

UNIVERSITY OF NAIROBI

**THE PHILOSOPHICAL-ETHICAL PRINCIPLES REGARDING
THE PRACTICE OF PUNISHMENT IN KENYA**

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**A THESIS SUBMITTED IN PARTIAL FULFILMENT FOR THE
REQUIREMENT FOR A MASTER OF ARTS DEGREE IN
PHILOSOPHY, UNIVERSITY OF NAIROBI**

BY

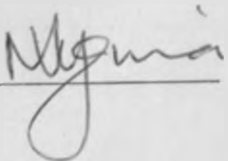
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NAIROBI 1996

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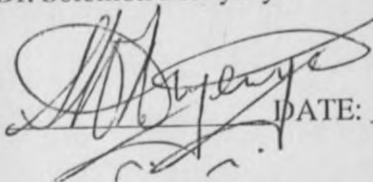
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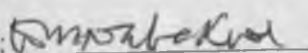
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DEDICATION

To my Loving and Supportive parents

To my late father John Ngare Mwai

and

My Mother Esther Mukami John

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I am extremely indebted to the University of Nairobi for having given me a full scholarship to undertake this study in the University of Nairobi.

My gratitude also goes to my supervisors, the Late Prof. Odera Oruka and Dr. Walter Nabakwe for their constant guidance, patience and encouragement without which I would not have come out with this kind of work. I also thank Dr. Solomon Monyenye who took over from the late Prof. Oruka for his assistance in making this thesis a success.

This thesis could not have been complete if it were not for the very co-operative informants who provided me with all the information they availed to me. I was lucky to have the privilege of talking to a very senior person in the prison's department. I am also grateful to the two lawyers and the traditional-philosophic sage. I owe all of these a lot of gratitude.

I cannot forget to mention and thank my husband Marius W. Gitonga and my daughters Catherine Njoki and Esther Mukami, for their encouragement and patience. I also thank them for their persistent sacrifice and also due to the fact that they never complained when I denied them my love and presence when they needed me most.

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I thank the secretaries who did diligent and untiring work. They did their work without complaining about my handwriting and some other mistakes. To Karen Jeruto Bett, I say thanks a lot.

To all of these, and all those who contributed to this study in whatever way, may blessings be yours always.

However, I take full responsibility for all the errors herein.

ABSTRACT

Punishment has been used everywhere as one of the means of curbing crime which is a social evil. However, more often than not, it has not achieved its objectives to this end. This is partly due to the social-economic problems as well the methods used in punishing criminals.

There is need for a study to be done in the area of the various methods used in punishing criminals with a view to find out what methods were used in both ancient and modern times. The intention of studying these methods of punishment is to find out whether they have any moral justification or not. An evaluation of these methods therefore will be done. A comparison will be done between the methods of punishment used in Europe and America, and those used in Kenya both in the ancient and modern times.

This thesis has taken as its hypothesis that crime is increasing at an alarming rate despite the fact that punishment has been employed to rectify the situation. Instead of curbing crime, the opposite is observed. Punishment, which is intended to curb crime, does not seem to be working in Kenya. This prompted us to investigate on the problem of punishment, mainly the philosophical - ethical principles regarding its practice.

We mainly relied on library research which forms the primary source. We also had secondary sources which were informants like the philosophic - traditional sage, a prison's superintendent and two lawyers chosen at random.

In the course of this study, we found it difficult to get adequate information on the practice of punishment in the Orient, Australia and New Zealand, hence, the scope of the study is limited to include only America, Europe and Kenya in Africa. Since Africa was colonised by western world, we found it appropriate to study punishment in Europe since our codes or laws are somehow related. However despite the exclusion of these regions, this study is sufficient.

From the above sources, we found that most of the methods used in punishing offenders are criminal in themselves hence we came to the conclusion that they should be revised. Punishment, such as the death penalty and imprisonment, are very expensive in terms of loss of life and dignity. Most methods are unnecessary and therefore should be avoided if we have to have a moral society. Criminals should be rehabilitated instead of being punished. The government should look into the factors that lead to crime like poverty, inflation, unemployment among other factors.

This study has contributed to knowledge especially due to the fact that it has highlighted that in the practice of punishment, crimes against humanity are committed in as far as reference to ethical principles is concerned.

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CHAPTER 1

INTRODUCTION

1:1 Statement of the Problem

For any society in the world to progress in any way, there must be peace, harmony, stability and social security. Crime, seen in this view of society, violates this peace and social security. Various ways and means are employed to curb crime. From our research, we have found that crime is accelerating at an alarming rate and therefore there is urgent need to avert this problem. Among other alternatives, punishment is used, not only in Kenya, but throughout the world as a means of social control.

Punishment of criminals is as old as wrong-doing itself. In all societies there have always been behaviours that are approved and considered moral by the majority of the people and there have been behaviours that hurt the interests of the group. The norms about morality and the customs of the society are passed from generation to generation. They are internalised in the course of socialisation so that in adulthood, they are experienced as conscience. Internalisation is supplemented by external methods of social control such as fines, imprisonment and also by reward though this rarely occurs. At the level of society as whole, the criminal law is the most appropriate and conspicuous formal mechanism of social control. The criminal law spells out what kinds of punishment should be meted against what crimes.

In all societies, one encounters some form of generalised objection to arson, theft, murder, lying, laziness among others, on which official and public opinion coincide. But there is always some disagreements within each society regarding what sanctions should be the most appropriate. There are some societies that would punish murder with capital punishment while another society will employ imprisonment.

The moral question of "making the punishment fit the crime is a crucial one." Differences arise as to whether a given crime is most appropriately punished by corporal punishment, by sending the offender into exile, imprisoning him or her for life or for a period of years or by placing him or her under house arrest, or imposing a fine, by sending or expelling him from work or by trying to rehabilitate him rather than by

punishing him at all and so on. The question of moral justification of these methods of punishment therefore arises.

Punishment, as we have said, is an immemorial institution. It comprises a very wide field of enquiry. It is an area of concern for different peoples such as the educators, legislators, the magistrates, the moralists, the philosophers, the sociologists, the criminologists, the psychologists and the general public.

For the purpose of this thesis, the concern is mainly an ethical one. We have examined and analysed the traditional methods and the modern methods of punishment used or employed for punishment of wrong doers. This examination and analysis have been done in relation to the ethical theories that have been formulated and propounded. From these, it has become clear that the methods we employ to punish offenders are either too harsh or too lenient and therefore morally unjustifiable. When some methods of punishment are employed, the end result is not what punishment really aims at for example, reformation, deterrence, compensation etc. but committing even more serious crimes. Most of the methods used to punish criminals are criminal in themselves for example the death penalty is murder in itself. Most of these methods are against the ethical principles.

1:2 Objectives of the Research

There is need for a study to be done in the area of the methods used in punishment with a view :-

1. To find out what methods were used in ancient Europe and America.
2. To examine the methods of punishment in a Kenyan Society, the traditional Kikuyu society.
3. To evaluate and compare these methods i.e. those used in Europe and America both in ancient and modern times with the methods used in the Kikuyu society.
4. The evaluation will be based on various ethical theories such as
 - a) the Act and Rule -Utilitarianism
 - b) egoism

c) categorical imperative

d) divine law .

These items are tools for argumentation.

5. The call for adulteration or softening or even abolition of severe and harsh methods of punishment which are against the ethical principles. Criminals should be rehabilitated and the government should eradicate some factors that lead to criminal activities like poverty and unemployment.

1:3 Justification and Significance of the Research

Volumes of books on punishment have been written both in the developed world and in the developing countries. Despite this important fact, only a few Kenyans have attempted to write on punishment. Oruka has gone a step forward in writing on this issue.

His text, Punishment and Terrorism in Africa, (1997/85) has been an eye opener for us Kenyan readers and in particular the students of philosophy especially those interested in ethical problems. In his book, he questions the practice of punishment and calls for its abolition. He has shown that when punishment is meted, some important issues are taken for granted such as the disregard for the criminal forces that make people commit crimes. However severely we may punish, a blindness to these forces will make our efforts fruitless. He has shown that punishment does not attain the purposes it sets to attain. These are deterrence, retribution, protection, compensation, expiation and reformation. He finally calls for the abolition of punishment.

While we agree with his analysis of punishment, we felt that alot more needed to be added on his work. We felt the need to go to the field to gather information from the public on how they view the moral aspect of punishment.

According to our opinion, it seems as if Oruka relied more on texts to analyse punishment. We therefore decided to go to the field to get first hand information from various people to fill the gap left by the work done by Oruka.

We have gathered information from professional lawyers, from a prison's official and from a traditional-philosophical sage. By getting this information, we were able to highlight an area we felt had been ignored, namely the ethics of the methods used in punishment in Kenya. The ethical theories propounded have assisted us in assessing the moral or ethical justifiability or non-justifiability of these methods of punishment. We have therefore evaluated the factual and objective views of the Kenya society on the rationale for the practice of punishment.

We found it necessary to look at the practice of punishment to find out whether it has any justification at all. This has been based on the various ethical principles. Any type of punishment must be supported by some ethical principle. Any punishment that is not based on any ethical principle must be removed. If a certain form of punishment is justified on this basis then it can be supported, if not then it should be abolished. The death penalty, for example, is not based on any ethical principle, hence should be abolished. It is a crime against humanity. It is tantamount to killing. There is therefore the need to rethink on the practice of punishment so that the methods used should consider the offender as an individual as well as a citizen whose inalienable rights demand respect.

1:4 Theoretical Framework

The study has been guided inevitably by various ethical theories such as retributive theory, deterrence theory, reformation theory and protective theories. Other theories looked at are the teleological theories, deontological theories, free will and determinism, traditionalism and the divine law. The methods of punishment used in Kenya are evaluated on the basis of these theories to determine whether they are morally justifiable or not.

1:5 Hypothesis

Punishment since time immemorial has been used as a method of social control. Various forms of punishment have been employed. These include corporal punishment, the death penalty, fines, imprisonment, detention without trial e.t.c. Punishment, however, does not seem to have any positive impact on crime. Instead of

curbing crime, infact, the rate of crime seems to be accelerating. More and more crimes seem to be committed. Crimes take place in different forms, are committed every day by different categories of people. This has made us suspicious about the role of punishment in its attempt to reduce crime. We have come to conclude that probably there is something morally wrong with the methods that are used to reduce crime or to deal with criminality.

1:6 Methodology

Different methods were employed to gather information hence compile this thesis. A lot of library research was done. We have gathered alot of information from various books, journals, newspapers, magazines, unpublished works from seminars, conferences and through reading other peoples' thesis. This library research forms the primary source of our information. We also carried a field research. This forms our secondary source of our information

We collected data from the prison's department to get first hand information about imprisonment as a method of punishment. We also interviewed some professional lawyers about the practice of punishment in Kenya. We also interviewed a Kikuyu traditional-philosophic sage. A sage is a wise man or woman, well-versed in the customs and practices of a people. A philosophical sage is he or she who is capable of giving a critical outlook on the customs and practices. He, that, is a philosophical sage, gives rational arguments, for or against certain beliefs and practices for his or her people. He or she is an independent thinker who is not only conversant with the past but also able to give reasons for the ideas held. He or she is also upto date and can predict the future in accordance with the way it is. He or she is capable of evaluating the present situation.

Visits to punishment institutions like prisons and courts were made in order to get first hand information. We were able, through these methods to get people's views.

The field research is meant to supplement the primary research hence help to illustrate the major argument in the library research that most methods that are used to curb crime in Kenya or to punish offenders are not morally justified.

In our library research, we have only examined the various methods used to punish offenders in Europe, America and Kenya in Africa. We were not able to get adequate information on other regions such as New Zealand, Australia and the Orient hence our scope is limited. We also have detailed information and keen interest in Europe because Africa was mainly colonised by Europe. Due to this historical accident, Kenya's codes and the criminal law in general are based on the European ones and the British criminal law specifically. This means that what is termed as criminal in Kenya is what is defined as so in the British criminal law. The methods of punishment for particular crimes are no exception.

Despite the absence of the study of these regions, the details we have on Europe, America and Kenya are sufficient.

1:7 Literature Review

There are various texts dealing with question of punishment. These belong to various academic disciplines such as sociology, criminology, law and political science. There are, according to our present awareness, very few philosophical books in Kenya dealing with this question. The value of these texts therefore cannot pass unnoticed. These include Punishment and terrorism in Africa by Odera Oruka, Introductory Ethics for College Students and Teachers by A.O. Mojola and Facing Mount Kenya by Jomo Kenyatta.

In his text, Punishment and Terrorism in Africa, Odera Oruka has done a commendable job in looking at ethical issues involved in the practice of punishment. It is his text, in fact, that inspired us to look further critically into the problem of the practice of punishment. Though he has examined the theories that justify punishment such as deterrence, retributive, preventive, compensation and reformative theories, we have also examined his findings in the light of ethical theories such as psychological egoism, categorical imperatives, the divine law and utilitarianism.

He discusses the practice of punishment in traditional African Society. He says that before colonialism, punishment did not aim at inflicting suffering or pain on the offender but aimed at restoring amenity or at redressing the loss. Even serious crimes like murder were solved mostly by compensation and the death penalty was inflicted only on incorrigible and frequent murderers and witches."¹

He supports the idea that Africa should employ compensation rather than the immoral, severe penalties of a retributive nature.

He expounds on the theory of freedom and determinism. He says that what makes a criminal is not the use or misuse of his freedom but it is the "criminal factors or forces that are beyond his control." He goes on to say that for a person to be charged as responsible for a crime, the action he performed must be "naturally and humanly avoidable." According to him, majority of crimes committed are naturally and humanly unavoidable hence they are determined to occur and one cannot exercise his freedom so as to avoid them. The criminal, therefore should not be held responsible for his action when he is a victim of circumstances, that is, he is a victim of the unavoidable criminal forces. To curb crimes, attempt should be made to eradicate the criminal forces and not the victims of these forces as this would be a futile endeavour.

According to Odera Orika, it is possible to have morality without freedom. Freedom, therefore is not a prerequisite for morality. Punishment is immoral, inhuman and useless since it aims at the wrong target; the victim of criminal forces.

He makes a distinction between punishment and terrorism. Terrorism is where punishment cannot be legitimately justified. It is the "illegitimate infliction of suffering or loss on another or else it is punishment beyond a reasonable maximum². He says that in Africa, there is more terrorism than punishment. He defines punishment as follows:-

"punishment means the intentional infliction of suffering or loss on a person by an authority on the ground that the person is believed to have broken or allowed the breaking of a rule and usually, though not always, on the assumption that the person was responsible for breaking or allowing the breaking of the rule; and the infliction is done with the

hope that it will serve as a deterrent to future attempt to break the rule."³

He rejects punishment, its rationale and practice. He calls for its abolition since it is an evil practice. He strongly argues for the abolition of punishment and terrorism and as an alternative he contends treatment should replace them. He regards criminals as "sick" people who need to be cured. He calls for the establishment of a "delinquent clinical board" consisting of medical doctors, psychiatric, economists, philosophers, sociologists, theologians, politicians, lawyer and reformed veteran criminals. This board should be responsible for administering proper treatment.⁴

We agree with his views about severity evident in some methods of punishment used to deal with criminals which mostly aim at inflicting pain hence morally unjustifiable. He says that apart from punishment,

"there are certainly other ways which are less embarrassing and costly, more curative to the offenders and more conversant with the material and psychological factors that determine behaviour than the habit of inflicting pain"⁵

According to him, the institution and practice of punishment should be abolished. He has clearly given the reasons for this philosophical rejection. The main theories that justify the concept and the practice of punishment are inadequate. These are deterrence, preventive, reformatory and compensation theories.

When he says that there are certainly other ways of dealing with offenders that are less embarrassing, less costly and more curative to the offenders than the practice of punishment, he implies that punishment as a practice, is embarrassing. This is true of some forms of punishment like corporal punishment especially when it is exercised publicly. Imprisonment also subjects the offender into an embarrassing environment. The offender is likely to be humiliated, degraded and dehumanised. Social stigma is also attached to those who have been to prison.

environment. The offender is likely to be humiliated, degraded and dehumanised. Social stigma is also attached to those who have been to prison.

Punishment is costly. This is true of fines and the death penalty. The cost may be personal, social, economic or political. The death penalty is an irreparable cost in terms of human life.

Punishment is seen as ignorant to the material factors that cause crime such as poverty, the educational and family backgrounds of the offender. Punishment is also not conversant with the psychological factors that cause crime such as the mental well-being of offender and frustration.

Oruka says punishment, as it is inflicted, is legal terrorism. This is true because the law is used to justify indulgence in excessive punishment. In most cases innocent persons are punished. He therefore calls for the immediate abolition of this dangerous and inhuman practice.

Another reason why he calls for the abolition of punishment is because all or most criminals are never responsible for their crimes. He discusses at length what qualifies an individual to be responsible for committing crime and therefore renders him blameworthy. One should not be punished for an action done unintentionally. Again one should not be punished for doing an unavoidable action. Some, if not all factors that induce people to commit crimes are beyond their control. Therefore, punishment in this case should not be practised.

Though Oruka has given well founded reasons for his call for the abolition of the practice of punishment, we however, find this call very untimely. Realistically speaking, if the factors that make people commit crimes are not removed, some people are likely to continue committing crimes. With the presence of crime, punishment must be employed to curb it. Calling for the abolition for punishment is not a solution to the crime problem. Should the practice of punishment come to an end, there will be alot of adverse effects. Those concerned with carrying out of punishment such as the police, prison officials, the magistrates, judges and many others would lose their jobs. The courts, prisons, cells and other buildings have cost the Government alot of money

hence with the abolition of punishment all these would be rendered useless. A lot of money has also been put into the training of law enforcers. The number of criminals is likely to increase hence there will be insecurity, disharmony and instability. The country as a whole is likely to lag behind, morally, culturally, socially, economically and politically.

Oruka also outlines some factors that contribute to criminal behaviour or crime. These include economic and psychological factors. Crime is an attempt to satisfy a need. The criminal forces lead an offender to commit crime. These forces or impulses are acquired from both social and economic existence. The criminal factors are beyond the control of the individual. They are unavoidable. The most appropriate way to stop or reduce crime is to eradicate the criminal forces. The criminal forces are the primary causes of crime. The intentions or the behaviour of the offender and the social - economic structures are the secondary causes.

To eradicate crime completely there should be eradication of the primary causes of crime. The social and economic nature of the society should also be improved for the better. It is a fact that the nature of society determines the quality and the quantity of crimes in it. No amount of punishment can improve a society. For society to have peace, harmony and maximum social security, the social, economic and political nature of the society should be improved to cater and accommodate all. The society to be just, should provide good education, employment and should be receptive to new ideas.

The book, *Ethics*, by William Frankena goes along way in introducing to us the various ethical theories. These theories help evaluate and determine when an action is right and when it is wrong. About the prevailing rules as standard for what is moral, he says,

"one objection is that the actual rules of a society are never very precise, always admit of exceptions and may come into conflict with one another. For example, the rules forbid lying and killing but do not define these terms very clearly. In fact, the rules even permit or excuse certain kinds of lying (white lies, patriotic lies) and certain kinds of

killing (capital punishment) and but they do have these exceptions built into them in any careful way."⁶

In his book, Introductory Ethics for College Students and Teachers, Mojola has written alot about how we can determine the rightness of an action. This book is very useful especially because it provokes the reader to think more critically about moral issues by means of clear, logical and systematic argumentations. He has discussed various ethical issues and these were of great help in evaluating the various methods of punishment.

Gardiner G.A., in his book, Capital Punishment as a Deterrent : And the Alternative, has highlighted his conviction that some of the methods used for punishment are very immoral.

According to him, we have a moral and personal obligation to condemn capital punishment. It is futile and immoral and the community would be best served by its abolition. He highlights the ground for his opposition of capital punishment:-

- a) that it is morally wrong. They say that the Christian purpose is redemptive; that Christianity asserts that human personality is of infinite value in the sight of God; that no one is beyond the reach of spiritual reclamation; maybe, the primary Christian aim in punishment must be reformative. Capital punishment is a denial of this essential Christian principle and itself lowers the public's respect for human life.
- b) that it is wrong to continue a punishment which deprives us of any ability to rectify any mistake which being human, we may make.
- c) that there is no other form of punishment which imposes so much suffering on wholly innocent people and that while every right thinking man and woman must sympathise deeply with the victim's family which so suddenly suffers a tragic loss, capital punishment adds to this suffering of innocent people.
- d) that a punishment, which consists of the deliberate killing of men, women and youths results in surrounding trials for murder with an

atmosphere of morbid press sensationalism panders those sadistic impulses and itself lessens public respect for sanctity of human life.⁷

Rational case and emotional case for capital punishment have been examined by Gardiner. About the rational case of capital punishment he says;

"The rationale case for capital punishment is based on four arguments; first that it is a much greater deterrent than any other form of punishment so that its abolition would result in an increase in murder ... Secondly, that there is no satisfactory alternative method, thirdly, that public opinion demands its continuance, and fourthly, that in any case with crime as it is, the present as it, this is not the right time to abolish it."⁸

Gardiner does not agree with this rational case for capital punishment. He says,

"that the chief deterrent to crime was not severity of punishment but certainty of conviction, that a punishment which an increasing section of good citizens vehemently believed to be morally wrong inevitably tended to lower the conviction rate; that the abolition would increase the conviction rate therefore, more likely to reduce than to increase the crime in question and that capital punishment only renders to brutalise the people."⁹

To him therefore capital punishment is unjustifiable.

A Fragment on Government by Bentham Jeremy, has discussed moral principles such as the principle of utility or the principle of the greatest happiness as the supreme good and also regarded as,

"the greatest amount of happiness as the true object of law and morality."¹⁰

This book is very useful particularly in shedding some light on the moral justification of the methods used in the practice of punishment.

Bentham treats punishment and the function of the law in a utilitarian manner. To him, the chief aim of the law is to augment the total happiness of the community. It

ought to exclude as far as possible, everything that tends to subtract from that happiness

He argues,

"But all punishment is itself evil. Upon the principle of utility, it ought to be admitted, in as a far as it promises to exclude some greater evil."¹¹

He outlines the basis on which punishment ought not to be inflicted. One, is where there is absence of mischief for punishment to prevent. Second, is where the punishment is not effective enough to prevent the mischief. Third, is where punishment would be unprofitable or too expensive. Finally, is where the mischief may be prevented or can cease on its own without the imposition of the punishment. A cheaper way of preventing crime for instance through warning would be more logical than employing punishment.

According to Bentham, the end of punishment is to prevent crime and "all punishments inflicted under any other impulse, are wasted or run the risk of being so"¹² Of the popular saying that punishment, "should be equivalent to the offence" or "should be like an offence," Bentham admits that no two things will less admit of real parallelism than punishment and offences.

(X) the infliction of punishment, Bentham says that it is an evil,

"The infliction of punishment is itself an evil; an evil not only to him on whom it is inflicted, but to the community by which the trouble and expenses of inflicting it have been incurred. Every item, therefore of punishment, beyond what is necessary to the production of preponderant good is punishment wasted - is a wanton act of mischief - is a crime."¹³

Bentham highlights Beccaria's theory of punishment,

"Pleasure and pain are the only springs of action being endowed with sensibility. Punishment is merely preventive and as it is effective in any given case, if the evil it occasions exceeds the good expected from the crime."¹⁴

He gives conditions for exercising punishment. It should be public, immediate and necessary, the least possible in the case given, proportioned to the crime and determined by the laws.

He sums up his theory,

"In order that a punishment may not be an act of violence of one of many against a private member of society, it should be public, immediate and necessary, the least possible in the case given, proportioned to the crime and determined by the laws."¹⁵

In The Principles of Moral and Legislation, Bentham has highlighted on moral facts about punishment especially as seen in his principle of utility. He says,

"But all punishment is mischief, all punishment in itself is evil. Upon the principle of utility, it ought to be admitted in so far as it promises to exclude some greater evil."¹⁶

Ethics of Punishment by W.H. Moberly gives highlights on punishment especially in the examination of various ethical theories. Of utilitarianism, he says,

"Total Unitarianism is unrealistic as well as immoral ... If punishment is to deter, utilitarian theory is vague as to "how."¹⁷

In his book, The Story of Punishment, H.E. Barnes has shed some light on the historic methods of ascertaining guilt in early societies and has talked about the persistence of torture in modern times. He mainly highlights about the methods used for punishment especially in America. He has also shown that, "severe punishments have never reduced criminality to any marked degree."¹⁸ This supports our view that most methods employed for punishment such as imprisonment and the death penalty do not meet their objectives and therefore would not be said to be morally justifiable. By employing these methods, we commit more serious crimes than what the offender had actually committed. We become more criminal than the criminal himself.

T. Mushanga in his book, Crime and Deviance in East Africa, has shown that before punishment was administered on a criminal before the coming of Europeans in East Africa, there was need for communication between the criminal and the punisher which is not the case today. Today what we find is that some people are arrested, imprisoned or even detained without being given a chance to defend themselves. He has also evaluated the merits and demerits of fines as a method of punishing a criminal.

"The most unfortunate thing about fines in East Africa is that fines are not assessed according to the offender's resources but often to the gravity of the offence."¹⁹

He continues to say,

"... when fines are imposed in criminal cases, the money is usually paid to the state rather than to the individual."²⁰

However, he says,

"fines do not interrupt the family life of the offender and do not interfere with his job or business. They do not stigmatise the offender as a prison sentence."²¹

Howard Jones in his book, Crime in a Changing Society, says,

"fines means very much less to a rich man than to a poor man ... fining hardly deters."²²

He shows that in most cases, fining does little to deter. It all depends on whom this method of punishment is inflicted. He says,

"it must also always be remembered that it is not the sentence which constitutes the punishment, but it is the individual's feelings about it. A fine means very much less to the introverted and isolated person, than to the gregarious whose life is only worth living if he is involved in a continuous whirl of social activity."²³

About the effects of deterrence he says,

"Deterrence it seems, has its place, but it may be a smaller place than we have been inclined to think in the past. It will not solve our crime problem by itself and is morally suspect since it is concerned only with the protection of society and not with personal rehabilitation of the criminal himself."²⁴

Imprisonment hardens the criminal and rather than reforming, the prisoner gets involved with more crimes than he previous was.

"The prisoners have their own highly cohesive and satisfying social life, which is out of the reach of their captors and of the vengeful or dissuasive hand of society. The powerful weapon of social refection is lost. The prison provides a ready-made society and one within which the criminal can find a place only if he is unregenerate, a kind of officially tolerated criminal underworld."²⁵

Therefore, to him this kind of punishment is unjustifiable.

About the objection to death penalty, Jonathan Glover in his article, "Causing Death and Saving Lives," gives the side effects of this penalty.

"When an individual is put to death, it is not him only who loses his rights, others also lose a number of their rights by his death ... It cannot, in a good ethical sense be endorsed that those to whom a victim of capital punishment owe some duties should lose their corresponding rights when they do not share his guilt or crime."²⁶

He objects to capital punishment. He emphasises on the sacredness of life. The right to live is a basic human right. He says that taking life away is evil. He also says it is wrong to reduce the length of a worthwhile life. It is also wrong to kill especially where the method used is frightening or painful.

Capital punishment is also wrong because killing may encourage people to take life lightly. According to Glover, what seems peculiarly cruel and horrible about capital punishment is that the condemned man has the period of waiting knowing how and when he is to be killed. He has the horror of knowing that his death will be ritualised killing by other people symbolising his ultimate rejection by the members of his community.

According to Glover, an innocent man may be mistakenly executed. He says that in 1953, there were 27 death sentences now established or presumed to be miscarriages of justice. He says that for normal people, to be professionally involved

with executions, whether being a judge, prison warden or captain, or the executioner, is highly disturbing. Therefore, capital punishment is not morally justifiable.

Richard Quinney in his book, The Social Reality of Crime, says,

"however diverse a rationale, the prison exists as a dramatic symbol of society's desire to segregate the criminal. And once the prisons are populated with criminals, the primary task becomes that of custody. To provide for the secure maintenance of inmates is thus the major objective in the administration of the prison."²⁷

He says, "the prison wall, the line between the pure and the impure has all the emotional overtones."²⁸ He says of inmates or prisoners,

"The inmate is deprived of basic liberties, goods and services, heterosexual relationship and autonomy. Imprisonment is painful. Not only are the physical deprivations overwhelming, but the withdrawal of the many commonly assumed freedoms is an attack against the foundations of the prisoner's sense of being."²⁹

Imprisonment as a method of punishment to him is therefore unjustifiable.

According to J Eysench, no amount of punishment will deter. It may have adverse effect in stamping in the undesirable conduct even more strongly than before. To him therefore, punishment does more harm than good to the criminals hence no kind of punishment is justifiable.

P.K. Wainaina's M.A Thesis on "Educational Implications of the controversy between Freewill and Determinism with special reference to punishment and moral education in school," looks at various definitions of punishment, their justifications, elimination of punishment campaign among other important issues which guided us in our research. Of great interest is his point about unpunishable behaviour where punishment as a disapproval, is not likely to work as a tool of behaviour modification because the person concerned, that is the offender, is convinced that his behaviour is right.³⁰ This means that whichever method of punishment will be employed against the said offender, no change will be expected. To the offender, his punishment is immoral.

The late President of the Republic of Kenya, Mzee Jomo Kenyatta in his book, *Facing Mount Kenya*, gives highlights on the methods of punishment employed against criminals in the Gikuyu society of Central Kenya in great details. The role of the father as the head of the homestead and of clan elders in settling disputes among families is emphasised. It is clear that when a crime was committed, the chief objective was to bring the disputing parties into a mutual agreement and to avoid any act of vengeance which might result in breaking up the family group. After wrongdoing, peace and reconciliation, and not punishment was seriously sought as evident in the words used by the presiding elder in settling a dispute.

"Elders, say let there be agreement and peace in the family group ...
Let here be peace in the family group ... Let there be peace in the
family group, beseech Ngai, peace be with us."³¹

It is also evident that both the plaintiff and the defendant were given a fair hearing. After the judgement was given,

"the two men in the dispute were called before the elders and asked
if they agreed with the judgement given."³²

This is unlike today when the accused person is not usually given a chance to say whether he agreed or not to the sentence passed against him such as imprisonment, detention or even the death penalty. The appeal usually follows not immediately and it is mainly done by a lawyer and not by the accused person himself.

From this book, we get the fact that in traditional Gikuyu society there were very few criminal cases such as murder which was rare, theft, trespass, assault and witchcraft.

Before any method of punishment was employed against an offender, he had to be warned and cautioned. Ways and means were employed to make him stop his evil behaviour.

The importance of curses is highlighted.

"The fear of public opinion expressed in the way of curses was the chief preventative of mischief and crimes because there was no police organisation in the Gikuyu society."³³

The rationale of the use of oath or ordeal as an important factor controlling the court procedures is given.

"The fear of it prevented people from giving false evidence and helped to bring the offenders to justice through guilty conscience and confession. On the other hand, it ruled out bribery and corruption and ensured impartial or unbiased judgement."³⁴

Kenyatta laments the negligence of the use of oath and with the use of Bible after the coming of the Europeans,

"... the Europeans have adopted a form of raising habits or of kissing the bible as symbols of oath. It can be definitely said that this form of oath has no meaning at all to the Africans. It has no binding force, moral or religious. The result has been fabrication of evidence in Courts of Justice and furthermore, bribery and corruption is the order of the day in many cases..."³⁵

It is also evident that punishment in the traditional Gikuyu society mainly aimed at compensation.

"The chief aim in a proceeding was to get compensation for the individual or group against whom the crime was committed. Since there was no system of imprisonment, the offenders were punished by being made to pay heavy fines to the 'Kiama' and compensation to right the wrong done."³⁶

According to Kenyatta, murder was punished with the death penalty.

"... the family group of the murdered man took up arms and invaded the murderer's homestead with the object of killing the murderer or one of his close relatives... If the invaders succeeded in killing the

murderer or one of his kinsfolk, the case was settled there and then, for the two lives were considered equal ..."³⁷

However, murder was very rare and in case there existed conflicts between one of the family group and another, it was the duty of the peace elders to bring the two to reconcile and this checked private revenge and blood feud through settling the matter peacefully once and for all.

Assault was settled by compensation in form of sheep or goats. Rape and adultery were also settled with animals. There were cases when the offender would be ostracised;³⁸

"The stigma attached to the ostracism was far greater and very much worse than that attached to the European form of imprisonment ... the fear of this was one of the chief factors which prevented the people from committing crimes."³⁹

These methods were employed in accordance to the dictates of the laid down traditions. The rationale of punishment is therefore traditionalism. Due to harshness employed in these methods, very few instances of crime occurred in the Gikuyu society.

Kinoti H.W., in her Ph.D. Thesis, discusses aspects of the Gikuyu traditional morality. Her work has shed light on what was valued in the society. According to Kinoti,

"good is rewarded and in so doing it is promoted. Evil, on the other hand, is punished and in so doing it is discouraged."⁴⁰

She defines good "wega" as that which promotes peace, goodwill, harmony and well-being in the society. Evil, "uuru", on the other hand means all that harms or disrupts the peace and good-will which should exist in the society. She looks at the rationale of punishment. First, she sees a wrong doer as earning his punishment. Second, punishment is seen as encouraging good and discouraging evil.

According to Kinoti, punishment has a purpose, that is, reformation, prevention, retribution and deterrence and so to this fact, the traditional Gikuyu considered it a mistake to ignore any wrong-doing however small.

Kinoti outlines the methods that were used to punish wrong-doing in the traditional society. A husband for example, could beat his wife for neglecting her duty to feed him.

The justification for employing this kind of punishment is given,

"Apart from the fact that she should have understood that to be part of her duties as a married woman, it was unfair to expect other people's wives to fulfil that duty. Extra-marital affairs could easily develop with the woman who fed him."⁴¹

Another example given is when a wife would be punished by her husband for taking snuff. The justification is outlined,

"The problem was not so much actual snuffing of tobacco but the common habit of going to beg for a little tobacco while the food is cooking ... the habit was often an excuse to engage in gossip or extra-marital affairs."⁴²

Other methods of punishment are also discussed for acts such as pre-marital sex, assault, ungenerous tendencies such as selfishness, theft, malicious destruction of property, witchcraft and murder. She gives reasons for punishing these offences.

"Murder was a serious crime because it deprived a person of his or her life in an irreversible manner. No individual could ever be replaced ... of the crimes of murder, genocide was considered the most terrible."⁴³

This chapter on punishment guided us in comparing the type of crimes that existed in the Gikuyu traditional society and the type of punishment meted, with those found in Europe and America. These are also compared with the methods employed in Kenya today.

Mbiti J.S. in his book, African Religions and Philosophy discusses the concepts of 'good' and 'evil' in African traditional society . He says,

"a person is not inherently 'good' or 'evil' but he acts in ways which are 'good' when they conform to the customs and regulations of his community or 'bad' when they do not."⁴⁴

He also outlines the adverse effects of evil thus,

"those who practice witchcraft, evil magic and sorcery are the very incarnation of moral evil ... are set to destroy relationships, to undermine the moral integrity of society, and to act contrary to what custom demands. When accidents, illnesses, misfortunes and the like strike, people immediately search for the agents of evil, for witches, for sorcerers and for neighbours or relatives who have used evil magic against them."⁴⁵

The occurrence of evil necessitated punishment to be employed to protect the society.

Cagnolo C., in his book, The Akikuyu : Their Customs, Traditions and Folklores, has given details on punishment among the Kikuyu society. He, like Kenyatta, emphasises the fact that there were a few criminal cases. Before a criminal could be taken to the larger society, his clan had the responsibility to warn him. If he proved difficult, then the clan had no choice but to call the larger society to punish him.

"The criminal and the minor offenders are under the responsibility of the clan. It is therefore a matter of course that when a lunatic, Kleptomaniac or evilly disposed fellow disturbs the public peace his clan is the first to take preventive measures ... if these warnings prove useless, they resort to more solemn public action..."⁴⁶

He discusses the various crimes and punishment employed against them. For murder he says,

"a murder was pursued until caught. His relatives were also held jointly with him as equally responsible so all efforts were made to arrest him ... if caught, the elders would immediately apply the laws of retaliation and kill him and this settled the case there and then ...

In some cases the elders demanded the penalty set in the tradition which was one hundred sheep or goats or ten cows."⁴⁷

A habitual thief was put to death publicly.

"... the sentence is always carried out in a very savage and inhuman manner."⁴⁸

He could be crucified, drowned, or stoned to death. He also says,

"perhaps the most terrible torture reserved for thieves is to be burnt alive. The thief is bound inside a big bundle of dried banana leaves ... a member of his clan is called to set fire to the bundle..."⁴⁹

These details make it evident that some of the methods used in the traditional African society were immoral.

Ethical theories are employed as a guide in determining whether the methods used in punishment can be said to be morally justified or not.

Mojola A.O., in his book, Introductory Ethics for College Students and Teachers, has discussed various ethical theories. These theories include traditionalism, act, rule and general utilitarianism theories, ethical and psychological egoism, the Divine Command theory and categorical imperative. These theories guided us in our analysis of methods employed for punishment in Kenya. Mojola critically examines the morality of these theories. On traditionalism as he says,

"We must question this basis as the determinant of rightness or wrongness of any action. The question must be asked whether the old ways, the traditionalism of the elders are right just because they are ancient or because they contain a criterion valid in its own right. Why should age in itself constitute a criterion of morality?"⁵⁰

He criticises ethical egoism

"This argument is faulty as it is defended on the basis of utilitarianism. The principle of self-interest is justified because it promotes general welfare. Such an approach seems self-defeating because the fundamental criterion of ethical egoism then turns out to be that of maximising general welfare, hence, this argument fails to be an effective defence of ethical egoism against others."⁵¹

He questions the divine theory as a basis of morality. He bases his objection on the question of God's existence and also on the autonomy of man,

"man as a moral agent, should not only have integrity but should act independently on the basis of decisions arrived at by himself without undue external influence ... the objection of the divine - command theory holds that acceptance of the theory involves, for the believer, total subservience and commitment to God and in fact total obedient to his commands."⁵²

According to Jean-Paul Sartre, an existentialist, punishment and justice, are individualistic, independent and subjective affairs. He gives the reason for this being that no person is like another. Everybody is unique. In the same way, no one situation can be comparable to another person's.

In this regard, therefore, when one commits an offence, his uniqueness should be considered. Dealing with him according to set standard is put into question.

"The existentialist concern with the individual, locates the question of rights and duties, of law and punishment in its most fundamental source, for the answer to the question as to the state's right to punish depends on apriori account of the extent to which the individuals hand over their own rights to the limitation and collectivisation imposed by the state."⁵³

Should the individual be punished in accordance with dictates of the law, the implication is that the individual is a limited being. The state is prior to his individuality. The individual has got very little to say since the law dictates what method of punishment should be meted. In this case, the law seems to be absolute.

According to Sartre, though man is considered to be an individual, a unique being, there are many sides to him, with as many moral absolutes for example, hedonism, stoicism, utilitarianism, etc. Sartre views these in terms of their partial compatibility and absolute incompatibility. This led him to conclude that:

"the only absolute standard of human morality is that there is no absolute at all."⁵⁴

Of values, he adds that these are not pre-established for all men but fashioned from the consequences of an artistic 'praxis' unique to each man. Morality and law, according to Sartre, are means through which the well-to-do maintains his constraint on human freedom. He declares,

"A moral attitude appears when technical and social conditions make a positive behaviour impossible. Morality is an ensemble of idealistic tricks which help you to live in the way the lack of resources and techniques compels you to live."⁵⁵

The law, by protecting the societal values, helps in sheltering the status Quo against innovations and this has the adverse effects of infringing on an individual's freedom subjecting him to exploitation and oppression. The law is always on the side of the rich man. It is through the law that his wealth is protected. It's the means of stabilising and preserving the states of affairs; the riches of the rich and the poverty of the poor. This implies that punishment is the way the status Quo tries to defend itself against those persons who would free themselves from itself. Man, according to Sartre, is a true subject of his own choosing, yet he's subjected to the artificiality of institutionalised standards and laws.

"As individual becomes a member of the law-abiding, punishment-approving group, he slips inconspicuously into the anonymous institution and unknowingly allows his absolute freedom to be converted into the slavery of the organisation man obeys. If he does not, he submits to punishment which itself is a form of social obedience. Both obedience to law and acceptance of punishment involve submission to alien forces betraying man's absolute freedom."⁵⁶

To Sartre, therefore, he sees any kind of punishment as an interference with man's freedom; denying him his humanity. If punishment is such that it interferes with man's freedom, it will not be fair to say that punishment in whatever form can be morally justified.

He sees man's unlimited freedom as the basis of true humanism. Punishment overrides this freedom hence is degrading and thus inhuman, therefore immoral. Sartre says that:

"Reality is only in action because values are created only by man's 'praxis' There is neither an inner essence of spiritual or intellectual meaning nor any apriori good. Man creates the good, just as he creates rules and values."⁵⁷

Man, therefore, should neither be held down by tradition nor by the existing ruling structures but is free to make his own history and destiny according to his freely chosen values. He asserts that human needs and desires, if freed from set of norms, will bring good into existence. He insists that there should be no absolutes which bind him absolutely.

"All is relative : law, crime and punishment included. Noxious fields of inertia bind man's freedom : red lights, clocks etc. One such field of inertia, Sartre implies is punishment, for like the other inertial forces, it reduces man's potentiality, limits his freedom, constraints his humanity. Freedom, thus is defined, not as an ability to do what one ought but the ability to do what one wants."⁵⁸

Sartre asks, "who has the authority to punish?" For him, authority and right are vested first and foremost in the individual and his consciousness. Man, as long as he exercises praxis, constitutes his own values, advances the humanisation of history, assumes responsibility and authority over himself.

"The individual's responsibility is absolute and sovereign. It extends over the individuals."⁵⁹ This means that the other, other than the self, has no rightful authority over the self. The other person constitutes "hell" for the individual. Each man is a wolf to his neighbour since each competes with the other for existential resources of conscious incarnation according to Sartre.

"One man's chosen obesity is necessarily another man's unchosen famine. By the same token, the state's imposition of punishment is

the individual's loss of humanity. He feels that any loss of freedom is parallel to loss of human dignity hence is immoral."⁶⁰

Sartre sees punishment as an artificial means of maintaining bondage to an authentic restriction of absolute freedom and self-protection.

"Punishment suggests that there are acts which man may not do, and that the criminal must learn to make the distinction between propriety and impropriety, a distinction which Sartre sees as the absurd impersonality of the 'serious' man of 'bad faith'. In reality nothing is improper, nothing illegal, nothing punishable, except the infringement of man's freedom."⁶¹

He says that everything is permitted except this infringement. But here, we must pose and ask whether a criminal does not infringe on his victim's freedom when he commits an offence against him.

He views each person as unique. He says,

"If there is no consensus, there is no law and hence nothing illegal. Since nothing is unnatural or illegal, man's only punishment lies in the fact that his existence is shared by others."⁶²

These views of Sartre cannot be overemphasised and left unchallenged. Despite the fact that man is a unique being, he cannot be left free to do as his emotions direct him. He operates in a society that has rules that govern and control his behaviour. Only by obedience can he be left to enjoy his freedom to the maximum. However, should he himself refuse intentionally to conform to the norms, he should blame no one when his freedom is curtailed. It is wrong for him to say that a man should not be restricted by the law. He goes too far to suggest that there is nothing illegal. This world would be in chaos, if there are no laws that restrict behaviour. Should each unique individual be left to follow his whims, it would not be an overestimation to suggest that the world would be immoral.

Albert Camus, like Sartre, is an existentialist. Camus rejects the superman overtures in Sartre's philosophy. Where Sartre is more infatuated with liberty, Camus

focuses more directly on the present-day life. For Camus, no appeal to realm of future ends can justify any attack on the present or on a present human value. Camus reveals his attitude toward all forms of punishment especially on capital punishment.

On deterrence, Camus argues that the state does not believe in the "example of deterrence" which it so often speaks in its endeavour to justify its practice of severe punishment.

"If society really believed in the deterrent possibilities of 'making an example' by severe punitive measures, society would celebrate severe punishments such as executions with the publicity it now reserves for national holidays and new brands of merchandise."⁶³

Camus also argues that criminals are not truly intimidated by the possibility of capital punishment. According to him, severity of punishment has little or no deterrent effect on potential criminals. Camus says that the effectiveness of punishment, and capital punishment in particular, is hindered by the consequences injurious to human values.

The act of execution is degrading for the crowd, the executioner, and the criminals, and its appeal is not based on rationality but on instincts. Furthermore, if capital punishment eliminates the guilty, it also eliminates the chance of correcting judicial errors imposed on the innocent. He says that,

"even a just imposition of capital punishment implies that the condemned has lost the universal human power of correcting his ways."⁶⁴

From his argument, Camus supports rehabilitative justification of punishment. Punishment is only justified by its ability to re-educate an offender thus returning him to society as an integral human being. He does not agree with the thesis that the criminal is immoral because of some abnormality which mitigates his freedom. Instead, Camus feels that the same freedom which lies at the roof of the criminal act must be preserved and returned in fuller form to the offenders.

Unlike Sartre, Camus believes,

"freedom is the ability to do what one ought, not what one wants to do. The obligations which the offender ignored must be instilled into the offender so that he can exercise his freedom properly."⁶⁵

Camus' theory of punishment emphasises the values of reform and re-education and plays down the social benefits of deterrence and protection.

In the examination of the history of punishment in Europe and America, it is evident that the methods used to curb crime can be compared to those used in the African traditional society. The methods used especially for capital punishment were very harsh and immoral.

"death penalty has included hanging, execution, electrocution, crucifixion and burning. Imprisonment has included incarceration in dungeons, guardhouses, galley ... physical torture and mutilation have assumed numerous and obviously barbarous forms-flogging, burning dismemberment, disfiguration."⁶⁶

A close examination of these methods indicates that they were even more barbaric than those used in traditional African society. Furthermore, there was no imprisonment before the coming of the Europeans in Africa. Methods such as electrocution were neither used in the traditional society nor are they applied today. However, in Europe and America, there has been a decline in the severity of punishment such as corporal and capital punishment. However, these methods are still being used in Kenya today.

1.8 Conclusion of Literature Review

A lot has been written about the practice of punishment by scholars from all over the world.

From these books, we have gathered information concerning the various methods of punishment employed to curb crime in the society. Despite the practice of punishment, the rate of crime has accelerated instead of decreasing. This can be attributed partly because of factors such as poverty, poor upbringing, bad education

and environment and partly because of the problem inherent in the practice of punishment itself.

In attempt to punish criminals, crime is committed. When a criminal is imprisoned for the purpose of protecting the society, the individual ends up suffering and most of his human rights are trampled on.

Richard Quiney, in his book The Social Reality of Crime says that however much we try to rationalise imprisonment, very little is achieved. The aim of imprisonment becomes that of custody where the criminal is segregated.

For death penalty, the society ends up in committing murder. Jonathan Glover, in his article, "Causing Death and Saving Lives," emphasises on the sacredness of life and says that the right to live is a basic human right. When we put a criminal to death because of committing crimes such as murder or robbery with violence, we too are committing murder and this is morally unacceptable.

Jean-Paul Sartre, an existentialist, argues very well about punishment and we strongly agree with him. He argues that if punishment is such that it interferes with man's freedom, it will not be fair to say that punishment in whatever form can be morally justified.

Most methods of punishment infringe on an individual's freedom and therefore they should be done away with. Criminals, instead of being punished, should be rehabilitated so that they can become useful members of the society. They should be given some work to do for the society like domestic, agricultural, or industrial employment which would be beneficial, not only to the society, but to the criminal himself. They should be placed on extra-mural penal employment schemes.

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CHAPTER 2

THE HISTORY OF PUNISHMENT IN EUROPE AND AMERICA

In this chapter, we shall examine the methods of punishment used in Europe and America both in the ancient and modern times.

We found it difficult to get adequate information on the practice of punishment in the Orient, Australia and New Zealand and this explains why these regions have been left out in this study. We found it appropriate to emphasise Europe because Africa, Kenya included, was colonised by the Western World. Our criminal law is related to that of Britain and this spells out what is crime, and punishment advocated to deal with each crime.

Furthermore, there is not much to borrow especially in terms of culture from these regions as compared from what we can from Europe and America.

The study will help us draw a comparison between the methods used for punishment in Europe and America with those used in traditional and modern African societies as exemplified by the Kikuyu society of Central Kenya.

The morality of those methods will be highlighted as to show their ethical justifications.

The knowledge of the brutalities of the punishment methods used in the past, we believe, has significance in exerting some influence in guiding us think of a way of having a more rational and humanitarian approach to criminality. Having realised that the immoral methods of punishment employed today are as futile as used in the past, there is need to think of a more rational and practical solution. The history of punishment, therefore we believe, has a bearing on the future of punishment.

The first theory of explaining crime was the theory of diabolic possession and instigation in the ancient societies. Any criminal behaviour was seen as having been caused by the devil. The notion of punishment held at the time therefore was to exorcise the devil or exile or execute the wrong-doer.

According to Barnes H.E in The Story of Punishment

"this doctrine was based upon the notion of protecting the community group against further outrages by the offending individual, but far more important was the notion of the necessity and the desirability of placating the gods"¹

Another theory appeared where more emphasis was laid on social revenge. The crime was seen, not as having been caused by the devil but as a wilful act of a free moral agent. The society had to revenge on the wilful, voluntary immoral act done by an individual. The guiding principle therefore was retaliation. The individual was believed to have capacity and liberty to choose between what was good and what was evil.

These two theories were metaphysical explanations of crime. Another theory was developed by an Italian physician and anthropologist, Cesare Lombroso (1836-1909) based on the physical appearance of a criminal characterised by,

"a low and slanting forehead, long ear lobes or none at all, a large jaw with low chin, heavy supra-orbital ridges, either excessive hairiness of the body or an abnormal absence of hair and extreme sensitivity or non-sensitivity to pain."²

This theory was rejected on the basis of its being inadequate in explaining the whole criminal class. These characteristics were said to be even more present in those who were feeble-minded among other detectives than in the criminals themselves. This theory was also rejected because it failed to account for criminality among those who were physically normal and the presence of these manifestations of criminality on law-abiding people.

Other theories were developed after Lombroso's theory was proved inadequate. Specific explanation of crime was proposed. These included the pressure of physical want, unfortunate social conditions, feeble-mindedness and insanity. However, no single explanation was adequate when taken on its own.

Psychiatric approach was developed. On this basis, criminal behaviour was shown to be,

"absolutely determined for the individual on the basis of his biological heredity, his past and present experiences or both. There is not the slightest modicum of freedom of choice allowed to either the criminal or normal citizen in his daily conduct."³

Revenge or retaliation was the most important justification of punishment in the period of ancient history. An offence was put to right by using the same method of punishment that the offender used to commit a crime. The offender received "just deserts." It involved a "get even" spirit - an eye for an eye and tooth for a tooth.⁴ The method used to attain this was often harsh and illogical.

Another justification for punishment was expiation. The offender had to atone for his crime through suffering. The method used to attain this objective was mainly public and was aimed at appeasing the society. This method usually degraded and humiliated the culprit. The society was hostile to him and proved that it was more superior than the individual. The punishment aimed at preserving the societal moral values and promote solidarity. However, the methods usually used were harsh and cannot be said to be morally justifiable. The individual had to suffer pain and publicly.

Another justification of punishment was deterrence. The criminal had to learn a lesson that crime does not pay. Other people, through punishing the offender are shown what will occur should they commit similar crimes. The society was determined to check through punishment to deter criminal behaviour.

We can question this reason for punishment on the basis of the offender being used as object lesson to the society. His humanity is disregarded. This purpose cannot therefore be said to be morally justified.

The biological theory developed by Lombroso indicated that a criminal was a degenerate individual who was "incapable of reformation or notable improvement,"⁵ hence the theory of incarceration became popular. The fundamental objective of this method was the protection of the society from anti-social people. Imprisonment was thought as a,

"safety device. Confined behind prison walls, the offender is considered unable to harm society."⁶

Again this justification of punishment is questionable. The adverse effects of imprisonment are numerous. Above all, the denial of a right to liberty is important. Incidence of torture and other brutalities are inevitable; poor food, sanitation, accommodation is well known. The individual is stigmatised such that even after coming out of prison, he is looked upon with suspicion. The moral justification of this method is therefore questionable.

The offender through imprisonment was supposed to reform. Behind the prison walls, the offender was expected to reflect on his misdeeds and reform. This was hardly achievable. Most offenders came out of prison even more hardened than before. They learned new techniques in commission of crimes from others prisoners.

According to Barnes,

"social revenge is the only honest, straightforward and logical justification brought forward in favour of punishing criminals. The claim for deterrence is disapproved both by history and logic. History shows that severe punishments have never reduced criminality to any marked degree."⁷

Punishment also as an adequate social protection is also questionable. Since imprisonment does not aim at locking the criminal forever, once out of prison, the ex-prisoner's presence gives insecurity to society around him. An ex-prisoner may have been turned into being a more dangerous criminal than he was before imprisonment. Therefore, rather than being reformed, a criminal becomes even more immoral. According to Barnes;

"Punishment, whether by corporal punishment or imprisonment, has never been controlled and applied in such a fashion as to produce any real and widespread reformation on the part of convicts. It has almost invariably made the individual more of a personal and social wreck than before."⁸

2.1 Methods of punishment in Early Societies of Europe and America.

There were three methods of settling the matter of guilt or innocence in early society. These were:

1. Trial by battle
2. The ordeal and
3. Compurgataion

Trial by battle : the injured person or his relative confronted the offender for duel. The victory was expected to come from the innocent party from gods. This method cannot be said to be morally justified because an offender could turn out to be victorious after the fight. He would, therefore, escape unpunished and continue with his wrong-doing. This method was also used among the Kikuyu of Central Kenya.

The ordeal : in this method, the gods also were expected to aid the innocent. The ordeal method was also used among the Kikuyu society. By subjecting him to torture, god was expected to intervene and show the innocence of the suspect. The ordeal entailed such acts as carrying a piece of hot iron, walking through fire, plunging one's arm with boiling water among others.

"The gods manifested their will and knowledge through the results of the ordeal."⁹ If the injuries inflicted during the ordeal healed fast, then the culprit was declared innocent. If they did not, then he was seen as guilty.

This method was harsh. An innocent person could be declared guilty or a guilty person could be declared innocent on the basis of the progress of the injuries.

Compurgation : oath was taken by the offender's kinsmen to show that the suspect was innocent. They could swear even when they knew that the suspect was guilty. This method was not conclusive since an innocent person could be seen as guilty according to the conclusion of the oath and the guilty person could also be concluded innocent. Sometimes, a decision could not be made and, people resorted to other ways like the duel or ordeal or compensation was demanded. Oathing was also evident among the Kikuyus.

2.2 Methods of Punishment with the Establishment of the Criminal Law

Court of law was established when the state came into being. It had the duty of ascertaining guilt and executing judgement. The duel and ordeal were no longer in use by 1260.

Torture was being widely used in Europe and was used as means of extorting confessions and procuring evidence. Torture was cruelly administered as Barnes says,

"the period of active torture was usually preceded by imprisonment in a foul dungeon or a small cell. It was particularly common to incarcerate the individual in a cold, damp, vermin-infested dungeon or to put him in a cell so small; that he could neither sit, stand or recline with any comfort. He was ill fed ..."¹⁰

The methods used for torture were barbaric hence immoral. These included psychological torture which involved viewing the objects to be used when torturing. The criminal could have his hands tied behind his back and then pulling him up with a rope. There was also water torture and strangulation.

"A piece of damp cloth would be placed upon the tongue and a stream of water allowed to trickle on it. In the process of breathing and swallowing, the cloth would be drawn into the throat and produced partial strangulation. The cloth would then be pulled out and the act repeated. Upon being pulled out the cloth would frequently be found to be saturated with blood."¹¹

These methods of torture cannot be ethically justified. Despite the fact that these methods of torture were employed in the 15th Century, Barnes emphasises that torture has persisted even in modern time America with a change only in technique and instruments used. Torture is very common especially in police departments. Even in modern Kenya, this is evident.

Other methods of punishment included corporal punishment. This continued until the time of American revolution when western civilisation began to substitute

corporal punishment with imprisonment. Corporal punishment included flogging which was not only a popular way of punishing crimes, it was also used as a method of preserving the family, domestic, military and academic discipline. Flogging has continued until the 20th century.

In 1800, imprisonment replaced corporal punishment but it was still employed in Delaware, Canada and Great Britain. It was used for such crimes as assault, robbery and rape.

In 1920, Britain legalised flogging for those convicted of robbery. Even where flogging had been forbidden, it continued to be used in prison as a method of disciplining the convicts. corporal punishment was brutal.

"The backs of the condemned were frequently cut in strips and blood gushed from their wound. Not infrequently salt was thrown upon the bleeding backs to increase the pain ..."¹²

Another type of corporal punishment that was used was mutilation. If one cut off the hand of another he had his hand cut off as a punishment. The principle that was followed directed that punishment be inflicted by a method which exactly duplicated the injury originally inflicted. It served as a deterrent method. This method involved a lot of pain. Loss of blood and infections were likely to produce death. Such a method cannot be said to be ethically justified. Mutilation continued in England. Not until early 16th Century did the cutting of ears and hands stop.

Another method was branding. This method was common in oriental and classical societies. These involved branding or marking the criminal on the forehead with the initial letter of the particular crime committed. England used this method upto 1699. Branding was also common in America for example, in New Jersey, the first offence for burglary was punished by branding with a T on a criminal's hand while the second offence was to be punished by branding an R on his forehead. Branding was abolished in the 18th Century in England and other European States.

This method was harsh and dehumanising hence immoral. Punishment for lying, perjury and blasphemy was by piercing the tongue with a hot iron. This is a very painful and cruel method of punishment.

Another method was the use of stocks and pillory. Pillory was abolished in England in 1837. These methods involved confining a person in public and exposing him to public contempt and humiliation. Victims could sometimes be pelted to death. They could even be whipped or branded while in stocks or pillory. This method was very degrading and humanising therefore unethical.

Transportation was also used as a method of punishment. Criminals were deported from England to their foreign colonies like America. Transportation of convicts from England ceased in 1776 with the American revolution.

In 1787, criminals started being deported to Australia. The method used in the transportation was barbaric as quoted by Barnes on how it was in 1779,

"about 240 of these miserable creatures were chained in pairs, had to hand or leg to leg, with no light but what came in at hatchways. At first, the darkness of the place, the rattling of the chains and the dreadful imprecations of the prisoners suggested ideas of the most horrid nature ... Besides, in a short time, a putrid fever broke out among the convicts and carried off 34 before the ship reached the cape and the ship became loathsome beyond description."¹³

This practice was abandoned in 1857. The convicts were distributed throughout Australia. Their conditions were miserable. They were brutalised. Their moral conditions were also terrible especially the prevalence of homosexuality. These convicts "came to Australia, starved, diseased and weakened from the effects of the long sea voyage passed under the worst conceivable conditions ... were put to work at the hardest kinds of tasks ... were controlled by brutal and sadistic overseers, whose chief pleasure seemed to consist in finding excuses for cruel and repeated flogging."¹⁴

Alot of reforms on the punishment of criminals took place between 1750 - 1850. One of the advocates of these reforms was Marchese di Beccaria (1738-1794). At that

time there was absence of provision for the defence of the accused person. The methods that were used for punishment then were very harsh such as torture, whipping, branding and mutilation. He recommended a system that entailed that:

- a) "the basis of all social action must be the utilitarian conception of the greatest happiness for the greatest number;
- b) crime must be considered as an injury to the society and the only rational measure of crime is the extent of injury;
- c) prevention of crime is more important than punishment for crimes; indeed punishment is justifiable only on the supposition that it helps to prevent criminal conduct;
- d) in criminal procedure, secret accusations and torture should be abolished; there should be speedy trials; the accused should be treated humanly prior to trial and must have every right and facility to bring the evidence of his behalf...
- e) the purpose of punishment is to deter persons from commission of crime and not to provide social revenge."¹⁵

According to Beccaria's views then, the ethical theory of utilitarian should be used as a guide in undertaking any kind of action. Any action should be taken when putting the feelings of the majority at heart. The society then becomes prior to the individual.

Any action to be taken against the criminal should also consider the extent to which the offence has harmed the society. In this view therefore, the individual should be punished according to the extent of the crime. The principle of making the punishment fit the crime becomes an ethical issue. The punishment of the individual should be commensurate with the crime. He should not be punished harshly if the offence was not severe. He also emphasised that property crimes should be punished with fines or imprisonment if the person is unable to pay the fine. Banishment is advocated for crimes against the state.

Capital punishment as a method of punishment should be abolished as it does not eliminate crime. It is also irrevocable and so in case of mistaken identity, there is

Capital punishment as a method of punishment should be abolished as it does not eliminate crime. It is also irrevocable and so in case of mistaken identity, there is no provision. He advocates life-imprisonment instead of capital punishment. Imprisonment's mode of application should be improved by providing prisoners according to age, sex and degree of criminality. He concluded:

"In order that every punishment may not be an act of violence committed by one man or by many against a single individual, it ought to be above all things, public, speedy, necessary, the least possible in the given circumstances, proportioned to its crime, dictated by the laws."¹⁶

Jeremy Bentham (1748 - 1832) also recommended for the reform of the criminal law. He was a utilitarian like Beccaria. According to him, what would deter commission of crime was by employment of punishments which would impose an amount of pain in excess of pleasure.

There were many British reformers who advocated for the reform of the criminal law. These included Samuel Romilly, Mackintosh, Peel and Buxton. Their recommendations led to the transformation of the barbaric British criminal code between 1820 - 1861 which had 222 capital crimes.

"In 1822, capital punishment was abolished on some 100 offences. In 1823, deportation was substituted for death penalty in case of making false entries on a marriage licence. In 1832, the death penalty was abolished for house-breaking, the stealing of horses and sheep and counterfeiting. In 1837, the death penalty was abolished on a number of other offences including smuggling and rioting. In 1861, the death penalty was finally removed on all offences except murder, treason and piracy."¹⁷

Even with these offences, it was rarely applied. Britain established prisons after the establishment of Pennsylvania and Auburn systems of prison discipline which attracted world-wide interest.

Just as there was reform of capital law in Britain, there was transformation of the criminal law in America from 1776-1825. Imprisonment was substituted for

various types of corporal punishment. Instead of capital punishment for robbery, burglary, sodomy or buggery, the criminal had to forfeit all capital to the state and serve a sentence in jail. Any non-capital offences that were initially punishable by burning and other torture methods were punished by imprisonment and hard labour for less than 2 years.

The most brutal methods were abolished but the death penalty was retained for some 10 crimes. In 1791, death penalty was abolished for witchcraft, whipping and branding were also abolished on adultery and fornication and instead a fine was imposed.

In 1794, only murder in the first degree alone was punishable by death. The aim of the death penalty and punishment in general was to prevent crime. The person executed could not participate in committing any more crimes. The death penalty also deterred others from committing crime through fear of death. The death penalty was to be inflicted by hanging on the neck. There was remarkable reduction of capital crimes and reduced penalties on those crimes initially punishable by death. The methods that replaced these were imprisonment and fines.

Before the middle of the 19th Century, imprisonment was the conventional method of punishing crime in both Europe and America. The Pennsylvania systems of imprisonment were adopted in England in 1835, in Belgium in 1838, Sweden in 1840 and they spread to other countries of Europe.

In 1840 commutation of sentence for good behaviours was started. At about the same time, the notion of an indeterminate time sentence was originated. A death sentence could be commuted to life imprisonment or a sentence of imprisonment reduced in length by commutation. Commutation is not the same as a conditional pardon but a change from a higher to lower penalty. The parole system was also advocated. The major objective of incarceration was ultimate reformation. However, a lot of hardships were experienced in prisons such as prevalence of torture, presence of communicable diseases, poor food, poor sanitation, lack of verbal communication

and general loneliness. The personality of the convict is demoralised. This method of punishment therefore is ethically questionable.

Unlike whipping and other forms of punishment, imprisonment degrades and disintegrates the personality of the individual being so it could be said to be worse than the ancient methods of punishment. Imprisonment is set to reform the offender.

According to Barnes,

"punishment and reformation cannot be twins in any system. We must choose clearly between the ends we desire to reach. The present prison is an admirable place in which to inflict brutal punishments. It is the last place in the world in which to expect reformatory influences to be created and applied."¹⁸

There is little sociability in prison, self-assertion is denied, there is little play and recreation provided. Another adverse effects of imprisonment is the absence of natural outlet for sex-instinct. There is therefore prevalence of homosexuality and masturbation. The atmosphere is that of fear, isolation, hopelessness and helplessness which promotes mental and personal disintegration.

There was the introduction of a system of suspended sentence and probation which was applied to first offenders and that seemed most effectively treated outside the penal institution in the mid 19th century.

There has been decline in the employment of severe methods of punishment like corporal and capital punishment. Most countries of Europe and America have abolished capital punishment.

In England for example, a society for the abolition of capital punishment was formed in 1828. By 1867, capital punishment was only used for murder and treason cases. In 1875, it had abolished public executions. Most countries in Europe have abolished capital punishment; Belgium (1963), Denmark (1933), Holland (1870), Lithuania (1922), Norway (1905), Portugal (1867), Spain (1932), Sweden and Switzerland (1874).

In Central and South America, a number of countries have abolished it; Argentina (1922), Brazil (1891), Colombia (1910), Ecuador (1895), Peru (1926), Uruguay (1926), Venezuela (1926), Costa Rica (1926) and Mexico (1929). The countries that have restored capital punishment include Italy (1928), Austria (1934) and Romania (1939).¹⁹

Instead of punishment, a lot of emphasis is put on treatment of offenders. As will be evident in the following chapters, the methods used in punishment in Europe and America in the ancient societies were as brutal and immoral or even worse than those found in traditional African societies. The modern methods of punishment in Kenya were brought by the British imperialists. These methods cannot be said to be ethically justified especially because, in their attempt to achieve their objectives, the individual's humanness is disregarded at the expense of the society. The ethical theory of utilitarianism is dominant when punishment is employed. The happiness or convenience of the majority overwhelms that of an erring individual. Any action that ignores the uniqueness and humanness of an individual cannot be said to be ethically justifiable.

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CHAPTER 3

FORMS OF NON-JUDICIAL SETTLEMENT OF OFFENCES IN TRADITIONAL AFRICAN SOCIETY : A CASE STUDY OF THE KIKUYU SOCIETY IN CENTRAL KENYA

In this section, attempt is made at examining various issues concerning crime and punishment among the traditional Kikuyu society.

The first part deals with the examination of what in the traditional society was regarded as crime or what was regarded as 'evil' as opposed to the moral ideals or the 'good'

Second, ways in which crime was treated is examined. The rationale of punishment will be discussed in a later chapter.

3.1 What is 'Crime' or 'Evil'?

In a broad sense, crime can be defined as the violation of rules and regulations which are enforced by the society. All the members of the society have an obligation to behave in accordance with the established norms and laws. Breaching of the norms is crime. It is the wrong doing.

According to Felix M. Keesing,

"... criminal behaviour ranges through 'should' or 'ought' categories to the 'must' categorise' that is conduct demanded by the society so that disobedience arouses widespread moral indignation even horror and call for severe punishment."¹

According to R. K. Choudhuri, crime:

"has its origin in the conflict of the self-seeking habits of the individual with the common customs of any social groups that ensures its survival in the struggle for the existence."²

Crime is a persistent problem in all societies. Criminal activities lead to physical injuries, loss of human life and property. Crime can be defined as a violation of the criminal law. No matter how indecent or immoral an act is, it cannot be said to be a crime unless the criminal law has listed it as so and hence provided a punishment

for it. An action may be immoral yet may not be defined as a crime. All criminal behaviours are punishable by law.

The Kikuyu society recognised social order, peace, security and harmony as essential ingredients for the survival of that society. The society was corporate with the closely-knit kinship relationships. Since the sense of corporate life was so deep, there was an urgent need for the maintenance of the societal solidarity. The behaviour that threatened this solidarity was regarded as crime. This was because interference with the corporate solidarity led to destruction and disintegration of the society.

Any misbehaviour by an individual not only affected the offender himself but also the whole family, clan and the whole society.

To curb misbehaviour or crime, there existed laws, customs, set forms of behaviour rules and regulations, observances and taboos which constituted the moral code of the society. Any breach or violation of this was met with punishment.

Before we attempt to examine the types of crime that existed in the Kikuyu society, we shall examine what was regarded as the 'good' deeds in the society as opposed to the 'bad' or the 'evil' deeds.

In the Kikuyu society, there were some behaviours that were approved and considered proper and 'good' by the majority of the people and the society at large and there were behaviours that hurt the interest of the society hence were disapproved and punished.

3.2 The 'good' or 'proper' behaviours

In her Ph.D. Thesis, H. W. Kinoti has thoroughly discussed certain moral ideals or the aspects of the Gikuyu morality. People in the society were expected to possess certain moral virtues. These included honesty (wihokeku), generosity (uuma andu), justice (kihooto), temperance (wiikindiria) and courage (ucamba).³

John S. Mbiti has also outlined the moral characters expected of the traditional African society. The Gikuyu society is no exemption in my opinion. These include:-

- i) Chastity before marriage

- ii) Faithfulness during marriage
- iii) Hospitality
- iv) Generosity
- v) Kindness
- vi) Justice
- vii) Truth and rectitude
- viii) Avoidance of theft
- ix) Keeping a covenant
- x) Protecting the poor and the weak
- xi) Giving honour and respect to the old
- xii) Avoidance of hypocrisy.⁴

These pertain to the traditional concept of good. The 'good' (wega) was rewarded hence encouraged, while the 'bad' or 'evil' (uuru) was punished hence discouraged.

Good means "all that promotes peace, goodwill harmony and well-being in the society. Evil (uuru) means all that harms or disrupts the peace and goodwill which should exist in the society. Justice functions to ensure social harmony and the welfare of the individual in the society. For this reason, wrong or evil deeds must somehow be redressed so that social harmony and the personal welfare of the individuals can prevail."⁵ Certain moral attitudes and actions were bad because they were disruptive of the special order, others were bad because they reinforced it.

3.3 The Evil (uuru) in the Kikuyu Society

These include:

1. disputes in the family
2. failure to pay debts (thiiri)
3. there were cases of murder which was rare (urangani)
4. theft (uici)
5. injuries and assaults
6. witchcraft (uraguri)

7. sorcery (urogi)
8. trespass
9. rape
10. adultery (utharia)

According to Mbiti, there are two kinds of evils; the 'moral evil' and the 'natural evil.' Moral evil pertains to what man does against his fellow man. Since there are laws, custom, regulations and taboos that govern conduct in the society, any breach of these constitutes a moral evil.⁶

He continues to say that, "a person is not inherently 'good' or 'evil' but he acts in ways which are 'good' when they conform to the customs and regulations of his community or 'bad' (evil) when they do not.

In short, crime, or evil is not inheritable but one's behaviour is defined as such by the society that monitors his conduct.

"Those who practice witchcraft, evil magic and sorcery are the very incarnation of moral evil. They are, by their nature, set to destroy relationships, to undermine the moral integrity of society and to act contrary to what the custom demands; therefore, such people are also instruments of natural evil, at least people associate them with it, so that when accidents, illness, misfortunes and the like strike, people immediately search for the agents of evil, for witches, for sorcerers and or neighbours or relatives who have used evil magic against them."⁷

He also draws a list of the don'ts in the traditional society:-

- a) don't kill another man except in war;
- b) don't steal;
- c) don't show disrespect to people of a higher status;
- d) don't have sexual intercourse with a wide range of persons such as another man's wife, your sister or other close relative or children;
- e) don't use bad words especially to someone of a higher status;
- f) don't backbite;

- g) don't tell lies;
- h) don't despise or laugh at a cripple;
- i) don't take away someone's piece of land.

He also draws a list of 'dos'

- a) keep the many taboos and regulations concerning parts of the body, and proper behaviour according to the kinship relationships,
- b) observe the correct procedures in ritual matters;
- c) be kind;
- d) help those who cry to you for help;
- e) show hospitality
- f) be faithful in marriage;
- g) respect the elders;
- h) keep justice;
- i) behave in a humble way towards those senior to you;
- j) greet people especially those you know;
- k) keep your word given under oath;
- l) compensate when you hurt someone or damage his property;
- m) follow the customs and traditions of your society.⁸

He says "the list of what should and should not be done is so long and detailed that a person is constantly confronted with moral demands throughout life."⁹ What one does determines who he is. Kindness is not a virtue unless someone is kind; murder is not evil until someone kills another person in his community. Man is not by nature either 'good' or 'bad' (evil) except in terms of what he does or does not do.¹⁰

To say that one is 'good' or 'bad' will summarise the whole picture of the person in question in the context of his actions.

"One does not 'love in a vacuum'. It is the deeds which signify what lies behind them."¹¹ An offence in the Gikuyu society then can be seen as any action which hurts or harms the interests of an individual or society. It is a violation of the social

order. It can also be seen as the commission or evil and failure to do what is good. It can also be taken to mean a breach against the societal harmony.

3.4 Dealing with Wrong-Doing

All the minor disputes in the traditional Kikuyu society were settled by the father who was the head of the family. He acted as the judge among members of the family. A big dispute was settled by heads of families within a 'mbari' or kinsfolk. These also acted as elders of the 'kiama'. Kiama was the council of elders chosen from all the members of the community.

Family disputes could not be taken to the larger society before the family council or "ndundu ya mucii" dealt with the cases within the precincts of their homesteads."¹²

The elders acted as arbitrators rather than judges. For them to be able to arbitrate between the parties concerned, clear evidence was necessary. They pointed out the recognised customs and traditions to be followed.

In their deliberations, their major aim was to find ways and means by which they could bring the disputing parties into mutual agreement and to avoid any act of vengeance which might result in breaking up the family."¹³

If two relatives quarrelled, the offended party prepared or brewed sugarcane beer as a sign of taking action. He sent elders to bring the relative who had offended him. Elders assembled in the morning when the dispute was to be settled. The beer was presented to the elders as sign of peaceful and friendly discussion.

"They were informed why the beer was brewed. A senior elder using a ceremonial drinking-horn (ruhia rwa guitanga) filled with beer, poured on the ground and in a loud and ritual tone, he invoked the ancestral spirits to join them in their deliberations. He stood up, holding his staff of office (mutheegi) and facing Kirinyaga (Mt. Kenya) uttered a prayer ... "Athuri, Ugai nyumba iroiguana, (i.e. elders, say, let there be agreement and peace in the family group). The elders answered in chorus;

(nyumba iroiguana, thaai thathayai Ngai thai (i.e. 'let there be peace in the family group, beseech Ngai, peace be with us')"¹⁴

Another aspect in the settlement of dispute which was of great importance was the uttering of curses.

The 'kiama' was expected to be seen as an authority that was unquestionable. The decision had to be obeyed. Any one who attempted to disobey their decision was cursed.

The presiding elder of the Kiama would say "ugai mundu uria ukararagia kiama arogwa na mucii wake na mugunda" (Elders, let curses be upon him who disobeys Kiama's decision; let curses lie upon his homestead and his field)."¹⁵ The elders answered in chorus; "Let curses be upon him and his homestead and fields.'

The plaintiff was called upon to state his case. He was supposed to give all the details of the criminal act. The presiding elder would demand for explanation and clarification until everybody present was well-acquainted with the facts.

During the trials, there was no production of written documents since these did not exist. The two disputing parties, had to tell nothing but the truth and that was why there was the idea of curse. The plaintiff handed twigs to the elders as a record of his statement and as notes of reference. "At the end of each concrete statement of a complaint or claim, he handed over to the elders one twig."¹⁶

The defendant was then called upon to defend himself or to plead guilty. "He stated his case and handed over the twigs which were held by another elder."¹⁷

When the two had finished making their statements, the case was open for discussion. Cagnolo observes the remarkable calm and quietness that prevailed, "a person after another is given a chance to speak calmly and quietly without any sign of anger which would in the long run weaken his case or make his case unconditionally disapproved or unacceptable."¹⁸ Anger and hot temper were considered hindrances to justice."¹⁹

During the trial, the elders demanded from the two contending parties the slaughtering of a goat so that they could give a judgement. Without this, the elders would refuse to give a judgement.

After reviewing the case before them and after cross-examining and counter-examining the witnesses, the elders appointed a committee of 'ndundu ya athuri' to give judgement. These retired alone to a secluded place where no one could hear them. There, they could discuss and evaluate the evidence given, before they could finally decide on a judgement to be delivered. The judgement was expected to be proper and impartial. The 'ndundu' returned to the council with the twigs arranged in accordance to the decision made. These were handed over to the presiding elder who announced the decision.

The disputing parties were called before the elders and asked whether they agreed with the judgement. "If they did, then all the elders stood up beating their staves together ... reciting some ritual words, indicating that the case was settled for good. Two of the senior elders were then appointed to see that the judgement was carried out."²⁰

The guilty party could be asked to produce a fine which had to be paid to the winning party. "The winning party paid the elders as compensation three large gourdfuls of beer, four gourdfuls of millet porridge and three measures of other cooked food."²¹

One time or another the offender could deliberately refuse to pay the fine. Since there did not exist policemen who would arrest him, the elders looked for a person and instructed him to remove from the guilty party what had been stipulated. In such a case, the 'victim' would not dare seek for redress. The person who has accomplished the task of 'stealing' from the forfeiter of the fine would be rewarded with a goat.

As we have seen above, in the Gikuyu country, no known registrar or originator of any legal code existed in the history of the Kikuyu. The Kikuyu's legal

disposition was closely tied to their way of life, their religious beliefs and superstition which were passed from generation to generation.

There was "no special courthouses, but there were several recognised meeting places (kiharo) where the 'Kiama' or the council of elders met in the open under a tree."²²

According to Cagnolo, "trials take place anywhere : under a tree, in the square where dances are usually held, at a cross road, even at the accuser's or plaintiff's home."²³

There were no special judges as all the recognised elders had a right to speak and give judgement on a given case. Professional advocates were non-existent. The accused and plaintiff's display of their skills determined the judgements to be given. The proceedings were communal. All the big cases and other matters of societal importance were settled in the 'Kiharo'.

The majority of cases before the elders involved cases of debts resulting from transactions of sheep and goats or cattle which were exchanged in buying land or paying marriage insurance (ruracio). There were also a few criminal cases, such as murder (which was rare) theft, trespass, assault and witchcraft.²⁴

In a case of unsuccessful marriage, for example, if a woman deserted her husband without a good reason, "the husband was entitled to claim the return of all the animals and the offsprings thereof ..." ²⁵ If a man wanted to recover a debt, he brewed sugarcane beer and took it to the debtor. Presenting the beer to the debtor was a sign of reminder, as a sign of friendship and the wish to settle the matter peacefully. In this way, the debtor was expected to be moved by the friendly approach and perhaps make full settlement of the debt or promise to pay it in instalment. An elder accompanied the indebted man. If the debt was not settled after three visits by the indebted man, the creditor had full right to take the matter before the 'Kiama' because he had tried to persuade the debtor to settle the matter mutually but he failed. Before a matter could be taken to a Kiama, there preceded cautions, warnings and friendly visits.

When the case was taken before the 'Kiama', the two parties had to pay fees in kind; sheep and male goats. In big cases such as the one that involved inheritance or land, a bull was paid. The fees paid depended on the number of animals connected with the case.²⁶

The two contesting parties stated their case to the assembly of elders. "Among the judges, 'athamaki' two elders were appointed to conduct the proceeding on behalf of the whole council."²⁷ Any member of the council had the right to interfere and ask questions or make statements. After all, when the evidences from both sides was heard before the assembly, the case was open for discussion. Any one was free to air his opinion.

"Before the committee retired to consider the case, the ceremonial elder stood and uttered curses on any one who might try to force wrong judgement through the influence of bribery and corruption."²⁸ The curse acted as check against the evils of bribery and corruption which could pervert justice.

After the presentation, "the committee of 'ndundu ya athamaki' retired alone to discuss the matter in private."²⁹ Meanwhile, the animals given as court fees were slaughtered and meat roasted. The galls of the animals were taken out and handed over to the 'ndundu ya athamaki' and using a stick from a shrub called 'mogere' the galls were broken. While doing this, the elders said 'let evil be upon him who disobeys our decision, may his galls be broken in the same way as we have broken these of the animals.'³⁰

After concluding the discussion, the roasted meat, was distributed according to the ranks of the 'kiama'. The presiding elder stood and invoked poverty, sickness and calamity upon anyone who disobeyed the judgement of the elders. After the judgement is given, two elders ensured that the judgement was carried out.

If, however, one of the parties could not agree with the 'Kiama's' decision, he was given an opportunity to appeal and his case heard again.

It was not unusual for a suspected person to deny having committed a crime. "To judge who was the offender, the Kikuyu resorted to use of oaths."³¹

In the Gikuyu society, oath or ordeal was the most important factor controlling the court procedures.

3.5 Justification of Oaths

Oaths served four purposes:

1. The fear of it prevented people from giving false evidences,
2. It helped to bring the offenders to justice through guilty conscience and confession,
3. It ruled out bribery and corruption,
4. It ensured impartial and unbiased judgment.³²

If the suspected thief continued to deny having stolen, there was need for a proposal for the accuser and the accused to 'Kinyua muma' or to take an oath; to submit to the judgement of God from which it would be discovered if the accused is really a thief or the plaintiff a liar.³³

Sometimes two people could argue their case and no sufficient evidence could justify a verdict. This made it necessary to appeal to the judgement of God. In this instance, the ordeal was by fire.

In such a case, a sorcerer would bring glowing charcoal on the scene and laying a knife blade on the fire, heats the steel until it is red hot. Starting with the accused the contending parties say, "if I have not spoken the truth, may God's judgement expose me!" The red hot blade is passed over their tongues and hissing pain would be shown. Each one is then ordered to chew a piece of sugarcane and then spit out the juice. The one who spitted out blood with his saliva was judged to be the guilty party.³⁴

Another method of punishment by fire was where the two parties were ordered to cover a distance of about a hundred yards carrying glowing coals which they were allowed to pass from one hand to the other. The one who was seen unable to reach his goal without yielding to the burns was seen as guilty since "an innocent man could not be harmed by the fire."³⁵

A person accused of bewitching another had to prove his innocence by submitting to the judgement of God. A goat had to be produced to the elders and the accused had to strike its head saying, "may my head be struck off if I be guilty of what I am accused of." If such an oath is thus made, no one has any further doubts as to his innocence.

There was an oath or 'numa' which was generally taken on minor disputes. "The symbol of the oath consisted of a lamb which was killed and the content of the stomach mixed with herbs, water and a little blood from the animal. The compound was put into a wild banana leaf (icoya ria ihendu) and then placed in small hole dug in the ground. The medicine man (mundu mugo) tied a brush of twigs and leaves from a ceremonial shrub called 'mogere'. Then the party concerned in the case knelt down towards the hole. The 'mundu mugo' dipped the brush into the mixture and lifted it to the mouth of the kneeling man who took an oath by licking the brush saying ; "if I tell a lie, let this symbol of truth kill me. If the property I am now claiming is not mine, let this symbol of truth kill me."³⁶

There was another oath of "kuringa thenge" (to answer by killing a male goat). This was administered in cases involving a lot of property and involving more than two people. In this case a small male goat was brought before the kiama and the contesting parties were asked to take the oath by breaking the limbs of the animal which was spread on a rock in a lonely and uncultivated field. A ceremonial stone called 'ingange' was handed in turn to each individual who proceeded to break the bone of the goat saying, "if the property I am claiming is not mine, let my limbs be smashed to smitherness like the bones of this male goat. If I am claiming more than what is due to me, let my family group be crushed like the bones of this male goat."³⁷

There was another very serious form of oath called 'gethathi'. This involves cases of murder or theft. "Gethathi was a shapeless greyish object, perforated with seven holes in a line ... an object of horror for a Kikuyu-argue, the hundred eye-devil-who not only discovers the most hidden mysteries of falsehoods but punishes the liar with death."³⁸

The object was put on a small stick which was planted on the ground. The place must be a barren ground not likely to be cultivated, for nobody would allow the ceremony to be performed in or near his cultivation. It was feared that the evil of the oath symbol might spread to the cultivated crop and destroy it.³⁹

The accused or the one partaking of the oath was given two sticks from the tree called 'mogere' by the sorcerer with which he penetrates into the holes after having broken them into pieces declaring, "if I have spoken falsely let the gethathi strike me at this moment"⁴⁰ while this was taking place, the elders put a piece of creeper (mukengeria) on their ears to protect themselves against the evil symbol of the oath. Women were not considered fit mentally and bodily to stand the ordeal which involved not only the individual going through it but the whole family group.

Those spectating held their breath as they were convinced that if the man was guilty, he would be struck dead. People waited for nine seasons for the punishment to take effect. Should one die, in the course of the time, he was deemed as the guilty party.

In case of a land dispute, an oath was also administered so that the rightful owner of the land would be determined. The claimants took before the elders of the tribunal, a goat. A pinch of earth is dipped into the water and then blood is added. Then the claimant swallowed the mixture saying, "may I be struck down by the judgement of God, if this land is not mine or did not belong to my ancestors."⁴¹ If both parties took the oath, the land was divided equally between them. Should one die before nine seasons were over, it was believed that he had sworn falsely and the survivor became the sole owner of the land.⁴²

Redress for insults or using bad words or abusive language was settled out of court. The rationale for this was that no man of dignity would take another to court for an insult. This would show that people were able to settle minor offences themselves. It would display immaturity, cowardice and inadequacy should one take another to court for insults. A man was considered responsible and capable of taking care of his dignity and seeing that he was not abused. The proper way of dealing with

such a problem was through duelling or fencing. If a man insulted another, an apology was asked and made by paying a small tribute of banana or calabash of beer or gruel to the age group of the insulted man.

If this was refused, he was asked to be ready for a duel. There and then, the two men in the presence of their friends settled the quarrel by duelling. After this, the two men shook hands and became friends again.⁴³

In this section, we have seen the various ways in which the Kikuyu society attempted to deal with wrong doing.

In summary, this included use of warnings, cautions, cursing, oathing and fining in terms of animals.

According to Cagnolo, "the Kikuyu code has wide range of sanctions which extended from a simple warning to the death penalty. The criminal and the minor offender are under the responsibility of the clan. It is therefore a matter of course that when a lunatic, kleptomaniac, or evil disposed fellow disturbs the public peace, his clan is the first to take preventive measures. They will warn him three or four times, but if these warnings prove useless, they resort to more solemn public action in the hope that he may abandon his evil course."⁴⁴

The whole clan would meet and the head would declare that the man concerned would be deprived of the right to appeal to the tribunal in case he suffered. He was prohibited from taking part in dances, drinking beer and could not be invited to take food. These measures aimed at stopping him from committing crimes and amend his conduct.

Should he not stop his behaviour, the clan would meet again for "gwithamba" i.e. disclaiming him as a member of their clan."⁴⁵

During this time, an ox would be slaughtered to be eaten by the elders and other members of the clan and a goat to conform with a kind of oath that is to be published. The head of the clan then declared, "we have tried all possible means to induce this fellow member to amend his conduct and has not done so, nor does there appear any hope that he will do in future. Now therefore, we intend to disclaim him

and in future, we shall accept no further responsibility for his deeds.⁴⁶ If he did a further crime, he would be expelled from the clan.

Fighting, duels, causing bloodshed and insult to elders were punished by a fine of a goat which was used as a sacrifice of purification.

Negligence of duty was also punished. According to Kinoti, a "husband could justifiably beat his wife for neglecting her duty to feed him."⁴⁷ A wife could also be punished by her husband for taking snuff."⁴⁸ A child could be punished either by his parents or the owner of the crops should she or he allow goats to graze on people's crops.⁴⁹

Any kind of disobedience was also punished. It was punished because of the implied defiance of authority vested in the parents, the husband, the clan or age groups over the individual.

A father could punish his son if he found the latter taking beer without his consent. "As a rule, a son did not start drinking beer until his father gave his permission to. A father who found his son drinking prior to obtaining permission stopped drinking beer himself to express his anger. A father's anger was enough punishment to a son. If he wanted his father to drink again, he would have to placate him by giving him a he-goat or ram. This was a token of repentance. He would also promise to stop drinking."⁵⁰

In case of personal injury, i.e., any bodily hurt or cut without loss of limbs was not considered a serious crime since sometimes in the course of settling a dispute, fighting or duelling would cause such injury. "In case of loss of limb or part of it, there was a payment or compensation fixed for each limb. For example, loss of finger was compensated by ten sheep or goats. For loss of a hand or arm, thirty sheep or goats. For one ear, ten sheep or goats. For a tooth, one sheep or goat."⁵¹

The punishment for adultery or rape was that the man paid a fine of three fat rams to the 'kiama' and nine sheep or goats to the husband or parents.⁵² According to Cagnolo, adultery with violence was fined ten goats. For an attempted rape, the penalty was three goats.⁵³

Irresponsible behaviour that ended in pregnancy outside marriage was punished. When the girl was discovered by her parents and relatives to be pregnant, several names were mentioned, implicating the culprit without saying openly who the culprit could be for in such circumstances, the girl was expected to maintain absolute silence. As the time of delivery neared, which, as she was warned, could be fatal for her, her parents pressurised her to mention the culprit. The parents had to know whom they were to sermon before the elders. With threats and the impending ordeal, the girl mentions the man's name at last.

The victim was given options. He could either marry the girl or he had to pay her father ten goats or sheep. He could also prove his innocence by taking an oath. In the latter case, he took a goat to the elders' tribunal. The goat's heart is removed and a portion roasted and the girl's private parts touched with it. The strip of skin which is used as an "under-apron" by the girl, "an unimaginably filthy thing is washed." To protect his innocence, the lad must consume the defiled portion of meat and drink this disgusting water, saying in the meantime the words : "If I be responsible in this matter, may the judgement of God strike me down." People waited for seven days for the oath to take effect. If no catastrophe occurred, he was declared innocent.⁵⁴

If the man agreed he was responsible and did not want to marry the girl, he was ordered to pay ten goats or sheep as compensation. Both partners to the misdeed suffered disrepute but the girl especially was subjected to a great deal of humiliation as her value was lowered at marriage. The matter was more serious if the two belonged to clans which did not intermarry. They were seen as having defied authority on the matter.⁵⁵

Rapists and adulterers could sometimes be ostracised. "The stigma attached to ostracism was far greater and very much worse than that attached to the European form of imprisonment. Many Gikuyu would prefer to go to jail rather than to be ostracised. The fear of this was one of the factors which prevented people from committing crimes."⁵⁶

An unfaithful wife was returned to her father and could no longer be acknowledged by her husband until her father or a family representative paid a penalty of a bull.⁵⁷

Traditional society also punished ungenerous tendencies according to Kinoti. These included stinginess, selfishness and self-isolation. These tendencies were interpreted as undermining the unity which was expected to exist between members of the society. If an elder was stingy and did not offer other elders proper hospitality when they paid him a visit, he was punished by his agemates. He was ordered to slaughter a ram or a bull (ngoima).⁵⁸

If an "elder did not call his clansmen to share in the meat of the sacrificial ram (ngoima) that sealed his daughter's marriage", this was regarded as a serious matter.⁵⁹ By doing this he showed as if he could manage all affairs on his own so he was ostracised. Due to this physical and psychological isolation, the elder would plead for reacceptance. Before they accepted him back, he was ordered to slaughter a bull and a sacrificial ram (ngoima na ndurume ya horio).⁶⁰

In case of murder, theft and poisoning, the laws were particularly severe. In traditional society, a thief was punished because he took "without being given."⁶¹ He took or deprived another person what he rightfully possessed. Punishment for theft therefore was severe.

According to Kinoti, "among the acts of destruction, arson was a serious crime because when a hut had been burnt down, it took time to replace the stock which had been destroyed. It was specially considered unreasonable for a man to set a hut on fire simply because he had quarrelled with his wife or son."⁶²

Punishment aimed at getting compensation for the individual or the group against whom the crime was committed. With the absence of imprisonment, the offenders were punished by being made to pay heavy fines to the 'Kiama' as compensation for the wrong done.

3.6 Punishment for Murder

Murder and manslaughter were treated in the same way, for the 'kiama' was not chiefly concerned with the motive of the crime or the way in which the crime was committed, but with the fact that one man had taken another man's life.⁶³ Murder was a serious crime because it deprived a person of his life in an irreversible manner. No individual could ever be replaced.⁶⁴ Premeditated murders were very rare among the Gikuyu, for it was a crime against society for a man to strike another without warning him, unless he was a foreign enemy.⁶⁵ To ambush a victim was especially condemned because it gave him no chance to defend himself. Murder was also heavily compensated. Some people killed through administering poison or through bewitching. Criminals who destroyed life in such callous manner were themselves purged away from society. They were ritually killed. Of the crimes of murder, genocide was considered the most terrible. Killing a man, his wife and his children was regarded as destruction of a seed (Mbeu) or a species (kiruka).⁶⁶

According to Cagnolo, a murderer was pursued until he was caught. His relatives were also held jointly with him as equally responsible so all efforts were made to arrest him. If caught, the elders would immediately apply the laws of retaliation and kill him and this settled the case there and then for the two lives were considered equal. In some cases, the elders demanded the penalty set in the tradition which was one hundred sheep or goats or ten cows. They must also deliver a girl who by bearing children will replace the murdered man. A large goat must also be forthcoming for the burial of the dead.⁶⁷

If a man killed another in cold blood, the murderer was treated with the greatest contempt, because not only had he disgraced himself but also his age-group. Should one die in the course of a fight, the murderer in such a case had the sympathy and respect of the community because he "acted in a manly fashion and in self-defence." For this reason, he was treated leniently.⁶⁸ In some cases, the family group of a murdered person invaded the cultivated fields for the murderer's family group.

According to Kenyatta, universal rules were made fixing the amount payable as compensation for loss of life according to sex. If a man wounded another seriously, he was asked to provide a male goat, which was killed to supply nourishment for the wounded man. If sooner or later, he died, the man was charged with murder because the provision of a male goat was considered as pleading guilty to the charge.⁷⁰

The compensation for loss of life of a man was fixed at one hundred sheep or goats or ten cows. For a woman's life, thirty sheep or goats or three cows. There was inequality of sex in the Gikuyu society which was responsible for the great difference between the value of a man's life and that of a woman. Regarding the issue of compensation, the difference was even more pronounced. The Gikuyu conception of value of life was according to the services which the man or woman would have rendered to his family group in his or her lifetime.⁷¹

3.7 Punishment for Theft

Robbery with violence was punished severely, especially if one was caught in the act. Immediately after being caught, his hands and feet were bound and the culprit confined in a hut. To get release, his relatives and friends had to pay seven times the items stolen. The fines were fixed according to the article or the animal the thief had taken. If a man had stolen a sheep, he was required to return the original sheep with another to purify it. If the stolen sheep was killed and eaten, the crime became serious and the thief, with all those who participated in eating the meat, were fined ten sheep or goats each. If a man has stolen honey from another man's beehive, the fines were thirty sheep or goats.

If a man found a thief stealing his property, he had a right to take the law in his own hands and beat the thief to his satisfaction and then bring him before the kiama to be fined.⁷²

A habitual thief was looked upon as a public danger and was put to death publicly. The council of elders held a meeting and after a lively discussion, they sentenced him to death. The sentence was always carried out in a cruel, savage and inhuman manner according to Cagnolo. "The culprit is usually crucified on a hill, his

limbs fastened to the ground by wooden folks across his ankles and wrists. A large folk prevents all movements of his head. There, he will lie tortured by the glare of the sun. At night, the hyenas will finish off the remains.⁷³

A thief could also be stoned to death. He could be fasted to a tree and the crowd hurled stones and rocks at him. He would also be drowned. He is bound hand and foot then flung into a deep river. Bows and arrows were kept ready in case he attempted to escape.⁷⁴

Another method was through burning. This punishment was also meted for witches or wizards. According to Cagnolo, "perhaps the most terrible torture reserved for thieves is to be burnt alive. The thief is bound inside a bundle of dried banana leaves. A solid ring of spears makes the death circle more secure. A member of his clan is called upon to set fire to the bundle and for a few minutes, there is an inferno of flames and screams. Meanwhile, the whole clan howl like a pack of hungry hyenas."⁷⁵

However, Cagnolo says that such executions were very rare. The measures taken to protect property from thieves were absolutely adequate. "So certain are they that terror of such condign (severe and well deserved) punishment is more effective than any police measure."⁷⁶

3.8 Punishment for other offences

poisoning through food or witchcraft or sorcery was brought to summary justice and torture. The witches were well known in the society. Before one was punished, he was warned several time to stop his evil ways. If he refused to hear, he was arrested and brought to the 'kiama' by members of his clan. He was wrapped with dry banana leaves (magayu) then fire was lit. He was then let free. He was surrounded by the people. He had no choice but to die. He could not escape.

Another method of killing him was through putting his head through the Kikuyu basket called 'kiondo.' His hands were tied at the back. He was then thrown into the hut which is then locked. The hut had to be put on fire. While inside, he confessed all the evils he had done such as the number of beautiful girls that he had

killed, the number of men who were good warriors and the innocent children whose death he had caused.

Another method was through enclosing him inside a beehive and then he was rolled down the highest hill such as Kiamucheru hill of Magutu location, Nyeri District. By the time the beehive reached the foot, he was dead.

According to Cagnolo, a prisoner could be allowed to take an oath to prove his innocence. "A ceremony is then performed, very dreadful for Kikuyu if one considers the fright and horror with which they regard a corpse ... the accused brings with him two goats which were killed at the outset for the ceremony. He smears his forehead and that of the corpse with that of goat. He then strides seven times over the corpse and finally stoops down his head like the ancient prophet, blows its nostrils saying "If I have poisoned this man, may I be struck dead by the judgement of God."⁷⁷

If nothing befell him after seven days, he was acknowledged as innocent. He then went to look for a witch-doctor for the sacrifice or purification as a self-respecting person.

3.9 A Critical Analysis of Punishment in Traditional Kikuyu Society

It is evident from this chapter that there were many behaviours that were unacceptable in the society. These were regarded as offences and were heavily punished. These included theft, murder, adultery, rape, lying, damage to property etc.. Various methods of punishment were employed to curb these crimes. These included paying of fines in form of animals, ostracism, corporal punishment and the death penalty.

It is very clear that before any punishment was meted against an offender, there preceded warnings, cautions, threats and friendly visits to ensure that the culprit changed his ways. It is after he has failed to reform that punishment was employed. Elders had to arbitrate in the cases. To arrive at any conclusion, both parties had to be heard. Each was given a fair hearing. Clear evidence had to be produced before the case was determined.

Attempts were also made to have the disputing parties to agree and this was done to prevent hostility between the families concerned and also to avoid revenge. The family unity had to be maintained rather than broken.

When determining the case, God's name was invoked. God was seen as all-powerful, all-seeing, all-hearing and just. He was seen as one who listened and was present during the hearing. The ancestral spirits were also invoked. These were the spirits of the family members who had long died but were believed to be present. They were believed to be the living dead that is, they were dead but also alive at the same time. If the living did what was wrong, the ancestors were said to get angry and did harm to the society. The living, then had to do good to please them. God, and the ancestral spirits, therefore were believed to approve cases.

Curses were uttered to befall on those who disobeyed the decisions made by the elders. This ensured that, the elders had to be obeyed. The 'Kiama' was the supreme body of the society and disobedience showed defiance to the 'Kiama's' authority which did not augur well with the society's harmony, peace, unity, order and well being.

Animals such as goats, sheep, bulls and lambs were slaughtered and given to the elders in the course of the settling a dispute. This was not an easy task and the disputing parties had to show appreciation for the work done by the elders.

Sometimes, animals were slaughtered and shared among the disputing parties and those listening to the case. This aimed at restoring friendship that had been destroyed.

The offenders had to pay fines in form of animals. They had to compensate for their misbehaviour. Animals and even food like millet and porridge was demanded. The society demanded what was available in the society. These were the resources that people had. This made it easy for the offenders since many of them could afford. However, sometimes the offender did not have these animals and had to labour in order to get these animals hence the offender had to feel a pinch in paying a fine.

Most of the methods of punishment aimed at restoring equilibrium and harmony in the society. The case in point, for example is where a wife deserted a husband. The husband was entitled to his dowry and his children. This was very embarrassing to the wife and her family. This was a way of discouraging divorce. This ensured that married couples lived mutually well and settled their problems amicably without having the wife desert her husband.

The ordeal by fire ensured that nothing but the truth was told during the case. A case in point is where it was not easy for the elders to determine who was telling the truth or where there was insufficient evidence. The disputing parties had their tongues burnt and then had to chew a piece of sugarcane. This was the culturally accepted method of verifying the truth. It could be that from past experiences, this often revealed who told lies, that is, one who spitted out blood was the guilty one. This custom then had to be followed any time such an incident accrued.

However, this method was very harsh and very painful. This discouraged lying. Anyone who knew that he was not telling the truth would not have agreed to subject himself to such an ordeal because he thought he could be discovered. The innocent could have accepted to subject themselves to such ordeals thinking that God would help prove their innocence by not spitting blood.

More often than not, this was not the case. The innocent were likely to get punished or to be seen as guilty while the guilty went scot free. This method was therefore, not just since it was not always correct but probable.

However, the method deterred other potential liars. It therefore discouraged telling lies.

The methods of punishment employed in the Kikuyu community show that the level of development was low. The methods used were the culturally accepted ones and went hand in hand with the level of development. Since there were no courts to determine who was guilty, these harsh methods had to be used. However, these methods are employed in modern society. Harsh methods such as torture to get confessions from suspects have more often than not been employed. Innocent people

have also suffered instead of the guilty ones. There are several cases where miscarriage of justice has been reported.

Crimes such as theft, adultery, rape and murder were specifically harshly treated. These were crimes against property and life. They caused irreparable loss to the society hence had to be severely punished. Sorcery was also severely punished because it was tantamount to murder. These crimes had to be eradicated from the society, since they threatened the societal peace, unity, harmony solidarity and well-being of the society. These crimes destroyed relationships hence harsh methods had to be employed. The culprits had to undergo very difficult ordeals to prove their innocence and wish for death incase they were guilty. Bitter mixtures, for example of blood and herbs, had to be licked to show ones innocence and a witchdoctor had to be involved sometimes. This shows the seriousness of committing offences in the society. More often than not, the guilty party died after taking the oath and this prevented commission of crimes. The innocent could also die. Use of the ugly objects really scared those about to take an oath. Any guilty party would not agree to partake such an oath because it led to death. It could be that those who had partaken before had died. This really discouraged theft and murder. The society believed that anyone who partook an oath when guilty would definitely die and this was the only way of ascertaining truth. No guilty person, therefore, would dare take an oath. Only the innocent partook and could also end up dying despite their innocence.

Negligence of duty was also punished for example, wife beating. This prevented the wife from being unfaithful. A wife had a duty to feed her husband and if she failed, the husband could use this as an excuse to commit adultery with another woman who fed him. A woman who took snuff could easily commit adultery if she was the type who borrowed snuff from the neighbours. This punishment ensured that the marital bond remained intact though sometimes the punishment did not prevent adultery.

In case of personal injury, there was fining in terms of animals. Money was not there hence the available resources, animals had to be used. Despite the animals

being paid, the damage had already been done so the animals did not replace or compensate the organs damaged. The victim, however, had been incapacitated by loss of hand, ear, foot etc. hence something had to be done about it. The loss of an ear was compensated with ten sheep or goats while for the loss of a tooth was one sheep or goat. Payment of animals discouraged people from fighting or assault one another because sometimes these animals were not always easy to come by.

Rape and adultery with violence were also punished with paying fines, in form of animals. This was a very lenient form of punishment. Rape and any other violent activity has very negative effects on the victim. This calls for very harsh punishment since it leads to physical damage and life-long psychological trauma. This needs to be harshly treated.

The Kikuyu community had a tradition that spelt what was crime and what punishment was to be employed. Punishment mainly aimed at compensation where the culprit had to pay heavily in form of animals for the offence committed. It also aimed at reconciliation where the disputing parties had to come into a mutual friendship exemplified by shaking hands after a fight. Those who committed crimes like adultery, rape and murder were harshly punished. The society had to be deterred from committing such crimes in future. Such criminals could be killed by drowning, burning etc. Through ostracism, expulsion and execution, the society was protected. These methods of punishment, therefore, could be morally justified in so far as they adhered to the traditions. However, these methods were too harsh and did not adhere to ethical principles. Punishing an offender to death through stoning, burning, drowning etc. is tantamount to committing murder. Two wrongs do not make a right.

All methods of punishment in the Kikuyu society aimed at making the people good and hospitable members of the society.

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CHAPTER 4

THE RATIONALE OF PUNISHMENT IN TRADITIONAL AFRICAN SOCIETY

In the first section of this chapter, we shall examine the ethical theories which help determine the rightness and wrongness of human conduct. These include:

1. Traditionalism
2. Utilitarianism (a) Act - utilitarianism
(b) Rule - utilitarianism
(c) General utilitarianism
3. Egoism (a) Ethical egoism
(b) Psychological egoism
4. Ethical relativism
5. Divine common theory
6. Categorical imperative theory

In the second section, attempt is made at analysing the methods used in Kikuyu society to rectify the wrongs hence showing their rationale. The third section examines the general purposes of punishment in relation to these ethical theories.

4.1 The Ethical Theories

In order to be able to evaluate whether the methods used for punishment can be morally justified or not, there is need to examine the various propounded ethical theories. These ethical theories are used in this thesis as a guide in determining whether the methods used in punishment can be said to be morally justified or not.

The question of punishment is an ethical issue. Basically, ethics is concerned with the question of right and wrong. Ethics is concerned with the question regarding human relationship, that is, how people ought to behave among themselves.

"Ethics is concerned with the question or the criterion of right and wrong, or the nature of the supreme good for persons in society."¹

According to A.O. Mojola, "a study of ethics is interested in, or is concerned with finding out the 'necessary' and 'sufficient' conditions for 'obligatoriness', 'forbiddenness' or 'permittedness'. Given such conditions one would be able to determine the rightness or wrongness of actions. This is the criterion of morality."²

When looking at punishment we are looking at the question of morality. The crucial question in this thesis is whether the methods we use for punishment can be said to be morally justified or not. The answer to this question would help in presupposing some criterion for the morality of the methods used in punishment. Further, we can try to find out whether this criterion for methods of punishment can in itself be said to be justified.

There are various ethical theories that have been propounded. These will include ethical egoism, traditionalism, relativism, categorical imperative, divine theory and utilitarianism.

4.1.1. Traditionalism as the Basis of Morality

There are people who base the argument about the rightness and wrongness of an action on the traditional past. For them the basis for punishment should be found by reference to the past. If it emanates from the traditions, then it must be right. Such people see the old ways as always good and full of wisdom.

We must question this basis as the determinant of rightness or wrongness of any action. The question must be asked whether the old ways, the traditions of the elders are right just because they are ancient or because they contain a criterion valid in its own right. Why should age in itself constitute a criterion of morality?³

Moral philosophers and other reasonable individuals are critical of such basis. Looking at the standard of rules of traditional society, a lot of questions are raised. First and foremost, "the actual rules of society are never very precise, always admit of exceptions and may come into conflict with one another. For example, the traditional rules forbid lying and killing but do not define these terms very clearly. In fact the rules even permit or excuse certain kinds of lying (white lies, patriotic lies) and certain

kinds of killing (capital punishment, wars) but they do not have these exceptions built into them in any careful way."⁴

4.1.2 Utilitarian Theory

Utilitarian theory is concerned with the outcome of an action. It is a teleological theory. It is a consequentialist theory because it concerns itself with the consequences of an action. It is concerned with the general welfare or the common good.

Utilitarianism has generally been popularised as supporting the principle of "The greatest happiness of the greatest number" as foundational in ethical decision making.

Bentham Jeremy was the founder of the utilitarian theory. Bentham found that this "utilitarian principle was at the root of all systems of religion and morality; that all codes of law were more or less founded upon it and that it was, in all places and at all times, an unseen and unacknowledged guide to human action."³ The proper ends of action should be "the good of the community," "the interest of the public," "the welfare of mankind."

Bentham showed that when the greatest happiness of mankind is lost sight of, in pursuit of more immediate ends, there is no check to aberration of human action.

Utilitarianism as a theory of ethics, "provides a criterion for distinguishing between right and wrong action."⁴

In its standard form it can be expressed as the combination of two principles:

- a) The consequentialist principle, that the rightness and wrongness of an action is determined by the goodness or badness of the result that flows from it and
- b) the hedonist principle that the only thing that is good in itself is pleasure and the only thing that is bad is pain.

Given this assumption, the doctrine can be expressed in the form of a single principle, the greatest happiness principle: the rightness of an action is determined by its contribution to the happiness of everyone affected by it."⁵

This formular is an account of what Bentham and John Stuart Mill held to be their fundamental doctrine. Bentham says,

"By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question"⁶

He continues to say, "Action then may also be conformable to the principle of utility, when the tendency it has to augment the happiness of the community is greater than it has to diminish it."⁷

John Stuart Mill 1806 - 1873

Utilitarianism as a doctrine was defined by J.S. Mill as "The creed which accepts as the foundation of morals, utility, or the greatest happiness principle; holds that actions are right in proportion as they tend to produce happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure and the absence of pain, by unhappiness pain and the privation of pleasure."⁸

Quinton makes a distinction between a morally obligatory action and morally permissible one. "An obligatory action is the right to do in the circumstances, the thing one ought to do, anything other than which it would be wrong not to do.

A permissible action, on the other hand, is one which it is all right thing to do but which is not required. An obligatory action is something it would be wrong not to do, permissible action is one it would be not wrong to do."⁹

According to Bentham, an action that deviates from the general happiness is wrong and ought not to be done. While any action that is all right or permissible, but is not something that ought to be done, it is something obligatory.

Three Types of Utilitarianism

There are act-utilitarianism, rule-utilitarianism, and general utilitarianism.

a) **Act - Utilitarianism** : This is the view that the rightness and wrongness of an action is to be judged by the consequences whether good or bad, of

that action itself. The assumption here is that under different circumstances, a different action may be right.

According to Mojola, an example is given when on one occasion, telling the truth may be the action that maximises general welfare and on another occasion, telling lies may be that action that does it. For the act-utilitarian, there are no general rules which are applicable to all relevant situations. It is a question of a particular action for a particular situation. Rules for all situations are not admissible.¹⁰

b) **Rule Utilitarianism** : Is the view that the rightness or wrongness of an action is to be judged by the goodness or badness of the consequences of a rule, and that such a rule should be followed by everyone performing the action in similar circumstances. Acting in accordance to such a rule maximises general welfare."¹¹

According to Frankena, Act-utilitarian holds that in order to tell what is right or obligatory, one has to appeal directly to the principle of utility, i.e. by trying to see which of the actions open to him will or is likely to produce the greatest balance of good over evil in the universe.

We should consider, for example, whether telling the truth will always produce the greatest general good or not. It can never be right to act on the rule of telling the truth if we have good independent grounds for thinking that it would be for the greatest general good not to tell the truth in a particular case.¹²

This view has limitations. Pure Act-utilitarianism would not allow us to use any rules or generalisations from past experiences but would insist that each and every time we calculate anew the effects of all the actions open to us on the general welfare. This is impracticable; hence we have to have rules of some kind. Hence we can say that Act-utilitarianism is unsatisfactory. We cannot enumerate the effects of each and every action that we do.

Frankena gives the Butler-Rose argument where in a certain situation there might be two acts, (a) and (b), such that, when their scores are counted, the results are as follows: (a) is conducive to a slightly larger balance of good over evil than (b); (a) may involve breaking a promise, telling a lie, or being unjust.

Act-utilitarianism must say A is unjust and B is wrong. Hence Act-utilitarianism must be rejected.

There may be cases in which keeping promises and not lying must be followed even if doing so is not for the greatest general good in the particular situation in question.¹³

A good action may not necessarily have to produce the greatest good. A particular act may be made good by facts about it other than the amount of good or evil it produces. It may be wrong because it involves breaking a promise, a lie, or violating some rule.

Frankena quotes Ewing, where he contends that many actions that are generally regarded as wrong would be right on an Act-utilitarian view consistently applied, e.g., a poor man may steal from a rich man in order to feed his family or society may punish an innocent person to prevent panic or an employer decides not to pay his employee due to the fact that he has got better use for his money. The issue at question shows that an act may produce at least as great a balance of good over evil in general as alternative open to the agent and hence an Act-utilitarian must therefore judge it to be right. Ewing is quoted thus;

"It is indeed difficult to maintain that it cannot under any circumstances be right to lie, etc., on Act-utilitarian grounds, e.g., to save life but it seems to be pretty clear that Act-utilitarian principles, if logically carried out, would result in far more cheating, lying and unfair action than any good man would tolerate."¹⁴

Rule-utilitarians emphasise the centrality of rules in morality and insist that we are generally to tell what to do in particular situations by appealing to rules like that of telling the truth rather than asking what particular action will have the best consequences in the situation in question. We should always ask which rules will promote the greatest general good for everyone, i.e., the issue is not which action has the greatest utility but which rule has. Rules must be selected, maintained, revised and

replaced on the basis of their utility and not on any other basis. The rule itself must have utility in mind.

For the Rule-utilitarian, it may be right to obey a rule like telling the truth simply because it is so useful to have the rule, even when in the particular case in question, telling the truth does not lead to the best consequences. It is the rule that guides us on what is right. It may not be the most pleasant thing to do but the rules must be abided to, e.g., driving on the left when it would be more convenient to drive on the right.¹⁵

c) General Utilitarianism

It holds that one is not to ask in each situation which action has the best consequences (act-utilitarianism) and it does not talk about rules or, what rule one should follow. The question at issue should be, "what would happen if everyone were to do so and so in such cases?"

The idea behind general-utilitarianism is that if something is right for one person to do in a certain situation, then it is also right for anyone else who is similarly situated to do and hence that one cannot ask simply what effects one's proposed action will have in a particular case. One must ask what the consequences would be if everyone were to act likewise in such cases.

In Summary

1. An Act-utilitarianism will undoubtedly choose to perform the alternative actions that maximises general welfare. To the question, is stealing always wrong, at all time and in all places for everyone? The answer is, No. An act-utilitarian does not come armed with a bundle of rules such as "though shall not steal", etc., applicable to all people, at all time and in all places. He comes with only one rule "perform that alternative act which maximises general welfare." In the case of stealing, he will say that it all depends on the situation or circumstance. In some situations or contexts, stealing may be the right action and in others not as each situation and context is unique. Another may steal to preserve the life of the child. A ruler may permit his enemies to make certain advances if these are believed to make them more vulnerable

and hence render their complete annihilation possible even if such advances involve some deaths of his citizens.

The key factor is that in each situation or in each context, the action that ought to be performed will depend on, which one, will from a set of possible concrete actions relevant to the situation, will maximise general welfare. No general rule of action is absolute. All rules of action are relative and subservient to the general principle of promoting the general happiness of mankind. This is the idea of relativism.

According to Mojola, "utilitarianism could justify punishment of an innocent person if the consequences of such an action far outweighs the initial evil action. He gives an example where citizens in a certain country are menaced, harassed, killed and their property robbed by trained bandits whose efforts to arrest them had turned unfruitful. These bandits secretly support their families. Should their families be victimised in retaliation and made to suffer, the bandits would stop their activities. Mojola assumes that the punishment and victimisation of these innocent people will bear positive fruits. He asks then "would such activities of punishing innocent people be justified?"¹⁶

To the act-utilitarian, the action will be right, if the possible consequences outweigh the negative consequences; if out of all the possible courses of action available, this course of action minimises the positive interests of society.

According to this argument, the act-utilitarian could justify torturing innocent people with all manner of cruelty, in the name of some general good of society which outweighs all the evil committed in its name.¹⁷

2 The rule-utilitarian does not agree with the act-utilitarian's defence of the view that it may be right to kill innocent people, to torture one's enemies, to break promises and agreements, trampling on peoples rights in the name of maximising general welfare over evil. He will reject these acts since their general performance may be counter-productive and could lead to general insecurity and unhappiness. Rule-utilitarianism is based on rules which are believed to maximise utility, e.g., disciplining an irresponsible and rebellious child as this, according to experience will help him.

Mojola concludes that neither act-utilitarianism nor rule-utilitarianism are convincing or possible.

3 General-utilitarianism is based on problems arising out of the difficulty of measuring utility or happiness. There is no general measure for happiness or utility. Such a calculus is a myth, for people's conceptions and perceptions of utility or happiness are varied and cannot be reduced to such a common measure.

A more positive criterion, according to Mojola, could be based on the general objective of minimising visible and perceived suffering and misery in the community, such as suffering arising out of lack of food, lack of shelter and clothing, ignorance and repression.¹⁸

4.1.3. Egoism

1. Ethical Egoism

This is the ethics of what Butler calls, self-love and of what Freudians call, the ego.¹⁹ The ethical egoists' basic contention is that everybody ought to promote his own self-interest or his own good. Like utilitarianism, ethical egoism takes into serious account the consequences of any given act the agent performs. It is a consequentialist or teleological theory. Ethical egoism may conceive of the good in terms of pleasure, i.e., hedonism. Non-hedonistic egoism does not focus on pleasure, but on something else such as amassing wealth for its own sake or attaining personal peace at all costs. Ethical egoist is not necessarily incompatible with doing good to others. If the ethical egoist derives pleasure from doing good to others, he or she is bound to see that act in terms of the promotion of his or her self-interest. It is that action with a higher utility to the agent that ought to be performed. The ethical egoist therefore must consider all alternatives to a given act. He must look at the possible and likely consequences or outcomes of all possible alternatives.²⁰

According to this view, an act is morally right if and only if it has higher utility for the agent than any other set of alternatives the agent could have performed, i.e., it has maximal utility in terms of promotion of the agent's self-interest. In considering his self-interest, he needs to consider not just his immediate interest but this future

interests as well. He may not always opt for his immediate gratification if by differing gratification, he satisfies the condition of his criterion. In this way, ethical egoism is based on rational or enlightened self-interest. It is rational or enlightened in the sense that it is based on reason and justified on the basis of the information available to the decision-maker considering available or known alternatives.²¹

According to Frankena, the following are the tenets of the ethical egoist:

- a) that an individual's one and only basic obligation is to promote for himself the greatest possible balance of good over evil;
- b) even in making second and third person moral judgements, an individual should go by what is to his own advantage and
- c) in making such judgement, an individual should go by what is to the advantage of the person he is talking to or about.

Ethical egoism may hold, any theory of what is good and what is bad, or what the welfare of the individual consists in. Hedonists like Epicurus identified the good or welfare with happiness and happiness with pleasure. They may also identify the good or welfare with knowledge, power, self-relaxation or with what Plato called the mixed life of pleasure, knowledge and other good things.²²

An argument for ethical egoism holds that in fact humanity would be better off if everyone concentrated on promoting their own self-interest. It is argued that interference in the affairs of others in the name of assisting them has been the cause of many problems and suffering, e.g., colonisation in the third world was justified in the name of Christianity, civilisation and commerce. This colonisation brought much suffering, oppression, exploitation and dehumanisation of the colonised people. In view of this, everyone ought to act only in such a way as to promote their own interest or their own perceived good and not for the greater good of other people.

This argument is faulty as it is defended on the basis of utilitarianism. The principle of self-interest is justified because it promotes general welfare. Such an approach seems self-defeating because the fundamental criterion of ethical egoism then

turns out to be that of maximising general welfare. Hence, this argument fails to be an effective defence to ethical egoism against others.²³

2. Psychological Egoism

This argument, in support of egoism, says that people are made in such a way that they can only act to further their own interests. This argument is based on a theory of human nature. Since this is the way the people are, it is asking the impossible in demanding that everyone acts in terms of principle of unselfishness or of putting the interests of others first which, it is argued, they are incapable of fulfilling. This theory is interpreted to be based on the idea that people are programmed to act in certain ways. They cannot act contrary to the programme fed into them perhaps due to heredity or environmental factors or fates. This problem raises other philosophical problems such as those of determinism and free will.²⁴

Mojola quotes Moore G.E's fundamental criterion of ethical egoism;

"each man rationally has to hold; my own greatest happiness is the only good that there is, my own actions can only be good as means on so far as they help with this."²⁵

According to Mojola, it suffices to say that ethical egoism appears intuitively unsatisfactory and unconvincing. Many actions which involve sacrificing one's happiness and good on behalf of others may be considered morally right. Actions which merely aim at promoting one's own self interest at the expense of others are not praiseworthy. Such activities are negative as they exploit and treat people as objects.²⁶

4.1.4 Ethical Relativism

This argument holds that an action is right or wrong depending on the particular society, people or certain situations. An action may be right according to one person but may be wrong according to another. Different societies may hold certain actions to be right and desirable while others may view them as wrong.

4.1.5 The Divine Command Theory

This theory holds that the standard of right or wrong is the will of God or Law of God. Supporters of this view hold that an action or kind of action is right or wrong if and only if and because it is commanded or forbidden by God and nothing else. The rationale of the Christianity ethic is that it is commanded by God and that if we love Him, we are obliged to obey and follow his commandments. A Christian therefore has a moral obligation to do God's will since God's will is good and desirable.

Objectives to this theory is the question as to whether this God who is said to command, really does exist or is just a figment of man's imagination. How does God Command? Does He communicate with people? How is His will made known to people?

Another question arises on the moral autonomy of man. Man as a moral agent should not only have integrity but should act independently on the basis of the decisions arrived at by himself without undue external influence. The agent's actions and decisions are said to be autonomous and true reflection of the agent's own moral convictions and moral awareness and not a result of external pressure and influences. The objection to the divine command theory holds that acceptance of this theory involves making the believer to have total subservience and commitment to God and in fact total obedience to his commands. This role, according to Mojola, appears to conflict with the role of being an autonomous human moral agent. Hence, it is argued that this theory is set against concepts of human freedom, of human autonomy and self-determination.

But according to the Christians and other believers, God is the source of perfect freedom, fulfilment and satisfaction. The Christian ethic, rather than dehumanising man, liberates and humanises him.²⁷

4.1.6 Categorical Imperative Theory

For Emmanuel Kant, the basic principle of morality is the categorical imperative which says;

- a) Act only according to that maxim by which you can at the same time will that it should become a universal law.
- b) I should never act in such a way that I could not also will that my maxim should also be a universal law.
- c) Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.
- d) Always act according to that maxim whose universality as a law you can at the same time will. This is the only condition under which a will can never come into conflict with self and such an imperative is categorical.

Act only according to that maxim, by which you can at the same time will that it should become universal law. According to Kant, an act is right, if and only if the rule of action on which it is based is such that it can be consequently be universalised to apply to all people everywhere at all times.

According to Kant, it is wrong to take an action that one would not will to be a universal law such as breaking a promise, committing suicide, lying and other negative actions.

Kant gives illustrations of the above;

- a) Suicide - a sad and miserable man decides to commit suicide: "for to live for himself, I make it my principle to shorten my life when, by a longer duration it threatens more evil than satisfactory." According to this maxim, when one's life is full of suffering and evil and no good appears to be on the horizon, suicide, may be the right decision for him to end his suffering. Kant argues that such a principle of self-love cannot be consistently universalised thus:

"One immediately sees a contradiction in a system of nature whose law would be to destroy life by the feeling of those whose special office is to impel the improvement of life. In this case, it would not exist as nature, hence that maxim cannot

obtain as a law of nature, and thus, it wholly contradicts the supreme principle of all duty.

b) Lying - a man decided to borrow money knowing very well he will not refund it. Kant says lying can never hold as a universal law and still be consistent with itself; it would contradict itself. It cannot be universalised. "For the universality of law which says that anyone who is believed to be in need would promise what he is pleased with, with the intention of not fulfilling, would make the promise itself and the end to be accomplished by it impossible; no one would believe what was promised to him but would only laugh at such assertion as vain pretences."

c) Rusting talent - a man with a useful and valuable talent to himself and to the society finds himself in comfortable circumstances and prefers indulgence in pleasure to troubling himself with broadening and improving his fortunate gifts. This cannot be universalised, "for as a rational being, he should necessarily will that all his faculties should be developed in as much as they are given to him for all sorts of possible purposes."

d) Non-contribution to charity : a well off man, prosperous and rich is surrounded by people in great hardships and suffering and decides not to contribute in helping them. According to Kant, this action cannot be universalised. "For a will which resolves this would conflict with itself since instances can often arise in which he would need the love and sympathy of others and which he would have robbed himself, by such a law of nature springing his own will, of all hope of the aid he desires."²⁸

Mojola criticises these views;

a) Suicide - one can consistently will that whenever someone is suffering from a painful incurable disease or finds life too miserable and intolerable, one is justified in terminating his own life. One can consistently will a case of suicidal euthanasia without contradiction. One can will that the maxim of this action becomes universal that anyone afflicted with such painful and incurable, terminal disease be permitted to terminate one's predicament.

b) Lying - the example given does not invalidate all other instances of lying or breaking promises.

c) Rusting talents - there's no moral obligation to develop our talents.

d) Charity - a man who refuses to contribute to charity can consistently will such a maxim. Also in the case of the "rainy day" he could simply preserve and stick to his principle not to receive help from anyone else irrespective of the consequences to him. The "rainy day" may not even come. Such a maxim can indeed be consequently willed to be a law of nature without contradiction.²⁹

4.1.7 Analysis of Ethical Theories

The ethical theories discussed here are all very well sounding. However, they present some problems that cannot be underestimated.

In traditionalism, it is evident that morality is determined by the past traditions of a group. What is right and what is wrong is dictated by the traditions of the people. A tradition may say, for example, that a child who has misbehaved must be punished by corporal punishment. In the traditional society, parents adhered to this tradition without fail.

Today, such a tradition may not be followed because the society values have changed. Caning or corporal punishment is not the right thing to do. In schools, teachers use this tradition to discipline pupils. A lot of harm has been caused where pupils have even been admitted to hospital or even died as a result of this method of punishment. Therefore, it is not right, then, to say that traditionalism should determine what is moral or immoral.

Behaviours and even actions change with time so reference to traditions of our forefathers may not be the right thing to do.

Furthermore, it may be difficult to know how to deal with an individual whose behaviour is new, that is a behaviour which had not been displayed before for example, drug addiction and therefore the tradition is silent about it. We can therefore say that traditionalism is not a sufficient determinant of morality.

Utilitarianism is also a very well - sounding ethical theory. However, it has some loopholes. For utilitarianism, morality of an action depends on its consequences to the majority of people in the society. However, an action may have positive consequences on the majority while the minority may be disadvantaged. The fact that not all have been favoured by an action shows that this is not a good criterion and hence cannot be universalised.

Another problem inherent in this theory is the fact that people have to wait for the consequences of an action to determine whether it is moral or not. An action is performed first and then morality of it is determined. If the consequences are negative, then the period taken to determine its morality may be too long. In case of the unpleasant results of the death penalty, it should take very little time to show that it is immoral. Though this punishment may be deterrent to the potential criminals, it should be avoided.

The principle of "the greatest happiness" is problematic. How do we measure "the greatest", "happiness"? The minority, again, may be unhappy because an action has been rendered moral because it has produced pleasure to the majority at their expense.

Happiness intends to produce pleasure and absence of pain, while unhappiness intends to produce pain and privation of pleasure. Some happiness may produce, not pleasure but pain. Not all happiness bring pleasure. There are people who have been known to have become too happy resulting to illness or even death. More often than not, happiness is accompanied by some forms of pain.

In Act-utilitarianism, the consequences of an action determines its morality. We cannot confidently say that a certain action is right or wrong. The action has to undergo certain processes and be approved or disapproved by the majority before it is said to be moral or not depending on its consequences. This may take long hence delaying a decision which could have been done earlier if the consequences were not to be awaited.

This theory is also defective in that it is relative in nature because an action may be right depending on certain circumstances and wrong in another for example, telling lies may have positive consequences on the majority as exemplified during the time of electioneering when candidates give empty or false promises. A candidate may get a lot of following due to this promise. However, in other situations, telling lies may have adverse effects or may have no effects at all on the majority. In this case, the act of telling the truth or lies does not determine morality.

In rule-utilitarianism, morality of an action is determined by the laid down rules. A rule may be harsh or may involve a lot of strains for the majority of people. Despite this fact, the rule must be followed despite its being inconvenient and unpleasant. Therefore, rule-utilitarianism is not a satisfactory theory.

General-utilitarianism is more appealing than both rule-utilitarianism and act-utilitarianism because the consequences of an action should be the generally accepted one. There is no appeal to an individual act or rule but the consequences of the action which is universally accepted by the majority.

Ethical egoism is another ethical theory and holds that everyone ought to promote her own self interest. The morality of an action depends on the consequences it has on an individual. If it promotes an individual's good, then it is right. If it does not, it is wrong. An individual has to choose among alternatives the action that will give him pleasure, happiness, peace, and any other positive income. This is dangerous because an individual may end up having self-indulgence in something that would harm him such as over-indulgence in sex, drug abuse, violence etc. He may end up being mentally affected and hence act abnormally. He may end up committing crimes to the detriment of the society.

Psychological egoism holds that an individual has been created in such a way that he cannot act against himself. His human nature is such that he will always perform that action which will be beneficial to himself. Man, is therefore, programmed or determined to behave in a certain way. He therefore, does not have to think before he acts. This is not true. If this were the case, the world would be chaotic or

disorderly if every individual were to behave as if he has been programmed without thinking of others and following his ego or whims unrationally. The theory assumes that man has no conscience and no freedom to choose. This is not true. Man has freedom to choose among alternatives, how to act or behave in any given situation, therefore the theory of psychological egoism is questionable.

Ethical relativism says that the morality of an action depends on a particular society, people, situation etc. What is moral in one society needs not be so in another. What is immoral to one individual needs not be so to another. This theory, therefore is not a strong one in determining the morality of an action. It is not a straight forward theory. One cannot confidently point straight away the rights or the wrongs in the society. This theory therefore is not a satisfactory guide to behaviour because people will hold different views concerning behaviours. This can result in a chaotic society if people behave the way they please without adhering to set out rules or regulations. This may result in commission of crimes.

For the Divine command theory, the morality of an action will depend on whether God approves it or not. This may pose difficulties for those who do not believe in the existence of God and His law. The question of whether God exists or not, and on the nature of God arises. People may doubt the authenticity of His will or His law. They may even say that what is immoral for God needs not be so for man since man is not God.

Another thing that poses problems is the idea that man is created in the image of God to do His will. Man is said to have been given God's will and freedom. If this were the case, then, man cannot act or behave contrary to God's will. The extent of man's freedom is questionable. He created man as a free moral agent but at the same time he has to act as God has commanded. Another issue is that not all actions are spelt out in His Commands hence it is difficult to know how to behave or respond in certain circumstances.

However, for those who are Christians, the divine command is the utmost guide to morality.

Categorical imperative theory is another ethical theory. Its basic principle of morality is to act only according to the maxim which can at the same time be universalised. This is a very satisfactory theory because it guides one against performing those actions which cannot at the same time be universalised. One is guided to do only the actions that can be willed to be universal laws, for example, being honest, sincere, obedient, truthful etc. These are all universally accepted behaviours by all kinds of people in all places.

Doing what is wrong or criminal behaviours like murder, theft, arson e.t.c., cannot be universalised hence people will be guided against such acts.

4.2 THE METHODS OF PUNISHMENT

Traditional Methods of Punishment Evaluated or Analysed on the Basis of the Theories Discussed.

In this section, we shall attempt to analyse the methods of rectifying the wrongs in the traditional African Societies discussed in Chapter three. These included:

1. Sermoning the individual before the elders,
2. Uttering of curses,
3. Slaughtering of animals
4. Fining in terms of animals,
5. Forfeiture of property,
6. Dowry return,
7. Cautions, warnings and friendly visits,
8. Oaths : involving God in the judgement,
9. Reconciliation outside court,
10. Duelling and fighting then reconciliation,
11. Confession or apology leading to forgiveness,
12. Social isolation from taking part in dance and beer drinking,
13. Disowning,
14. Beating e.g. wife-beating : habitual thief was also beaten,
15. The parent's refusals to take beer,

16. Pressurising confession of pregnancy,
17. Ostracism,
18. A return of a girl to her father in case of unfaithfulness,
19. Purging .g. ritual killing,
20. Retaliation in case of murder,
21. Compensation e.g. girl delivered to replace the murdered,
22. Crucifixion,
23. Stoning thieves to death,
24. Drowning of thieves,
25. Burning wizards to death e.g. being put into a bundle of dried banana leaves,
26. Death through 'kiondo',
27. Killing through beehive,

Some of the methods employed to punish evil doers in the Gikuyu society were too harsh and barbaric. They were employed according to the dictates of traditionalism. This seems as if the African people and in our case, the Kikuyu, were morally bankrupt and had no sense of right or wrong. This is not the case. A close examination at the books written by the non-Africans about Africans will be clear evidence of this. The Africans are presented as being "immoral, uncouth, cannibalistic, blood-thirsty, lacking respect for human life, unprincipled, lacking self-control, gluttonous"³⁰ and many other negative attributes

Mojola quotes Christopher Wilson where he has written about the Kikuyu. "The Kikuyu people, their minds clouded with paganism and ignorance ... create for themselves as formidable atmosphere of spirits and imaginary fears which fill everyday with terrors and pervade their intimate life."³¹

It seems that such people who write negatively about the Africans have not studied them well.

Cagnolo, in expressing the reaction of the Kikuyu towards capital punishment through burning says;

"The thief is bound inside a big bundle of dried banana leaves. A solid ring of spears makes the death circle more secure. A member of his clan is called upon to set fire to the bundle ... then there is an inferno of flames and screams. Meanwhile, the whole clan howl wild like a pack of hungry hyenas."³²

The rationale of these methods of punishment is that there was urgent need for the maintenance of harmony, peace and order. To the whole of the Kikuyu society, this was the most important duty and an ideal society had to have these qualities. The society was organised in such a way that these virtues were maintained and preserved. Everyone who attempted to threaten the social peace, harmony and order had to be punished in accordance to the laid down customs and procedures which the society believed would help in restoring and enhancing such threatened values.

Any action which appeared to threaten that ideal was considered as morally wrong hence punished accordingly. On the other hand, any action which promoted communal harmony, peace and order was morally right. In Kikuyu society, just like any other Kenyan society, one had an obligation to do what was right and to avoid the evil deeds. There was great concern shown to everyone. The society was communalistic. Such concern, care and peaceful living in the community was aimed at enhancing this ideal. Healthy relationships were inevitable as evidenced in communal activities that they corporated in. Should people have poor relationships, then this ideal was under threat.

According to Mojola, "such virtues as generosity, friendliness, hospitality, respect for people, etc., were morally obligatory and thought to contribute to this ideal ... just as diseases, famine and other natural disasters were signs of an imbalance, disruption or distortion in social relationships in the community, so as was the death of some members of the community."³³

In case a catastrophe occurred in the society, the community searched to find out the causes in the field of human relationships which were responsible and what actions could be undertaken to restore the balance. Peace, love, unity, order and

harmony were ideals which had an important function of promoting human life and well-being.

The sanctions that we have mentioned were aimed at promoting the said ideal. These sanctions contributed to the realisations and sustenance of social harmony and peace hence enhancing human interests and welfare in the society.

According to Prof. Wiredu, "traditional thinking about the foundations of morality is refreshing and non-supernaturalist ... anyone who reflects on our traditional ways of speaking about morality is bound to be struck by the pre-occupation with human welfare: what is morally good, is what benefits a human being, it is what is decent for man, what brings dignity, respect, contentment, prosperity, joy to man and his community. And what is morally bad is what brings misery, misfortune and disgrace. Immoral conduct is held to be hateful to god, the supreme being and even to the lesser gods. But the thought is not that something is good because God approves but because it is good in the first place."³⁴

This intense concern for human welfare and well-being, the care and concern for every person in the community, shows the African societies, the Kikuyu society being no exemption, were humanitarian in their outlook.

The methods used to punish people were in accordance to moral, human, social and religious dictates of the society. Each and every member of the society had to follow the laid down rules and regulations. One had to be moral. An immoral person was punished., One had to have concern with everybody especially the weak i.e. one had to be humane. The regulations were laid down by the society hence obedience to them was a social obligation. Failure to obey and behave contrary to the laid rules led to punishment. Sometimes taking an oath i.e. calling upon the judgement of God and also through curses one had to prove his or her innocence. This shows that evil had to be done away with. This was a religious aspect of punishment.

The reasons or the rationale of punishment as explained were social, ethical, moral, religious and these gave rise to the legal rationale of punishment. The rules and

regulations of the society had to be followed and failure to do so called for punishment. These rules and regulations were passed from generation to generation.

The question which now remains is the basis on which an action was regarded as right or wrong. Just what is the fundamental criterion of morality of the Kikuyu or any other Kenyan society?

From what we have argued above, an action is right if and only if it conforms to the rules and regulations established by the community through years of practice and tradition i.e the rules and beliefs to promote harmony and well-being in the community."³⁵ An action is wrong if it does not or it violated the regulations established by the community. This principle is an ethical ideal.

We have found out that the most appropriate ethical theory that fits this kind of argument is the rule-utilitarianism. An action is right if it aims at promoting the greatest happiness. This happiness can be seen in terms of the maintenance of peace, harmony, goodwill, love, unity and order. An action is wrong if it does not promote these ideals but promotes an amount of evil. Violation of rules and regulations led to destruction and disintegration of the society. Any disaster that occurred in the society such as famine, diseases, drought, earthquake etc. was seen in terms of violation of rules and regulations. There was heart searching all over the society to find out what could have caused the disaster. The culprits had to be punished to restore the expected peace and harmony. Some of the methods employed, however, were too harsh and barbaric, therefore immoral.

Ethical egoism, we can say had no place in the Kikuyu society. As we saw, according to this view, an action is right if and only if it attempts to promote the greatest happiness to an individual. The criminals or evil doers in the society such as thieves, adulterous people, rapists, wizards, murderers and other criminals engaged in activities that aimed at promoting their own selfish good. By so doing, they interfered with other people's lives and properties hence brought disharmony and hatred into the society. The society had no choice but to punish them. In trying to enhance their own good like getting wealth, they were a threat to the whole society hence deserved

punishment. What a criminal thought to be his own inalienable rights were disregarded at the expense of the whole society. Due to his attempt at serving his own interests, he was punished.

Ethical relativism also had no place. The criterion for rightness or wrongness of an action according to this view is that what is good for one person needs not be so in another. What is right now needs not be so in future. The rules and regulations had the whole society in mind. Relativism did not have any place in the Kikuyu society as far as rules and regulations were concerned. What was good for an individual had to be good for all otherwise in enhancing one's own good, one was likely to commit crimes hence punishment followed.

An examination of the Kantian categorical imperative shows that one had to act on that maxim or rule that one would will to be a universal law. Engaging in activities such as theft, rape, murder, disobedience, disrespect cannot be willed to be a universal law. What one would will to be a universal law is obedience to the rules and regulations governing the society and punishment for violation of these; that any criminal act has to be punished.

The Rationale of punishment according to H.W. Kinoti are threefold:

1. The wrong doer earns his punishment, i.e. Retribution; the person who is punished should agree that his punishment is deserved. It is a consequence of his wrong doing. "Before a notoriously mischievous character was given one of the serious punishment, he was told that he had brought it upon himself. In this connection, the Gikuyu has a saying, "People modify he who modifies himself." (Kuhheragio wiheretic).³⁶
2. Another reason for punishment is that it serves to encouraged good and
3. Discourage evil.

In this connection, we can say that punishment was aimed at reformation, at deterrence and at protection of the society against evil doers.

According to Kinoti, since punishment had a definite purpose to serve, the traditional Gikuyu considers it a mistake to ignore any wrong-doing however trivial.

She says, "there is no wrong and small wrong" (Gutiri uuru na kauru).³⁷ Once an offence has been overlooked, the course of justice is weakened as the offender may never stop committing the offence.

Kinoti also discusses the role of the superhuman forces in punishing the wrong-doers. "The society could not maintain absolute vigilance against offenders. Much of the crime was done under such subtle circumstance that it was difficult for people to discover and punish them. It was believed, however, that the superhuman forces corporated with the society to bring about the deserved punishment to the offenders."³⁸

Should a misfortune fall on the society, it was believed to be as a result of wrong-doing. God, was also believed to approve every just punishment that was meted on wrong-doers.

According to Kinoti, "what people punished was not so much the deed or misdeed as the disregard the offender had shown of some moral principle."³⁹

A close examination at the methods used in the Kikuyu society for punishing crime shows that crime was discouraged by the forces creating the social cohesion of the tribe rather than by punitive sanctions. Punishment was inevitable as any wrongdoing was regarded as disturbance of social equilibrium.

The communal sense where one identified with another was very strong as was the mutual goodwill. The whole society aimed at communal good. Relationships were based on the principle of reciprocity.

The attitudes and actions that seemed to threaten the social order such as theft, murder, lying, breaking promises, e.t.c. were discouraged. If such attitudes and actions were condoned and everybody adopted them with impunity, the social order would collapse and therewith the spiritual and material security of its members. Anything which violated the social and political structure or the moral discipline of the tribe was regarded as wrong.

Punishment or the treatment of wrong was directed at restoring the balance in social equilibrium that had been disrupted. It was concerned fundamentally with restoring the status quo.

For civil wrongs, the punishment was mainly compensation and reconciliatory. For crime itself, punishment was expiatory and to a lesser extent deterrent. Civil wrongs included adultery, assault, homicide and theft. Criminal wrongs included incest, rape, contempt of elders, witchcraft and repeated civil wrongs.

The question that arises when it comes to the kind of punishment that was meted for each wrong done is on what criterion it was based. The sentence in a criminal case conformed to the recognised penalty attached to the crime. It also had regard to the mutual standing of the parties concerned. A man's character, status, age and means were also taken into consideration. These penalties were derived from traditional law handed from generation to generation which was uniform throughout the tribe.

When employing any form of punishment, the aim was clear to everybody. The principle employed were in this order:

- a) Reconciliation
- b) Restitution (paying, retaliation, retribution)
- c) Compensation to the individual and family
- d) Compensation or fine to the community
- e) Corporal punishment was employed when the offender could not afford to pay compensation
- f) Social ostracism and public ridicule
- g) Protection of community from hostility of ancestral spirits through the repudiation of the curse
- h) Protection of community from direct physical harm through expulsion or execution
- i) formal reconciliation of the offender to the community whenever possible.
- j) Deterrence and

k) **Reformation**

The methods used in the traditional society are morally justified in so far as they go by these principles which are generally utilitarian.

4.3 GENERAL PUNISHMENT IN RELATION TO ETHICAL THEORIES

In this section, we shall analyse the reasons or justifications for punishment in relation to the ethical theories we have examined. There are five major reasons for punishment. These are retribution, expiation, deterrence, protection and reformation.

RETRIBUTION

a) **Retribution and Egoism**

A criminal is punished in order to bring right the wrong he has done. The society attempts to give him his 'just deserts', that is, what it thinks the offender deserves. When one does something good, it has to be rewarded. By doing what is evil, the offender has got to be punished. He deserves punishment. There is an attempt to apply the form of punishment that will be equivalent to the crime committed. This involves a 'get even' spirit - an eye for an eye, and a tooth for a tooth.

When a crime such as murder or theft is committed, people react with revenge. People or the societies show their resentment and anger. When a form of punishment such as mob justice is applied, this is an instinctive reaction. Every participant wants to satisfy himself or herself. This is an egoistic reaction which is nonmoral and cannot be ethically justified. If the crime done is against a certain authority or state such as sedition, an egoistic measure is likely. The authority feels challenged and a stiff punishment is likely in order to satisfy his or her ego.

Egoism should not be applied in this case to justify punishment which is aimed at retribution..

To achieve retribution, other forms of punishment are also used such as capital and corporal punishment, imprisonment, fines among others. When these are applied, they cannot be said to be morally justified.

Consider a case of a traffic policeman who sees a vehicle belonging to a well-known rich businessman along the road where he is stationed. He may stop the vehicle even if there has been no violation of traffic rules. He may look for the slightest mistake to make sure he gets the owner in trouble. He may be jealous of him. He may decide to fine him for a very minor mistake. This kind of punishment is an attempt, by the policeman, to satisfy himself. This then cannot be morally justified.

Even in a case of corporal punishment, the punisher may be out to satisfy himself irrespective of the crime committed. Therefore, when a criminal is punished with an egoist motive whatever method is used, this cannot be said to be morally justifiable.

b) Retribution and Utilitarian Theory

The society may take revenge on the criminal due to the crime committed such as murder, rape, theft among others. The problem here is that a criminal may be punished more severely than he deserves. On the other side, the society may punish him leniently.

The philosophical problem in this issue is how to equate punishment with crime. How much punishment would suit a certain crime? The society may not achieve its objective of retribution in punishing an offender. Not all forms of punishment are acceptable to all members of the society in its attempt to achieve this objective. Some may feel that the form used is too harsh while others feel that the form is too lenient. Measuring leniency and harshness is a problem at hand. Public approval of the method used to achieve retribution is therefore difficult to come by.

c) Retribution and Categorical Imperative Theory

Some forms of punishment for the purpose of retribution may not be acceptable as being an ethical criterion on which punishment should be based. In case of a murder, more often than not, the murderer may be sentenced to death. Sentencing a human being to death, to many, cannot pass as universal law. There are very few individuals who will advocate capital punishment regardless of what crime has been

committed. It is difficult to come up with a method of punishment which will be universally accepted given the kind of crime committed.

d) Retribution and Divine Authority

There are some forms of punishment such as corporal and death penalty that are unacceptable according to some rule such as "Though shall not kill". Revenge is also unacceptable as a way of punishing an offender according to the divine theory. It becomes difficult therefore to come up with a form of punishment that will be considered morally justifiable using this criterion.

e) Retribution and Ethical Relativism

An offender may not be adversely affected should certain methods of punishment be inflicted on him. In case of assault, the offender may be given corporal punishment which may not have any effect on him. A thief, who is fined, may not feel the pinch if he is a rich person. A different offender may be adversely affected. When applying punishment, we have to keep in mind that the offenders are not homogenous. What may be seen as offensive today may not be so in future. Some of what we term as seditious utterances today need not be so in future.

The punishment applied may be more lenient or harsher as compared to the crime committed. When punishment is applied, it may not actually be seen as effective as compared to the initial act done. Offenders will therefore react differently to the same forms of punishment given that they are not homogenous.

EXPIATION

a) Expiation and Egoism

An offender is made to atone for the crime he has committed through suffering. The punisher has in mind that the offender has to suffer for the crime he has committed. In this case, severe forms of punishment are likely to occur especially if exercised publicly. An offender may be made to pay heavy fines or harsh methods of corporal punishment like torture is likely to be employed. The punisher may employ harsh and cruel punishment instinctively without reasoning. Here punishment is inflicted to satisfy the punisher. The offender, through suffering, may not even atone

for the offence he had done. The punishment may be too harsh or too lenient to achieve the said objective.

b) Expiation and Utilitarian Theory

Through making a criminal suffer, the majority in the society derive their satisfaction. The society may not regard which method is appropriate so long as the criminal suffers. On the other side, the form of punishment applied such as a fine may have no effect on the criminal, so no atonement is achieved. The society harbours an attitude of hostility towards the law-breaker since to it he is immoral.

c) Expiation and Categorical Imperative

Some forms of punishment may not be acceptable as far as making a criminal suffer is concerned. Corporal punishment may be too cruel, fines may be too heavy or capital punishment is likely to do more than making the criminal suffer. In this case, therefore, using some forms of punishment may not be acceptable as a universal rule on which punishing an offender should be based.

d) Expiation and Divine Theory

Making one suffer is doing evil. Insulting, assaulting, causing bodily harm and others are unacceptable. Suffering or making one suffer goes against the command to love one another. It has negative connotations or emotional overtones therefore it cannot be said to be morally justifiable.

e) Expiation and Ethical Relativism

Offenders are not homogenous. A certain offender may be remorseful after a certain form of punishment is inflicted on him while it would be useless for a different offender. If a certain form of punishment may make a criminal suffer today it may not have the same effect in future. Fining an offender a certain amount of money today may make a criminal suffer today but tomorrow or in future his economic status in the society may improve such that the punishment meted means nothing to him in future.

What could be termed as suffering in one place need not be so in another place. A certain form of punishment may bring about suffering to an offender but another form may not bring the same effect. The form of punishment applied to

achieve expiation may have effect on some individuals but not in others. Time and place also matter as far as employing punishment for reasons of expiation is concerned.

When expiation is the goal of punishment, the forms of punishment usually aim at ridiculing the offender. The criminal is treated like an object whose rights are not taken into consideration. He becomes a scapegoat for the societal anger and resentments. He becomes an object of chastisement, scourging and degradation. He is dehumanised when a form of punishment like corporal punishment is employed, for example in mob justice. This provides an outlet for the outraged feelings that the society has against the crime committed such as rape, theft or murder. The society has the offender as their enemy and will apply any method in the name of preserving the moral values. The society feels more superior to the offender and will do anything to show the offender that crime does not pay. In the process, the criminal may be severely punished. He may be punished more than he deserves.

When punishment is inflicted to the offender by the society, the society sense of solidarity and cohesion is enhanced. The majority feel that at least justice has been done. However, the methods used may be morally unacceptable.

DETERRENCE

a) Deterrence and Egoism

A criminal is punished in a way that teaches him that certain behaviour or crime does not pay. Punishment is also applied to show others or the spectators and warn them what will happen to them should they behave in certain ways.

The punisher believes that once punished, the offender is not likely to repeat the crime. A teacher may beat up a student for getting to school late or because of violating a school rule. However, the punishment may be too severe to match the student's behaviour. The teacher may be having other emotional disturbances so any slight misbehaviour may provoke him hence apply severe punishment in disregard of the offence done. In this case, the teacher is egoistic. He wants to satisfy himself. The student may have nothing to learn from the punishment applied to him if it is too

harsh or too lenient. Therefore, this kind of punishment that is based on other external influences other than the nature of the crime is not morally justifiable.

b) Deterrence and Utilitarian Theory

The society feels that it has an obligation to teach the offender a lesson for his misbehaviour. It also has a duty to warn potential offenders so that they will not commit crime. Failure to punish, the society feels, will encourage more crimes.

This concept of deterrence assumes that one should first think about all possible consequences before engaging in any act. This, in reality is not possible. People behave in certain ways and get involved in a certain behaviour without thinking of the fear of punishment. Hence, it is difficult to apply this theory in so far as deterrence is concerned.

c) Deterrence and Categorical Imperative Theory

Applying certain forms of punishment to an offender for the purpose of deterrence is very well sounding and is well intended but in practice, it may not work because of some misinformation. There are some people that will not stop committing crime even if they are severely punished. There are many cases of jailbirds. However much we imprison some offenders, they may not be deterred. We have seen many people imprisoned or detained for committing various crimes but some members of the public may not be deterred. There are some who even sympathise with those who have been detained and they in fact publicly express their solidarity with them without fear of punishment.

When a person knows that he will be punished for doing a certain crime, what he will do is not to stop doing it but he will be more cautious and ready to conceal his movements and actions. The risk of punishment therefore makes the culprit more cautious and encourages him to conceal his tracks in order to stop his being apprehended. We cannot make it as a universal rule that we punish offenders to deter them or the society from committing crime.

d) Deterrence and Divine Theory

Judging an offender that he will be deterred by punishing him does not augur well with the divine theory. Each person is unique. We should not assume that by punishing an offender, potential offenders will learn a lesson and stop committing crime. Severe forms of punishment like imprisonment and capital punishment do not augur well with this theory.

e) Deterrence and Ethical Relativism

The form of punishment that deters a certain individual needs not deter another person. The form of punishment that deterred yesterday may not have the same effect at present or in future. What deters in a certain society may not do the same in another society.

When punishment is inflicted to deter an individual, that individual's personality and uniqueness is belittled. He becomes an object from which others are expected to learn.

PROTECTION

a) Protection and Egoism

There are certain forms of punishment that are used as a means of protecting the society from criminals. These include; imprisonment, capital punishment and detention. An individual may be detained for committing a political crime. This is true especially of those involved in underground movements and sedition. The punisher may be very revengeful and apply severe forms of punishment for the sake of satisfying the person in power or the state. In this case, the punisher is egoistic. Severe forms such as torture especially to get confession of others involved in crime are likely, not to have the purpose of protecting the society itself but satisfying one's ego.

b) Protection and Utilitarian Theory

The society is prior to the offender. It has to be protected against the immoral ones. By imprisoning the offender, the society is safely defended. The offender can no longer harm the society. Due to the nature of crime, an offender may be given a life-imprisonment sentence. In this way, the society feels completely safe.

be given a life-imprisonment sentence. In this way, the society feels completely safe. The offender may be sentenced to death. His removal from the society is a great relief to the society. However, this has many shortcomings. The sanctity of life has not been respected. Killing an offender because he killed is not logical. Two wrongs have never made a right. While in prison, the society is protected. The intention of safeguarding the society is achieved but the offender may be suffering in the prison. The society needs to be protected but at the same time, the rights of the criminal should also be safeguarded. The criminal may be removed from the society permanently through capital punishment but this has adverse effects on his family, relatives, colleagues and the economy of the country at large. The criminal's positive contribution in building the nation should not be underestimated.

The criminal may be imprisoned or detained but he may be set free for one reason or another. He may continue committing crimes hence the society's protection is short-lived. This is especially possible if the criminal will not stop engaging in criminal behaviour. He may even influence the society once he is set free. This is true of political detainees. Most of them are never sorry for what they had done to warrant their imprisonment or detention. Inside and outside prison or detention, other members of the group will be going on with the offensive activities. He may have a lot of following. To achieve total protection, there is need to arrest all criminals but this is not possible because of concealment. Therefore, it is not easy to achieve this objective of protection of society when punishing offenders.

c) **Protection and Categorical Imperative**

When one commits a crime, there is no way a society can be fully and totally protected by punishing him. No criminal behaves in a certain way in isolation. There is usually a group that he works with. Imprisonment, capital punishment or even detention without trial should not be used universally applied to protect society. This is because the society's protection is short-lived. Other criminals will continue committing crime. Those released may go back to committing crime. Capital punishment therefore should not be used as a universal rule to react against an offender

with the aim of protecting the society. The offender is a human being like others and his right should be safeguarded.

d) Protection and Divine Theory

In the name of protecting society, some forms of punishment may not be acceptable according to this theory. The law of loving one another, and the law against killing are issues that are prominent in the divine theory.

e) Protection and Ethical Relativism

Just like criminals, societies are not homogenous. Imprisonment may protect now but may not achieve its purpose in future especially if there are other criminals that have not been apprehended. By imprisoning only a few criminals, the society is not protected. In case of political arrests, imprisonment, detention and even capital punishment, it is possible that only a small percentage of the society is meant to be protected for instance the ruling minority. Therefore relativism can only be applied on those who are supposed to be protected.

There is also relativism as far as what is crime is concerned. A certain behaviour may be termed as criminal or offence today but in future, the situation may change such that the term crime does not apply. One can consider a case where people are locked in prison because of making certain demands. In the course of their confinement, the situation may have improved whereby what they were demanding may already have been provided. This means that their demands can no longer be regarded as crime hence they need to be set free. This applies especially in political crimes.

REFORMATION

An offender is punished in order to make him more law-abiding. He is, through punishment, taught a lesson so that he corrects his shortcomings. He may be imprisoned and inside the prison he is prepared to return to the society as a law-abiding individual. Once his behaviour improves, he may be given indeterminate sentence. He can also be put on probation.

a) Reformation and Egoism

A punisher may employ a certain kind of punishment on an individual in an attempt to make him reform. He may be egoistic. He may not put into consideration the feelings of the offender and the nature of the offence. An offender may not reform due to the severity of the punishment. On the other hand, if the punishment is too lenient he may not reform. The philosophical question is how much should one be punished. Some forms of punishment may reform some people but not others. Imprisonment may reform some but not all criminals. Rehabilitation is not easy to achieve. Imprisonment is more likely to corrupt an offender than reform him. It does a lot in harming him such that he becomes anti-social and more hardened because of his experience in prison. Capital punishment has never reformed anyone. This is true of other forms of punishment like fining. If one is rich and is fined, this form of punishment hardly reforms him. The punisher may fine a rich offender a lot of money with which he wants to enrich himself. In this way, no reformation can be achieved.

b) Reformation and Utilitarian Theory

An individual is punished so that after punishment, he becomes a reformed person. The society has an obligation to punish those who violate moral values. However, the punishment may be too severe or too lenient to achieve this objective. When the individual is imprisoned by the society, he becomes more anti-social and withdrawn. He may even turn out to be a worse criminal than he was before, so this purpose of punishment is not achieved. The criminal may end up doing worse crimes than before hence the society is more endangered than before.

c) Reformation and Categorical Imperative

When an offender is punished, we should not assume that he will be rehabilitated. He may end up being a worse off criminal than before. This being the case, punishment of criminals should not be advocated as a universal law that will reform criminals.

d) Reformation and Divine Theory

The aim of punishment according to this divine theory is reformation. However, very few criminals reform. The form of punishment applied should be lenient and aim at reforming the individual. Some criminals are not remorseful for their crimes hence cannot reform however severe they are punished. All methods of punishment involve some suffering whether physical or mental; suffering is not in line with the divine theory.

e) Reformation and Ethical Relativism

There are criminals that cannot reform whichever form of punishment is applied. These are hard-core criminals and jailbirds. Some form of punishment can reform an offender while others cannot. One can reform after imprisonment but later if the social, economic or political situation has not improved, they will go back to the life of crime. Punishment for the sake of reformation is not universal. It differs from person to person, from time to time and place to place.

General Shortcomings of Punishment

The knowledge that one will be punished for behaving in a certain way makes an offender cautious such that he conceals his activities. When some methods of punishment are applied such as imprisonment; the offender is stigmatised; it makes him feel hated; he becomes withdrawn and isolated from the society such that he cannot positively contribute to its development.

Some forms of punishment herorize the offender. This is true especially of political prisoners and detainees. This is evident in our courts where the audience sometimes express their solidarity with the offenders.

Punishment contributes to the offender's development of anti-social grudge. The offender, especially after being imprisoned or given corporal punishment, will develop strong resentment of authority such that instead of being law-abiding, he becomes a liberal.

Punishment does not prevent crime. It hardly deters potential criminals and the offender is likely to go back to the world of crime.

However, punishment is necessary as a means of social control to prevent crime. It is also important as far as sustaining the morale of society is concerned. It also to some extent, helps to reform the offender, deterring potential criminals and in protecting the society.

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CHAPTER 5

THE RATIONALE OF THE VARIOUS METHODS OF PUNISHMENT USED IN KENYA

In this chapter, the views of various people on the question of the methods used to punish people are put down in a dialogue form. We shall also analyse these views from some practising lawyers, a prison official and traditional-philosophic sage. This does not, in any way indicate that these are the only people from whom we could get philosophical information regarding methods of punishment. These three different categories of people do not know everything or have no monopoly of knowledge regarding punishment. Due to the limitation of space, it is not possible to put down the views of everyone who could discuss this topic. This is why we were rather selective and we believe the views of these few represent the general stand of the public on the methods of punishment employed in Kenya. However, anyone who is in dispute of the points put down is free to challenge them.

This field research only forms the secondary sources of our information. It only complements our primary source of information which is the Library research.

5.1 An Interview with a Prison Official on Imprisonment

Question: What is the origin of prisons in Kenya? Give a brief historical background of prisons.

Answer: Before the coming of Europeans to Kenya, there were no prisons. The commissioner of prisons in the United Kingdom adopted the Indian Prisons act of 1894 with the approval of the Principal Secretary of State for Foreign affairs. In 1902, the East African Prisons Regulations no. 12/1902, was enacted throughout the British East Africa Protectorate adopting the same Indian Prisons Act of 1894. In 1914, the East Africa Prisons regulation no. 12/1902 was repealed and Prisons Ordinance no. 13/1914 was enacted. This was repealed and

several other ordinances was enacted and repealed over the years upto prison ordinance no. 49/1962. This became operative from 1st February, 1963. The ordinance is now known as the Prisons Act Chapter 90, Laws of Kenya, under which the prisons in Kenya are now being administered. Borstal institutions were started in 1963. Detention camps were started in 1925 by enacting the Detention Camps Ordinance no. xxv of 1925. Detention Camp ordinance and the detention camp rules were combined to form the present act under which the detention camps are administered. The act is the Detention Camps Act Chapter 91, Laws of Kenya.

Question 2: How many punishment institutions do we have in Kenya and where are they located?

Answer: There are 74 prisons in Kenya, 8 detention camps, 2 Borstal institutions and 1 youth corrective training centre. These are located in the district and provincial headquarters throughout the country.

Question 3: About how many prisoners do we have in Kenya?

Answer: During the year 1990, the following were committed to serve their sentences in various institutions:

Prisons (convicted Prisoners)	64,681
Detention camps	9,056
Youth Corrective Training centre	117
Borstal Institutions	458

Question 4: For what crimes is this method of punishment employed?

Answer: This method of punishment is used against crimes such as robbery, theft, murder among others as given in Chapter 63, Laws of Kenya.

Question 5. From what age is one liable to be imprisoned?

Answer: One is liable to be imprisoned if one is from 18 years. Persons of lesser ages, not below 15 years are imprisoned in Borstal and Youth Corrective Training Centres.

Question 6: Are all the prisons the same or there are different categories?

Answer: There are 3 categories of prisons; Maximum security Prisons like Kamiti Prison, Medium security Prisons and District Prisons categories. Men are imprisoned in separate institutions from those of women.

Question 7: What is the criterion for determining the length of imprisonment?

Answer: Sentence is at the discretion of conviction courts. The convicting court determines the length of sentence in accordance with penal code as may be applicable to the offence committed and the gravity of the offence. The courts before sentencing, take all the factors into consideration. The process is governed by the criminal procedure code.

Question 8: What category of people is punished using this method in terms of age and sex?

Answer: Anyone who had committed a crime can be imprisoned. During the year 1990, the following were committed to different institutions:-

Males	62,928
Female	11,384
Ages under 16 years	201
16 years - 18 years	2,816
18 years - 20 years	12,973
21 years - 25 years	20,840
26 years - 50 years	32,123
over 50 years	5,359

It is evident that women do not get involved in crime as much as men do. This is because of the fact that men are exposed than women to other areas outside the family circle. More often than not, the man is the breadwinner in the family so he has got to search for it outside the family. He is more exposed to the stresses and temptations of social life outside home. They go out more to earn hence they are subject to more powerful economic pressures than women. It is also evident that more and young people are getting into crime. The reason is that as they enter adult life, they do so full of ideas and rebellious impulses. Many are getting involved in crime because of unemployment and poverty. People try very hard to make ends meet but due to the high rate of inflation this is extremely difficult hence people resort to crime.

Question 9: What different types of work do the prisoners do?

Answer: Once in the prison institutions, the prisoners are engaged in domestic, industrial and agricultural work which is meant to be productive and useful. The kind of work a prisoner is engaged in is determined largely by the length of sentence. Those with long sentence are employed in industrial work while those with short sentences are employed in agricultural and domestic work.

Question 10: What are the aims of imprisonment in Kenya?

Answer: The aim of imprisonment is to punish the offender by deprivation of freedom and by so doing makes him realise his mistake. While in prison, he is to be rehabilitated and then released back to the society to lead a useful life. The prisoner, being a dangerous element in the society is left in peace. This shows that the prison plays a protective role to the society.

The prisoner is tamed in order to be reformed. This does not always happen. One can be imprisoned for ten years. At this time, the society is safe or is protected. However, the prisoner can choose not to change his behaviour no matter how long he has been locked in. A change occurs essentially as a matter of choice of active will. The prisoner must have a will to change and this cannot be imposed on him.

Imprisonment serves both the society and the offender. For the prisoner, the prison should rehabilitate him. For the society imprisonment is deterrent and protective during the temporary incapacitation of the criminal while in prison.

Question 11: What is the rate of recidivism?

Answer: On release, some criminals go back to criminal behaviour. The rate of recidivism in 1990 was 2.29%. This is only for prisoners serving two years and above.

Question 12: Why is it that some prisoners would commit more crimes after they are released?

Answer: Some prisoners commit more crimes after they are released because;

i) The society seems to reject them hence forcing them to go back to crime.

ii) Of bad influence by hard-core criminals during their term in prison. A lot of criminal activities and techniques are learnt in prisons.

iii) Economic factors may force them to go back to crime. When they come out of prison, they may find that they cannot get employed and sometimes, if they had a family there are possibilities of breaking up during imprisonment.

Question 13: Is it possible for an ex-prisoner to lead a normal life like the rest of the society?

Answer: It is very possible. The stigma attached to imprisonment depends on the offence committed and where it was committed for example, a cattle thief can be glorified and hence easily accepted in some societies. A rapist will not be easily accepted because of the stigma attached to the act. The type of reception in the free society plays either negative or positive role in settling back the ex-prisoner in the society.

Question 14: How effective is imprisonment in helping to curb crime in Kenya?

Answer: Though this method is not 100% effective, it has reduced crime to manageable levels through resocialization of the offenders and deterrence against further crimes.

Question 15: Would it be logical to do away with imprisonment?

Answer: It would not be logical because there will always be offenders in the society as crime is a by-product of the society's development. A criminal who is a danger to the society deserves to pay a high price in form of individual freedom. However, only those who commit serious offences and hard-core criminals should be imprisoned. Petty offenders should benefit from non-custodial sentences such as fines, probation, suspended sentences or placed on extra-mural penal employment scheme.

Question 16: What is the philosophy behind the use of imprisonment? What is the underlying principle behind the use imprisonment as a method of punishment?

Answer: Imprisonment is morally justifiable. It protects the society against criminals especially the most dangerous. The punishment

inherent in imprisonment primarily consists of liberty deprivation which involves compulsory confinement and subsequent segregation from the normal society. In carrying out that punishment in prisons, the aim is to ensure that the offender returns to the society not only willing but also able to lead a self-supporting life.

5.2 Interview with Practising Lawyers on Crime and Punishment

We prepared questionnaires which we sent to a number of lawyers. The findings were almost similar. In this thesis we shall put down the views of two lawyers. We shall call them Lawyer 1 and Lawyer 2 respectively.

Question 1: How does the law define crime?

Lawyer 1: Crime means any act or omission which contravenes a provided law and for which some form of punishment is provided. For crime to be committed, therefore, first, it must be an act which violates a provided law and secondly, it must be an act for which a punishment is provided.

Lawyer 2: Legally, a crime is any contravention of the law.

Question 2: How does the law define a criminal?

Lawyer 1: A criminal is any person who has been convicted of an offence stipulated by the laws of Kenya.

Lawyer 2: He is any person whom the court of law finds has committed a crime.

Question 3: What does the law say about someone who is a criminal?

Lawyer 1: A criminal has to be punished according to the law provided. Also, the circumstances of the offence such as provocation also need to be taken into consideration before a criminal is punished

Lawyer 2: Appropriate action needs to be taken against the criminal by the

court. This could include unconditional release especially if there is little or no evidence implicating the said offender with the offence.

Question 4: How would you define punishment?

Lawyer 1: It is retribution. It is an action aimed at making the criminal pay back for his criminal deeds.

Lawyer 2: It is the suffering in person or property, inflicted on the offender under the sanction of the law.

Question 5: What different types of punishment are provided in the laws of Kenya today?

Lawyer 1 & 2: These include fines, personal confinement, capital punishment, corporal punishment, non-custodial like extra-mural centres, probation e.t.c.

Question 6: How does the law categorise what type of punishment should be meted for what crime?

Lawyer 1 & 2: There is some form of punishment for every prescribed offence. The law provides maximum of fines of imprisonment. The court has discretion depending on the gravity and seriousness of the offence. Generally, the seriousness of the offences, the role played by the offender and all the circumstances leading to the commission of the crime are considered. The minors, as opposed to adults, the mentally sick as opposed to those who are normal, are treated differently. The level of involvement is also taken into consideration.

Question 7: What is the underlying principle behind the use of each method of punishment for each crime?

Lawyer 1: The underlying principle is to bring the society in order. The main principle is ideally corrective in order to protect the society from evil deeds.

Lawyer 2: The main principle is to use the fairness in the administration of justice "that the punishment fits the crime." A lot of injustice would arise if the same kind of punishment was meted on all offenders.

Question 8: What is the reaction of the (a) offender (b) victim and (c) society to the methods of punishment such as fines, imprisonment, corporal, capital punishment etc.?

Lawyer 1(a): An offender will react differently to the methods of punishment meted against him. Some offenders are remorseful and hence indifferent especially in case of hard-core criminals and those who believe they do not deserve punishment because they do not deem their behaviour criminal.

Lawyer 2: The offender's reaction depends on the type of punishment meted against him. The offenders being unique person will react differently towards different methods of punishment.

Lawyer 1(b): Victims will also react differently to different forms of punishment meted. Some feel that the punishment employed is not stiff enough e.g. in case of rape. Some are indifferent, "after all, there is little to gain after punishment." Some will even sympathise with the offender later on and if they had filed a case against him, they may request the court to withdraw it.

Lawyer 2: The reaction of the victim will generally depend on the offence committed, the social status of the victim and the offender, the relationship that had been existing, if any, between the offender and the victim. Some victims will favour a stern action against the offender. They usually look for revenge and with punishment, they feel that justice has been done and they also feel protected.

Lawyer 1 (c):

The society's reaction is very varied. It all depends on the sensitivity of the case in question. In case of rape for example, the society looks for revenge. The relationship between the observer with the victim or with the offender will dictate the reaction of the observer.

In case of a fine imposed on a matatu driver who is accused of overloading or overspeeding, the society reacts differently. Some people will not consider the danger involved in such a fatal situation. To them fining is not justified. These people will give priority to getting to their destinations as fast as they can hence do not consider overloading or overspeeding as a serious offence. Others will feel that fining is very lenient and call for more serious punishment like imprisonment which will be more meaningful. After all, they could have suffered in other ways like being overcharged.

Lawyer 2:

The reaction of the society depends on the nature of the offence committed, who committed it, where it is committed, the perception of the crime such as rape or murder by the society. The reaction of the society also depends on the particular time and also the particular residence where the crime is committed.

Question 9:

Do these methods of punishment have any effects on the lawyers and judges?

Lawyer 1:

Mostly, lawyers want to see their clients freed. They are however, bound by the law to be and have little to do with what is to be implemented in form of punishment. Theirs is to implement the law. Most lawyers and even judges abhor some punitive measures such as corporal and capital punishment which are immoral and have no respect for

human dignity. They do not feel comfortable especially with a criminal who has committed a capital offence.

Lawyer 2:

The method of punishment employed against an offender will be used as a reference point in future in advising clients who commit similar offences. On capital punishment, it is evident that ideally, nobody wants to see another person die except, of course, those who are sadists. Life is sacred and a judge advocates this method because it is "the law which sanctions" no matter how much he sympathises.

In this case therefore, it is evident that the judge is not a free agent. What he does is determined by the law. Capital punishment is not actually punishment since the victim does not reform as a result of it.

Question 10:

What really does punishment aim at?

Lawyer 1:

Punishment aims at deterrence and rehabilitation. However, some forms of punishment used in Kenya today are out dated as values have changed. As values change, the law also needs to change. The problem is that the law takes time to be amended hence mostly, laws that we have aim at vengeance.

Lawyer 2:

It aims at punishing the offender for the crime he has committed. Punishment therefore is retributive. Another aim is rehabilitation. Essentially, this is a means of enabling the offender to reform and become a law-abiding member of the society for the protection of the whole society. Punishment aims also at deterring prospective offenders.

Question 11:

When punishing, whose interest do you give priority to (a) the criminal (b) the victim or (c) the society?

Lawyer 1:

The main target is the offender whose correction will benefit the victim and the society at large. The victim feels that when

an offender is punished his or her rights are protected. The society also feels protected and secure with the criminal punished.

Lawyer 2: The offender and the society at large are considered. First, the punishment must fit the crime. A court worth its name will decide its case on the basis of the society and the offender especially the circumstances leading to the commission of the crime. In some cases, the victim should be given prior consideration especially the victims of rape e.g. of a child due to the physical, social and psychological effects of the crime on the victim. Also in case of murder, a suffer punishment is meted. If the victim is dead, the offender has to die, "he died, you have to die."

Question 12: What do you think to be the best way of dealing with crime?

Lawyer 1: Crime should be dealt with from its roots. There is urgent need at examining the main causes of crime. Most offenders are victims of social, economic and political forces. These forces should be considered and rectified in order to reduce crime.

Lawyer 2: To be able to deal with crime, we should first investigate why it exists in the first place. There is no society that is free of crime. What varies is the modes. If the causes of crime are known, the best way would be to eradicate them, for example, reducing poverty and providing employment. If the causes are numerous, the offender should be assisted to reform.

Question 13: How can we curb crime in Kenya today?

Lawyer 1: It is possible to reduce crime. What needs to be done is to re-examine and correct our values and strive for a more balanced

society economically and politically. People should also be educated on the need to be honest.

Lawyer 2: It is difficult to curb crime in Kenya today. We need to ask ourselves why people commit crimes in the first place. However, there are suggestions on how we can try to curb crime.

1. reduction of the level of unemployment
2. redistribution of wealth
3. reduction of situation of stress
4. adjustment of social behaviour by being more responsible.
5. developing a national ethic that abhors crime and educating people on the need for respect and morality.

Question 14: Should we retain or abolish punishment and why?

Lawyer 1: It is not possible to abolish punishment. In religion, there is the idea of heaven and hell. Man must always be made accountable by the knowledge that there is a sanction if he deviates from the 'normal' behaviour. However, punishment must be made more realistic for the benefit of the whole society.

Lawyer 2: Punishment should not be abolished. This is because:-

- a) there will always be those who, other things notwithstanding, will not "toe the line,"
- b) the society has to be protected. Punishment is a defence mechanism against wrong-doing. However, some forms of punishment should be abolished like capital punishment. This is committing crime for another crime. It is a crude method

of punishment which should be condemned in the strongest terms possible. It cannot be morally justified.

5.3 (i) The Thoughts of a Traditional-Philosophic Sage on traditional Methods of Punishment

Identifying a traditional-philosophic sage in our society was not an easy task. We were, at last able to identify some wise people who were conversant with the traditional way of life of the Gikuyu people. They were conversant with their history, from their origin to the present situation. Through interviewing some 'wise' men and women, we were able to tell those who were more than wise and whose thoughts we deemed philosophical. We have put down the thoughts of one old philosophic sage who was well versed with the traditions of the Gikuyu people and gave news on the present and future issues. He could give reasons for holding or not holding some beliefs in the traditional society. For our purpose, we interviewed him on crime and punishment prevalent in the past, present and future.

Question 1: How were disputes settled in the Gikuyu society before the coming to the Europeans?

Answer: Before answering this question, I shall tell you about leadership in the Gikuyu society. Before the coming of the Europeans, there were no rulers in the political sense of the word in Gikuyu land. The ability of an individual determined his being as an able leader for example, in leading a war, one got the capacity to lead. People recognised him as a leader. Such a leader was surrounded by a group of elders who were the trustees of the tribal traditions. These acted as judges in all disputes. They formed a council of elders whose membership depended on age and payment of a fee in form of a goat. At the family level, the father was the head of the family and solved all disputes within it without any external interference. His prestigious position gave him power to command and to be obeyed. He owed his

family a duty of making sure that justice was always done within his family.

Question 2: Was there division of labour within the family?

Answer: The husband and wife had a role to play within the family. The husband provided the land for cultivation, food and shelter. The wife did the household chores. The man would never assist in the domestic chores. The reason was he would become the laughing stock of the whole neighbourhood as a man who would engage in domestic chores would be seen as a less man, one who was "sat on" by the wife.

Question 3: How was adultery punished?

Answer: The bond between the husband and the wife was a strong one. There were laws and penalties for unfaithfulness to make the bond more apparent and its rights obligations.

The wife could not take the behaviour of her adulterous husband lightly. She showed her full discontent. She could even take full revenge which had adverse effects on the family's peace and harmony.

An adulterous wife was taken back to her father and a heavy penalty was demanded in order for her to be accepted back by her husband. Her partner was also heavily punished with a fine of livestock. An adulterous husband was also heavily fined by the wife's family. The fine was in form of livestock.

Question 4: How do you view the practice of wife-beating?

Answer: In the Gikuyu traditional society, the husband had full control over his wife and cases of wife-beating were not uncommon. This happened in case she disobeyed him, was lazy or went visiting neighbours unnecessarily.

This act is cruel and should be discouraged. This is because, it has adverse effects on the relationship between the couple. It is an act that degrades and belittles the woman. It is a shameful, disrespectful and

dehumanising action. The woman is treated as an object, subject to the man's brutality. However, if the wife's behaviour is extreme in terms of rudeness, disobedience and disrespect, she should be disciplined.

Question 5: How were the children punished?

Answer: The parents had full control over their children. Disobedient and lazy children were disciplined by their parents. They were taught what was good and what was evil. They were taught the rules of honesty and obedience. Telling lies and theft were discouraged. Sexual morality was also emphasised. The consequences of disobedience were clear; punishment by caning.

Question 6: How was pre-marital sex and pregnancy outside marriage viewed?

Answer: These were heavily punished. The crime of making a girl pregnant before marriage was termed as "kuuna kuguru gwa kamwati." This means "breaking a limb's leg." When parents notice that their daughter was pregnant, they demanded to be told who was responsible from the girl. When the girl revealed who he was, elders were immediately sent to the man to inquire about it. To declare his innocence, the man had to take an oath. If he accepted that he was responsible, a feast after another where beer was brewed was held.

The feast took place in the man's father's home. The first feast was called, 'giathi kia njohi ya ime' or 'the feast of the beer of dew'. This was a feast that had to take place very early in the morning when the grass was still wet with dew.

The second feast was called 'giathi kia njohi ya ngarura mwehio'. Another termed for "mwehio" was "muthuru." This was the garment worn by girls. This was because the girl's garment had been touched and there was need for cleansing. In all of these feasts, elders from both the girl's and the boy's side had to be present.

The third feast was called 'giathi kia kwona ndegwa' or the feast of seeing the bull. A bull had to be slaughtered in accordance with the demands of the 'kiama' or the council of elders. The meat was shared according to the instructions of the girl's father.

The fourth feast was 'giathi kia kurariria njohi ya guikurukia nyama'. This is the feast where beer was to be taken in order to make easier the swallowing of the meat. A bull and a goat had to be slaughtered. This was a big ceremony where the man had to show whether he wanted to marry the girl or not.

Some beer was put into a horn and given to the man. In the Gikuyu society, all the brothers to one's father were addressed as "baba" or father. This is also true today. If a brother is older, he is called, "baba mukuru" and if he is younger, he is called "baba munyinyi."

The man had to pass the horn to the girl's "younger father" if he wanted to marry her. Should he pass it to his own father, this is a sign of rejection. In case he rejected the girl, he had to pay a heavy penalty for his misdeed. He had to pay a fine of ten goats or a heifer and a goat. This kind of penalty is justifiable as these animals were meant to be slaughtered after the girl had delivered so that she could gain some strength.

Question 6: How was theft punished?

Answer: Theft was not common. There was nothing like stealing food as food was very abundant. If however, a person did not have food and decided to help himself from a neighbour's farm, this was not taken as crime. What was mostly regarded as crime was when one stole an animal like a goat or a sheep. If one was caught stealing especially at night, he could be killed. A thief was pinned down or crucified with curved sticks. A habitual thief was warned several times before justice was done on him. Infact, the villager sang a song to warn him that if he did not stop his

behaviour, he would perish. The following song was sung as a warning to the thief and the sorcerer.

Muici and murogi	-	thief and sorcerer
Muici wimenyerere kwa	-	thief take care, the
Murogi kwanahia	-	sorcerer's place has been burned
Njama ni ya waititi	-	it's the waititi group
Ikuria micuko ii	-	it has become annoyed
and yagwatia kimuri	-	and has lit the fire
Kwahia kwa murogi	-	the sorcerer's place is burnt.

The thief had to be warned several times before he could be put to death. If he was not ready to reform after several warnings, the society had no choice but to deal with him in accordance with the tradition.

A habitual thief was said to disrupt peace in the society and to save it, he had to die. He took without being given. He took what rightly belonged to another. This is the philosophy for employing the death penalty. This kind of punishment acted as a deterrence against habitual theft.

The others were warned that should they commit a similar crime, severe punishment would follow. Usually, there was no forgiveness after a criminal had been warned several times to reform.

Question 8: How was sorcery punished?

Answer: A sorcerer or a "murogi" was a person who was believed to practise witchcraft or magic. He used his power to cause illness in the society. Most sickness and deaths were attributed to sorcery. A sorcerer was very well-known in the society. This art of sorcery gave him a lot of

pleasure and even wealth. People could go to him if they wanted their enemies to fall sick or die.

If there was a sorcerer within the family, the clan or "muhiriga" met so that the sorcerer could be warned against his misdeeds. He was given several warnings. If the clan was not able to make him stop his behaviour, the Kiama was consulted. If again he could not stop, nothing but punishment should force him. The culprit was arrested by young men in the society and this also included his relatives. He was then brought before the Kiama. He was wrapped with banana leaves, "mugayu", then put on fire. He was set free. The whole community surrounded him. There was no way he could escape. He had to die. He could attempt to escape by running away. The more he ran, the more the fire glowed and the more he was burned.

Another method employed was where the culprit's hands were tied to the back with the head put inside a "kiondo", or the Kikuyu basket. He was hurled into a small hut which was locked from outside. The hut was then put on fire. While inside, he confessed about the crimes he had committed seeking for mercy but there was no way he could escape death.

Another method was where he was enclosed inside a "mwatu" or beehive. This was then rolled down the highest hill of the land like Kiamucheru Hill.

Though this was a harsh and brutal way of dealing with a criminal, it is not for nothing that it had to be done. The philosophy behind the killing of a sorcerer was that since he had disregarded the health and lives of others, why should he be allowed to live? The society had a few sorcerers and would be better off if cleared of all of them. The same case applied to murderers. They had to die in the same way they had caused the death of the other person.

Question 9: Who determined the form of punishment to be employed for a crime?

Answer: The Kiama and the clan determined the type of method to be used for a certain crime. This was in accordance with the rules of the tradition which were final and unquestionable. Most methods aimed at inflicting pain. The more painful the punishment was, the more it was thought to deter potential criminals.

Question 10: How do you compare in general terms the severity of the traditional methods of punishment with those employed in Kenya today?

Answer: In terms of severity, the traditional methods of punishment were harsh, brutal, inhuman, and therefore immoral. Though in the traditional setting it was believed that the criminal had brought evil upon himself even death, the methods employed were very barbaric. One never had a chance to defend himself. All the same, several warnings had been given to him. Today even a murderer has a chance to defend himself and can even escape a penalty including capital punishment. Issues of provocation and the circumstances leading to an offence are assessed before one is finally sentenced. However, this is not to say that all methods of punishment are approvable.

5.3 (ii) The Thought of a Traditional-Philosophic Sage on Modern Methods of Punishment.

Question 1: What is the origin of the modern methods of punishment?

Answer: With the coming of the Europeans so came different methods of punishment. These include fines in terms of money, imprisonment, probation, remand homes, juvenile homes, different methods of corporal and capital punishments.

Not only did the Europeans impose those methods of punishment, they also imposed their laws which are still being followed today. These laws replaced the traditional rules and customs. The forms of

punishment to be meted against a criminal have to be in accordance with the dictates of the white man's law.

Question 2: What is punishment?

Answer: The term punishment has negative connotations. In the Gikuyu language, the term used for punishment is "kuherithio." This means "to be made to suffer." This is something unpleasant done to the person who has done what is forbidden. Pain must be included, "ruo", when punishment is employed. Inflicting pain is not morally justifiable.

Question 3: How do you generally view modern methods of punishment in relation to traditional ones?

Answer: The harshness of traditional methods of punishment is also evident in the modern methods. The problem of crime will not be solved by imposing a lot of suffering both psychological and physical. Both the traditional and modern methods of punishment mostly do not regard or consider the criminal's individuality. Any method of punishment in this view is seen as an expression of the hatred toward the criminal. The criminal is viewed as an "unclean" person who defiles the society but despite this fact, he has to be treated like a human being. Any method of punishment that interferes with an individual's freedom is morally unjustifiable.

Despite the fact that there are laws that ought to be followed, man's own individuality should not be ignored. Every person has and is entitled to his "inalienable rights." This includes his right to choose what to do.

Question 4: How justifiable do you think is deterrence as a reason for punishment?

Answer: Once a crime has been committed, it has been done. No amount of punishment will blot out the fact that a crime has been committed in the first place. One should not be treated as an object through which people are educated not to commit crimes. Each person is unique. Any

attempt at making the society learn a lesson from another person through punishment is futile. People are different in nature. There are some people who will be deterred after an individual is punished but there are others especially hard-cores and potential criminals who cannot be deterred. The suffering of the criminal then becomes futile hence unjustifiable. The criminal is treated like a teaching object, not like an individual who is in need of help. His individuality is taken for granted at the expense of the society. This is morally unjustifiable.

Question 5: What is your view of capital punishment?

Answer: Capital punishment is a method of punishment which is the most morally unjustifiable and all ways and means should aim at abolishing it. Capital punishment is a clear indication of how immoral the society has become. People have neglected their conscience to the extent that they do not feel guilty at all after carrying out this form of punishment. This method of punishment is very barbaric. Whether the criminal has murdered or not, this is not an ethical-logical way of punishing him. Life being sacred ought to be given its ultimate respect.

This method usually involves a lot of pain and torture hence should be condemned in the strongest terms possible. The individual is not treated like a human being but like an animal, like a cow, or a hen to be slaughtered. Employing capital punishment as a method of punishing a criminal is a clear indication that though we are living in the present world which should be humane and modern, in practice, we are living in the times of our forefathers.

Paying evil with evil is immoral. Working on the principle that since a criminal has murdered he deserves to die is fallacious. Two wrongs do not make a right. Killing a criminal because he killed another person is immoral. Capital punishment goes beyond just punishing the criminal. It extends to the family, his colleagues and the society that knew him.

The family that is dependent entirely on the victim of capital punishment is made to suffer materially, physically, emotionally and psychologically. The suffering involved with the death of the victim of capital punishment is negative. Therefore, it cannot be morally justifiable.

Question 6: Why do you think people get involved in crime?

Answer: The prevalence of crime in the society is a clear indication of the society's inability to provide the needs of the society adequately. It indicates that something very essential is lacking. People do not commit crimes for the crime's sake. There must be a cause. There is urgent need for eradication of poverty, provision of education and employment. With the rise of population, crime has also increased. Land is inadequate, so is employment. Poverty has set in. The high cost of living, inflation and unemployment, poor wages have also contributed to the rise in crime. People commit crime in their attempt to make ends meet.

A close examination at crime indicates that most of them are economically-oriented. Road-accidents are very prevalent today. Most of those vehicles are public service vehicles like matatus and buses. Most of these overspeed, overload and even overcharge with the aim of making a lot of profit. When an overloaded vehicle is impounded, the drivers or the conductors are able to get away with it very easily through corruption. Sometimes heavy penalty in terms of fines is imposed on the drivers. This is meant to stop and deter his likes from this kind of behaviour. It has become evident that this method hardly reforms the driver or deters other drivers. This method is too lenient hence does not achieve its purpose. Being too lenient a method, such kind of behaviour does not stop. The commuters suffer hence this form of punishment is not morally justifiable. However, sometimes a heavy

penalty is imposed on the driver even when there are only about two extra passengers in his vehicle. The driver is harshly punished for the sake of others.

Question 7: How do you view punishment being employed for the sake of preventing a repeat of a crime in future?

Answer: Most punishment are inflicted not necessarily because of the effect of crime on the present but because of the future; to deter others. The question is whether the crime that has been committed today will surely occur in the near or distant future. We are never certain of the future. Even the person who commits a crime today needs not commit it in future. In this case, any method of punishment that is future-oriented is immoral. It should not be overgeneralised that since a criminal has been punished, he will not repeat doing crime in future. It does not mean that because a criminal has been punished, members of the public will not commit a similar crime. It does not follow that since a certain criminal reformed after he was imprisoned, others will also reform, It is fallacious to assume that if a certain form of punishment has deterring effect in one situation, it will always have similar effects in all situations.

Human behaviour is quite unpredictable. One does not necessarily have to reform after being punished. Punishment does not always deter. If deterrence occurs, it may be short-lived. The future is unpredictable. Any attempt at deterrence and even reformation through punishment is tantamount to infringement on human inalienable rights and humanity of an individual. This is especially evident in methods such as the death penalty, corporal punishment which involves pain, humiliation and degradation of a person, imprisonment where ones movement and other rights are deprived and so is detention without trial. All these methods

indicate that the welfare and the rights of and individual are taken for granted.

Question 8: According to you, whose welfare should be considered more when punishing; the society's or the individual criminal's?

Answer: Both are equally important. The criminal is a dangerous person to the society hence has to be punished and society has got to be protected. Punishment aims at promoting and securing the good of the community at the expense of the individual. Individual's rights should be prior to those of the society. Pain and deprivation need not be imposed because a crime has been committed as this tends to overlook ethical considerations. Most methods of punishment are too severe hence tantamount to committing crime against an individual. This should be avoided. We should avoid to commit crime when employing any form to punishment.

Question 9: How much do you think a criminal ought to be punished?

Answer: A lot of injustice is done to the criminal if he is severely punished. A criminal ought to be punished justly. The question is how just punishment ought to be. When punishment is employed against a criminal, he suffers twice. First, pain is inflicted for his own sake. Since he has done wrong, he has to be punished. He is punished in order that he reforms so that in future he becomes a law-abiding citizen. The question is how certain we are that he is likely to do crime in future. Secondly, he is punished for the sake of others of the society. Since the state has failed to teach morality, the criminal is treated like a moral object. Severe penalties have adverse effects on the criminal. They hardly help in curbing crime. What should be done instead of inflicted harsh punishment is the provision of necessities as the moral obligation by the state. This will lead to a humane society where a criminal's individuality and humanness is seen as worth.

Question 10: What is your opinion of imprisonment?

Answer: This is one of the most expensive methods of punishment. A lot of money is spent in building and maintaining a prison. Imprisonment and detention without trial usually entail the use of torture which cannot be ethically justified. In these forms of punishments dehumanising conditions are evident.

These are instances where food is eaten at very odd hours and generally the quality of this food is questionable. The uniform worn which includes a pair of white dirty shorts and a shirt is dehumanizing. The prisoners are usually shaved. Efforts need to be made to provide good quality food, shelter and accommodation. Confinement alone is enough punishment. Additional punishment is committing more crimes. This includes caning the prisoners, denying them basic needs, denying them enough beddings, making them lie or sleep on cold floors to mention only a few. These lead to deteriorating health conditions of the prisoners. Medical attention in case of sickness is very poor. It is not surprising therefore, that when some prisoners or detainees are set free, they have lost a lot of weight and are in very poor health. Evidence is available where ex-prisoners or ex-detainees seek medical assistance from abroad. This is clear proof that after all, a prison is not "a holiday camp" but an unpleasant and a dehumanizing institution. This shows the immorality of the practice.

Question 11: What attitude should we develop towards a person who is a criminal; a dangerous person to the society?

Answer: Despite the fact that an individual has committed a crime, he should not be abused in the name of rectifying the situation. Once a crime has been committed, it has been committed. There is no going back to the situation of non-crime. Account should always be taken that the offender is a citizen and a human being like any other law-abiding person. Each is entitled to protection. The offender has got equal rights with anybody else to be protected. Through locking him in i.e. by imprisonment or detention, the state has failed to protect his welfare. It

is high time we became mindful of other people's welfare so that it will be possible also to build a moral nation. It should be noted that the suffering of an individual has great effects on the society. There are cases where people express publicly their sympathy after a certain individual has been sentenced to jail or to life-imprisonment or to death irrespective of the crime that has been committed.

Question 12: What is your opinion of life-imprisonment as a method of punishment?

Answer: It is no better than the death penalty. The victim, his family, colleagues and those who know him suffer mentally as well as physically. People live in fear and anxiety, when they know that a person that they love has been sentenced to life-imprisonment. A lot of uncertainty about the offender's welfare and even his life is questionable. It is a terrible method of punishment which should be abolished. It cannot be morally justifiable.

Question 13: How do you view fining?

Answer: Too little amount of money charged as fine cannot deter, reform or even help the society. If the offender is a rich person, he will comfortably pay the fine. This means that chances are high that he will repeat the crime since he has got the money. He has no regrets for having committed the crime. Through this method, he cannot reform since it is very lenient. The society is not protected when the criminal is set free on account of fine payment. In this case, this method is not morally justified.

There are times when the fine is very heavy and the offender cannot afford to pay it. The alternative should be found for instance, short-term imprisonment. The crime committed may not be too serious to deserve the heavy penalty hence this method is not morally justified as the punishment used does not fit the crime committed but brings suffering. In this case, the purpose of punishment like deterrence and

reformation are not achieved. This only brings deprivation when the penalty is too high. Too little penalty, for example in terms of fines has no deterring effect. One takes advantage of the lenient punishment to repeat the crime.

Question 14: Do you think there should be uniformity when employing a certain form of punishment or a particular crime of each case should be treated on its own merit?

Answer: Punishment for any crime should be thoroughly assessed. There should be no uniformity where a certain crime is punished with a set form of punishment. Certain facts ought to be considered before sentence is passed on an offender.

The age of an offender should be taken into consideration. An old man of about fifty-five years should not be jailed for many years. Those under twenty years should be put on probation and not jailed unless one is a habitual offender. Prior involvement in crime is another factor that needs serious consideration. For those who are first offenders especially young people, being labelled as "an accused" or criminal person is enough punishment. Employing another punishment on top of this is crime. It does more harm than it does good. These young people should not be remanded in custody on pretence that investigations are not complete. The case in point is where some boys from St. Kizito Secondary School in Meru District were accused of rape and murder of nineteen school girls in the same school. These boys should be put on probation and allowed to continue with their studies. Their case being a social and national issue is enough punishment. Most of them are victims of circumstances and should never be treated as if they are hard-core criminals. They should be given a more logical and fair treatment such as suspension from school for a year. Caning or jailing them is too much punishment. A offender's

marital status should also be considered before any method of punishment is meted against him. A lot of damage is done when a married person is jailed for many years. This threatens the stability of the marriage. The spouse left behind may lose hope and remarry. This has adverse effects on the children and the whole family economically or financially, psychologically and emotionally. The children may not be able to continue with their education.

The present social status of an offender should also be considered before any method of punishment is employed. Imprisonment and corporal punishment are degrading and disrespectful to the offender. When this kind of punishment is employed, the individual loses confidence. The society is likely to change its attitude towards the individual. People are likely to disrespect, dishonour and stigmatise him.

In case of political offenders, one's experience in political or politics scene needs to be evaluated. When an individual commits a crime for example by failing to account for 'Harambee' money, people should be able to predict whether such a person is likely to repeat the offence or not. If one utters unpleasant political statements, a stern and public warning is enough. Detention without trial for political crime should only be meted if all the other ways have been tried and failed. This method should be used as a last resort especially if one should only wish the offender nothing but death through suffering.

There is also need to assess whether a certain form of punishment has had deterrent, reformative or preventive effects against the crime in question. This is a moral obligation to all. It is immoral if the offenders are punished regardless of the effects the punishments have on themselves and the society. Any method of punishment employed without assessing its effects cannot be said to be morally justified.

Question 15: Do you think increasing penalties has any effect on the decrease in crime?

Answer: Not at all. No individual is like another. People will react differently to different forms of punishment. Some offenders may reform while others will continue to commit crime despite the severe punishment employed. Some members of the society will be deterred by certain form of punishment while others will not. There should be no increase in penalty in order to deter, reform or protect. Increase in crime should not be the determining factor in increasing penalties on criminals. The involvement of the offender in crime could have nothing to do with the fact that there is high crime rate. When passing sentence, magistrates will advocate a severe punishment and will not be lenient simply because, "recently there has been an increase in this kind of crime." This crime could be robbery with violence, theft, cattle theft, rape, being found with seditious publications among others. The offender could be a victim of circumstances. He may also have been a victim of wrong identity. He may be a first offender. It is immoral to punish him for the sake of general deterrence. Increasing the penalty on the grounds of general deterrence cannot be morally justifiable. There is no causal or logical relationship between the past, the present occurrence of crime and the future or the likelihood that the crime will be committed.

Question 16: Give us your general views of the formal methods of punishment in Kenya today.

Answer: Most of these methods cannot be said to be justifiable. The only give evidence of irrationality of punishment. Capital punishment, imprisonment and detention without trial are the best examples. These methods are criminal in nature. Returning evil for evil is irrational.

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Everyone is entitled to live and it is immoral to shorten one's life when he wants to go on living just because he has done wrong. Decent living is a natural desire. Confining an offender in prison is an indecent action. The torture experienced and some adverse behaviours learnt in prison such as homosexuality are immoral. Some people, convicted of having committed crime do not view themselves as criminals. This is especially true of political detainees. They have not the slightest regret for their action or involvement in a certain act which is deemed criminal. This means, however much they are punished, whichever method is employed, the exercise is futile. In some instances, the society will sympathise with their sufferings. This kind of offenders are quite different from the others who feel that they deserve punishment. Some criminals do not regard themselves as responsible to the crime committed. There is urgent need to assess an offender's responsibility in committing a crime before punishing him. His background, the schools he attended, his associates, his general environment, the prevailing economic situation, employment, marital status among other factors should be assessed.

Question 17: What is your view of mob justice? Is it immorally justifiable?

Answer: Mob justice is an immoral action. This is very common in towns especially. Usually it is inflicted on those caught misbehaving red-handed for example purse-snatchers and thieves. This is not a logical but an emotional way of reacting to misbehaviour. It is possible that some of those that are readily available to employ this kind of punishment are not innocent people. The offender's friends, associates exercise this method which is humiliating, disgusting and dehumanising. An offender is not treated with dignity and respect which everyone deserves to enjoy but is treated like an object. A thief could have stones

hurled on him or would be battered using any weapon available. Sometimes he could be burnt alive.

This method is shameful, embarrassing and merciless. It is very unethical. It is too severe a method compared to the crime committed. A bag-snatcher may pay with his life for very little amount of money or sometimes for snatching an empty bag. When people exercise mob justice, they take the law into their hands which is not morally justifiable. A thief should be arrested and taken to the police station so that the law enforcers should deal with him.

The method is also immoral in case the victim has been wrongly identified. This method of punishment in no way tries to compensate for the crime done, does not reform, deter or protect the society. Despite the fact that one bag-snatcher or a thief has been publicly and mercilessly been beaten to death, the law is unable to apprehend his associates. Killing one individual could serve as a warning to the others, but the method employed cannot be morally justified. Burning an individual alive is very harsh and inhuman. When people react with emotion to an offender as a mob, little rationality is exercised. People lose a sense of what is right in the hands of the strong. Pain is deliberately and violently inflicted causing a lot of untold suffering hence morally unjustifiable.

Question 18: How do you view shooting of a criminal in public?

Answer: This is also wrong as every individual is entitled to a hearing. One should be given a chance to defend himself. One should be taken to a court of law and his guilt assessed.

Question 19: What is your opinion of detaining a patient in the hospital if he is unable to foot the hospital bill as a way of punishing him?

Answer: This is an immoral behaviour. When a patient is detained due to his inability to pay the hospital bill, it shows the life and health of an

individual is taken as valueless compared with the money. Once a patient has recovered, he should be allowed to go home and join his family. Any right thinking individual will feel obliged to pay for the treatment. Many families will make all efforts necessary to raise the money to clear the hospital bill. Cases of negligence of patients have also been reported in our hospitals because of their failure to pay money. This is very immoral. This is also evident in some hospital mortuaries where dead bodies are not released to the family members if they do not meet some financial obligation. This immoral way of making money should be condemned.

Question 20: How do you view abortion and negligence of small children?

Answer: These two types of behaviour can also be regarded as criminal. A mother who goes for an abortion because she has no financial means to bring the child up has committed a crime. She has punished the unborn child through killing it for mistakes which are not of its own making. This is very immoral. An innocent, unborn baby, should not be punished because of economic reasons. Neglecting small children because of the parents' inability to cater for them is also a crime. These children do not deserve this kind of punishment. However, poor one is, one has a moral obligation to take care of his or her own children. Letting the children suffer cannot be morally justified.

Question 21: What do you think about divorce, separation and desertion?

Answer: These are immoral behaviours. A husband or a wife may desert her partner due to her or his misbehaviour or due to financial inability. This makes the partner who has been left very insecure. A lot of physical and psychological suffering occurs both to the parent and the children.

Question 22: Is wife beating a justifiable method of discipline?

Answer: This is also morally unjustifiable. When this punishment is employed, it degrades and dehumanizes the woman. She is treated not like a person

with feelings but like an object, like a drum or like an irrational being. She not only suffers pain physically but also psychologically. The physical wounds may heal but psychological ones are ever-lasting. Problems with the family should be settled through communication amicably. Wife-beating is exercised by the most irrational of all men.

Question 23: What method or methods of punishment would you advocate for misbehaviour in institutions such as schools, colleges and places of work?

Answer: In case of misbehaviour in schools, institutions of learning and even in places of work, the methods generally resorted to is suspension and expulsion. People should instead be justly fined. Suspension and expulsion have adverse effect on the victims. There is also insecurity attached especially to the loss of jobs and loss of companionship or associations. These cause alot of psychological pain, humiliation and material loss. The families of the victims are adversely affected. After spending alot of time in educating their children, when this kind of punishment is employed, the parents feel frustrated. Some of the victims could do alot of harm to themselves due to this kind of punishment. This punishment therefore cannot be said to morally justifiable.

5.4 Analysis of Field Research

From the prison official, we gathered the information that no prisons existed in Kenya before the coming of the Europeans late in the 19th century. One is liable to be imprisoned if one is 18 years and over. Those below 15 years are imprisoned in Borstal and Youth Corrective Training Centres.

By 1990, there were more male prisoners than female ones. The difference is that men go out more to work outside the family circle. When they do so, they are likely to be exposed to stresses and temptations of social life outside home. Prisoners

end up being engaged in domestic, agricultural and industrial work which is meant to be productive and useful.

Prisons aim at punishing the offender basically by depriving him of freedom so that he can realise his mistake and reform. He is tamed so that the society is left in peace. He however, does not reform and instead learns immoral behaviours such as homosexuality in prison and ends up even committing more crimes than before. He may end up going back to the life of crime especially if he does not get meaningful employment when he is released. However, for the time the criminal is in prison the society is at peace.

From the practising lawyers, we gathered that crime is any contravention of the law which is punishable. The underlying principle behind the use of each method of punishment for each crime is to bring society in order. Crime is not easy to curb because the society is not in order. The society needs to reduce the level of unemployment, redistribute wealth fairly and develop a natural ethic that abhors crime and educating people on the need for respect and morality.

For the abolition of punishment, the lawyers agree that this is not easy. Man must always know that there is a sanction if he deviates from the 'normal' behaviour. There will always be those who will not obey the law of the society. However, some methods of punishment like the death penalty should be abolished because it is committing crime for another crime. Two crimes do not make a right.

The traditional-philosophic sage informs us on both traditional and the modern methods of punishment.

There were heavy penalties employed for behaviours such as adultery, pre-marital sex, theft, sorcery, murder etc. Wrong-doing was punished because it threatened the societal peace, harmony and well-being. Though the methods used were harsh, the rate of crime, however, decreased.

Modern methods of punishment such as the death penalty are condemned and abolition advocated. The criminal is not treated like a human being but like an animal. Paying evil for evil is immoral. Working on the principle that since a criminal has

murdered he also deserves to die is fallacious. Two wrongs do not make a right. The death penalty should be replaced with life imprisonment because murder is not committed in its implementation.

5.5 Our Summary of the Field Findings

When any form of punishment is employed, we should not lose sight of the fact that crime is a by-product of the society. As much as an individual offender could be responsible for the crime committed, the society has also its part to blame. If there is no society, then it is impossible for crime to occur.

Despite the fact that criminals are dangerous people, they should be treated with dignity worth of every individual. It is time that the state or society has a right and duty to protect the citizens. However, this does not give it a licence or power to punish excessively. The state owes each and every citizen a duty to protect and safeguard his rights. When punishing, people's welfare should be put into consideration so that one should not be excessively punished. Severe punishment are tantamount to committing crime. We should not attempt to stop crime by committing another crime as two wrongs do not make a right. In our endeavour, we should enhance our Nyayo Philosophy of love, peace and unity. Our employment of punishment should not be exemption.

5.6 Notes

1. Senior Superintendent of prisons
2. Lawyer 1 and 2 are advocates of the High Courts
3. Traditional philosophic - sage - waithanji Gregory.

CHAPTER 6

SUMMARY OF THESIS AND CONCLUDING REMARKS

A close examination at both the history of punishment in Europe and America shows that the kinship group played a significant role in the administration of justice which was mainly in terms of compensation. This is comparable to the administration of justice before the coming of the Europeans in Kenya. The aim of punishment was mainly to redress the wrong done rather than the infliction of pain.

The ancient methods of punishment in Europe, America and in fact African were inhuman and hence morally unjustifiable. This is exemplified with the methods such as the death penalty which included various forms such as hanging, crucifixion and burning. A lot of physical torture and mutilation was also evident. These came in various forms such as in flogging, burning, dismemberment and disfiguration. Due to the barbarity and inhumanness evident in these methods of punishment, both Europe and America went along in abolishing them. Instead of making punishment more severe in order to curb crime, tremendous efforts were made at humanising punishment and reducing the brutalities that went with it. This drastic change came as a result of writings and agitations of scholars and a lot came due to the economic, social and political forces that were in operation.

Pardon and commutation of sentences became evident. Corporal punishment which included application of abusive physical pain has declined. There has also been the decline in the use of capital punishment. These methods are inhuman and hence morally unjustifiable. It is no wonder then that they have been abolished in both Europe and America.

As we have seen in chapter two, the methods that were used for punishment in traditional African society as exemplified by the Kikuyu society of Kenya, were also barbaric and inhuman. These methods cannot be said to be morally justified. These included burning of the offenders like witches or wizards to death, stoning thieves to death, rolling thieves down hill and corporal punishment. It should be noted that

before such methods were meted or employed, there preceded several warnings. These barbaric methods were eventually employed to those offenders who never changed their ways or those offenders who were habitual offenders. All the same, these methods cannot be said to have been morally justifiable. The disregard for life and infliction of pain is evident and can in no way be justified. The society punished in accordance to set rules and traditions which were followed unquestionably. The only justification for the use of these methods was that they were traditional. This is not a rational argument for the employment of these methods.

Compensation in terms of livestock, cattle, sheep and goats was mainly preferred and used mainly on non-habitual offenders. People were fined in accordance with the set traditions. Ways and means were sought at bringing disputing parties into mutual agreement. Friendship and reconciliation between disputing parties and not infliction of suffering was evident.

To avoid the evils of bribery and corruption which could threaten justice, there was the idea of uttering of curses. The oath controlled the procedure of settling disputes. The oath served several purposes such as preventing people from telling lies through the fear it invoked, it helped to bring offenders to book through guilty conscience and confession. It also ensured impartial and unbiased judgement. However, the ordeal involved in the whole process of oathing sometimes involved severe pain. In this case the moral justification is questionable. Since the traditional society believed these oaths to be effective, none could take the ordeal when guilty.

Capital punishment was rarely employed except on habitual offences such as murder, theft and other serious crimes but all the same these were very rare. Corporal punishment was used very rarely. The most important methods of curbing crime in the traditional society was fining. A fine came in form of livestock. Punishment though aimed at deterrent, that is making the rest of the society to learn that crime does not pay. Making an offender as a lesson object is not justifiable despite the purpose it served in society of deterring others.

Punishment in traditional African society was also retributive. An offender had to experience pain and public shame because of the offence he committed or the evil he did. The saying among the Kikuyu is that the offender had brought the evil on himself since he knew too well what would happen to him if he erred; "weka uuru niwe weika; weka wega niwe weika" is a renowned proverb. "This means that when you do evil you will bring evil upon yourself and when you do good, you bring good upon yourself. The more serious the crime was, the more severe was the punishment.

The utilitarian theory is the only ethical theory that had a place in the traditional African society. Any action that threatened communal order and harmony was discouraged and punished. Such actions were not condoned since they threatened the spiritual and material security of its members.

Punishment in the traditional African society aimed at restoring the balances in social equilibrium that had been disrupted. Various principles were employed when punishing. These were reconciliation, restitution, compensation to the individual and family, protection of community from direct physical harm through expulsion or even execution and formal reconciliation of the offender to the community whenever possible.

One would say that the methods used by the Gikuyu society were harsh and hence immoral. However, we can say that they are morally justifiable in so far as they go by these principles which are generally utilitarian. The good of the community was prior to that of the individual and punishment aimed at showing exactly that.

From what we gathered from the field, from the professional lawyer, prison officials, the traditional sage and also from our scholars, most of the methods of punishment used in Kenya today are not morally justifiable. The offender's human rights are usually not put into consideration when punishment is meted against him. The social-economic factors that contribute to the commission of crime should be improved. Poverty, unemployment, inflation are some of the causes of crime. When these are present, no amount of punishment will curb the crime rate which keeps on raising. The gap between the rich and the poor keeps widening. The rich keeps on

getting richer while the poor keeps getting poorer. With the rise of population, jobs are becoming more and more scarce, the cost of education is also rising hence very few will get enough education with which to secure a job.

The crime rate will only decline if these socio-economic factors are taken care of. Severe, cruel methods of punishments, as shown by the history have never been known to curb crime. Imprisonment, capital punishment, corporal punishment and detention without trial should be abolished. This is because they are not supported by any ethical principle. These are morally unjustifiable. Fines should be reasonable and should be evaluated according to one's resources.

CONCLUSION

There is an urgent need to soften severe sanctions. This should be done, not on the grounds that crime has not been committed or that "offence" is not an offence, but on the grounds that, where any two or more forms of punishment will achieve the same effect, it's always preferable to apply that which is less or least harsh hence more morally justifiable. The logic of this suggestion is not so much that what a criminal does is of itself to be approved nor even appropriately to be regarded with indifference but rather that even where what he does is wrong or granted in certain circumstance, any form of public interference and punishment in particular, would prove far much worse. We should exercise restraint. The logic of this kind of restraint is to avoid committing crime through morally unjustifiable methods of punishment in attempting to correct the wrong or avoiding the crime commission.

We are not advocating total abolition of punishment since in the kind of society we have today, with socio-economic problems of the type we have mentioned, crime commission will continue. Punishment's importance cannot be underrated. It ensures that evil-doing has to be justly dealt with and it also reaffirms the society's collective agreement about what is right and what is wrong. People have to differentiate between good and bad actions. Punishment also serves to reinvigorate individual's conscience. However, severe punishments should be avoided because they are against ethical principles. We must avoid the assumption that "twice as much is

always twice as good." There are situations where half as much, but treatment of imprisonment is twice as effective.

We are not also for the "treatment" as an alternative. This is because it is an expensive endeavour and we doubt its morality in terms of practicability and predictability that the criminals will be rehabilitated for ever and that these methods will totally curb crime in Kenya.

It should be put into consideration that an offender is a human being and a citizen like any other person whose humanity and well being need to be respected and safeguarded. He has inalienable human and constitutional rights like any other individual human being.

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