

PRISONS AND THE CRIMINAL: TO WHAT EXTENT DO OUR PRISONS FULFIL
THEIR ROLE AS INSTITUTIONS OF REFORMATION AND REHABILITATION?

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DEDICATION

This dissertation is dedicated to my dad Bowers,

my mum Edah, and of course Linette.

~~your wife~~

- nonsense
- makes alot of sense

ACKNOWLEDGEMENTS

Too many people have certainly contributed, in various ways, to the successful completion of this work - too many to be all personally acknowledged here. To all of them, I forever remain grateful.

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INTRODUCTION

The Criminal, or to be more precise, what our society considers as a criminal has always fascinated me, especially from the point of view of incarceration. I have often wondered whether our society's idea and perception of a criminal necessarily merits or warrants his incarceration as is usually the case. Locking up people in prisons pre-supposes that these people have committed crimes due to their criminal tendencies: Hence they should be isolated from the rest of the society in order to try and root out such tendencies. However, might there be other factors other than criminal tendencies - for instance, socio-economic pressures - which might contribute to the incarceration of a majority of our inmate population? This paper hopes to find out whether we do actually send the "right" people to prison.

Secondly, how successful are our present prisons in contemporary society? This question has been prompted due to the tremendous rise in prison population over the years since their inception. At this juncture, I find it imperative to mention that according to a survey carried out by the National Institute for Crime and Rehabilitation as reported in the Daily Nation of Monday 6 July 1981 (Page 20) Kenya is one of the seven countries with a high per capita prison population in the non-communist world! That for every 100,000 people out of jail in Kenya there are 165 prisoners. This paper therefore humbly sets out to try and find out why we have such a high prison population and whether the prison institution is helping in any way to stall this rise.

My paper consists of four Chapters. Chapter I lays out a historical background of the prison system. Its main purpose is to try and situate the prison institution in our African society before the coming of British rule. Did such an institution exist? If not, how did pre-colonial African society deal with wrongdoers? Chapter II deals briefly with the origin of imprisonment and modern ideas of imprisonment in the world today. It also has a resume of the interviews carried out with prison inmates. Chapter III contains a closer analysis of the observations made in Chapter II. Chapter IV contains recommendations and a conclusion to the paper.

CHAPTER I

A Historical Background of Prisons in Kenya

Western influence through colonial rule has imposed the Western system of combatting crime in the form of prisons.¹ Larger and larger penitentiary institutions are built and budgets meant for combating crime are some of the highest after education and social welfare in most countries.²

Prisons are by and large a product of the colonial system thrust upon us from the end years of the 19th Century. However, it would not suffice in my view, to embark on a historical background of our prison system without giving an insight on African penal conceptions, before the advent of the colonial system.

Although punishment of criminals was an accepted institution among various societies and tribes in Africa, (some of which I will mention here) a fact that surfaces is that imprisonment was a particularly alien institution. To these pre-colonial societies, punishment for criminals was more of a family/community affair. In looking at some of these pre-colonial societies, it is important to note at this stage that my intention is not to give a better portrayal of treatment of prisoners by the pre-colonial societies, but rather to emphasise the fact that prisons are very foreign institutions to the African.

Among the Nandi of Kenya, offences against property, such as theft, were governed by the general principles of restitution and compensation.³ A fine could be imposed to be paid to the community, usually in the form of livestock, which was normally offered to the elders. The extent of the fine depended on the income and resources of the offender and also on the type of crime that had been committed.⁴ After the animal had been slaughtered and eaten by the elders, the elders would be reconciled to the offender, to demonstrate the removal of any ill feeling on the part of the community towards the offender.

A procedure also existed whereby one who had for instance committed theft could confess to the owner of the stolen goods. In such circumstances, the offender would take a special gourd full of milk with sprigs of two special grasses known as "Kipkanduliet" and "Swendet" tied to the neck of the gourd. He would then give it to an old man acting as an intermediary, who would then take it to the house of the owner of the stolen goods and placed it among his household goods. When the owner discovered it, he would know that the offender was seeking forgiveness. A meeting of the elders would then be convened and the intermediary would be called to explain the incident. When the stolen property was restored or replaced, the matter was considered settled immediately.⁵ One caught in the act of stealing could be killed by the owner. But normally, one was ordered to pay a fine or make restitution, and was given ample time (sometimes as long as a year) to do so. If circumstances were such that he needed his crops in order to buy the particular items to be restored, the elders allowed him to wait till the harvest.⁶ Disobedience of the elders' orders was rare owing to the fear of their curse which was held as a most severe punishment. It was said to run to posterity.⁷

For repeated theft a man was ordered to leave his village and his history would be spread far and wide. However he could be received by members of his clan in another village. He would surrender his plot immediately and could only carry his personal property. A perpetual thief on whom the already mentioned actions had had no remedial effect would be stoned to death because he was considered as being against society. His own family would be the first to throw stones at him. This was to ensure that the family had also accepted the guilt of the offender and there was to be no ill feeling by them towards the remainder of the community. Payment of fines and restitution for thefts committed by children and wives would be the responsibility of their husbands. If a person stole of necessity and tendered an apology he could be forgiven.

In dealing with offences against the person, compensation to the injured party or clan, if the injured man died, was the overriding principle. If assaulted, one could retaliate provided it was done at the time of the attack. A man could also seek forgiveness from the injured person using the same procedure as for confession of a theft, already mentioned above. Compensation depended on the nature of the injury and the resources of the offender.⁸ A poor offender was fined less. The fine could be produced by his close relatives if he was unable to pay. A man who repeatedly committed serious assaults was executed. In cases of homicide whether accidental or deliberate, blood money had to be paid by the clan of the person causing the death, to the clan of the dead man. If, however, the dead man came from the same clan as the murderer, no blood money was paid but compensation was made. As soon as a murder had been committed, the person responsible or his near clan relatives would pay one heifer to the deceased's family to avoid retaliation. The matter was then to be regarded "sub-judice" until the elders made a decision which was compensation in most cases. It can be seen that imprisonment and confinement played no part in the punishment process.

The Kamba used ordeals, oaths, restitution and compensation in dealing with offenders.⁹ Offenders who denied their guilt had to undergo oaths and ordeals. Since most of the ordeals were so harsh and since oaths were to administer serious effects (and fatal ones too), most people would admit their guilt and make compensation or restitution. Kamba ordeals were harsh punishment indeed. It was believed that if one was not guilty, he would go through them unscathed. Among the famous ordeals were the "hot-knife" or "Kivyu". The knife was heated in fire and a suspect was to lift it to his tongue and lick it calling out that if he is guilty may the knife burn him. The "bead" or "Kyuma" proceeded in this way; a small bead was placed inside the lower lid of the suspect's eye. If he blinked and the bead fell out, he was innocent. If the bead worked its way further into the eye, he was considered guilty.

In cases of homicide, blood money was paid as in the case of the Nandi. There was also no distinction between murder and manslaughter. The guilty man was assisted by his clan in the payment of blood money.¹⁰ In assault cases compensation was ordered. Thefts of food crops or stock from ones neighbours could be forgiven if they were done manifestly due to hunger and need. The thief was to return the property stolen, although he could be allowed to do so when famine was over. The thief would then take an oath not to steal again.¹¹ A habitual thief who committed petty thefts could get his house burned down by the elders. For serious habitual theft, or a single major theft, the offender might be executed.¹²

The execution of a thief was done in public with the consent of his relatives. If for instance the father or next of kin did not consent to the execution then all the fathers stock would be taken by the elders and any needed for compensation to sufferers from his son's thefts would be handed over to them. The remainder would be slaughtered before him. A thief caught in the act could be killed, but blood money had still to be paid. Again it may be observed that imprisonment was not a sanction used.

Among the Baluhya of Western Kenya, often a person from whom thefts had been committed would resort to "self-help," for instance, fetching back the stolen animal from the ofender. Resort was also had to invoking a spell or a curse. Dr. Wagner¹³ says he witnessed a few cases where stolen property was secretly returned within a few weeks after a curse had been uttered. "Ordeals" were undertaken where matters could not be decided conclusively. Some evil would be visited on the guilty party as a result of the oath; hence an oath for a guilty party was held in terror as very heavy punishment.

Among the Kikuyu a convicted person was ordered to pay a fine as compensation.¹⁴ The Kikuyu code had a wide range of sanctions which extended from a single warning to the death penalty. But again imprisonment was not one of these.

Offenders among the Kikuyu fell under the responsibility of their clans. The clan was then answerable, in the same way that parents are for their children,¹⁵ for any offences committed by clan members. Hence when a person was found to be disturbing the public peace - for instance by manifesting the signs of being a kleptomaniac, or was considered evilly disposed, his clan was the first to take preventive measures. They would issue him with three to four warnings. If the warnings proved useless a more solemn public action was resorted to.

First of all, he was called before the elders' tribunal and the elder of his clan would announce that from then henceforth the man in question was to be deprived of the right to appeal to the tribunal if any harm befell him. It was also announced that he had been prohibited from taking part in any dances, and from sharing in beer drinking parties and that no member of the clan was to invite him to take food.¹⁶ All these measures were taken in order to make the offender amend his ways. If he failed to reform, the clan would publicly disown him. If he further persisted, the elders would expell him from the country.

Fighting duels causing blood shed and insults to elders were punished by a fine of a goat which was used as a sacrifice for purification. A habitual thief when caught, had a most terrifying experience. From the premise that the country was tired of him, the council of elders normally passed a death sentence. Death sentences were carried out in a cruel and savage manner. The culprit was usually crucified on an ant-hill, his limbs fastened to the ground by wooden forks. Stoning and drowning were also used as methods for carrying out the death sentence. A convict could also be burned alive. He was normally bound in a big bundle of dry banana leaves and then set on fire. It is however notable that the occasions on which they might have recourse to these heavy punishments were very rare indeed.¹⁷

- Also one could be put in a hide ^{willing} that got down a steep slope

Murderers were also sentenced to one of the above tortures. However, an idemnity could be paid by the clan to the dead man's clan. This was normally one hundred and ten goats and a young girl to go and bear a son to replace the dead man.

The Baganda of the Buganda Kingdom in Uganda were one of the most centralised and politically well organised societies in Africa before the coming of British rule. To them too, prison was a very alien institution. The punishments in Buganda for serious crimes were death by fire, being hacked to pieces by reed splinters, fine and mutilation. In most cases these mutilations proved fatal, though it was not uncommon to come across people without eyes, hands ears and even noses.¹⁸ Confinement in stocks or slave forks is recorded. However this type of imprisonment was for people waiting for trial when the Kabaka (King) courts were too full to attend to all the cases at hand.¹⁹ At any rate the natives were accustomed to such severe punishment at the hands of the chiefs or the Kabaka that they lived in great fear of ever being found guilty of an offence.

As noted earlier, the penal system presently in existence in East African territories was introduced by the British and modelled on the British Penal system modified to suit a colonial administration.²⁰ The Imperial British East Africa Company was the forerunner of British rule in Kenya. The Company had tried to set up an administration in the interior. There is not much on record as far as the Company's dealings with the administration of criminal courts and penal institutions are concerned. However when the Company handed over power to the British Government in 1894, it is recorded that Sir Arthur Hardinge inherited all the buildings erected by the Company including Forts and prisons.²¹ This then throws light on the fact that prisons were in existence even before official British rule, at least for the period of the I.B.E.A.

On July 1, 1895 a British protectorate was declared over Kenya. The first piece of prison legislation took effect immediately by the application of, namely chapter VIII Prison-Indian Act No. IX of 1894, and known as the Prisons Act of 1894.

The above Act worked in association with the Indian Penal Code and both were, but for some variations based upon English law. The penalties prescribed in these acts were essentially those that had prevailed in the 19th Century England. And it is with this order in council that imprisonment became a principle feature of the Kenyan penal system.²²

Imprisonment under the Indian Penal Code was to be in the form of penal servitude for Europeans and Americans. The alternative was transportation, which had already been abolished in England, half a century before the Indian Penal Code introduced it into East Africa. Hard labour was also to be applied to convicts as a special category of punishment by imprisonment.

In 1897, the important Order-in-Council of the same year was promulgated which led to increased British authority and power. The Order-in-Council dealt extensively with the judicial system. It established for the first time two categories of native courts. It also empowered the then governor, Sir Arthur Hardinge to constitute and appoint judges and other officers necessary for British administration in Kenya. The establishment of courts and appointment of judges made further organisation of prisons a necessary requisite for their operation. Already in 1895, the ancient Fort Jesus at Mombasa had been converted and organised into a central prison.²³

Fort Jesus was the first government prison in Kenya.²⁴ Its original construction was by the Portuguese as a military Fort in 1592-5. It saw service as such in the control of different parties for the next three hundred years. By the last decade of the 19th century, the Fort had been taken over by the Imperial British East Africa Company. When, in 1895 the British Protectorate over Kenya was declared the seaward part of the Fort and later the whole building was converted into the jail for the Coast. Longterm prisoners of six or more months were sent to Fort Jesus. Those with less than six months served their term in barracks or forts of towns where they had been convicted and often merely in cells in government stations.

In 1897, Fort Jesus had an average number of 130 convicts at a time. By June 1897 there were 473 African, 39 Indian, 34 Arab and 2 European prisoners in Fort Jesus.²⁵ The Fort was also used for the custody of vagrants, lunatics and paupers who were accommodated separately from the convicts.²⁶

Apart from Fort Jesus, no more prisons were established until 1902. In that year, the first Kenyan legislation on prisons was promulgated. This was the Prison Ordinance 1902. This empowered the then acting Commissioner General F.J. Jackson to establish such increased number of prisons as might be desired.²⁷ This was to be done through subsidiary legislation under the ordinance, which in fact was done. The African Prisons Regulations of 1902 (No.12) were published. Under clause 1 thereof, a number of prisons were established in the whole of the protectorate, numbering twenty one.²⁸ The King's Regulations, under Article II of the East African Order-in-Council 1899, (as also applied at Fort Jesus), were also applied at these new prisons.

Staff for the new prisons consisted mainly of ex-military men, best known for their distinguished services as harsh and merciless officers. The prison system was then run by the inspector General of Police. This was to remain the position until 1911.

Under circular No. 1 of 1911 issued by the Prisons Board, which had been appointed in the same year, a Prisons Service was created and it became autonomous. The circular laid down a general format of the new organisation and outlined in detail the methods of introducing more progressive correctional measures.²⁹ In 1914 a Commissioner of Prisons was appointed.

By 1916, there were 30 prisons in Kenya and a total of 9,530 convicts, with a total staff strength of 378. Hence for sixteen years there was a steady though not a rapid increase of prisons.

By the end of the First World War, no clear policy on treatment of prisoners had as yet been formulated. Prisons were regarded as mere caretaking institutions. The treatment remained harsh and inhuman.



The obvious overcrowding and equally obvious distortion of the role of the prisons from custodial institutions into centres of political indoctrination had their inevitable effect. In 1957 serious incidents of violence and rising tension in several penal institutions broke out. Eight serious riots were staged by detainees resulting in a number of staff casualties. The same year saw the introduction of a chaplain and a number of catechists to provide prisoners with religious instruction of their choice.

In 1959, the Prisons Service faced a major crisis when it was found that eleven Mau Mau emergency detainees had died as a result of ill treatment allegedly at the hands of prison officials in what is known as the "Holla Tragedy". A committee was appointed to investigate the matter. As a result of recommendations of this committee, the administration of emergency camps were removed from the Prisons Department in the same year and further still, the Emergency Regulations were repealed.

In 1960, proposals embodying and in line with modern objectives of prisons, such as the principles of reformation and rehabilitation, were finally introduced. The year 1961 saw the progressive contemporary approach to the treatment and training of prisoners introduced in 1960 become firmly established in the Department's policy. New prison legislation with a view towards modernising the existing Prisons ordinance was under consideration. A new Prisons Ordinance (No. 49) of 1962 was passed and became operative on 1st February 1963.

In 1963, Kenya attained Independence. Reforms were introduced to facilitate proper classification of inmates. The Progressive System, the Earnings Scheme, Parole, Extramural Penal Employment and a Youth Corrective Training Centre at Kamiti were introduced. The successful results of this system led to the closing of brief detention camp.

The immediate period after independence saw the Prisons Service make developments for the betterment of prisoners in various spheres.

By 1922 twenty eight prisons had been established and there were 11,621 convicts. By 1924 there were 11,336 convicts compared to 425 staff. In 1925 a further category of confinement was created and institutions for this purpose established. The detention camps ordinance No.XXV was enacted. By 1922 there were 22 detention camps with 1,421 detainees. By 1930, the number had soared to 8,746.

A look at the Prisons service at this point in time reveals that there was a need for more staff. Most if not all of the senior posts were held by Europeans who had little experience in prison administration. Indeed no efforts were made at this time to train the African staff. By 1945 there were 32 prisons and 41 detention camps with a total of 23,987 convicts and 14,167 inmates respectively.

There was a steady increase of prisoners between the years of 1945 and 1950 mainly due to the rise of nationalism in Kenya. From the original purpose of prisons, that is, to keep custody of criminals, their role had become increasingly a political one. Thousands of "Wananchi" considered to be against the colonial administration were herded off to prisons and detention camps.

The declaration of the emergency period in 1952 precipitated an extra-ordinary rise in the inmate population. It was not until 1953 that the department of prisons experienced the full impact of the emergency situation. In 1955 the Prisons Department had to be reorganised to accomodate the increased work created by the Emergency. Additional European staff were recruited from the United Kingdom. During the same year there were 230 executions of whom 221 were of freedom fighters. In 1956, 99 persons were executed for their part in their struggle for our independence. All this is a ghastly example of how the colonialist used prisons meant for criminals for his own political aims.

FOOTNOTES

CHAPTER I

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CHAPTER II

- I A short history on the origin of imprisonment.
- II Modern ideas and objectives of imprisonment.
- III Interview with Prison inmates.

I A Short History on the Origin of Imprisonment

Imprisonment as a means of punitive or correctional treatment of convicts has not always existed in human society¹. While motivation and method have varied widely in different periods, measures for the elimination of offenders, temporary or permanent, partial or complete, may be found in all periods of human history².

Banishment or outlawry along with capital punishment are the most ancient sanctions still in force today. Under the law of Athens, for instance, and other Greek cities from the fifth century B.C., the citizen might be ostracised and compelled to leave the city. A special form of banishment associated with a kind of public work existed in the Roman and Greek practices of condemnation to slavery in the galleys. Servitude for life in the galleys was practised by the Germans, Dutch and the English of the Middle Ages.

Transportation was highly elaborate and, for a time a highly popular form of banishment. Convicts were sent out to penal colonies for life or a number of years.

Prison in the modern sense came about in the sixteenth century. Confinement in town gate houses often for a period of a few months was sometimes used as a penal sanction³. The Houses of Correction or work houses that developed in England and Europe in the sixteenth and seventeenth centuries constitute a major antecedent of the modern systems of imprisonment. With the end of feudalism, a succession of wars, the growth of commerce and migration to the towns, poverty and theft became a deeply embedded phenomena in the newly developing urban environment⁴. By 1779, a Penitentiary Act was passed in England which established a prison system of slavery, confinement with labour and religious instruction. In 1865 the Prison Act was passed in England and it is to this Act that the Prisons Act, Chapter 90 of Kenya traces its origin.

II Ideas and Objectives of Imprisonment

Through the ages, mankind has been accustomed to regard imprisonment as nothing but a preparatory stage for the infliction of other penalties. It was however realised that this measure of treatment of prisoners was by no means effective. Ideas that advocated change in the methods of treating prisoners sprung up. However, it was during the close of the eighteenth century that fresh ideas relating to criminal law and punishment developed in England and on the continent. Proposals were made for changes; old practices such as vile conditions of prisons, promiscuous use of torture and mutilations were attacked by scholars of the day, *inter alia* Montesquieu, Rousseau and Voltaire. Jeremy Bentham, an English theorist, better known for his contributions to the study of jurisprudence, and Paul John Anselh Von Feurebach, a German jurist and criminal reformer were against the retribution geared methods of punishment. Due to this, major changes were made in English and European prisons to better the conditions of prisoners.

In our contemporary world, it is generally accepted that the purpose and justification of a prison sentence or a similar measure which deprives one of his liberty is ultimately to protect society against crime. This is coupled with the enlightened view that, in order to protect society, this can only be achieved by rehabilitative and reformatory measures in the treatment of offenders. This view has come up due to the general failure of the prison system as a corrective institution, coupled with a general change of attitude of the developed countries, as regards the treatment of offenders.

Extensive literature exists which advocates rehabilitative and reformatory measures in the treatment of offenders. It is not possible here to consider all the writers on the subject, but the sum total of their ideas is to make the prison institution better in its treatment of the criminal so that on release, he can be reintergrated back to society, a better person.

Probably Sir Everlyn Ruggles Brise^a, a prison reformer⁵ summarises best what every prison reformer would like done. He states that each man convicted of a crime is to be regarded as an individual; as a separate entity or morality, who by the application of influences of discipline, labour and education, moral and religious backed up by a well organised system of after care, is capable of reinstatement in civic life. Sir E.R.Brise's statement is most appropriate when we try to take into account what prison life can actually be:

"Self respect is systematically destroyed and self-expression prevented in every phase of prison existence. The buildings in their ugliness and their monotony have a deadening effect. The labour is mostly mechanical and largely wasteful, and every indication of craftsmanship or creative ability is suppressed. The meals are distributed through momentarily open doors as though the prisoners were caged animals. The sanitary arrangements are degrading and filthy, and the dress is hideous, slovenly and humiliating".⁶

Official statements about prisons in Kenya or even legislation likewise, state that the aim of the service's objectives is to reform and rehabilitate the offender. An example can be found in the Prison Rules, Part J Section 3(C) of the Prisons Act Chapter 90 of the Laws of Kenya that;

"At all times the treatment of convicted prisoners shall be such as to encourage their self-respect and sense of personal responsibility so as to rebuild their morale, to inculcate in them the habit of good citizenship and hard work, to encourage them to lead a good life on discharge and to fit them to do so".

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Having therefore established what the objectives of our prison service are, the cardinal question as far as this paper is concerned is to what extent are these objectives, that is reformation and rehabilitation taken into account in the treatment of offenders? Secondly are these principles "suitable" to every prisoner who goes to prison? Thus are we making offenders better persons by taking them to prison or are our prisons but a "Manufactory of lunatics and criminals."⁷

III Interview with Prison Inmates

The aims and objectives of prisons being clearly laid out in the Prisons Act and official prison statements, an impression is easily created that these aims of imprisonment are entirely non-problematic; that all the prisons service ought to do is implement them. Secondly, I would like to state at this juncture that there is a presumption that everybody who goes to prison is a subject for reformation and rehabilitation; how true is this? It is with these views in mind that I visited three prisons within the Nairobi area, where I had an opportunity to interview inmates. The interview was a person to person one with already prepared questions.

My first visit was to the Nairobi Prison situated within the Industrial area of the city. Of the prisoners I interviewed, all were between the ages of eighteen and thirty five.

Most had committed petty offences *inter alia* being drunk and disorderly, "changaa" brewing and petty thefts and were generally on short term sentences of less than twelve months. Some were even serving sentences of seven days! Their general disposition, during my interview with them, was far from criminal.

On prison life almost 100% had the opinion that it was a bad place, 20% added further that it was not a place for human beings, 100% knew that the offences they had committed were against the law, however they tried to justify their actions. Those on theft offences said they stole because they were in need. Those on charges of drinking and being disorderly said that they still did not understand why one was imprisoned for being drunk. "Changaa" brewers said it was the only means of income available to them.

A particular case deserves mention here; a case which will be useful in my argument on prison institutions later in the paper. I interviewed a man who was on a four year sentence for this third conviction. His first conviction of four months was as a result of being drunk and disorderly. On release he was back again for nine months on an assault conviction. His third conviction was based on an offence of stealing; he evidently seems to have become more daring with each new crime since his first conviction. I asked him whether he enjoyed imprisonment and whether this was the reason for his frequent convictions. He emphatically denied such a proposition; he said that he hated prison life; that prisons were not places for normal human beings. He said that his present problems began with his four months imprisonment for drunkenness. On release he found his wife had left him and most of his property had been stolen. This made him very bitter. He had no means of support whatsoever.

Being an ex-convict he was ashamed of himself and people also regarded him with suspicion. They thought him a murderer or robber by the mere fact that he had been to prison. I asked him whether his previous terms had not taught him some useful skills with which he would have used to earn a living, to which he replied that he had worked in the "Shambas" and that this was not helpful to him since he had no shamba on which to practice the farming skills he had learnt. He also said that he was still bitter at the man he had assaulted and working in the "shamba" would not lessen this bitterness.

On their relationship with prison officials, 70% said they lived in fear of them because the officials were harsh to them. They could not communicate easily with them; they wished for more communication with the prison officials. 100% said that they had friends amongst their fellow inmates and that they did not fear each other. 100% said they were ashamed of the fact that they had been imprisoned.

My visit to the Langata Women Prison was indeed a very interesting one due to some particular cases I found here, which were supposed to be undergoing rehabilitation and reformation. Most of the women were here on petty offences; especially "changaa" brewing. They were normally jailed for less than a year on failure to pay a fine. They said that they knew changaa brewing was an offence. They however defended it for being their only means of livelihood. They intimated that they would, due to circumstances, go back to brewing it. They gave examples of how "changaa" had helped educate their children and also how it provided the initial capital to start small businesses. They worked mostly in "shambas" as do all short-term prisoners. They however said they had no shambas to go back to and that is why they brewed "changaa" in the first place. Similarly, being taught sewing and handcrafts would only be helpful if one had capital on release.

As I mentioned earlier, some cases are of special mention here from the point of view that probably some "offenders" sent to prison by the courts are not suitable for the prison aims of rehabilitation and reformation, a matter which I will consider in detail in Chapter III. Such is the case of a young girl jailed for nine months for giving false information to the police. The circumstances of the case were that a certain man stole her watch and alleged that it was his. She then went to report the matter to the police. When the man learnt about the action she had taken, he returned the watch. The police then accused her of giving false information to the police. Her attempts to explain what had happened did not do her much in mitigation; the issue was whether she had reported that her watch was stolen and that the watch was later found in her house.

I asked her whether she knew that she had been imprisoned to help reform and rehabilitate her. In answer, she said she was too bitter to know what was happening to her in prison. She said that she still did not know what crime she had committed.

80% of the prisoners interviewed at Langata said they feared prison officials and there was no easy communication between them. One inmate said she was afraid of talking to the officers in case she was beaten for being a nuisance. They found prison very monotonous including the work; they worked in "shambas" every day. Long term prisoners were taught trades such as tailoring and took grade tests.

The Youth Corrective training centre is situated at Kamiti. To this place come youth of between seventeen and twenty one years who commit less serious offences (Borstal Stations receive youth who commit more serious offences). Looking at the young men, my first impression was that they should not be here at all; they should be in school.

100% of the inmates I interviewed had committed petty offences relating to theft. They all invariably came from poor families or had no families at all. Some were more psychological problems and did not know how to relate themselves to society. Most had started working at a very early age in order to fend for themselves. They worked for instance as "Matatu Boys" and "House Boys". The longest sentence here is six months.

About 80% of those interviewed said they were ashamed for being imprisoned. They were first offenders mostly and had no aim of embarking on a career of crime when they committed the offences they did. Most did not wish their families to come and see them due to the fact that they were in prison. Infact 50% of the inmates said that their families did not know that they were here.

Indeed several observations come to light from these interviews with prisoners. From my point of view, they were generally a far cry from what one would expect from persons strictly termed as criminals. However, an elaboration of the observations from this section will be dealt with in detail in Chapter III.

FOOTNOTES

CHAPTER II

1. TAPPAN, P.W. "Crime, Justice and Correction"
(New York, McGraw, 1960) Page 590
2. See CHAPTER I, where we have already looked at the punishments that existed in the African society before pre-colonial rule.
3. MANNHEIM, H. "The dilemma of Penal Reform"
(London, Allen and Unwin, 1939) Page 48.
4. TAPPAN, P.W. Supra, Page 594.
5. CROSS, R. "Punishment, Prison and the Public"
(London, Stevens, 1971) Page 22.
6. CROSS, R. Supra, Page 18. This extract quoted is a real life experience of two ex-prisoners.
7. HAVELOCK, E. "The Criminal"
(London, Scott, 1890) Page 337.

CHAPTER III

From the interview with Prison inmates in Chapter II, certain observations can be made. Firstly, it is clear that it is mostly petty offenders who swell our inmate population. This fact from the interviews can also be supported by documentary evidence as follows:

YEAR : 1978

INMATES LENGTH OF IMPRISONMENT	% of TOTAL PRISON POPULATION
1. Serving less than 6 months	80.63%
2. Six months but less than 12 months	4.90%
3. 1 year but less than 18 months	5.76%
4. 18 months but less than 24 months	4.48%
5. 3 years and over	4.12%

SOURCE: (ANNUAL REPORT ON THE ADMINISTRATION OF PRISONS. 1978. PAGE 45. See also Appendix L)

From the figures, 85.53% of the total prison inmate population of Kenya in 1978 was serving terms of less than twelve months. The offenders must have been guilty of petty offences in order to merit such short terms of imprisonment. The question then arises as to how any meaningful measures of rehabilitation and reformation can be exercised over these people in such a short time.

Furthermore, the majority of the offenders are guilty of such crimes as petty theft, being drunk and disorderly minor assaults and brewing of illegal beer. Now taking into account that rehabilitation implies that an inmate is somehow dislodged from his society or community by the criminal act done by him¹, how do you come about rehabilitating the petty offenders mentioned above? If a man, for instance, gets totally intoxicated on one night of all nights in his life time and starts shouting unnecessarily and howling abuses at everyone else, what proof is there that he has dislodged himself from the community?

How do we assess such a person and come to the conclusion that he needs to go to prison to be rehabilitated? How criminal, indeed is his action? How has he endangered society that he ought to be removed from its midst? The questions are endless. Would it not be better to put such a man on probation for such an offence, than to lock him away in prison for one month or seven days for that matter, where he will have to be fed and be looked after on the public taxes?

Indeed, a man who has offended society and is a danger to society ought to be incarcerated. But if we are to succeed in rehabilitating him, it is not logical, that this can be done within a seven day or even six months period. Instead, we will be taking him to prison to meet real cases of criminality and he might end up becoming worse. Attention should be drawn here to the case I reported earlier in Chapter II from Nairobi Prison.

The case was of the man who was serving a sentence on his third conviction. It all started with his being imprisoned for four months on a charge of being drunk and disorderly. He is now on his third conviction serving a term of four years for theft of a higher degree. One can not help thinking whether the situation might have been different had the man never been near the precincts of a prison in the first place. Note should be taken here to the fact mentioned earlier too, that his problems were aggravated by not what is or is not done in prison but out of how his family, relatives and friends perceived his conviction.

From the interview, I was also able to observe that over three quarters of the prison inmates are not criminally disposed. They are what one would call "Circumstantial Offenders". For instance, most of those who had committed petty theft said they did so out of want of the bare necessities of life. They had not yet developed a criminal attitude towards society as such. It should not be construed here that I term petty theft as not a crime. My aim is to show what kind of person we take to our prisons, and assess whether the well meaning prison objectives can have an impact upon such persons.

Now, if a man has the need for the bare necessities of life, how do you remove this need? At least not by taking him to prison nor by making him work in the "Shamba", where he will engage himself in cultivating crops. It is to be noted here that most of the offenders come from Urban areas. They have no "Shambas" in those areas and mostly none in the rural areas, nor any other means of survival. That is why they live in urban areas in the first place.

It has been stated elsewhere² that 90% of Kenya's population earns its livelihood from the land, and therefore employment on the farms and "Shambas" today forms an important part of the prisoners programme while in prison. They are also taught animal husbandry and poultry keeping so that on discharge they may return to the land and implement the skills they have attained. With due respect to these noble measures, the factual situation is that these offenders have no land, or if they do, it is too small to even generate any subsistence livelihood. Indeed, the fallacy here, maybe that while 90% of Kenya's population may be connected to the land, 90% of its prison population is not so connected. Secondly, there is no after care or post-prison programme specifically geared to try and place or "return" the released person to employment in, or ownership, of land.

When petty offenders commit crimes, it does not necessarily mean that they do not know how to cultivate land. They probably do but, as already mentioned, do not have the means to cultivate the land. Hence a prison might not be the best place for them. However, a sure result of the imprisonment of further petty offenders is overcrowding in the already overcrowded institutions, and consequently a severe drain on the National budget.

Short-term prisoners therefore gain very little from imprisonment, and the ideas of reformation and rehabilitation as implemented by our prisons. The wholesale regard of farming as a means of rehabilitation might not be a sure way of trying to give these people a better life. Long term prisoners as I observed from the interview are taught more immediately usable skills *inter alia* carpentry, masonry and tailoring. They are also able to undertake government trade tests.

Short-term prisoners loose out most by imprisonment. In most cases, they are given unskilled jobs in the prison. Due to the brevity of their term the result is that upon release they are normally back where they started.

Since the prison institutions take the teaching of various skills as part of their rehabilitation programme, there must be a very strong presumption that these people are committing offences due to lack of skills and consequently, lack of jobs or self employment. Indeed, from the interviews, I observed that the majority of the inmates here were unemployed or engaged in "petty jobs". Now, if we strongly believe that the majority of prisoners commit the offences they do due to lack of gainful employment why should they be taken to prison? Would not a different kind of institution modelled on the lines of the National Youth Service be for instance, more appropriate. This is taking into consideration that most of these inmates are not criminals as earlier stated, and also the fact that the majority of them are between the fruitful ages of eighteen and thirty five.

The rate of recidivism has a bearing on the issue as to whether we are sending the wrong people to prison, to whom the institutions' ideas of reformation and rehabilitation do not achieve much result. The last published annual figures show that there is a steady increase of the rate of recidivism among ex-convicts. For instance, in 1977, there were 1,480 convicts sentenced to imprisonment for the second and subsequent times for serious offences. In 1978, 2,475 offenders were convicted for serious offences for the first time while in comparison, 1 580 convicts were sentenced for serious offences for the second and subsequent times.³ There seems therefore a very strong likelihood for an ex-inmate to commit a crime, and a more serious one for that matter. This again seems to be rather contrary to the prison institutions' intentions and legislative aims. Might there be something about prison life that hardens or affects inmates so that they are more likely to commit a crime, once they are free again? With this kind of situation, it would probably be better to avoid sending people to prison. We probably, more often than not send the wrong people to

prison, where, instead of being rehabilitated, they become bitter and end up becoming hard cores; where instead of being deterred from committing crime again, are more likely to commit such crime.

The rate of success of the aims of penal institutions is dependent to a large extent on conditions within these institutions, and this is a widely accepted fact. From the interview with prison officials, most were of the opinion that the present prisons are not suitable for the present ideas of reformation and rehabilitation. This is, in their view, due to the fact that the majority of these prisons were built during the colonial time with punitive objectives. Hence the planning of these institutions was consonant with such an objective. They are generally old fashioned high security buildings modelled on their old European counterparts. Of course at this point, I do not hesitate to say that we need the high walls for the hardened criminals to whom ideas of rehabilitation do not and would not make sense, and who, furthermore, do not care whether they are in prison; such criminals actually do exist and are in most cases in the minority.

Prison officials whom I interviewed were of the opinion that prison life was too predictable due to the set down rules of prison institutions. Hence it was difficult to make any changes without contravening these rules. Furthermore, they were of the opinion that for some of the convicts, as mentioned earlier in Chapter II, prison was not the best place for them since they were not in essence criminally disposed.

Once under the high walls, the inmates loose touch with society completely. How then do we propose to reintegrate them back into society? There is a complete loss of the "individual" in these institutions. From the interview with inmates, I found out that their lives are regulated down to the most minute details; all decisions are made for them. They literally 'float' through their existence. The psychological effect of this atmosphere is to undermine the inmates self-image and make them grow to doubt their inability to run their

lives.⁴ I am not on this point advocating that prisoners should be allowed to run their own lives in prison. However, life in prisons is too predictable; right from the time one goes to sleep. Of course institutions have to establish a routine and discipline, but routine and discipline fundamental as they are can be deadly to change in the individual.⁵

It should not be forgotten that it is the length of the prison sentence; hence the consequent loss of freedom that actually measures the degree of punishment, not the conditions under which the term is served.⁶ This is borne true by the fact that during my interview with prisoners they said that the loss of freedom, was their greatest blow. Anybody can adjust themselves to terrible conditions with an amount of bitterness. This should serve as a warning against the ill considered notion of making prison life as uncomfortable as possible on the ground that this, in addition to the deprivation of liberty, will serve as a deterrent to the offender and others, or that it is right that the offender should be treated in such a manner.

The approach used by prison officials determines greatly the response of the offenders in prison. From the interview 80% of the inmates suggested that the officials were generally harsh to them. One of the welfare officers I talked to expressed shock at the way some of the officials handled prisoners. The inmates expressed lack of communication between them and the officials. They felt they were regarded as nothing more than prisoners. They were generally afraid of the officials.

However, one of the prison wardens intimated that they were not entirely to blame for their harsh treatment of the prisoners. This is because they worked under considerable tension arising from the fact that if a prisoner escaped, the warden(s) was punished severely. This would be done, for example, by a big cut in one's pay packet for an indefinite period. They were hence afraid of being too human to the inmates in case they felt this would be interpreted as a weakness which might lead to an escape. Hence, their work was carried out with

a permanent suspicion of the prisoners, which was proper and a continuing harshness which is perhaps more than is necessary.

The Remand Prisoner

During my visit to the prisons, I came across another kind of prisoner - the remand prisoner. There has been a tremendous increase of remand prisoners at these institutions and this has led to undue pressure on these institutions as concerns accommodation and staff requirements. With due respect our legal process has a flair for remanding suspected offenders only to acquit them later.

A glaring example occurred this year when there was an employer-employee crisis within the East African Industries Limited. This was a purely internal matter of the industry. However as a show of strength almost two hundred of the employees were arrested and put in remand, only to be acquitted later. A highly placed prison officer stated that a lot of money was spent in maintaining these people in custody. That this was an uncalled for exercise whose only effective result was to put to use Government money which could have been channeled to more urgent needs.

For the people affected by such an exercise as above, there is bitterness to contend with on their part. I would like to submit that this was a complete misuse of the prison establishment. Employers, trying to use prisons to achieve their aims is reminiscent of the colonial days when colonialists used prisons to achieve their political ends. Prisons are for criminals.

When remands are acquitted, apart from the vindictive attitude towards society and contempt towards the machinery used for the detection of crime, such humiliating treatment can provoke in the innocent, the problem of contamination by real criminals and this is a very serious issue.⁷

It is important to note here that many people fear prisons.

This fear, coupled with the social stigma of self respect which accrues from imprisonment is a real deterrent to many people from committing crime.⁸ This can be supported by the observation from the interviews with inmates that they were very afraid of prisons and had no intention of ending up in them. Hence, this fear and shame must be maintained as a deterrent as far as possible by keeping as many people away from the prison.

It would not suffice were I not to mention a few observations as regards the attitude of prisoners towards criminal justice. The sentiments they come to prison with determine quite largely their response to whatever treatment programmes are presented to them. If they come in already convinced that the punishment awarded is disproportionate to whatever offence they committed, it makes the work of prison officers all the more difficult.

During the interviews, I found cases (for instance the Langata Prison case of a lady who allegedly gave false information to the police) which with due respect to the law did not seem to have been properly assessed. There were, moreover, a lot of complaints from prisoners of being framed and false evidence being used against them. I submit that there may be some truth in these complaints by calling attention to the fact that only 48% of all the people on remand eventually end up in prison; and for the rest, there is always hope for an acquittal on appeal.⁹

It can also be observed that the sentencing authorities and the prison department do not work hand in hand with each other. For instance, are the sentencing authorities aware of the Prison Department's objectives of reformation and rehabilitation? If so, how far do they take them into account when sentencing convicts? On this, the Magistrates I talked to were of the opinion that the two worked like two completely different institutions.

Another questionable case for supposed 'rehabilitation' was found

at the Youth Corrective and Training Centre. A young boy of about seventeen years lent a friend some money. When the friend refused to give it back, he confiscated the friend's clothes with a view to secure a repayment of his money. The friend reported the 'theft' of his clothes to the police. The young man of course explained events leading to the 'theft'. The friend did not deny owing him money.. However, he realised that the sole issue in his trial was whether or not he was 'guilty' of the 'theft'. He pleaded guilty under the circumstances, and was convicted thereupon. Now what element of criminality was to be removed from this young man by taking him to prison? How dangerous to society is he and how has he dislodged himself from the Community? How was a prison sentence going to help him in the circumstances?

Finally, as far as this Chapter is concerned, it is a fact that all of the prisoners who enter our penal institutions will one day be going back to rejoin society. What type of attitude does our present society in Kenya have towards them as ex-convicts? This indeed is a crucial question. As our present President once said,

"The test of any prison system is not what goes on in that prison but what happens when a prisoner comes out What you surely must appreciate is that no matter what efforts the prisons make, or how good their training system for prisoners is, the whole of it can be nullified and be a waste of money unless we have the support of the public and of interested men and women to help a man when he has finished his sentence."¹⁰

It would not be very far from the truth in stating that society has not yet completely accepted the ex-convict. He is still regarded with suspicion. Even employers are hesitant in taking on ex-convicts. Once again, the ex-convict is left out in the cold. So that even if a prisoner has been reformed and rehabilitated, the disadvantages of the stigma attached to imprisonment remains. Should we then abolish prisons in order that we may be able to change society's attitude towards these people? This and many other questions I have asked in the course of this Chapter will be looked at more conclusively in Chapter IV, to which I will add any necessary recommendations.

FOOTNOTES

1. Tibamanya Mwene Mushanga "AN ADDRESS TO PRISON OFFICERS CONFERENCE" (Nairobi, 6th of March, 1974) Found in Africana Collections, University of Nairobi.
2. Saikwa, A. K. "TRAINING AND REHABILITATION OF PRISONERS". An address to the Kenya Press Club, City Hall, 10th October 1972.
3. "ANNUAL REPORT ON THE ADMINISTRATION OF PRISONS" (Nairobi, Government Printer, 1978) 45
4. Wright, Jnr and Lewis, P.W. "MODERN CRIMINAL JUSTICE" (Maidenhead, McGraw, 1978) 279.
5. Junod, P. H. Dr., "RESTITUTION AND AFRICAN PENAL CONCEPTIONS" (January 1966) East African Institute of Research Conference Papers. (Africana Collections, University of Nairobi) Page 62.
6. Cross, A.R.N. "PUNISHMENT, PRISON AND THE PUBLIC" (London, Stevens & Sons, 1971) 34.
7. Rugimbana, O.K. "SOME ASPECTS OF THE IMPRISONMENT SYSTEM IN EAST AFRICA" (1972) 2 E.A.L.J. 21.
8. SUPRA, P.21.
9. SAIKWA, A. K. "PENAL INSTITUTIONS" A paper, presented at the Kenya Magistrates Conference held between the 29th of October and the 1st of November (1976) at the University of Nairobi (Found at the Prisons Headquarters, Nairobi).
10. Speech by his Excellency Daniel Arap Moi, quoted in "PRISONS AND SOCIETY" by Saikwa, A.K. Available from the prisons Headquarters.

CHAPTER IVCONCLUSION AND RECOMMENDATIONS

From the preceding chapters one may get the impression that prisons are a costly failure. Nevertheless, prisons seem to be here to stay and for very plausible reasons too.

First and foremost, apart from the prison of today, there is no satisfactory alternative, taking the public's protection into consideration. Secondly, imprisonment is the only device that removes the offender from the circumstances in which his criminality was endangered. It also provides an opportunity for corrective treatment and training in a controlled environment. Moreover, since the loss of freedom is precious to the human being, it is claimed that imprisonment; more than any other sanction has deterrent value for the control of crime. No less important is the versatility of imprisonment as a correctional device compared with other methods. This is because it is adaptable to a diversity of ends and to a wide variety of offenders. Hence, it could easily be adjusted both to the divergent categories of criminals and in some fair measure to the distinct problems they present¹. However from the study of prisons and criminals done here, the above do not seem to be the case in reality.

We can, from the study done in this paper and from various other materials on the same subject, conclude that the traditional prison neither protects society, nor reforms the offender. In the conditions in which the prisoners have to live, we find that retribution and social retaliation, though persistently criticised by modern advocates of a progressive penology, continue to be a major ingredient of our penal law and correctional system. Our jails, built with punitive objectives are commonly inadequate in structure, even for the rudimentary deficiencies in living arrangements. The fact that there has been a change of approach to prison institutions from that of a punitive one, to one of reformation and rehabilitation does not mean that the structure of these prisons has also changed. Instead of the hoped for rehabilitation, the usual prisoner lives under conditions that encourage patterns of dependence, irresponsibility, manipulation and destructiveness².

The prisoners have no say in what is done to them while in prison.

Indeed, the massing of anti-social individuals together, while it may protect society and avoid contamination of the innocent for a while is considerably abnormal; and for that reason, must be an imperfect preparation for responsible living in the free community.³

With the afore-mentioned views, the question then arises as to whether there are any possible alternatives to imprisonment or, what can be done to make these institutions serve the purpose which they are presently meant to serve; namely rehabilitation and reformation.

The paradox of a ^{prison} person is that it attempts to train men and women to function in a free society by socialising them in the norminative structure of a society of captives. It is, in this respect, like "attempting to train sailors for sea by sending them to boot camp in the Gobi desert"⁴.

Were I in a position to do so, I would certainly abolish the idea of prisons though reality would demand the existence of a few prisons for the apparently irredeemable recidivists or the specially dangerous offenders. The abolition of prisons being unpalatable at this stage in time, I would submit the following as alternatives.

The first and most important step is to ⁽¹⁾ avoid sending people to prison. This is mainly due to the fact that prisons and imprisonment serve as deterrent factors in themselves. From my interview with prisoners the majority, if not all had an inherent fear of prisons especially so for the first offenders. With due respect to our judicial system, it seems to be too ready (as mentioned earlier in a previous chapter) to commit people to prison on the illusion that once one has had an experience of prison he will never commit a crime again. On the contrary, once a man gets into prison, and after the initial shock he settles down and adjusts to whatever conditions therein, however terrible.

It is with this in mind that I submit that greater use should be put to the imposition of fines in lieu of short term sentences. As we have already observed, the majority of prisoners are short-termers hence petty offenders. Probation services should be used to cater for these type of offenders. Suspended sentences and warnings should be applied as alternatives to imprisonment. From the interview with prisoners the majority age suggests that these people are kept in prison during their most productive years; hence my advocacy of treatment of prisoners outside prisons especially in areas of community work. The immediate result of such measures will be to ease overpopulation in prisons.⁵ It will also act as a better deterrent to offenders. The fear attached to prisons coupled with the social stigma attached to imprisonment will help deter these petty offenders to a substantial degree.⁶

It is a fact that our prisons are overpopulated. This makes it difficult for the efficient running of these institutions. It is also very tempting to state that over population in our penal institutions can be solved by the building of more prisons. However this conventional solution, in addition to increasing staff, which, quite apart from any other considerations, drains our country's financial resources and can not be allowed to continue indefinitely⁷. Hence my strong advocacy of treatment of offenders outside prisons, especially so for the petty offenders who comprise almost 86% of the penal population in Kenya⁸. These people are not at all criminally disposed to warrant incarceration.

In support of probationary sentences it may be said they give a person an opportunity to prove himself. It has been stated that 84.4% of those placed on probation do not offend again⁹. In comparison, the likelihood of a second and subsequent offence for one who has in fact been to prison is appallingly high. In 1978, 2,475 people were sentenced to prison for serious offences for the first time. 1,580 were sentenced for serious offences for the second and third time¹⁰.

I strongly submit that the idea of sending to prison young boys as those I found at Kamiti Youth Corrective Centre should be abolished. Here, I met boys of as young an age as thirteen years. These young people should never be sent to prison or even an institution that resembles one. The majority, if not all of these young boys were not driven by powerful criminal tendencies in committing the petty crimes they did (mainly petty theft). Invariably all of them came from poor houses. They need the very bare necessities of life such as food, clothing and shelter and, in our contemporary world, education. Taking them to institutions like the Kamiti one will not remove these needs at all. It will only psychologically scar their young minds and invoke in them bitterness towards society. It is not very difficult to visualise boys of thirteen years being taunted as ex-convicts.

Moreover, on release, the boys are returned into the same circumstances (for instance of financial and social disadvantage) which forced them to commit the offences they did. What these boys need is an education. Those who have had some form of education should be put into village polytechnics and institutions like the National Youth Service. Again, emphasis should be made here for outside prison treatment. More approved schools or Borstal stations (there are only two Borstal Stations in Kenya) should be established to cater for these young men, where formal education and training in technical subjects should be offered. Although this might sound as too expensive an exercise, it is effective on a long term basis by producing qualified man power for the state and will avoid recidivism which is equally expensive for the state. In any case the state is already spending thousands of shillings to maintain them where they are for no apparent beneficial purpose. What should be the guiding principle in dealing with these young boys should be that will they be able to earn a suitable living when they come out in order to remove them from their criminally disposed background?

The judicial process plays an important role in the reformation and rehabilitation of offenders. As mentioned in an earlier chapter the sentiments which a prisoner has about the way the judicial process took its course matters a lot as far as his attitude towards imprisonment is concerned. During my interview with prisoners, I came across cases where the prisoners felt that they were not guilty of the offences they were charged with. Or more important that the crime committed did not merit the sentence given, or any sentence at all (see chapter III).

A basic dilemma therefore, surrounds any examination of the prison and judicial-penal process. This is due to the confusion and conflicts between various aims and objectives which exist between the sentencing authorities and prison departments. Firstly, the modern prison objectives of reformation and rehabilitation are not at all reflected in most of the sentences prescribed in the Penal Code of Kenya. So that in most cases, when an offender comes before a court, the Magistrate or Judge's pre-occupation at the moment is whether the offender is guilty or not and if guilty, imprisonment follows. It does not necessarily mean that every person (save for the few who are put on probation, fined or discharged) who is proved guilty is in need of prison attention. The criminal court ought to be in a position to select the persons who should be subjected to correctional control and treatment. Psychologists, social workers and possibly men from the offenders home should be made to sit on the panel to assist in determining this selection.

As far as the criminal court is concerned, I would submit that our courts, in dealing with offenders act in a very abstract manner. The courts apply the "Law as it is"¹¹ regardless of whether it is suitable to the circumstances in question. For instance when you decide to jail X for trying to enforce repayment of his debt by detaining Y's shirt, how dangerous to society is X to merit incarceration? As far as the law is concerned, he X has committed theft even if Y admits that he owes X some money. What would be so wrong in advising X that his means for procuring his debt is not the proper way; bearing in mind that X is uneducated, lives in the countryside and is non-knowledgeable about the law?

How was X to know that he should have signed a contract with Y - a contract which he can prove in a court of law? To sentence such a man as X to imprisonment would be, and is a thorough application of abstract justice, a justice that is not conscious of the social circumstances and social phenomena at large. Neither does this justice serve the stated purposes of reformation and rehabilitation.

Nevertheless, we can not put too much blame on the prison authorities for producing worse human beings than the ones we sent to them. Nor can we do the same for the judges and magistrates; they apply the "law as it is" because these laws have been passed by our legislature, the highest law making body in the country. Hence the legislature is as much or should be involved in the treatment of offenders as are the prison department and judiciary. A case to consider here is one of the "changaa" brewer. Sentencing a "changaa" brewer for a prison term does not remove the economic need which the brewer must satisfy. Why blame such a person without giving him an alternative solution? Our economic super structure is such that there will always be people in need; how long are we going to send these people to prison before we can realise that we can not solve their problems in this manner? It is high time we looked at crime as a social disease which needs social ways of counteracting it, not only in the offender but also for the welfare of his victims.

It is with this view that I submit that our legislature should consider African customary penal conceptions with a view to reducing our penal population. Our legislature should introduce customary concepts of punishment especially compensation and restitution.¹² As seen earlier on, restitution is an African living concept which can be used to spectacular effect if it is made the centre of penal and prison policy. A writer¹³ states that African states must refrain from looking towards Western ways in their attempt to curb crime. They must return to restitution or compensation. Restitution is based on the fundamental moral nature of man, even if this has disappeared in the hardened criminal or the gangster.

Restitution plays another important factor in that it removes bitterness between the parties and the guilty party is accepted back into society, more readily; thereby avoiding the social stigma attached to imprisonment. Once compensation or restitution has taken place the issue of contention is forgotten completely.

While still considering the legislature, mention should be made of the Prisons Act, Chapter 90 of the Laws of Kenya. Some of the provisions of these Act are not consonant with the professed prisons' objectives. It is beyond the scope of this paper to mention all the disparities in the Act. Mention will however be made to the most glaring ones.

The Prisons Rules rule number 5 deals with the classification of prisoners in order to avoid danger of contamination. Rule number 5(c) implies that all prisoners with vicious tendencies or habits should be grouped together. The question then arises that how will this group know anything better if all their associates are of supposed vicious tendencies. The criteria used in deciding whether these people are vicious is based on characters and previous history. I submit that this is not a fair criteria in the circumstances. For instance if a prisoner has been twice to prison even for minor offences, then he is said to have a bad history. But what tangible proof is there to prove that the man has inherent vicious tendencies? I therefore recommend a more thorough examination of prisoners to be carried out by psychiatrists and psychologists before any classification is made.

Under Rule 9(1) we are confronted with the stage system. All prisoners are supposed to serve their terms in accordance with the stage system. Certain privileges accrue with each different stage. The rise to higher echelons of the stage system depends on one's conduct during one's stay in prison. This may have a probable positive result in that it may produce an incentive towards good conduct.

It however has a negative mark as well, in so far as good conduct may be induced in order to merit promotion. A prisoner under rule 14 may even be referred to as an Honour Prisoner on entering the Special Stage! This stage system seems to be oblivious of the fact that a prisoner is a prisoner no matter what names and stages you put him into. This only contributes to producing a "prison aristocracy" and the prisoners who come out without making it to the privileged stages come out feeling even more inadequate as human beings. He feels that he could not even "make it" in prison. I submit that this idea of re-classifying Prisoners should be abolished.

Further under rule 17, several privileges, *inter alia*, attending lectures, attending school, and library and the provision of means of recreation accrue at certain stages. A prisoner in the First and Second Stages is not provided with any means of recreation and may not attend school. I submit that such facilities should be made available to all persons irrespective of the stage system.

Letter writing and visiting privileges are contained in Rule 53 (2), and are also based on the stage system. A prisoner in the first stage can write one letter in four weeks and a visit of twenty minutes every four weeks. A fourth stage prisoner is entitled to two letters for the same period of time. A prisoner in the Special Stage may write a letter every week and a weekly visitation of thirty minutes each. This provision takes the view that human emotion and needs vary with this artificial stage system. Secondly, that those in the lower cadre of the stage are mostly short term and new prisoners. Hence that they do not need more communication with the outside world; either they have just come into prison or that they will go out after a short term. In my view, it is more probable to assume that new prisoners need more communication with the outside world and reassurance from their families due to initial "prison shock". It is my view that those who have stayed longer in prison and are probably higher in the stage system are more adjusted to prison life and in fact need less of these prison visitation and letter writing privileges.

It is therefore my view that changes should be made to the above provision so that special attention is given to new prisoners who might need more visits and letter writing. Besides I recommend that a prisoner should be able to write a letter when he needs to do so, this being his best contact with his family and the outside world. New prisoners should be given more time to see their families who are normally left in a state of shock when a member of their family goes to prison.

Rule 45 of the Prisons Rules leaves much to be desired. It states that if a prison officer strikes or uses force against a prisoner, he should immediately report the incident to the officer-in-charge! This provision was made, in my view, without due consideration to human nature and human weaknesses. The prisoner himself in this case should be the one to report the incident. Rule 66(g) forbids communication between a prisoner and another without authority. This kind of provision should not be maintained in our laws on prisons.

From the Act, one observes that a prison has 'a prison' within itself which deals with offences committed within the prison itself. A prisoner may suffer solitary confinement or a penal diet,¹⁴ or both, for a prison offence. Under rule 15(3) three quarters of a prisoner's earnings may be confiscated, or the rate of his earnings may be reduced, or he may be completely removed from the earnings scheme. In my view the above amount to an infliction of further punishment to a prisoner and in total contradiction with the principle that a prisoner is not sent to prison for punishment but as a punishment. Of course a prison must have rules since rules are necessary for the proper functioning of any system. However rules or even punishment should be such that they are not unduly harsh or aimed at inflicting emotional or physical pain. The above rules are unduly harsh taking into consideration the basic circumstances under which one has to live in a prison.

The legislature has therefore to take cognisance of the fact that although law and penal laws are static, left by themselves the individual man is not.

It is hence the legislature's duty to see to it that we do not continue to flagrantly adhere to rules which are not consonant with human development especially with the prevailing view on reformation and rehabilitation.

It is high time our legislature stopped seeing crime in a vacuum. Our laws have the view that crime is a voluntary individual social circumstances. Hence the courts then try the offence in a vacuum and sentence the offender without any other considerations, They do not take into serious consideration at the trial time, the factors which made the offender commit the crime. A man is eventually sent to prison without due consideration of the conditions that played a s a catalyst to the commission of the offence .

And

"A prison system which has no effect whatever in removing the conditions which produce the criminal, a prison system which aggravates these conditions, is bound to fail as a deterrent agency; it is certain to swell the ranks of the habitual criminal population and this is what is happening in our midst today".¹⁵

Indeed, our prison system by incarcerating people without due consideration of their social circumstances only creates bitterness in them and this alleviates the problem of recidivists. The majority of recidivists have no better conditions to turn to on their release and therefore embark on a career of crime and hence problems of recidivists. In my view our present prison system with its noble aims does not solve the problems of our so called criminal elements in our society to a large extent. This is shwon by the fact that those who have been to prison for a lesser offence are likely to commit more serious offences.

And

"If a prison does not succeed in deterring an offender who has had an experience of its severities from coming back to it again and again, it is not likely to have much influence in deterring the criminally disposed from embarking on a criminal life. On the contrary, the spectacle of an offender going to prison for the fifth, the tenth, the twentieth time is calculated to encourage the peccant materials in the population rather than to deter them"¹⁶

In conclusion, imprisonment should be phased out from our social set, bearing in mind that about 80% of the people we send to prison are not what one could call criminally disposed. Greater attention should instead be paid to the social conditions in our midst which make them commit these offences. If a man should be sent to prison, especially for the first time, this should be seen as time for deep discussion with him and plenty of advice to be given by prison officials. Involving him in prison work programmes, essential though they may be, should be seen only as a secondary factor of his being there.

I would also like to recommend that psychiatric treatment should be given to prisoners whose problems seem to be more emotionally orientated.¹⁷ Society must be directly involved in the treatment of offenders by the establishment of work programmes within the society itself, not inside prisons. The building of more prisons should not be the rule in trying to cope with the penal population. Probationary services should be increased and made more effective and these should incorporate African ideas of dealing with offences such as compensation and restitution. More trained personnel in such fields as psychology and psychiatry should be attached to prison institutions in order to help select people who should or should not go to prison. The problem of prisoners is more complex and the magistrates and judges should be assisted in the task and not left to do it alone. If we do, we shall soon have our penal population running into unmanageable proportions in a few years, and this will be a much more difficult problem to deal with.

It is indeed time we looked at the prison system from our own social context and try to implement useful programs to help curb this problem. The legislature, the judiciary, the prison department and doctors from the Ministry of Health should sit down together and review the whole prison set up from a socio-economic view point, which indeed contributes a lot to our penal population. Until this is done the principles of reformation and rehabilitation will not have the desired effect on our penal population.

FOOTNOTES

1. Tappan, P.W. "CRIME, JUSTICE AND CORRECTION"
(New York, McGraw, 1960) Page 668
2. LaPatra, T.W. "ANALYSING THE CRIMINAL JUSTICE SYSTEM"
(Lexington, Mass, 1978) Page 153.
3. Tappan, P.W. SUPRA, Page 668.
4. Wright, J. Jnr. and Lewis, P.W. "MODERN CRIMINAL JUSTICE"
(Maidenhead, McGraw, 1978) 279
5. Rugimbana, O.K. "SOME ASPECTS OF THE IMPRISONMENT SYSTEM
IN EAST AFRICA" (1972) 2 EAST AFRICA LAW JOURNAL. PAGE 18.
6. Rugimbana, O.K. SUPRA 18
7. Saikwa, A.K. "An approach to penal administration in
East Africa" (1972) E.A.L.J. 25.
8. See "ANNUAL REPORT ON THE ADMINISTRATION OF PRISONS IN KENYA"
(Nairobi, Government Printer, 1978).
9. See "PROBATION SERVICE ANNUAL REPORT" Rift Valley Province.
(Nairobi, Government Printer, 1979).
10. "ANNUAL REPORT ON THE ADMINISTRATION OF PRISONS" SUPRA Page 11.
See also appendix 1.
11. Dias "JURISPRUDENCE" (London, Butterworths, 1976) Page 451.
See also other materials on Jurisprudence for John Austin's
theory of law.
12. See Chapter I, herein above.
13. Junod, P.H. Dr. "RESTITUTION AND AFRICAN PENAL CONCEPTIONS"
(January 1966) East African Institute of Research Conference
Papers. (Africana Collections, University of Nairobi)

14. PRISONS ACT, CHAPTER 90, LAWS OF KENYA. (A penal diet consists of 455 grammes of maize meal, 25 milligrams of ascorbic acid and water)
15. Cross. R. "PUNISHMENT PRISON AND THE PUBLIC" (London, Stevens, 1971) Page 338.
16. SUPRA, Page 338.
17. It is notable here that the available psychiatric treatment in Kenya is very scarce. There are very few doctors in this field who can cope with the general population, let alone the prison population. In Professor J. Muhangi's 1st Inaugural lecture at the University of Nairobi on the 31st of January, 1980, entitled "PSYCHIATRY IN KENYA" there were then eight phychiatrists in Kenya. According to his lecture, there should be now twenty psychiatrists in Kenya. It is my view that since the training of psychiatrists is a very expensive exercise and which takes a long time too, the government should intensify the teaching of psychology and mental health expecially to all types of prison workers and help deal with prisoners and would-be prison cases.

PROPOSED QUESTIONS TO COLLECT INFORMATION FROM INMATES

1. When were you committed to this prison?
2. How old are you?
3. What was your offence?
4. How long were you sentenced for?
5. What was your idea of a prison when you were outside?
6. Did whatever idea you had ever scare you so that you never ever thought of becoming an inmate?
7. When you first came to prison, what were your first impressions? How did you feel?
8. Were you working when you committed the offence? If not, how were you earning your living?
9. Where were you living - in town or the countryside?
10. What is your standard of education?
11. Why did you commit the offence, in your opinion? Did you know that what you had done or was going to do, was an offence? Did you know that you could go to prison, and if you did, weren't you scared?
12. Do you, in your opinion, feel you deserve a harsher punishment for what you did? If not, why?
13. What is your relationship with the prison officials? Do you tell them your problems? If not, why?
14. Is this your first prison term?
15. Do you have any family or relatives? Do they visit you?
16. Have you made friends with any of your fellow inmates?
17. Do you take part in any of the prison activities like games? If not, why? What do you do in your spare time?
18. Give me an account of your typical day in prison from the time you wake up, up to the time you go to sleep.
19. Are you repentant of what you did? Would you ever want to come back to prison again?
20. Do you feel ashamed for having been a prisoner?
21. What do you want to do after your release?

PROPOSED QUESTIONS TO COLLECT INFORMATION FROM PRISON OFFICERS,
WARDERS AND WARDRESSES.

1. When did you join the prison service?
2. Why did you decide to join this service?
3. What do you think of criminals?
4. What is your comment on the present prison system?
5. What is your idea on treatment of prisoners?
6. Were you given an opportunity to start your own prison, what changes would you make?
7. What is your view of long term prisoners?
8. Do you like your job?
9. Do you feel you have enough training to deal with prisoners?
10. Why, in your opinion, do prisoners come back to prison?
11. Can you give your opinion on the prisoner - warden - officer relationship?
12. Are you afraid of prisoners?
13. Were you to become a prisoner, what would you like done in order to make you a better person?