their news of the best response, the type of punishment may depend on which theory, which purpose of punishment is explicit or implicit in policy. It may also depend on which philosophical ideas underpin the chosen punishment. E.g. where the individual is seen as autonomous or possessive, free will or whether their actions are determined by their surrounding environment or genetic makeup.
2. **The so called ‘new penology’:** This has also influenced penal law. It draws on the new managerialist focus on value for money which is reflected in new public management. It applies private sector method to public sector incorporating a concern with efficient use of resources e.g. to consider whether punishing certain types of minor infringements is cost effective. It uses actuarial (statistics to manage, predict, etc) to manage the risk of offending and reoffending. The new penology according to Simon 1992, embraces both a theory and a practice and punishment. In the new penology, crime is seen as normal and the best we can hope for is to control crime and risk through actuarial policies and technocrat forms of knowledge, internally generated by the penal system. This approach focuses on categories of potential and actual offenders rather than an individual on managerial aims rather than management and transformation of the offender. Its focus is on actuarial incapacitation as a way of managing risk and removing persistent offenders from society. Prison is used to warehouse offenders at high risk of reoffending and because of managerial cost concerns are, prisons will be reserved for the rest risk categories. Actuarial justice provides means of selecting the target population to be imprecated. This approach has been a significant influence of penal policy in USA and UK.
3. **Classical theories of punishment:** The principle justification of punishments is clearly associated with distinct traditions or schools. Retribution was influence by the late 18th Century philosophies and received in the 1970s and 80s. The rival tradition is which includes the justification of, social protection or incapacitation.

Both theories accept that punishment can be justly inflicted but differ in their views of what constitutes the justice of a particular punishment. Both seek to limit to use of discretion of sentencing in favor of a more vigorous principle approach and both address issues of proportionality. Both approaches have had a strong impact of penal policy in recent years. One major influence of penal and sentencing policy has been a particular reattribute idea of just desserts. Justice will be served to better through a more consistent approach in sentencing so that convicted aims get their just and deserts which is the calculation of seriousness and the consideration of a sentence proportionate to it.

Policy trends in the late 20th Century, due to the increased repeat offenders and increasing during the 1940s onwards the rehabilitative deal lost much of its support but have recentlyreceived renewed support. In the 1990s in the USA and UK saw a marked increase in the use of punishment and incapacitation with focus being a proportionate punishment rather than treatment or deterrence per say. Trends in the past 20 years or so have seen the emergence of law and order as key. In the UK, more policies focus is being shifted towards the heed to rebalance the system in favor of victims, witnesses and communities and to give paramount importance to protecting the public and resting public confidence in the aim justice system. The aim is to increase the rights of victims even if this means fever rights of the defendants.

Corrections in prisons

Providing rehabilitation for inmate’s offers countless benefits to the individual inmate as well as the community that inmate will re-enter upon his or her release. The options for rehabilitation for inmates vary by facility, offense, and sentence length. Just like the cause of incarceration varies by inmate, the type of rehabilitation an inmate might respond to can also vary. Some inmates may benefit from multiple kinds of rehabilitation. We put together a list of five of the most rewarding types of rehabilitation for inmates below.

1. Education Rehabilitation for Inmates

It has been proven time and time again that education programs in prison help to give inmates a second chance. In fact, inmates who participated in educational programs were 43% less likely to commit a crime and return to incarceration within three years than those who did not.

The statistics proving the value behind providing education programs in prison have helped change the landscape of educational offerings for inmates. Positive outcomes for inmates who leave prison more educated than when they entered filter down into the community. The extended family benefits, the local economy benefits when the ex-offender returns to work, and the taxpayers benefit when less people are incarcerated.

Oftentimes these inmates’ education programs cover functional skills (above and beyond traditional academic programs). For example, inmates who haven’t had access to a computer or the internet in many years are at a disadvantage when attempting to return to the workforce. Computer training programs have become a crucial piece of re-entry educational programs. Education programs in prison are helping give the power of knowledge to inmates. With this power, overcoming the past and enjoying a better quality of life are two very achievable goals.

2. Employment Rehabilitation for Inmates

Inmates who have the opportunity to engage in prison work programs while incarcerated have an easier time getting work once they are released. The inability to find and maintain work is a main factor in recidivism across the nation. When former inmates re-enter society without marketable skills, a domino effect occurs that often times leads to new offenses.

Breaking the cycle relies on becoming a productive member of society through gainful employment. Being able to support oneself is beneficial financially and mentally. For a person newly re-entering society, the self-esteem and fulfillment that can come from working hard plays a big role in lessening criminal behavior.

During prison, many inmates are given an opportunity to participate in work programs. These programs offer a consistent way to prepare for work in society. Punctuality, responsibility, deadlines, accountability and other skills are learned through taking part. The benefits of prison work programs go much deeper than just job training.

3. Counseling Rehabilitation for Inmates

Prison Counselors play a significant role in rehabilitation for inmates. These criminal justice and mental health professionals provide guidance to inmates throughout the duration of their sentence. The support a Prison Counselor provides will range by inmate. Most counselors can offer hands on counseling covering the following topics:

* vocational
* academic
* social
* personal

The goal is to provide rehabilitation for inmates that will help them consider new skills and new insight into their goals and motivations. Additionally, inmates can seek counseling on issues like depression, stress or substance abuse. Sometimes this may come in a group form, or one on one.

In addition to the support provided by the staff, counseling for inmates can be obtained through many non-profit organizations. For example, non govermental program offers prison inmates “encouragement and the necessary support to take stock of the life experiences that have propelled them into criminal activity, take responsibility for their criminal behavior, change lifelong patterns of violence and addiction, and build productive lives.”

This organization trains counselors, chaplains, volunteers and others to visit prisons and provide counseling services. Their work extends into youth prisons and the community as well.

Taking advantage of the counseling offered during prison is a positive step towards rehabilitation.

4. Wellness Rehabilitation for Inmates

Physical and mental wellness brings clarity and purpose to many inmates during their sentence. Depending on the offerings in an individual facility, an inmate may be able to participate in programs like yoga, tai chi, or meditation. Practicing these kinds of mental and physical exercises are proven to provide long term benefits including stress/anger management among others.

Positivity can be a difficult trait to maintain during a prison sentence, but some prisons are offering programs to help bring a positive light into an inmate’s life. Programs like dog training, culinary classes, gardening and more offer inmates opportunities to practice fulfilling skills that make a measurable difference. Making good nutrition choices with meals in prison can also be difficult. But with effort, a healthy diet can also be maintained.

5. Community Rehabilitation for Inmates

Rehabilitation for inmates continues throughout an inmate’s life, even after they have left the system. Re-entering society and taking steps to join the community is a necessary piece of the rehabilitation process.

Adjusting to life after prison successfully has many variables. Having a support system within the community helps an ex-offender stay an ex-offender. Getting involved in the community creates accountability in the form of communal obligations. Feeling a sense of belonging is invaluable, whether it be through:

* church
* volunteering
* social groups
* or another form.

The newly built support system relies on the ex-offender as he/she relies on it. This leads to more positive interactions and less opportunity for criminal behaviour. Additionally, the relationships built within these community groups can lead to job opportunities—a crucial step for reentry to society and elimination of recidivism.

summary

Summary

This unit discused Penology which is the study of punishment, correction and control of known offenders. It focused on various dimensions of imprisonment. We shall examine some of the key issues associated with the use of correctional facilities or prisons in Zambia

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# UNIT 5

# COURTS, SENTENCING AND THE JUDICIARY

INTRODUCTION

Welcome to unit five. We shall focus on the structure of the court, the state prosecution service, trials and sentencing and commutation of sentences. Specifically, we shall look at the laws of Zambia that establishes the courts and gives powers to the courts to impose sentences to the offenders. Lastly this unit will look at the commutation of sentences in Zambia correctional centres.

**Learning Outcomes**

By the end of this unit, you are expected to

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| https://previews.123rf.com/images/promesaartstudio/promesaartstudio1802/promesaartstudio180200274/96540327-symbol-of-law-and-justice-with-zambia-flag-close-up-.jpg   * Discuss the structures and classification of the courts in Zambia * Explain the different powers of the courts * State the different types of commutation of sentences and the prerogative of mercy. |

**Time Frame**

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| Time In this unit you are expected to spend approximately   * 1-hour study time * 2 hours in class |

## Establishment of Courts in Zambia.

## supreme-court-1-borderd

The courts in Zambia are established by the Constitution and the functions have outlined in details in the Acts of parliament. There is the High Court Act Chapter 27, the Subordinate Act Chapter 28 and the Local Court Act, Chapter 29 of the Laws of Zambia. Article 119 (1) of the Zambia Constitution amendment Act No. 2 of 2016 provides for the establishment of the Courts in Zambia. The constitution vests judicial authority in the courts and clause 119 (2) of the Constitution outlines the following judicial functions to be performed by courts;

1. Hear civil and criminal matters; and
2. Hear matters relating to, and in respect of the constitution

The judicially consist of the following courts

Superior courts

1. Supreme Court and the Constitution Court which ranks equivalently
2. Court of Appeal
3. High Court

Lower Courts

1. Subordinate courts;
2. Small claims Courts;
3. Local courts;
4. Courts, as prescribed.

5.3 Subordinate Courts

Subordinate courts are constituted by section 3 of the Subordinate Courts Act Cap 28 of the laws of Zambia**.** The Act envisages that there shall be and are hereby constituted courts subordinate to the High Court in each District as follows:

(*a*) a Subordinate Court of the first class to be presided over by a principal resident magistrate, a senior resident magistrate, resident magistrate or a magistrate of the first class;

(*b*) a Subordinate Court of the second class to be presided over by a magistrate of the second class;

(*c*) a Subordinate Court of the third class to be presided over by a magistrate of the third class.

From the aforementioned provision of the law, you may submit that the subordinate courts are presided over by Principal Resident Magistrates, Senior Resident Magistrates, Resident Magistrates, Magistrates Class I, Magistrates Class II and Magistrates Class III and are in each district of the republic. The jurisdiction of the courts so constituted is limited by section 4 whereby the courts are ordinarily exercising their powers only within the districts for which they are constituted. It is further provided by section 7, subject to the provisions of the Criminal Procedure Code, that the power authority & jurisdiction of all subordinate courts shall be equal for example a Class I court can’t supervise a Class II court.

You may wish to know that in a Subordinate Court of the First Class the following magistrate presides over the court; Chief Resident Magistrate, Principle Resident Magistrate, Senior Resident Magistrate, Resident Magistrate, Magistrate Class I. In a Subordinate Court of the Second Class sits: Magistrate Class II and in a Subordinate Court of the Third Class sits: Magistrate Class III. It should be noted that Chief Resident Magistrate, Principle Resident Magistrate, Senior Resident Magistrate and Resident Magistrate are lawyers who are admitted to practice law whilst Class I, II and III are lay magistrates but all are accorded the same respect. .

* 1. What is Jurisdiction

According to Black’s law dictionary (2014) Jurisdiction is a term used to mean the power and authority constitutionally conferred upon (or constitutionally recognized as existing in) a court or judge to pronounce the sentence of the law, or to award the remedies provided by law, upon a state of facts, proved or ad- mitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal, and in favour of or against persons (or a res) who present themselves, or who are brought, before the court in some manner sanctioned by law as proper and sufficient.

Concomitantly, you should define Jurisdiction to mean (a) legal authority and (b) the territory over which it extends. The powers of subordinate courts in dealing with criminal matters is set out in Section 4 to section 17 of the Subordinate Act, Cap 28 of the laws of Zambia. Any offence under the Penal Code may be tried by the High Court or the Subordinate Court. Whist any offence under any other Act may be tried by the court specified in the Act or by the High Court, or, if no court is specified, by High Court or Subordinate Court.

The High Court is empowered to pass any sentence or make any order authorized by law. Subordinate courts of the First, Second or Third Class may try any offence under the Penal Code or any other law but powers of imprisonment and, in the case of one court, fining, are restricted.

Activity

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| Considering that the High Court of Zambia is empowered by the law to pass any sentence or make order.   1. Discuss whether the High Court can order for a man who has committed rape to be castrated? 2. Discuss whether the High court can order a person who has committed murder to be hanged? |

5.4.1 Sentencing Powers

For court presided over by Chief Resident Magistrate Principle Resident Magistrate or Senior Resident Magistrate, max sentence of imprisonment is 9 years.

For court presided over by Resident Magistrate the maximum sentence of imprisonment is 7 years.

For court presided over by a Magistrate Class I, maximum sentence of imprisonment is 5 years.

For court presided over by a Magistrate Class II or III, maximum sentence is 3 years.

Furthermore there are safeguards and limits that are placed on the relatively wide powers of the subordinate courts when ordering a person to be imprisoned. The High court has been given supervisory powers to confirm the custodial sentences passed by the magistrates. The following are the supervisory powers when it comes to sentences.

* More than two years, imposed by a Magistrate Class I require confirmation by High Court.
* More than one year, imposed by a Magistrate Class II requires confirmation by High Court.
* More than six months, imposed by Magistrate Class III needs confirmation by High Court.

You may wish to know that the reason why the High Court is give the supervisory powers is to provide checks and balances through ascertaining the correctness of the procedure and the conviction. The term of imprisonment passed by the Courts may be with or without hard labour. The aggregate of consecutive sentences passed on one person at one trial count as one sentence and, should in total not be more than the maximum allowed, the record will be required to be sent to the High Court for confirmation of sentence.

For example, we discussed that Class III magistrate can only pass 6 months. Therefore if a Class III magistrate passes sentences on three counts against the same person as follows:

* Count one: 4 months, count 2: 3 months and count 3: 3 months,

The aggregate of the sentences will come to 10 months and since the aggregate is beyond the 6 months max for a Magistrate Class III), then the case record must be sent to the High Court for confirmation. The High Court, when considering any sentence requiring confirmation, may exercise all the powers held by them as a court of revision under Order XI of the Criminal Procedure Code Chapter 87 of the laws of Zambia.

## Fines

The powers of a Subordinate Court of the First and Second Class to fine or to imprison in default of payment or distress are unlimited and the sentence may be carried into effect in the case of the First and Second Class courts with the safeguard that in the case of a court presided over by a magistrate of the First Class, a fine of more than 3,000 penalty units [Penalty unit is currently K180] requires confirmation by the High Court. For a court presided over by a Magistrate Class II, the limit is 1,500 penalty units. In these cases a copy of the record must be immediately forwarded to the High Court, which thereafter can exercise in respect of such case, all the powers of revision it holds as an appeal court.

The position is a little different for a Class III court. The upper limit for a fine to be imposed within confirmation by the High Court is 750 penalty units and nothing may be done to levy the excess until the High Court has confirmed the fine for example they can levy the 750 penalty units but not the excess whereas for Class I and Class II courts all can be levied and if the High Court reduces the fine later, the excess is returned to the party paying the fine.

5.6 Other Powers

Subordinate courts have powers under section 8 of the Criminal Procedure Code, Chapter 87 of the laws of Zambia to promote reconciliation and facilitate the amicable settlement of proceedings for assault or any other offence of a private or personal nature where there is no aggravation by payment of compensation and such other terms as may be approved by the court. The student should understand that the offence should not be a felony such as murder, rape and robbery.

Section 12 of the Criminal Procedure Code, allows the magistrate court to combine any of the sentences. The law allows to orders a term of imprisonment or a fine or both. It also allows the magistrate to release on bail at its discretion, any person upon whom a sentence requiring confirmation has been passed pending such confirmation.

The law further allows the magistrate to pass the sentence consecutively or concurrently for example. three counts with sentences of 3, 4 and 5 years. Consecutively means the sentences will run one after the other and so the convict will serve 12 years in total. Concurrently means that the sentences will “run together” and the convict will only serve 5 years.

In addition the magistrate have powers to suspend the operation of the whole of the sentence or part of it for a period of not more than 3 years on conditions specified by the courts for compensation or good behaviour. E.g. if the convict is sentenced to two years suspended for three years subject to him not repeating the offence, he will not go to prison and the sentence will hang over his head for three years unless he re-offends and then he will be prisoned and if he does not breach the conditions attached to the suspension of his sentence he will not go to prison.

The magistrate court is also allowed by the law to order a medical examination of an accused person at any stage of the trial or inquiry to ascertain any matter that is or may be of material importance to the case before the court. For example to ascertain the age of a youth, to ascertain paternity (used to be a blood test uncertain now DNA).

5.6 Further Restrictions on the Powers of a Subordinate Court

Further restrictions are placed on the powers of a subordinate court by Section 10 of the Criminal Procedure Code which gives power to the High Court to restrict the participation of the subordinate court to the extent that they merely hold a preliminary inquiry.

From the above, section 11 of the Criminal Procedure Code, empowers the Chief Justice to order that any class of offence specified in a notice and published in the Government Gazette shall be tried by the High Court or tried or committed to the High Court by a court of a Principle Resident Magistrate or Senior Resident Magistrate only and that no case of treason or murder or any offence specified in such notice shall be tried by a subordinate court unless specific authority has been given by the High Court for such a trial.

5.8 Territory the Legal Authority of a Subordinate Court Extends Over

Geographical limits have also been placed on the power of subordinate courts. Section 4 of the Subordinate Court Act, Cap 28 of the laws of Zambia restricts the powers ordinarily to the boundaries of the district for which they are constituted but directives made by the Chief Justice may extend the jurisdiction of a Pricincple, Senior resident or Resident Magistrate. For example a Principle Resident Magistrate in Lusaka may be given jurisdiction to preside in a case in Western Province. If the case arises in Mongu, it is the Principle Resident Magistrate who will travel to Mongu and not the case come to come to Lusaka as it is fairer to inconvenience one person, the Magistrate, rather than many like the witnesses and parties.

You should know that the subordinate court is an open court this means that when the court is sitting it is open to the public to witness the proceedings. There are, however, a lot of issues dealt with in chambers and this has led to some complaints. The subordinate courts Act, allows the magistrate court to use assessors but the decision is that of the court and the presiding magistrate is not bound by the advice given by the assessors. Assessors are not part of the court and the judgment is not theirs, even if the magistrate takes their advice.

You should also know that all the subordinate courts are courts of record. This means that all proceedings in the court must be recorded so that whatever is provided during the trial can be accurately known after the event by consulting the record, even if all the parties have since died.

5.10 Practice and procedure

Practice and Procedure is regulated by the subordinate court Act Chapter 28 of the laws of Zambia and the criminal procedure Act Chapter 87 of the laws of Zambia. Where there is no procedure provided for the court should be in substantial conformity with the law and practice for the time being observed in England in the county courts and the courts of summary jurisdiction. Take note that the conformity should be the Law of England and Wales not Scottish or British law. English Acts are to be construed with such verbal alteration as to make them applicable to Zambia but not such as to affect the substance of these Acts

The subordinate court has the power to transfer proceedings to any local court whether it be a criminal (e.g. public nuisance) or civil matter, and at any stage in those proceedings, provided that the local court is within the local limits of the subordinate court’s jurisdiction. This power may only be used in exceptional cases as the subordinate court has the power to apply customary law under section 16 and to summon experts on the same.

5.11 Law and Equity

Customary law may be enforced provided it passes the twin tests of repugnance and incompatibility. The customary law should not be considered to be repugnant to justice, equity or good conscience and not incompatible with any written law. For example customs in some areas that if you leave one headman’s area and move to another, you forfeit your land in the former and all the developments on it to the headman. You should consider this act of surrendering to the chief to amount to theft.

6. Commutation of sentences

Commutation of sentences relates to a change to the character or the duration of the sentence. It is the substitution of a lesser penalty for that given after a conviction for a crime. It replaces dictum in the judgement regarding the sentence by a new one. The penalty can be lessened in severity, in duration, or both. In Zambia Section 145 of the Prisons Act Chapter 97 of the laws of Zambia allows inmates to petition the president for pardon. Furthermore the correctional authorities have power to deduct one third of the sentence from the order of court due to good conduct and behaviour of an inmate

**Activity 5.1**

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| --- | --- |
| |  | | --- | | 1. Discuss the legal implications for the person who is pardoned 2. Does commutation of a sentence affect the status of an offender. | |

**Summary**

You have come to the end of the model**.** At this point you are encouraged to back to the previous units that we have looked and ensure that you have grasped the concepts being presented.

*Larson, Aaron.*[*"How to Apply for a Pardon or Commutation of Sentence"*](https://www.expertlaw.com/library/criminal-law/how-apply-pardon-or-commutation-of-sentence)*. ExpertLaw.com. ExpertLaw. Retrieved 23 May 2017.*

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