

A CRITIQUE OF THE KENYA PENAL SYSTEM

(A case for Reform)

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S T A T U T E S

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CHAPTER ONE
INTRODUCTION

The laws concerning the Penal System in Kenya are found in three statutes namely: the Penal Code.¹ which defines the criminal offences as well as prescribing the maximum sentences which can be imposed by the law courts; the Criminal Procedure Code².... defining the procedure of all the courts in trial, sentencing and appeal, and finally the special statutes that deal with specific forms of treatment such as - the Prisons Act³, the Probation Act⁴, Detention Camps Act⁵ and Borstal Institutions Act⁶.

The Kenya penal system is a colonial importation. It is an entirely alien system of dealing with offenders compared with African Penal Standards. The importation as well as the introduction and establishment of the system was a gradual process. This imported system incorporated the western penal sanctions whose methodology of infliction will face criticism in this paper.

The Colonial Era which saw the adoption of English Penal methods and system also saw the almost slavish apeing of English sentencing policies. There was little recognition that Kenya Conditions might demand a different and relevant approach when applying the English system. Historical empirical evidence shows that the general trend throughout the colonial period was characterised by a substitution of the African Penal sanctions for those familiar to the western nations' eg imprisonment.

Western notions of justice and treating of offenders were also advanced through the training of judges where emphasis was laid on the British ideas as opposed to the promotion of traditional modes of treatment eg Restitution. Thus the system developed on lines generally reflecting development in the motherland although it was unable to keep pace with the changes i.e. while the British kept on modifying their system to suit their changing circumstances e.g. abolition of the capital punishment, Kenya has failed to make such changes within its system. The Kenya system has continued to uphold sanctions that have already been found inadequate by those who formulated them eg capital punishment has been abolished in so many countries

With this colonial background of the Kenya Penal system, the underlying argument in this paper is that the foundation of the existing Penal system is not only inadequate but is also short of requirements in that it attempts to solve the criminal problem without destroying the causes of crime as elucidated in Chapter two. The system as it is to-day has been focused on the criminal per se leaving out the root-causes of the criminal elements. The criminals must be helped to avoid the criminal elements instead of subjecting them to a punishment

that is simply aimed at inflicting pain and suffering. Throughout this paper it is proposed to strongly and emphatically criticise the mechanisms of the present penal sanctions calling for greater reforms of the entire system and the adoption of more humanitarian and effective methods of treating criminals.

In the second chapter the definition of crime as well as the theories of crime causation is /are provided as a necessary foundation to the aim of the paper. The theories form the basis upon which a criminal ought to be treated eg. they tell us the causes of crime. In the third chapter, analysis will be made of the various professional goals of the Kenya Penal System in the light of these theories. This is the criterion upon which the present system will be criticised.

In the fourth chapter various penal sanctions will be subjected to a thorough scrutiny with a view to identifying coherent penal sanctions. It will be argued that the imposition of the penal sanctions per se is not enough. The sentences must not only be based on the legal matters violated, but courts must as well consider all other influencing non-legal matters eg. the economic and political influence on the society.

It is an established fact that no society is static. Every society changes with time. It is the same with the economy as well as the political system. In support of this view Marx and Engels have said that law is a historically determined phenomena. In other words, law has got no history of its own. Hence nature, origin and development of law cannot be seen in isolation of social development ie the economic, political and ideological conditions of life in society. Consequently since law is there to serve the society in its needs, it must change to keep pace with the general changes and development. It is only in such circumstances that a legal system can achieve its maximum effectiveness. Consequently, the Kenya legal system must keep pace with the general changes. As society moves from one period to the next, new crimes come up which demands new scientific methods of treating them.

It will also be pointed out that there is no original clear cut policy upon which our penal system is based. The rationale for its retention is that of the colonial power. This position has been criticised in this paper calling for a policy that will be based on the needs (social, economic as well as political) of the Kenyan Society.

Finally various suggestions for reforms within the system will be made.

Research was basically intended to be in the prisons, police Criminal Reports - at the headquarters in Nairobi, the High Court Criminal Registry library and the University Library. The author regrets for having not been granted permission to research in the prisons as well as the police Headquarters. This explains the lack of statistical data in this paper.

Many aspects of the problems of the penal system have been simply alluded to, merely mentioned or even wholly untacked. However, it is hoped that the paper, despite its short-comings will initiate, encourage or even accompany a deeper analysis of the entire system, by way of criticism or otherwise, for it touches and affects the very fabrics of our national societal integrity.

CHAPTER TWO

CRIME AND THEORIES OF CRIME CAUSATION

A. INTRODUCTION

If society is to fight and resist criminals, more need be done than just depending on police and the law courts. The role of the courts and the police is simply the administration of justice. They too are a creation of the system of law which they seek to enforce. On the other hand the police Act¹ provides that police are employed for the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged, one thing that is clear about the above two institutions is the fact that none endeavours to understand the causes of crime. This means that their role is not enough for a strong resistance against crime.

The penal system per se cannot succeed in rehabilitating or reforming the offenders. Hence if crime as well as the causes are to be understood, if risks are to be evaluated, and if preventive or remediable actions are to be taken, each must be looked at separately. It is difficult for us to discuss the penal system in Kenya without some knowledge of crime and its theories of causation .

For the enacted law to be effective there have to be legal sanction^{2(a)}. This implies that the penal sanctions are established in an effort to wage a relentless war against crime and the offender, concurrently^{2(b)}. It is submitted that for Kenya's Penal System to be effective it must have effective sanctions. And for there to be effective penal sanctions inflicted upon a particular offender, one needs to understand the crime and the factors leading to it. The punishment that an offender gets must be comparatively equivalent to the wrong done.

B. DEFINITION OF CRIME

It suffices to mention that upto now there has been no comprehensive and Universally accepted definition of what constitutes a crime. This is because it is not easy to state or evaluate a certain percentage of conduct which is common in all prohibited acts. There is no degree of "badness" to make certain conduct a crime. There is also the difficult of having one common characteristic running through what we may call a "crime". The only Common thing is that they are all prohibited conducts. They are prohibited because they are contrary to the interests or wishes of the majority in the society.

The state as a political personality makes very many laws in the course of its history. Some crimes have been viewed as critically serious and others less serious. In this connection a distinction has been drawn between on one hand essentially wicked types of conduct such as murder - (mara in se)^{3a} and on the other the technical offences (mala probita) ^{3b} eg. traffic

offences - There has been a tendency of viewing the former category as more serious (ie in gravity) and thus inflicting heavy punishments, while the latter category of offences have been taken to be less serious (carry less weight) and hence given lighter punishment. It is from this categorisation that we get crimes and offences the former appearing for a heavier punishment while the latter is lighter punishment. The basis of this distinction is the gravity of crime. Driving without a valid licence is a traffic offence while rape or robbery with violence are crimes. From general observation it can be said that a wrong is any breach of the law, but a crime whether it be classified as a felony or a misdemeanor is an offence which comes as a result of a breach of a specific criminal law. However, it is submitted that the above distinction of crime and offences is very narrow as in both cases there is a threat to social security.

The other reason which explains the difficulty in defining crime is the fact that crime changes with laws. Roscoe Pound noted that law is always changing⁴ and as it changes certain acts that were previously not crimes become crime when committed. It is thus correct to say that what might be criminal to-day might not be criminal to-morrow and vice-versa. The obvious implication then is that what is crime varies with time and place. This view has also been reiterated by Lord Atkin when he said:

"The domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the state to be crimes, and the only common feature they will be found to possess is that they are prohibited by the state and that those who commit them are punished"⁵

The difficulty of defining what constitutes a crime is also expressed by Smith and Hogan:

".... Crimes then are wrongs which judges have held or Parliament has from time to time laid down as sufficiently injurious to the Public to warrant the application of criminal procedure to deal with them. Of course this does not enable us to recognise the act as crime when we see one. Some acts are obviously harmful to the public that any one could say they should be criminal and such acts almost certainly are - but there are many others, about which opinions differ widely. When citizens are heard arguing that there ought to be law against it ... they are expressing their personal conviction that some variety of acts are so harmful to the society that they ought to be discouraged by being made subject of criminal law proceedings. There will almost be a body of opinions which disagrees with them, the acts in question would not there-by become crimes. Public condemnation is ineffective without endorsement of an act of Parliament"⁶.

The task of defining crime has also covered a good area in Jurisprudence. To many Natural Law jurists crime is any immoral act. This view is a familiar touch-stone of orthodox "Liberalism" whose greatest champion is Lord Devlin⁷. But the positivists, like Professor Hart, have strongly disagreed with this view. Hart is of the view that morality should not be the chief determinant of what is crime. Instead Criminal law is there to safeguard morality just like any other law⁸.

The above discussion illustrates the difficulty facing a lawyer in his attempt to arrive at a comprehensive and Universally accepted definition of what constitutes a crime⁹. However, amidst this sea of conflicting definitions of what constitute a crime, our predecessors in the criminal field have laid down some definitions few of which we shall now critically analyse.

In law, crime has been defined as the contravention of the penal code of a state¹⁰. But such a definition raises one difficulty in that it does exclude all other crimes outside the penal code. There are criminal acts in other statutes eg Prevention of Corruption Act,¹¹ the Price Control Act,¹² and the Traffic Act, etc¹³. This illustrates how narrow this definition is.

Most dictionaries define crime as a wrong. However, to a lawyer and courts not all wrongs qualify to be called criminal acts. From the "Concise Law Dictionary" we get the following definition:

" Crimes are acts or the faults which tend to the prejudice of the Community and are forbidden by law on pain of punishment inflicted at the suit of the state".

This view of Crime is also expressed by Prof Allien who says:

" ...crime is a crime because it constitutes wrong doing which directly and in a serious degree threatens the security or the well being of society and because it is not safe to leave it redressable only by a compensation"¹⁴.

Allien's definition looks at crime from a positive point of view. He sees crimes as emanating from wrong doing. This would in away imply that no omissions can be a crime. This is not the case and consequently Allien's definition of crime is not comprehensive enough.

Lord Atkin has said that :

".....:crime can only be ascertained by examining what conduct or acts at any particular time are declared by the state to be crime and the only common feature they will be found to possess is that they are prohibited by the state and those who commit them are punished".¹⁵ This definition suggests that crime should be taken to be what the state has considered wholly wrong that has been embodied in the statute in a particular state and time.

Lord Denning, M.R. says that ... "crime is Sin"¹⁶ Lord Denning here gives a theological concept of Crime. He sees Crime as sin that originates from man's spiritual rebelliousness against God. The problem with this definition like others is that it does not as well state what constitutes a crime. In summary we would hence say that none of the above definitions is comprehensive enough to provide a comprehensive and universally acceptable definition of what constitutes a crime.

Finally the Kenya Penal Code¹⁷ defines¹⁸ the offence as :

".... as an act, attempt or omission punishable by law."

It should be noted that the Kenya Penal Code does not use the word "crime" directly. Instead the word "offence" is used to refer to what is prohibited by law. Crime is therefore viewed as synonymous to "offence" in the Penal Code¹⁹. The synonymous use of the two words or terms is supported by Granville Williams when he says that:

"... the word "offence" is another name for crime. crime in the broad sense includes not only the major crimes (indictable offences) but so many offences, which regulate many trades and special activities (the so called regulatory offences) as well as conduct of ordinary people in the daily life"²⁰.

This synonymous nature of "crime" and "offence" supports the expressed view above²¹ on the weakness of the distinction of crime and offence. However, such a narrow distinction is usually put there for the purposes of inflicting punishment upon the criminals on the basis of the gravity of their wrong doing.

Before concluding this section it is worth mentioning that there are two basic elements that must be established for an act to qualify to be a criminal act, omission, or attempt. Firstly - "Mens Rea" i.e. the evil intent in the criminal leading him to the commission of a crime and the second is the "Actus Reus" i.e. the act itself²².

But it must be noted that Mens-rea is not an essential element of crime in all cases. In crimes of strict liability and vicarious liability, mens rea need not be established²³. If this was not the position then people who create circumstances which lead to the commission of crime though not by themselves but by those who are acting under their instructions eg. servants or agents, would always escape liability. To stop crimes committed in this manner, liability here is made mandatory.

In English Common Law mens rea came to be adopted in the 19th Century. Offences falling under principle of strict liability are Public Nuisance and criminal libel. Here mens rea need not be established. The Actus Reus above is enough to make accused guilty. This principle has been applied in many cases²⁴. The object of strict liability is the protection of public interest

This is prominent especially in the social welfare acts. However, it should be noted that the role of strict liability is unjust and does not help in promoting the objectives of Criminal law. The courts/to move with prevailing circumstances as well as /tends the frequency of the commission of a particular crime. But it must be noted that one can not consider all crimes together when causation is at issue, as the factors leading to the commission of the various crimes differs from one to the other.

C. THEORIES OF CRIME CAUSATION

In undertaking the study of the causes of crime, there is an assumed rationale that they are significantly discoverable and removable. One clear and acceptable fact is that no one is born a criminal. Every person is born without having a knowledge of good and evil and the character of every person is mostly a result of the traits of his parents plus his social experience and existence. This does not exclude the influence of biological and environmental theories in crime commission. The above assertion could be empirically provable. Therefore, the factors which induce or influence people to commit crime donot originate from them but rather from their inheritance or social environment. However, such factors, or criminal forces as we may call them, one may argue, affect the body, not the mind of his free will.

A study of causes of crime is important if one is going to launch an effective war against criminals and determine the nature of the sanctions to be imposed. This will help us to postulate the rightful measures within the Kenya Penal System in an endeavour to fight crime in the society. It is submitted that though we cannot eliminate crime entirely we can regulate or control criminality. This goal can be achieved only through proper knowledge of crime and its origins. It is on this premises that the study of theories of causation of crime becomes essential in this paper!

In a discussion of theories of causation it must be borne in mind that there is no single cause of crime that can be solely and independently taken to be the cause of crime. All contribute to explain crime causation though at unequal magnitude or degree.

THEORIES OF CAUSATION

In the following discussion the theories will be categorised into three - firstly we shall look-at general mass feelings, secondly theological and biological theories which views causation as originating from the inside of a person; and thirdly are those originating from the outside of an individual called the social - cultural theories.²⁵

The populist view of causes of crime in Kenya ranges from unemployment to impact of the over all economic as well as political system²⁶. One school of thought is of the view that unemployment is one factor to blame. In Kenya population growth has been projected at 3.3 to 3.5 per cent per annum. While wage earning employment grows at about 1.9 per cent per annum then increasing unemployment results. The 1979 population census results have shown that Kenya's population stands at about 15.3 million people. This makes 3.9 per cent increase from last census. In regard to this problem a commission of the International Labour Organisation Report has stated:

"..... as long as divergent growth rate continues the prospect of growing unemployment in the future seems inevitable²⁷".

Lack of employment creates a task for these people to get a means of income. Once such people lose hope of being employed they turn to any means of earning their daily bread. From these some turn to illegal means of earning their living. It is, however, submitted that not all unemployed people turn to illegal activities. Theoretically, the relationship between unemployment and crime can be measured in two ways; either by comparing the fluctuations of unemployment figures and of criminal statistics or by examining individual criminal cases with the view to finding out the percentage of persons who had been unemployed whilst committing crime and to study the effect which unemployment had upon them. But it must be noted that both methods have to struggle against great odds. This was not possible in this paper because of lack of access to data. It must be noted also that even if we could regard the statistics of unemployment and crime as representing the actual amount of both methods, it cannot however be overlooked however, that there are, besides unemployment, many other factors involved of an economic, social or psychological character, which may counter balance the effect of unemployment as a crime producing agency. Moreover, it is not so much occasional short-term unemployment, but rather enforced idleness of long duration that adversely affects the workers power of resistance.²⁸

The seriousness of unemployment and hence its contribution to criminality can be reflected in the economic position in Kenya. The economic growth of Kenya which stands between 6 and 7 per cent cannot generate enough jobs for these people. Many school leavers every year are making this problem more acute. And if employment and crime are relative in any way, then those statistics are indeed significant to our security. It is submitted that even employed people commit crimes especially white collar crimes. This can only be explained by the fact that criminal elements are in both employed and unemployed as well. As stated above criminality is a result of many factors.

Another local school of thought is of the view that crime has tended to grow because Kenya has behaved as a free society and people are in need of better status and having material comfort that some so obviously enjoy. The position in Kenya is such that the country's wealth is within the hands of a few people. The poor are left at the mercy of the rich few. The chances of the poor, the basic necessities of life are very remote. Hence a number of these people are deterred by these needs leading them to commit crime eg theft to meet their needs. Thus crime is born.

The above discussion on the ^{Pu}polist view in Kenya has some relevant in Kenya. The author agrees with this view. It is, however submitted that unemployment and the economic position in Kenya are but a few or some of the factors that contribute to criminality in Kenya. There are many other factors as shown below.

Before we can analyse other factors that contribute to criminality it must be noted that in law "causation" is an essential ingredient of every crime in which firstly the actor's behaviour and secondly the harm or injury sustained for which the state seeks to impose penal sanctions are extrinsically related.

THEOLOGICAL AND BIOLOGICAL THEORIES

The theological theories can be viewed in a triangular perspective. Theologically crime has been attributed to demonology, original sin as well as the doctrine of free will²⁹.

As regards demonology the argument has been that according to the Bible while all good is attributed to God, all bad is associated with the devil. Advocates of this theory generally hold that man as created by God is "good" but once he is possessed by the devil he begins to do bad things, sin here is equated to crime³⁰. Demon possession is not implying madness or insanity. It is implying a situation where theologically, the offender is under the influence of an evil spirit. Thus demonology does not carry a practical influence. The internal influence here is manifested through the wrongful action done³¹.

The concept of original sin³², is a central element in christian teachings. The theory, asserts that when Adam and Eve ate the forbidden fruits, they fell from God's laws, thus sinning against God. As a result all descendants became hereditary traits of all human species³³. The question that this theory does not answer is why all people do, equally or all engage in similar crimes? why don't we have all people turning to be rapists, thieves etc? Perhaps this concept could be more real if considered in conjunction with other theories i.e. biological as well as social-cultural theories, so that one can see its effects.

Lastly comes the "free will doctrine". The doctrine teaches that as a result of Adam's sin, Man fell from God's grace. But God being so merciful he sent his son, Jesus Christ to come and die for man's sins so that man could regain the lost divine fellowship. God also gave man the ability to right from wrong. The doctrine assumes that free will is equally given to all mankind. Hence to do evil has been interpreted as misusing the God-given faculty of free will. The funny thing about this doctrine is that it does not take into account the persons' environment and its effects in moulding the individuals' exercise of free will. Free will, like personality, is both a product of heredity and ecology. It must be noted, also, that free will is a very vague metaphysical notion³⁴. This doctrine also fails to give reasons for the great variation or diversity in criminality in Kenya compared with the rest of the world.

In conclusion, one thing that is evident about theological theories is that they have ignored the influence of cultural values in violation of criminal and divine laws, and deviation from social norms. But there is a general christian feeling that if all men were ready to accept the forgiveness of their sins,

then there would be no criminals 35 .

"Heredity" has also been viewed as a cause of criminality. This theory asserts that criminality could be passed from parents to children. This theory was developed by Cesare Lombroso in his Luome delinquente (The Criminal Man) in 1876. Lombroso said that "criminals are by birth". To him criminals can be recognised by stigmata or anomalies i.e. long lower jaws, asymmetrical cranium flattened nose, scanty beard, keen sight, and insensitivity to pain. He said that these signs do not in themselves cause criminality, but that they show the kind of person that is likely to be susceptible to criminality.

Lombroso's theories have been disapproved by another physician, an English man called Charles Goring through a comparative study of criminals and non-criminals whose result only showed insignificant differences between them. To-day we even hear people describe others as "looking like a thief". Such statements need to be examined very carefully before they can be taken seriously, for things are not necessarily what they look like. However, crime could be associated with heredity only in case of deviant behaviours which are a result of the mental observation or malfunction³⁶ .

Another theory is the "genetic theory". This is the Sutherland theory of differential Association³⁷. The theory states that criminal behaviour is developed or learned by normal social processes common to all learning. The explanation is "sociological" in that it centres its attention on social interactions - the frequency, duration, priority and intensity. This means that associations with anti-criminal and also associations with criminal behaviour vary in those respects. This theory can be criticised because of its one sidedness in that it attributes crime to sociological factors ignoring other factors eg heredity.

There is also the concept of "sub-culture of violence". This concept has its greatest supporters - Professors Wolfgang and Ferracut. The concept was originally formulated to explain violent criminal behaviour; but it is also useful for explaining other behavioural characteristics of human groups rather than of individuals. On the former, the concept seeks to explain why members of a particular group express their behaviour through violence. Such people are known to be more irritable, more quarrelsome and more belligerent than others.³⁸ This does not happen because violence is part and parcel of this culture. Violence here is only legitimised through the concept. There are other factors eg environment that can lead to such violence.

The "cultural conflict" as a theory of criminality was formulated by professor Thousten Sellin in the late 1930s. The theory is based on the contradictions or conflicts of conduct norms confronting persons in certain situations. Where cultural norms conflict with each other because of cultural mix and contact, some of the behaviour patterns may be defined as deviant by the superior cultural group and thus be defined as crime. Supporting this theory T.M. Msanga, in his book - " crime and deviance" 39 says :

... " since laws are supposed in general, to reflect the basic social values of the society conflict in values of different cultures inevitably leads to one set of values, usually subordinate culture, being defined as deviant many countries in Africa have laws that were made purposely to benefit the colonialists, which makes nonsense in the present day independent Africa ... The African lawyer seems unable to see where the law is in conflict with the dominant social values ".

This view holds much water in Kenya to-day where the penal code and other statutes carry offences as stipulated by the colonial power. A good example of these offences is bigamy. The aim of creating this offence was to promote monogamy among the Africans who strongly believed in polygamy. Cultural conflict here led to the creation of bigamy as an offence. The colonialist created and defined criminal acts the way they conceived them. But it must be clear that because of cultural differences what is criminal to whites is not necessarily so among Africans.

SOCIAL - CULTURAL FACTORS

Criminality has been attributed to poverty. This is an economic explanation of Crime' It has been statistically shown that the highest rate of criminality in Kenya is within the low income group⁴⁰. Poverty may be most conveniently defined to mean earnings insufficient for the maintenance of bodily health. By taking the expenditure needed for food, rent, clothing, and fuel, with a family of stated size, it is possible to calculate, for any given year, a minimum standard for the cost of living⁴¹. The minimum standard may be termed the poverty-line; it marks the margin of a bare subsistence.

By this theory criminality has been associated with the poverty stricken or the low income brackets⁴². But it must be clear that no class of society is exempt from crime. The rich the poor or educated as well as the illeterate are all subject to it⁴³. The only difference is that the rich have devices of getting away with it while the poor are always netted and sometimes unfairly.

The contribution of economic theory to crime causation has been recognised by such writers like- Karl Marx, Lenin, Engels, Rosseau, etc. In his "criminality and economic conditions ⁴⁴, W.A Bonger, says that the economic imbalance or conditions are mostly the factors which lead men to do crimes". The proletariat are forced due to the economic and social misfortunes to commit more crimes than the rich.

Kar Marx, in his "Das Capital" felt that crime, prostitution, vice and the moral evils were primarily due to poverty produced by the general maladistribution of wealth and the inevitable class struggles.⁴⁵ But clifford, who is a bourgeois supporter says that -

"..... to blame capitalism for crime is to invite a refutation. This is to imply that socialism would eliminate or significantly reduce crime"46.

The present writer agrees with Marx's view Even without going into great details. Criminal reports show that the rate of criminality caused by poor economic stand among the criminals is highest in the capitalist world, unlike the position in the socialist world where the state strives to ensure that every citizen is assured of getting all basic needs of life.

But economic concept could be objected to. The prevailing crime rate of the highly developed countries negates the hypothesis that an increasingly high standard of living and the provision of social services diminish crime. Infact a stronger case may be made for the relation of affluence to crime i.e. United states⁴⁷. The unparalleled economic and social progress of the last century and a half has given the ordinary worker much better economic position than he ever enjoyed in the past but it has also brought new pressures and demands that often result in criminality. Poverty dictates these needy people leading them to committing these illegal acts. It is the author's observation that crime, related to poverty will continue to reach greater heights unless proper economic measures are taken. But this could be averted.

It is submitted that in order to control property crimes it is necessary to reduce socio-economic differential existing in our society. William A-Bonger, a Dutch social Reformer, in his book - "Criminality and Economic conditions"⁴⁸. Suggests that the solution to crime and its associated evils could be achieved through reo-organisation, and development of a classless society. It is however utopian idea to dream of complete eradication of crime. If the above is done social uniformity would be created thus reducing crime and other forms of deviant behaviour.⁴⁹ In summary on this theory we can then say that crimes are performed under impose to satisfy an economic or psychological need, to fulfil the need or dictates of male - volent unconscious e.g. crimes can be said to be an attempt to fulfil a need. It is the identification of that need which should determine the sanction to be applied.

Criminality has also been attributed to criminal forces⁵⁰. These forces have something to do with irresponsible parental care belonging to despised or poverty stricken class, discrimination and suppression by the family or society being a moral or social outcast, mental delangement or bad education. All these could be linked to poverty generally. As will be shown in the fourth chapter our penal system has given little or no consideration to these forces in its efforts to treat criminals. This accounts for the little achievement in crimanl rehabilitation through the Kenya Penal System.

Crime could also be as a result/insanity⁵¹ or provocation⁵². /of Both of these are provided for in the Kenya Penal code ⁵³.

In summary our discussion shows that these causes varies from spitual to biological and finally to social - cultural factors. All these factors contribute to criminality though not on equal degree. But it must be noted that these factors have

one weakness i.e. These theories tend to generalise everything. This generalisation ignores many factors, as the environmental as well as the physical pressures leading a person to commit crime are not the same every where in the world.

The above knowledge is of help if any Penal System will achieve, effectively, its goal of criminal rehabilitation (as explained in the next chapter). we must know the causes of crime in a society. It is only by eliminating these causes that we can succeed in changing the criminal into a law abiding citizen. Our system has ignored this. It is upon this premises that an appeal for a system that will put into consideration all these factors is made. The next chapter is proposed to investigate the justification of the Kenya Penal System.

CHAPTER THREE

THE JUSTIFICATION FOR INFLICTION OF CRIMINAL SANCTIONS.

In chapter two the nature of crime and the theories of causation were elucidated. In this chapter the task will be to analyse the goals of the Kenya Penal System which are reflected by the sanctions imposed. This will constitute an analysis of the expected results on the offenders of the infliction of penal sanctions as a means of treating them. The analysis will form the basis upon which evaluation of the effectiveness of the penal sanctions at work in Kenya to-day will be made. It will be the criterion upon which approval or disapproval of the Kenya Penal System will be based. It will be submitted that the philosophy upon which it was formulated is outdated and consequently the entire system calls for reform.

It is submitted that the sanctions adopted are of short lived effect in that their emphasis has been focused on inflicting pain upon the offenders ignoring the criminal forces that have greatly contributed to crime increase. It is not enough just to inflict pain on the offender and then leave him there. The causes of crime i.e. factors that influenced the offender leading him to commit the crime in question, must be eradicated as well. Thus a penal system should be focused firstly and in the foremost on the causes and then the criminal himself. The source of the problem is not the criminal himself but the criminal forces.

Generally speaking the theoretical aim of the penal sanctions is to reduce crime and to maximise social security and harmony. "The Annual Report on the Administration in Kenya for 1968 and 1969" had this to say about the basic functions of the penal system as realised through the prison department -

"... the primary obligation of the prison service to the nation is the protection of its general populace. For this reason the department at all times insists upon implementation of the stringent measures of security in each insitution entrusted to its care"1

It is clear from the above quotation that the basic objective of the Kenya Prison systems is the protection of the society from the social maladjustment of crime. It is submitted that this goal cannot be realised simply just through the treatment of the offender per se, but also the criminal forces behind the commission of crime must be eradicated as well.

The primary function of treatment is to modify individuals subjected to it in such a fashion that they will not engage in law violating activities after they are freed from incarceration. It is submitted that it is the nature of the change that is important and necessary if the goal of personal and societal protection is to be achieved². Most prisoners are ultimately released and if released unchanged would constitute the "same threa

as they had prior to their incarceration.³ This is likely to occur in case the criminal forces that made the offenders commit the crime in question are still pressing him hard. It is, however, submitted that in majority of cases the ex-offenders change for good. But it must be noted that this is not likely to happen with hardened offenders who are a basic concern as they form the real threat to the security. Statistical data on recidivism given in "the Annual Report of the Administration of "Prisons in Kenya" for 1976-79 show that these types of criminals are generally on the increase. This negatives any positive achievement worthy of any recognition in so far as transforming these criminals into law abiding citizens is concerned.

Proper measures should be formulated to change these criminals. Treatment should vary with the crime in question, the individual accused, and the circumstances leading to the commission of such a crime. We shall now proceed onto a brief assesment of the efficacy of treatment/offenders. However, it should be noted that though in theory the Kenya penal system ought to lay its emphasis on rehabilitation in general, it is regreted that in practice the aim has been at punishing the criminal. The existing sanctions are basically aimed at inflicting pain in the criminal. It is submitted that this approach is unnecessary as its implementation is short-lived in its effectiveness. A critical analysis of "Treatment" is made here. /of

TREATMENT

The aim of treatment is to relieve pain, correct disability or combat illness. Treatment may be painful or disagreeable but, if so, these qualities are incidental, not purposive. Treatment can also be seen in two ways; Firstly the treatment of offenders ought to be curative, and non-punitive. This is so as the ultimate goal is to change the criminal and not inflict pain per se. But in case pain has to be inflicted this should only be supplementary to the basic methods of cure. This latter view has been adopted by the independent government after realising that the colonial system whose emphasis was on punitive rather than corrective measures was defective. It is, however, regreted that, as shown in the next chapter, this is only in theory but not in practice.

Secondly, it should be seen as treatment of society which deals with the way in which social ills, bad conditions or obstacles to descent existence inherent in society can be cured. The idea of treatment is based on the assumption that in treating the offender, first, that human behaviour is the product of antecedent causes of crime. This does not rule out the environmental effect on the human behaviour. It is also assumed that measures employed to treat the convicted offender should serve a therapeutic function, that such measures be designed to effect the change in the behaviour of the convicted person in the interest of his own happiness, health and satisfactions and in the interest of social defence.

From the above discussion we find that treatment is justified on three major grounds: Firstly, such a criminal is potentially dangerous to Society and cannot be left to go free i.e. unpunished for his wrongdoing; Secondly, such a person has failed to conform to the legal rules of society and it is the duty of the society to make him conform; Thirdly there is the need to make good the harm or damage done by such an offender. The problem with the third justification is that one fails to see how the harm could be made better by punishing the offender. This, if possible, could only be realised in case of restitution, though this remedy is also limited in its application. Restitution could be effective for example in case of theft or in case of a traffic offence.

The offender here would be hit hard economically and this can deter him from committing a similar crime in future to avoid a similar economic loss. But it is however, impossible to grant restitution in case of murder. This is so since the aim here is to make good the harm done on the victim.

It suffices to mention that there is not always agreement regarding which of the various measures that an offender or inmate ought to be subject to (which or that) ought to be labelled treatment. It must be clear also that the various treatment approaches utilized to bring about changes in the offender are based on some notion of causation that identifies the conditions, traits or characteristics to be modified by the treatment effort. The statement calls for a treatment of offenders directly looking at factors influencing the offender leading him into committing crime. The author strongly recommends the adoption of this kind of approach in the next chapter.

But it must be noted that not all treatment efforts are based on explicit theories. Criminal problems can be handled successfully without complete understanding of what produces these problems. So long as one understands the real causes.

There are various methods through which the treatment of offenders can be realised. These include punishment, deterrence, rehabilitation and societal defence. These methods illustrate how the treatment of criminals is brought about.

(a) PUNISHMENT

In every society there has always been approved and disapproved human behaviour. Any anti-social behaviour is regarded as hurting the interests of the community. Hence laws have been codified to curb such anti-social misconduct. The violators of these laws are consequently punished.

Punishment is one method of treating a criminal. It is a practice that usually involves two parties one of the partners is the punishing party, the other is the party receiving punishment. The former is usually an authority over the latter.

According to the definition of punishment in "Blacks Law Dictionary", part of the meaning of the term is the infliction of pain by a certain authority. Hence the authority has to inflict pain intentionally if infliction should be called punishment. Various reasons have been given to justify the infliction of punishment on offenders.

It has been argued that by inflicting pain on a criminal, fear is created in him hence preventing him committing crimes in future. This view does not reflect any of the causation theories mentioned in the previous chapter. The idea of fear can be questioned however, and it may be said that this fear is limited to prison. How then can one explain or account for criminal offenders with up to seven convictions and at times all on offences of a similar nature i.e. offences against property. It is also true that the fact that an ex-prisoner has not appeared in court again is not a guarantee that he no longer commits crime. No follow-up is done and so in most cases there is no evidence that such a person has changed. He might be committing crime but be always free from arrest.

The Retributivists hold that punishment is in itself a reward, a compensation or a kind of annulment, for crime,⁴. They further argue that punishment restores the balance that a crime has upset⁵. According to retributivists, this is the only ethically possible justification of punishment. It is not yet clear as to how punishment restores the balance that crime has upset. It is clear that punishment is usually inflicted on the criminal himself. But one fails to see exactly how the punishment of the criminal would at the same time make good the wrong done. Though the offender will suffer for his wrong doing, the wrong done all the same stands.

But according to utilitarian view, punishment is a mischief undesirable and ought never to be inflicted for its own sake or because a crime has been committed. Only if punishment promises to exclude some great evil ought it to be recommended⁶. Thus according to utilitarians punishment is an act whose value can only be extrinsic. If punishment has any positive value at all, its value consists in its having beneficial consequences either to the person punished or to society in general. The moral justification of punishing a man is that he deserves it for what he has done.

Supporters of punishment have argued that in fear of revenge of retribution, punishment does to some extent restrain some potential criminals from carrying out their criminal plans or intentions. It is submitted that the effect of such fear or intentions, if any, is very minimal. As mentioned in the previous chapter the criminals are always aware of the fact that what they are doing is legally wrong. They do this with a hope of getting away with it.

Following the introduction of the death penalty for robbery by violence in Kenya, the Attorney General, Mr Charles Njonjo is quoted (infra)⁷ telling the Parliament that the criminals had devised new ways of stealing and hence the crime was on increase. This shows that the theory of fear of punishment does not hold much water in the modern society.

Bentham suggests three major ways in which punishment may prevent the occurrence of offences; by making it impossible or difficult for an offender to break the law again, at least in certain ways; by deterring both offenders and others; and thirdly by providing an opportunity for reforming of offenders. In the first way the offenders are prevented by incapacitation i.e. imprisonment unless those offences he could commit even if he is in prison. It must be noted here that the restraint of the offender from committing crimes is simply temporary and not permanent. The offender cannot commit the crime so long as he is in prison, but once he is released he is free to do all he wishes as there is no other after prison follow-up to make sure that the ex-prisoner stops committing crimes. This shows how temporary the effect of incapacitation upon the offenders is.

The second way of punishing a man as stated by Bentham, makes him less likely to offend again because of fear of increased disrespect and mistrust by the society and this may act in the same way to deter others. As for Bentham's third way of prevention of crime, punishment may be a means of changing man's character or personality so that out of some motivation like consideration for others he obeys the law. It is however submitted that though punishment has a great contribution in the curbing of crime, its effectiveness is far limited. Like other methods of criminal treatment punishment is simply focused on infliction of pain or suffering on the offender giving little or no attention to the criminal forces. The implication here is that the criminal acted "intentionally" and hence he should be made to suffer for his wrong doing. But as we saw in the previous \angle there are so many factors ranging Chapter from theological, biological as well as social-cultural all of which dictate a person leading him to commit a crime. Punishment as such fails to see these crime causation factors. This has greatly affected the effectiveness of punishment in the curbing of crime.

DETERRENCE

Deterrence can be classified into both general and individual deterrence. It aims at preventing the onlookers and those being punished for committing crime. Unlike retributivism, deterrence theory looks to the future. The two differ in that the deterrence theory finds no justification in a past offence, which has no more than a certain, evidential importance, and depends upon consequences of punishment other than the immediate satisfaction given to victims of offence and others.

By individual deterrence the theory aims at deterring the offender from further criminal commitment. It discourages him from a continued criminal life.

It is submitted that the effects of general deterrence are not far-reaching as many people have always thought. Only a very small number of people gets to know the punishment inflicted on the offender. Little publicity, if any, results to this. Even if publicity was adequate this would still make little difference. As pointed out in the next chapter, there is one fact that both the lawyers and penologists have ignored i.e. the fact that man is by nature a "criminal". Theologically man is by nature

a sinner. The divergence in individual personality as well as the economic in-equality will always lead man to commit crime. The subject is pursued further in the next chapter.

REHABILITATION

Rehabilitation is also called Reform or Correction. In talking about rehabilitation one would be talking about the transformation of a criminal into a law abiding citizen. The offender is inclined to become habitually law abiding. He is made to realise that what he has done is wrong and consequently ought not to be repeated. He is made to discard his criminal ways.

Theoretically the goal the Kenya Penal system is rehabilitation of offenders. In realising this goal, the system has adopted a method of inflicting pain on the offender. It is submitted that this approach to criminal rehabilitation or reform is evil and barbaric and is a violation of human dignity and personarity. After all, the approach gives no attention to the root causes of crime which in most cases are outside the criminal - i.e. economic or environmental factors.

It has been argued that rehabilitation can be achieved through punishment an act which is said to be justified because it provides an opportunity for the reformation of the offender and consequently the reduction of criminality. It is however submitted that this is a practice that aims at causing "unjustified distress". As stated above punishment carries no reformative effect as such. This is so as its effect is totally short-lived. It simply inflicts pain on the offender thus causing him unnecessary suffering without taking any attention on the criminal forces acting upon such an offender.

It is submitted that cruelty of punishment cannot reform the offender, Without the eradication of the prime causes of crime.

It must be noted that even if it is taken that punishment does deter a man from breaking the law, the obeying of the law here, is not on moral motives, but of fear. In a way it is submitted, punishment has a moral effect on the individuals other than those who actually experience it. If it can help the offender to realise the badness of his actions, it is also hoped that it can as well help others to realise the badness of committing similar crimes.

In summary it can be said that Rehabilitation involves the change of the offenders belief and others as to the wrongfulness of crimes - thus leading such offenders to become habitually law abiding citizens.

SOCIAL DEFENCE

It has been stated that the establishment of the penal system was aimed at protecting the society from social maladjustment of crime. This is supposed to be the case with punishment which is usually expected to bring about individual as well as general deterrence. A high rate of criminality leads to a sick society. It creates an atmosphere in which no member feels secure. To eliminate such an atmosphere societal protection has become necessary.

The quotation from Prison's Annual Report,⁸ states that the primary objective of the prison service to the nation is the protection of the general populace. Consequently the inflicted Penal Sanctions must be articulated not only at treating the individual per se, but also at creating social security and harmony by eliminating criminality within the society. Crime is a social phenomenon that brings about insecurity in society. Crime is as well an enemy of the social integrity which is achieved through harmony within the members of any community.

It follows that social integrity is at threat in a society where crime rate starts to rise to an alarming point. Although it is not possible to wipe out criminal traits in toto, it is possible to regulate or control criminality, maintaining it at a very low level. It is clear then how important the Kenya Penal System is to-day if the above and all other discussed goals are to be achieved.

Having critically discussed the justification for the Kenya Penal System the next task shall be an analysis of the various Penal sanctions found in the Kenya Penal System pointing out their shortcomings or weaknesses.

But perhaps before proceeding on to the next chapter, it is worthy to look at the justification for infliction of sanctions under customary Penal system briefly.

The Penalties of African Law, whether punitive or by way of compensation are directed not against specific infractions but to the restoration of the equilibrium. The central concept with the African system was the reconciliation of the two parties. Cotran, talking about the Bunyoro of Uganda Says that -

"there is no aim to "punish" a wrongdoer, though a penalty can be imposed; rather it is the object of the proceedings to dispose of quarrel between members of the community and to reintegrate a wrongdoer into the community"⁹.

Thus the African Penal system was not concerned with the criminal in helping him to fit in the society unlike the modern English Penal System which basically inflicts pain to such a criminal. It is contended that the Kenya Penal System should aim at promoting reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for a personal or a private nature not amounting to a felony and not aggravated indegree on term of payment of "compensation" or other terms approved by the court and may thereupon order proceedings to be stayed.

CHAPTER FOUR

A CRITICAL ANALYSIS OF THE SANCTIONS OF THE KENYA PENAL SYSTEM

In every society the need to protect the interests of the group requires the establishment of a system of laws which states the unaccepted behaviours or conduct amounting to a criminal offence and the penalties available in case of breach of the codified law.

The law¹ in Kenya provides various penal sanctions to be inflicted on law breakers as a punishment for their wrongdoing. As mentioned in Chapter One, these sanctions are all alien to the Kenyan Society. The Government replaced the African Penal Sanctions e.g. Ostracisement², Restitution, etc. with the borrowed sanctions.

The basic source of criminal law in Kenya is the Kenya Penal Code³. The code was modelled on the law in force in Nigeria without regard to local requirements as no expert opinion on native customs was obtained in order to determine what could be reasonably accepted as crime by the natives. Looking at this code, one notices a desire to develop criminal law suited to Kenya as conceived by the colonialists and not the Africans. Thus the code embodied principles based on an individualistic society where punishment for the offence is meted out on the individual while under native law is meted out on the whole community to which the accused belonged. Penalties in native law are directed towards the restoration of the status quo necessary for the maintenance of the social equilibrium while under the Penal Code they are for the deterrent purposes on the accused and other members of the society to desist from committing similar acts⁴. It is through this code that many offences which are alien to Kenyan natives as well as the procedural nature of trial which are necessary for conviction, have been introduced into Kenya. Such offenses include - attempts, Bigamy, offences relating to lotteries, gaming, vagrancy, etc.

It suffices to mention that most of the crimes in the Penal Code are outdated. The purposes for which they were enacted have ceased to exist. Quite a good number of offenses were enacted for political purposes e.g. Oath offences - for strengthening the colonial government position in Kenya around 1950s during the height of the Mau Mau war of independence⁵. S.60, Penal Code introduced in 1952 made imposition of death Penalty in Oath cases Mandatory⁶. These penalties were harsh as they were meant to stop Africans resisting colonial administration. Today they no longer serve that purpose. Circumstances have changed since then. The Kenyan Society, the social, economic, and political structures have greatly changed with time. Hence noting that law is a very important tool of development in any country, the law must be modified to effectuate this great function. If the law as well as its sanctions are going to be of maximum effectiveness, they must likewise change with time to keep pace with other changes in general⁷. The Kenya Penal system lacks these changes. It is suggested that the system be modified to adopt Modern Scientific Methods of treating criminals. Kenya must aim at being original in the formulation of its Penal Sanctions to cater for her own needs.

It is observed that from the prevailing economic and political circumstances in Kenya, the legal system is here to stay. And so is the Penal System.

But the system as it is leaves much to be desired. It needs reform to have maximum effectiveness to its goals. The system has a lot of undesirables that call for reform and especially in the mechanism of infliction of punishment. There is need for a system that will rehabilitate offenders - thus reconciling the individual selfish wants with the general social interests⁸. Looking at the entire Penal System in the light of the theories of crime causation as well as the professed justification of the system, much appears in theory but not in practice. It is upon this premise that the various undesirable elements within the system will be exposed and alternative methods suggested.

Looking at the various Penal Sanctions as provided in the Penal Code (infra) it would appear that in Kenya treatment of offenders has been nothing less than the infliction of pain, or suffering upon the criminals. Although the Prison Department, for instance, has said that its policy is to digress from the colonial Penal Policy which was aimed at punishing the offender through punitive measures, it is regretted that its treatment policy is nothing more than a charm and a change of terminology adopting a more polite term that reflects a humanitarian approach to the criminal problem. The sanctions are the very same ones instituted by the colonial government. Likewise the institutions are the very same ones with a few extra congested institutions or prisons just as it was in the colonial era. The mechanism of inflicting these sanctions has also been wholly maintained. One here wonders as to whether the mere change of terminology per se can be taken to mean the overhaul change of the entire Penal System. The answer here is in the negative. It is submitted that the law in regard to the Penal System must be reformed thus making provisions for more humanitarian sanctions as recommended in the next Chapter.

It is also observed that although the goal of this Penal System has been the rehabilitation of the offenders, the practice of the system has been all punitive and revengeful. It is submitted that the dominant belief which has greatly influenced the treatment policy has been that no offender, irrespective of the weight of the wrong done, can be rehabilitated without the administration of pain or suffering. The absurdity behind this system is that it simply punishes the criminals leaving the causes of crime untreated. The offender has been taken to be entirely responsible for his criminal acts. The system should aim at treating both the causes and the criminal concurrently. The system as it is today has simply been dealing with the end results. The system must be reviewed and be devised in such a way that it will effectively deal with the criminal forces permanently. This calls for greater attention to the theories of crime causation.

It is submitted that the ineffectiveness of this system is reflected by the rising recidivism as well as the increasing crime rate in Kenya between 1970 - 1979 as shown in the Prisons Annual Reports covering that period.

Remarking on the high crime rate in Kenya, the Commissioner of Prisons, in his Annual Report, had this to say in 1972:

"...Crime has in no doubt, increased. There are more persons now committing serious crimes than there were nine year ago".⁹

In 1978, commenting on the crime increase, the same Commissionere once again had this to say -

"Alongside social and economic changes as a result of the rapid development criminal trends has also changed. Those committed to our penal institutions tend to be young people, have formal education and have sophisticated criminal tendencies which require a modern knowledge on the part of prison whose responsibility is to rehabilitate them.... There was an increase in number of long term prisoners...."¹⁰.

Crime increase today has been influenced more by economic rather than biological factors. Among these factors are the rapid urbanisation, and general economic development. Criminal statistics show that more crimes are committed in urban areas than in rural areas, generally. The general development has had disruptive influence upon the lives of many persons especially the youth. Social changes e.g. cultural influence has also lowered the African moral conduct thus encouraging such crimes as rape, seduction, enticement, etc. The economic inequality, which for Kenya is determined by the political ideology, has created a big gap between the rich and the economically poor. The rich have continued to be richer while the poor have continued to be poor. This has made the poor to turn to illegitimate and illegal methods of getting life's necessities.

Criminal Reports show that crimes against ^{property} poverty dominates criminal courts¹¹. This dominance implies that the chief cause of criminal activities is usually decreased by the material requirements. This shows how important an understanding of the economic theory of crime causation is, if a fruitful attempt will be made in the rehabilitation of criminals.

The above discussion shows how significant the economic as well as ideological system are in Kenya in determining the trend of crime. It is therefore useless to expect the penal system to control crime, while the prevailing economic and political system stands intact. For the system to be effective enough there is need for the reform of the existing law in regard to all spheres of life in Kenya where this is necessary for an effective legal administration. It is only through such a reform can the current Kenya Penal System acquire its effectiveness. However, it must be clear that the economic theory of crime causation is but one theory among many.

It is amazing to note that punishment as it is being employed in Kenya today is not rationalized or justified by any legal philosophy other than that introduced by the colonial power. The Kenya Government must have a rationale for maintaining the system. The sanctions must be based on the gravity of crime in question and not crimes of that nature generally. Punishment should be thundered not in vengeance for the satisfaction of the state, but imposed for the good of the offender; in order to afford the means of amendment and to lead transgressors to repentance.

Even Jeremy Bentham whose views modern Penal Systems have scorned and more often ignored, has observed that:

"It is a great merit for punishment to contribute to the reformation of the offender not only through fear of being punished again, but by change in his character and habits"¹².

According to R.A. Watson, Professor of Psychology and Law at the University of Michigan:

"Punishing criminals gives society the opportunity to get even, but it is not to solve the problem. The urge for retribution is biological and we can't deny it. But retribution is dramatically opposed to what we should be trying to do in a civilised society - deter and rehabilitate We have done terrible things in the name of treatment Prisoners are entitled to certain rights especially the right not to come out more embittered than when they went in....."¹³. (Italy's mine).

It is strongly contended that an offender should not be subjected to punishment in the name of treatment. The penalty given for a crime must always be evaluated in the light of the weight of crime in question. It is suggested that only offenders who are beyond hope of correction should be executed or only those criminals who cannot be left at learge as they are a threat to the social security, who should be taken to prison. It is futile and foolish to punish a person who is suffering from physical or mental illness simply because he cannot rebut the presumption of his sanity at the material time when the crime in question was committed.

It is submitted that although punishment has some deterrent effect, it is in itself an evil. It is characterised by severity. It is needlessly cruel, hence self-defeating, and because it debases and brutalises all who witness it. Unless punishment is a defensive precaution against a danger in future it should never be inflicted.

When punishment is inflicted there is a guiding presumption that the convict acted wilfully, voluntarily or intentionally. It is contended that though acting intentionally might be necessary for the charge of responsibility. In some cases a person is unable to resist the criminal forces which induced him to commit a crime e.g. a man who finds his wife in bed with another man, hits him and kills him. It is a contradictory act for the law to accept provocation here but at the same time proceed to sentence accused to life imprisonment. One wonders what is to be treated in this man. It is suggested that such offenders should be allowed to go free. It must be noted that with respect to criminal forces it is possible that crimes are, with respect to those who commit them, naturally or humanly unavoidable. This can only be attributed to the concept of original sin, i.e. the theological theories of causation.

It is contended that our system has failed to consider all the above factors. This is of great necessity and consequently must be adopted. As the proponents of the American School of Realism have argued, Law should be seen as a means to social end and not as an end in itself. Since society changes faster than law, law must also change to keep pace with the changing society. Hence some jurists have suggested that when there is a dispute before the court, the court should not only consider legal matters but also the extra-legal factors, e.g. economics politics, sociologys, etc. in determining the right penalty that a convict should get.

The following is a detailed critical scrutiny of a few of the Penal Sanctions provided within the system. These will include imprisonment, capital punishment, corporal punishment, fines, juvenile treatment, detention and extra mura Penal employment scheme.

(a) IMPRISONMENT

As stated above, the prison institution is alien to Kenya. Imprisonment is one of the various custodial sentences in Kenya. As an institution, it is directed to transforming "self-willed" outcasts into useful citizens, to protecting society and deterring the strong and the weak from the work of crime, with fairness and firmness aimed at rehabilitation and deterrence.¹⁴ But as we shall see below there are today economic, as well as moral arguments against prisons.

Imprisonment involves the holding of a person from the time of his conviction to the time of his discharge from the prison. The institution has grown steadily as the standard mode of treatment. Thus it has been seen as any exercise of force or express or implied threat of force, by which a person is deprived of his liberty, compelled to remain where he does not wish to remain, and to go where he does not wish to go.

Imprisonment as a form of handing offenders originated from an interest to put an end to inhuman brutality that was characteristic of punishment in Europe. It was a replacement to what is known as Lex Talions (Italycs mine) or the law of Moses which was a guiding principle. It advocated an eye for an eye, a tooth for a tooth, etc. Thus imprisonment marked a development in the Penal System.

The proponents of imprisonment have said that this sanction aims at rehabilitation of prisoners. Treatment here is done by removing or reducing a known offender's disposition to repeal his offence or, more ambitiously, intended to remove or reduce his disposition to break the criminal law in any way in future.

Supporting this view, the former Minister for Home affairs, Mr. Stanley Ole Tip Tip, is quoted saying:

"Prison duty is to rehabilitate people by encouraging them to abandon criminal tendencies And it is the work of the prison to ensure that those jailed leave prepared to live as good citizens."¹⁵

Reiterating the same point, Mr. Andrew K. Saikwa, The Commissioner of Prisons, has this to say:-

"There is now an urgent need to explore new methods for the prevention of crime and the treatment of offenders, which would fairly reflect our society's interests in protecting itself and yet would provide maximum opportunity, for individual to turn away from a career of crime. In addition to ensuring the secure custody of those who constitute a potential danger to the community our treatment of offenders should aim at discovering in each individual inmate his positive potentials and developing them as far as possible in the settling of a penal treatment towards his rehabilitation."¹⁶

The question that can be asked here is whether the prison institutions in Kenya have lived up to these anticipated goals. Many people are of the opinion that the prison institution have not lived up to these expectations. Cases have been reported of people with up to 20 previous convictions,¹⁷ all relevant to each other. The obvious implication here is that imprisonment does the criminal no good at all. It is submitted that this failure can only be attributed to the failure of the judicial and prison department to investigate the real cause of the criminal conduct. This can be done through an investigation on offenders life status and especially the circumstances surrounding the commission of the crime in question. As stated in Chapter Two the causes of crime must be eradicated if the criminal will be effectively treated. It is not enough to put a criminal behind the prison bars and then after a few months or years release him. There must be an assurance that the criminals will come out of prison better people than when they went in.

The use of prisons as institutes of rehabilitating the offenders rests on the widely held belief that crime deterrence is achieved by severe punitive justice.¹⁸ In fact many people would solve criminality by even greater use of death penalty. Many times court prosecutors have asked the magistrates for a heavy punishment (which is usually through imprisonment and hard labour) on the ground that certain crime is prevalent in a particular locality. It is submitted that this is a wrong premise of determining the sentence that a criminal should get. Sentence should be based on the weight of the offence in the light of circumstantial evidence - i.e. circumstances surrounding the commission of that crime. A sentence that is not passed on this premise goes against justice and principles of good conscience.

The prison institution in Kenya has many ills. One of the prison rules provides that:

"At all times the treatment of convicted prisoners shall be such as to encourage their self-respect or sense of personal responsibility so as to build their morale, to inculcate in them the habit of good citizenship and hard work, to encourage them to lead a good life on discharge to do so."¹⁹

One wonders whether prisons in Kenya do in any way help prisoners in respecting themselves and others, or do they help others from committing further crimes within the society? It is submitted that prisons have not succeeded in helping the prisoner to respect himself. It is contended that this failure has been due to prison

mistreatment environment that the offenders are subjected to. It is submitted that the prisons in Kenya are more less of punishing institutions than training institutions. There has been little attempt to wipe out this negative impression from the members of the public.

Prison institution can also be criticised in that it denies the inmate of his liberty, freedom of what he eats, wears or reads.²⁰ He is deprived of his sexual gratification or his rights of consortium in case of a married convict. Such a person becomes physically tortured or psychologically forced to take to homosexuality and masturbation.²¹ One then wonders whether this kind of environment can really make a prisoner have self-respect. It is submitted that the inhuman prison conditions that an inmate is subjected to, destroy his confidence in life - thus making him see himself as a social outcast and a failure in life.

The prison institution in Kenya has also tried to initiate some reformatory programme which cannot go without criticism. Among these are prison farms, prison "factories" for the processing of such products as clothes, tables, chairs, shoes and also learning of masonry skills.²² In his attempt to justify the prison labour, Mr. A.K. Saikwa, the former Commissioner of Prisons had this to say:

"It is generally accepted in principle that the idle mind is the devil's workshop"²³.

There is a problem with this statement because the prison work will not do anything, for the offender. If this is to remove idleness then this is a temporal solution to his problem if this was the cause of his criminal act. If a convict is a rapist, sentencing him to imprisonment where he is to be treated through growing cabbages will not remove his sexuality.²⁴ It has been noted that prison labour can constitute little effect, if any, to the criminal reform, and it is as well socially -short sighted.

The skills provided by the training programmes in prison are just temporary solutions. It is also futile to give farming training to a man who has no farm i.e. urban resident. Such an inmate has got no farm where he could later put into practice the skills gained on his discharge. The whole idea is more absurd as it is given to all inmates irrespective of their crimes or sentences. This would be constructive if only the prison department did have a follow up to make sure that the ex-prisoner is in a place where he could put the skills learned into practice. Ex-prisoners with no employment (self or otherwise) should be employed by the Government in areas of their specialization in the public sector. To solve this problem the Government can, for instance, start factories or farms where these ex-prisoners could be absorbed. It is submitted that unless the prison department follows these ex-prisoners making sure that they have work to do in one way or the other, then the whole programme will be totally wasted effort. It must be noted that digging and wood work, for instance, have got no correlation with discrimination of the criminals in prison.

It is contended that the institution as it is today leaves much to be desired. The lives of inmates are wasted, their families disrupted with no hope of repairing them and the more this goes on the more it assumes sub-cultural traits in the society. The case of Philip Makas²⁵, illustrates how offenders are made to suffer extremely and unnecessarily for very trivial crimes. In this case the accused was sentenced to seven years in jail. He was further placed under police supervision for five years on completion of his jail sentence. The accused had attacked a man in a Nairobi street and stole from the victim Sh.7.65 and a piece of paper. It is submitted that the jail sentence given here was excessively heavy. It must be noted that it is not the length of sentence given here that brings about deterrence.

It is submitted that the prison institution as observed lacks incentive on the part of inmates. Some of these inmates are in prison for too short a time to bother about training them and are only waiting for the sentence to expire so that they can walk out. They have no wish to learn another and probably poorer skill i.e. a professional convict.

Subjection to similar punishment, for all the offenders, is highly criticised. Kenya needs a classification of criminals according to their rates of success in non-reversion to crime. Crimes such as murder, manslaughter, rape and arson have, on the whole much lower rates of recidivism than theft, burglary, prostitution, illicit distillery of "Changaa"²⁶. Offenders charged with drunkenness, vagrancy, loitering, etc. need not be sent to jail for failure to pay fine. It is contended that there is nothing to be corrected or treated in such a person. Magistrates should exercise their discretion here. Such accused people should be absolutely or conditionally discharged²⁷. It must be noted that conformity under the strict regime of a prison is no indication that the prisoner has become or is going to be a law abiding citizen henceforth.

Some of the prison rules are a gross violation to human dignity. Rule 57 provides that:-

"On prisoner being visited, the police officer shall be within hearing distance and in case language is different, an interpreter must accompany such an officer"²⁸.

This is a colonial prison rule. It was introduced to prevent any chance of a prisoner making any private conversation with his visitor affecting the government. The rule interferes with the prisoners right to secrecy in his affairs. What has a prisoner's conversation with his wife to do with the police officer or the government. It is suggested that the rule be abolished.

Rule 58²⁹ prohibits visitors and letters to and from the prisoner. It is suggested that such a rule is unnecessary in our Penal System today. An inmate is just like any other person who is at large. He is therefore entitled to such fundamental rights of communication. Prisoners should be allowed to communicate with their families or friends through letter writing or telephone. Likewise visitors should be allowed to visit such inmates during certain specified times e.g. over the weekends. During such occasions the inmate and his/her visitor should be free to discuss their own affairs.

It is also submitted that up to now the prison institution does not yet have properly trained staff. This is of great importance. Prison personnel must be trained on how to deal with the inmates. It is hoped that guided by a psychologically skilled and tolerant prison administration the offender will be prepared for his ultimate return to society as a respectable person.

Finally it is submitted that prisons are here to stay. However reforms on the prison institutions have been suggested in the following Chapter, a step which would make them more effective than they have been so far.

(B) CAPITAL PUNISHMENT

Capital punishment is also called the death penalty. The penalty is provided for under-S.24 of the Penal Code. S.25 provides that:

"Where any person is sentenced to death, the form of sentence shall be to the effect only that he is to suffer death in the manner authorised by law".

It must be noted that in Kenya the death penalty is mandatory for murder, treason and aggravated forms of robbery. But the death penalty cannot be passed against a person who is under 18 years³⁰ or against a pregnant woman. In the latter case she ought to be sentenced to life imprisonment.³¹

No such thing as this!
The death penalty was extended to robbery in 1973 under the Hanging Bill. The Bill was a response to increasing robbery cases. The attorney General in moving the Bill said that the Criminal Amendment Bill of 1971 was not effective as it was being avoided by robbers:

"I suggest to the house that the only deterrence to this behaviour is to impose a death penalty"³², he said.

Since the passing of this Bill, quite a good number of people have been hanged.³³

It is observed that despite the severity of the penalty robberies have been on increase and this has caused a lot of concern. This has made a lot of people question the effectiveness of the death penalty.³⁴

Capital punishment has its supporters as well as critics. The retentionists are of the view that the death penalty is deterrent. Hence its removal would unleash dangerous elements now restrained by the fear of death. They also argue that such men are beyond hope of rehabilitation and that this is less costly to tax payers than other alternatives. It is submitted that this argument is an expression that the current penal system is incapable of rehabilitating such people. The allegation that such people are beyond rehabilitation is rather erroneous. How can we say that a first robber or murderer etc. is beyond hope of rehabilitation? It is submitted that cases of people who are beyond hope of rehabilitation are very few. The only conclusion that can be inferred from the above criticism is that infliction of the Death Penalty has had no proper justification and hence has greatly violated the offenders fundamental human right i.e. his right to live.

The abolitionists on the other hand have argued that the death penalty is not punishment at all. To many people this sanction is fit for only a very small fraction of criminals. In many countries where the abolitionist view is supported, this practice has been viewed as a symbol of imperfection. It is submitted that the death penalty cannot deter people from robberies. Both Europe and United States have realised the ineffectiveness of this penalty, hence discarding its use.

It is observed that death penalty is no punishment. It is neither deterrence and if so, its effectiveness is very minimal. It cannot be a deterrence to the individual since once he is dead it would be stupid to speak of deterring him. The idea of general deterrence is not also very evident. No data has ever been collected to show how many potential murderers ^{are} deterred.

The death penalty is not warranted. It is a great crime against humanity by the state. It only brings about the pre-mature and needless death upon the offender. It is suggested that such a practice which causes much evil to accused than the crime in question, results in loss of human value in society.

The penalty ignores crime dictates. It assumes that the offender is responsible for his own acts in all circumstances. Yet it has been established that no criminal commits a crime out of pleasure. The penalty is therefore contrary to the highest concept of judicial Christian ethics - "thou shall not kill".

Martin Ennals, Secretary General of "Amnesty International" asserts that the death penalty in all its forms - whether it is imposed in political or criminal cases or whether it is carried out by the state or by illegal killers - is one of the most extreme violations of fundamental human rights.³⁵ He says that:

"....Every execution, whether it takes place on the gallows or in the street, whether it results from a decision taken publicly by a court or clandestinely by conspirators, is an irreversible and totally unacceptable abuse of power As judicial punishment, the death penalty is unequal, unjust and irreversible. History everywhere shows that the principal victims have been the poor and members of the minorities and oppressed groups within the society"³⁶.

In cases of Judicial Death Penalty, the Amnesty International Conference concluded that it had never been shown to have special deterrence effect - either to would be criminals or those planning acts of political violence. In the author's assessment, capital punishment has achieved nothing more than revenge.

It is submitted that death penalty against robbery mainly affects the poor economically. This then shows that use of capital punishment is deliberately discriminatory against various socio-economic and racial groups. The principle assumption behind this argument is that the penalty of death is the poor man's punishment. The rich will hardly be charged with robbery with violence. Hence they have got no chance of being victimized here. They are under no economic forces leading them into victimization.

The death penalty could also be criticised on moral grounds. It is fatally offensive to human dignity. No immutable moral order requires death for murderers and robbers. The aim should be to prevent crime and not to kill criminals.

As regards deterrence, it has been seen that there is insufficient evidence to that effect to support the retention of the penalty. Justice White has suggested that the "....

"deterrence justification for capital punishment is not served by the infrequent imposition of death as a penalty. Common sense and experience tells that seldom - enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted"³⁷.

Even if the penalty was assumed to be an effective deterrent force, it would be difficult to prove since murders which are exactly deterred will not be reflected in the crime statistics. It is also evident that the deterrent effect of capital punishment is definitely not a settled matter, and this is the strongest social scientific conclusion that can be reached at the present time. We can thus conclude that the deterrence hypothesis is unacceptable. The hypothesis no longer holds any legal basis.³⁸

In conclusion it is submitted that capital punishment imposed on committers of crimes such as murder, robbery, treason, etc. should be completely abolished but if retained then it should be given to the little percentage of the people who are beyond rehabilitation. Robbery for one should not be a case of death. This is an economic crime dictated by a need.

The death penalty brutalises the society that uses it. It is only logical to conclude that a society cannot rid itself of murderers by becoming a murderer itself.

(C) CORPORAL PUNISHMENT

Section 24 of the Kenya Penal Code provides for the corporal punishment as one of the various methods of punishing an offender. Section 27 of the same Act provides the circumstances under which corporal punishment can be inflicted:

- S,27(1) A sentence of corporal punishment should be to receive such a number of strokes with a cane as may be specified by such a sentence.
- (2) No sentence of corporal punishment shall be passed upon female or upon any male sentenced to death.

Also males under 18 years have been exempted from corporal punishment. The section does also provide that where the criminal is not in a position to receive the penalty, a substitute can be given. But it must be noted that no corporal punishment shall be imposed in default of payment of fine. Also the sanctions cannot be executed until given time for appeal has expired.

The sanction involves the infliction of pain and suffering upon a convicted person for deterrence, expiation and correction. In Kenya this is done through flogging with a cane, rod or other instrument for different ages of persons as may be approved by the Minister.⁵⁵

It is worth noting that this penalty is usually given together with a jail sentence. However in a few cases the penalty can be inflicted alone. In such cases flogging is held to be enough to bring about the reform wanted.

The basic aim of this sanction is to correct or treat offenders through pain and suffering. This is based on the assumption that the offender is responsible for his own acts and consequently he must be made to suffer through pain. It is submitted that this approach reflects a revenge rather than treatment for the good of the criminal. It is contended that the infliction of this penalty involves terrible violence and mercilessness. It is argued that the penalty simply damages the body of the offender. The effect of the penalty is limited to the extent of the pain administered. Hence the penalty only creates greater hatred in the inmate towards the police, the magistrate and the prison officers all of whom are responsible for this inhuman suffering inflicted on him. Pain, per se, cannot make a criminal a law abiding person. The penalty ignores the criminal forces enumerated in Chapter Two.

It is suggested that if a penalty has to be inflicted, provided circumstances warrant this, it must attempt to eradicate the sources of the problem and in particular should be aimed at rehabilitating the offender i.e. help him to settle in society without violating the interests of the other members of the society. Any penalty that does not strive to achieve this goal should be abolished. It is hence submitted that since corporal punishment falls short of this requirement, it should be abolished.

FINES

This is a non-custodial sentence provided for under S. 24 of the Penal Code³⁹. It is a sum of money paid to the court for the wrong done. The penalty can be applied alone or jointly with another sentence. Generally, it serves as an alternative to short prison sentences. When the penalty is inflicted alone, the assumption is that accused can do without imprisonment.

Section 28 of the Penal Code⁴⁰ stipulates the circumstances under which the sanction can be imposed. The section provides that:

Sub-Sec. (1) Where fine is imposed under any law, then in the absence of express provisions relating to such fine in such law the following provisions shall apply:-

(a) Where no sum is expressed to which the fine may extend, the fine which may be imposed is unlimited, but shall not be excessive;

(b) In case of an offence punishable with a fine or with a term of imprisonment and fine, the court may in its discretion -

(i) direct by sentence that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which in prison shall be in addition to any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of sentence and also

(ii) issue warrant for the levy of the amount on the immovable and movable property of the offender by distress and sale under warrant:

Provided that if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if the offender has undergone the whole of such imprisonment in default, no court shall issue a distress warrant unless for special reasons to be recorded in writing if he considers to do so.

Sub-S. (3) The imprisonment or detention which is imposed in default of payment of a fine shall terminate wherever the fine is either paid or levied by process of law.

But sub-Sec (2) stipulates that the maximum period that one can be imprisoned for failure to pay fine depends on the amount of fine in question.

The above section makes it clear that the payment of fine in substitution for imprisonment shall not be ordered where the law concerned provides for maximum sentence of imprisonment.⁴¹ Length of prison sentence for non-payment of fine is limited to six months unless the law under which the conviction is made enjoins or allows a longer period.⁴²

A fine has a deterrent effect in most of the offences related to money and business, especially if the offender is able to pay and the fine is heavy. But fines like any other sentence must be equivalent to crime in question and not excessive.

Observation has shown that courts do not only impose heavy fines but do also act unnecessarily harshly.⁴³ From Nyahururu Resident Magistrate's Court eight cases were reported in the local newspaper (Daily Nation) in August, 1979, in which the offenders were charged with the contravention of the Price Control Act.⁴⁴ The accused people had sold a tin of Falex Baby Food, weighing 500 grams, at five cent above the New Prices. Evidence showed that although the government had gazetted the new prices during the week this had not come to the accused persons' knowledge. Irrespective of their genuine ignorance, the Resident Magistrate fined then Sh.2,000 each for this offence and Sh.500 for failure to display the new prices in their shops. It is true that ignorance of the law is no defence, but one really wonders how these traders were expected to display what they did not know. It is submitted that where a genuine defence is shown, the magistrate should sentence such an offender to a meagre fine e.g. Sh.50 or 100.

From an economic point of view it can be argued that this penalty has enough deterrence. The convicted person is made to lose economically. This makes him detest criminal activities in future. But as shown below the sanction has a lot of undesirables in its effects.

The penalty protects accused against all evils specified under imprisonment, above. In cases where sending of the offender to prison would have more serious side-effects e.g. where offender is the sole bread winner for the family, it is recommended that in all trivial crimes, the accused should be sentenced to a fine.

However, one of the weaknesses of this sanction today is that the accused is required to pay the fine in cash or in a single instalment. This requirement has greatly hit the poor. An offender who fails to pay fine is given jail sentence. The implication is that fine sentence is of advantage to the rich and not the poor. It is suggested that in instances where the criminal cannot genuinely raise the fine immediately, courts should allow such a person to pay his fine by instalment while he remains at large.

On the other hand, a fine should be imposed with care especially when it comes to rich people. Rich criminals may not feel the effect of fine. Such people can act in an irresponsible manner or negligently where they know that the penalty will simply be a fine. It is hence suggested that in awarding fines, the courts should exercise their discretion. Where evidence shows that fine will not deter such an accused person has acted intentionally, then the courts should give such a person a heavy fine for him to feel the pinch for his wrong doing. It is only through exercise of such discretion that fine as a penalty can achieve maximum effectiveness.

(E) TREATMENT OF JUVENILES

Young offenders are not dealt with as adults in the same correctional or treatment institutions. Treatment of juveniles is provided for under three statutes namely: Children and Young Persons Act⁴⁵, Borstal Institutions Act⁴⁶ and Prisons Act.⁴⁷

Section 17, Cap. 143⁴⁸, enumerates methods of dealing with offenders under 18 years. These methods include discharge under S.35(1) of the Penal Code⁴⁹, Probation under Probation Act,⁵⁰ committing offender to care of a fit person or approved institution willing to undertake his care. If the juvenile is under 16 years he can be ordered to go to an approved school suitable to his needs and attainments. The court could order fine compensation or costs to be paid by the juvenile or by parents or the guardian. Finally the court can order a parent or guardian to give security for his good behaviour. Though constructive the institution sounds, it is however, submitted that it does not give room to most of theories of crime causation as will be shown below.

It must be noted that a child is not supposed to be imprisoned or detained. However, imprisonment can be imposed in case there is no other way of dealing with such.

By section 5 of the Borstal Institution Act⁵¹, convicted youth's previous conduct must be reviewed before passing of the sentence. In majority of cases this task is given to probation officers who visit the juvenile's home for this information. In practice courts base their sentences on the recommendations of the probation officer.

For reform the young offenders are sent to a borstal institution for training. It has been said that the state here aims at diverting young persons from the ways of crime before its too late.⁵² It is submitted that this statement limits or confines criminality to youths. It ignores the fact that when the juvenile will be released, he will be subject to the various factors dictating him to commit crimes i.e. the economic theories. Diversion is temporary. No data has been given up to now to show that such juveniles do not revert to crime later.

Section 66, Prisons Act,⁵³ establishes "Youth corrective Centres". This is a corrective training centre for youths aged between 17-18 years⁵⁴. This excludes youths who have had previous prison detention or those who had one time been sentenced to corrective training in a Youth Corrective Training Centre. But is there any justification of depriving persons under 17 years albeit first offenders, of the corrective training.

It is submitted that the institution does a good job in helping these juveniles to avoid criminal activities. The only problem here is that the measures are limited to institutions. No attention is given to such theories as the theological, environmental as well as economic theories all of which contribute to crime causation though at unequal magnitude. It is, therefore, submitted that the available juvenile treatment in Kenya does not as well cover all the theories of crime causation. It is temporal i.e. limited to the period when the juveniles is serving his sentence and hence inexhaustive.

F) EXTRA MURAL PENAL EMPLOYMENT SCHEME (E.M.P.E.S.)

This mode of punishment involves the sentencing of a prisoner to do some public work outside prison for a relatively short period of time.⁵⁶ Petty offenders whose sentences are too short to allow for any specialized training do not undergo custodial treatment. The E.M.P.E.S. is an alternative sentence in this case. Generally, these type of offenders are first offenders with less anti-social problems which do not need custodial treatment. The offender does the work while residing at home.

This system has both advantages and disadvantages. The punishment keeps the offenders away from hard core criminals in prison, relieves congestion in prison and enable corrective training. Such a sentence does not mar the individual's image. On the other hand the penalty gives no attention to the causes of crime. It simply focuses its attention on the offender perse just like many other sanctions analysed above. The application of this punishment has also been limited by its restriction to first offenders. It is suggested that the field of operation of this mode of punishment should be made wider. The sanction ought not to be limited to first offenders only. Even for those others with previous trivial criminal activities, the advantage of this sanction should be extended to them. It should be extended to people who cannot afford meagre fines in courts, instead of imprisonment in default of fine payment. It is only by the extension of the field of operation will E.M.P.E.S. obtain maximum effectiveness.

G) DENTENTION

The punishment has a narrow application. It is only applicable to political offenders. As a result it has little or no application on the general populace.

The penalty is provided for under the Public Security Act.⁵⁷ The Act provides for the restriction and detention of persons, if the Minister for Home Affairs is satisfied that it is necessary for the preservation of security in the prescribed area or country either to exercise control over residence in their movement. He may order the restriction of that person to the area specified that it is necessary for the preservation of Public Security to exercise control beyond that afforded by restriction order over any person. He may order that such a person be detained.⁵⁸

The rationale for this punishment is that the political offender is threatening the Public Security. This then appeals for societal protection. But it must be noted that the Act does not provide the circumstances under which we can say that Public Security is at Stake. The sole judgment is put on the Minister to determine when Public Security is threatened.

It is submitted that this is excessive power given to an individual. As a government supporter, the Minister will tend to be prejudiced against the accused at the benefit of the ruling class as a whole. Historical evidence shows that this section has in most cases been used as a political tool to get rid of the critiques of the ruling class for the safeguard or maintenance of such a class in power no matter how "evil" such leadership could be. This has been the case especially in the New Emergent Independent African States.⁵⁹ In most cases people who has been detained in Kenya, have been political figures whose activities in general have always been approved by the general populace. It is hence evident that the term - "Public Security" has been used by the Independent Government as a cover-up for the "Political Security". The Act safeguards the security of the ruling class. The threat is to the security of the ruling class and not to the Public Security unless in very rare cases. In most cases the people are never tried before a court of law, a fact which is in violation of the constitution. A gross misuse of this sanction is clearly illustrated in the case of Ooko V. Rep.⁶⁰

It must be noted that detention has much that is undesirable. Consequently the sanction has not been deterrent to either the individual victims or to potential offenders. The penalty instead of discouraging such offenders from future involvement in their political activities that they have been accused of, have encouraged them into the same by creating, psychologically, these so called political offenders, highly esteemed positions in the society. The masses see such people as political heroes and opponents of mass oppression by the ruling class. This has been evident not only in Colonial Kenya but also in independent Kenya. A good example of the latter case are cases of Ngugi wa Thiong'o, Martin Shikuku, Miss Chelagat Mutai and Marie Serono.

It is clear then that detention as a sanction falls short of its expectation within our Penal System - i.e. Rehabilitating the so called political offenders. The author consequently condones the penalty and calls for its abolition because the sanction as it is serves as a political tool for the ruling class, and a source of injustice to poor victims who in most cases are never taken to the court of law.

The above discussion of the various sanctions provided for by the Kenya Penal System has shown that the present system as it is, has its focus on the criminal perse ignoring all the other factors i.e. theories of crime causation analysed in the second Chapter. The present approach to the correction of offenders assumes crime to be emanating from criminal himself.

The sanctions give no attention to theological, biological or social cultural factors or theories explaining the causes of crime in society. It is submitted that these practices have gone off the goal in their effort to reform offenders, thus making such criminal law abiding citizens. This accounts for the little success in controlling crime.

It is suggested that if the system is going to gain maximum effectiveness it must deal with both the causes of crime and crime concurrently. Knowledge of the nature of crime will greatly help the courts as well as the prison department in determining the right penalty that a criminal should get. It is also suggested that the system must be directed at dealing with a case perse and not in contrast to others. Hence the sentence awarded should be determined on the weight of the crime. It is, however, realised

it is not easy to wipe out crime completely. Crimes are here to stay so long as law exists and also so long as people have different personalities and have unequal economic opportunities. It is, however submitted that the system can succeed in regulating crime by first making a thorough study of the causes of these crimes, thus formulating the rightful measures. Both criminals and the causes of crime should be dealt with concurrently.

It is also suggested that there be a review of the current penal laws most of which are out of date as well as inhuman, replacing them with a new mode of treatment as recommended in the next Chapter.

CHAPTER FIVE

PROPOSED REFORMS AND CONCLUSION

The discussion in this paper has shown that the present Penal system has got a lot of aspects characterising its administration or infliction on the criminals most of which are not only undesirable but also unworthy of retention. It has been shown that while the system theoretically aims at the treatment of offenders, in practice the system has laid its emphasis on the infliction of pain on the offenders. The discussion has shown that the available sanctions are all focused on the criminal per se. No attention has been given to the theories of crime causation. The infliction of pain and suffering has not only affected the offenders physically, but psychologically this has made the criminal think of himself a social misfit and a total failure in life. The society sees such a person as a social outcast, a threat and a danger to its security. Such an offender is seen as an enemy of the society. No body can put him in a position of trust in the case of employment.

It has also been stated that the system remains as left by the colonial government with very minimal changes or modifications. A casual look at the correctional system in colonial Kenya reveals an iniquitous, harsh and discriminatory system. Law, particularly criminal law, was used by the colonial government as an instrument of achieving its unjust colonial interest. The awarding of maximum sentences whether of imprisonment or fine, corporal punishment or death penalty against the Africans was a common feature in colonial Kenya.

It suffices to mention that the very same penal sanctions administered by the colonial government have been retained by the present system although the circumstances have greatly changed. The administration of these sanctions have continued irrespective of these changes. One wonders as to why the independent government has been such reluctant in modifying the system. This should not be seen in isolation of other sectors of public institutions. It was noted in chapter one that the system as well as the Kenyan legal system is a colonial importation. Consequently it is not possible to change the penal system while the law upon which it is based has not yet been reformed. Thus it is recommended that the law upon which the penal system is founded be reformed thus bringing about changes in the penal system. It is submitted that as a result of the failure of this system to keep pace with the general development, this has resulted to the retention of a system that carries great evils whose result is the dehumanisation of the offenders.

A review of this system has shown that the system is inadequate - both intrinsically i.e. in its structure and in the nature and scope of responsibilities given to it, and extrinsically i.e. in its relation with the people it is meant to serve.

It is submitted that punishing an offender simply because he has done a wrong without having in mind the ultimate goal of correcting him serves no basic purpose in as far as the treatment of offenders is concerned. It has been contended that deterrent

punishment can only suppress criminal inhibitions and tendencies in the human nature and cannot exactly cure them. As soon as the threat is removed, persons prone to such tendencies are liable to fall victims to **their** urges. It is submitted that what is required is cure and not suppression.

It is contended that the suffering brought about by some of these sanctions i.e. capital punishment ^{or} corporal punishment, produces great suppression in the offender. The psychological setbacks such as suppression, produces in an individual great bitterness against the society. Such developments in mental attitudes of the criminal make it difficult, if not impossible, to give a measure of successful rehabilitation. The imposition of such sanctions thus gives a very bleak outlook to the scope and reach of the reformatory treatment of the criminal.

The system as it is leaves much to be desired. But it is submitted that the system is here to stay in spite of its shortcomings. Hence the goal should be a reform of the entire penal system making it conducive to local circumstances and demands. There is therefore, an urgent need to explore new methods for the prevention of crime and the treatment of offenders which would fairly reflect the interests of the Kenyan society in protecting itself and yet providing maximum opportunity for the individual to turn away from the career of crime.

It is submitted that the law that governs criminal justice, the correctional institutions and treatment should be closely analysed in the light of the needs of the Kenyan society, culture and development.

The system must function in Kenya's political economy, otherwise a reality would be avoided. If this is not done, then it becomes utopian to speak of criminal treatment. This suggestion is of great importance when we realise that the causes of crime to-day can be summarised briefly as a complex inter weaving of psychological, sociological and economic factors i.e. the strains produced by the changing social patterns caused by urbanisation and industrialisation by the rapid pace of modern life with its competitive pressures and its tendency to plunge the individual into a maze to which he is unable to adopt himself is making criminality an acute and complex problem. It is also suggested that the system should aim at discovering each individual in-mate his positive potentials and developing them as far as is possible in setting of a penal treatment towards his rehabilitation as well as discovering the nature of crime and its causes so that the proper cure may be administered. It is therefore suggested and recommended that the following reforms be effected.

It is suggested that an over-all review of the entire Penal law be done. Upon this review a modification should be made on all outdated sanctions giving room to more upto-date sanctions that would be necessary for the treatment of modern criminal as well as the crimes. On this basis a recommendation is made on the reform of the prison institution.

It is submitted that the institution is here to stay. But much ill exists in these prisons to-day. It is suggested that living conditions in prison be improved. Hygienic conditions in the room

should be improved i.e. be free of parasites like lice. Prisons should have libraries, games' rooms, T.V. set, etc. for reading and recreational purposes, respectively.

Brutality, flogging and general mistreatment of prisoners should cease. In this case corporal punishment as executed today should be abolished as it has been the case in Britain and Tanzania.

It is also suggested that a provision be provided in the prisons Act stipulating the guiding policy of prisons as treatment of offenders and not punishment through infliction of pain per se. Treatment should involve lectures given to the inmates on how they can start living a constructive life in future.

It is also recommended that a greater use of non-custodial treatment of offenders be made except in the cases that might definitely need custodial treatment. It is suggested that greater use of probation orders and Extra Mural Penal Employment Scheme should be made. Where inmates have shown positive changes through treatment they should be discharged conditionally instead of continuing to keep them in jail.

It is recommended that prison labour be reviewed so as to be directed at imparting skill to the inmates that could be of use even after their release from jail. In this connection it is suggested that there should be a categorisation of prisoners as well as the work they have to do. The weight of the work done should be determined by the nature and "gravity" or weight of the crime. It is suggested that regard should be given to the inmates area of interest i.e. work he would like to do in his life time.

It is submitted that lack of expert personnel required for the purposes of introducing and carrying out curative treatment and rehabilitation or reformation of the criminal, stands as a major hindrance to the achievement of the projected goals. Prisons need better and qualified personnel than the ones at present. Some officers and nearly all wardens have no idea of human behaviour, crime causation, human motivation and not the slightest idea of how to go about to reform the offender. Faster and better results could have been, and would be, achieved by the presence of experts in the fields of criminology and penology, scientifically trained in the modern methods in these fields. It is hence suggested that there should be post-graduate courses for those lawyers who would like to work with either the judicial or prison departments. These courses should cover the above stated areas. It is recommended that these courses should be taken as life time careers so that we can have a body of people that is fully equipped for the treatment of criminals. This training can be extended to non-graduates working in prison department.

It is also recommended that minimum sentences which are the outstanding features in the code be abolished since they curb the discretion of the judge or magistrate. If such discretion is allowed, then, the judge will have a free hand in deciding what penalty he can give to fit the offence, based on the facts of the case before the court at the material time. In this way justice will be done.

It is also recommended that except where there is no alternative, short-term imprisonment should be abolished. They serve no effective purpose. Instead Extra Mural labour should be imposed here. But where the crime in question is a trivial one, and the offender does not stand a risk to the society, then the criminal should be put on probation order or be discharged conditionally.

It is submitted that up to now no facilities exist in any of the prisons for obtaining and recording the background information e.g. family history, early environment, education, cultural and financial backgrounds of the criminal, nor details of the circumstances which led him or her to commit the crime for which he is charged with. This information can help in understanding the causes of crime and hence the formulation of effective methods of treatment. It must be noted that the best attempts at curative treatment seldom produce the desired effect and will not do so until we can at least arrive at a reasonable diagnosis of the root cause of the evil. The suggested information above, would be of great importance here. It is upon this premise that a recommendation is made for the establishment of such undertaking within the judicial department, which will be a joint venture between the police and court officers. But the police would be most involved.

It has been established that the present penal system deals with the criminal as long as he is serving the sentence. Whatever happens to such an ex-offender has been no problem of the system. As stated in the previous Chapter this is a dangerous thing as such ex-prisoners or offenders are likely to go back to their criminal activities unless followed up.

It is upon this insufficiency within the present penal system that a recommendation is made for an after-care body whose focus will be on the ex-prisoners to see to it that they are living as anticipated following treatment. To avoid great expenses for such a personnel it is further suggested that such a task can be extended to the probation institution. But it is submitted that the effectiveness of this body demands not only public support but also government support.

To cater for the juveniles it is recommended that the government should come up with "Youth Working Groups". Convicted youths should be mobilised in such groups as the present institutions are not enough to cater for these juveniles. These institutions also do not have enough skills to treat these youths. In these working groups these juveniles should be taught the various skills fit for their age, which could later help them to settle in the society as responsible people on their release.

It is further recommended that section 175 of the Criminal Procedure Code¹, be made use of properly in regard to awarding of compensation to victims, for the wrong done. This should be mandatory and not discretionary. This move aims at directing the offender towards social responsibility and towards gaining other constructive attitudes through making good with those he has wronged by his offence.

Capital punishment should be abolished. Empirical evidence is abundant that the majority of murderers are psychologically abnormal people who should not be held responsible for their actions, and if abnormal they need treatment and not punishment.

Finally, a provision should be given requiring trial before detention is applied upon an offender. It is only through such trial will justice be achieved and the infliction of such a sanction be justified. Failure to do so tantamounts to miscarriage of justice.

It is therefore suggested that the Kenyan Legislature should invoke amendments on the proposed areas within the entire Penal System in an attempt to reform the entire Penal Law for the better treatment of criminals. Much could be achieved through the formation of a select committee (composed of law lecturers, judges, prison officers as well as sociologists) to look into the entire penal law suggesting an up to date penal law to accommodate modern criminals. Such penal law should give room to theories of crime causation. It is only through the implementation of such recommendations will the Kenya Penal law succeed in achieving security and harmony in society.

CHAPTER ONE

FOOT NOTES

1. Cap 63, Laws of Kenya
2. Cap 87, Laws of Kenya
3. Cap 90, Laws of Kenya
4. Cap 64, Laws of Kenya
5. Cap 91, Laws of Kenya
6. Cap 92, Laws of Kenya
7. Alarn Milner - African Penal System "1969.
8. The following countries have abolished capital punishment - Austria, Brazil, Columbian Costa Rica, Denmark, Finland, Norway, Swerwn, etc. In America States such as Michiga[^](in 1846), Rhode Island (in 1852), Wisconsin (in 1853) were the first to abolish the barbaric practice. In 1972, the Federal supreme court ruled that the death penalty is an unusual and cruel punishment which should not exist in a civilized society, but recently some politicians have been advocating a return to the practice, but only in very special cases.

CHAPTER TWO - FOOT NOTES

1. Cap 84, Laws of Kenya, Section 14 (1).
See also ^uclinard and Abbott-
"Crime in Developing Countries" P. 25
- 2(a) From Lord Lloyd of Hampstead - "Introduction to Jurisprodence" 3rdEd. Austin says in his contribution to Jurisprudence that legal sanctions are fundamental if law is to be effective.
- 2(b) "Positirism, Analytrical Juriprudence and the concept of Law" - P. 152 By Jeremy Bentham. Bentham says that there need not be legal sanctions for a command to belaw. To him people can obey law for a promise of reward. He however admits that such laws are rare. Thus he also agrees that it is on sanction that law is obeyed.
3. This is the only inference one can make for the assertion that some of /are of higher gravity e.g. murder while /the cri others are petty and cause no serious harm to victims or society.
- 3(a) + Bad in itself - morally
- 3(b) Bad because if its prohibited by the law itself.
4. A similar view was expressed in the words of Sachs, L.J. in 1969 when he said:

"The court must put into account the human outlook of the period in which they make their decisions, both as regards that important factor "the conduct of the parties" and also "other circumstances" of the particular case. The practice as to discretion has thus naturally varied on this matter as on so many others in the exercise of any such, the law is a living moving with the time and not a creature of dead or moribound ways of thought".
Porter V. Porter (1969) I.W.L.R. 1155 & P. 1159
5. Infra - FN. 15
6. Smith and Hogan - Criminal Law, 3rd

London, Butterworths, 1973. Turner J.W.C. & Kenny's outlines of criminal Law (1966) Cross and Jones - Introduction to Criminal Law, 1972 and Turner J.W.C. - Russel on Crime (1964).
7. Lord Devlin - The Enforcement of morals
8. Prof. H.L.A. Hart - Punishment and Responsibility.

The position at common law was that crime was viewed as an immoral conduct. Hence those who committed immoral acts could be punished. The Report of the Wolfenden Committee gives more details of the position at common law. For a detailed analysis of this jurisprudential subject see the following:

- (a) Law and Morality - N.Y.U.L.R. Vol 43. P.61
- (b) Enforcements of Morals - 1960 C.L.J. 174
- (c) Lon L. Fuller - Positivism and Fidelity to law
- A reply to Prof. Hart. 71 H.L.R. 630.
- (d) Social Solidarity and Enforcement of morality
- By Prof. Hart 35 U.C.L.R.
- (e) Case of Shaw V.D.P.P. (1961) 2 All E.R.
446 or 2 W.L.R. 897.

- 9. Kenny's outline on Criminal Law - 19th ed. Pl
Cyprian O. Okonkwo and Michael E. Naish -
Criminal Law in Nigeria PP 22-23
- 10. Tibamanya Mwene Mushanga, Crime and Deviance - an intro-
duction to Criminology (1976)
- 11. Cap 65, Laws of Kenya
- 12. Cap 504, Laws of Kenya
- 13. Cap 403, Laws of Kenya
- 14. Professor Allien. Law in the making
- 15. Proprietary Articles Trade ASS V. AG of Canada
(1931) A.C. at 304.
- 16. Lord Denning M.R., Comment on "The Wolfenden Report on
"Homosexual offences and Pristitution - para.13-16
- 17. Cap 63 , Laws of Kenya
- 18. Section 4 _
- 19. For the purposes of this paper in its relation to the
Kenya Penal code, the word "crime" is used instead
of the term"offence"
- 20. Granville Williams - Tex book of Criminal Law
London, sterens, 1978, P.8.
- 21. See F.N. 18
- 22. Kenny's Outline on criminal law (supra)
pp 7-43; Smith and Hogan - Criminal Law
- 23. Ibid

24. Cundy V. Licocq (1884) QBD 207
Lloyd V. Grace Smith & Co. (1912) AC 716
Sweet V. Parsley (1969) 2 WLR 470
Bombay Trading stores and Another V. Rex (1962) EA 589
Sherras V. De Rutzen (1895) 1QB 918
25. See an Article in Sunday Nation, March 28th 1976,
P. 28 "Bank Robberies a startling New Menance in Kenya"
26. Observation based on populist view - generally.
27. Reported in Sunday Nation; March 28th 1976, P.28
28. W.G. Carson & Paul Wiles - Crime and Delinquency
in Britain - Sociological Readings, PP 40-47,-
29. T.M. Mushanga (supra) P. 30 gives this classification
which the present writer has opted to adopt as best
and comprehensive.
30. Demonology is the study of demons or evil spirits in
a theological context.
31. "Wrongful action" here refers to "Crime"
32. Genesis chapter 3 and Psalms 14.1 This is the sin that
was committed by Adam and Eve.
33. Romans 5.12 - "wherefore as by one man sin entered into
the world and death by sin; and death passed upon men,
for that all have sinned"(Authorised Version).
34. Odera Oruka - Punishment and Terrorisms in Africa P.14
35. Mushanga, (Supra), PP 34 -35.
36. Sutherland and Cressey (supra) PP 76-80 and see
Clinard (supra) Chap. 7.
37. T.M. Mushanga, Supra, P. 38
38. Ibid, P.43
39. Ibid
40. Erastus Muga - "Crime and Deviance in a Kenya Town"
A Study of "kisumu"
41. W.G. Carson & Paul Wiles - "Crime and Delinquency in
Britain - Sociological Readings - PP 35 - 39
42. Based on authors observation during his fourth term
clinical programme in Nyahururu Resident Magistrate's
Court - July/August 1979. The criminal registers showed
that most of the people accused with theft charges,
were people of no specific occupation or hardly owned
any property.

43. The only difference is that while poverty crimes e.g. theft are common among people in low income brackets, white collar crimes are common among the literate class and in Kenya the rich are most association with corruption and smuggling cases especially those holding key positions within the government
44. W.A. Bongler - "Criminality and Economic Conditions" -
Little, Brown and Co. (1916)
45. The same idea is also expressed by Marx and Engels in the book "The Communist Manifesto".
46. William Clifford - "An introduction to African Criminology"
47. Ibid - P. 75 - see Details on Crime rate in developing Countries.
48. OP. Cit.
49. W.A. Bongler, Supra, P. 173
50. Odera Oruka, Supra.
51. S.12, Cap 63, Laws of Kenya
52. 5. 208 (1) Cap 63 "Provocation means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."
- Exceptions to this definition are provided for in the same section 208 (3), (4) & 5. Provocation has been considered in many cases e.g.
- | | |
|-------------------------------------|-----------|
| (a) Leonsion s/o Matheo V.R. (1961) | E.A. 364 |
| (b) Maina Thuku V.R. (1965) | E.A. 496 |
| (c) Yovan V. Uganda (1970) | E.A. 405. |
53. Supra *X* *ibid*

CHAPTER THREE - FOOT NOTES

1. Prisons Annual Reports, Treatment of offenders, Ministry of Home Affairs, Kenya 1970, P.15 see Commissioner's Annual Report.
2. Robert G. Lenger and John R. Straton-
" The Sociology of Correction"
3. By "Same threat" this does not necessarily refer to the same crime. This refers to any legally prohibited act or omission.
4. H. Odera Oraka - Pushiment and Terronsim in Africa.
5. Ibid, P.4
6. Bentham J: The Principles of moral and Legistlation (1908) P. 170
7. Infra,
8. Supra
9. E. Cotran - Essays in African Law - P. 122 see also - Journal of Denning Law Society Dec 1967, Vol 2 No 1; EC Contran-
Position of Customary Criminal Law in East Africa Countries: Twinning - The place of Customary law in the National Legal System in East Africa and James Read Crime and Punishment in East.

CHAPTER FOUR - FOOT NOTES

1. S. 24 of the Kenya Penal Code, Cap 63, Laws of Kenya
2. In case of ostracisement, the offender used, to be sent away into "exile" for a specified period after which he would be free to return to his place of domicile' While in exile the offender was under no confinement. He is free to interact with people of the country of exile. This is clearly illustrated in Chinua Achembés - "Things Fall Apart".
3. Supra.
4. A similar argument has been possed by R.N. Kwoma in his LLB Dissertation 1976, at P. 32.
5. Section 3 of the 1952 Schedule.
6. Section 5 of the 1955 schedule
7. Society keeps on changing consequently if the law will effectively serve the needs of the society it must likewise keep pace with these changes.

8. Law should aim at reconciling the individual selfish interests with those of the society.
9. Prisons Annual Report, 1972.
10. Prisons Annual Reports, 1975
11. Erastus Muga - "Crime in a Kenya Town"- A Study of Kisumu
12. Supra
13. A Report on the "8th Annual Symposium on Crime", Daily Nation, Tuesday, November 12th, 1974, at P.8.
14. Sunday Nation, October 7, 1979 at P. 11.
15. Daily Nation, July 20th, 1979, P.20
16. An Approach to Penal Administration in East Africa
E.A.L.J. Vol 2. 1966, at P 25
17. Daily Nation, February 15, 1980, at P.4
18. Clinard, MB - Crime in Developing Countries - P. 231
19. Rule 3, Section (c) of the Prisons Regulations
20. Food in Prisons, is barely ^{nutritious} ins^utritious. It gives proteins and Cabohydrates. The prisons are generally badly fed. No wonder that relatives take food with them when they visit prisoners. This view is supported by Mr. Shem Ong'ondo, Lecturer in Law, University of Nairobi, in his paper presented at the Third International Syposium on Victimology at Menster in West Germany - entitled "The Role of the victim in the Criminal Justice system : A comparative Stduy of the modes of treatment of offenders under African and English Law
21. Evidence has shown that the deprivation has led to homosexuality in prisons. However, though this is just at a minimal level, if allowed to continue, it might end up being a threat to society as those men will ultimately be discharged to live in the society. Such habits once they become conditoned might not be easy to stop.
22. Prisons Annual Reports 1970-78.
23. Prisons Annual Report, 1979.
24. Courts must note that to-day most rape cases are usually caused by women. These women, behave i.e. through clothing and general solicitation, in a manner that can be constructed in contract language to be an "invitation to treat".

In some cases the woman may allege rape after the man has failed to pay the charges she demands. Courts must always consider circumstantial evidence before passing their judgement or sentence against the accused.

25. Daily Nation, August 4th, 1972.
26. A local beer prepared by distillation.
27. S. 35 of the Penal Code.
28. Prisons Act Cap 90, Laws of Kenya.
29. Ibid.
30. Section 25 (2), Penal code.
31. Section 211 and 212, Penal Code.
32. Leg - Ass Deb 1973 Cl 46
33. Unreported cases- But Appeared in local Newspapers.
see Daily Nation 16:11:1974 Daily Nation 29:1:76;
Daily Nation 14.1.1976; Daily Nation 20.1.1976; Daily
Nation 4.2.1976; Sunday Nation 14.1.1976 and East Africa
Standard 8.1.1975 and 19.11.1975.
34. Daily Nation 4.1.1976 - Miss Margaret W. Kenyatta, a former
Mayor of Nairobi, is quoted lamenting over the high Crime
increase which she said was "a great menace that
called for effective sanctions".
35. Nairobi Times, October 14th, 1979, P.5
36. The Journal of Crimal Law and Criminology
Published for North Western University School of
law - Vol 69/N2/ summer 1978
Issn 9901 - 4169 at P. 183.
37. Ibid - Vol 70/No2/summer 1979-Issn 9901-4169
38. Cap 63 Laws of Kenya
39. Ibid
40. Ibid
41. S. 28 (1) Penal Code and S. 392 - Criminal procedure code
42. Nyahururu Resident Magistrate Court-July/August 1979
43. Cap 504, Laws of Kenya
44. Cap 141, Laws of Kenya.

45. Cap 92, Laws of Kenya
46. Cap 90, Laws of Kenya
47. Supra
48. Supra
49. Supra
50. Cap 64, Laws of Kenya
51. This view was supported by Harris. J. in Letoyian V. Rep (1972) E.A. 50.
52. Cap 90, Laws of Kenya
53. Ibid.
54. Ibid
55. Cap 90, Section 68
56. Public Security Act, Cap Laws of Kenya
57. Ibid.
58. Ghai Y.P. & MacAustra - Public Law and Political Change in Kenya .
59. A Kenya High Court Decision (unreported).