

JUVENILE DELINQUENCY

A dissertation submitted in Partial  
fulfillment of the requirements for Bachelor  
of Laws Degree, University of Nairobi.

by

JEPCHIRCHIR, EUNICE

JULY, 1982

NAIROBI.

DEDICATION

To my father for his love, patience and  
encouragement which has inspired me even in the  
most difficult times of my life.

4th Dec 1940

TABLE OF CONTENTS

	page
ACKNOWLEDGEMENTS .....	(i)
TABLE OF STATUTES.....	(ii)
TABLE OF CASES.....	(iii)
ABBREVIATIONS.....	(iv)
<b>(i)</b>	
INTRODUCTION.....	1
CHAPTER ONE.....	3
Definition of Juvenile Delinquency .....	3
Origin and Evolution of Juvenile Judicial System .....	7
The Development of the Court and Juvenile	
Institutions .....	11
<b>I am greatly indebted to my Supervisor, Mr. Kangwana, Lecturer in the</b>	<b>14</b>
<b>Faculty of Law, University of Nairobi, whose useful comments and</b>	<b>14</b>
<b>Constructive criticisms made the writing of this paper possible.</b>	<b>15</b>
<b>My gratitude also go to the Senior Probation Officer, Rift Valley</b>	<b>16</b>
<b>Province, Mrs. Kamuren, who provided me with useful material on</b>	<b>17</b>
<b>probation and after care services.</b>	<b>17</b>
The Theory of Differential Association .....	20
Broken Homes and Juvenile Delinquency.....	21
Physical Explanations of Delinquency.....	24
Biblical Explanations of Delinquency.....	25
Psychological Explanations of Delinquency.....	27
The Interactionist Theory .....	28
The Socialist Approach to the Causes of Delinquency.....	29
Shortcomings of the Theories of Delinquency Causation ....	31
CHAPTER THREE.....	37
Children in Need of Care, Protection and Control.....	39
Committal to the Care of a Fit Person or Approved Societies	40
Non-Custodial Sentences .....	42
Discharge .....	42
Corporal Punishment .....	44
Fines.....	45
Probation.....	46
Aims and Objectives of Probation.....	47
Custodial Sentences .....	51
Remand Homes .....	57

TABLE OF CONTENTS

	page
ACKNOWLEDGEMENTS .....	(i)
TABLE OF STATUTES.....	(ii)
TABLE OF CASES.....	(iii)
ABBREVIATIONS.....	(iv)
INTRODUCTION.....	1
CHAPTER ONE:.....	3
Definition of Juvenile Delinquency .....	3
Origin and Evolution of Juvenile Judicial System .....	8
The Development of the Juvenile Court and Juvenile Institutions .....	11
CHAPTER TWO.....	14
Causes of Juvenile Delinquency .....	14
Poverty and Delinquency.....	15
The Theory of Anomy.....	16
Large Families and Delinquency.....	17
Urbanization and Delinquency.....	17
The Theory of Differential Association .....	20
Broken Homes and Juvenile Delinquency.....	21
Physical Explanations of Delinquency.....	24
Biblical Explanations of Delinquency.....	25
Psychological Explanations of Delinquency.....	27
The Interactionist Theory .....	28
The Socialist Approach to the Causes of Delinquency.....	29
Shortcomings of the Theories of Delinquency Causation ....	31
CHAPTER THREE... <del>THE</del> ... <del>SYSTEM</del> ... <del>OF</del> ... <del>DISPOSAL</del> .....	37
Children in Need of Care, Protection and Control.1.....	39
Committal to the Care of a Fit Person or Approved Societies	40
Non-Custodial Sentences .....	42
Discharge .....	42
Corporal Punishment .....	44
Fines.....	45
Probation.....	46
Aims and Objectives of Probation.....	49
Custodial Sentences .....	50
Remand Homes .....	57

	page
Approved Schools .....	55
Borstal Institutions .....	58
Detention Centres .....	62
Young Corrective Centres .....	63
Athi River Prison .....	63
 CHAPTER FOUR .....	 65
Juvenile Judicial System, A Critique and Recommendations .....	 65
Problems Related to the Criminal Jurisdiction of the Juvenile Court and the Welfare Principle ....	 66
Problems Related to the Fixing of the Age of Criminal Responsibility .....	 67
Recommendations .....	69
Problems Related to the Penal Measures .....	71
Recommendations .....	72
Borstal Institution .....	73
After Care Work .....	74
Difficulties Encountered in Respect of After Care Work	75
Recommendations .....	76
Conclusion .....	77
Footnotes .....	80
Selected Bibliography.....	90

TABLE OF STATUTES

(i)

KENYA

Borsial Institution Act ( Cap. 92, Laws of Kenya )

Children and Young Persons Act. ( Cap. 141, Laws of Kenya )

Detention Camps Act ACKNOWLEDGEMENTS 91, Laws of Kenya )

Industrial Training Act ( Cap. 237, Laws of Kenya )

I am greatly indebted to my Supervisor, Mr. Kangwana, Lecture in the Faculty of Law, University of Nairobi, whose useful comments and Constructive criticisms made the writing of this paper possible. My gratitudes also go to the Senior Probation Officer, Rift Valley Province, Mrs. Kamuren, who provided me with useful material on probation and after care services.

BRITAIN

Childrens Act, 1908

Children and Young Persons Act, 1933

Factory Act, 1883

First Offenders Act, 1887

Parrkhurst Act, 1838

Probation of Offenders Act, 1907

Reformatory Schools Act 1854

Summary Jurisdiction Act, 1879

Youthful Offenders Act, 1854

OTHERS

Child Welfare Act, 1896 (Norway )

Juvenile Court Act, 1889 ( Illinois )

(ii)

TABLE OF STATUTES

KENYA

Borstal Institution Act	( Cap.92, Laws of Kenya )
Children and Young Persons Act.	( Cap.141, Laws of Kenya )
Detention Camps Act	( Cap. 91, Laws of Kenya )
Industrial Training Act	( Cap. 237, Laws of Kenya )
Juvenile Ordinance	( No.22 of 1934 )
Penal Code	( Cap. 63, Laws of Kenya )
Probation of Offenders Act.	( Cap. 64, Laws of Kenya )
Prisons Act	( Cap. 90, Laws of Kenya )
Refamatory Schools Ordinance	( No. 29 of 1910 )

BRITAIN

Childrens Act, 1908	
Children and Young Persons Act, 1933	
Factory Act, 1883	
First Offenders Act, 1887	
Parrkhurst Act, 1838	
Probation of Offenders Act, 1907	
Refamatory Schools Act 1854	
Summary Hurisdiction Act, 1879	
Youthful Offenders Act, 1854	

OTHERS

Child Welfare Act, 1896	( Norway )
Juvenile Court Act, 1889	( Illinois )

(iii)

TABLE OF CASES

ABBREVIATIONS

<u>Letoyian and Another</u> V R	( 1972 ) E.A. 1050
Cap <u>Katete</u> V R	( 1972 ) E.A. 532
Ed: <u>M'Ikungi and Others</u> V R	( 1943 ) 20 K.L.R. 115
<u>R.V.Gorrie</u>	( 1838 ) J.P. 136
<u>R.V Kaburi Wa Kiruki and Others</u>	( 1938 ) 18 K.L.R. 171
<u>R.V Njue</u>	( 1972 ) E.A. 532
E.A.	East African Law Reports
Ed.	Indicates that the person named was editor and not author of the entire work.
HMSO	Her Majesty's Stationary Office, London.
KL.R.	Kenya Law Reports
J.P.	all Justice of the peace and Local Government Review.
R.	Republic.

JUVENILE DELINQUENCY

( iv )

INTRODUCTION

ABBREVIATIONS

- "Crime and its causes are not a single, simple phenomenon that can be analysed and described in one piece. It occurs in every part of the society. Its manifestations and victims are people of various ages and backgrounds. Its causes are legion. Its cure is an examination of any single kind of crime rather than an examination of the whole of the social complexity."
- Cap.....Chapter
- Cd., Cmd., Cmd..... Indicates the "Command number" by which certain parliamentary papers in Britain are identified.
- E.A..... East African Law Reports
- ed..... Indicates that the person named was editor and not author of the entire work.
- HMSO..... Her Majesty's Stationary Office, London.
- KLR..... Kenya Law Reports
- J.P..... All Justice of the peace and Local Government Review.
- R..... Republic.
- were subjected to similar problems that U.K. Children faced in the early 19th Century.
- We must also inquire about the different agencies that interact with delinquent juveniles and the role they play in determining their fate. These agencies are, the juvenile Court, the Police, the social workers, child care officers and probation officers. It is these factors that are the causes of juvenile delinquency. Socio-economic factors play

a great role in the development of children and it is important that Society creates favourable conditions for their lives. In this respect it JUVENILE DELINQUENCY know why some children

become delinquent and why others do not, even if they come from the same economic backgrounds. To enlighten us, I will look

at the various theories of causation that have been propounded by

"Crime and indeed delinquency is not a single, simple phenomenon that can be analysed and described in one piece. It occurs in every

part of the Society. Its practitioners and victims are people of all ages, incomes and backgrounds. Its trends are difficult to ascertain. Its causes are legion. Its cures are controversial.

An examination of any single kind of crime raises a myraid of issues of the utmost complexity."

we must find out the important role played by the "After Care Service"

In Kenya there is a separate judicial system especially designed for juveniles. It has many parallels with the adult criminal system.

In this paper I propose to examine in great detail the concept of juvenile delinquency and what it entails.

In Chapter One of this paper, it will first be necessary to define the term "juvenile delinquency", so that we know who we are going to deal with, and the circumstances that lead to their lead to their delinquency. In this chapter we will also have some background material on the judicial system of juveniles. It is important for example to know its origins, historical development and the circumstances that prompted humanitarians and Legislators both in Kenya and the United Kingdom to formulate special Laws for juveniles. In this respect we must also find out whether Kenyas juveniles were subjected to similar problems that U.K. Children faced in the early 19th Century.

We must also inquire about the different agencies that interact with delinquent juveniles and the role they play in determining their fate.

These agencies are, the juvenile Court, the Police, the social workers childrens officers and probation officers. In Chapter Two, I will look at the causes of juvenile delinquency. Socio-economic factors play

a great role in the development of children and it is important that Society creates favourable conditions for their lives. In this respect it will be necessary to know why some children become delinquent and why others do not, even if they come from the same socio-economic backgrounds. To enlighten us, I will look at the various theories of causation that have been propounded by some scholars who are specialized in the subject.

Chapter Three will consider the methods adopted by the Courts in dealing with juveniles. First there are non-Custodial Measures which include, discharge, probation and fines. The custodial measures include orders of sending the child to a borstal institution, Approved schools and Remand homes. To know the successes and failures of the above methods, we must find out the important role played by the "After Care Service" in supervising those children who have been released from the borstals or approved schools. This will help us know how far the children concerned have been rehabilitated or reformed.

Chapter Four will deal with the re-appraisal of the juvenile judicial system. Here I will show how far the system has succeeded or failed in achieving its aims. I will point out the weakness of the juvenile Court and the drawbacks in the methods adopted by the Courts in disposing juvenile cases.

Finally, I will suggest some reforms that would help to cure the defects in the juvenile judicial system.

CHAPTER ONE

DEFINITION OF JUVENILE DELINQUENCY

Definition of juvenile delinquency largely differ because they are formulated by authorities of significantly different training and orientation. Although many Countries do not agree on how to describe a juvenile delinquent in precise terms, they have enacted in a language that is broad enough to cover any form of anti-social conduct. It is the aim of this paper to attempt to assign misbehavior to a place in the total social structure and to determine when misbehavior should be termed as delinquency.

In Kenya a child is defined as a person under the age of 14, a juvenile as a person who is 14 years or more but is under 16 years, and a young person who is 16 years or more but is under 18 years. (1) The definition of juvenile followed the recommendation of the Report of the Committee on young Persons<sup>(2)</sup> which defined a juvenile to mean and include any child or young person as defined above. The children and Young Persons Act (3) defines a juvenile delinquent as a person between the statutory juvenile court age,(4) who commits an act, which when committed by an adult or persons beyond this statutory juvenile court age would be punishable as a crime or as an act injurious to the public. From this definition, it would appear as if the term delinquency only refers to actual criminal acts committed by juveniles. However delinquency seems to include not only criminal acts but also non-criminal acts. This is because the Act(5) goes on to set out a number of the circumstances which may lead a child to a juvenile court even if the child has not committed any crime as such. A child may also be taken to court if he is in need of care, protection and discipline.

The committee on the Treatment of Young offenders put the matter in

this way.

This begs the question which children can be said to be in need of protection and discipline.? The Act is very clear on this. They include such children as have been deserted, destitute, vagrant, those who are beyond parental control or have fallen into bad associations or are exposed to moral or physical danger, those who are kept in unhealthy or dangerous premises or prevented from receiving compulsory education, those who frequent public bars gambling places or are drug addicts, beggars or any child who is a member or potential member of a household of a person who has been convicted of any offence involving bodily injury to a child (6).

The close acquaintance with the whole range of children who are deviant or in trouble of some kind has led to the conclusion that there is no great difference between the children who come to the Court on a criminal charge and many of those who are said to be in need of protection or discipline. This is so because it is often by accident that determines whether a child comes to Court in one way or another. For instance, a young girl who defies her parents and stays out at night and is on the way to become a prostitute may come to the Court as a child in need of control. A girl who behaves in the same way and is likely to go shoplifting may either be caught by the law of larceny or by her non-criminal but unbecoming conduct or by sheer luck she may avoid both forms of legal intervention. In such cases the courts have tended to look at the needs of the child without making great distinction between charges and complaints.

The committee on the Treatment of Young offenders put the matter in this way.

" In considering the treatment of young offenders we believe there is no room for controversy as to the main object—namely to restrain him from straying further into criminal habits and to restore him to normal standards. The lesson that wrongdoing is followed by unpleasant circumstances must be taught, but in the case of boys and girls the court pays more attention to the vital question of their future welfare.

..... The idea of making the punishment fit for the crime dies hard, but it must be uprooted if reform action rather than punishment is to be, as it should be for young offenders, the guiding principle". (7)

This principle was written into the children and Young Persons Act.

" Every person in dealing with a child or a young person who is brought before it as being in need of care and protection or as an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from the undesirable surroundings and securing that proper provision is made for his education and training" (8)

If the court is to observe this principle it is essential that it should have regard to adequate information. The court shall, except in trivial cases obtain such information as to the general conduct, home surroundings, school record, medical history and such other information as may enable it to deal with the case in its best interests.

It is clear therefore that the distinction between the official delinquents and those children brought to juvenile court as in need of care and control is often more theoretical than practical. This is because:

"their situation may later lead them to commit offences"(9)

For the purposes of this paper delinquency will be used to describe acts of a kind which when committed by a person beyond the statutory juvenile court age are punishable as crimes.

Juvenile delinquency is a problem besetting society as a whole. Although many sociologists believe that lower socio-economic backgrounds produce more juvenile delinquents, it is also not disputable that from high socio-economic backgrounds come a great number of delinquents. Along with other criminal activities juvenile delinquency continues to increase despite the prevention measures that have been undertaken and despite the correctional measures undertaken by the juvenile courts.

The offences committed by young people differ in kind and nature from the typical crimes of adults. Young people, may for example steal things not knowing that this is forbidden, older children may do so because they have not learnt the self-restraint which normally develops with increasing years and adolescents may break the law just to show how daring and tough they are or just to annoy their parents. The relevance of age to culpability and modern methods of control are recognized in the statutes of every modern legal system, although the precise chronology differs from one Country to another.

In Kenya, the criminal responsibility is fixed at the age of eight years. (1D) At this age there is an irrebutable presumption that a child is not criminally responsible for any act or omission. This is because at this age a child is believed not to be capable of entertaining the requisite "Mens rea". Such a child is said to be "doli - incapax".

ORIGIN AND EVOLUTION OF JUVENILE JUDICIAL SYSTEM

There is however a rebuttable presumption that a child "under the age of twelve years is not criminally responsible for an act or omission unless it is proved that at the time of doing the act or making the omission he had the capacity to know that he ought not to do the act or make the omission" (11) This principle is well illustrated in the case of R V Gorrie. (12) In this case, a thirteen year old boy jabbed another boy with a pen - ~~Knife~~ and caused his death. He was charged with manslaughter but the jury were directed that it was not sufficient to prove the presence of a guilty mind as would suffice in the case of an adult, that is, the knowledge that the act is dangerous. It was necessary to go further and prove that when the boy did the act, he knew that what he was doing was not merely wrong but gravely wrong. The requirement is often expressed in the phrase "Malitia supplet actetem" malice makes up for want of age. Here "Malice" is taken to mean the knowledge that the act is morally and legally wrong. It is also irreputably presumed that a <sup>male</sup> ~~made~~ person under the age of twelve years is not capable of having <sup>criminal</sup> ~~cernal~~ knowledge. (13) For this reason he cannot be convicted on charges of rape.

All charges against juveniles are dealt with <sup>no</sup> summarily by the juvenile court. Legislation dealing with juveniles is aimed, in so far as is possible, at keeping young offenders from adult courts, prisoners and prisons. Instead, they are made to serve custodial sentences separately from adult prisoners in boystal institution approved schools or detention centres.

Children on the other hand are presumed to be incomplete beings who are not fully competent to determine and safeguard their interests.

ORIGIN AND EVOLUTION OF JUVENILE JUDICIAL SYSTEM

The move to have a separate judicial system for juveniles can be traced for back to common law concepts of "Parens Patriae" and "Loco parentis". These two concepts formed the legal and philosophical foundation for the juvenile court and its procedure. They contain the common law notion that the monarchy stands in the relationship of a parent to the Country. "Loco parentis" refers to the obligation of the state to all children. This means that the state stands in the shoes of the parent in relationship to the welfare of the children. These two <sup>doctrines</sup> provided a source of authority for the intrusion of the state into family affairs, especially the relationship between the parent and the child. In this respect, juvenile courts proceed from the premise of focusing not so much upon the nature of the child's violations, but instead, it espouses the philosophy of helping the child become a worthwhile citizen.

// At this stage, one <sup>may</sup> ask why there has been an attempt by almost every legal system to promulgate a separate judicial system for delinquent juveniles. This is so because the child is singled out by the law as by custom for special attention. The law distinguishes between adults and children in physical, psychological and societal terms. Adults are presumed to be responsible for themselves and capable of deciding what is in their own interests. The law is therefore by and large designed to safeguard the rights of adults to order their personal affairs free of governmental intrusion. Children on the other hand are presumed to be incomplete beings who are not fully competent to determine and safeguard their interests.

They are seen as dependent and in need of direct intimate and continuous care by adults who are personally committed to assume such responsibility. The degree of intervention on the private ordering of the child parent relationship ranges from a minimum automatic assignment of a child by a birth certificate to his biological parents, to a maximum court - ordered removal of a child from his custodians because he is found to be delinquent or neglected, or open to moral and physical dangers. The traditional goals of such intervention is to serve in the "best interests of the child".(14)

Children, unlike adults whose psychic functioning proceeds on more or less fixed lines change constantly from one stage of growth to another. They change with regard to their understanding of events, their tolerance for frustration and their needs for parental care, support, stimulation, guidance and restraint. The demands of children vary as the child matures and begins to need independence, i.e. gradual freedom from control since non/of the child's needs remains stable. What serves his interests on one level may be detrimental to his progression on another. one writer put the matter this way;

"children unlike adults who are generally better placed to deal with vagaries of life via reason and intellect are governed in much of their functioning by the irrational parts of their minds, i.e. their primitive wishes and impulses. Consequently they respond to any threat to their emotional security with fantastic anxieties,

denial or distortion of reality, reversal or displacement of feelings reactions which are no help for coping, but rather put them at the mercy of events. The child's body therefore needs to be tended, nourished and protected. He needs assistance from adults in curbing and modifying his primitive desires."(15)

The adult penal system was noted for its harshness. It dealt with not only adults but juveniles as well. An arrested juvenile might be placed in the same cell with adults, charged with rape, robbery, murder and other violent offences. Upon conviction the juvenile <sup>and all</sup> ~~ought~~ <sup>will</sup> ~~well~~ be placed in the same person with child molesters, robbers or murderers. There were in fact numerous cases of children being terrorized and even molested by adult offenders. Juvenile delinquency as something to be treated apart from crime, with its own characteristics and treatment programmes asserted itself in England in 1889. At that time, the inhuman treatment ~~noted~~ out to children both as workers and offenders, particularly in Britain, then under going rapid economic transformation was one of the main factors which led to the intensification of philanthropic activities. This eventually led to public opposition to the use of children as a cheap labour force for industrialization (16). As the century advanced there was a growing feeling of revulsion against the working condition of the child. There were many reports of children being maimed by machinery and suffering from new industrial diseases.

This worsened with the breakdown of kinship system which itself had resulted from technological advances. Parents and children no longer worked together. The 1883 Factories Act in Britain limited child labour to twelve hours a day. //

#### THE DEVELOPMENT OF THE JUVENILE COURT AND JUVENILE INSTITUTIONS

Some modification of the criminal court procedure for dealing with children took place in the middle of the 19th Century. The summary - Jurisdiction Act (17) gave jurisdiction to justices so that children could thereafter be tried by magistrates' courts rather than higher courts. Then separate institutions to which the court could commit children were developed. At first they were managed on voluntary basis. The childrens Act (18) was passed to establish juvenile Courts. A committee was appointed after the first World War to review the juvenile institutions. The Committee recommended that the distinction between reformatory and Industrial Schools (19) should be abolished. The Refomatory Schools served juveniles aged between fourteen and sixteen years. such children had committed crimes and might otherwise have been sent to prison. Industrial Schools catered for children aged between seven and fourteen years. Such children were said to be in need of care and protection. These institutions were conspicuous symbols of moral disaproval with an almost prison atmosphere.

It is from this earlier institutions that the complex system of our approved Schools today has grown.

The recommendations of the committee (20) were implemented in the Children and Young Persons Act. (21) This was the basis of the Kenyan juvenile ordinance of 1934 which remained in force until 1963 when the children and Young Persons Act was passed.

A Reformatory School was established in Kabete in 1909 based on the philosophy and practice of the British borstal System. The Borstal Institution Act was passed in 1963 in Kenya. Of the two Acts (22) that deal with juveniles, the children and Young Persons Act provides for more instruments for dealing with juveniles. The Act, for example provides for juvenile Courts, approved Schools remand homes, Probation service and many others. In the whole process of the juvenile judicial system, the act gives pro priority to the welfare of the child at all levels.

From the above analysis, it is clear that during the colonial rule, Kenya faithfully adopted the English legislation dealing with juveniles. There was nothing unique in this policy as this was but a small part of the massive reception of English common and statutory law. The situation is of particular interest to lawyers and Legislators of now independent Kenya. At the time of adoption there was little or no consideration as to whether these laws were of relevant to the prevailing and often peculiar local conditions.

In Kenya today, the reasons why the laws were adopted in total are no longer obvious and cogent and we must set ourselves the tasks of enquiring amongst others the relevance and usefulness of such laws. It will be my task in the course of this paper therefore to point out places within the juvenile judicial system that need urgent reform and suggest possible solutions to the problems that are within the system.

It is a complex combination of factors. It will not be surprising therefore to find that the theories of evolution, survival and are greatly related to each other. It is also important to note that although often the causes of juvenile delinquency and those of adult crime are labelled differently, there is actually no essential difference between them. For the purposes of this paper the words "crime" and "delinquency" will be used interchangeably.

Unemployment, economic crisis and social delinquency is the direct result of economic depression or of the inability of a society to adjust the economic and social goals of a society or individual needs. This is usually explained by concepts like "survival of the fittest", "property", and "social justice". In general, the individual delinquency or criminal is said to be unsuccessful in a social - oriented society.

CHAPTER TWO DELINQUENCY

CAUSES OF JUVENILE DELINQUENCY

It is true that poverty and particularly poverty surrounded by wealth is a direct incentive to crime. The equitable distribution of a nation's wealth is a prerequisite for the maintenance of law-breaking. The most we can do now is to throw light on factors or circumstances associated with various kinds of crime...."(1)

It is difficult to separate out for detailed examination the social, psychological, ecological and physical factors that are important in delinquency causation. This is because delinquency is due to a complex combination of factors. It will not be surprising therefore to find that the theories of causation overlap and are greatly related to each other. It is also important to note that although often the causes of juvenile delinquency and those of adult crime are labelled differently, there is actually no essential differences between both types of causation. For the purposes of this paper the words "crime" and "delinquency" will be used interchangeably.

In developing countries crime and indeed delinquency is the direct result of economic deprivation or of the inability of persons to achieve the economic and desired goals of a society by legitimate means. This is usually explained by concepts like "anomy," "differential association", "poverty", and "maladjustment". In general, the individual delinquency or criminal is said to be unseccesful in a goal - oriented society. that improvement of material conditions will considerably reduce if not eradicate juvenile delinquency. (3)

POVERTY AND DELINQUENCY

It is true that poverty and particularly poverty surrounded by wealth is a direct incentive to crime. The equitable distribution of a nation's goods comes high in the list of weapons against Law-breaking. In a capitalist society such as we have in Kenya crime is the direct outcome of competitive economic conditions and exploitations. In such a society the economy is controlled by only a few people while the majority are left in poverty. In this respect, crimes are committed by those who cannot afford simple amenities and needs of life because of their low income and inadequate capital formation. It is not unusual for example to find somebody who steals food because he is hungry and clothing because he is poorly dressed. The temptation to steal is even greater for children who have not learnt self-restraint and who entertain fantasies of wanting to be as good as other children. Without question, poverty in any country seriously affects health, life-expectancy, housing and quality of family life.

Poverty as a cause of delinquency has been accepted by the Economic and Social Council and the Secretariat of the United Nations whose general view has been that crime problems, lie deep in the process of economic and social development and must be resolved within them. (12) Lopez - Rey, has pointed out that in developing countries, governments still rely excessively on the thesis that improvement of material conditions will considerably reduce if not eradicate juvenile delinquency. (3)

THE THEORY OF ANOMY

Delinquency has also been said to be the result of a state of anomy or the clash between the institutional means and the cultural goals in the access to a given goal by legitimate means. (4)

Robert Merton the proponent of this formulation points out that most modern societies emphasize material success in the form of acquisition of wealth by education, as an accepted status goal. At the same time, society fails to provide adequate institutional means or norms for the lower social classes and poor group to achieve these goals. (5) These people are often referred to as being anomic in the sense that they are powerless to achieve money higher education and general affluence of the society. Such people become frustrated by the system and may resort to crime or other adaptations to achieve status goals. This is very true in the Kenyan situation where the education system we have has frustrated many youths. Today, there are many youths who after completing free primary education find themselves victims of unemployment. This is so especially when the said children get no places in the available secondary schools or cannot afford secondary school fees. These are the kind of children who will usually become parking boys or join delinquent boys in their venture of making a living. In this environment expectations are accepted by most members of the society. Deviations from the daily routine are unusual and formal censure is quick and compelling. (7)

The situation is even worse for secondary school leavers or drop-outs, who come out of school without any skills. These youths could easily resort to criminality to make a living. This is even more probable when the youths in question come from poor families where there is usually little to eat, poor clothing and poor accommodation.

because few really care. Each one is after himself." (8) The migrant is confronted with new norms and values.

#### LARGE FAMILIES AND DELINQUENCY

The growth of economy spurs occupational diversification, and another factor which contributes to juvenile delinquency is large families. Most families in developing countries are quite large. With unemployment, poverty and inflation it is usually hard to feed, clothe and accommodate such families. Children from such homes may find themselves roaming in towns as vagrants or in the country side seeking a means of living because they cannot be contained in their families.

#### URBANIZATION AND DELINQUENCY

Industrialization and the development of money economy often necessitates the movement to the towns for economic gains. (6) Migrants to urban areas receive their initial training in developing their value systems in a comparatively homogenous village setting. In this environment expectations are accepted by most members of the society. Deviations from the daily routine are unusual and formal censure is quick and compelling. (7)

In the village the individual expects his kin to respond to his needs in times of crises. The urban environment undermines this communal base of rural living without supplying substitutes, such as unemployment compensation as is done in industrialized countries. In general, according to one migrant in Kampala, "it is hard for people to improve things because few really care. Each one is after himself." (8) The migrant is confronted with heterogenous maze of norms and values. The growth of economy spurs occupational diversification, and new life styles emerge. One writer had this to say about urbanization,

"Exposure to the city's wiles, its contrasts and strange experiences opens new vistors to the ex-villager. He learns that other life styles exist. Because he must, he ~~learns~~ learns to tolerate attitudes and habits which clash with his own."(9)

In the urban setting economic problems absorb a large part of the migrants attention and may even bring out undesirable activities. Shortage of money is a major problem for most migrants because of unemployment, partial employment or high living costs. Even if he is employed he is often overwhelmed with the realization that in cash economy he must pay for his housing and for almost everything he consumes. Although cheap subsistence is possible in the village, in urban areas, goods although - abundant, are expensive and closely guarded. (10) He finds it equally hard to realize the breakdown of the traditional security of traditional community and his rights to make demands on the extended family in times of crises.

With this source denied him, he may resort to crime because of the uncertainty of living conditions migrants, are often unwilling to take their families with them, but when they do, they find it almost impossible to accommodate, clothe and feed young migrants who follow them. This may have very adverse effects on young migrants who could easily resort to delinquency because of the unfavourable living conditions in their homes

In both developing and developed countries the majority of reported delinquency occurs in slum areas. The migrant family which settles in slum areas are economically hard - pressed. The family gradually loses its ideals of community welfare and sentiments of cohesive life. Often, both parents try to work, but they lack the support of other family members who were always available to care for the children in the village. The neglected or destitute child is either victimized by adults or takes to law violation activities as a means of supporting himself. (11) The problem is more acute in the cases where the youths in question are children of single mothers. In rural areas the parents of such mothers may help them bring up their children. In slum areas, a single mother must strive to bring up her family by resorting to prostitution or theft.

?? you mean all of mothers are their prostitutes?  
useless ↓

theory of differential association...  
of delinquency to a neighbourhood of "dilapidated houses, dirty alleys much poverty, poor sanitation and inadequate recreational facilities.

It can be very difficult for such mother to exercise proper control and care over their children. Since such parents have themselves low moral values, it follows by logical conclusion that their children will usually have low morals as well. It will not be unusual for example to find young girls from such families induced to prostitution.

#### THE THEORY OF DIFFERENTIAL ASSOCIATION

One of the principal exponents of this view was Edwin Sutherland best known for his theory of differential associations. This put simply, means that if an individual is exposed to more criminal than non-criminal influences in his immediate environment, the chances of his breaking the law are thereby increased. Sutherlands suggested that there might be a tendency for persons exposed to criminal influences to share the same culture, interests and beliefs, in which case, certain forms of anti - social or delinquent behavior might be condoned and people might even be required to conform with them. Sutherlands theory of differential association links highest incidence of delinquency to a neighbourhood of "dilapidated houses dirty alleys much poverty, poor sanitation and inadequate recreational facilities.

From a cultural stand point it is a place where the neighbourhood has ceased to be an integrated and integrative agency of sentiments, values and social control, has drawn in all people of different and more or less conflicting mores, morals and standards of behavior; has to some extent developed a tradition of delinquency. "(12)

This kind of approach although of much aid of the phenomenon in the mass, is relatively of little aid in exploring the mechanisms of causation. This theory does not explain why all children in such areas do not become delinquent and why some children from rich neighbourhoods become delinquent. It is common knowledge that a great majority of children growing up in poverty - be it in urban slums or rural areas, do not become delinquents despite the deprivations of a poor environment, despite the fact that they and their parents have not had access to fruitful economic opportunities and despite the fact that they are swimming around in the same anti-social culture in which delinquents are said to thrive (13) so neither poverty nor poor neighborhoods alone can be said to be the sole causes for delinquency. There are other contributory factors.

#### BROKEN HOMES AND JUVENILE DELINQUENCY

Parents play a very vital role in moulding and shaping the characters of their children. It is the duty of parents to teach, guide and protect their children so that they mature to be good citizens. It is difficult to bring up children in this manner when a home is broken.

Judge Rodney S. Ellis, of Darien Connecticut also pointed out

a similar reason for delinquency:

A broken home may be defined as:

"...a home from which one or both parents are absent because of death, desertion, separation, divorce, employment as migrant workers elsewhere, sentences to prison or for any other reason unable to fulfill in continuous and due form what are generally regarded as parental duties and responsibilities." (14)

However, the physical presence of both parents does not ensure appropriate fulfillment of these duties, particularly when both parents are at work. Against this, it may be said that their daily absence does not deprive children of their attention and love; this is true in many cases but not in all. Furthermore, bad parents or parents estranged from each other may always be physically present and the home be as broken as if they were away. Juvenile delinquency cases usually show a great percentage of causal connection with broken homes. Broken homes in effect ruin the foundation of human character which is first formed in the family unit. Dr. David Abrahamsen writer of volumes on the psychology of criminals put the matter thus:

" Areal answer to the problem of violence today must come from within the families and the way we raise our children. There is no mass solution - not in our schools or in our jails....." (15)

Judge Rodney S. Eilso of Darien Connecticut also pointed out a similar reason for delinquency:

" I am sick and tired of spanking someone else's children in court. This has to be done at home where the moral fibre of a young person is woven. Until we place the responsibility where it belongs, with the parents our country will continue to see a rising incidence among teenagers of larceny...." (16)

Broken homes have the effect of depriving children of parental care and discipline. If the parents fail to discipline the youngster, thereby instilling in him the sense of self discipline, then it later becomes almost a hopeless job for the courts or any other institution to do so. It is therefore necessary that not only parents but also the state the schools, the churches and other religious organizations, do support each other in teaching and practising the law of "Love your neighbour as yourself." (17) It is submitted that the things that count most in raising children to be law abiding citizens do not depend so much on income as they do upon their parents' right values, affectionate attitudes and fair but firm discipline. It is also said that true parental love is more than providing material comforts of life and that it involves training children in right values and character. (18) This is usually true because often children from well-to-do families become delinquent not withstanding that they have all material comforts life can give.

PHYSICAL EXPLANATIONS OF DELINQUENCY

The positivist school maintains that some people are born criminals because of their physical make up. Literature provides us with numerous illustrations that support the tendency to live evil with certain physical characteristics.(19) The staunchest supporter of this proposition is Cesare Lombroso. (20) In his very influential book "Crime Its causes and Remedies", Lombroso expressed the view that some men were born to be criminals, that this was an accident of birth and could not be helped. Further he held that such "Criminal types" could be identified by certain physical features he called stigmata. He used a highly scientific method to study the body structure of certain criminals. He came out with the conclusion that a combination of certain physical features were sure signs of born criminals. Some of these features he said are "retreating forehead, small skull, voluminous ears and certain cerebral deficiencies." Although a succession of later physicians including the English prison doctor, Goring,(21) were to disprove of Lombroso's theory, his work was important in that it stressed the need for careful collection of material about individual criminals at a time when the prevailing tendency was to think of people collectively.

Although this theory looks attractive, it does not fully explain the cause of delinquency for it is possible for a person to have the criminal features that Lombroso identified, and yet have nothing to do with delinquency. It is also possible to find delinquents who do not have any such "criminal features".

#### BIBLICAL EXPLANATIONS OF DELINQUENCY

In the western civilization the theory of delinquency causation expounded by the classical school is based on the christian philosophy. Here delinquency has been attributed to the theological concept of the original sin. The original sin is said to have come to the world because Adam and Eve, the first people created by God, disobeyed God by eating fruits from the forbidden tree.(22) By doing this Adam appropriated the prerogative of deciding what is good and what is evil, what is right, and what is wrong. Adam's free choice is said to have been the choice of all mankind. For this reason, "all men have sinned and fallen short of the glory of God".(23) How did God react against this? The book of Genesis is very clear;

"And God said.... and now lest he put forth his hand  
take also of the tree of life and eat and live for ever;  
and he placed at the east Garden of Eden Cherubins and  
a flaming sword..... to keep the way of the tree of life." (24)

As a result, man became separated from God who is the source of love  
and goodness. Since then all humanity has been born with minds that  
are cernal and hostile to God.

The classical school therefore maintains that crime is a deliberate  
act of immorality. It is assumed that offenders have chosen to do  
wrong and must be punished for it. However, God has given man a  
chance of redemption:

"For God so loved the world, that he gave his only begotten son  
that whosoever believes in him should not perish but have  
everlasting life." (25)

In 1776 Beccaria wrote a book (26) in which he set out <sup>the</sup> theory  
that society must help the morally weak to resist crime. Because of  
his work Beccaria has been called the father of the classical school.

Some of the PSYCHOLOGICAL EXPLANATIONS OF DELINQUENCY

include "reality therapy, guided group interaction, therapeutic communities and transactional analysis" (26). However, some of the theories of delinquency causation based on the mind of the offender. Here criminal behavior is believed to spring from the deep unconscious mind. (27) Freud Sigmund (27) for example felt that criminal behavior can be traced to childhood disappointments, frustrations and acculturation conflicts. with time and effort he believed that criminal behavior and delinquency can be cured.

Alfred Alder (28) another exponent of this theory advanced an essentially purposive or teleological theory in the sense that although mans actions may be related to the causes, they are actually dictated by goals. According to him every psychic phenomenon, if it is to give us any understanding of a person can only be grasped and understood if regarded as a preparation. The final goal or guiding principle is the advancement of self-esteem, the overcoming of inferiority feelings and the striving for superiority. This purposive pattern of life may manifest itself in many ways - either as an ideal or as seeking a more immediate attainment of life such as sex work or art.

Some of the current approaches to treatment on this level

include "relity therapy guided group interaction, therapautic

communities and transactional analysis"(29) However none of

these theories proved a general explanation for human

behavior and hence crime and delinquency. Their thesis may

explain some specific cases of criminal behavior, but their marked

biological instinctual determinism makes its acceptance difficult.

#### THE INTERACTIONIST THEORY

On the basis of recent studies, Eugene Doleschal and Nora

Klapmuts (30), have put forward a theory that has been

described as interactionist.

Two of its findings are:

(a) A person is labelled a criminal not because of committing

a crime but because of being arrested and convicted. This is

because many people commit, but not all are caught and labelled.

The socialist approach to the theory of delinquency causation

is based on the following premises:

(a) Marxist - Leninist philosophy, broadly stated, philosophical  
 (b) No single socio-economic class is responsible for  
 materialism which regards economic evolution as the determining  
 committing a majority of criminal offences. Rather, members  
 factor, not only of the total social structure, but also <sup>new</sup>  
 of a certain racial and economic groups are selected for arrested.  
 its ideological super-structure. Consequently, not only  
 They are likely to be arrested and prosecuted and they receive  
 material living conditions are determined by the ways of  
 comparatively harsh punishment. This approach to delinquency  
 production, but social, political and spiritual processes as well.  
 causation accepts that criminal behavior is inevitable in all  
 It is therefore not consciousness that determines what man is but  
 segments of society. It questions why some acts have come to be  
 his social self that determines his consciousness. (32) It was in  
 labelled as criminal or delinquency and how laws governing  
 the light of this tenets that marx, Engels and Lenin referred  
 these acts are actually enforced. In essence, this approach  
 occasionally to the problem of crime. To them crime was the "  
 shifts the blame from both the offender and the society  
 outcome of competition, economic conditions and exploitations  
 environment as the sole cause of crime. Instead, it  
 which would eventually disappear in a socialist structure of  
 accuses the system which singles not certain groups for vigorous  
 society. (33) According to dialectical materialism too socialist  
 law enforcement while treating others leniently. The target of  
 transformation implies a prerequisite with respect to crime.  
 this approach is therefore unequal treatment before the law.  
 important changes in other fields such as education, health  
 and culture.

THE SOCIALIST APPROACH TO THE CAUSES OF DELINQUENCY

structure and aims, the conflict between individual and social  
 The socialist approach to the theory of delinquency causation  
 interviews do not arise in a socialist society. This conception  
 is based on the following premises:  
 is that of a man whose wants and desires would always be in  
 harmony with those of the socialist society. However this  
 has been found not to be true and experience has proved it

(a) Marxist - Lenninist philosophy, broadly stated, philosophical materialism which regards economic evolution as the determining factor, not only of the total social structure, but above all, its ideological super-structure . Consequently, not only material living conditions are determined by the ways of production, but social, political and spiritual processes as well. Some insight into the causation of delinquency can be obtained from almost any approach that bears a reasonable relationship to the nature of the problem. By and large, the examinations of the his social self that determines his consciousness.(32) It was in existing researches in juvenile delinquency disciplines the light of this tenets that marx, Engels and Lennin referred tendency to emphasize a particular approach or explanation, occassionally to the problem of crime. To them crime was the "Proponents of theories still insist that the truth is to be found outcome of competitive economic conditions and exploitations only in their fields of study and that ex hypothesis researches which would eventually disappear in a socialist structure of made by other disciplines contribute very little to the society."(33) According to dialectical materialism the socialist understanding of delinquency. When therefore research into transformation implies a prerequisite with respect to crime, the causes of delinquency emphasizes the sociological, or important changes in other fields such as education, Health ecological, or cultural, or psychological approach and and culture. Another important assertion is that by its own ignoring other approaches, we must be careful because structure and aims, the conflict between individual and social intervests do not arise in a socialist society. This conception is that of a man whose wants and desires would always be in harmony with those of the socialist society. However this has been found not to be true and experience has proved it

but as a theoretical premise it is still of much use to involve the study of man as well as his society, of nature as well as nurture, of segments or mechanisms of human nature as well as the total personality, of patterns of intimate social relationship as well as large areas of social process or masses of culture. They involve, therefore, the participation of several disciplines. Without

the recognition of such factors, the validity of both method and interpretation" (30)

SHORTCOMINGS OF THE THEORIES OF  
DELINQUENCY CAUSATION

Some insight into the causation of delinquency can be obtained from almost any approach that bears a reasonable relationship to the nature of the problem. By and large, the examinations of the existing researches in juvenile delinquency disclose a tendency to emphasize a particular approach or explanation.

Proponents of theories still insist that the truth is to be found only in their fields of study and that exhypothesis researches made by other disciplines contribute very little to the understanding of delinquency. When therefore research into the causes of delinquency emphasizes the sociological, or ecological, or cultural, or psychiatric approach and ignoring other approaches, we must be careful because

are operative not in the external area or culture, but in the mental life of the individual, and in detail as well as in general.

"The problems of human motivation and behavior involve the study of man as well as his society, of nature as well as nurture, of segments or mechanisms of human nature as well as the total personality, of patterns of intimate social relationship as well as large areas of social process or masses of culture. They involve, therefore the participation of several disciplines. Without the recognition of such factors, bias must weaken the validity of both method and interpretation"(34)

For example, the weakness or incompleteness of much sociological reasoning on the causal processes in crime is the assumption that the area of highest incidence of delinquency is also one of poverty and deterioration (35) Such areas as Glueck puts it, are

".....neighbourhoods of dilapidated houses, dirty alleys, much poverty and dependency. From a cultural standpoint it is a place where the neighbourhood has ceased to be on integrated and integrative eagerly of sentiments, values, behaviors standards and social control....." (36)

This kind of approach to the problem of delinquency, although of much aid in the phenomenon in the mass, is of relatively little help in exploring the mechanisms of causation. These mechanisms are operative not in the external area or culture, but in the mental life of the individual, and in detail as well as en masse.

These studies establish that a region of economic or cultural disorganization tends to have a criminological effect on the people residing therein; but these studies fail to reveal that this influence affects only a selected group comprising a relatively small proportion of all the residents. They do not reveal why even the most extreme delinquency areas fail to turn the great majority of children into delinquents. Further, they do not disclose whether the children who do not succumb to the evil and disruptive neighbourhood influence differ from those who become delinquents, and if so in what respects.

It cannot also be assumed that economic motives are the only ones which determine the behavior of men in a society. The varieties of the physical, mental and social history of different persons, must to a large extent determine the way in which they will be influenced by social disorganization, culture conflict and the problems of urbanization.

UNIVERSITY OF TORONTO  
LIBRARY

An association between delinquency and a general social

The unquestionable fact that different nations, individuals and roles behave differently under the same economic conditions, in itself proves that the economic factor cannot be the sole determinant. It is quite difficult therefore:

Our only recourse is to further analysis of the psychological side of the individual, on the one hand and analysis of the psychologically

" To understand how psychological factors can be overlooked where the reactions of living human conditions are involved; for not only were such factors already concerned in the establishment of these economic conditions, but, even in obeying these conditions men can do no more than set their original instinctual impulses in motion - their self-preservative instinct, their love of aggression, their need for love and their impulse to attain pleasure and avoid pain."(37)

Another approach to delinquency causation involves the economic factor of poverty as is revealed by many European studies of crime.(38) It has been proved equally sterile and distorted without psychological adjuncts. Since poverty operates differently on various types of persons, it should have been obvious that something more than the socio-economic datum of poverty or unemployment, or the fluctuations in the price of some basic commodity, had to be examined before the role of poverty in the genesis of delinquency could be understood.(39)

UNIVERSITY OF MANKATO  
LIBRARY

An association between delinquency and a general social condition like poverty really tells us very little about the *e* Lombro causes of the behavior we would understand. Precisely how does it *sub* have this effect in some individuals but not in others? To *the* answer this question, *one* destined from birth and physical

characteristics. "Our only recourse is to further analysis; analysis of the psychological needs of the individual, on the one hand and analysis of the psychologically relevant attributes of the environment, on the other,"(40)

To understand how economic status happens to be associated with delinquency, he must know what low economic status means to the individual in terms of frustrations and gratifications of basic needs. And, similarly we must understand how a child of high status family may be faced with environmental influences that lead to delinquency. From this point of view it will appear that the objective sociological survey is only but a rough and general research.

Another unilateral study of the causes of delinquency is found study in the approach adopted by proponents of various biological theories. Attention should be paid upon the point of contact between special social and biological processes as they interact accommodate or conflict in individuals.

THE SYSTEM OF DISPOSAL

Lombroso's recognition of the operation of sociologic factors was submerged in his persistent enthusiasm for the theory that crime is often the natural activity of persons destined from birth and physical characteristics. (41) In fact Lombroso did recognize that his familiar theory applied only to about two - fifths of all criminals and that environmental factors played some role. (42)

CONCLUSION

At present, there is need for a different approach to the study of the causal process in human mativation and behavior (such an enquiry should be designed to reveal meaningful integrations. of diverse data from several levels of inquiry. There is need for a systematic approach that will not ignore any promising leads to crime causation, covering as many fields and utilizing as many of the most reliable and relevant techniques of investigation and measurement as are necessary for a fair sampling of the various aspects of a complex biosocial problem. Ideally, the focus in such study be upon the selectivity that occurs when environment and ~~and~~ <sup>cut it</sup> organism interact. Attention should be paid upon the point of contract between special social and biological processes as they interact accommodate or conflict in individuals.

CHAPTER THREE

THE SYSTEM OF DISPOSAL

Juveniles are normally tried by special magistrates' courts

known as Juvenile Courts.(1) This confers a number of

advantages. Members of the public are not admitted as casual

observers. Those present are usually confined to parties to the case

members and officers of the court and bona fide representatives

of the press. Members of the press are not allowed to report the

offenders name, address or school or any other particulars likely

to identify such juveniles or publish their pictures. (2) Except

in trivial cases the court must have a report, usually supplied

by a probation officer or a children's officer. The report

should contain the juvenile's general conduct, home surroundings,

school and medical history where such a report is not ready, the

court should allow time for its preparation by remanding the

juvenile.(3) The procedure followed is simple and informal. The

Court must for example explain proceedings to the young offenders

and where necessary help him cross-examine the witnesses.

If he is not legally represented, and few are, his parents must be allowed to help him to prepare and conduct his defence. The child may be brought to court on being in need of care. Parents may be required to attend if the court thinks it is protection and guidance as a good parent may reasonably be expected to give, and in addition, that he is falling into desirable. (4)

Unlike adult courts which work on the basis that the kind of measure adopted should depend on the gravity of the offence, juvenile courts have been able to adopt a different outlook. The principle factor has been the combination of dealing with criminal charges and non criminal complaints of children in need of care, protection or control. In considering the treatment of young offenders, there is no controversy as to the main objective - namely to restrain the youth from straying further into criminal habits and to restore him into normal and acceptable standards. In this regard, the courts have a statutory duty when dealing with children who come before them,

".....to have regard to the welfare of the child and (italics mine) in a proper case take steps for removing him from undesirable surroundings and securing that provision is made for his education and training."(5)

(2) May order him to be sent to an approved school or to remain home,

(3) May place him under the supervision of a probation officer."(5)

Children in need of Care, protection or control

Commitment to the care of a fit person or approved societies.

A child may be brought to court as being in need of care protection and guidance as a good parent may reasonably be expected to give, and in addition, that he is falling into bad associations or exposed to moral or physical danger; or that he is a victim of a sexual offence or an offence involving bodily injury, (6) or lives in the same household as the victim or perpetrator of an offence of this kind against a juvenile (7).

In "care" cases it is important to note that children under 17 years These circumstances may lead the child into undesirable careers.

It is important however to appreciate the fact that these children have not committed any crime as such and that the usual procedure is to seek the decision of the court, that he is in need of care protection or control. This decision enables the court to order a number of measures most of which are similar to those which can be ordered as a result of criminal prosecution. These will be described later in the chapter. In brief, a juvenile court which has to deal with a person in need of care, protection or control:

- (1) "May commit him to the care of a local children's department or other fit person,
- (2) May order him to be sent to an approved school or a remand home,
- (3) May place him under the supervision of a Probation officer." (8)

objection, it is the duty of the local authority to find him  
Committal to the care of a fit person or approved societies.

5.13(1) of the Children and Young Persons Act empowers the court to commit children in need of care, protection or control, to the care of fit persons or approved societies. Such "fit persons" or "approved societies" have the same rights and powers and are subject to the same liabilities in respect of the juvenile's maintenance as if they were his parents.

In "care" cases it is important to note that children under 17 years may be received into care by the children department without proceedings in court. This can be done especially where the child is lost or has been abandoned or has no parents, or if they are there, are prevented from looking after him properly due to illness or some other cause. In some other cases, a child may be received into care with the intervention of the children's officer if it is necessary in the child's interest. Intervention of this kind is seldom against anyone's wishes since the parents are usually missing or irresponsible or so desperate that they welcome any help.(9)

A Juvenile who is received into care in one of these ways is placed in one of children's departments own "Homes". Unless he is likely to be in care for only a short time, or there is some good

Penal Measures.

objection, it is the duty of the local authority to find him a suitable foster - home, if they can do so. Other such children are cared for in homes managed by charitable organizations. A small minority whose parents consent to adoption, or are dead or untraceable, are adopted, usually as a result of arrangements made by adoption agencies. Children's departments are required by statute to supervise any voluntary organizations in their areas which act as adoption agencies.

Approved societies in Kenya include the child welfare Society, the Salvation Army and the National Christian Council, of Kenya among others. (10) They are all answerable to the Inspector of children in the Ministry of Home Affairs. These Societies usually receive deserted children, vagrants, or orphans and disabled children. It is very rare that children who commit actual offences are committed into these societies.

It is clear that these societies are largely charitable. They usually receive donations from the public and these are not adequate. They therefore need increased government aid if they have to discharge their duties effectively.

By virtue of 5.17 (a) of the children and young persons Act, if the court thinks, having regard to all the circumstances of the case, including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment, and that in addition a probation order is not appropriate, it may make an order

PENAL MEASURES.

In this section, I shall deal with measures which can be ordered by a court which has found a juvenile guilty of an offence. Like the children in need of care, protection or control, this category of children must be treated with special regard to their welfare.

A. NON CUSTODIAL SENTENCES

5.17 of the Children and Young Persons Act empowers the court to apply the following non-custodial measures against juvenile offenders.

- (a) Discharge the offender under 5.35 of the Penal Code
- (b) Make a Probation Order under the Probation of Offenders Act. (11)
- (c) Order him to receive corporal punishment, subject to 5.27 of the Penal Code
- (d) Fine him or order that he should pay compensation costs.

(a) Discharge.

By virtue of 5.17 (a) of the children and Young Persons Act, if the court thinks, having regard to all the circumstances of the case, including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment, and that in addition a probation order is not appropriate, it may make an order

discharging the offender either absolutely or conditionally.

as to the future conduct which are involved relate only to the  
An absolute discharge can in some cases be regarded as an out  
commission of further offences not to good behavior.  
of judicial compassion. It is not a penalty but a formal

recognition in some circumstances that as far as the offence  
An order for conditional discharge can be combined with a security  
itself is concerned, it is so trivial or so technical that no  
from the offender's parents for his good behavior. If the juvenile  
sentence of deterrence or retribution is necessary. This may  
commits another offence during the specified period, (12) can be  
indicate the court's view that there had been no actual  
brought to court and be sentenced for the other offence which he  
delinquency in the first place. This is especially so in  
had previously been discharged of and the offence which constituted  
cases of petty theft. This measure can hardly be regarded  
the breach. If there was a surety when the offence occurred, (13)  
as rehabilitative as a no-penalty in such cases would be a  
occurred, then the surety is liable to pay the sum adjudged. (13)  
recognitions of the fact that rehabilitation or reform

was not necessary, either because it had already occurred and  
did not need reinforcing with mild individual deterrent  
like a conditional discharge or a probation order, or a fine.

only be given with the doctor's supervision. (14) For young  
A Conditional discharge on the other hand is a mild deterrent.

It is a recognition that the circumstances of the case are such  
itself and cannot be combined with any other punishment. (15)  
that a sentence of general deterrence or of retribution is not  
Muthami vs M'laung and Others (16) The accused, Muthami,  
called for, but that the good intentions of the offender not to  
were each ordered to receive a number of strokes and in addition,  
repeat his misbehavior need some kind of legal reinforcement which  
their fathers were also fined.  
falls short of the supervision and support that a probation order  
would provide.

However, because there is no supervision involved, the undertaking as to the future conduct which are involved relate only to the commission of further offences not to good behavior.

An order for conditional discharge can be combined with a security from the offender's parents for his good behavior. If the juvenile commits another offence during the specified period,(12) he can be brought to court and be sentenced for the other offence which he had previously been discharged of and the offence which constituted the breach. If there was a surety when the breach of the condition occurred, then the surety is leable to pay the sum he pledged.(13)

(b) Corporal Punishment

Corporal punishment is provided for by 5.17(c) of the children and Young Persons Act. The strokes given must not exceed ten and can only be given with the doctor's supervision.(14) For young offenders, corporal punishment is recognized as a punishment by itself and cannot be combined with any other punishment.(15) In Muthami Wa M'IKungi and Others V.R., (16) the accused juveniles were each ordered to receive a number of strokes and in addition, their fathers were also fined.

It was held by the supreme Court that only one form of punishment may be ordered. This requirement has been given effect by 5.19 of the current children and Young Persons Act. Young girls like adult females cannot be ordered to receive corporal punishment.(17)

(c) Fines

Under 5.17(g) of the children and Young Persons Act the Court may fine a juvenile who has been found guilty of an offence. If the offender is a child, the court must, and if it is a young person, the court may order his parent or guardian to pay unless it is satisfied that the later cannot be found or did not conduct to the commission of the offence by neglecting to exercise due care over the juvenile. In R.V Kaburi Wa Kiruki and Another,(18) the two accused children were aged 2½ and 2¼ years respectively. They were charged with negligently starting a grass fire without the permission of the owner of the <sup>land</sup> law. They were acquitted since they were not criminally liable but their father was ordered to pay Ksh. 500 fine. The supreme court said.

"Where a young person or child is charged with an offence and the court is of the opinion that a fine, damages or costs would be payable, then it should order that the fine, damages or costs be paid by the parent or guardian of the child, unless the court is satisfied that the parent cannot be found or that he has not conducted to the commission of the offence."

Parents or guardians who default in payment can be dealt with as if the offence had been theirs. If a juvenile is found on admission to an approved school, detention Centre or borstal institution to have an unpaid fine hanging over his head, this is not often enforced on the grounds that it would increase the offenders difficulties when he is discharged.

Viewed in terms of the objectives of the penal system as a whole, it is evident that a fine can be used both as a deterrent and also in a retributive way in the sense that it gives some mark of public disapproval of the conduct penalized.

(d) Probation

Probation is one of the most widely used methods of handling juvenile offenders. A brief look at the law relating to probation in Kenya reveals that it was enacted on the basis of English law on the subject. In England, it was originally developed as a penal measure for the young. Its official origins are found in the system of binding offenders over to come up for judgement when called upon to do so under the Summary Jurisdiction Act, 1879 and in the provisions of the First Offenders Act, 1887.

The latter Act allowed voluntary supervision by the police and court missionaries, many of who became probation officers when the service was established by the Probation of Offenders Act, 1907. But the injunction to "go away and sin no more" has a much older history. It had been a practice of many magistrates in England to impose nominal penalties in respect of young children on condition that they agreed to accept the help and supervision of parents or missionaries as the case may be. It was on this basis that the procedure and structure of probation service was established in Kenya. The probation of Offenders Act (19) was enacted in Kenya in 1943.

In considering the role of probation, the Morrison Committee had this to say

".....Society must protect itself against the wrongdoer. It must show its disapproval this principle because, while it seeks to protect society through the supervision to which the offender is required to submit, it both minimizes the restriction placed on him, offers him the help of society in adjusting his conduct to his demands. It seeks to strengthen the offenders resources so that he may become a more responsible member of the community which must also play a role in rehabilitating him."(20)

In Kenya, the Probation of Offenders Act (21) empower the court to release the offender on probation where having regard to his youth, character and antecedents and home surroundings, it is of the opinion that he should be placed on probation. The offender must comply with the conditions in the probation order which should last for a period of not less than 6 months and not more than 3 years. (22) A probationer who fails to comply with the requirements of his probation order may be sent to an attendance Centre. Like adult probationers, juveniles can be subjected to the requirements that they reside at a specified address and this can be a probation hostel. Approved probation hostels are run by charitable or religious organizations with government financial aid.

A probation order is a punishment by itself and cannot be combined with any other punishment. R.V Njue (23) a 17 year old youth was convicted for arson and placed on probation for 2 years. The trial magistrate also ordered that he should receive 7 strokes. On appeal to the High Court, Trevelyn, J. said

"Probation is any other punishment within the meaning of S.27 (3) the Penal Code, so that an order releasing the offender on probation cannot in law be accompanied by and award of corporal punishment. S.4 of the Probation of Offenders Act gives power to subordinate courts to release the offender on probation in circumstances therein referred to and the object of probation is to give an offender an opportunity to prove himself."

### Probation Officers

Probation officers perform a variety of duties. They conduct investigations into family and social backgrounds of prospective probationers. In cases where a young offender is committed to an institution they are charged with the duty of finding a vacancy for him in the available institutions. Where the offender is placed on probation, the probation officer has 2 duties.

- (i) investigation of the background, personality and character of the offender in order to create a basis for the magistrate's decision.
- (ii) Furnishing of supervision or guidance as well as disciplinary oversight for delinquent probationers.

If the probationer should breach any of the conditions of the order, it is the duty of the probation officer to apply to the court for a warrant of arrest so that the probationer can be arrested and taken to court for appropriate action. The probation officer can also apply to the court to have the probationer discharged.(21)

### Aims and Objectives of Probation:

Probation can be said to be both deterrent and reformative in aim in the sense that when the order involves a condition of

residence in a hostel, it seeks to provide the offender with what Nigel Walker calls

".....a prophylactic environment for a period during which he will settle down or grow out of it." (25)

It is reformatory in the sense that its aim is the ultimate re-establishment of the offender in the community. Put simply, this aspect seeks to provide support for the individual which will help him avoid <sup>committing</sup> Community further crimes and thus probation helps the offender to become more responsible for his actions. It in turn helps to protect the society as a whole. But in addition, there is an element of discipline which involves the submission of the offender, while at liberty to the supervision of the probation officer. This falls short of "letting off" which is commonly supposed to be made clear to the offender at the outset.

B. CUSTODIAL SENTENCES

There are four kinds of residential institutions to which a young offender can be committed. a remand home, an approved school, and detention centre and a borstal institution. He cannot be sent to any of them as a penal measure, unless he has been found guilty of an offence for which an adult could be punished with imprisonment.

This is in accordance with the law of separating juvenile offenders from adults. In addition to receiving juvenile offenders, an approved school also receives children who are in need of care, protection or control. A child can be received into a remand home for several other reasons which will be explained shortly. There are also other institutions for youthful offenders who are either too difficult or incorrigible that they cannot be controlled in the above mentioned institutions or not old enough to be sent to adult prisons. These institutions include detention camps, and Youth corrective centres. In addition, there is a section of Athi River Prison which has been set aside to receive young prisoners. These latter institutions deal with offenders who can be described as young adults or persons between the ages of 17th and 19 years.

(1) REMAND HOMES

S.11(a) of the children and Young Persons Act provides for the committal of juveniles into Remand Homes. They are the first places that a youthful offender is placed on being picked up by the police.

This is in accordance with the aim of separating juvenile offenders from adult prisoners to avoid "contamination."

Remand homes are provided for and staffed by the departments of some local authorities, but they also serve the areas of adjoining smaller authorities. They serve a variety of purposes, only one of which is the reception of children committed to them as a penal measure. A juvenile of any age, may find himself in a remand home for one of several other reasons:

- (i) that he has been found by the police to be a victim of ill-treatment, neglect, a sexual offence, a crime of violence or other offences involving physical or bodily injury;
- (ii) That he is awaiting to be brought to court as being in need of care, protection or control or has not been responding satisfactorily under supervision;
- (iii) that he is awaiting trial for an offence and the police are unwilling to release him until then, usually for fear that he will disappear;
- (iv) that he has been found guilty by a court which has remanded him in custody for medical psychiatric or social reports before deciding what to do with him;

(v) that he has been the subject of an approved school order and is awaiting allocation to a vacancy.

(vi) that he is awaiting transfer to a mental hospital.

As a result, the population of a remand home is as miscellaneous and transient as that of an adult prison. They are as it were the "pending trays" of juvenile courts. They cater for a wide age-range than any other penal institution for juveniles. For all these categories of children, detention in a remand home cannot be used as a penal measure, unless the offence is that which an adult could have been sent to prison. Unfortunately this does not prevent juveniles from spending longer periods in remand homes while on remand or awaiting vacancies in approved schools or borstal institutions.

Several factors combine to make remand homes the most difficult sort of institutions to run satisfactorily. The children in them are very diverse in their ages and in their circumstances; delinquents are mixed with victims of cruelty neglect or sexual offences. The periods for which they are in remand are usually short and constantly interrupted by visits to the clinics for diagnosis or to courts for decisions or for further remands.

The children will not usually have recovered from the shock of their first removal from home. On most cases therefore the staff can hope to do a little more than "ensure that the child is well fed, cleansed from dirt, treated for neglected physical disorders and given healthy recreation mixed with a little education." (27)

The most ambitious function which a remand home can try to serve is that of an observation centre. The staff of such institutions who have to look after the child day and night have better opportunities than any psychiatrist or psychologist for observing his reactions to adults and other children. A wise clinician could seek their impressions and observations. Unfortunately the staff of such institutions are not always selected or trained to make use of their opportunities.

In Kenya, there are only 2 remand homes. They are in Nairobi, Kiambu, Nyeri, Nakuru, Eldoret, Kakamega, Kisumu and Likoni.

Mary Carpenter published her pamphlets (28) in 1831 criticizing the harshness of the institution, she preferred to see such schools run by religious organizations.

2. APPROVED SCHOOLS

In Kenya, approved schools are modelled with few modifications on their English Counterparts. It is therefore necessary to have a brief look at the English history of approved schools to know the conditions and circumstances that led to their establishment.

During the early years of the 19th Century in England children convicted of crime or awaiting trial were sent to the same appalling prisons as adults where they were no doubt quickly deproved and brutalized by their experience. Separate arrangements were made for young offenders following the report of the select Committee of the House of Lords set up in 1835 to inquire into the state of jails. The commission recommended that a penitentiary for juveniles be opened. Under the Parkhurst Act, 1835, an old military hospital on the Isle of wight was converted to a prison for young offenders. When Mary Carpenter published her pamphlets (28) in 1851 criticizing the harshness of the institution, she preferred to see such schools run by religious organizations.

The schools were to receive youthful offenders aged between 11 and 18 years. The courts were expected to send young offenders to reformatory schools for periods ranging from 2 to 7 years. This was later reduced to 4 years. (30) The 1854 Ordinance,

1854 abolished reformatory schools and provided for the establishment of approved schools in their place. This Ordinance was passed. It authorized the establishment of reformatory schools to be run by voluntary organizations and supervised by the Home Secretary. The boys admitted into these schools were first made to serve short prison sentence. The number of children sent to prison gradually decreased until 1908 when the Children's Act was passed. It abolished imprisonment for children under 14 years. It was from this earlier institutions - reformatory and industrial schools as they were then called, that the complex system of approved schools has grown today.

In Kenya, the Refamatory Schools Ordinance (29) of 1934, gave the governor power to establish and maintain reformatory schools in any part of the country.

Department, but in some other cases by voluntary bodies of managers.

The schools were to receive youthful offenders aged between 14 and 16 years. The courts were empowered to send young offenders to reformatory schools for periods ranging from 2 to 7 years. This was later reduced to 4 years. (30) The Juvenile Ordinance, 1934, abolished reformatory schools and provided for the establishment of approved schools. In their places. Thus Kabete Reformatory School was named an approved School. (31)

Although approved schools in Kenya were established with similar aims as those in Britain those in Kenya differed because as well as receiving youthful offenders, they also received children in need of care and protection. Approved Schools established by the Children and Young Persons Act have become centres for social educational and recreational functions for those delinquents below 16 years. The orders for detention in an approved school cannot remain in force beyond the date which a youth attains the age of 18 years or for a period longer than three years except by an order of the court. (32)

Approved schools are managed in most cases by the Prisons Department, but in some other cases by voluntary boards of managers. They are regarded as being in need of a longer period of training than is available at a detention centre, or who are either thought to be unsuitable or too old for an approved school.

An approved school child cannot be released within the first six months unless there is a special order to that effect from the Ministry of Home Affairs.

At present there are 9 approved schools in Kenya namely: (33)

Wamumu Approved School for boys

Kabete Approved School for boys

Dagoreti Approved School for boys

Othaya Approved School for boys

Kakamega Approved school for boys

Gatathuru Approved School for ~~boys~~ <sup>girls</sup>

Machakos Approved School for boys

Kirigiti Approved School for girls

Nakuru Approved School for girls.

### 3 BORSTAL INSTITUTIONS

Borstal institutions in Kenya like those in Britain are the normal methods of custodial treatment for young offenders who have reached the age of 15 and not above 18. They are regarded as being in need of a longer period of training than is available at a detention centre, or who are either thought to be unsuitable or too old for an approved school.

This was due to the recommendations of the Committee on

The Borstal system in England was set up in 1908 and grew out of the concern that was being felt about the contamination of young offenders by their association with adult prisoners.

This was by no means a novel fear for as far back as 1828

a select committee on the State of the Police of the Metropolis

had in its report drawn attention to this danger, as well to

inequalities in dealing with the delinquency of the children

of the rich and poor alike. In 1896 the Gladstone committee

dealing with the same problem recommended the development of

a penal reformatory which should be " a half - way house" between

the prison and the reformatory and the prison. This would

provide a staff capable of giving sound education, training the

inmates in various kinds of industrial work and general kinds

of moral influence. In 1959, the Government White Paper(31)

characterized a borstal as essentially, " a remedial and

educational system based on the personal training by a

carefully selected staff."

In Kenya, prior to the passing of the Borstal Institution Act,

a modified system of borstals had applied in the approved

schools in 1934.

This was due to the recommendations of the Committee on Juvenile Crime and Kabete Reformatory School. The committee recommended that the English principles should be applied in such schools. Since then, young offenders above the statutory age of 16 years who could not be sent to the Prison in Athi River were trained according to the principles of the English borstal system (35).

The Borstal Bill (36) was introduced to the National Assembly in 1969 and its objectives were:

- (a) to ensure the protection of society by providing that Juvenile offenders be given training best suitable to their needs and from which they are likely to derive the most benefit.
- (b) to keep the young offender under the apparent age of 18 years out of prison.

The Borstal Institution Act (37) provided that a different institution should be set up for girls. None has yet been established. So girls who are between 16 and 17 years who commit offences and cannot be sent to approved schools are sent to prison,. However their number is minimal.

The Borstal Institution Act outlines the circumstance under which an offender can be committed to a borstal: (38)

(i) that the offence for which one is convicted must be one which, but for the restrictions on the imprisonment of young offenders would be punishable by imprisonment.

(ii) the offender must be under 18 years of age

(iii) The court must be of the opinion having regard to all the circumstances of the offender's character and previous conduct, that it is expedient that he should be sent to training for not less than six months.

Borstal training is based on the principle that the delinquent is in need of rigorous training aimed at character formation.

The only two borstal institutions in Kenya, Shikusa and Shimo La Tewa offer primary School education and in addition skills such as brick - laying, masonry, carpentry, tailoring, wood - carving, poultry and livestock keeping.

In cases where an in-mate proves difficult and incorrigible

so that detention in a borstal institution serves no useful purpose, he can be taken to court which then sentences him to imprisonment for the remaining period of his training. (39) An inmate who is released on licence and behaves well may be apprenticed under the Industrial Training

Act (40)

and while undergoing apprenticeship he will be deemed to be discharged from the borstal. (41)

4. DETENTION CENTRES

Detention Centres are established by the Detention Camps Act.(42) They are owned, staffed and administered by the Prison Department in the Ministry of Home Affairs. Young offenders who have been convicted of an offence punishable with imprisonment, but for the statutory restrictions may be ordered to be detained at the detention Centres. (43) Here detainees receive short but strict lessons which exact the highest possible standards of discipline and behavior. The strenuous routines followed are useful in providing potentially delinquent young people with what has been called a "good habit formation as a preparation for adult life."(44)

Detention Centres are therefore said to be a restricting environment. Young people in them live under orders and failure to obey brings immediate consequences. Except in so far as it aims to build the body, detention does not set out to develop the youth's potential as a person.

5. YOUTH CORRECTIVE CENTRE AT KAMITI

This was an innovation of the Prisons Department (44). It was intended to cater for boys between the ages of 14 and 17 years, who did not merit to be sent to borstal institutions for 3 years. The period of committal to this institution runs between 6 months and 2 years. However since it was not established by statute, there is no fixed age or period for committal. These are fixed by the prison's staff who own and administer it. The stay here is strenuous and the staff of the centre feel that they have to achieve the best results within a short time. Since the boys are received at different times, their programmes have to be carefully planned so that they can complete at the same time.

6. ATHI RIVER PRISON

A section of the Athi River Prison has been set aside for young offenders below the age of 18 years, who have been committed to prison. The in-mates are those youths who have been sentenced to prison by the High court after it is satisfied that the youth cannot be dealt with in any other way.

The Young Persons' Prison further receives those youths from borstal institutions who have been recommended by the commissioner of Prisons to be admitted because their behaviour is such that their detention in a borstal institution is no longer expedient.(45)

CHAPTER FOUR

THE JUVENILE JUDICIAL SYSTEM

A CRITIQUE AND RECOMMENDATIONS

I have so far outlined the system of Juvenile law and how it functions. From that it seems as if the Children and Young Persons Act provides a good and enlightened system. It means that the juvenile courts have reasonably clear guiding principles to follow, unlike the confusion that attends sentencing process in adult courts. The objectives of the adult penal system and those of the juvenile penal system are more or less the same. They both aim at reforming the offender, deterring further criminal offences and protecting society. However, juvenile courts usually receive information about the young offender whereas adult courts frequently sentence without knowing very much about the offender. It can thus be said that juvenile courts have led the way towards a more rational method of dealing with offenders. There is much truth in this but the juvenile judicial system has come under much criticism. The most disturbing is the fact that however rational and enlightened the jurisdiction of the juvenile court may be, juvenile delinquency continues to increase. It would seem as if sometimes the court is required to travel simultaneously in different directions.

We have also seen that the aims of the juvenile penal system are to reform the offender, deter further offences and to protect the Society. If this is so, then why do some juveniles become persistent offenders even after or during their probation, after being released from borstals, approved Schools, remand homes and detention centre?

Since I have already outlined the causes of delinquency, I will now point out some of the problems within the juvenile judicial system that may be said to cause or encourage recidivism. I will then proceed to suggest appropriate recommendations and solutions.

#### PART I

##### (a) Problems related to the criminal jurisdiction of the juvenile court and the welfare principle.

The Juvenile court is a special statutory court that has among its responsibilities the hearing and disposing of juvenile cases. In this capacity, it has expressed a wide range of values which frequently conflict.

On the one hand, it is bound by the rules of criminal procedure, and on the other, it is enjoined to have regard to the welfare of the child who comes before it.

In the attempt to discharge both duties, it would seem as if sometimes the court is required to travel simultaneously at different directions.

The Ingleby Committee, for example, has this to say about the conflict between the courts judicial and welfare functions.

"The court remains a criminal court in that it is a magistrate's court..... It is governed by the law of evidence in criminal cases. Yet the requirement to have regard to the welfare of the child, suggests a jurisdiction that is not criminal. It is not easy to see how the two principles can be reconciled. (*italics mine*). Criminal responsibility is focused on the allegation about some particular act, isolated from the character and needs of the defendant, whereas welfare depends on a complex of personal, family and social considerations." (1)

The weakness of such a system is that it appears to be trying a case on one particular ground and then to be dealing with the child on some quite different grounds. As a result, the juvenile court has been seen at best as beset by conflicting dilemmas and expectations: Should the court, for example, have regard to the individual before it as a child in difficulties or as an offender? Should it consider the interests of the child at the expense of the interests of the society or just strike a balance between the two interests? such is the dilemma facing the juvenile courts today.

(b) Problems related to the fixing of the age of criminal responsibility.

Determining the age of criminal responsibility is another problem related to the criminal and the welfare jurisdictions of the juvenile court.

Guilt as I have already indicated is defined in terms of knowing right from wrong. Below the age of 8 the law conclusively assumes that no child has this understanding.(2) Between the age of 8 and 14, there is a rebuttable presumption to the same effect.(3) From this, it logically follows that a child above the age of 15 is able to distinguish between what is right and what is wrong. I find it difficult to imagine that a child who is 10 years old is essentially different from a child who is 8 years old and that a 14 year old child is essentially different from a child who is 15 or 16 years old. It is not disputable that different individuals have different intellectual and physical capacities of growth and development. Some individuals show the very first that they are retarded in intellectual, emotional and volitional powers, which are indispensable to successful adaption to the mores and legal codes of the societies in which they live. Some individuals meet these requirements till they become adolescents or mature. Others become delinquents very early in life, while others never become delinquent at all. The fixing of the ages of

of criminal responsibility does not seem to have taken into account these differences.

#### RECOMMENDATIONS

As regards the conflict between the courts' judicial and welfare functions, I suggest that:

- (i) Notwithstanding the apparent conflict, the essential status of the juvenile court should be retained with or without modifications. I suggest this because for the proper protection of those who are the subject of proceedings, the tribunal should be a court of law, and the power to interfere with personal liberty should be entrusted only to a court of law.
- (ii) If the conflict between the judicial and welfare functions of the juvenile court must be resolved, I suggest that the method that prevails in the U.S.A. be adopted. In Illinois as a result of the child welfare movements, the Juvenile Court Act was passed in 1889. The Act set up a separate non-criminal procedure for children ~~for the children~~ who had committed offences or who were in need of care and protection. The intention was to treat juvenile offenders "as a wise and merciful father who handles his own children whose errors are not discovered by authorities."<sup>4</sup> The aim of the court instead of determining whether or not the boy has committed a specific offence, was to find out <sup>what the nature</sup> what he or she is

physically, mentally and morally. Hearings were accordingly informal and the criminal procedure was disregarded. This model has been followed throughout the U.S.A.<sup>5</sup> The advantage of such a system over that which prevails in Kenya is that it would resolve the conflict between the courts judicial and welfare functions. Here the criminal jurisdiction of the court will be disregarded and the welfare principle will prevail.

(iii) Another alternative method is to adopt the Scandinavian Model of Child Welfare Boards to replace juvenile Courts. The child Welfare Act, 1896, established welfare Boards in Norway. The Board consisted of a judge of the Local Court, a clergy man and a physician. Under this system, a child who came before the board was viewed as an individual in problems. The criminal jurisdiction that existed in juvenile courts was disregarded. This system has been adopted by the Scandinavian countries.

(iv) I would also suggest that the age of criminal responsibility be raised to say 10 or 12 years children below these ages should be taken out of the courts altogether and be dealt with by child Welfare organization. In most commonwealth countries, the age of criminal responsibility has been fixed at 13 or 14 years and children below these ages are dealt with by child welfare organization.<sup>6</sup> Whether they be offenders or children in need of care or protection.

PART 2Problems related to the Penal Measuresa) Remand Homes and Approved Schools

It might seem as if the penal survey of the methods of disposal should have no concern with care and protection cases, after all, the children involved have committed no legal offences and are dealt with not by the criminal proceedings but under civil jurisdiction of the juvenile court. Nevertheless, when it comes to treatment, there is little difference in the machinery available for them and for offenders. They can be put under the supervision of the same probation officers, though a supervision order is made for children in need of care or protection while a probation order for juvenile offenders. Both categories of children can also be sent to the same approved schools and remand homes criticism is sometimes made that it is wrong to send care and protection cases to remand homes and approved schools where they mix and get contaminated by young offenders.

However, it is a mistake to regard all care and protection children as innocent victims of circumstances and the delinquent as necessarily more depraved. The adolescent girl under 17, for example, who is beyond parental control and already having promiscuous sexual relations with men is not legally delinquent, since she has not broken the law. Generally, she is more depraved and difficult to handle than the average young law breaker.

Thus it is sometimes justifiable to send care and protection cases to the same institutions with delinquent children.

When offenders are dealt with by institutional methods, a good system of classification is of vital importance and one of its objects must always be to minimise as far as possible the risks of contamination. Unfortunately classifications in institutions for juveniles in Kenya does not lead to a clear-cut division between offenders and care or protection children. This could be said to be one of the reasons why some children who are committed into remand homes or approved schools come out of them more depraved and not rehabilitated or reformed at all.

#### RECOMMENDATIONS:

i) To solve the above mentioned problem, I would suggest children of upto, say 14 or 15 years should be dealt with by the already existing machinery for care and protection cases, i.e. by a juvenile court sitting as a civil court. In this, respect, it will be immaterial whether such a child who comes before the court is an offender or in need of care or protection. Added weight is given to this proposal by the fact that the distinction between delinquent children and children in need of care or protection is much less clear-cut than the words suggest.

ii) To avoid the risks of contamination of children in need of care or protection by offenders, I would suggest that different institutions should be established for

children in need of care, protection or control. By so doing, rehabilitation and reform programmes will be easier to plan and implement, than when both categories of children are integrated in the same institutions.

This problem is very well illustrated in the case of remand homes. In chapter three of this paper, I pointed out that remand homes are the most difficult sort of penal institutions to run satisfactorily. This is so because the children in them are diverse in their age and circumstances. Delinquents are mixed with victims of cruelty, neglect or sexual offences. In most cases, all the staff can hope to do, to put it in the words of one text book writer, is

"... to ensure that the child is well fed  
cleansed of dirt and vermin, treated for  
neglected physical disorders, and given  
healthy recreation mixed with little education."<sup>7</sup>

If different institutions were established for children in need of care, protection or control, it would be easy to discover the needs of the children and easy to carry out the methods of satisfying such needs.

(b) Borstal Institutions:

I have already explained the functioning of borstal institutions, its aims and objectives.<sup>8</sup> Before I point out the problems that affect these institutions, I would first like to say something about after-care work carried out in respect of juveniles leaving approved schools and ex-inmates of borstal institutions and detention camps.

After Care Work

After care work simply involves the kind of supervision carried out in respect of juveniles who have been released from approved schools, borstal institutions and detention camps. This is part of the continued character training that begins in the above mentioned institutions. Supervision is important because it keeps an eye on juveniles who have been released from penal - institutions to ensure that they do not become a nuisance to the society and to discourage further criminal behavior.

After care work in respect of ex-borstal inmates is carried out voluntarily by probation officers. Hence ex-inmates are expected to keep in touch with probation officers to be of good behaviour and lead industrious lives. Those who are released on licence are required to inform probation officers of their proposed change of address.

After care work can thus be said to be important in that it ensures that ex-inmates make good use of the training they received in the borstals and that they do not get into further trouble. If an ex-inmate indulges in further criminal behaviour it is the duty of the probation officer in charge to take him to court for appropriate action.

Difficulties Encountered in Respect of After  
Care Work

Probation officers who are charged with the duty of supervising ex-inmates have many other duties to perform. They are required to make court enquiries. This means that they have to visit homes of prospective probationers, make enquiries into the socio-economic background of the offender and the circumstances leading to the offence. They have also to attend court proceedings whenever they are required to and to produce probation reports of offenders. They also have the duty of appraising existing files of probationers. All these duties in addition to general office work reduces the time allocated to the supervision of ex-borstal inmates.

Lack of sufficient funds is another problem that probation officers face. Transport subsistence for full operation is inadequate.<sup>10</sup> This means that only a few ex-inmates can only be supervised at a time.

Those who are released for after-care are usually poor. They have no school fees to continue with their education. Although they may have acquired skills in the borstals they lack proper employment. This makes it hard for them to settle into meaningful occupations. Ex-borstal in-mates also lack support from the community due to scarcity of facilities and the stigma attached to them most people feel that they are criminals and fear to associate with them.

RECOMMENDATIONS

In the Quarterly Report to the Board of Visitors which met in Shikusa Borstal Institution in 1981,<sup>11</sup> It was recommended that the borstal training should be extended to a longer period to enable the inmates have full concentration in their training. The Board of Visitors also felt that the training programmes were not carefully planned so that some in-mates spend all their time splitting wood or herding cows or doing other kinds of manual work that will be of little help to them after release. As a result the Board recommended that the in-mates should be given "proper and useful skills."

Ex-borstal inmates should also be given tools, funds and any other help to enable them start life afresh. Usually, ex-inmates find themselves handicapped after their release because they have no funds to start useful business. There is nothing that can prevent such a person from turning into a criminal if he finds that life is too hard without money and without employment. I accordingly suggested that the government should realize this problem and provide either funds or employment for these youths. Religious and charitable organizations should also step in and help either with funds or help the youths become self-employed.

However, I realize that this would make life more attractive than that of an average child and that this would be a very costly project to be undertaken by the

government. But I feel that the effort and the risks involved are worth taking because they will help to build good moral foundations for our youths who are tomorrow's leaders.

#### CONCLUSION

In the course of this paper, I have explored the whole system of laws dealing with juvenile delinquency. I have traced their origins, history and development and found out that the juvenile judicial system in Kenya is essentially based on the English model. In this respect it has been necessary to point out the socio-economic problems that children in Britain faced and which prompted humanitarians and legislators to promulgate different laws to deal with juvenile delinquents. Although Kenya's children were not subjected to similar problems at the time these laws were adopted, it was felt that with the imposition of Western civilization, Kenya would sooner or later face similar problems.

I have also made attempts to define the term juvenile delinquency and come out with the result that the children and Young Persons Act does not make a clear cut distinction between juvenile offenders and children in need of protection or care. This notwithstanding, it is clear that the paramount aim of the juvenile court is to have regard to the welfare of the child who comes before it.

To give effect to this principle attempts have been made to keep juvenile offenders away from adult prisons and prisoners to avoid "contermination." Accordingly, different penal institutions for juveniles have been established.

I have also made a full survey of the juvenile penal system. Its aims and objectives are to reform and rehabilitate juvenile offenders, to protect society and to deter the commission of further offences. The non-custodial measures which include discharge, ~~fin~~es and corporal punishment are adopted when in the opinion of the court, custodial sentences would serve no useful purpose in the child's life. Custodial measures which include committal to remand home, approved school, detention camps, borstal institutions and Youth corrective centres, are applied when the court thinks that to release him would do no good and that he will receive better training in custody. I have submitted that these methods have gone a long way in carrying out their objectives.

However, I have not hesitated in making it clear that, the juvenile judicial system, however, enlightened it may be is not without weaknesses. It is not often that the penal measures reform or rehabilitate the offenders. Some offenders are released from the Penal Institutions actually reformed or rehabilitated while others do not. In this respect I have pointed out

the problems that such institutions face and accordingly suggested appropriate reforms and solutions.

It is my submission that these solutions and recommendations must not be looked at in isolation. Kenya as a developing country, has its own peculiar needs and the fact that a certain system operated successfully elsewhere, does not necessarily mean it will work in Kenya. Therefore the suggested recommendations can only be meaningful to Kenya's juveniles, if modified where necessary to suit our conditions and circumstances.

INTRODUCTION

1. Barsani, C.A. Crime and Delinquency

—(The MacMillan Company, 1970) p.3.

CHAPTER ONE

- (1) The Children and Young Persons Act ( Cap.141, laws of Kenya) 5.2
- (2) 1950.
- (3) The Children and Young Persons Act, Supra., 5.3
- (4) 7 and 16 years.
- (5) The children and Young Persons Act, Supra., 5.22
- (6) 1 bid., schedule 1
- (7) Report on the committee on Treatment of Young Offenders cmd.2831,1927
- (8) The children and Young Persons Act, Supra., 5.14.
- (9) West D.J. The Young Offender , (Pelican Book,1968) Chapter Two
- (10) Penal Code (Cap. 63,Laws of Kenya) , 5.14 (1)
- (11) 1 bid., 5.14(2)
- (12) (1883) 83 J.P. 136.
- (13) Penal Code, Supra., 5.14(3)
- (14) Goldstein, J Beyond the Best Interests of the Child  
(The Free Press, Macmillan Publishing Co. New York,1973) P.4
- (15) I bid., p. 13
- (16) Philantropists like Defoe and Hanway saw the need and advantage of extending labour to women and children in the struggle against poverty. Large families could avoid starvation by relying on child labour.
- (17) 1879 (England)
- (18) 1908 (Englan)
- (19) Refamatory Schools Act,1854 created refamatory Schools.  
Industial Schools were founded in 1884.
- (20) The Departmental committee on Refamatory and Industrial Schoold  
(England), appointed in 1896.
- (21) 1933(England)
- (22) The children and Young Persons Act. supra. and The Borstal  
Institutions Act,(Cap.92,Laws of Kenya)

FOOT NOTE

CHAPTER TWO

- (1) L. Rodzinowicz; Ideology and Crime: A study in its sociological and historical context, (Heinemann, London, 1966) P.16
- (2) United Nation, International Action in the Field of Social Defence, 1966-1967 (DOL. E/CN/5/RS 1966).
- (3) Manuel Lopez - Rey, Crime ; An Analytical Appraisal: (New York: Praeger and London: Routledge and Kegan Poul, 1970), P.21.
- (4) Emile Durkheim, Suicide (Translated by HJohn Spaulding and George Simpson: New York : The free Press, 1951).
- (5) S.M. Miller and Martin Rein, "Poverty Inequality and Rolicy", in Howard, S. Becker , Social Problems: A modern Approach (New York: Willey, 1966), P.436 - 437.
- (6) Lo'pez - Rey, Supra; P.171
- (7) Clinard M.B Crime in Developing Countries: (A Willey Interscience Publication, 1970) P.109.
- (8) Ibid. P.108.
- (9) William McCord, The Springtime of Freedom: Evolution of Developing Societies. (New York: Oxford University Press, 1965), p 36
- (10) Caldwell, J.C. African Rural - Urban Migration  
The Movement to Ghana's Towns. (New York: Columbia University Press, 1969).

- (11) Kenneth Little, West African Urbanization: A study in voluntary Associations in Social Change. (Cambridge University Press 1965).
- (12) Morris, T. The Criminal Area (Routledge and Kegan Paul Publication, 1958), p.43.
- (13) Glueck, E.; Unravelling Juvenile Delinquency. (Harvard University Press, 1968) p.5.
- (14) Lo'pez - Rey, Supra., p.166.
- (15) Psychology of Crime, 1960; Our Violent Society ,1970  
Quoted "The plain Truth" - A Magazine for Understanding;  
October, 1981 p.8.
- (16) Mc. Calls, January, 1966; Quoted in "The Plain Truth", A Magazine for Understanding Ibid., p.8.
- (17) Leviticus 19:18; Matthew 19:19.
- (18) The "Plain Truth" - A Magazine for Understanding, Supra.; p.27.
- (19) Julius ceasar said of his most feared enemy  
"Yond Cassius has a lean hungry look - he thinks too  
much such men are dangerous.
- (20) 1836 - 1909.
- (21) Goring, C.O The English Convict H.M.S.O, 1913.
- (22) Genesis 3: 1 - 18

- (23) Romans 3: 23
- (24) Genesis 3: 22 - 24
- (25) John 3: 16
- (26) Beccaria An Essay on Crimes and Punishments,  
(W.C.Little Co. London 1872)
- (27) The basic writings of Sigmund Freud (1938) Translated and edited by Dr. A.A. Brill; The Evolution of Modern Psychology (1935), by Richard Muller - Freinfels particularly pt. 5
- (28) Alfred Alder in Lopez Rey. Crime, supra.; p.123,125,126.
- (29) Edelstein, C.D, An Introduction to Criminal Justice,  
(Gregg Division/McGraw - Hill book Company ,1977) p.67
- (30) Doleschal, Eugene and Nora Klapmuts,  
"Toward New Criminology". Crime and Delinquency  
Literature, 5(4) , 1973) p.616.
- (31) Edelstein, C.D An Introduction to Criminal  
Justice supra., p.69.
- (32) German Ideology in A Handbook of Marxism,1935
- (33) Lopez - Rey, Crime Supra., p.40
- (34) Glueck, E Unravelling Juvenile Delinquency. Supra.,p.4
- (35) See H.D.Mackey, Juvenile Delinquency and Urban Areas  
(University of Chicago Press,1942)

- (36) Glueck, E. Unravelling Juvenile Delinquency. supra, p.5
- (37) S. Freud. New Introductory Lectures on Psychoanalysis.  
1942. tr by W. J. H Spott, (New York, Norton, 1933).
- (38) see Bongor, W. A., Criminality and Economic Conditions  
tr. by H. P. Horton, Boston, Little, Brown, 1916.
- (39) R. N. Sanford, "Psychological Approaches to the Young  
Delinquent," Journal of Consulting Psychology, VII (1942),  
223 - 224.
- (40) see Radzinowicz, "A Note on Methods of Establishing the  
connection Between Economic Conditions and Crime".
- (41) Sociological Review XXXI, No 3 (1939) 260 - 280.
- (41) C. Lombroso, L'Uomo Delinquere, 1876 tr., with modifications  
by H. P. Horton, as Crime, Its causes and Remedies, modern  
Criminal Science Services No. 3, Boston, Little, Brown, 1911.
- (42) For a full Critique of heredity, see M. F. A Montaque, "Some  
Anthropological Terms, a Study in the Systematics of  
confusion" American Anthropologist XLVII, (1945), 119, 132.

13. Junod: Aspects of Penal Policy in Africa, 1971

S.A.L.J. p. 158.

14. The Penal Code (Cap. 83, Laws of Kenya, s. 27.

15. Ibid., s. 3.

FOOTNOTESCHAPTER THREE

1. Children and Young Persons Act, 5.3(i).
2. Ibid., 5s. 4 and 5.
3. Ibid., 5. 13(iii).
4. Ibid., 5. 9.
5. Ibid., 5. 14.
6. Ibid., 5.22.
7. First Schedule of the Children and Young Persons Act.
8. Ibid., 5. 25.
9. This information was obtained from an interview with the Children's Officer in Charge of Uasin-Gishu, Elgeyo Marakwet, Transzoia and Nandi District, Mrs. Maneno on 22nd October, 1981.
10. Ibid.
11. Cap. 64, Laws of Kenya.
12. In Kate te VR (1972) E.A. 532, the Period was Fixed at 12 months.
13. Junad: Aspects of Penal Policy in Africa, (1971)  
E.A.L.J. p. 152.
14. The Penal Code (Cap. 63, Laws of Kenya), S.27.
15. Ibid., 5.3.

- (16) (1943) 20 (2) K.L.R 115. See also R.VNjue (1962) E.A. 479
- (17) The Penal Code, Supra., S.27.
- (18) (1938) 18 KLR 171
- (19) Act No. 29/1943.
- (20) Report of the Departmental Committee on probation Service, 1962 comnd. 1950; at paras. 13 and 14.
- (21) Cap.64, Laws of Kenya.
- (22) Ibid., S.4(1) and S.5(1)
- (23) (1962) E.A 479.
- (24) Probation of offenders Act (cap.64 Laws of Kenya) S.12(1)
- (25) Nigel Walker, Crime and Punishment in Britain (Revised Edition), University Press, 1968), p.143.
- (26) This information was obtained from the Resident magistrate in the District Magistrate's Court in Eldoret, Mr. J.L.A Osiemo, on 12th, October, 1981.
- (27) Nigel Walker, supra., p.194
- (28) In 1857, Mary carpenter wrote pamphlets on "Refamatory Schools for the Children of the perishing and Dangerous classes and for juvenile Offenders."
- (29) Act No. 29 /1910; S.9(2) and 1st schedule to the Ordinance.
- (30) Schedule Rules, Ibid., rule 1/1911

- (31) Kabete Approved School was established under Gazette Notice No.637/1934, Act No.22/1934 (Government Printer, Nairobi)
- (32) Children and Young Persons Act, Supra., S.44(3).
- (34) In Penal Practice in a changing Society; Cmnd. 465, at para .35.
- (35) Treatment of Offenders, Annual Reports of the Prisons Service, 1960, (Government Printer, Nairobi).
- (36) Kenya National Assembly Debates, 1963, Column 818, (9th, July, 1963).
- (37) Act No.23/1963, (Cap.92, Laws of Kenya), S.18
- (38) Ibid., S.5. The principle was also expressed by Harris.J.in Letoyian and Another V.R (1972) E.A.50.
- (39) Ibid., Ss.42-43, Lays down the procedure followed in conducting proceedings against a juvenile while he is in a borstal.
- (40) Cap. 237, Laws of Kenya.
- (41) Treatment of Offenders, Annual Reports of Prison services, 1968 - 1969, (Government Printer, Nairobi.)
- (42) Cap. 91, Laws of Kenya
- (43) Ibid., S.5(1)
- (44) Keith , Devlin, Sentencing Offenders in magistrates Courts, (Sweet and Maxwell, 1970) p.151.
- (45) The prisons Act (Cap.90 Laws of Kenya), S.66, establishes Youth corrective centres.
- (46) Borstal Institution Act, Supra, S.42.

CHAPTER FOUR

1. Committee on Children and Young Persons, Report. London, H.M.S.O., 1960, (C.mnd. 1191). Chairman: The Rt. Hon. The Viscount Ingleby.
2. The Penal Code (Cap. 63, Laws of Kenya), S. 14 (1).
3. Ibid., s. 14 (2).
4. Mack (J.W.), "The Juvenile Court," Harvard Law Review, 1909, 23, 104.
5. For more detailed outline, see Van Waters (M.), "The Socialization of Juvenile Court Procedure," Journal of American Institute of Criminal Law and Criminology, 1962, 13, 61.
6. For more discussion, see, Elkin Winifred, A. The English Penal System, (Harmondsworth, Penguin Books, 1957).
7. Nigel, Walker, Crime and Punishment in Britain, [Revised Edition] (University Press, 1968), p. 194.
8. See Chapter three of this paper.
9. The Superintended Quarterly Report to the 70th Board of Visitors Meeting on 19th, June, 1981, in G.K. Shikusa Borstal Institution, in a letter addressed to the Senior Probation Officer, Rift Valley Province, R.E. Annual Report, 1981.
10. Ibid., p. 2.
11. Ibid., p. 3.

SELECTED BIBLIOGRAPH

UNIVERSITY OF MARY  
LIBRARY

- Alexander, B. Smith: Treating the Criminal Offender,  
(Oceana Publications, 1974.).
- Barsani, C.A.: Crime and Delinquency. (The Macmillan  
Company, 1970).
- Clinard, M.B.: Crime in Developing Countries. ( A Willey  
Inter-Science Publication, 1973).
- Glueck, E.: Unravelling Juvenile Delinquency  
Harvard University Press, 1968).
- Glueck, S.: Delinquents and Non-Delinquents in Perspective.  
(Harvard University, Press, 1968).
- King, Joan, F.S.E: The Probation and After-Care Service  
(Butterworths, London, 1969).
- Keith, Devlin: Sentencing Offenders in Magistrates Courts  
(Seet and Maxwell, 1970).
- L'opez-Rey Manuel: Crime, An Analytical Appraisal  
(Praeger Publishers, New York: Washington,  
1970).
- Matza, David: Delinquency Drift.  
(London Routledge and Kegan Paul, 1964).
- Morris, A.: Juvenile Justice.  
(Heinemann, London, 1978).
- Nigel Walker: Crime and Punishment in Britain  
(Revised Edition, University Press, 1968).
- Parsloe, B.A.: The Work of Probation and After-Care Officers.  
(Kegan Paul Publications, 1967).
- Roger, H.: Borstal Re-Assessed.  
(Heinemann, London, 1965).