ZAMBIAN APPROACHES TO DISPOSITION OF JUVENILE OFFENDERS

by

Enoch Mweetwa Simaluwani

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Name: Enoch Mweetwa Simaluwani

Degree: MASTER OF ARTS (CRIMINOLOGY)

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Examining Committee:

Neil Boyd,
Chairperson,
Associate Professor, Criminology

Douglas F. Cousineau,
Senior Supervisor,
Associate Professor, Criminology

John W. Ekstedt,
Associate Professor, Criminology

Duncan Chappell,
External Examiner, Professor, Criminology

Date Approved: April 16, 1985

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Zambian Approach to Disposition of Juvenile Offenders

Author: _____
(signature)

Enoch Mweetwa Simaluwani
(name)

April 11, 1985
(date)

ABSTRACT

The present study uses an historical approach to examine the impact of western influence in Zambia on the traditional system of handling juvenile offenders. The study includes a review of the literature on the development of a British criminal justice model in Zambia. This approach continues to dominate the practice of Zambian courts in sentencing juvenile offenders.

Using official statistics compiled by the Zambia police department, the seriousness of two crime categories (felonies and misdemeanours) and the severity of dispositions are analyzed for the period 1964 to 1974. Three serious crimes (under felonies), Theft, Breakings and Entering and Theft, and Theft by Servant, and three less serious crimes, (under misdemeanours), Escaping from Lawful Custody, Assaults, and Malicious Damage to Property, were chosen for analysis, on the basis of their high degree of reportability. The dispositions were classified into two types in accordance with previous studies: those dispositions regarded as punitive (caning and institutionalization) and a number of minor dispositions (fines and probation-discharge).

The frequencies of, and percentages out of total, dispositions in respect to each crime category were compared by tabular and graphical presentation of the data. The analysis found that caning, which has been considered the most punitive disposition, is the most frequent disposition handed out in all

crime categories. Probation-discharge, considered the most lenient disposition, has been found to be the least frequently imposed sanction in the Zambian juvenile courts.

The study concludes that punitive (severe) dispositions are the sentences most frequently handed out by the Zambian juvenile courts. Zambian juvenile courts seem to follow the retributive/deterrence theories which emphasize the punishment of offenders as opposed to their rehabilitation.

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DEDICATION

This thesis is dedicated to my late cousin, Silas Siachobe, in whom I had entrusted the care of my family. Against his will, this task was abandoned on 14th October, 1983.

and

To Grace, my wife, who thereafter cared for the children without a supporting hand.

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I. Introduction

Social reaction to juvenile crime has differed considerably in contemporary societies in general. Societal reaction puts pressures on national legislators and law enforcement agencies to do something about juvenile crime, as it is recognized as a social problem. However, this reaction depends on the nature of social, economic, and political factors in each country. Social attitudes about crime are reflected in the operations of law enforcement agencies as the primary representatives of society in this area. Social factors assist in explaining juvenile crime because in most cases the culture determines the nature of crime, as well as how the child is handled for misconduct. In every social setting an individual is assumed to be influenced by the beliefs, knowledge, and values of that society. The individual adapts himself to the changes in beliefs, knowledge, and values of the society. This pertains to the recognized behaviour as legally and morally right in regard to the particular values and beliefs of a particular society (Gibbens and Ahrendeldt, 1966:21). All the values and beliefs are embedded in the culture according to Cohen (1955:12), who defines culture as follows:

> The concept of 'culture' is familiar enough to the modern layman. It refers to knowledge, beliefs, values, codes, tasks, and prejudices that are traditional in social groups. Our American language, political habits, sex mores, taste for hamburger and cokes, and aversion

to horse meat are part of American culture...

Similarly, Eriksson (1964) states that the penal law of a country should be based "on the characteristics of the culture to which it is given and adapted to prevailing social, economic, and political conditions"[1].

While there are differences affecting each country, it is nevertheless agreed that factors associated with the rise of juvenile crime have been: urbanization, population growth, and social and technological change (Platt, 169; Seigel and Senna, 1981; Empey, 1982, etc). These factors have been identified in the historical development of the juvenile justice systems of the United States, Canada and England, the first countries to adopt a separate approach to the treatment of juveniles. Thereafter, it seems most criminal justice systems shifted their emphasis from punitive policies to the "rehabilitation ideal". Seigel and Senna (1981:211-220) note that harsh sentences imposed on adult criminals were not to be handed down to juvenile offenders on the basis of treatment-oriented policies.

Insofar as the issue of handling juvenile offenders is concerned, the literature is replete with a number of theories and models, aimed at analyzing the operations of juvenile justice institutions (police, courts, probation services) and the decision-making process employed by these institutions (Larsen, 1982; Saunders, 1978; Thornberry, 1973). The major

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[1]"Society and treatment of offenders", in Stanley E. Grupp (ed.), Theories of Punishment. Bloomington: Indiana University Press, 1964:264.

problem, however, centers around the general objectives of sentencing in the various criminal justice systems studied (Von Hirsch, 1976; Armstrong, 1976; Ekstedt and Griffiths, 1984). Should social reaction to juvenile crime be punishment-oriented or based more on an individualistic approach to such crime? Should juvenile offenders receive correctional sentences or be placed in community-based programs? The current lack of consensus regarding the handling of juvenile offenders is a situation deserving of closer attention and forms the basis for the approach taken in this thesis.

The general aims of the thesis are stated, therefore, as follows. First, it will be necessary to conduct a review of the existing literature on the nature of juvenile justice in western countries and the range of sentencing responses to juvenile crime. Second, it will be necessary to provide an overview of the literature on the historical development of the criminal justice system in Zambia, bearing in mind the western influence and, in particular, the impact of British rule from the time of their increasing involvement in the 1890's to the mid-1960's. Finally, the discussion will include an examination of Zambian approaches to juvenile crime since independence, with a view to understanding the nature of Zambian policy in relation to the handling of juvenile offenders.

It should be pointed out at this stage that, although the same causal factors that contributed to the rise of juvenile crime in western countries (urbanization, population growth,

disorientation of family life) may be seen to be at work in Zambia, there is no reason to assume a common approach to the sentencing of juvenile offenders, due to the number of social, political and other differences in the Zambian and western situations.

Definition of Terms used in the Study

For the purpose of this study , the following definitions will be used:

1. Juvenile Crime: Since the term "delinquency" used in western countries seems to be ambiguous, with varying connotations in both legal and social terms (violations of Statutes and status offences), it will not be adopted in this discussion (Empey, 1982; Seigel and Senna, 1981). Juvenile crime is defined here as an act that violates the Penal Code and other Statutes. It must be noted that, in Zambia, juvenile crime is not separated from adult criminal behaviour. A juvenile can be charged with an offence for which an adult could also be charged.
2. Disposition: This term refers to the sanction or penalty imposed by the court upon a finding of guilt. This may be after all the evidence has been heard or at the time that a defendant registers a plea of guilt.
3. Punitive Disposition: Disposition involves policies associated with retribution and deterrence, and which cause

hardship for the offender, often expressed in terms of a penal sanction.

4. Minor Disposition: A disposition which is community-based.
5. Juvenile Offender: A person who has attained the age of 8 years but not yet attained the age of 19 years.

Thesis

It will be argued in this thesis that the juvenile justice system in Zambia is punitive in nature, despite the treatment orientation suggested by the western terminology being used. This punitiveness may be attributed to factors associated with the dual legal system which operates in the country. The law in force in Zambia is based, in principle, on early English law. In practice, however, the behavioural norms of the majority of the population have their roots in older traditional systems or values, which have their origin in tribal culture. These fundamental cultural norms exist side by side with the with the official norms, introduced into Zambian society by early British rule, and enshrined in the Penal Code in 1930.

In line with the aforementioned approach, the following hypothesis will be subjected to a descriptive assessment:

> It is expected that punitive dispositions will be used more frequently than other dispositions as a means of dealing with juvenile offenders in Zambia. This statement is based on a prior assumption that the juvenile justice system in Zambia adopts a punishment-oriented approach to juvenile crime.

This hypothesis will be examined by analyzing the distribution

of six chosen crime categories as they relate to dispositions. The aim is to determine the frequency with which dispositions were handed down for each crime category in each year of the ten year period following independence in 1964. Crime category is a statutory classification in the Penal Code which separates offences into felonies and misdemeanours. A felony is considered a serious offence which is punishable "with death, or with imprisonment for three or more years with hard labour"[2]. A misdemeanour is considered less serious and, if no punishment is expressly provided, is "punishable with imprisonment for a term not exceeding two years or with a fine"[3]. The three felonies chosen are: theft, breakings, and theft by servant. The three misdemeanours are: escaping from lawful custody, assaults (excluding wounding, grievous harm and other serious ones), and malicious damage to property. The definitions of these crimes are provided in Appendix A, and the rationale for their selection will be given in Chapter V.

Limitations of the Study

The study falls short of an ideal, since no empirical data will be collected to validate the official statistics presented in the study. In addition, a number of variables have been omitted from the analysis (number of previous offences, number

[2]Section 4 of the Penal Code

[3]ibid. Section 38

of co-offenders, etc.) because of the absence of specific research into these areas in Zambia. The result for this discussion has been a reliance on data obtained from research conducted in western countries. Some caution should be taken in the interpretation of this data because of the social, political and other differences that exist between Zambia and the western countries. One such difference is in the traditional communal approach to the upbringing of children in Zambia. The philosophy underlying this approach differs substantially from the child-rearing philosophy of western countries, particularly in its reliance on informal social control in the discipline of the young. This discussion will be continued in greater detail later in Chapters III and IV.

Organization of the Thesis

This chapter attempts to provide a brief introduction to the notion of juvenile crime and treatment and to a number of resulting research problems.

Chapter II examines some western countries' responses to the sentencing of juvenile offenders and criteria underlying sentencing dispositions. Discussions of theoretical notions underlying the approaches of the courts to punishment and rehabilitation are also included in the chapter.

Chapter III provides an historical assessment of the influence of British rule in Zambia and of the rise of the

criminal justice system in the country. A discussion of possible factors (political, economic, social) affecting juvenile crime and the Zambian government's responses to this crime are also included.

Chapter IV examines the criminal justice system that emerged in Zambia after independence and, in particular, looks at the juvenile justice system that developed in the country.

Chapter V provides a rationale for the general approach taken in the study. Included here is a discussion of some of the problems usually encountered in the use of official statistics, an examination of the variables used in the study, and a discussion of some of the reliability and validity concerns raised by the study.

Chapter VI includes a restatement of the original hypothesis and a presentation of the findings arising out of the analysis of the data. Chapter VII summarizes the approach and general findings of the thesis and presents a number of concluding remarks.

II. Rise of Juvenile Justice System in Western Countries

Traditional Response to Juvenile Crime

This chapter will examine some of the literature on the various approaches to the sentencing of juvenile offenders in a number of western countries. Central to this discussion will be an analysis of the theoretical notions underlying the development of the juvenile justice systems in countries like Canada, England and the United States. This is regarded as important because of the general influence of the West on the Zambian legal system and, in particular, the critical impact of British common law in the country.

Child misconduct existed before the 18th century in western societies, but it was not considered illegal and a term like "delinquency", to describe the phenomenon, did not exist. Empey (1982:4) notes that it was regarded as mischievousness and was a family matter, involving family reactions and responsibility. But the misconduct that came to the notice of the authorities was dealt with severely because there was no distinction between juvenile and adult criminal behaviour. Apparently, in western civilizations up to the time of middle ages, "childhood" was not recognized as a special phase in the life cycle, "set apart from adulthood" (Empey, 1982:18).

Empey (1982) notes that the concept of childhood was based on the idea that children should be regarded as human beings, with their own right to live, but because of their particular levels of physical, moral and intellectual development, "required careful preparation for the harshness and sinfulness of an adult world" (1982:8). Hence, with the recognition of child status, there was an increasing tendency to be less harsh with the children charged with crimes. Empey, (1982:8) further notes that this helped "to create an ideal image of childhood" with the responsibility for the rearing and disciplining of the child assigned to the parent. Children's conduct that was not in line with the expected ideal was regarded as misconduct. So strict was this ideal that the scope of acceptable child conduct was severely reduced which, in turn, led to difficulties in maintaining discipline and control. The gradual breakdown of social control in the family led to the increasing involvement of the State in the management of children and the eventual social construction of "juvenile delinquency". As Empey (1982:5) notes, "delinquency is a social creation of relatively recent times. It is a concept intended to focus our attention upon forms of youthful behaviour, which though they have been common through history, have become of increasing concern in recent years".

This led to the specification of deviance according to age and allowed as delinquent a number of acts that were considered legal and, indeed, normal for adults. This development occurred

at the same time as the public became more conscious of the need to treat juveniles different from adult offenders and to shelter them from the negative impact of association with such adults. Encouraging maturity and positive skills in children was seen to require guidance and treatment rather than punishment.

In order to trace the history of juvenile justice in the West, it is necessary to start with the development of legislation respecting children in England from the 18th century onwards. England is the important focus for this examination because of the origin of the common law system in that country (Siegel and Senna, 1981; Empey, 1982).

By the 1800's, asylums had been established for juveniles in England under the Poor Laws. These laws empowered certain officials to be overseers of poor children regarded as vagrant or neglected delinquents. This led to the establishment of poor houses, or workhouses, which were designed to attend to the child's physical, spiritual and educational needs. One early product of this scheme was the apprenticeship movement that exists in most countries of the western world today (Siegel and Senna, 1981:306).

Despite these advances, the criminal law and criminal process remained the same for adults and juveniles alike, even in the area of punishment. This approach was based on the concept of freewill, that persons act rationally and know the consequences of their actions. Seigel and Senna (1981:306) state that this philosophical understanding of crime and delinquency

was "based on the idea that people were hedonistic by nature but could freely choose to behave morally". This is in line with Beccaria's (1764) Essay on Crime and Punishment which called for a systematic scale of crimes penalties, based on the hedonistic principle that human motivation is inspired by rewards and punishments, pleasure and pain. It was on this basis that punishment was justified as an attempt to prevent crime. This was premised on the idea of deterrence, that the threat of punishment would keep people from committing crimes and even from engaging in other socially undesirable behaviour[1]. Criminal law in respect of juvenile offenders was also in line with deterrence theory and harsh penalties were handed down in a manner similar to that accorded to adults.

Juvenile Justice System in England

The creation of the Court of Chancery in England played an important role in the welfare of juveniles. Its operation was based on an assumption that children, and other individuals deemed incompetent (e.g. mentally ill and immature persons), should be under the protective control of the monarch. This was based on the concept of parens patriae, which assigned to the monarch a parental role in terms of his subjects. Besharov

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[1]For more information on deterrent effect of punishment see for example, Beccaria 1764; Andeneas, 1964; Armstrong, 1964; McGrath, 1976; Fattah, 1977

(1974:2) comments that "the concept apparently was used by the English Kings to justify their intervention in the lives of the children of their vassals, children whose position and property were of direct concern of the Monarch". Thus, the parens patriae was used originally as a means of intervening in the lives of families and their children in the interests of the general welfare.

This protection did not extend, initially however, to children violating the law. It was a merely a super-parental and political measure designed to control the future of the monarch. As Rendleman (1971:205) points out "the idea of parens patriae was actually used to maintain the power of the Crown and structure of control over families known as feudalism".

By the end of the 19th century, the jurisdiction of the Chancery had been broadened sufficiently to allow some juvenile offenders to be brought under its protective umbrella. As a result of this more liberal interpretation of the parens patriae principle by the courts, the rigid common law procedures, which had applied to juvenile offenders, could at last be circumvented. The Court of Chancery could now deal with such offenders in a much more informal manner, taking into account all the aspects relating to the child's background and the circumstances surrounding the commission of the offence.

This broadening of the parens patriae power can be seen in

the decision handed down in the case of The Queen v Gygall[2], where Justice Kay stated Kay stated that:

> ...the jurisdiction, arising as it does from the power of the Crown delegated to the Court of Chancery is essentially a parental jurisdiction, and that description of it involves the main consideration to be acted upon in its exercise, is the benefit or welfare of the child. Again, the term 'welfare' in this connection must be read in its largest possible sense, that is to say, as meaning that every circumstance must be taken into consideration, and the court must do what under the circumstances a wise parent acting for the true interests of the child would or ought to be.

This decision is representative of a number of reforms, brought about in court decisions at the time, that attempted to individualize the treatment of juvenile offneders. The Children Act of 1908 only codified the procedures that had been developed by the Court of Chancery in cases such as the one outlined above. The emphasis after the enactment of this Act, then, was on the treatment of juvenile offenders within the community. Where incarceration was still considered necessary, in the case of more serious offences, juveniles were now detained or imprisoned in separate facilities from those which housed adult criminals (Seigel and Senna, 1981).

Juvenile Justice System in the United States

A number of factors have been seen to contribute to the rise of the juvenile justice system in the United States, where

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[2](1893) 2 Q.B. 232.

the criminal law of the 18th and 19th centuries was similar to that of England during the same period, as a result of its origins in English common law. Like its English counterpart, the early American colonial law had provided for severe and even brutal punishments for criminal offences. These sanctions applied equally to juvenile offenders and adult offenders (Platt, 1969; Seigel and Senna, 1981; Empey, 1982).

During the early period of the 19th century, however, the United States experienced a rapid population growth, due to the increasing birth rate and immigation from Europe. This population explosion placed enormous pressure on the ability of the justice system to cope with the influx in crime. The result of this demand was the growth of workhouses and poorhouses to accommodate the increasingly large numbers of destitute and vagrant youths in the cities and towns. In time, the alarming proportion of juvenile offenders in the population led to calls for a separate system to handle these delinquent youth. The "childsavers" movement advocated the intervention of the state in the lives of these children, in an attempt to expose them to a program of rational, social discipline (Platt, 1969:45).

A separate system for juveniles was soon established; the 1899 Juvenile Court Act in Illinois created juvenile delinquency as a legal concept and a court was set up as a judicial forum for dealing with young offenders (Seigel and Senna, 1981:311). When challenges were made to the legality of the juvenile institutions that arose out of acts like the Illinois

pronouncement, the courts simply applied the concept of parens patriae, giving parental jurisdiction to the refuge managers (Seigel and Senna, 1981:309). This is illustrated in Ex Parte Crouse, a case in which the State's right to intervene in the life of a delinquent child was seriously contested. In delivering his decision, the presiding judge stated that:

> The right of parental control is a natural right, but not an unalienable one. It is not accepted by the Declaration of Rights to be out of the subject of ordinary legislation, and it consequently remains subject to the ordinary legislative power, which, if wantonly or inconveniently used, would soon be constitutionally restricted, but the competency of which, as the government constituted, cannot be doubted [3].

This decision was typical of the courts' overriding concern at the time for the welfare of children, whom, it was thought, would be abandoned to lives of crime and destitution. And it was a concern which generally mitigated against any demonstration of the need to safeguard the individual liberties of the child. This attitude continued in the United States until the mid-1960's, when a number of court decisions began recognizing the legal rights of juvenile offenders brought before them[4].

Juvenile Justice System in Canada

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[3] 4 Wharton 9 (1839) 11

[4] In Re Gault 387 U.S. (1967) 1; Miranda v Arizona 384 U.S. (1966) 436; In Re Winship 397 U.S. (1970) 358

In Canada, the development of the juvenile justice system was impeded because of a federal-provincial struggle for the control of juvenile offenders (Leon, 1977; Larsen, 1979). In 1893, Ontario introduced the Child Protection Act , a comprehensive piece of legislation which provided for the apprehension and detention of children in need of protection, as a result of parental abuse or neglect. In reaction to this move, the Federal Government, in 1894, brought in An Act Respecting Arrest, Trial and Imprisonment of Youthful Offenders, a document which most contained most of the provisions of Ontario's Child Protection Act and was designed to achieve the same measure of control over delinquent youth (Leon, 1977:156). The matter of ultimate control was settled, finally, in 1908 when the Federal Government introduced the Juvenile Delinquency Act, marking the beginning of the first comprehensive juvenile justice system in Canada.

Under this new legislation, the juvenile court was given exclusive jurisdiction for the care of delinquents, with the exception of some serious offences which remained under the jurisdiction of the adult criminal court. The Act proscribed a number of dispositions for dealing with young offenders, ranging from fines and probation to commitment to a juvenile detention centre. There was also a clear emphasis in the Act on the treatment of juvenile offenders, as Leon (1977:166) has pointed out:

> ..as far as practicable every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and

misguided child, and one needing aid, encouragement, help and assistance.

The creation of juvenile justice systems in England, Canada and the United States, then, was an attempt to remove the retributive underpinnings of the existing policies, to shift the emphasis from that of punishment to rehabilitation. Treatment and guidance were now to be the principal rationale used by the courts in dealing with juvenile offenders and turning them into responsible members of society.

Recent Developments in the Juvenile Justice System

The rehabilitation philosophy that accompanied the development of the juvenile justice system in the countries mentioned above, led to the establishment of a range of community-based programs designed to assist in the guidance and treatment of juvenile offenders. This system of treatment was based on developments in the behavioural sciences and, in time, this "rehabilitative ideal" became virtually synonymous with the so-called "medical model" of corrections (Allen, 1959). According to this model, criminal behaviour is like a disease and can be cured provided the right therapy is applied. This therapy usually involves the creation of an atmosphere in which an individual is able to develop a range of social skills that will later help him to play a positive role in society.

The failure of the rehabilitative ideal to achieve its goals in relation to juvenile offenders has led to a great of

criticism in recent years. Finckenauer (1982:5) notes that:

> this phenomenon seems to have spawned a particular pattern in our battle with juvenile crime....A certain approach is posed as a cure-all, or becomes viewed and promoted as a cure-all....as an intervention which will have universal efficacy and thus be appropriate for nearly all kids.

By the mid 1960's, as has already been noted, the rehabilitative ideal, based as it was on the concept of parens patriae, came under increasing attack by the courts. This was particularly the case in the United States where the traditional use of the parens patriae notion was now seen to have deprived juveniles of many of the constitutional liberties which other members of society had enjoyed (Fox, 1974; Empey, 1979; Rothman, 1979). A number of court decisions now reaffirmed the legal rights of children under the concept of due process, that any individual charged with an offence, whether a juvenile or an adult, had the right to be tried "in accordance with the guarantees of all the provisions of the Bill of Rights..."[5]. These decisions went on to say that the juvenile offender should have adequate notice of the charges brought against him, the right to be represented by counsel, the privilege against self-incrimination, and the right to cross-examination of the sworn witnesses[6]. It was further stated that delinquency charges in juvenile court must be proved beyond a reasonable doubt and not just on the standard of proof required in civil

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[5] In Re Gault 387 U.S. (1967) 1

[6] Miranda v Arizona 384 U.S. (1966) 436

proceedings[7].

These American developments subsequently influenced the Canadian juvenile justice system, as judges began advocating the legal rights of juveniles in this country. Justice Thompson of the Ontario Family Court reflected this approach when he stated that:

> ....we lose sight of children's legal rights because of our tendency to assume that the child and society are not in opposition. It becomes easy to circumvent the problem by simply asserting that we are granting the child additional rights, not taking the existing ones away (1973:15).

The number of criticisms levelled against the juvenile justice system in Canada eventually led to the enactment of the Young Offenders Act, in 1982. This Act, which came into force on the 1st April, 1984, abolished the concept of delinquency in respect of status offences and restricted application of the term to a number of specific offences defined in the Criminal Code. The legislation also reversed the position on accountability in that, now, juvenile offenders will be deemed by the courts to be culpable for actions committed by them.

Despite a number of early concerns, the Act seems to have gained a degree of acceptance in Canada. Cousineau and Veevers (1972:253) raised the concern, during the intitial debate on the Bill, that the legislation, if passed, was going to "increase the possibility of stigmatization in the courts and the probability that guilty offenders would be subjected to

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[7] In Re Winship 397 U.S. (1970) 358

punishment". However, as Osborne (1979:24) points out, a hallmark of the juvenile justice system in Canada has been its persistent attempts to protect clients from any adverse labels or stigmatization.

One of the ways that this stigma has been overcome has been in the development of a diversion program in Canada. The Young Offenders Act made special provisions, through section 4 of this Act, for the referral of juvenile offenders to community-based programs at time of arrest, instead of instituting formal court proceedings. Osborne (1979) notes that, in addition to removing any stigma, these provisions also protect the child from any undue harshness in the criminal justice system.

It would appear that the Act has done much to redress many of the procedural shortcomings of the Juvenile Delinquents Act of 1908. The Act gives the offender the right to decline to participate in any diversion scheme and, as a result, have the matter dealt with by the court. The Act also recognizes the legal rights of juvenile offenders in relation to representation by counsel[8].

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[8]The present writer visited the Burnaby Juvenile Court in the summer, 1984 and noted that many cases were being adjourned on the offenders' demands to be represented or following judges informing the offender of his legal right to representation

Rise of Discretionary Powers in Juvenile Court

The rehabilitative ideal brought with it the notion of individualization, that is, that the disposition imposed on the offender should be calculated to the offender's needs, and should take into account the background of the offender, and the circumstances surrounding the offence, in determining the matter of sentence. Such a situation necessarily means that the judge must possess a great deal of discretionary power in assigning a truly individualistic response to the alleged offence.

However, the apparent arbitrariness of decisions handed down by the courts has led to serious allegations that the courts have too much unfettered discretionary power. Kaliel (1974:34) argues that the amount of discretion available to the court in the processing of juvenile offenders is so great "that ...conceivably a child who is charged with jaywalking could receive the same treatment as the child charged with bank robbery". Von Hirsch (1976:28) argues that wide-open discretion in the "name of individualization has caused disparity in sentencing".

Much of this sentencing disparity has been attributed to the different orientations of judges in the juvenile justice system. Dunham (1958:508-527) has dichotomised the conflicting orientations of judges into those focussing on the court's social agency function and those concerned with the court's legal functions. The use of the latter term here refers to the

restraint, control and punishment of youthful conduct while the former term involves those activities engaged in by the court that are intended to provide help and treatment to an accused young offender. These orientations compete for consideration in the judicial decision-making process and, by definition, require that a judge have a great degree of latitude in selecting from the range of dispositions available.

Dunham (1958) further ranked these alternative measures in order of their desirability. Thus, the pure treatment disposition includes referrals and services to psychiatric clinics, mental hospitals, foster homes and residential schools. A second treatment disposition involves placing committed juveniles under the probationary supervision or in special recreational, educational or correctional programs. The third, least desirable alternative treatment disposition, a judge or magistrate may select involves committing juvenile offenders to correctional institutions.

The placing of a juvenile offender in a custody-oriented institution is regarded as punitive because of the hardships caused by institutional environment. But this is seen as the court's social responsibilty for the protection of society and promoting the specific deterrence of the offender. This is so, because punishment is supposed to serve as a deterrent to juvenile crime. This is based on the assumption that crime is reduced by the fear of punishment and strict law enforcement supposedly prevents crime (Andeneas, 1964).

However, it must be noted that criminal deterrence works when a potential offender, in deciding whether or not to commit a crime, weighs the chances that he/she might be caught and be punished, and thereafter may be discouraged from committing the proposed crime. He may be influenced by some other factors which include the personality of the person to be deterred, his moral and social values, awareness and knowledge of the law, and a number of surrounding conditions such as the behaviour of peers. In other words, if punishment is to have any deterrent effect, potential offenders must know about it. For example, Silberman (1978:190) points out that:

> ..most criminals, even the disorganized lower-class youths who do not plan their crimes, would rather avoid a prison term if they could. Their lack of planning reflects their general incompetence, an exaggerated (and often liquor or drug-heightened) faith in their own omnipotence to punishment....

Fattah (1977:100) notes that studies of impact of sanctions on "the specific offences do not offer an ultimate proof for or against the deterrence hypothesis. Some offences are more likely to be deterred than others by threat of punishment".

So pronounced has the attack on judicial discretion been that some critics have suggested a return to a more punishment-oriented model of justice (Fox, 1974). In a similar vein, others have argued that the only way to limit the discretionary powers of the court is to have a legal system based on a "just deserts" model. The supposition here is that the only defensible policy is one which ensures that justice is uniformly administered and that offenders are punished according

to the gravity of their acts (Armstrong, 1964; Empey, 1979; Murray and Cox, 1979).

However, despite this reaction, a general rehabilitative ideal still seems to pervade the approach to juvenile justice in Canada. The judge possesses a wide range of diversionary options in determining the most appropriate disposition to be handed down by the court. And the needs of the offender still seem to be the principal preoccupation of the judge in arriving at this disposition.

A Review of Sentencing Studies

It has been noted in the last section that the basic issues underlying the disposition of offenders have not yet been resolved even in the developed countries, and the theoretical arguments about deterrence, retribution, and rehabilitation are likely to continue to be debated. It has further been suggested that the basic purposes and goals of criminal law are deterrence of the offender and society from involvement in crime, retribution for the crime committed, rehabilitation of the offender, and protection of society through the incarceration of offenders(see, for example, Cousineau and Veevers,1972:135-152; Eriksson, 1964:264).

As uncertainty persists about the fundamental objectives of the criminal justice system, judges tend to differ in their approaches to sentencing. The emphasis might be on more severe

sanctions where it is hoped to punish and discourage certain types of crimes. This reflects the influence of deterrence as an aim of punishment. Sentencing may proceed on the basis of punishing offenders proportionate to the seriousness of the crimes committed. Finally, the emphasis may be on rehabilitative measures, taking into account the offender's situation and the prerequisites for improving his future conduct.

Hogarth (1971:3) notes that the "imposition of sentences is one of the more important mechanisms through which society attempts to achieve its social goals". But there is no agreement as to those social goals and it is the obligation of the sentencing judge or magistrate to reconcile these competing goals of the criminal justice system (Hogarth, 1971).

Thomas (1973:3) refers to this obligation as sentencing policy and describes it as a dual system of sentencing, based on the concepts of retribution and deterrence on the one hand, and concerns for rehabilitation of the offender and individualized treatment on the other hand. Thomas (1973:3) discusses sentencing policy as follows:

> The primary decision of the sentencer in a particular case is to determine on which side of the system the case is to be decided; is one of the individualized measures to be used, or is the case to be dealt with on tariff basis? Once the primary decision has been made, the secondary decision follows.... Where on the tariff is the sentence to be located, or precisely what individualized measure is to be used".

Therefore, according to Thomas, the sentencing judge or magistrate has to resolve two conflicting penal objectives in establishing a framework for determination of the sentence. He

further notes that the conflict mostly rises where a serious offence has been committed by a person who, on the face of the facts, needs some individualized response to his situation. But after reviewing the pre-sentence report and other factors, the court is faced with the question of whether "the demands of public policy which underlies the tariff system are such that a tariff sentence is necessary or whether these are outweighed by the claims of the individual offender to rehabilitative treatment" Hence, the court uses its discretion in resolving this conflict and in imposing an appropriate disposition that meets both the prescribed statutes and the conflicting array of social and political values that impose on the outcome. Hogarth (1967:157) supports this analysis in his description of the Canadian situation:

> Sentencing takes place within the context of a complex set of laws, conventions, expectations, assumptions and conflicts, some of which are likely to influence the manner in which discretion is being exercised.

Lack of consensus in sentencing criteria, then, has been seen as responsible for the sentencing disparity of judges with respect to offences of similar gravity. But uniformity in sentencing offenders, regardless of the particular circumstances of the offender appearing before the court, would mean the imposition of a set of fixed sentences, and this has been seen as equally undesirable (Hogarth, 1971).

Having examined briefly some of the theoretical considerations in relation to sentencing, it is necessary to look more closely at the results of the research that has been

carried out into sentencing. This process will assist in the eventual selection of variables to be used in the present research. Because of the absence of studies done on sentencing in Zambia, it will be necessary to review some of the research carried out in other common law countries, in particular, England, Canada and the United States.

Haldane et al., conducted a study in Canada to see whether there was particularism in juvenile court sentencing, by examining the relationship between disposition, offence and factors in the juvenile's background to see which of these were associated with different types of dispositions. This was a study to determine the criteria used by judges in handing out sentences for particular types of offences. The research found that the relevant criteria used in sentencing did not constitute universalism, but that judicial process had so much particularism built into it, "that there was relatively little room for judges to manoeuvre", when it comes to extralegal factors (1972:242). The authors further noted that some social characteristics were important factors that influenced judges through a conventional belief that "evil-causes-evil". Such past background was assumed responsible for delinquent acts. It was further assumed that it "may foster further delinquent behaviour unless the child is removed from it temporarily" (1972:240). Finally, the authors state that "where discretion is exercised on a greater than chance basis it tends to occur in terms of factors...possibly being part of 'evil-causes-evil' view of the

etiology of delinquency" (1972:242).

Loftus (1975:215) did a study to see which factors were associated with the disposition of juvenile court orders in Australia. He notes that "in the juvenile court, the magistrate generally uses the 'tailor-made' rather than the 'tariff' system, where the magistrate takes into acount, and gives the greatest weight to the factors personal to the offender, in order to make the sentence as apt as possible. Loftus suggests that this is an illustration of the way the courts tend to avoid the tariff system and its concern for the treatment of cases on a consistent basis. The results of this study indicated that, in respect of the types of orders made by the courts, "each showed a characteristic constellation of personal, social, educational, and familial factors..." (1975:215).

These two studies suggest that extralegal factors are an important consideration in the judicial decision-making process and are often related to the severity of dispositions handed down. Once the emphasis is on tailor-made dispositions, there is a tendency to circumvent the application of the tariff system.

These findings have been challenged by Kueneman and Linden (1983:235) in their research into dispositions handed down by the Winnipeg juvenile courts. In this study, it was noted that extralegal factors played a very minor role in determining the range of dispositions meted out by the court. The procedures adopted by the judges in the Winnipeg juvenile court were found to be relatively legalistic ones, underlying the claim that

legal variables are far more important than extralegal variables in predicting juvenile court dispositions. Variables like class and race were seen not to have had a significant impact on the disposition of sentences; both prior record and number of current offences, on the other hand, had an important influence on dispositional decision-making (1983:234).

These findings contrast sharply with the work of Hirschi (1975:191) on the juvenile court process:

> As everyone knows, the (traditional) juvenile justice system was explicitly constructed to give the kindly agents of the State a relatively free hand in dealing with the children. The system was authorized to take into account the needs of the child, his/her probable future behaviour, and so on, through a long list of considerations that would seem to allow or even require bias or discrimination on the part of officials.

The sentencing studies in the United States found that that race and class act as key variables over the manner in which justice is administered in the juvenile courts. Lemert (1951:311) states that "members of minority groups, migrants, and persons with limited economic means are the scapegoats of the frustrated police in our local communities". Clinard (1963:550) reached a similar conclusion when he stated that "it is a generally established fact that the Negroes, as well as Spanish speaking peoples, on the whole, are being arrested, tried, convicted, and returned to prison more often than others, who commit comparable offences". Schur (1973:121) points out that juvenile courts in many parts of the U.S. tend to work on a stereotypical basis and that, while legal variables such as offence charged are important factors at at disposition, race

and socio-economic status are much more important factors in determining the matter of disposition:

> the philosophy of the juvenile court - with its throughgoing social investigation of the alleged delinquent, and its relative lack of concern with the particular offence - virtually ensures that the stereotypes will influence judicial disposition.

Schur (1973:125-126) further points out that the differential treatment of these minority offenders by the courts seems to be based on a belief that they are delinquency-prone:

> In our society, lower-class children more than middle-class ones, black children more than white ones,...face high probabilities (i.e., run a special 'categorical risk' in the actuarial sense) not only of engaging in rule-violating in the first place, but also of becoming enmeshed in official negative labeling process (1973:125-126).

However, Cohen and Kluegel (1978:74), in their study of two Metropolitan courts in Denver and Memphis, pointed to offence and prior record as major determinants of the type of disposition handed down by the courts. The authors noted that bias may appear at stages prior to a youth's referral to the juvenile court. In conclusion, they state that "once the youth is referred to the juvenile court, prior record and offence, not race and class, are the major determinants of severity of accorded disposition". This suggests that legal variables play a significant role in the juvenile court process at the dispositional level, but discrimination at the police and the intake levels may also need to be considered in future studies.

These findings have been challenged by Thornberry (1973, 1979), in his research into the juvenile justice system in

Philadelphia. He examined the differential dispositions at each of the major stages of the juvenile justice system, at the police level, intake hearing level of the juvenile court's probation department, and at the hearing level of the juvenile court itself. He found that the legal and extralegal variables were both important considerations at the stage of deciding the disposition of the offence. But he notes that, when legal variables like seriousness of offence and number of previous offences were held constant, extralegal variables like socio-economic status and race also played a significant part in disposition as well.

The studies that have been reviewed yield contradictory results insofar as the disparity in the dispositions handed down by the juvenile courts have been attributed to legal variables, on the one hand, and to extra-legal variables on the other hand. Such a finding brings into question the rationality of judges, and the extent to which judges are affected by factors that go beyond the realm of evidential proof. The rationality of sentencing judges has been noted in a number of studies that have been done in the adult courts. A brief examination of these studies, at this stage, could prove useful insofar as rationality plays an important role in the process of judicial decision-making.

Green (1961:703) notes that "justice is not merely what the law says it is, or what the judges in responding to their private predilections wish it to be. Rather it is psycho-social

reality reflected in striving to accommodate sensibly the various factors which the judges regard as legitimate claims upon their deliberations". Sellin (1935:216) attributes most of the disparities in sentencing to the "human equation in judicial administration". It has been argued that the personal attitude and individual sentencing habit of the judge or magistrate has an influence on the severity of dispositions in most cases (Shoham, 1959:327-37; Hood, 1972:148).

Hogarth (1967:156) notes that a judge has discriminative and reasoning powers that would assert themselves over time, and that there is a capability of self-criticism and insight, while dealing with each particular case before him. Through this process, the judge is faced with alternatives among which he has to choose. It is not an easy task to accomplish because of the inherent complexity of the task and the knowledge of the hardship that the offender may have to endure. However, Hogarth (1971:17) suggests that sentencing must be done within a systematic analysis of legal, sociological, and psychological factors, which at times also "raise the difficulty of selecting those variables from each area that are likely to be relevant...to have a logical consistency". But all this can be achieved by adapting to the prevailing social, economic, and political conditions.

This chapter has looked at a selective series of studies on sentencing in the juvenile justice systems of a number of western countries. This information is important to the present

research insofar as it has shown that legal variables are related to the manner in which dispositions are handed down by the courts. In other words, severity of sentence has been directly related to the seriousness of the offence committed.

It is now necessary to turn to an examination of the historical development of the juvenile justice system in Zambia. This will enable an examination of the western and, in particular, the British influence on the development of the juvenile court system and its approach to the sentencing of young offenders.

III. Historical Development of Criminal Justice in Zambia

The modern history of the Zambian criminal justice system (in particular the juvenile justice system) can only be understood by examining the impact of British rule between the 1890's when the British political and economic structures were established, and 1964, when Zambia attained its independence. At independence the Zambian society was based on one primary economy (Copper industry), with many western values, transposing life in tribal Zambia. These factors (economic, social, and political) played a critical role in the development of the criminal justice system; where tribal laws gave way to a British form of criminal justice system, even though the traditional tribal customs were at times recognized and enforced side by side with the new law. primarily thru social not legal control

The British trade, commerce, and civilization in Central Africa was first aroused by Dr. David Livingstone's journeys between 1851 and 1873 (see Hall, 1965; Roberts, 1976; Kaplan, 1979). The discovery of copper in late 1890's, in the areas that came to be known as the Copperbelt, increased the British interests in the area, as a result concessions were signed between the traditional paramount chief of the Barotse and the representatives of the British South Africa Company (BSAC), which was entrusted with the administration of the two provinces (North-western Rhodesia and North-eastern Rhodesia). The British

industry was soon well established in the country and the industrialists who had already settled in South Africa, began to have a new interest in copper resources of the country and thereafter saw a massive investment capital injected, especially at Bwana Mkubwa (Roberts, 1975:185).

However, the British, fearing the Portuguese, Belgians, and Germans bordering the territory, quickly took steps to protect this potential source of wealth by unifying the country. By 1911, the British had amalgamated the eastern and western parts of the country under the name of Northern Rhodesia and a resident Commissioner, answerable to the High Commissioner stationed in South Africa, was appointed. Administration of the country by the British South Africa Company (BSAC), subject to the exercise of certain powers of control by the British Crown, continued until 1924. When the administration of the territory was assumed directly by the British Crown, through the Colonial office, the Northern Rhodesia Order-in-Council, 1924, proclaimed the territory a British protectorate. The first Governor was appointed and an Executive Council, and a Legislative Council were set up (Kaplan, 1979:25-26, Hall, 1965:104-105).

Before the amalgamation of eastern and western parts of the country nothing was known about crime. Criminal behaviour in Zambia is documented through the work of social anthropologists, who were interested in social change in Zambia (Colson, 1953; Epstein, 1958; Gluckman, 1965; Clifford, 1966, 1974). Crime, for a great many rural Africans was (and is) behaviour which could

be clearly and unmistakably defined in their terms as something physically or spiritually detrimental to social relationships, and likely to affect the ties of kith and kin adversely. It was contrary to customary law, if a behaviour threatened this social harmony, and that act was considered to be offensive to the spirits, or seen as a menace to the harmony of the tribe. Hence, in traditional Zambia, insulting language was regarded as a serious misconduct equated to a serious assault, as this could lead to fights and break up the social harmony. Clifford (1974:57) in his study of the concept of juvenile delinquency in Zambia found that "tribal elders and a wide variety of other people thought that the Penal Code was far too lenient with those who used insulting language. Children were taught to avoid and detest it".

Gluckman (1965:200) in his study found that the Lozi judges (belonging to Lozi tribe) in deciding on the merits of a case examined all the actions of parties, and "wherever they found departure from established usage--from custom---they became suspicious that the deviating person had committed more serious breaches of rightdoing". However, customs descended by word of mouth from older generation to younger generation, customary law was unwritten and varied from one community to another. It has been argued that this behaviour had to be related to its significance to the spirits of ancestors hovering with the family or clan, and " a prime responsibility of all concerned was to keep this social group united" (Clifford 1974:55).

Therefore, this social harmony had existed on the basis of moral relationship; for the preservation of peace and order, the tribal elders had to maintain this system by settling disputes on reconciliatory basis (Gluckman,1965; Epstein, 1958; Colson, 1953).

Hence, under these conditions, deviant behaviour and its consequences were not regarded as being purely an individual responsibility and crime, but as social peril. The communities were thinking in terms of communal or collective rather than individual responsibility, and any misconduct was followed by the society's repressive measures. If a person commits a wrong the whole kin is involved and every member was liable, not as an individual but as part of the kin. Clifford (1974:58) notes that " a person attacked is his kin attacked: a person stealing means an act of stealing by his kin; if he be slain it is the blood of the kin that has been shed and the kin is entitled to compensation or vengeance".

Durkheim (1964:75) regards such maintenance of social solidarity as repressive law, rather than restitutive law enforced by specialized organs (courts, industrial tribunals). Durkheim argues that repressive law tends to remain diffuse within society, and is essentially conservative. Because the totality of beliefs and sentiments common to "average citizens of the same society forms a determinate system which has its own life"). While referring to Roman system of Twelve Tables, he went on, to say that repressive justice tends to remain more or

less diffuse in that it does not function through the means of a special magistracy, but the whole society participates in a rather a large measure:

> Even though in fact it had delegated its powers to permanent commissions, the people remained, in principle, the supreme judge of this type of process, as these special functionaries or persons are made the authorized interpreters of collective sentiments (1964:76).

Durkheim (1964:75) further contends that punishment in traditional societies is, first and foremost, an emotional reaction, to the violation of rules which do not need a juridical expression, "because everybody feels their authority"). He then states that:

> Peoples in these societies punish for the sake of punishing, making the guilty party suffer solely for the sake of making him suffer and without seeking any advantage for themselves from the suffering which they impose. Punishment often extends further than the guilty party and reaches the innocent, his wife, his children, his neighbours, and it expands in a quite mechanical fashion (1964:85).

On the other hand, Durkheim (1964:111) argues that restitutive law does not have an expiatory character, but consists in a return in state. The prescriptions (obligations) involved in restitutive law, covering individual rights, do not stimulate the collective anger characteristic of repressive sanctions. Thus the application of restitutive law demands for the establishment of specialized agencies for the administration of law, in contrast to the repressive sanctions of the traditional communities, which are normally administered diffusedly through the kin group. There comes into being,

therefore, organs which are increasingly specialized: commercial courts, tribunals, and adminstrative courts of many kinds. However, the sphere of repressive law does not disappear, it remains fundamental in regard to values embodied in moral individualism, and consequently is applied to acts, such as murder, which offend these values (Durkheim, 1964:114).

Therefore, the underlying principle for treatment of crime in traditional Zambia, was retribution; thus, the punishment must fit the crime. But compensation was the main remedy for misconduct; it was used even in serious acts to compensate the offended by the offender/his kin. Colson's (1953) article, "Social control and Vengeance in Plateau Tonga society of Zambia", by focusing on one detailed case of homicide, shows how members of this society (Tonga) handled a breach of prescribed rules, on settlement by agreement of compensation payment.

The communal way of living with social, moral and rules supporting each other served as a means of reducing emotional conflicts which exist in industrial societies, where the environments breed criminals and juvenile delinquency (Clifford, 1974). The Zambian traditional communities did not experience teen-aged gangs with their own sub-cultures, as there was no recognition of adolescence (just children before initiation and adults afterwards). Child misconduct was defined in terms of adult misbehaviour and treatment was the same for both. There was no juvenile delinquency in the traditional communities.

After the amalgamation of the two provinces the attitudes of the indigenous peoples of Zambia were affected; as the colonizers brought with them new standards of behaviour and concepts of crime and punishment, through christian teachings, western form of education and the English common law tradition. The North-Western Rhodesia Order-in-Council, 1899, which introduced the English law, had provided that Native law was to be respected unless "incompatible with the due exercise of Her Majesty powers and jurisdiction" (Gann 1957:94). The traditional customary law was also preserved in the North-Eastern Rhodesia Order-in-Council, 1900, which provided that Native laws were to be applied in civil cases between Africans, "unless contrary to natural justice or specific legislation" (Gann, ibid:93)[1]. However, this move by the British was intended to restrain the Roman-Dutch law's influence to spread to this country, as it was in force in the neighbouring country (Southern Rhodesia).

The provisions of these Orders - in - Council made one of the most significant changes in the legal tradition, that the transition from tribal customary law to the English common law was not an abrupt change. As to some extent they amalgamated, but the courts created were to apply both. The British did not want to intervene in purely native cases. Magistrates were to hear juvenile cases as well as adult cases in the same manner.

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[1]Article 35 of the North-Eastern Rhodesia Order-in-Council, 1900 as quoted by Gann (supra)

By 1911, when the judicial system of the two provinces was unified, there was legal specification in Zambia, provided for the mutual interests of the British and the indigenous people, as it was provided for in the North-Eastern Rhodesia Order-in-Council of 1900. This led to the establishment of the High court of Northern Rhodesia, and appeals from it could only be directed in certain circumstances to the judicial committee of the Privy council. This was so because the Privy council was considered the highest court of Appeal. At the lower levels of the judicial hierarchy magistrates, native commissioners, and assistant native commissioners sat to hear criminal cases. They dealt with disputes before them in an informal manner, as they did not have a legal training background. The head of the High court was the one who was supposed to be a trained person. However, as time went by, a more formal system of justice came into existence. Large parts of judicial work remained in the hands of the traditional chiefs; as the native commissioners could not visit each village in their respective areas more than once a year. This became the official policy to encourage chiefs to adjudicate in minor criminal cases.

It was not only a new justice system that was brought into the country, but new offences or crime categories were also introduced. This was important because it dramastically altered the tribal way of justice. As Gann (1957:96) notes that "tax evasion became a crime, so did offences against firearms regulations, and breaches of labour contracts. All these had

been unknown in tribal life; they came into existence through the problems created by the contact between tribal Africans on one hand and a dominant European group on the other". British courts claimed the sole jurisdiction to deal with more serious crimes. Thus, the British system of justice was superimposed on Zambian tribal law which remained part of civil law.

It is important to note that the juvenile justice system was not a separate system of justice at this time. Partly because juvenile crime was not a serious social phenomenon. Juveniles were not permitted to live in newly expanded "copper" towns. The tribal customs and laws still maintained effective control over juvenile crime. As child misconduct was a family matter and a family reaction was the means used to control it.

The superimposition of British justice, on the Zambian judicial system led to some degree of conflict with the indigenous population. One source of this conflict was the British way of dealing with serious offences arising out of tribal superstitions, such as witchcraft allegations, which were prescribed by law. This led to serious unrest among the native Zambians whose beliefs in these religious and social practices was seen to be seriously violated, and upset tribal customs (Gann, 1957).

Conflicts similar to one above led to an attempt by British authorities to place more responsibility for tribal affairs into the hands of tribal chiefs. In 1924, the British South Africa Company handed over administration of the country to the

Colonial office. The colonial office introduced the concept of "indirect rule" in Zambia; where chiefs were given the management of their own affairs within tribal areas, and were to preserve and maintain all that was considered good in tribal organization and customs. This led to the enactment of the Native Courts Ordinance, 1929, which is (the Local Courts Act), and this Act gave chiefs jurisdiction over minor criminal cases and applying customary law, in the courts in the rural areas. However, this Ordinance, only recognized what was already a very effective set of judicial institutions in the western part of the country, where there was a Barotse[2] kingdom, and formalised the means whereby appeals could go from the King's court to the territorial judiciary (Gluckman, 1955 and 1965).

This process of indirect rule was to apply to new urban areas as well, in an attempt to to maintain some measure of social control and to avoid detribalization. In 1936, a new Native Authority Ordinance was introduced, which re-enacted and strengthened the policy adopted in 1929. It created local courts in Copper towns and in other urban areas, where elderly persons from rural areas, considered to be acquainted or conversant with customs of tribal areas were appointed, as presiding justices for the established courts in the urban areas. The indirect rule made traditional chiefs primarily servants of the government, especially in their judicial functions. However, the conflict

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[2]Barotse means a tribe, which comprises a number tribes speaking the related language Lozi

was not resolved despite the dual legal system. The tribal societies continued with their traditional way of settling disputes on the reconciliatory basis, as Colson (1953:204) notes that:

> Today, with the presence of the British administration, Northern Rhodesia Police, the government-instituted chiefs with their courts and messengers, there is effective force to prevent the mobilization of units in vindictive action, but underneath this superstructure one can still see the the interplay of the old forms of social control based on the interaction of kinship and local groups. These still work to reach a settlement over and above that which can be obtained through the courts. They are interested, not in the punishment of the offender, but in the re-establishment of good relations between the groups involved.

The process of indirect rule could not cope with the impact of the copper industry, which was expanding its production and stimulating other economic sectors. This affected the tribal life and the importance of tribal laws. The copper industry stimulated agricultural settlements, since the mining companies could not rely upon tribal production for food along the sparsely populated line of rail. Hence, under Sir Herbert Stanley's guidance, the first Governor, the government sought to encourage further European immigration and set aside reserved land for exclusive use of Europeans. This land was mostly situated along the line of rail between Livingstone and Katanga (Zaire border), since in terms of both soil fertility and access to markets, this was the most favourable region for farming (Roberts, 1976:183).

However, with the idea of indirect rule in process the Africans were forced to settle in the established trusts land

which were unsuitable for cultivation. This assisted the implementation of indirect rule where the chiefs were left to manage their own affairs in these areas, through the guidance of Native Authority Commissioners. The chiefs were to enforce the tribal customs on the juveniles, who in return were expected to abide by them. The Fine was introduced as a disposition, and the parents were held reponsible for the actions of their children.The tribal chiefs settled disputes on informal and advisory manner (Epstein, 1958).

But the mines also stimulated town growth; the expansion of commerce, the establishment of secondary industries, and the extension of a money economy. This provided financial incentives and attracted a large number of young persons to the expanding copper towns and other emerging commercial and industrial centres along the line of rail[3]. As a man in the traditional Zambian society was looked at as the bread earner, more men than women drifted into towns to search for employment which left a relatively higher percentage of women in the villages. The man was no longer tied to the traditional work of tilling the land; and being a peasant farmer at that stage was regarded as being inferior, and for a better living meant seeking professional, government, or unskilled positions in the urban areas. Some of the individuals left their villages to seek employment on the European farms (thus in the reserved lands). As Roberts (1976:178) remarks this migration was as a result of the need to

[3]See Appendix D showing the emerged towns

obtain money to pay taxes, "and to buy from European stores, the imported household goods which were replacing the cloths, pots and hoes that were once made and bartered in the villages".

Therefore, the individuals who migrated from tribal areas in search of financial incentives found themselves in different environments. As in the Zambian traditional communities, the influences that surrounded a person were relatively steady, uniform, harmonious and consistent. The individual was surrounded by all his relatives, and this larger family determined his career and behaviour. Thus, he was trained to be a hunter, craftsman, and traditional farmer. This larger family, moreover, was supported by the surrounding community, which was also harmonious in its traditional culture. These communities had rules, or norms designed to control the behaviour of their members. Children were expected to be raised according to the cultural values of the community, which were being enforced by the traditional chiefs in tribal areas. The extended families controlled the children of the family and child misconduct was the responsibility of the family. Juveniles in urban areas were in insufficiently controlled environments, living with strangers. As Wilson (1941) in the study of Kabwe (then Broken Hill) commented:

> Today the inhabitants of Northern Rhodesia are members of a huge worldwide community, and their lives are bound up at every point with the events of its history...They have entered a heterogenous world stratified into classes and divided states, and so find themslves suddenly transformed into the peasants and unskilled

workers of a nascent nation state[4].

The restraining eye of the village community was no longer upon the juveniles who migrated to urban areas or even those born in urban areas. Hence,these youths found themselves in industrial or commercial centres without friends, without family ties, and belonging to no social circle in which their conduct could be either scrutinized or observed. The family and tribal elders had lost control of the young persons who might have migrated to urban areas and later engage themselves in criminal activity and other juvenile crimes. As Jenkin Lloyd Jones while referring to the United States industrial centres stated that:

> Some of the serious social problems were associated with industrialism. The currents of industrial and commercial life have set in tremedously towards the city. Thither flows with awful precipitancy the best nerve, muscle and brain of the country, and the equilibruim will be a current established, whereby the less competent, the unprotected, the helpless and innoncent can be passed back, to be restored and reinvigorated....[5].

It is, therefore, noted that the concentration of the population in the newly expanded copper towns and those other industrial centres, combined with the economic instability are considered as contributing factors to criminal behaviour that emerged in these areas. As Morrison, referring to the economic instability that rose in 19th century in the United states, remarked that:

> A community of this sort produces a large portion of weak and ineffective people possessing very inadequate physical equipment for successfully fighting the battle

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[4]See A.L. Epstein, Urbanization and Kinship, London: Academic Press, (1983)p.3

[5]See M.A. Platt The Child Savers, Chicago: University of Chicago Press (1969)p.38

> of life. As a result of their physical deficiencies, people of this kind are unable to obtain regular employment or to keep in work when they obtain it. ...they are driven down to the very lowest social stratum if they do not happen to have been born in it[6].

Rise of Criminal Justice Institutions

It can not be supposed from the process of indirect rule that the colonizers had any interest in handing over power to the indigenous Zambians, but the structure was introduced to maintain control over Zambian society through tribal leaders, and to have control of the economic wealth of the country. As more and more young people were leaving the tribal areas and settling in the expanded towns and on the reserved lands, there was need for new measures to control their behaviours, because they were no more in the reach of traditional leaders. British authorities introduced a Penal Code in 1930, which was a codification of the English common law tradition and this differred from the English law which was not codified. It had provided for the application of principles of English law in the Zambian courts, with the burden of proof borne by the prosecutors. A person below the age of eight years was incapable of criminal responsibility. The decisions of the Court of Appeal of England and those of the House of Lords were binding on the Zambian courts.

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[6]D.W. Morrison, Juvenile Offenders New York: D.Appleton (1897)p.28

The introduction of the penal code required an enforcement agency to be established, the need for improved police services became essential. The nature of the work required officers who could specialise in police duties and recieve essential training. In 1932, an officer was seconded from the Northern Rhodesia Regiment (Military unit) and was appointed the first Commissioner of police under the Northern Rhodesia Police Ordinance, which set up the police force as a separate civil police unit[7]. The police stations were established in the copper towns and main towns along the line of rail and small detachments were at Mongu and Chipata (then Fort Jameson) in the western and eastern parts of the country respectively. The established police force was not to operate in the trust lands, which were under the control of the tribal chiefs and the district messengers from the offices of Native commissioners were to enforce the local laws. Police could only enforce the laws in these areas once called upon by the Native Commissioners. The main police work was arising in the "industrial areas, with the wandering labour population, the unauthorized residents in the townships and squatters on farmlands"[8].

The establishment of a specialized police force led to the creation of a correctional institution which was caring for the

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[7] Report of the Commission Appointed to Enquire the Financial and Economic of Northern Rhodesia, London: His Majesty's stationery office (1938)p.307

[8] Ibid:311

convicted persons, there was need for prison services. At that time the colonial rulers did not see it fit to have a separate prison services from the police force. The Commissioner of police was also appointed as Chief inspector of prisons. All members of the prison services were appointed under the police Ordinance and district messengers were also at times called for prison duty. However, the commission appointed to enquire the financial and economic position of Zambia (then Northern Rhodesia) in 1938 recommended that there should be a separate administration of prisons from the police work, and in its conclusion stated that "Goal administation has now become a specialized science and should be controlled by men whose special duty it is, and not by officers whose primary work is to prevent and detect crime" (1938:320). But the situation did not change up to the time of independence in 1964.

The lack of specialty in the corrections field by police wardens led to the detention of ordinary inmates together with those of the mental ill. But this was later remedied by establishing an asylum at Mazabuka which was later converted to an approved school for juvenile offenders. Juvenile offenders sentenced to imprisonment terms were confined together with adult inmates at Livingstone central prison, because there were no adequate arrangements for them. The commission (1938:319) notes that with the younger generation in the copperbelt developing, there was need for adequate arrangements to be made, since the country did not have a local reformatory or Borstal

institution. However, the legislation of the time had a provision authorising juvenile offenders to be transferred to a reformatory in South Africa (The Commission, 1938).

By 1952, the colonial government had not yet established a department of social welfare. But the Salvation Army operated a Home of Refuge for European children in the copperbelt at Ndola. And also the Diocese of Northern Rhodesia operated one such Home for European children at Ndola. African welfare in urban areas was the concern of local government authorities, who did run general recreactional activities and youth clubs (Colonial List, 1952:88). The colonial government was not interested in providing education for African children in the copperbelt, as Sandford, the Senior Provincial Commissioner, stated that "....I am certain that native children are better off in their own villages without education than the children in the mine compound with education" (Hall, 1965:109). This was in line with process of indirect rule which required that juveniles should be in the tribal areas where they will be controlled by the tribal elders, and where education was not a necessity.

The British rulers continued to extend their wish to control juveniles offenders, in the industrial and commercial centres. By 1953, there was enacted a Probation of Offenders Act, for providing a more general use of the probation system, for supervising the offenders in the community rather than in correctional institutions. This Act was to be applied only to the copperbelt and other industrial centres along the line of

rail, and was not to be applied in the native trusts lands (tribal areas). But there was no distinct institution established under this Act.

It is necessary to note here that the British influence up to this time had been so profound that the situation seemed irreversible. This will be discussed further later in Chapter VII. By 1956, there came an enactment of the Juveniles Act, which for the first time, attempted to create a separate juvenile justice system in Zambia. But there were/are no magistrates solely appointed to hear juvenile crimes. All magistrates hear cases that involve juvenile offenders as well as adult criminals, and the process is the same as in adult criminal proceedings (i.e., taking of a plea, trial, cross-examination of sworn witnesses through final dispositions). However, the Act abolishes the use of the words "conviction" and "sentence" in respect of juvenile court proceedings; the use of terms as "finding of guilty" and "an order made upon such a finding" are recommended[9].

This Act is based traditionally on the provisions of the English Statutes, (i.e., the Children and Young persons Act, 1933, the Criminal justice Act 1948, and the Prisons Act,1952). For example , the establishment of the Katombora reformatory near Livingstone, has rules similar to those relating to Borstal

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[9]Sect. 68 of Juveniles Act

training in England[10]. The establishment of the Nakambala Approved school is based on the English approved schools[11]. The Chilenje remand home in Lusaka, was established on the basis of English remand homes for safety custody of juvenile offenders[12]. However, all these came about on the recognition of juvenile crime as a social phenomenon, but still defined in terms of adult behaviour. This may be interpreted that the enactment of this Act was just the importation of legislation from the mother country, when in fact the time was not yet ripe for such legislation in Zambia. This is illustrated by allowing the application of African customary law in making dispositions relating to the convicted African juvenile offenders. This is provided under Section One subsection two of the Act, that:

> In the application of this Act to African juveniles, the provisions of African customary law shall be observed unless the observance of such customary law would not be in the interests of such juveniles.

The introduction of the Juveniles Act was in line with the treatment orientation of the juvenile offenders, but it was based on two standards of justice in the country. The approved schools were primarily established for European childern, that they should be trained in academic and industrial activity as a means of rehabilitating them.

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[10] Criminal justice Act 1948 (11&12 Geo 6 c. 58) Sect.20 (1), Prisons Act 1952 (15&16 Geo 6 & 1 ELIZ. 2 c. 52) Sect. 45 (2), (3)

[11] Children and Young Persons Act 1933 (23&24 Geo 5 c.12) Sect. 57 (1).

[12] ibid. Sect. 77 (1)

The Rise of Caning

Caning (corporal punishment) was introduced as a disposition for African children, as Africans were thought to control or discipline their children by chastening them (home corporal punishment). As any other form of treatment was held could not correct their future behaviour. Institutionalization was thought not to be a proper treatment for African juvenile offenders. This led to legal specification for observing African customary law in dealing with juveniles. As Gann (1957:100) notes that "flogging, a favourite punishment for Africans, never seems to have been applied to Europeans. Prison on the other hand was regarded as unsuitable for Africans, as they were believed not to suffer by it". Hence, the arguments based on the efficacy of corporal punishment in homes and of being favoured by some parents are irrelevant, because there are essential differences between this type of corporal punishment and judicial corporal punishment (as imposed by the courts). Parents (except, of course, those who use violence excessively) know their children and how they are likely to react to corporal punishment. The punishment is usually inflicted by the person who has made the decision to inflict it. There also exists a continuing relationship between the parent and the child, with a lot of chances for reconcialition. While a prison officer who inflicts the judicial corporal punishment is unknown to the recipient (the juvenile offender). Therefore, there is no

continuing relationship between the parties, and the resentment felt by the juvenile offender will be towards "authority" rather than concentrated on an individual (the prison officer who is unknown to the offender). The Royal Commission in England on corporal punishment (1960) notes that "for too often proponents of corporal punishment misinterpret personal responses motivated by fear and hatred as signs of affection and respect. When they do, the goals of treatment and correction are not well served"[13].

Corporal punishment was thought to be an appropriate treatment for African juvenile offenders, and this view was based upon the principle that excessive pain would overcome the supposed pleasure of juvenile crime, as retribution and deterrence were the primary goals of punishment. Incarceration was not considered to possess the potential effectiveness for achieving the primary goals, as incarceration was not known to the Zambian traditional society. This is illustrated by the above quotation and a remark made, while the Native Court Ordinance, was being debated. One commententor stated that on the rule of imprisonment as a native custom that; "I have been a good many years in this country and I have never yet seen a native prison" (Hall, 1965:106).

A double standard of justice that developed in the country reflects the conflict that rose as a result of superimposition

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[13]Corporal Punishment: Report of the Advisory Council on Treatment Offenders, (London: Her Majesty's Stationery Office, 1960):4-5

of the British justice system over the tribal laws. The traditional Zambian society settled disputes by compensating the offended by the offender, this was also done even in serious cases, where the family had to be held responsible for the actions of a member of that family, either a juvenile or an adult person. This approach to juveniles exists today in rural areas. The fine has taken the place of compensation which is not often used. Caning is also retained as a form of disposition.

The Situation after Independence

Although British authorities continued to maintain their control over the Zambian society, on the political side the situation was becoming bad for the colonizers. A small number of educated local Africans turned to political life and started the struggle for independence. They operated through associations formed under African welfare in urban areas, and at independence Zambia inherited the criminal justice system with institutions established by the colonial government.

Zambia achieved its independence from Britain on the 24th October, 1964, with a president as head of the newly-formed democratic state and a parliament consisting of 120 members, representing a range of party affiliations (three Parties). The President's party United National Independence Party (UNIP) having a majority of seats in parliament, assumed power (for more information see Hall, 1965; Pettman, 1974; Roberts, 1976;

and Kaplan, 1979). In 1973, the ruling party UNIP with an agreement with the opposition party, instituted a one party democracy state. There are general elections once every five years, to elect members of parliament, and on a Yes and No basis to confirm the President's candidacy (Constitution Act 1973).

The Zambian government, while assuming political power, failed to gain control of the economy. This was due, in part, to the following problems:

1. a scarcity of skilled and educated manpower;
2. a surplus of unskilled labour beyond the number of wage earning jobs which the economy could provide; and
3. an extreme dependence on expatriates manpower at most levels of skilled employment in government and in the private sector[14].

The situation was further complicated by the fact that "in Zambia in 1964 there were in total just over 1,200 Africans who had obtained secondary school certificates...and at the same time there was scarcely 100 University graduates in the country"[15].

The lack of qualified manpower was the same in the criminal justice system where all the judges of the High court were

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[14]First National Development Plan, (Lusaka: Govt. Printer 1966 - 1970)p. 73-78. See also Republic of Zambia, Manpower Report and Statistical Handbook on Manpower, Education, Training and Zambianization, (Lusaka: Govt. Printer, 1965-1966)p.1

[15]Advisory Mission (ILO),Narrowing the Gaps: Planning for Basic Needs and Productive Employment in Zambia, Addis Ababa: JASPA (January, 1977)p.45

expatrates, and also the majority of magistrates. All the magistrates who continued to hear cases were appointed by the colonial government. The first locally born Zambian judge of the High court was appointed in November, 1969, and there were many Zambian magistrates appointed to fill the vacancies left by the expatriates who resigned from the judiciary.

The mining industry's stimulation of town growth, that started during the British rule continued after independence, with more movements searching for financial incentives. This increased population growth in urban areas. The United Nations Conference on Human Settlement (1976:6) held at Vancouver, notes that after independence, with the abolition of the poll tax and the removal of restriction on movement, "the migration links established during the colonial period, between the rural areas and the towns were strengthened", and urban growth rates since independence have been extremely high. This has led to squatters and slums springing up on the peripheries of main towns.

The Background for the Consequence of Juvenile Crime

To add to this problem, many of the juvenile migrant town dwellers had no adequate training to make them suitable for employment. The 1969 census recorded about 380,000 persons who

had declared "themselves available for and seeking work"[16]. The Advisory Mission (1977:54) notes that the large balance of persons seeking urban jobs have either found themselves in informal employment , which attracted them for getting quick money, or have swelled up the population of frustrated job-seekers. The Advisory Mission (1977:50) further notes that most of the large increase in African wage bill after independence went to "pay people more rather than paying more people".

The existence of one primary economy developed during the colonial era, restrains the growth of other economic activity, and the limitation of education facilities has continued to affect the country. In 1969, the Department of labour noted that the unemployment among youths was steadily rising, especially in large centres such as Lusaka, Ndola, and Kitwe. The majority of these youths are elementary (primary) school drop-outs, many of whom are either too young to be employed or have not yet acquired any useful skills. The Minister of Education in Parliament on 1st, March, 1984, stated that after 1983 grade seven final examinations, 135,139 students were not selected for grade eight, (thus dropped out of educational system, at elementary level)[17]. It does not mean that these students failed the examinations, but there were no places in schools for them

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[16] ibid:42

[17] News Brief for Zambian Students, in Canada and Caribbean, Ottawa: Zambia High Commission, (April, 1984)p.2

to continue into grade 8.

A nondiversified economy with mining as the single primary activity in the economy has caused some imbalances affecting and frustrating job-seekers. There are imbalances between the growth of job opportunities and the growth of education, between aspirations and expectations of school leavers and the type of employment opportunities available, and between the development of formal and informal education and training facilities.

British rulers' desire to keep job-seekers out of urban areas did not establish a welfare receipts scheme in the country, and this has remained the same even today. Juveniles in search of quick financial incentives join the informal sector as a means of sources of income. This sector consists of the foodstall, in public markets or in the back streets, the suitcase salesmen on the fringe of regulated markets, most of the individual craftsmen, small house builders, shoe repairers, bicycle repairers, hairdressers etc., those found in the towns, are mostly from squatters housing areas, and they also go around in the rural areas. But individuals with employments have started joining the informal sector to supplement their small incomes from formal employment. Many people look down upon informal sector activities and consider them unproductive (Advisory Mission, 1977). Yet it is the informal sector which has absorbed the majority of juveniles dropping out of educational system in urban areas. They have been known as cigerettes sellers (Mishanga boys), as they go around to bars

and other drinking places selling loose cigarette sticks, instead of packets to those who cannot afford to buy packets of cigarettes. These are the people in Zambia being referred to as delinquents. But they are only charged with offences under specific legislation, the violation of which by an adult would lead him to be brought before the court.

As the informal sector is associated with the notion of delinquency, it is neglected by the government and the persons who are involved in its activities often come in contact with the police. It is regarded as lacking basic socio-economic infrastructure conducive to productive economic activity. It faces the existence of various laws and regulations relating to 'black marketeering', and legislation requiring all businesses to be licensed. This is difficult for juveniles who find themselves under the age to qualify to hold a business licence.

The Emergence of Juvenile Crime

However, it should not be supposed at this point that all juveniles in the urban areas, who search for employment join the formal or informal sector. There are some of them who therefore, of necessity, become criminals and engage in various crimes (theft, breaking, assaults and other crimes). For example, the number of juveniles being dealt with by the courts has increased since independence. There were 1,864 juvenile offenders proceeded against in 1964, and the number rose to 3,000 in 1974,

for offences under the Penal Code. This increase could be attributed to factors that have been mentioned in the early sections. The most important change is the emphasis on formal social control to ensure a greater respect for the authority of the state and diminish the importance of the tribal laws. Thus, any child misconduct is brought to the attention of police who later take the juvenile before the court (Clifford, 1974).

The desire for greater respect for the authority of the state has increased the impact on the local customary law. The customary law has lost its status in criminal activity and its application has been restricted (Colson, 1976:25). Child misconduct under customary law was always defined in terms of adult behaviour and the parents were held responsible for the juveniles' actions, and that they had to compensate the victim. The matter was always dealt with on a reconciliatory basis, the family of the victim and of the offender were brought together to solve the dispute, whether it was criminal or otherwise. Thus, violations of customary law can no longer lead to criminal charges and moreover, customary law offences could not stand in court, if they were considered contrary to justice, equity or good conscience or incompatible with any statute[18]. The powers of tribal chiefs have been reduced, they do not manage their own affairs in tribal areas and have lost their judicial jurisdiction as they do not sit in courts to hear cases (Colson, 1976:26). The police were/are charged with the policing of the

[18]Section 12 of the Local Courts Act

whole country, including the tribal areas. The Constitution has provided that no person could be tried and convicted of a criminal offence unless that offence was defined and a penalty prescribed in written law (Constitution 1973). The application of tribal laws is retained in civil matters relating to customary marriages and divorce, inheritance, and any matter incidental thereto (Colson, 1976). But the majority of the population still deal with cases that involve juvenile offenders in traditional ways. For instance, minor assaults and damages to property are taken before the traditional courts (local courts) in urban areas for compensation. In rural areas where police stations are situated at distant places from the villages most of the criminal cases are not reported to police or taken to court. Instead they are being dealt with by village elders, and compensation is used as a remedy (Canter, 1976; Colson, 1976).

With determination to control public conduct, in April, 1967, Dr. Kenneth Kaunda, the president, introduced a concept of Zambian humanism, consisting of a set of principles to combine the advantages of modern technology and welfare with the purported communal and man-centred life of the tribe being the guiding features for the Zambian society. As he wrote:

> This high valuation of Man and respect for human dignity which is a legacy of our tradition should not be lost in the new Africa. However, 'modern and advanced' in a western sense this young nation of Zambia may become, we are fiercely determined that this humanism will not be obscured. African society has always been man-centred...It is clear all human activity centres around man. (Kaunda, 1967:7)

However, it is seen that the concept of humanism contributed to the growth of a single moral community and helped to sustain respect for the aims of the government, which has been in power since 1964. It has been the cornerstone of nationhood in Zambia. But nationhood cannot be said that it had created a homogenous society with a national culture. As the Zambian society is comprised of about 70 ethnic groups with different customs and languages; this has led the government to have a uniform substantive code of criminal law, by requiring the elements of customary law to be codified. In other words, the values, and morals of the traditional Zambians are being tested by the modern standard of justice and good conscience, and the application of traditional customary law concerning crime diminished in importance and practically disappeared. Thus, the Zambian government has neglected the informal social control that enforced the customary law and put all the emphasis on the formal social control which is based on the new introduced Penal Code. Therefore, all child misconduct is to be processed through the criminal justice system, with the aim of punishing those found guilty. The reconciliatory orientation of the traditional laws is at its minimal level.

Zambian government in an effort of building a man-centred society, has retained without any change the criminal justice system, which was established by the colonial government. The only exception is the creation of the Supreme court as the highest court of appeal in the country (Constitution,Act 1973).

But the inherited criminal justice system had a double standard of justice, where African children were harshly treated and the European children were cared for in the homes for juveniles. This is illustrated by the findings of the Commission (1938:320) which noted that while a few young Europeans had been convicted of such offences as theft of motor vehicle, none seemed to have been imprisoned, while African juvenile offenders were sentenced to imprisonment terms and were confined in Livingstone central prison. But, it is not clear from the report whether this meant for the same offences. However, the adopted Juveniles Act, that was introduced in 1956, established approved schools with rehabilitative measures as the underlying policies. But the confinement in this institution means removal of a child from the parents, and this causes considerable distress to the offender, because of its being custody-oriented. The offender committed to an approved school will be detained for a long period, regardless of the offence committed (whether serious or less serious). This will be dealt with in Chapter V under dispositions[19].

It is interesting to note that the policies underlying the man-centred society are punitive in nature, as the emphasis is on punishment as a means for controlling misconduct and maintaining social harmony contrary to concept of Zambian

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[19]However, for more information about the effects of incarceration (physical and psychological effects) see Luc Gosselin, Prisons in Canada, (Montreal: Black Rose Books, 1982):32-44

Humanism which advocates for communal life. Thus, the orientation underlying the sentencing rationale is deterrence, the use of pain is justified to discourage the inclination towards criminal behaviour on the part of the offender being found guilty, and the society in general. Therefore, severe penal sanctions are believed to prevent or reduce the incidence of juvenile criminality, and to increase the maintenance of the social order. As Dr. Kaunda propounded in his concept of humanism, regarding the maintenance of social harmony:

> Obviously, social harmony was a vital necessity in such a community where every activity was a matter of team work. Hence, chiefs and traditional elders had an important judicial and reconciliatory function. They adjudicated between conflicting parties, admonished the quarrelsome and antisocial and took whatever action was necessary to strengthen the fabric of social life. Mention must be made here of the fact that when any of these anti-social activities were punished, very often the punishment was heavy (Kaunda, 1967:5).

The implication that can be drawn from this quotation is that harsh penal sanctions are advocated as ideal for those offenders found guilty of offences (involved in anti-social activities). This applies to juvenile offenders because as it will be noted later that there is no clear distinction of criminal process between juvenile and adult offenders. Hence, treatment measures exist in principle as the underlying philosophy, while, deterrence and retributive principles are the underlying policies for controlling anti-social behaviour. Dr. Kaunda further stressed that discipline should be maintained in the villages and juveniles should not participate in drinking. But the communities in the villages are governed by the Penal

Code and their actions should conform with the provisions of the new law and not the traditional customs. However, some individuals in villages do not report incidents to police, but prefer the matter to be dealt with before the headman on reconciliatory basis, rather than punishment be imposed on the juvenile offender.

However, it is noted that at independence the Zambian government did not reckon juvenile crime, as a social problem. As Dr. Kaunda (1967:30) has pointed out "what problems do we now face?...I would say that we have four which are immediate and vital ---hunger, poverty, ignorance, and disease". Hence, there was no policy stated relating to juvenile offenders, in the First National Development Plan. The second National Development Plan (1972-1976:155-156) provides for statutory supervision of juveniles on probation and those released on licence from correctional institutions (parole). Social welfare officers have to maintain their role of submitting pre-sentence reports to courts. This will be dealt in detail in Chapter IV. However, there were no suggestions to have a distinct probation system under the Probation of Offenders Act, from the social welfare department which is established under the Juveniles Act, whose main concern is with child care, matrimonial reconciliation and counselling, neglected children and those in orphanages.

The increasing number of youth migrating to many towns and cities, who are scattered all over the country, led the government to come up with a preventive measure. Thus, the "Back

- to - Land" campaign, was started in the mid-1970's wherein the government took steps to curb the migration of youths to the cities and other towns, through the establishment of Rural Reconstruction Centres. In this program the unemployed school leavers are recruited and made to engage in agricultural production instead of loitering in urban areas. It was hoped that the number of unemployed school leavers previously found in the towns would be reduced to a minimum (Tiberondwa, 1976:8). This policy was aimed at reducing juvenile crime in urban areas, by preventing juveniles from migrating to urban areas in search of financial incentives. Instead they should live in the rural areas and engage themselves in the traditional career of tilling the land. It was seen by the government as a measure to minimise the desire for seeking professional, government, or unskilled positions in the urban areas. As President Kaunda declared:

> These (rural reconstruction)centres are very cardinal to the revolution in the country --- now the focus of the government's efforts. Colonial brain-washing has led our youths to grow with the idea of life under the bright lights of cities and of white-collar jobs as the only avenue to a decent future.... Future of youths flourishes on the fertile soils of Zambia, and offers abundant opportunities for the people of Zambia to live happily and in prosperity. We must educate the Zambian youth right from the beginning about the beauty of working on the land.... These rural reconstruction centres should be a leading motivating force in spearheading the agrarian revolution in the countryside.[20]

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[20]K.D. Kaunda, President of the Republic of Zambia, Address to the eighth National Council Meeting of UNIP on 27th April, 1976. Reported in the Times of Zambia, (28th April, 1976)p.3, (Tiberondwa, 1976:8)

This preventive measure can be viewed as a political and economic motive underlying punishment, as the restriction of movements of youth to urban areas remains as an official policy. As Tiberondwa (1976:20) notes it is the same sentiment that occurred in Uganda in 1971, where school leavers argued that the advocates of the back - to - land philosophy "do not call us to come and join them in rural areas, but they order us to leave them in the best areas of the cities and towns and go and join our parents in the villages".

The preventive measures which is based on the agrarian revolution and the desire for increasing agricultural or food production for local consumption and for export has been the underlying policy for prison farms and production units. Where the prison inmates have to be trained in agricultural production, while in correctional institutions, so that on release, they can go back - to - land as productive citizens. Therefore, the corrections programs in the juvenile institutions are on agricultural training. Katombora reformatory is one of the correctional institutions with major prison farms and gardens, which produce corn (maize), vegetables, poultry, beef and dairy products. The Nakambala approved school also runs a production unit, which is engaged in agricultural production and training.

Hence, for the prison farms and gardens to be productive the courts have to sentence offenders to imprisonment terms, with long detention periods in correctional institutions. Thus,

on the basis of protecting society by incapacitating offenders, for example, ordering the juvenile offender to the reformatory, or approved school, for him not to engage himself in juvenile criminality during that period of detention. This makes the legal system custody-oriented.

However, a custody-oriented legal system can be mistakenably considered as rehabilitative; thus its aim is to rehabilitate the juvenile offenders within the correctional institutions through training programs (academic, industrial, and agricultural training). While the main purpose is an economic basis for incarceration of offenders (increasing food production for the society), because after release from the corrections institution the offender may not be able to utilize the acquired training in the community for various reasons. For example, he may not have investment capital to start any economic activity of his training.

The more easily identifiable rehabilitative dispositions employed by the courts are: discharges which could be absolute or conditional, binding over of the offender to keep the peace, and probation. These afford the offender the opportunity to socially readjust and reintegrate into the community whose laws he had breached.

The traditional remedy for compensating the offended on the recinciliatory basis has become the source of revenue for the government; thus, once the offender is found guilty he will be ordered to pay a fine. In addition, to any disposition he may be

ordered to pay costs towards the expenses of the criminal proceedings, rather than compensation to the victim[21].

It is necessary at this point to look at the inherited criminal justice system in contemporary Zambia, which endeavors to uphold the social order, by examining the established structure, substantive and procedural aspects of Zambian law, in particular as it relates to juvenile offenders and general dispositions available. The present criminal justice system and penal laws of Zambia are discussed in the next Chapter.

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[21]Section 172 (1) of the Criminal Procedure Code provides that it shall be lawful for a judge or a magistrate to order any person convicted before him of an offence to pay such reasonable costs...may seem fit, in addition to any other penalty imposed and such costs shall be paid, where the prosecution was in the charge of a public prosecutor, into the general revenue of the Republic...

IV. Criminal Justice System and Penal Laws in Zambia

Structure of Courts

The contemporary approach to juvenile crime in Zambia may be understood through an examination of the basic structures underlying the Criminal justice system and penal laws in this country. It has been noted in the last chapter that at independence, the Zambian government retained without any change the Criminal justice system that was established during the British rule and the new law that was introduced in the country. The only exception was the creation of the Supreme court as the highest court of appeal in the country (Constitution Act, 1973).

The court system comprises of the Supreme Court, High Court, Subordinate Magistrates' Courts, and the Local courts; all of which, with the exception of the Supreme court, have both criminal and civil jurisdiction as courts of first instance. The Supreme Court, as the highest court, hears appeals from the High court, and its decisions are binding on all lower courts. This has reversed the previous position, where the English courts' decisions were binding on the Zambian courts; but now they are persuasive, as other court decisions of Commonwealth countries. When the Supreme court sits as Court of Appeal, it is required that it be composed of an uneven number of jugdes---no less than

three[1].

The High court has an appellate jurisdiction for cases from the Subordinate Magistrates' court. It also exercises supervisory and review powers, thus, it can call for and examine the record of any criminal proceedings before a subordinate magistrate court, for the purpose of checking as to the legality of any finding, sentence, or order passed, and as to the regularity of such proceedings. In such cases the High court is empowered, in the case of a conviction to confirm, vary or reverse the decision of the Subordinate court or order the convicted person to be retried by any other Subordinate court of competent jurisdiction[2]. However, the convicted person can still exercise his legal right of appeal, when his case is being reviewed by the High court. The High court also serves as a court of first instance in serious offences, inluding all cases in which the death penalty might be imposed, except where the accused is a juvenile offender, who can only be tried in the high court for an offence of homicide or attempted murder[3]. Hence, the High court has a limited jurisdiction over juvenile crime.

The limitation of High court jurisdiction over juvenile crime, has led to the legislation relating to juveniles not to develop as few cases come before the High court, and most of the

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[1] Art. 107 (5) of the Constitution Act, 1973

[2] Sections 337 and 338 of the Criminal Procedure Code

[3] ibid Section 11; Section 64 of the Juveniles Act

cases are being dealt with in an administrative manner. The juvenile crime is left in the jurisdiction of legalistic magistrates' courts, presided over by the majority of lay magistrates. Therefore, the court is denied one of important role of making the law through judicial decisions-making (precedent).

The Subordinate magistrates' courts are divided into four classes, reflecting the differences in the training of magistrates and the severity of sentences they might impose. The lay magistrates undergo a one year magistrates' course at the National Institute of Public Administration (NIPA). After passing examinations in criminal law and procedures, rules of evidence, and English; they are appointed Magistrates class III, and through promotions can rise to Magistrate class I. However, once they become fully qualified lawyers, they are appointed as Resident magistrate and can be promoted to Senior resident magistrate. This applies to any person who joins the judicial services, a fully qualified lawyer. Senior resident magistrate can be appointed as judge of the High court, after a five year experience on the bench as a fully qualified lawyer or having a long standing in practising law.

The senior resident magistrate can impose a maximum nine year imprisoment term, while a resident magistrate can impose up to seven years. Magistrate class I, and magistrates class II and class III can impose a maximum five years and three years imprisonment terms respectively. These powers refer to any

person found guilty of an offence charged, either as an adult or juvenile offender. Although for the lay magistrate these terms are subject to confirmatiom by the High court, for instance, if the term exceeds three years for magistrate class 1, and one year for magistrates class II and class III.

Nearly all criminal prosecutions in the magistrate courts are conducted by police prosecutors, who are trained at NIPA. They undergo a similar training as that of lay magistrates and are expected to pass examinations in criminal law, criminal procedures, rules of evidence, police procedure, and English, in order to be awarded a Public Prosecutors' Certificate[4]. The police prosecutors act under the general directions of the Director of Public Prosecutions[5].

The Local courts, which were created by the British authorities, in 1929, have increased in number. But their criminal jurisdiction has declined after independence as discussed in the last chapter. The presiding justices of the local courts are appointed on the basis that they are conversant with local customary law. It has been noted that they were created in order to avoid detribalization and that juveniles were expected to identify themselves with tribal norms. The presiding justices of local courts were to enforce these tribal norms and the traditional values in the changing society

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[4]Personal experience, as the present researcher attended such a course from September, 1975 to August, 1976 before entering the Law school of the University of Zambia, in November, 1976

[5]Section 86 of The Criminal Procedure Code

influenced by urbanization and economic development. The local courts operate in an informal way, since there are no formal pleadings to be filed in court, in order to institute court proceedings, and professional lawyers are barred from appearing in local courts. Rules of evindence are not being observed (hearsay evidence is accepted), and it is not a court of record. Thus, if one party is not satisfied with the decision of the Local court and appeals to a Magistrate's court, the magistrate in determining the case will not rely on the record of proceedings from the local court, but will have the case dealt with de novo. The process in customary law is in most cases not a claim for a specific remedy, but a litigant may sue the other party for the behaviour considered to be contrary to that of the community's norms, and seek the court's advice (Epstein, 1958; Gluckman, 1965). Epstein (1958:211) points out that the African local court in its application of customary law is "a process in which judges and litigants alike work towards the reaffirmation of norms and values of the community".

Generally, the remedy in local court is compensation to the offended by the offender, or his parents or guardian, if he is a juvenile. Canter (1976:268) in his study of the Mungule local court notes that since most local court decisions involve compensation, litigants work out a plan for payment of the compensation and concluded that in:

> that way an 'adjudicated' decision can become a 'compromise in compliance' between litigants, who are given a decision backed by force, but left to decide the actual means of compensation themselves.

Fines are also imposed by the local court justices. Local court justices hear criminal cases in rural areas where there is no magistrate's court and they are empowered to impose a six months imprisonment term, subject to confirmation by the magistrate's court. But nowadays police do not take cases before the local courts, as magistrates go round to places where there are no stationed magistrates to hear such cases.

This has reduced the local court's jurisdiction over criminal cases. This is because the country is mainly policed by the Zambia police force, which is responsible to the Minister of Home Affairs. It is a statutory body with a wide range of powers. The Zambia police force is similar in organization and training to the British colonial police from which it evolved. It is charged with the duties of preservation of peace, the prevention and detection of crime (juvenile crime included), and the apprehension of offenders throughout the country (Kaplan, 1979). As a result the preparation of cases for court proceedings is done by police prosecutors. However, the general population is contributing to the reduction of criminal jurisdiction of local courts, as the civil cases they take before local courts include those which are supposed to be taken before the police, which include: rape, assaults, theft, and abduction (Canter, 1976; Colson, 1976). Colson, (1976:28) notes that:

> cases of disguised theft are brought before local court, as civil suits because the plaintiffs are interested in compensation and the restoration of property rather than the punishment of offenders, which would be the result

if they laid charges of theft before police.

Separation provisions exist for containment of adult and juvenile offenders at police stations and prisons, and also for during their transportation to and from court. But this is not followed due to lack of resource facilities, as there are no separate juvenile detention centres for those waiting trial. However, Chilenje remand home for juvenile offenders is being used to confine convicted juveniles together with those awaiting trial.

Penal Laws

The basic source of Zambian criminal law is the Penal Code, which forms an integral part of the laws of Zambia. It is a modification of the colonial Penal Code introduced in 1930, and has undergone several amendments. For example, in 1974, theft of a motor vehicle was made a distinct offence from general theft[6]. Robbery, committed with the use of a firearm as from 1974, carries a mandatory death penalty by hanging[7]. The Penal Code is divided into two parts:

1. Part I----General provisions - deals with interpretation and application of the Penal Code, rules of criminal responsibility, and punishments; and
2. Part II---Is a listing and definition of all crimes covered

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[6]Section 281A of Penal Code, as amended by Act 29 of 1974

[7]ibid. Section 294

by the Penal Code and specifies the maximum penalties for violating or committing each of the different crime categories. The Penal Code also specifies whether the crime is a felony or misdemeanor, relating to the seriousness of the offence committed, and this in return corresponds to the severity of the disposition supposed to be handed down. Offences covered by the Penal Code are listed under eight headings: Offences Against Public Order; Offences Against Lawful Authority; Offences Injurious to the Public in General; Offences Agaist Persons; Malicious Injury to Property; Forgery, Coining, and Impersonation; and Offences Relating to Corrupt Practices. This is in the same order that the incidence of juvenile crime is reported in the Police Annual Reports. It is therefore difficult to assess the juvenile crime rates through police statistics (Annual police reports), because all criminal activities are recorded under the headings: cases reported, cases not taken to court, and cases taken to court, (thus adult criminality and juvenile crime).

The punishment is generally imprisonment on conviction. Juveniles between the ages of eight and eighteen years are being charged with criminal offences, and it is generally said that punishment of juveniles found guilty is less severe than that for adults (Kaplan, 1979:239). The present writer does not concur with this contention because juvenile offenders when found guilty are subjected to severe punishment. For example, corporal punishment which consists of whipping with a rod or

cane in a manner approved by the Minister of Home Affairs[8] is common, as well as the detention in a reformatory for four years regardless of the offence for which the offender has been found guilty[9]; while adults are sentenced to 12 months or less imprisonment for same offences, such as, assaults, theft and damage to property. This point will be dealt with in detail in Chapter VI.

However, the dispositions that are covered in the Penal Code, generally give the judges and magistrates some latitude in sentencing juvenile or adult offenders. These dispositions inlude death by hanging, imprisonment with, or without hard labour, corporal punishment, fine, forfieture of property, deportation, payment of compensation, and absolute and conditional discharge[10]. Juvenile offenders in addition to these sanctions can be ordered to an Approved school or Reformatory, or be placed on probation, as provided for in the Juveniles Act.[11]

A conviction of murder, treason and robbery with a firearm carries with it a mandatory death penalty. But a person under the age of 18 years at the time of the commission of the alleged offence cannot be sentenced to death, and a pregnant woman is excepted from this penalty. The juvenile offender found guilty

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[8] Section 27 (5) (c) of the Penal Code

[9] Section 93 of the Juveniles Act

[10] All these are spelt out in Sections 24 to 42 of the Penal Code

[11] Section 73 of the Act and see Appendix B.

of these offences can be detained at the President's pleasure, on the conditions that may be set out[12].

It has been noted in Chapter II that the development of the juvenile justice system was a recognition of two reasons for dealing with juveniles, or of bringing them before court:

1. That they have committed criminal offences; or
2. That they are being raised up in a manner or conditions that would influence them to become criminals (for example status offences),

and, therefore, some individualized measures were to be employed, or measures which were applied by non-penal agencies were to be followed (Siegel and Senna, 1981:5). This led to age specification for those to be criminally dealt with and those to be referred to non-penal agencies.

Age of Criminal Responsibility.

The Penal Code has retained the common law minimum age of criminal liability of eight years[13], and there are no suggestions to have it raised as in other countries. For example, in Canada the Young Offenders Act, 1982, has raised the age to 12 years. The Zambian legislation has not taken any step to have juvenile offenders not to be identified with adult criminals, and to have them physically separated from adult

[12]Section 25 of the Penal Code

[13]ibid Section 14 (1).

deviants, to avoid the criminal stigma, which traditionally has been thought would ruin juveniles' chances for rehabilitation. But terms common to the adult criminal court were excluded from juvenile court terminology. "Accused" was replaced by the term juvenile offender; "Conviction" by a finding of guilty; "Sentence" by an order made upon such a finding[14]. However, this does not change the position, because a finding of guilty of juvenile offenders of ages between 8 and 18 years is treated as a "previous conviction" as if the case was dealt with in the adult criminal court. This differs from the English system where a finding of guilty of a juvenile who has not yet attained the age of 14 years "is not treated as a previous conviction after the offender has become an adult at the age of 21 years" (Walker, 1969:176). However, the magistrate is empowered to exclude the general public when hearing a juvenile case and the news media is not allowed to report the court proceedings in such a way that the juvenile offender would be easily identifiable.

The Zambian courts have criminal jurisdiction solely vested on the Subordinate magistrates' court to hear juvenile crime, as provided under section 63 of the Juveniles Act. Hence, the court deals with juvenile cases in the same manner as in adult criminal proceedings. Thus, the court proceeds on the assumption that the offender before it is to be held answerable for his actions. This differs from the assumption that led to the

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[14]Section 68 of the Juveniles Act

development of the juvenile justice systems, as discussed in Chapter II where courts proceeded on a different basis from that of the adult criminal court. The Penal Code still regards juvenile offenders before the court as answerable to criminal law, in the manner the proceedings are being conducted and the term "responsible" has not acquired the meaning attributed to it in the countries where the minimum age has been raised. Walker (1969:178) notes that with a gradual shift in the meaning of the term responsible which has come to mean something like "knowing what is criminal and able to decide rationally whether to do it or not". Hence, age can affect a disposition to be handed down on a juvenile offender found guilty, as it can be taken as a mitigating factor or not. This issue will be discussed in Chapter VI, while analyzing data.

Procedures in Juvenile Court

It is necessary now to look at some procedural aspects in juvenile court proceedings in Zambia. It has been noted above that juvenile offenders are being brought before the courts as answerable to criminal law. This affects the nature of evidence that is to be adduced and some procedural aspects of the court proceedings. Rules of evidence are observed in the same manner as in the adult criminal court, as the juvenile case has to be proved beyond any reasonable doubt.

The juvenile court differs slightly from the adult criminal proceedings, in being closed to the general public, except for the relatives of the offender, and of the victim if he is a child. Also the offender does not stand in the dock, but in a particular place at the front of the court, where he can speak to the magistrate, and be spoken to without any difficulty. The rights before the court are the same as for the adults. Thus, juveniles have the right of representation by a counsel of choice, except in cases of rape, murder, aggravated robbery, incest, and other specified offences, where legal counsel must be provided by the State, in the event that the offender is unable to provide counsel of his own. When an offender is brought before court charged with any of these specified offences, the court is under legal obligation before taking a plea to issue a legal aid certificate, which directs the Director of Legal Aid Department to provide a counsel to represent the offender in court. Juvenile offenders have also the right to notice of charges, and right to appeal within 14 days of being found guilty of the offence charged. They also have the right to cross-examine the sworn witnessses. The parent or guardian of the offender, if present in court and wishes to cross-examine the sworn witnesses can do so, "at the close of the evidence in chief of each witness"[15].

After consideration of the evidence and taking into account the information of the pre-sentence report submitted to court by

[15]ibid section 64 (4)

the social welfare officer (Probation officer), and a discussion with the parents or guardian of the offender, the magistrate, then sentences the offender to any of the dispositions that have been discussed earlier on in this chapter.

This leads to the sentencing principles as to what special considerations apply to the disposal of juvenile offenders. It has been noted that the rise of the juvenile justice system was on the basis of distinguishing juvenile from adult offenders, as the juveniles were regarded more likely to respond to parental influences, and as such that influence should be given " a fair chance to correct the juvenile before resorting to more costly and drastic measures" (Walker, 1969:182). The families are to be given chances to control their children before the court orders their removal from home. Therefore, on this basis the courts get more information on the family background from the probation officers' social inquiry reports (pre-sentence reports). These reports contain information relating to the parents' reaction to the child misconduct, and whether a warning could be an effective measure on which the family would take an action to correct the offender's behaviour and any other recommendation by the probation officer, which could assist the trial magistrate to make an appropriate disposition, in respect of the juvenile offender that has been found guilty of the offence charged.

However, in Zambia, the work of probation officers is not straightforward as in the western countries, because the case worker has to do his work within communities which still have

tribal approachs to family obligations. For example, in a matrilineal tribe where the mother's brother rather than the natural father in some cases is the real source of authority and discipline over the family children. Therefore, at the breakdown of marriage in such a tribal community a juvenile does not lose social control, as the maternal uncle would be able to exercise social control over that juvenile, once the mother is separated from the father. Hence, an appointed probation officer is a multi-purpose social worker, who deals not only with the statutory functions under the Probation of Offenders Act, and the supervision of licencees from the Approved school and the Reformatory, but also with public assistance, juvenile welfare, matrimonial, and other social work services. Clifford (1966:9) notes that the African social worker faces complicated problems by the absence of many of the aids which would be at his disposal in a more developed country. He further states that:

> Because the social worker is often a general purpose worker he is called upon to deal with a wide variety of situations which arise in the family. He has usually to be the probation officer for courts, the child care worker, the medical social worker for the hospitals, the marriage counsellor and the public assistance officer--all at one and the same time (ibid:9).

Hence, once called to investigate the social background of the offender and family, the probation officer needs a clear understanding of the customary law, customary procedures, and of the influences of traditional ideas on the modern legal system. He has to understand the other tribes and their different attitudes to his own traditions, within the changing society,

especially in urban areas, where children are brought up without ties to the rural communities, which still have traditional approaches to children upbringing and avoid court process for child misconduct (Clifford, 1966).

However, this broader approach by probation officers would recognize the importance of tribal laws in dealing with juvenile offenders, while the government's aim as pointed out in the last chapter, was/is to have a unified laws and reduce the application of uncodified customary law and customs in the criminal proceedings. Therefore, a pre-sentence report which leans heavily on the tribal laws will be in conflict with the court's legalistic orientation, which administers modern law and that any person before it is answerable for his actions. The broadened approach is in line with the local court's orientation, the recognition of the customary law in dealing with juveniles, and the reaffirmation of norms and values of traditional communities (Gluckman, 1955, Epstein, 1958).

Hence, the conflict may lead the magistrates to have no confidence in the probation system, and even have some doubts about its effectiveness. As a result of that the courts may be disregarding the probation officers's recommendations, and may opt to sentence juvenile offenders to corporal punishment, as a means of deterring them, from further criminal activity, or to correctional institutions on the basis of the parents' failure or inability to control their children, and may not given them any other chance. As a result the dispositions that would be

optioned by the courts could be punitive rather than those identified as rehabilitative. This argument will be continued in Chapter VII on the discussion of findinds. The next chapter discusses the general perspective of the study and the data sources.

V. General Perspective of Study

The present study is an attempt to explore and analyze the general pattern or trend of dispositions, as they relate to crime categories (i.e., seriousness of offence) in Zambia. It is a first move of presenting a more accurate and informative picture of dispositions in juvenile courts in Zambia using available data. By examining the general trend of dispositions that are handed down by the courts it may reveal the punitiveness of the legal system in respect to juvenile offenders. As such, it is an examination of the Zambian approach to the disposition of juvenile offenders.

It is assumed that magistrates sentence offenders to permissible dispositions, after taking into consideration the seriousness of the offence, personal characteristics of the offender, whether he/she is a first offender or has previous convictions, the damage caused to the victim, family history of the offender (stable or unstable, parents employed or unemployed). The personal experience of a trial magistrate, and his understanding of theories of punishment may influence his judicial decision-making in each particular case. But the magistrate is constrained by legal rules which provide alternatives to sentencing, such as imprisonment, caning, probation. But a magistrate may not give a decision which is contrary to to the decision of a higher court on a principle or

rule of law (the doctrine of stare decisis) (Green, 1961; Hogarth, 1967; Hood, 1972). The community in which the court is situated may have some infuence on the magistrate's decision.

In Chapter II, it was noted that the American and Canadian researches in sentencing have focused upon race, socio-economic status, number of previous offences , and the seriousness of the offence as variables most significantly related to dispositions (Cohen and Kuegel, 1978; Haldane et al, 1972; Kueneman and Linden, 1983). It has also been noted that the well established institutions within the juvenile justice system contributed to easy examination of differential disposition at each level of these institutions: the police, intake hearings by the juvenile court's probation department, and hearings by the juvenile court itself. Therefore, the existence of resource facilities enable researchers to trace differential dispositions at any level or stage of the juvenile justice system, from arrest through final disposition of cases (Thornberry, 1973).

From the review of other studies it can be said that the variables that could be examined in sentencing research may be grouped into three sets of variables: legal factors, extralegal factors, and factors in the process.

Legal factors include the type of crime committed, the previous convictions of the offender, the number of co-accused, and the pre-sentence report submitted to court by the welfare department or the mental institution.

Extralegal factors include sex, age (but age can be a legal variable), race, place of residence and information on familial status or occupation (SES) of the offender.

Factors in the criminal process are the trial judge or magistrate prosecuting counsel and defence counsel, if any.

The present study looks at legal variables of the type of crime (seriuosness of offence), other elements are eliminated due to lack of data. The Penal Code specifies the offences which are classified as felonies and misdemeanours. A felony is considered to be a serious offence, as the offender is liable to imprisonment with hard labour for three years or more, even death without proof of previous convictions.[1] A misdemeanour is a less serious offence. This categorization of crimes will be dealt with later in the chapter.

Measurement of the dependent variable, the severity of legal dispositions, is relatively straight forward, because it is a legal variable already defined by the Penal Code, C.P.C, and the Juveniles Act of Zambia. According to police records, the dispositions that can be given to a juvenile in Zambia, are as set out under section 73(1) of the Juveniles Act --namely dismissing the charge, an approved school order, a reformatory order, caning, fine/compensation, bonding-over for good behaviour, and imprisonment. These were divided into two categories:

1. Dismissing the charge, probation order, fine/compensation,

[1]See the Appendix A; Section 4 of the Zambian Penal Code.

and bonding-over the offender for good behaviour were classified as minor dispositions (thus Fine and Probation-Discharge).

2. Caning, imprisonment, approved school order, and reformatory order were classified as punitive dispositions (thus Caning and Institutionalization).

A brief account of each disposition is given in order of their severity as perceived in the present study, in accordance with the reviewed studies. Loftus (1975:217) in his study in Australia considered fine, order without probation supervision, and probation supervision for periods under two years as minor court orders, while control orders for periods over two years, and institutional placement (committal to a state-run reformatory) as major court orders. Haldane et al (1972:236) in their study in Canada, divided court dispositions into two categories: "dismissal, fine, and reprimand were combined as minor dispositions; probation and committal to corrections institution as major dispositions". While Thornberry (1973) in his study in the United States ranked the dispositions in their severity throughout the juvenile justice system levels. First a remedial arrest, where a juvenile offender is entirely handled by the police, after an hour's or so detention at police station, the juvenile offender is let free and his case is not referred to juvenile court. The second is a discharge, where the case referred to juvenile court is dismissed at the first juvenile court hearing without probation order. The third is a

fine, where the juvenile offender is ordered to pay a fine or makes a restitution to the victim. The fourth is probation, where the juvenile offender is placed on probation for a certain period of time. The fifth and most considered severe is institutionalization, where the offender is ordered to spend a certain period of time in a correctional institution. However, none of the studies had caning (corporal punishment) as a disposition. In England, by 1938 the use of corporal punishment for juvenile offenders had almost died out. It was officially abolished by the Criminal Justice Act, 1948 (Corporal Punishment, 1960:3).

Hence, the term disposition in this study is used to refer to the sanction or penalty given by the court after a finding of guilty. This may be after hearing evidence adduced before the court or when the offender pleads guilty before the court.

Caning (Corporal Punishment)

The Zambian law requires that a juvenile offender convicted of any offence punishable by imprisonment for a term of three months or more to be caned in substitution of imprisonment or in addition to it[2]. The court should specify the number of strokes but they can not exceed twelve. The caning is to be inflicted in the presence of a medical officer who has certified that the offender is fit for such punishment. The medical officer can

[2]Section 27 of the Penal Code

stop the infliction of this punishment when he considers that the offender is not in a fit state of health to undergo the remainder thereof and this should be followed by a written statement by the medical officer to the court that made an order of this punishment.

However, it can be argued that this disposition is retributive/deterrence in nature, as it causes personal hardship to the offender. It's aim is to deter the offender from offending again without necessarily changing him in any other way and also as a means of punishing him for the offence committed. The requirement of the medical officer at its infliction is in agreement with this assertion. It is economically cheap and swift in its application, but it does not take into account human dignity. It is calculated on the tariff basis, and is one of the oldest treatments of crime.

It must be noted that under tribal laws, corporal punishment was employed, but it was inflicted by a member of the the family on the juvenile, after the other member of the family or the victim complained of a misconduct. But as already pointed out in Chapter IV that home corporal punishment differs from a judicial imposed corporal punishment, as the juvenile usually has affection, or at least respect, for the person who beats him, and because of their continuing relationship there are a lot of chances for reconciliation. These conditions do not exist in prison environment.

Institutionalization

This covers imprisonment, approved school order, and reformatory orders. This requires the offender to spend a certain period of time in a correctional institution.

The imprisonment is usually with hard labour in any prison which could be a maximum security prison, if the term of imprisonment is for three years and/or if the offender is considered to be dangerous. It could be medium security prison if the sentence is for a two year term, and if the sentence is less than two years, it can be served in a minimum security prison. The offender could be placed in solitary confinement for infractions of prison regulations. Imprisonment term is usually of determinate duration, the maximum of which should be no more than the penalty prescribed for the offence of which the offender is found guilty [3]. It is considered punitive in the present study because it is custody-oriented and by its nature (thus, it is based on tariff system). Thomas (1973:35) defines tariff as "the process by which the length of a sentence of imprisonment is calculated, where the primary decision is not in favour of individualized measure". The offender sentenced to imprisonment is entitled to one third remittance of the term imposed by the court, but this depends on his conduct while in the corrections institution (prisons).

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[3]Section 26 ibid.

An approved school order is an authorisation for the detention of the juvenile offender in an approved school. The offender has to be detained for a period of three years, which is a flat sentence, regardless of offence committed[4]. An approved school order is not to be carried into effect, until it has been confirmed by the High Court. Pending the confirmation of the order by the High Court, the court making the order, prepares a temporary order committing the offender to a place of safety, usually to Chilenje Remand home. Thereafter, the juvenile offender is conveyed to Nakambala approved school at Mazabuka in the southern province. This institution is generally considered as a rehabilitative treatment of the juvenile offenders (Department of Social Welfare Annual report, 1971:5).

But in the present study the approved school has been classified as punitive because it is custody-oriented. The approved school rules authorize punishment in the form of solitary confinement and corporal punishment for the maintenance of discipline. The only treatment programs offered at this institution are vocational training, and academic education, the same as the industrial and agricultural programs in prisons. Individual psychotherapy which can only be carried out by a specially licensed psychologist or a psychiatric social worker is not offered at this institution.

A reformatory order made by the court after finding a juvenile offender guilty of the offence charged , is an

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[4] Section 78 of the Juveniles Act.

authority for the detention of the offender at Katombora reformatory for a period of four years (flat sentence the same as the Approved school order). The order has to be confirmed by the High Court, before it can be carried into effect, and the offender has to be conveyed to the reformatory immediately after an order is made by the court, without waiting for the confirmation.

The control and administration of this institution is vested in the commissioner of prisons. The unexpired period of the reformatory order can be commuted to a term of imprisonment by the Minister of Home Affairs on the advice by the Commissioner of prisons that the offender named therein, exercises a bad influence on the other inmates. This allows the layman to change an order which was made in a judicial capacity for a specific offence to have it cover infractions of reformatory rules. The commutation can only be made when the offender has attained the age of fourteen years. This disposition is based on tariff principles and it is custody-oriented. The reformatory operates in the same way as the prisons and discipline is enforced in the form of solitary confinement and corporal punishment. The treatment programs are the same as for the approved school. This institution is situated in an isolated area sixty kilometres from the main town of Livingstone. Therefore, a reformatory order is classified as punitive in this study because it is custody-oriented. This is in line with other studies which classified institutionalization

as major disposition.

Fines

The Penal Code provides for the imposition of fine as alternative sanction for most crimes and as a supplementary penalty for all misdemeanors.[5] The maximum amount of the fine prescribed by legislation for each of the various crimes is usually relative to the degree of seriousness of the crime as measured by its maximum term of imprisonment. It is classified as minor in the present study because of less degree of deprivation of civil freedom of the offender, as he is immediately let to the community, if he is able to pay the fine. It is considered minor as other studies classified it (Haldane et al, 1972; Loftus, 1975).

Probation-Discharge

This disposition involves some conditions attached to the release of the offender, after he/she is found guilty.

A probation order requires the offender to be under the supervision of a probation officer for a specified period of time of not less than one year and not more than three years.[6] Probation is not punitive but rather treatment oriented. It is

[5]Section 28 of the Penal Code.

[6] Section 3 of the Probation of Offenders Act.

classified as a minor disposition .

The court after a finding of guilty of the offender, may make an order "discharging him/her absolutely or subject to the condition that he commits no offence, during a period of twelve months from the date of the order"[7]. This disposition differs from a probation order , in that the offender is not released under the the supervision of the probation officer or any law enforcement agency. The court in making a discharge order takes into account all circumstances including the nature of the offence and the social characteristics of the offender.

After a finding of guilty, the court may order the offender to enter a bond for keeping the peace and of being of good behaviour for a fixed period which the court thinks appropiate taking into account all relevant facts of the case.[8] This could be an alternative sanction or a supplementary sanction for an offence not punishable with death.

These three orders are categorized as one in this study and classified as a minor disposition. The police records also combine these sanctions as one category.

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[7]Section 41 of the Penal Code.

[8]Section 31 ibid.

Data Sources

The reliance on official statistics as a means of measuring criminality or delinquency from the seventeenth century has been a pressing problem (Sellin and Wolfgang, 1964:7). This is so because it concerns reliability and validity of such data. Every research in this area of study will undoubtedly rely on agencies entrusted with the enforcement of the criminal law and the administration of justice for sources of information on criminality or deliquency. These are usually the police and the courts.

The police keeps all records with the information relating to complaints received, arrests made, cases detected and undetected, convictions, and dispositions made by the courts. The cases that are not taken to court are also shown with the reasons for not been presented to court. The courts also keep records of information about the offences dealt with, social characteristics of the offenders, convictions, and dispositions ordered.

For decades there has been a division, some researchers paid more reliance on criminal statistics from court records, as basic data for measuring criminality. On the other hand others put more emphasis on police statistics (Sellin and Wolfgang, 1964). In 1897, William Douglas Morrison, (cited by Sellin and Wolfgang, 1964:15) in a paper read before the Royal statistical Society said:

> Police statistics from our point of view may be....defined as a body of returns relating to the number of offences annually reported to the police, and to number of apprehensions.... as a result of these reports . Statistics of this character are the most comprehensive account to be obtained of the annual dimensions of crime...

This view has continued in criminological researches. The official statistics has been criticized on the basis of bias, as on the way counting, coding is done and the one doing the counting (Nettler,1974:46). But at the same time, Nettler (1974:61) made an observation that "no presently employed measure of criminal activity , official or unofficial, is sensitive to the full range of crime and at the same time, sensitive to variations in the judged gravity of these crimes".

In supporting the use of official statistics, Wolfgang (1970:59) has made the observation that "we do not know the total amount of crime, even with 'hidden delinquency' and victimization studies. We do not know at any specific moment in time, or even stretches of time, the relationship between offences known to police and committed."

Hogarth (1971:11) argued against the use of official statistics in sentencing studies, as this leads the researcher to imply or impute the attitude of the sentencing judge without knowing his personal orientation and the surrounding environment. However, it is useful to make use of available information from official statistics in sentencing studies when the purpose is to ascertain the general pattern or trend of dispositions in the legal system.

The United states Uniform Crime Reporting system (UCR) has placed reliance on data on offences known to the police for an index of serious criminality. The police data was considered as useful source of information about the character and extent of criminality, as the police "are nearest in time to the offences that occur and include information about offences that escape the attetion of courts due to the fact that a large proportion of offences lead to no apprehension and prosecution of offenders" (Wolfgang, 1970:56).

Hence, official statistics are able to furnish some information on how the small homogeneous sample of offenders were treated by the courts. Homogeneous in the sense that they are the unlucky ones who faced police discretion power exercised against them. The data collected from official statistics enable the researchers to make comparisons for a population over a period of time or between proups. Thus, it is possible to find out the proportion of offenders sentenced to imprisonment or placed on probation. Nettler (1974:58) commented that by using official statistics researchers in attempts to increase their predictive abilities "think in terms of ratios, proportions or rates".

In order to ascertain a reasonable distribution of dispositions in relation to crime , it is necessary to collect enough data on the index crimes. These should be of a degree of constancy in the proportion of reported from the considered total universe. Sellin and Wolfgang (1964) notes that the

framers of the United states's Uniform Crime Reporting System contended that not all offences against the criminal law were equally useful for index purposes. Hence, offences are seen to fall into three categories:

1. Offences that cause some harm to a person or his property, that leads him or some other person (friend, neighbour, relative) to notify the police of their occurrence;
2. Offences that involve conspirational or consensual acts, that can in more cases be brought to the notice of police by the participants who are usually the only ones who know of their occurrence, in cases such as, rape, incest, corruptive practices etc.
3. Offences that disturb the public order, the victim being the community at large and rarely reported to the police (Wolfgang, 1970:57).

Sellin and Wolfgang (1964:165-172) in their study found that offences involving physical injury, property loss and property damage had primarily effect of prompting the victim or some other private person to notify the police of their occurrence; as their magnitude is unaffected by the consensual character of some other offences or by police activity, and they were considered the most appropriate for a crime index. Wolfgang (1970:60) later stated that the offences furnishing the data for the index of crime "must possess a high degree of constant reportability".

Wolfgang (1970) further notes that this excludes offences that disturb the public order as their discovery depends more or less on police activity. Therefore, fluctuations in proportions known could not be trusted to portray changes in their real frequency of crime. This can also change the pattern of dispositions imposed by the courts on the offenders, as the increase in proportion of the offenders brought before courts may be interpreted by the courts as prevalency of those crime categories rather than simple shifts in police practices.

It is not only enough to collect available data, but some confidence should be invested in that data. It has already been pointed out that in criminological researches official statistics have been doubted, when it comes to the problems concerning reliability and validity of such data, in measuring criminality or delinquency. In the present study it has been taken into account that official records are not free from error. As Skogan (1975:45) notes that "every statistics.... is shaped by the process which operationally defines it, the procedures which capture it, and the organization which interprets it".

However, statistical performance records are used by the police supervisors, members of the general public, and researchers in assesssing the efficiency of police. This includes simple counts of police activities (i.e., arrests may be used to evaluate the effectiveness of inquiry as to the clearance rate of reported cases). It must be noted that there

is a miscounting to crime statistics, which is subject to alteration for organizational, administrative, and political reasons. Thus, there is deliberate alteration of statistical performance records in crime statistics, which occurs by deliberate "downgrading" offences. Downgrading is a declaration that a criminal act originally thought to be serious (felony) is recorded as less serious (misdemeanour). For example, theft of property valued over $200 may be recorded as theft under $200. Therefore, a decline in the crime category of theft may be seen as a result of downgrading offences. Seidman and Couzens (1974) studied downgrading in the district of Columbia of the United states and concluded:

> that at least part of the decline in crime statistics for the district of Columbia is attributable to increased downgrading of larcenies and, to a lesser extent, of burglaries. This appears to be a pure case of the reactivity of a social indicator: the fact that the statistic is used as a measure of performance affects the statistic itself. The political importance of crime apparently caused pressures, subtle or otherwise, to be felt by those who record crime-- Pressures which have led to the downgrading of crimes (ibid:476).

Hence, crime statistics can be improved by deliberate downgrading offences and when this practices occurs, "it is a clear example of the reactivity of archival data" (ibid:463).

There is no other source of information available in Zambia for use in this type of study. Therefore, data for the present study comes from official sources. Crime and dispositions data for this study were obtained from the Zambia police Annual reports---the year-end figures for the six chosen categories of crime known to the police. It has been noted in Chapter III that

the Zambia police Force, is one law enforcement unity, governed by the Zambia Police Act. This Act is supplemented by Force Standing Orders, and Force Instructions, which lay out the regulations for police operations. The regulations provide the transmitting of all reports to Police Headquarters daily, weekly, monthly, and yearly returns. These include arrests, convictions, and sentences passed by the courts. The recording of the reports or complaints and others records are standardized; thus, the record-books used are the same at all police stations. All members of the Police Force are attested to be loyal to the Government and are civil servants , under the pensionable conditions of services.

Data gathered for a ten-year period (1964-1974) of this study for the three felony and three misdemeanor crime categories, as follows:

Felonies

1. Theft
2. Breaking & entering and theft.
   (a) Breaking and entering and theft, businesses and others.
   (b) Breaking and entering and theft, residences---generally referred to as Housebreaking when the breaking was done during the day time; Burglary when the breaking occurred at night (7.00 p.m to 6.00 a.m)
3. Theft by servant

Misdemeanours

1. Escaping from lawful custody
2. Assualts.
   (a) Assualt Ocassioning Actual Bodily Harm
   (b) Common assualt
3. Malicious damage to property

The breakings have been combined in a single crime category, and assaults also in a single crime category for purposes of the analysis.

Theft is not classified as in Canada where seriousness of this crime is by a dividing line of $200 of the value of the property stolen. In the Zambian Penal Code the value of the property is not an important ingredient of the offence[9]. In 1974 the penalty for theft was amended by the deletion of the three years sanction and the substitution of a five years sentence. The rationale was an obvious case of the increasing occurrence of this crime category.

The sex offence cases are excluded from this study because of the statutory criterion, that a male person under the age of twelve years is presumed to be incapable of having carnal knowledge[10]. This automatically excludes the rape category used in the U.S and Canadian studies. The present study intends to

[9] See AppendixA for the definition of theft.

[10] Section 14 of the Penal Code.

have crime categories which have no limit on age to who has to be charged of an offence. This will not encourage the analyzing of cases involving older juveniles only.

The crime category of homicide is also excluded in this study. The occurrence of homicide is generally very low in Zambia and its small numbers do not justify its inclusion in the analysis. The other reason is statutory, that the penalty for murder is a mandatory death sentence. However, a person convicted of murder will not be sentenced to death, if at the time of the alleged offence was under the age of eighteen years. Although he could be detained under the President's pleasure[11].

The robbery category is also excluded because it involves older juveniles and it does not cover all the age groups. It is also excluded on the statutory basis as homicide; as from 1974 the use of an offensive weapon in robbery carries a mandatory penalty of death.

The crime category of escaping from lawful custody is included in this study on the basis that its occurrence will be constant in juvenile offenders, and has a high degree of constant reportability. The other crime categories chosen in the present study also possess the criterion advocated by Wolfgang (1970) of 'reportability' because they are of the nature that involve injury to person or property. This can prompt the victim or someone who has witnessed the occurrence to make a report to the police, and the matter may be later settled in court where a

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[11]ibid. Section 25

final disposition will follow, which is the concern of this study. The classification of crime category (felony and misdemeanor) made in this study is statutory as already pointed out.

The penalties are also reflected in the seriousness of offence, as the general punishment for misdemeanor, if not specifically stated to the offence, is imprisonment for a term not exceeding two years[12]. The misdemeanors are considered to be less serious offences even though they involve injury. This is illustrated in the category of assaults which do not include wounding nor grievous harm considered serious injuries in the Code.

The present researcher concurs with Sellin and Wolfgang (1964:41) that the classification and scoring for seriousness of crime must be the event unit scored for index purposes and not merely the number of offences regarded serious. For example, suppose that a hold-up man robs a bank, kills a teller, injures a customer seriously, steals thousands of dollars from the cash register; suppose further that in another city, during a fight, one assailant kills someone-- each of these cases may be classified and scored as one of homicide (murder), ignoring that in the first instance another person was seriously injured and a big sum of money was stolen. Hence, a jurisdiction with this practice of statistical recording has no way of dealing with such a complex event. This happens where offences are recorded

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[12]ibid. Section 38

by their legal labels (such as robbery, burglary, rape).

However, in the present study it has been decided to adopt legal labels in crime classification, as the Zambian Penal Code, makes provisions for dealing with a complex event, where one act constitutes several crimes. This is provided under Section 36, as follows:

> Where a person does several acts against or in respect of one person or thing, each of which acts is a crime but the whole of which acts are done in the execution of the same design and in the opinion of the court before which the person is tried form one continuous transaction, the person shall be punished for each act so charged as a separate crime and the court shall upon conviction award a separate punishment for each act. If the court orders imprisonment the order may be for concurrent or consecutive terms of imprisonment...

The data were tabulated for each crime category for period of analysis (1964-1974). As Shown in Table 1 to Table 7. The year-end figures of the completed cases involving juvenile offenders were recorded in the form of frequencies counted in each of crime categories. The record of data is incomplete as the data for 1966 and 1972 were missing. The present study has used police statistics, as other studies did so as to make use of the already available data.

VI. Analysis

Most criminological studies use factor or multiple regression analysis, for the purpose of uncovering correlations between crime rates and legal, socio-economic attributes. The present study employs descriptive analysis through graphs and tables as a statistical method. Frequency distributions make it much easier to grasp the information contained in a set of data, if the distribution is depicted graphically rather than in numbers per se, which are not presented in a systematic way. Statistical methods include tools for summarizing, organizing, and simplifying data, so that they can be more easily and precisely interpreted. They furnish investigators with succinct descriptive summaries of masses of observations (Mills, 1955; Alder and Roessler, 1964; Bailey, 1971; Kirk, 1978). Alder and Roessler (1964:4) note that "representation of a mass of data by either tabular form or graphical method is part of statistical analysis which should lead to a better over-all comprehension of the data". Mills (1955:1) states that "perhaps most important of all, in the statistical approach we have is a means for the advancement of knowledge that seems to accord in fundamental ways with the nature of things in the world we are seeking to understand". Therefore, this analysis can be used as a test of association or relationship between the variables being studied. It is useful if the purpose is to see the change of the

phenomenon being studied in the specified period; as this will reflect changes in patterns over time. Hence, the analysis employed in this study will be useful in answering the questions: "what percentage of cases of each crime category brought before the courts each year between 1964 and 1974, received more of punitive disposition"? What was the percentage of caning, institutionalization, fine, or probation-discharge in each of the years?

The analysis employed will give a clear general trend of dispositions; thus, the differences between the punitive dispositions and minor dispositions, as percentage representation of dispositions, are depicted graphically, as they relate to each of the crime categories. Hence, a general picture of optioned and popular dispositions that are handed down in the Zambian juvenile courts will be observed.

The present study uses time series analysis which have been defined as "successive observations of the same phenomenon over a period of time" (Alder and Roessler, 1964:209; Mills, 1955:4). Time series graphs known as histograms of frequencies of dispositions against time are presented in figures 1A, 2A, 3A, 4A, 5A and 6A. Histograms of percentages of the cases out of total cases in each crime category are used in addition to frequency distribution because percentages often communicate statistical information better than simple frequencies. Percentages are far more meaningful than frequencies, since the frequencies might change greatly depending on sample size, while

percentages might not (Kirk, 1978:19-30). This statistical method presents to the eye a very clear picture of distribution, showing quite unmistakably the relative number of cases falling in each of the dispositions.

The underlying assumption of the present study is that the findings will be contrary to the studies that have been reviewed in Chapter II (Thornberry, 1973: Loftus, 1975: Cohen and Kluegel, 1978 to mention a few) that found that the most lenient dispositions were associated with minor offences and the most severe dispositions were associated with serious offences. These studies had race and socio-economic status as the variables that allegedly explained those interactions, however.

It has been urgued that the legal system is punitive in its nature and is based on the tariff system using the principles of retribution/deterrence. Thus,the punitive dispositions would be more frequently handed down than minor dispositions in line with the punishment oriented approach to juvenile offenders.

It has been noted previously that there are no data relating to social characteristics of offenders, nor other legal elements as previous convictions, number of offences charged with, and number of co-accused. However, the findings of the present study will set up a base for further studies in this area, as there are none done so far. It will be necessary after seeing the pattern of dispositions that have been handed down during the study period to make recommendations for further studies as to other explanations that can be given as to the

observed picture of the dispositions.

Figures 1A, 2A, 3A, 4A, 5A, and 6A show the frequency distributions of dispositions relating to each crime category, while Figures 1B, 2B, 3B, 4B, 5B, and 6B are representations of percentages of dispositions in respect of the same crime categories as those shown in the former histograms. It must be pointed out here that the changing scale for each (number of disposition, frequency) does not matter in this study, because the comparisons used are within each particular graph. Thus, how dispositions were handed down in each crime category and in each year, across the study period.

Another point which need clarification is on how the calculation of the percentages presented in Table 1 to Table 7 was done. The percent was calculated by taking the raw data of each disposition and divided by the total number of all four dispositions in respect to that crime category, and multiplied by 100.

The dominating position of caning as a disposition is noted in Table 1, where misdemeanour offences had higher percentages from 1964 to 1968. Thus 59.1% of misdemeanours compared to 53.7% of felonies in 1964. In 1967 it was 70.6% of misdemeanours, while felonies was 61.6%. But under institutionalization felonies had higher percentages than misdemeanours. While under fines misdemeanours had higher of this disposition than felonies.

Table 1

Percentage of overall dispositions by year, type of disposition by crime category

Year	Caning		Institutionalization		Fine		Probation-Discharge	
	*Felo	Misde	Felo	Misde	Felo	Misde	Felo	Misde
1964	53.7	59.1	19.5	18.2	2.0	6.1	24.8	16.6
1965	51.6	62.0	35.6	16.2	2.8	11.2	10.0	10.6
1966	N O		D A T A		A V A I L A B L E			
1967	61.6	70.6	29.9	10.0	1.7	13.4	6.8	6.0
1968	65.8	71.1	20.6	8.1	2.0	8.1	14.6	12.7
1969	76.1	75.6	17.6	6.8	1.6	8.6	4.7	9.0
1970	73.3	69.7	20.4	15.1	1.7	9.5	4.6	5.7
1971	68.3	68.0	25.5	9.6	2.5	19.5	3.7	2.5
1972	N O		D A T A		A V A I L A B L E			
1973	62.9	56.6	23.3	15.4	4.0	20.4	9.8	7.6
1974	64.9	47.0	28.7	20.3	3.4	27.2	3.0	5.5

*felo = felonies , misde = misdemeanours.

Source: Zambia Police Annual Reports 1964-1974

But under probation-discharge the differences varied in each year, trying to narrow the gap. However, further examination of the distribution of dispositions within crime categories reveals some variations that require percentage comparison of the dispositions in each year.

Felony and Disposition

Table 2, shows that caning as a disposition for the offenders found guilty was the most frequently handed out disposition.

Table 2

Percentage of dispositions in respect to Theft 1964-1974, with total numbers

Year	Total number	Caning	Institutionalization	Fine	Probation-Discharge
1964	540	55.6	18.9	3.3	22.2
1965	578	58.3	27.0	3.5	11.2
1966	N O	D A T A	A V A I L A B L E		
1967	598	63.7	25.9	2.2	8.2
1968	536	63.0	19.8	2.8	14.4
1969	529	76.4	17.2	1.9	4.5
1970	609	75.2	17.7	1.8	5.3
1971	656	70.9	21.3	3.5	4.3
1972	N O	D A T A	A V A I L A B L E		
1973	812	69.6	19.7	3.7	7.0
1974	771	69.3	25.6	4.1	1.0

Source: Zambia Police Annual Reports 1964-1974

Figure IA. Distribution of dispositions in respect to theft for the period I964-I974. (Zambia Police Annual Reports)

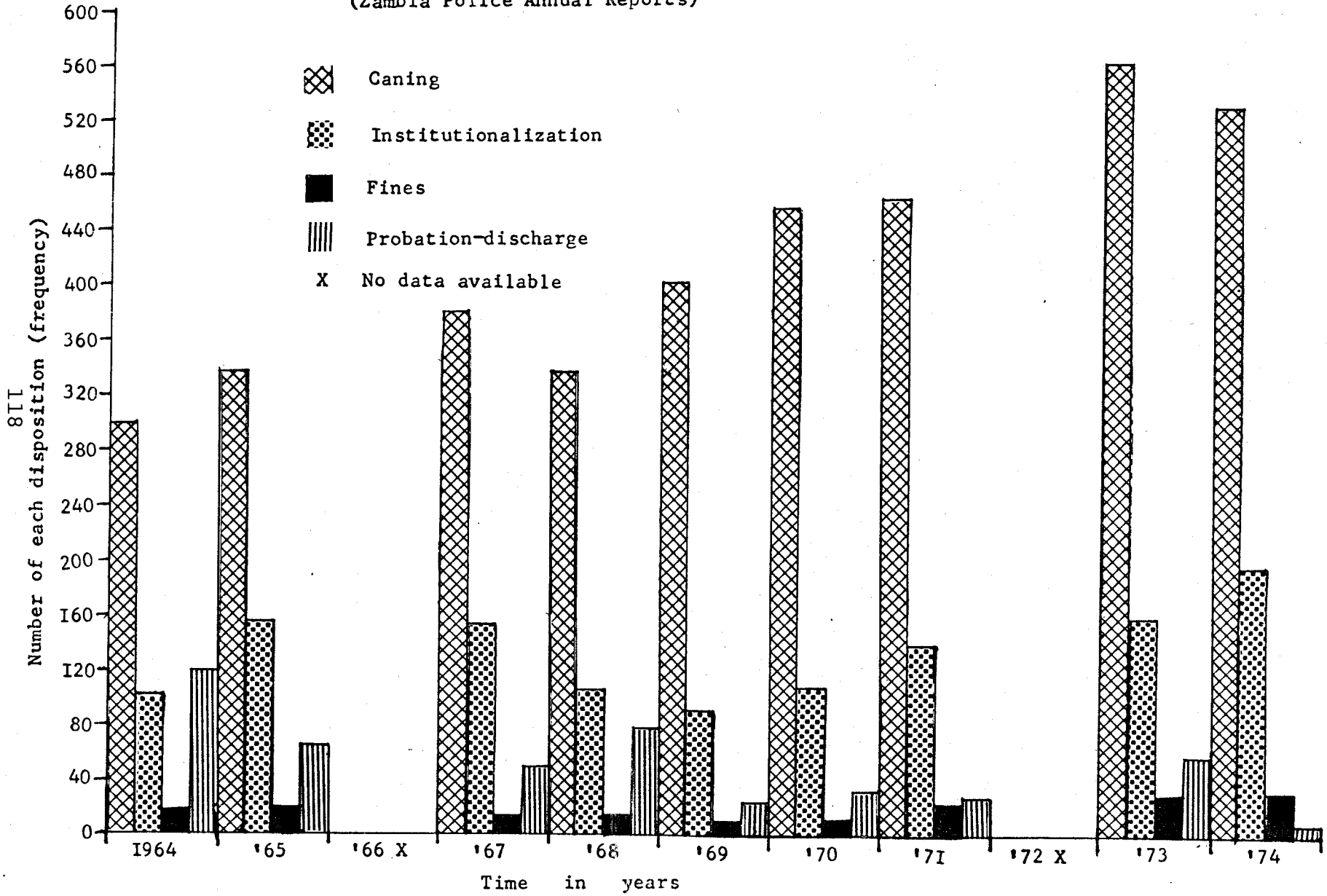
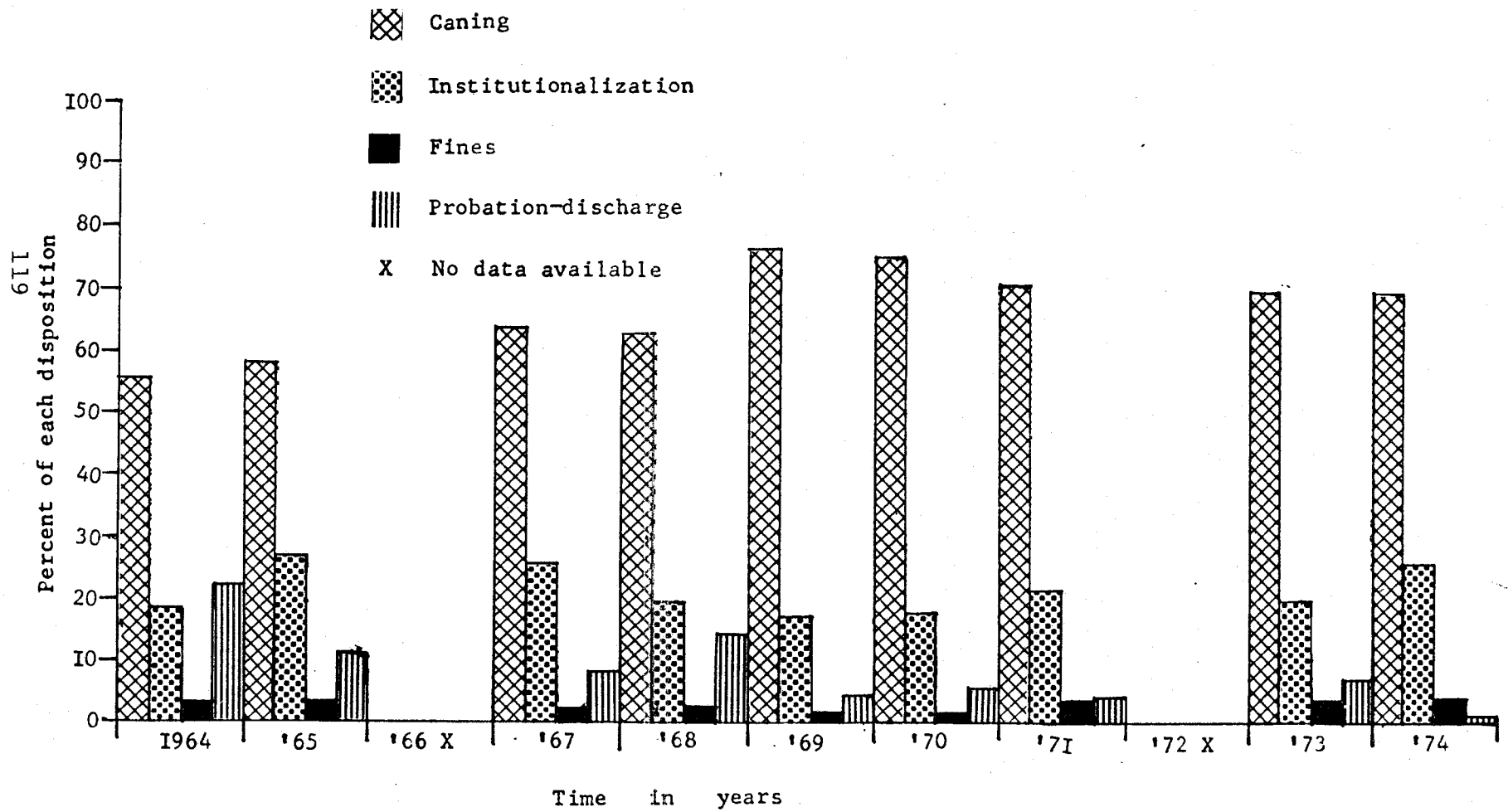


Figure IB. Representing percentages of dispositions in respect to theft for the period I964-I974. (Zambia Police Annual Reports)



This is followed by institutionalization which is classified as punitive in the study. Caning was used about 55.6% in 1964 for theft, while probation-discharge was 22.2% and fine 3.3%. Probation-discharge declined throughout the period from 22.2% in 1964 to 1.0% in 1974. While caning was increasing with variations and in 1969 reached 76.4%, in 1974 it was 69.3%. The increasing trend is also noted under institutionalization, with the highest value of 27.0% recorded in 1965 , and in 1974 it was 25.6%. In comparison with other minor disposition fines do show only a small increase from 3.3% in 1964 to 4.1% in 1974 but remains relatively constant.

However, examining figures 1A and 1B, it is noted that caning and institutionalization were more frequently handed down than fine and probation-discharge. Especially, fines as a disposition was the least disposition that was being imposed by courts throughout the period of analysis.For example, the highest for fines was 4.1% in 1974.

Breakings which cover wide range of breaking and entry (business, residence, and others) had institutionalization 46.6% compared to 42.6% for caning, in 1965 as shown in Table 3.

Table 3

Percentage of disposition in respect to Breakings 1964-1974, with total numbers

Year	Total number	Caning	Institutionalization	Fine	Probation-Discharge
1964	499	50.3	20.2	0.6	28.9
1965	552	42.6	46.6	1.8	9.0
1966	N O	D A T A	A V A I L A B L E		
1967	456	56.4	38.2	1.3	4.1
1968	355	71.0	21.1	0.9	7.0
1969	409	78.2	16.7	0.7	4.4
1970	382	70.4	25.1	0.8	3.7
1971	449	62.6	33.4	0.7	3.3
1972	N O	D A T A	A V A I L A B L E		
1973	486	54.7	27.4	5.6	12.3
1974	435	59.5	31.5	2.3	6.7

Source: Zambia Police Annual Reports 1964-1974

Figure 2A. Distribution of dispositions in respect to breakings for the period I964-I974. (Zambia Police Annual Reports)

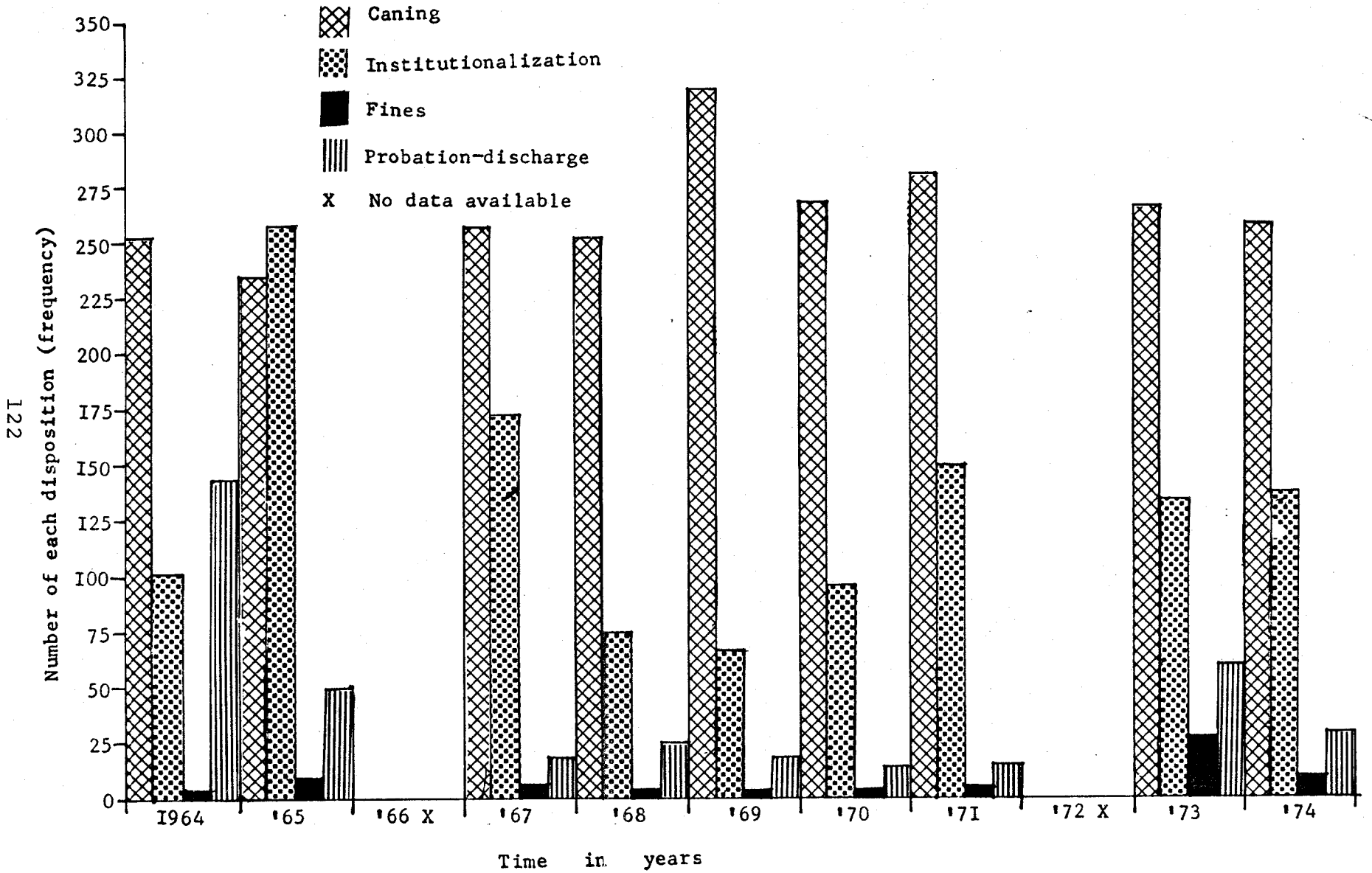
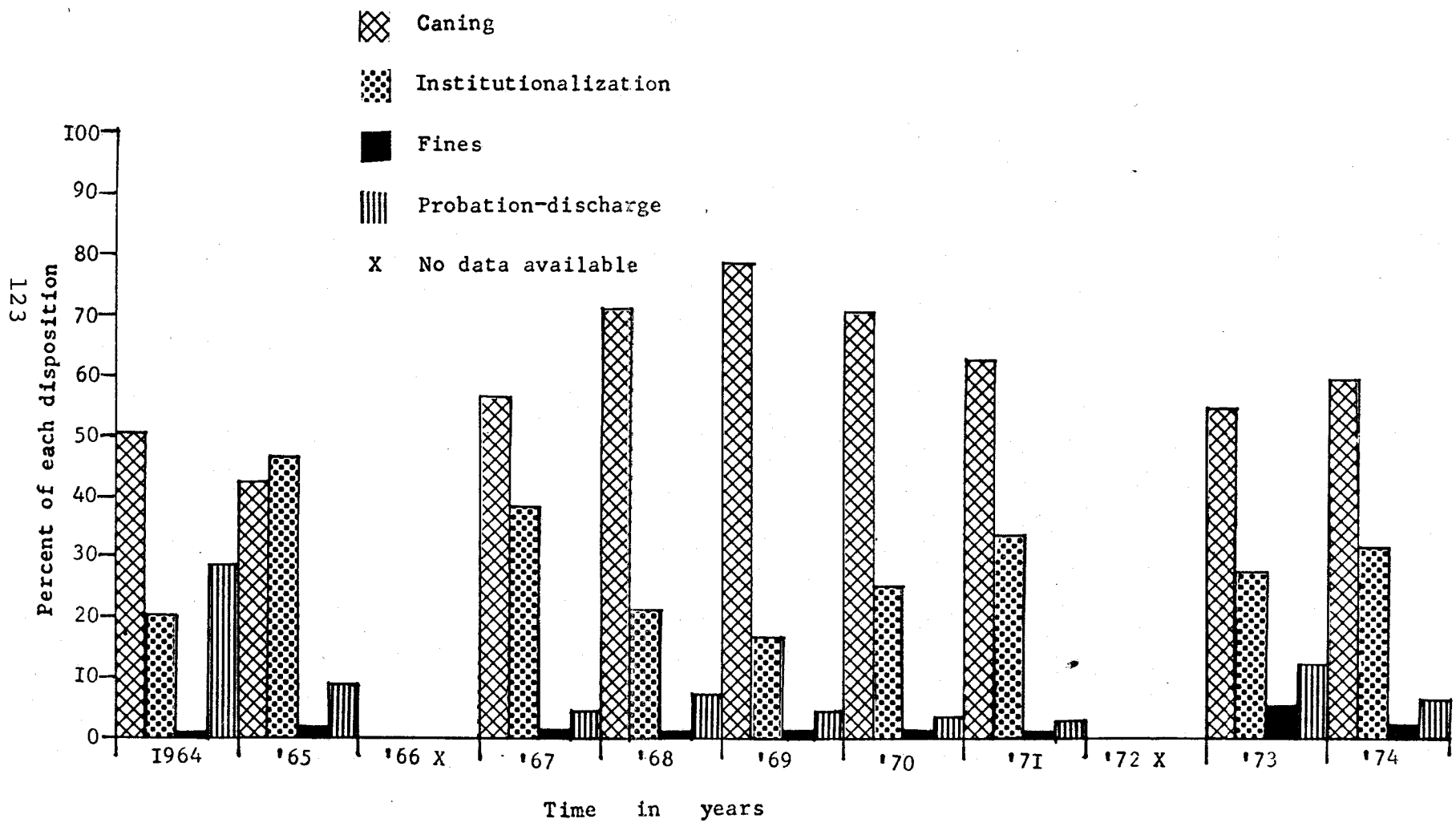


Figure 2B. Representing percentages of dispositions in respect to breakings for the period I964-I974. (Zambia Police Annual Reports)



However, caning has dominated in respect of this offence, in that in each year caning disposition had the highest percentage, except in 1965 as pointed out above. In 1969, caning disposition was 78.2% compared to the minor dispositions, fines with 0.7% and probation-discharge had 4.4%, while the other punitive disposition (institutionalization) was 16.7%. Probation-discharge was also declining throughout the period from 28.9% in 1964 to 6.7% in 1974. Fines increased from 3.3% in 1964 to 5.6% as the highest 1973, while in the same year, caning and institutionalization were 54.7% and 27.4% respectively. Institutionalization was 16.7% in 1969 as the lowest percentage. Punitive dispositions are optioned for this crime category, because it is considered to be a serious offence, especially when it takes place at night[1].

Closely examining figures 2A and 2B, it is noted that the same picture observed under theft, is seen under this crime category (breaking), caning was the most frequently handed down disposition; while fines as a disposition was the least imposed sanction in each year.

It is noted in Table 4, that the relationship between crime category of theft by servant and disposition is still in the same direction as for theft and breakings analyzed above. Caning in each year was a popular disposition, with some variations. The lowest percentage for caning was in 1973 (53.3%) and this

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[1]Section 301 of Penal Code provides that...if the offence is committed in the night, it is termed "burglary" and the offender is liable to imprisonment for ten years.

was the year when probation-discharge was 16.4% being the highest. While institutionalization and fines were 29.6% and 0.7% respectively. In 1974, probation-discharge was 2.6% and this was the same for fines, compared to 55.5% and 39.3% for caning and institutionalization respectively.

Table 4

Percentage of dispositions in respect to Theft by servant 1964-1974, with total numbers

Year	Total number	Caning	Institutionalization	Fine	Probation-Discharge
1964	49	67.4	18.4	2.0	12.2
1965	85	64.7	23.5	4.7	7.1
1966	N O	D A T A	A V A I L A B L E		
1967	86	74.4	14.0	1.2	10.4
1968	93	62.3	23.7	1.1	12.9
1969	72	62.5	26.4	4.2	6.9
1970	70	72.9	17.1	5.7	4.3
1971	122	75.4	18.9	3.2	2.5
1972	N O	D A T A	A V A I L A B L E		
1973	152	53.3	29.6	0.7	16.4
1974	117	55.5	39.3	2.6	2.6

Source: Zambia Police Annual Reports 1964-1974

Figure 3A. Distribution of dispositions in respect to theft by servant for the period I964-I974. (Zambia Police Annual Reports)

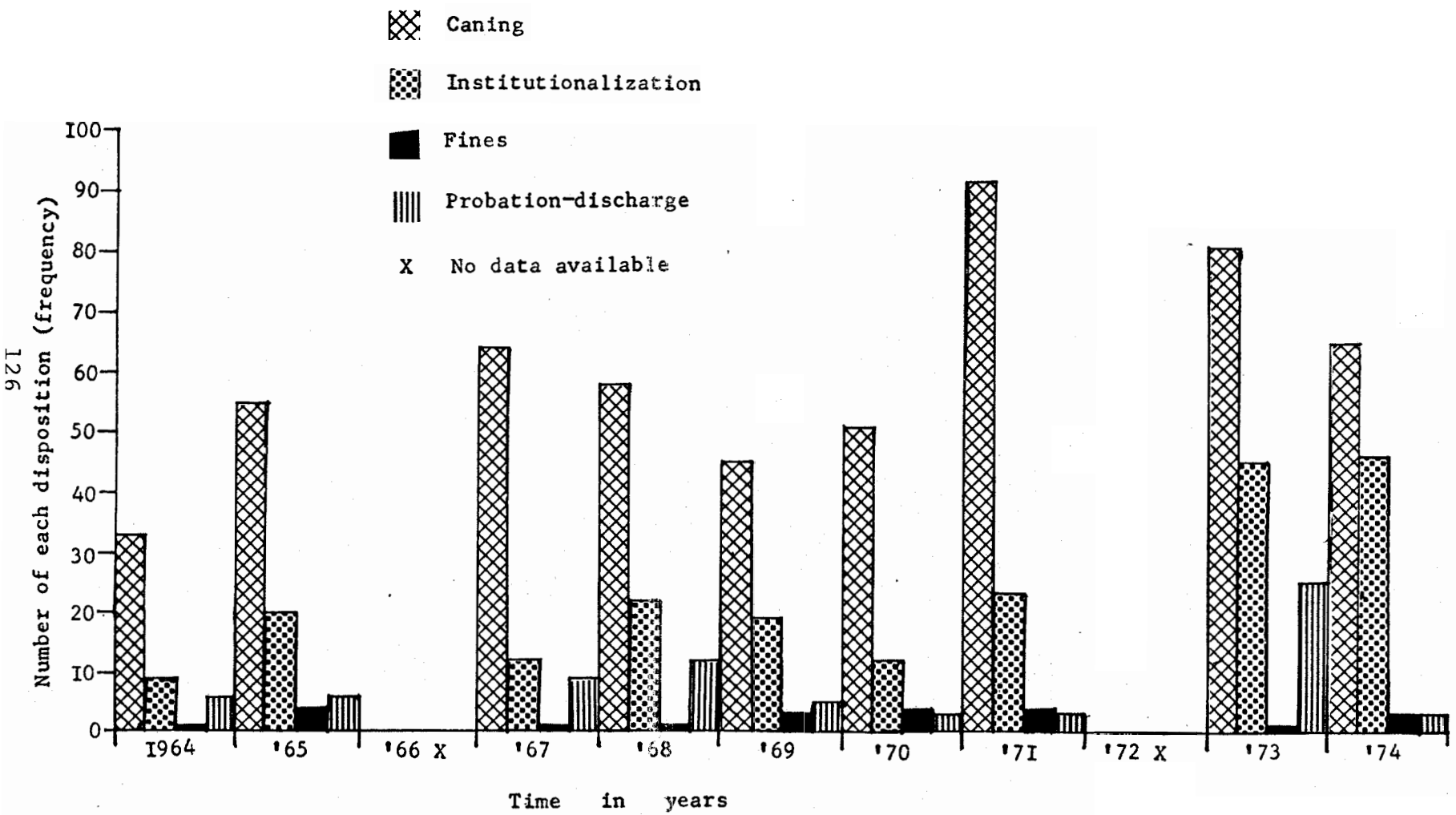
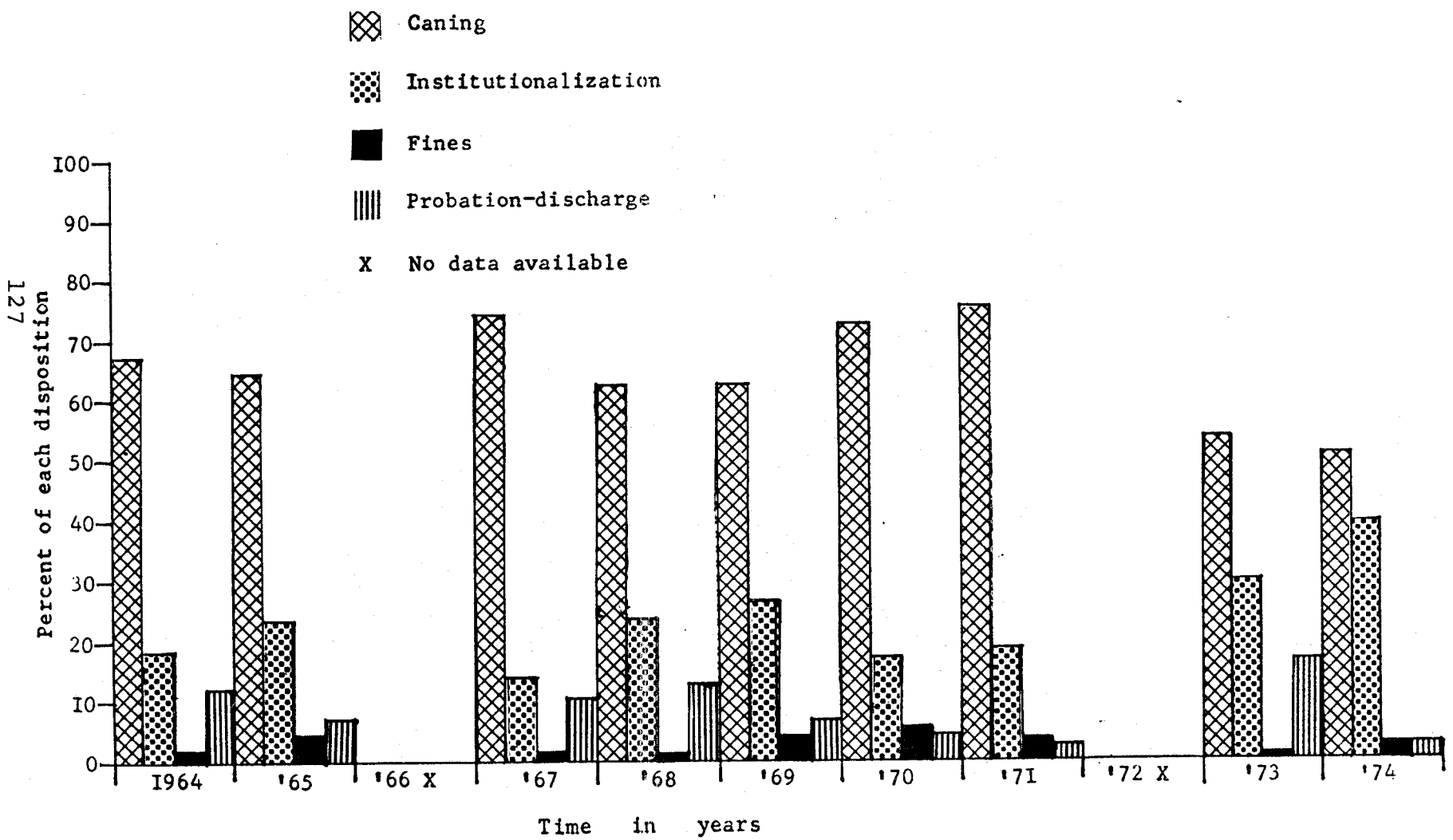


Figure 3B. Representing percentages of dispositions in respect to theft by servant for the period I964-I974. (Zambia Police Annual Reports)



However, this offence is considered serious as it carries the maximum penalty of seven years imprisonment[2]. However, a change is noted in figures 3A and 3B, in the last two years (1973 and 1974), that institutionalization increased. It must be noted that this crime category has a historical classification, that it was enacted specifically for the Africans who were employed as maids or clerks in private firms. This was the main area of contact between tribal Africans on one hand and a dominant European group on the other, as the European group was trying to protect its interests in property. Hence, disputes arising from this contact were given a special attention. The disputes involving Africans were left in the hands of traditional leaders (Gann, 1957).

Misdemeanour and Disposition

The relationship between misdemeanour (less serious offences) and severity of disposition is quite similar to that observed when felony offences were the independent variables; although there were some differences, but the optioned dispositions in each year were pointing in the same direction. As can be seen in Table 5, that crime category of escaping from lawful custody had no fines as disposition for the rest of the years except for 1970 2.7% and 1973 5.9%. Probation-discharge as a disposition has been decreasing throughout the period except

[2]See Section 278 ibid.

for 1969 which recorded 26.3% as the highest percentage. But it is small compared to 71.1% for caning in the same year. In 1968, caning disposition 86.6% compared to 6.7% for probation-discharge.

Table 5

Percentage of dispositions in respect to Escaping from lawful custody, 1964-74, with total numbers.

Year	Total number	Caning	Institutionalization	Fine	Probation/ Discharge
1964	63	60.3	20.6	0.0	19.1
1965	93	78.5	19.4	0.0	2.1
1966	N O	D A T A	A V A I L A B L E		
1967	24	41.7	50.0	0.0	8.3
1968	30	86.6	6.7	0.0	6.7
1969	38	71.1	2.6	0.0	26.3
1970	37	59.5	29.7	2.7	8.1
1971	30	56.7	36.7	0.0	6.6
1972	N O	D A T A	A V A I L A B L E		
1973	34	50.0	44.1	5.9	0.0
1974	45	42.2	55.6	0.0	2.2

Source: Zambia Police Annual Reports 1964-1974

Figure 4A. Distribution of dispositions in respect to escaping from lawful custody for the period I964-I974. (Zambia Police Annual Reports)

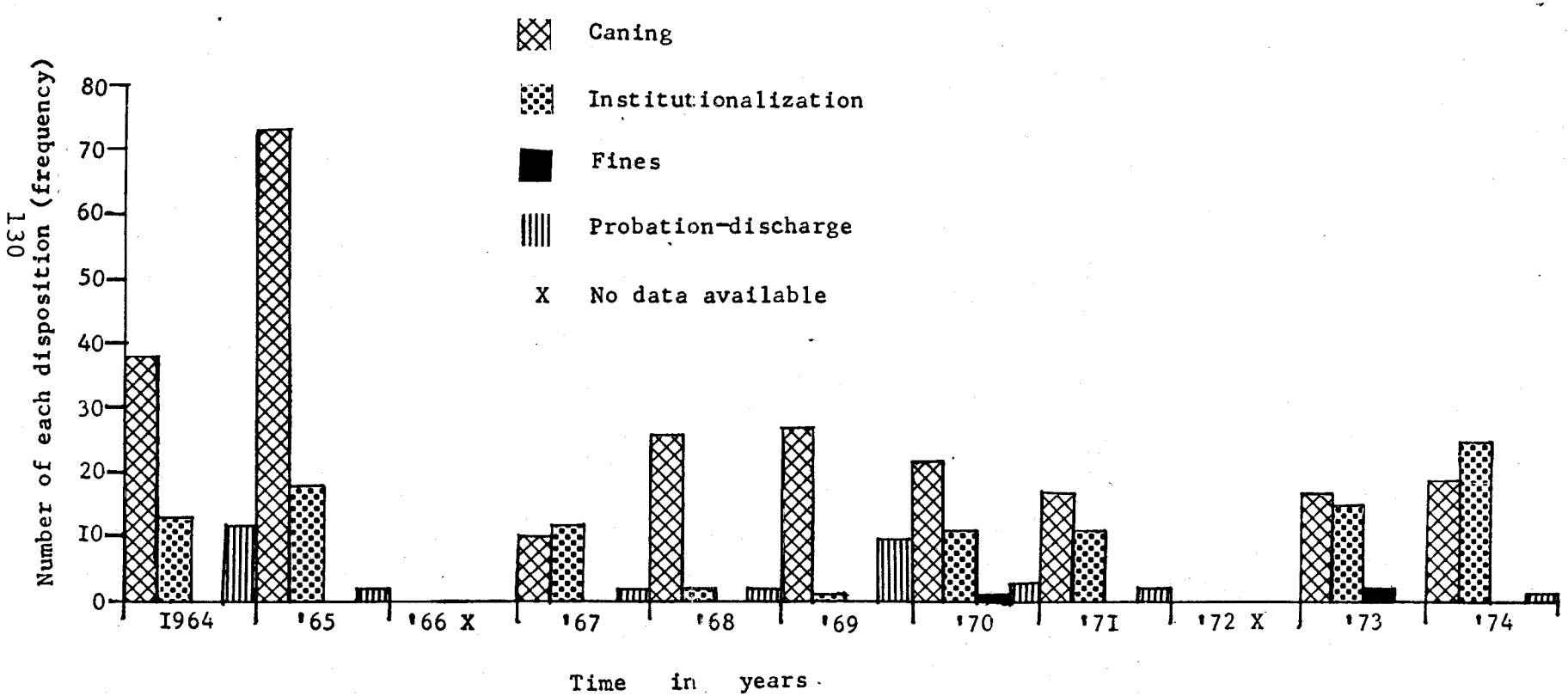
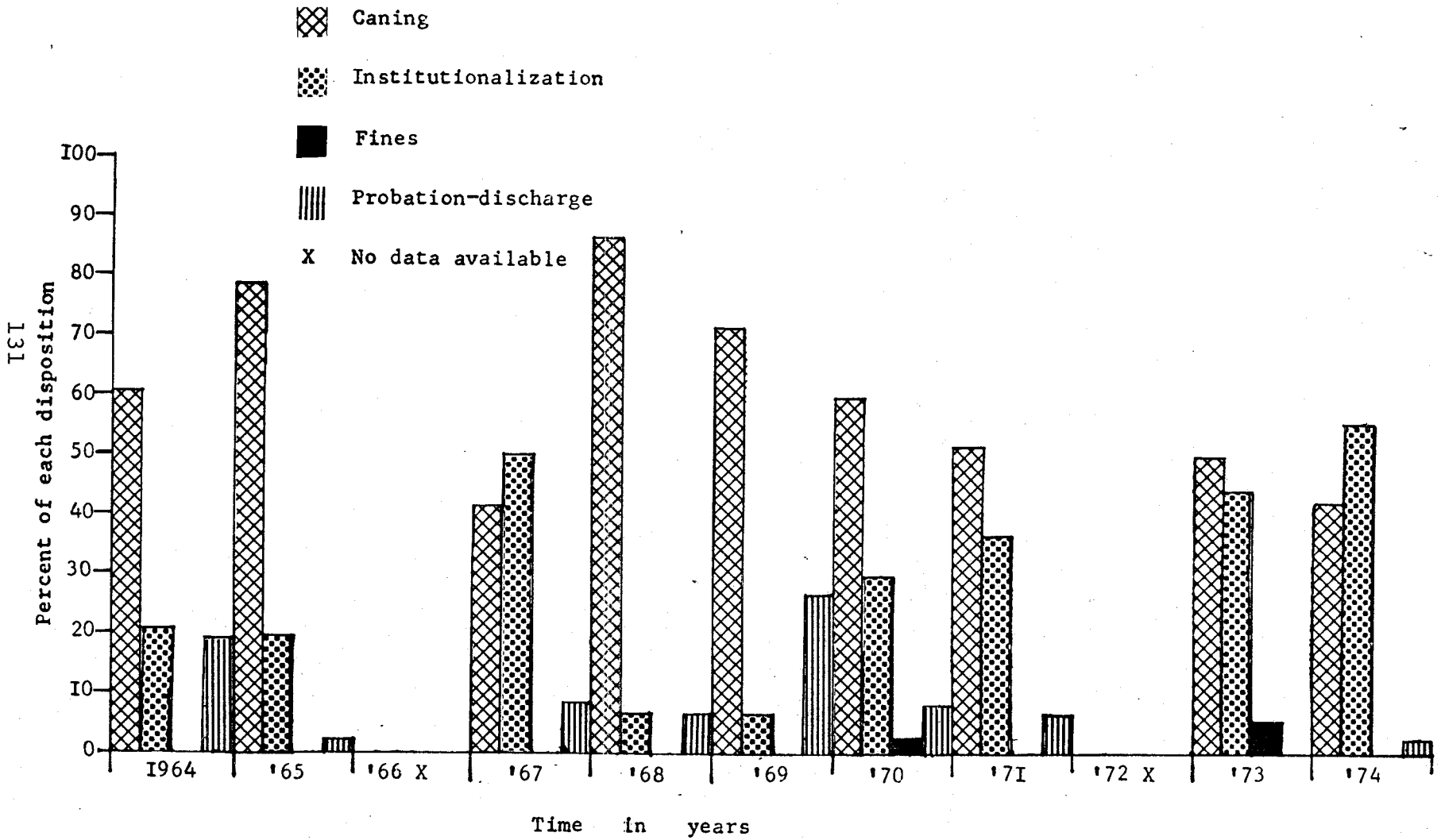


Figure 4B. Representing percentages of dispositions in respect to escaping from lawful custody for the period I964-I974. (Zambia Police Annual Reports)



It is noted that institutionalization in 1967 was highest with 50.0% and caning 41.7% compared to 8.3% for probation-discharge. In 1974, institutionalization again was highest with 55.6% , while caning as a disposition had 42.2% compared to only 2.2% for probation-discharge.

Figure 4A does not give a clear picture of distribution of frequencies of the dispositions; however, figure 4B shows that the trend is the same as those analyzed above. Caning and institutionalization were more frequently handed down than fines and probation-discharge in each year, in respect to this crime category. The courts seem to be harsh with the juvenile offenders who commit this crime category, as it touches the effectiveness of the law enforcement agencies, the way they handle the offenders.

It is noted in Table 6, that fine as a disposition in the crime category of assault, was increasing throughout the period with some variations. The obvious reason could be its nature, which requires compensation for the injuries sustained. In the traditional Zambia reconciliatory measures were the only remedy for this crime category. In 1965, fine disposition 27.8% and probation-discharge 20.4% were higher than institutionalization 14.8%, but caning 37% was still the highest. Fines continued to be higher than institutionalization except in 1970. However, caning continued to be highest in this crime category. Probation-discharge was higher than institutionalization in 1965, 1968, and 1969, but on the whole it was used at its

minimum compared to caning.

Table 6

Percentage of dispositions in respect to Assaults, 1964-1974, with total numbers.

Year	Total number	Caning	Institutionalization	Fine	Probation-Discharge
1964	37	73.0	18.9	8.1	0.0
1965	54	37.0	14.8	27.8	20.4
1966	N O	D A T A	A V A I L A B L E		
1967	149	72.5	5.4	16.7	5.4
1968	155	62.6	8.4	12.2	16.8
1969	155	76.8	6.5	9.7	7.0
1970	186	71.0	14.0	8.6	6.4
1971	255	69.4	6.3	22.4	1.9
1972	N O	D A T A	A V A I L A B L E		
1973	355	57.2	14.1	20.0	8.7
1974	416	44.2	18.5	31.0	6.3

Source: Zambia Police Annual Reports 1964-1974

Figure 5A. Distribution of dispositions in respect to assaults for the period I964-I974. (Zambia Police Annual Reports)

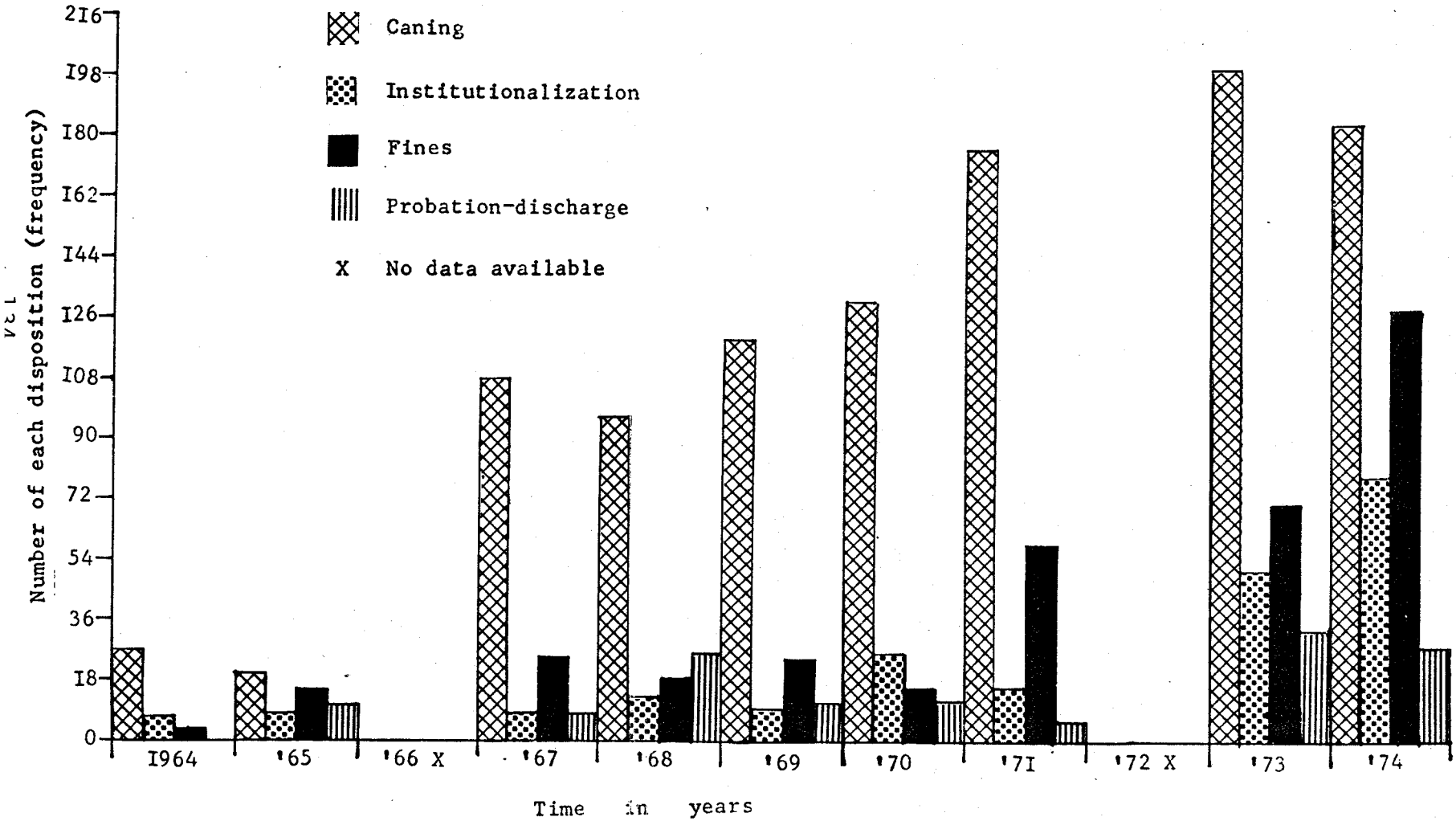
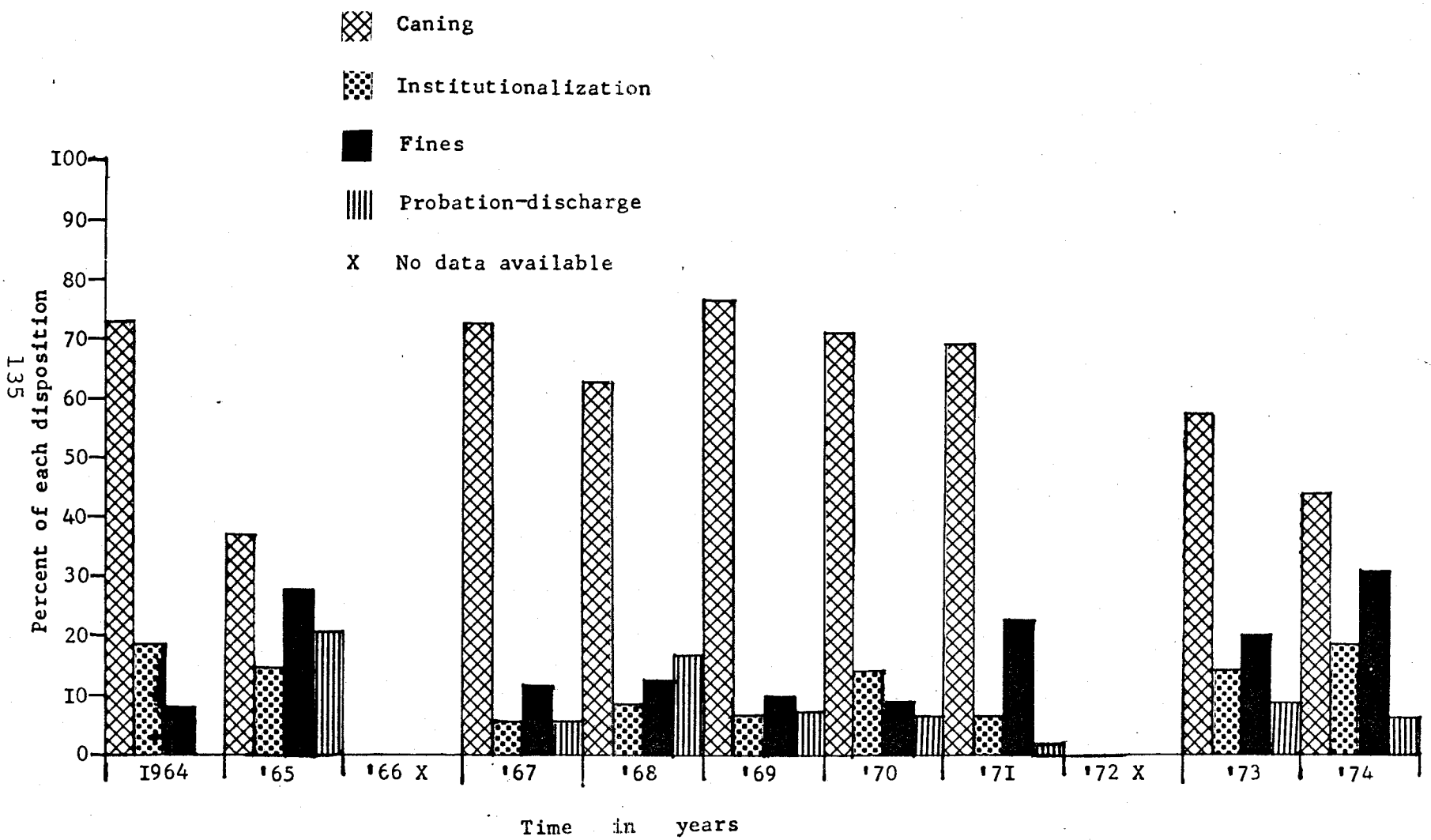


Figure 5B. Representing percentages of dispositions in respect to assaults for the period I964-I974. (Zambia Police Annual Reports)



It is noted in figures 5A and 5B, that fines as a disposition had consistently competed with institutionalization, and showed an increasing trend in the last two years (1973 and 1974). But caning is seen as the most frequently handed down sanction throughout the period of analysis in each year. The use of fine disposition in assaults can not be said to be a reflection of change, as it has been pointed out earlier that this disposition could be used as a reconciliatory remedy, because generally this crime category occurs in public places (especially in drinking places) and sometimes involves neighbours. But now fine is used as a source for revenue, and taking no account for the victim of the crime nor the future conduct of the offenders. It is a state retribution for the crime committed. However, in general, caning and institutionalization are the most common dispositions for this crime.

Malicious damage to property received the highest percentage of fines as a disposition of 40.6% in 1973, and also had the highest for caning of 88.2% in 1968, as compared to other five offences discussed above, as noted in Table 7. The use of probation-discharge as a disposition decreased from 18.5% in 1964 to 3.5% in 1974. Caning as a disposition has been constantly optioned in each year. Institutionalization was used except in 1967 and 1973. Although changes are noted in fines, the same direction observed in the above offences is seen in this crime category. However, it is noted that in 1968, fines as

a disposition was not employed. Probation-discharge was also not employed in 1969 and 1970.

Table 7

Percentage of dispositions in respect to Malicious damage to property, 1964-1974, with total numbers.

Year	Total number	Caning	Institutionalization	Fine	Probation-Discharge
1964	27	48.2	14.8	18.5	18.5
1965	32	56.3	9.4	15.6	18.7
1966	N O	D A T A	A V A I L A B L E		
1967	28	85.8	0.0	7.1	7.1
1968	51	88.2	7.9	0.0	3.9
1969	41	75.6	12.2	12.2	0.0
1970	41	73.2	7.3	19.5	0.0
1971	37	67.6	10.8	18.9	2.7
1972	N O	D A T A	A V A I L A B L E		
1973	32	56.3	0.0	40.6	3.1
1974	57	70.2	5.3	21.0	3.5

Source: Zambia Police Annual Reports 1964-1974

Figure 6A. Distribution of dispositions in respect to malicious damage to property for the period I964-I974. (Zambia Police Annual Reports)

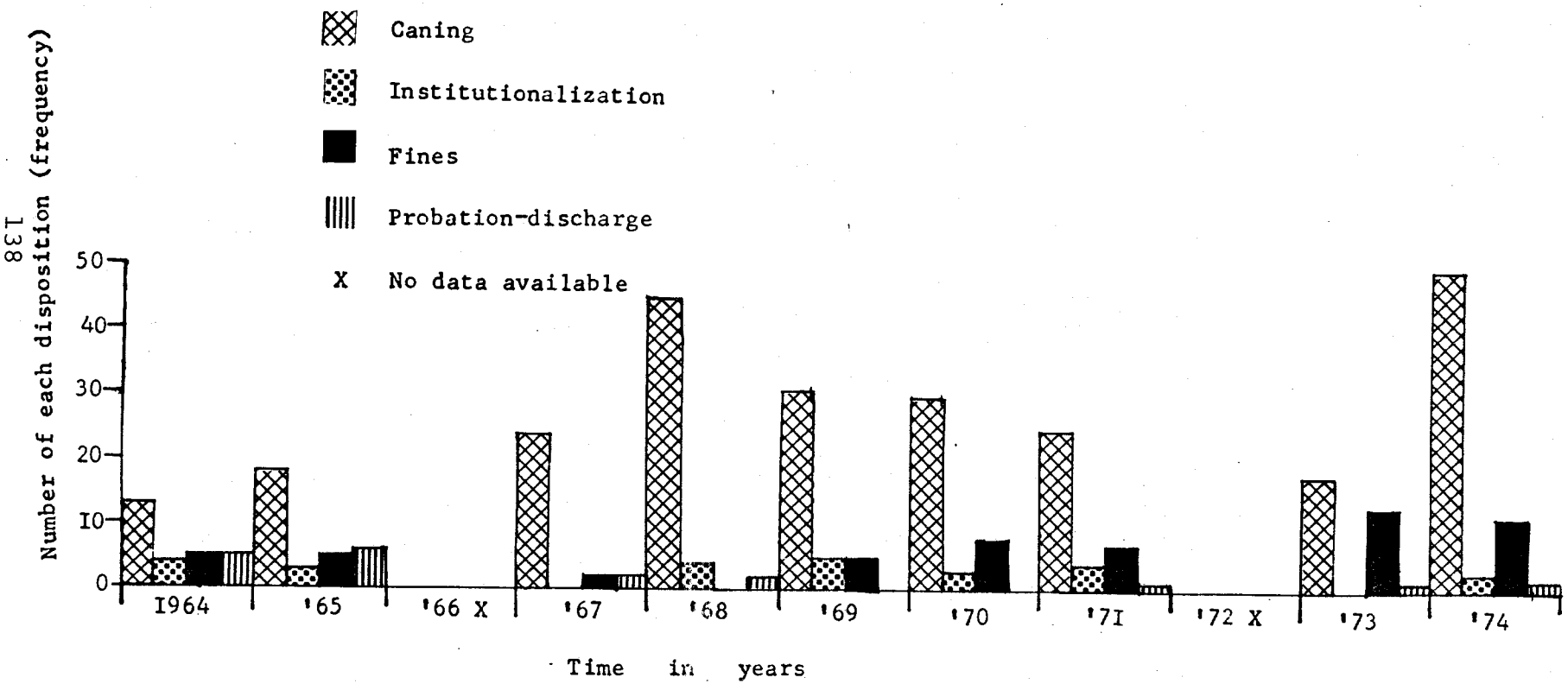
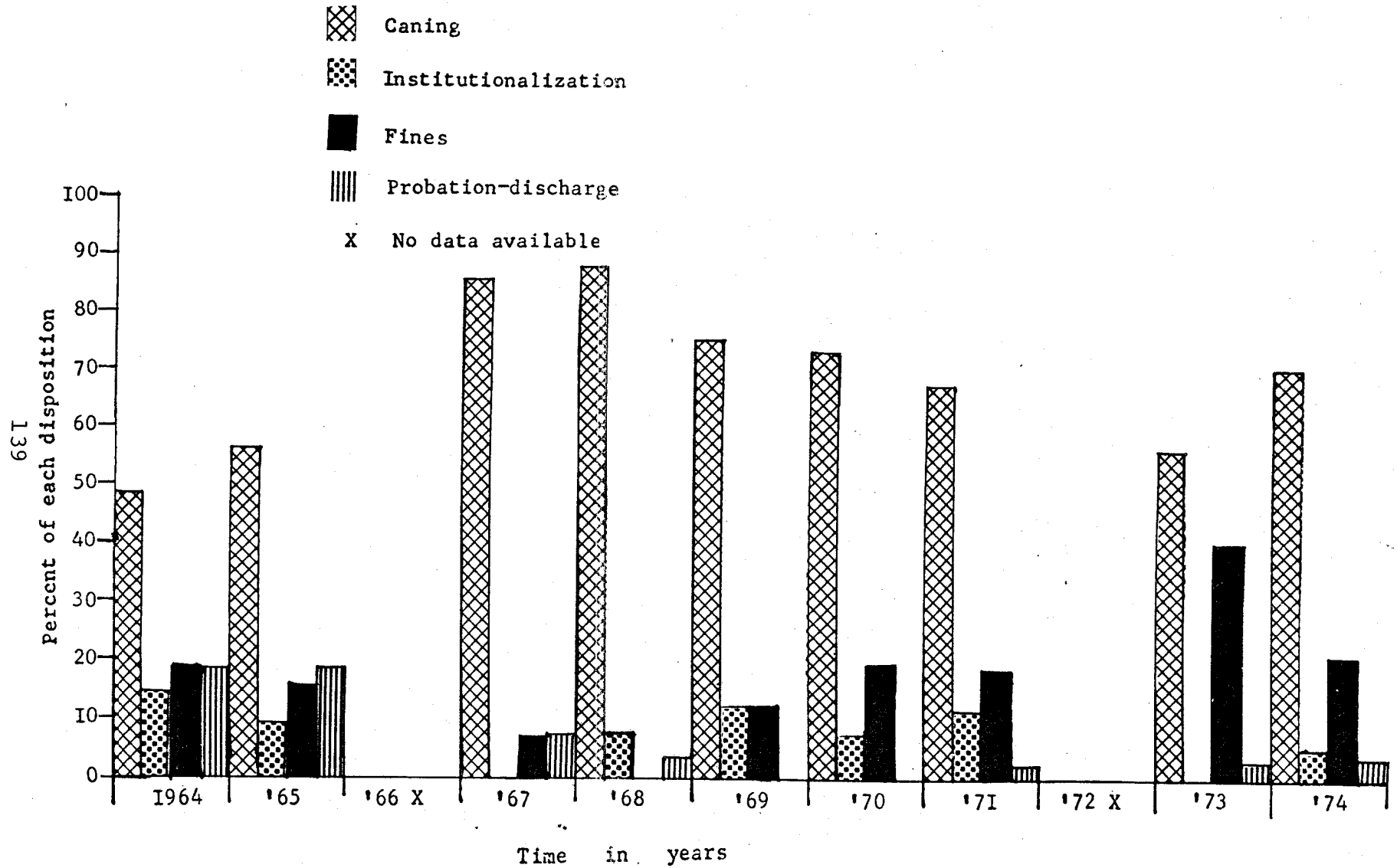


Figure 6B. Representing percentages of dispositions in respect to malicious damage property for the period I964-I974. (Zambia Police Annual)



Especially, examining figures 6A and 6B, caning is noted to have been the most frequently handed out disposition and probation-discharge as the least disposition imposed throughout the period of analysis. For example, in 1969 and 1970 probation-discharge was not employed as a sanction, and had about 19% in the beginning years of analysis (1964 and 1965). Thereafter had received less than 10% in each year. While caning ranged between 48.2% and 88.2%.

In conclusion, the data reveal that juvenile offenders found guilty before courts are likely to receive punitive dispositions. The use of probation-discharge as a disposition is at its minimal level, even in the less serious offences (misdemeanours) and caning is the most common disposition in the juvenile courts. This finding is generally supported by the data analyzed.

Age

It has been found out in the first argument that the legal system favours tariff system of sentencing, which involves the caculation of the period of institutionalization or the number of strokes to be ordered. This leads to the question of mitigating factors which is the process of reduction or increasing of the sentence to be imposed. But this process is a matter of the discretion of the court whether to take into account the mitigating factors or not.

The youth of the offender is generally recognized as the most effective mitigating factor (Thomas1973). This has been illustrated in Chapter II as to the rise of the juvenile justice institutions where the emphasis was on treatment and led to the establishment of community- based program services, and the probation system being the cornerstone of the juvevine justice system, as noted in Chapter II. The individualization of treatment was strongly favoured in the case of offenders under the age of nineteen years. Because of the nature of data avaliable for the study, it is intended to look at the provisions of the Acts to see whether age can restrict the courts to impose certain type of dispositions.

Section 72 of the Juveniles Act provides a restriction on imprisonment of a child. A child is defined as a person who has not attained the age of sixteen years.[3] But it is also provided under section 101 of the same Act that "withstanding any provisions of this Act when a person detained in a reformatory has attained the age of fourteen years and is reported to the Minister by the Commissioner of Prisons that he is exercising a bad influence on the other inmates, the Minister may commute the whole or part of the unexpired period of reformatory order to a term of imprisonment. If an offender aged fourteen years can be sentenced to imprisonment by the Minister, why not by the court, which can take into account his character and previous convictions, and circumstances of the offence. The courts are

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[3]Section 3 of the Juveniles Act

usually justified to sentence offenders aged under fifteen years for the purported reformation and the prevention of crime.

The approved school order can be made in respect of an offender who has not yet attained the age of fourteen years and the duration period at the approved school is three years. The unexpired school order can be commuted to reformatory order by the Minister, if the inmate is considered to be conducting himself badly and that may have some influence on other inmates.

The disposition of caning as already noted in Chapter V, that the infliction of this punishment can be of twelve strokes of a cane for an offender aged under nineteen years. When the offender has been found guilty of an offence punishable by imprisonment for a term of or exceeding three months. It can be used for maintaining displine in the approved school where the inmates aged under fourteen years are detained[4].

However, it can be argued that age is not regarded as an effective mitigating factor in the Zambian courts and there is no statutory criterion in sentencing. Therefore, juvenile offenders who were supposed to receive more of probation orders and other easily identifiable rehabilitative dispositions as opposed to punitive dispositions (caning and institutionalization) do get a reverse disposition according to the findings of this research.

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[4]The present researcher had handled cases of juvenile offenders aged under ten years sentenced to caning and were ussually ordered to six strokes of a cane

VII. Summary, Conclusions on Findings, and Discussion

Summary and Conclusions on the Findings

It has been noted that a number of earier studies found that serious crimes (felonies) were more likely to get severe dispositions than less serious crimes (misdemeanours). Although such relationships could generally be explained by extralegal variables (race, socioeconomic status of offenders, place of residence) and other legal variables--the number of previous offences committed and the number of co-accused (Haldane el at, 1972; Thornberry, 1973; Loftus, 1975; Cohen and Kluegel, 1978; Kueneman and Linden, 1983).

The foregoing analysis of data presents a somewhat different picture; thus, it yields findings that are quite different. At least part of the reason for this is the fact that the variables for analysis are not the same as those examined in the western studies, and also there are jurisdictional differences of the legal systems reviewed, although they all enforce some version of the modified common law. In the present study, it was assumed that the extralegal variables had a role in a sentencing process, although these were not examined. With the earier studies, it was found that the most lenient dispositions were associated with less serious crimes, and the

most severe dispositions were associated with serious crimes. Unlike the previous studies however, the present study shows the punitive (severe) dispositions remained for all crime categories as the popular and most frequently handed out sentences by the Zambian courts.

Caning, regarded as the most severe disposition in this study, remained the most frequently employed disposition preferred by courts in respect of juvenile offenders. This sanction was followed in frequency by institutionalization, which is also classified as a punitive disposition. Although this pattern was more noticeable for the felonies than in some misdemeanour offences, it was generally observable in all crime categories. Caning as a disposition has been constantly used throughout the period of analysis. It has been noted that malicious damage to property, a misdemeanour receiving the highest percentages for caning (88.2%) in 1968. While no felony offence in the period of discussion received such a high percentage on caning or institutionalization.

Probation-discharge as a disposition has been employed infrequently, and in a low percentage use during the same period. It shows a declining pattern with variations in all crime categories, even in less serious crimes (misdemeanours). Probation-discharge was the least frequently imposed sanction. This differs from previous studies where probation was found to be competing with institutionalization in frequency of utilization (Loftus, 1975; Thornberry, 1973).

However, in other studies legal and extralegal variables were held constant to find out the relationships between crime seriousness and dispositions. For example two legal variables were controlled for in Thornberry's 1973 study (i.e. seriousness of crime and recidivism), which was not done in the present study because of the nature of the data. The absence of these other variables limits the scope of the findings, and may to a certain extent restrict the explanations that can be attributed to the findings.

The present findings are related to the basic issues underlying the disposition of offenders often found in the theoretical realms of criminology, thus arguments about deterrence, retribution, and rehabilitation (Armstrong, 1961; Andeneas, 1964; Cousineau and Veevers, 1972; McGrath, 1976; Von Hirsch, 1976; Fattah, 1977; Silberman, 1978). Thus the findings may seem to indicate that juvenile offenders found guilty before courts are harshly treated on the principles of retribution/deterrence, rather than on the individualized measures related to rehabilitation. This centers around the issue of courts' sentencing objectives, as to what they (courts) view as social goals; and this may be reflected in the sentences imposed. Thus the emphasis of legal penalties imposed by judges or magistrates are severe in circumstances where the purpose is to punish and discourage further criminal activities; or it is on the basis of the needs of the offender (individualized measures). This is in line with the dual system of principles of

sentencing, as in tariff systems which are usually based primarily on the concepts of retribution and deterrence on one hand, or on the individualization of treatment on the other hand (Thomas, 1973). This leads to the conflicting orientations in the juvenile courts. The court's social agency functions to emphasize dispositions that will allow activities aimed at providing help and treatment programs to offenders. The other orientation is the court's legal functions favouring dispositions which pertain to restrain, control, and the punishment of juvenile offenders (Dunham, 1958).

The findings of the present study indicate that caning as a disposition is most frequently imposed on juvenile offenders found guilty of offences charged before courts. However, this disposition is retributive/deterrence in nature, as it's aim is to deter the offender from offending again without necessarily changing him in any other way. It is also as a means of punishing the offender for the crime committed. While it could be argued that it probably has an influence, of reforming the offender, which is termed as specific deterrence; it may also be argued that it also operates on a different level, facilitate general deterrence. This means that it possibly has an impact on the general public. Thus general deterrence is the view that sanctions imposed on some offenders has the potential of deterring other offenders from criminal activity. However, the fear of pain (punishment) is indistinguishable from effects of rehabilitative techniques, which are individualized measures,

even though they could possibly reform offenders.

The United States Research Council (1979) in an effort to explain what rehabilitation means and its function and to distinguish the effects of rehabilitative techniques from punitive forces to modify criminal behaviour, gave reasons why penal sanctions are imposed on persons who violate laws:[1]

1. to deter the offender from offending again by punishment or fear of punishment (without necessarily changing him or her in any other way);
2. to deter others from behaving as the offender;
3. to incapacitate the offender and thus deprive him or her of the opportunity to offend again for a given period of time;
4. to forestall personal vengeance by those hurt by the offender;
5. to exact retribution from the offender and so to set right the scales of moral justice;
6. to educate people morally or socially; and
7. to rehabilitate or reform the offender.

The Council thereafter, considering the above mentioned reasons gave a definition of rehabilitation. This was distinguished from reason number one (specific deterrence) where the offender is not reformed in his criminal behaviour, but deterred possibly because of the pain. The definition of rehabilitation by the Research Council is as follows:

> Rehabilitation is the result of any planned intervention that reduces an offender's further criminal activity, whether that reduction is mediated by personality, behaviour, abilities, attitudes, values, or other factors. The effects of maturation and the effects associated with 'fear or intimidation' are excluded, the results of the latter having traditionally been labeled as specific deterrence.[2]

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[1]The National Research Council, "The Rehabilitation of Criminal Offenders: Problems and Prospects", 1979:18

[2]ibid:4

Therefore, corporal punishment and correctional institutions' effects are out of being considered having effects of rehabilitating the offender (or rather the effects of the singular act of imprisonment). Hence, caning is used on the basis of deterrence. However, the Commissioner of prisons in Zambia, once commented that "the deterrent value of caning is at least questionable, but it is considered necessary for juvenile offenders" (Prisons Department Annual Report, 1964:18).

Caning being used on the basis that it has an influence of deterring the potential offenders, can be criticized on the basis that making an individual an example in order to deter others "may cause him (the punished one) to become more bitter, and therefore, more perilous to society than he was already" (McGrath, 1976:9). It can also be criticized on ethical grounds that it is not proper to make an individual as example in order to deter others (Von Hirsch, 1976).

Institutionalization as a disposition has been popular for all crime categories. It has been used as a means of restraining, controlling, and punishing juvenile offenders. It has been used by the courts in carrying out their legal functions, in order to incapacitate the juvenile offenders and depriving them of any opportunity to commit other juvenile crimes, for a period of three years, once an approved school order was made, and for four years for a reformatory school order.

Fines showed a tendency of being common in misdemeanours, but it did not challenge caning's dominating position. This is attributed to the nature of offences such as assaults and malicious damage to property. It was expected that fines as a disposition would be the most frequently handed down disposition, in respect of these offences. It was assumed that these offences could be settled in reconciliatory manner, thus a payment of compensation to the offended by the offender. The use of fine as a disposition does not change the pattern of dispositions in the period under discussion. The fine is used as a source of revenue and is not really a lenient disposition to the juvenile offenders. This point will be continued later in this chapter.

It is noted in the findings that the use of probation-discharge as a disposition has no competing power in the period of analysis. This is a disposition which is identifiable as rehabilitative, because an offender on probation may have to undergo a planned program through the supervision of the probation officer, in line with the definition of rehabilitation given by the U.S Research Council, (1979). Hence, it appears that courts in this period reduced the use of what could be said are individualized measures, with emphasis on the court's social agency functions.

It was suggested that punitive dispositions would be more frequently handed down than minor dispositions in line with the punishment oriented approach to juvenile offenders. The present

study found that juvenile offenders found guilty of any offence (thus felony or misdemeanour) before courts have a greater likelihood of being ordered to be caned or institutionalized with a flat sentence of three or four years in an approved school or in a reformatory, respectively, and even may be sentenced to an imprisonment term.

It must be concluded that the argument is supported by the present findings. The research has brought to the fore that the severity of disposition and crime category is towards caning. Caning was seen as a popular disposition in the Zambian juvenile courts. These findings can be viewed as unique, in the sense that they are not parallel to those reported in the United states, Canada and other common law systems, even though the Zambian courts are greatly influenced by these countries, in the use of juvenile- court terminology. This is reflected by the frequency utilization of caning as a legal sanction.

Discussion of Findings with a Concluding Remark

The present findings may be interpreted in a variety of ways. The present writer sees the judicial approach to juvenile offenders, reflected in the general pattern of dispositions, as best explained by the historical development of the Criminal justice system, social, political and economic environment of Zambia. Thus, despite the establishment of specialized agencies for the administration of law (courts), the social reaction has

remained within the sphere of repressive law, whose sanctions are for the sake of punishing, making the guilty offender suffer solely for the sake of making him suffer (Durkheim, 1964).

It has been noted in Chapter III that there was a conflict between tribal laws (customary law) and those laws introduced by the British authorities in an attempt to produce a unified legal system. This conflict seems to be in existence as the majority of the people seek redress from the local courts which enforce the customary law. The findings indicate that corporal punishment was the most frequently handed out disposition, which supports the misconception of the British authorities at the time of introducing corporal punishment, about Africans being fond of chastening their children for misconduct. This also supports the contention that "flogging, a favourite punishment for Africans, never seems to have been applied to Europeans" (Gann, 1957:100). Therefore, if that is the case the tribal laws which exist side by side with the introduced law could be regarded as having a significant influence in judicial decision-making in Zambia. However, it has been noted in Chapter IV that home corporal punishment differs from state imposed corporal punishment, as a juvenile usually has affection, or at least respect, for the person inflicting corporal punishment on him for a misconduct at home, and because of their continuing relationship there are a lot of chances for reconciliation. These conditions do not exist in prison environment where the judicial imposed corporal punishment is carried out.

It must be noted that legal systems are supposed to change with the prevailing values of the changing society. Ekstedt and Griffiths (1984:67) notes that "Courts try to describe the intention of sentencing as it is reflected in the society's alleged consensus of the day". The literature in Chapter II illustrated that reforms in Criminal justice systems of western countries came about as all sectors of society got involved. For example, individuals, charity organizations, policymakers, and courts (Platt, 1969; Empey, 1982; Saunders, 1978; Seigel and Senna, 1981 mention a few). Corporal punishment was used in the U.S and Canada in the earlier identifiable correctional models, when the emphasis was for punishment, and there was no classification of offenders and segregation of adults and juveniles (Bartollas and Miller, 1978:23-25; Ekstedt and Griffiths, 1984:66-70). Therefore, the use of corporal punishment can not be attributed to Africans only, as it has been pointed out in several sections of this thesis that home corporal punishment should be distinguished from judicially imposed corporal punishment. But it must be stated that the use of corporal punishment will be frequent if the aim of the sanction is to deter and punish the offender.

The historical development of juvenile justice systems in the western countries as noted in Chapter II came about in recognizing juvenile crime as a separate and serious social phenomenon from adult criminality. The juvenile court in these countries developed in an adaptation of the English concept of

parens patriae, in the alleged recognition of state intervention for juvenile offenders as children in need of care, education and protection rather than punishment. This shifted the emphasis to treatment orientations. While the Zambian situation is different, the law in force was imposed on the existing tribal laws, without letting the law develop with the changing society. The tribal laws were also left to operate in certain areas and some courts were established to enforce them. Thus, two different set of laws were left to co-exist in one society. In addition, there is no point in time when juvenile offenders were not identified with adult criminals. Magistrates who hear juvenile cases are not specialized in juvenile matters, nor do they have specialized training in juvenile crime. They attend to juvenile cases in the same way as in adult criminal cases. Therefore, if the juvenile case is similar in facts presented before court to an adult criminal case, which received a harsh sanction, then why can't the juvenile offender receive a severe disposition in line with other cases dealt with by the same magistrates?

The legalistic approach of magistrates could conflict with the social welfare approach advocated by probation officers, whose training teaches them about customary laws, traditional way of living, juvenile problems in developing communities, (Clifford, 1966). The role of probation officers seems to be not significant in the juvenile justice system in Zambia, because they are only called upon at the time of sentencing for a

pre-sentence reports. This position has remained unchanged although the Third National Development Plan of 1979-1983, in what purported to be suggestive measures to be used in future to curb the incidence of crimes were as follows:[3]

1. The Department of Welfare services' probation officers will continue to assist courts in carrying out pre-sentence investigations and present reports to courts about juvenile offenders in order to guide magistrates in making decisions that are in the best interest of the juveniles concerned.
2. As far as institutional training is concerned, facilities for academic education, vocational training, and recreation will be improved through the employment of qualified social workers, teachers, trade instructors, psychologists, and sociologists. This will ensure faster and better rehabilitation of the youths in such a way that they become useful members of their communities and the nation as a whole.

These suggestions still require probation officers to furnish reports to courts, but not assisting the offenders on the post-disposition. This is reflected in the findings of the present study, that probation services are at minimal level of being used by courts.

It was pointed out in Chapter III that a custody-oriented legal system can be viewed as having a political and economic motive underlying punishment, as it could be mistakenably considered as rehabilitative. Thus its aim is to rehabilitate the juvenile offenders within correctional institutions through training programs (academic, industrial, and agricultural training). While the main purpose is an economic basis for incarceration of offenders (increasing food production for the

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[3] 1979-1983:408

society), through prison farms and gardens. This could be attributed to the institutionalization as a disposition and its popularity. This contention is supported by the Law Development Commission of Zambia's programme launched in 1982, whose objectives included, inter alia, "to find ways and means of making prisoners generate income"[4]. This could be the reason why fines as a disposition in the last two years of the period of discussion gained popularity in the misdemeanour offences.

In conclusion, it must be emphasized that all of the inferences regarding the factors discussed above are tentative. Clearly, the fact that the analysis was limited to only the examination of dispositions relating to the six chosen crime categories, makes it impossible to draw any firm conclusions regarding the predictive power of any of these factors. However, at the very least, they appear to be associated with the administration of justice and this points to several obvious avenues for future research into sentencing process in juvenile courts , and especially into the related issues raised in this chapter (See Appendix C).

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[4]Times of Zambia, September, 3, 1982:9

APPENDICES

Appendix A

Crimes Used in the Study as Defined in Penal Code 1930

Theft

Section 272: Any person who steals anything capable of being stolen is guilty of the felony termed 'theft', and, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, is liable to imprisonment for five years.

Breakings

Section 301: Any person who---
(a) Breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or
(b) Having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof;
is guilty of the felony termed 'housebreaking' and is liable to imprisonment for seven years. If the offence is committed in the night, it is termed 'burglary' and the offender is liable to imprisonment for ten years.

Section 302: Any person who enters or is any building, tent or vessel used as a human dwelling with intent to commit a felony therein, is guilty of a felony and is liable to imprisonment for five years. If the offence is committed in the night, the offender is liable to imprisonment for seven years.

Section 303: Any person who--
(a) Breaks and enters a school, shop, warehouse, store, office, or counting-house, or a building which is adjacent to a dwelling and occupied with it but is no part of it, or any building used as a place of worship, and commits a felony therein; or
(b) having committed a felony in a school, shop, warehouse, store, office, or counting-house, or in any such building as last mentioned, breaks out of the building;
is guilty of a felony and is liable to imprisonment for seven years.

Theft by servant

Section 278: If the offender is a clerk or servant and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years.

Escaping From Lawful Custody

Section 119: Any person who, being in lawful custody, escapes from such custody, is guilty of a misdemeanour.

Assaults

Section 247: Any person who unlawfully assaults another is guilty of a misdemeanour and, if the assault is not committed in circumstances for which a greater punishment is provided in this Code, is liable to imprisonment for one year.

Section 248: Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

Malicious Damage to Property

Section 335 (1): Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unles otherwise stated, is a misdemeanour and is liable, if no other punishment is provided, to imprisonment for two years.

Appendix B

Methods of Dealing with Offenders

Section 73 (1) of the Juveniles ACT, provides that where a juvenile charged with any offence is tried by any court, and the court is satisfied of his guilt, the court shall take into consideration the manner in which, under the provisions of this or any written law, the case should be dealt with, namely:

1. by dismissing the charge;
2. by making a probation order in respect of the offender;
3. by sending the offender to an approved school;
4. by sending the offender to a reformatory;
5. by ordering the offender to be caned;
6. by ordering the offender to pay a fine, damages or costs;
7. by ordering the parent or guardian of the offender to pay a fine, damages or costs;
8. by ordering the parent or guardian of the offender to give security for the good behaviour of the offender;
9. where the offender is a young person (thus has attained the age of 16 years, but not yet attained the age of 19 years), by sentencing him to imprisonment; or
10. by dealing with the case in any other manner in which it may be legally dealt with.

Appendix C

Suggestions for Research.

A short list of questions is given below. A few are accompanied with suggestions or comments, most would require survey research. While the questions raised and areas covered may appear brief, research which addresses these issues is vital to provide a new approach for handling and treatment of juvenile offenders in Zambia.

Attitudes Towards Caning

1. How do magistrates and judges judicially regard caning?

   SUGGESTION: A survey research among the Magistrates and Judges across the country, (thus those working in urban and rural areas) would be conducted, to determine how caning is viewed in judicial circles. The instruments could include a questionnaire and with one to be filled by the participating magistrates in the survey, on sentencing a juvenile offender to corporal punishment. Setting out the reasons for such an order, the offence, social characteristics of the offender, first offender or otherwise. In short, the research could follow that of Hogarth, (1971).

2. How do the general public and professionals view Caning?

   SUGGESTION: An attitude measuring questionnare could be administered on the general public and must be prepared in such a way that traditionalists, social welfare oriented, and legalistic oriented would be identified. Subjects should be allowed to state age limits proposed,

offences for which caning is considered necessary and other related factors. There should also be an instrument drafted specifically for professionals such as lawyers in private practice and those in government services, probation officers, sociologists and others.

Correctional Institutions

1. What is the justification for flat sentences relating to approved school and reformatory?

2. Does analysis of training programs in the correctional institutions support the factors resulting from the above question?

SUGGESTION: An evaluation research would be an appropriate one by independent researchers, for example from the University, who are not much attached to the political realm.

COMMENT: If the above suggestions are carried out properly and the recommendations followed, this could lead to a new legislation relating to juvenile offenders. As law is a dynamic process by which rules are supposed to be constantly adopted and changed to fit the complex situations of a developing society. The law relating to juveniles has been static, since it had been imported from England, during the colonial era. For example, Section 1 (2) of the Juveniles Act, provides that 'in the application of this Act to African juveniles, the provisions of African Customary law shall be observed... This implies that there are two standards of justice in the country when that is not the case now.[1]

RECOMMENDATION: A council comprising of an elder conversant with, local laws, a probation officer and a

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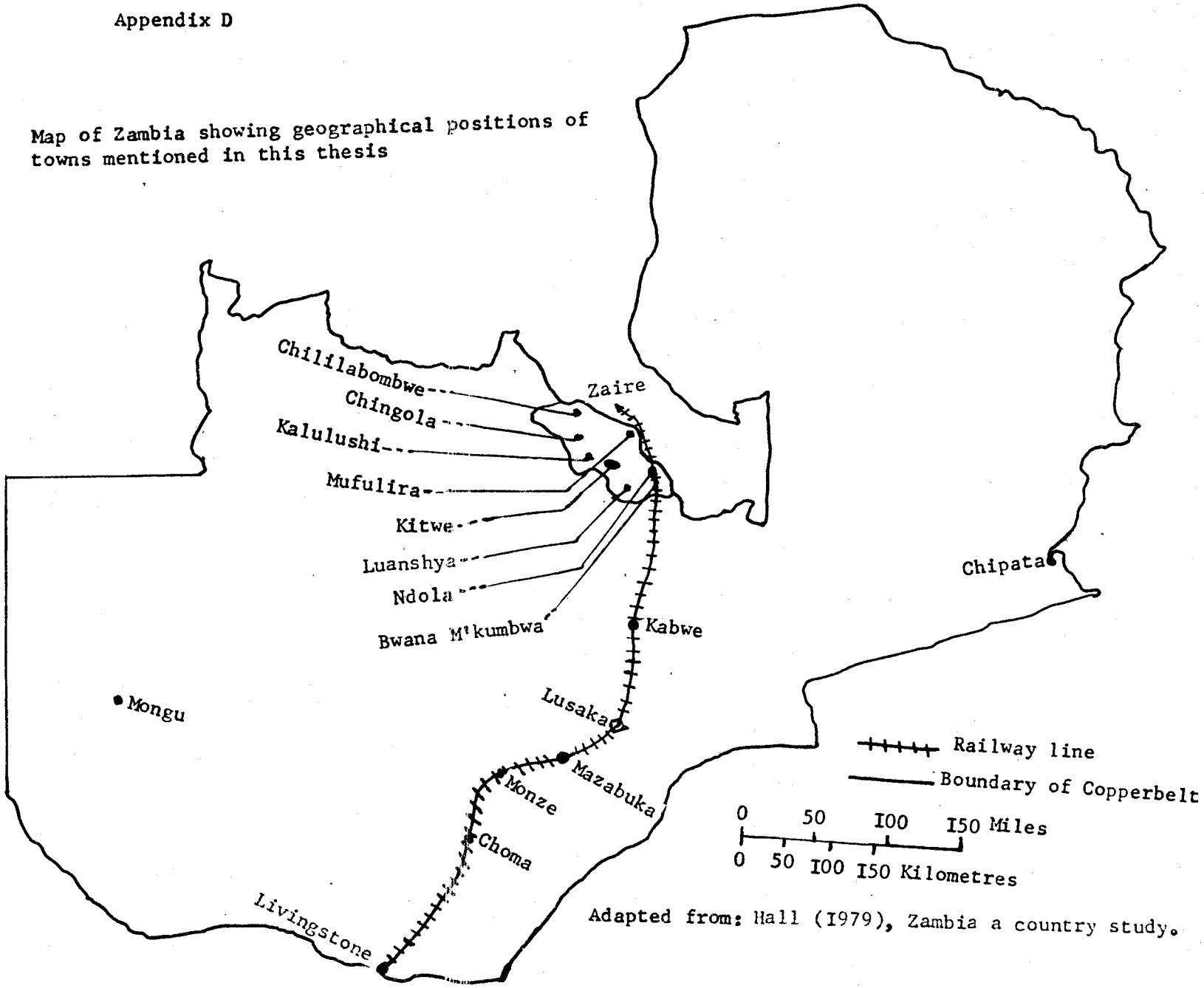
[1]The present writer since he has been involved in prosecutions, has never handled a criminal case involving any juvenile of other races, besides Africans (within and outside Zambia, in short blacks). Although there are juveniles of different racial background (citizens and resindents), but adults of other races do appear before the courts. The reason for non-appearance of juveniles of other races can not be readily given.

police should be established. This council would be charged with the responsility of screening juvenile cases before being referred to court. This would lead to the probation services to be extended to pre-trial and post-disposition. This could also reduce the frequency of juvenile offenders being criminally processed even in trivial cases. The jurisdiction of the council could extend to interviewing the victims of crime and parents of offenders. It could strengthen the familial social control, rather than relying heavily on formal social control. This will be in line with Dr. Kaunda concept of Zambian Humanism, which advocates maintaining the traditional features of communal life.

Appendix D

Map of Zambia showing geographical positions of towns mentioned in this thesis



Adapted from: Hall (1979), Zambia a country study.

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