

PUNISHMENT AND COMPENSATION IN KENYA

(With particular reference to crimes against
the person)

I thank my supervisor, Shirozo Kibiki for all the
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Chapter One - Sociological treatment of

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— the level of the skills employed in very writing

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<u>Am. J.C.L.</u> (1959) T.A.L. 1035	American Journal of Comperative Law.
<u>C.P.C.</u> (1959) T.A.L. 1035	Civil Procedure Code.
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<u>D.M.C.</u> (1959) T.A.L. 1035	District Magistrate Court
<u>E.A.C.A.</u> (1956) I. Q.B. 1	East African Court of Appeal P. 33
<u>E.A.L.J.</u> (1927 A.D. 310)	East African Law Journal
<u>E.A.L.R.</u> (1927 A.D. 310)	East African Law Report
<u>J. Cr. L&Cr.</u> (1927 A.D. 310)	Journal of Criminal and criminology.
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Dedicated To:

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and his

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for the sake of great sacrifice and love for my own welfare.

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by sisters.

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Mrs. Manjoti, Manjira and Maswitha for their good care and moral

encouragement to aim to achieve higher goals.

and

Dr. Wadhwa, for his tender love, moral and emotional support.

DEDICATION.

Dedicated To;

Dad and Mum,

For all those years of great sacrifice and love for my own welfare.

My brothers,

Njukia, Kahunyo, Kihira and Kahumbu and

My sisters,

Mrs. Wanjohi, Wanjira and Wamwitha for their good care and moral encouragement to aim to achieve higher goals.

and

My Dear Wachira, for his tender love, moral and emotional support.

INTRODUCTION

'Punishment and Compensation' under the Kenyan Penal system is the subject of this paper. The aim is to try and find out how far the penal system punishes the convict so as to compensate the crime or otherwise provides for compensation for the victim, why should we punish? This question will be answered by referring to sociological treatment of punishment. This will be dealt with in chapter one. Reference will also be made to customary modes of punishment and compensation. This will be dealt with in chapter two. It will be observed that under customary law, the aim of punishment was to restore the disturbed social equilibrium, by payment of compensation to the injured person, group or clan.

Chapter three will deal with punishment and compensation under the Penal Code, Criminal Procedure Code and Civil Procedure Act and Rules respectively. A critique will be offered against these relevant provisions of the penal system. It will be observed that the system has outlined its purpose. It is outdated and does not serve the needs of our people. In chapter four, recommendations will be made, in particular regarding the reform of the existing law.

Before we go into the main subject, it is necessary to look at the legal basis of application of these penal laws in Kenya.

Kenya was declared a Protectorate in 1895. Two years later, the 1897 Order - in - Council was enacted which provided the Constitutional theory and legal basis of the application of the common law system in Kenya. It is the most significant piece of legislation. It is through it that the English legal philosophy or jurisprudence dominant in Kenya during the colonial and post - colonial period was introduced. It also introduced new institutions called courts.

A new institution to compete with the old institution had come Civil and Criminal wrongs were distinguished whereas under customary law, all laws were civil wrongs that could be settled by payment of compensation to the injured person to redress the wrong done.

By the Native Courts Regulations of 1897, made under the 1897 order in - Council, Native Courts which were manned by the Europeans were to apply the Indian Penal Code. By Article 11(a) and 12 of the said Order - In - Council the Common and statute law of England was to apply wherever there was a gap in the Kenyan laws. By Art 6 of the 1897 Order - in - Council, a High court was established which was mainly a political court.

The 1897 Native Courts Regulations made it clear that all officers of the court had to be Europeans and to be guided by Indian Civil Procedure Code and Indian Criminal Procedure Code. This was provided by Articles 2 (a) and 3 of the said order - in Council. These Codes were used as weapons of oppressing those who hesisted foreign domination.

This was the position until 1902 when the 1902 Order - in - Council repeated the 1897 Order - in Council but expressly provided that where no provisions were made to cover a thing , the 1892 Order - in-Council would apply. Under Articles 15(1) of the 1902 Order - in - Council, a High Court was established with full jurisdiction, Criminal and Civil over all subjects and over all matters in East Africa." Article 18 established subordinate Courts. This remained so until 1907 when another Order - in - Council was promulgated.

By the 1907 Order - in - Council only one High Court with only one line of subordinate Courts was established.

Section 14 of the said Order - in - Council provided that all the courts were to follow the principles of procedure laid down in the Civil and Criminal Procedure Codes "So far as the same may be applicable and suitable."

By section 13, a subordinate court of first class was to exercise supervision but not unduly interfere with the procedure, orders in punishments of any tribunal authority within it's jurisdiction except where these procedural orders or punishments were contrary to Justice or morality or any written laws in force in the Protectorate. This is a reflection of the moral relativism of the philosophy of Imperialism and free enterprise. This is basically the court structure that remained in force until 1930.

Under the 1931 courts ordinance, section 12 provided that the procedure to be followed was that contained in Civil Procedure Ordinance and Criminal Procedure Code "So far as the same may be applicable and suitable". This remained so until 1957, when the native Tribunal Ordinance of that year replaced the 1930 native Tribunal Ordinance.

The chief aim of the 1957 ordinance, was to give legal effect to modernisation of native courts which took the form of making African Tribunals resemble English type of courts and by ordinance number 65 of 1957, Section 4(1), to carry on the process of civilization by a gradual application of the doctrine of seperation of powers to Africans which would result in less control of these courts by the Executive. The African High Court called the African Court of Review was established, which was principally a civil court.

CHAPTER ONE

This court structure remained until 1967, when, by the Judicature Act number 16 of 1967 (now^w Cap 8 Laws of Kenya) and Magistrate's court Act number 17 of 1967 (non cap 10 Laws of Kenya), the so called integration of courts took place. A court structure came into existence which is the one we still have today.

Against this background of criminal law being applied from prior to 1895 and 1897 up to the present, the following chapters deal more especially with the question of punishment and compensation under the Kenyan Law.

The word 'punishment' is a very difficult word to translate into other languages and forms. The word has several meanings which must be established historically and sociologically before I proceed to look at punishment as an

The basic meaning of the word punishment in English is derived initially from Latin 'punire' (to punish) is to cause an offender to suffer for an offense. The word 'compensation' has several meanings and for the purpose of this paper, I think the most appropriate meaning is to 'indemnify' or other words to make a payment in recompense of an invasion of rights with the consent of the person or persons receiving it. In law or from sociological understanding, the complexity of the term punishment becomes apparent.

I now proceed to look at it from sociological point of view. Punishment should first be seen as an aspect of social control. I quote Karlson on this aspect

CHAPTER ONE

SOCIOLOGICAL TREATMENT OF PUNISHMENT.

In this paper, I will attempt to answer the question "To what ^{extent} content if any does the punishment imposed on the accused person compensate the victim of the crime? I begin with a brief look at the various concepts of punishment which dominate legal and sociological thought in the field. First, as with all such concepts, it presents ~~contents~~ ^{Certain} ethnocentric features which characterise its meaning in English and is therefore difficult to translate easily, into other languages and idioms. The word has several meanings which must be established semantically and sociologically before I proceed to look at punishment as an

The basic meaning of the word punishment in English is derived initially from latin 'punire' (to punish) is to cause an offender to suffer for an offence. The word compensation has several meanings and for the purpose of this paper, I think the most appropriate meaning is to 'indemnify' in other words to make a payment in recompense of an invasion of rights with the consent of the person or persons receiving it. In law or from sociological understanding the complexity of the term punishment becomes apparent.

I now proceed to look at it from sociological point of view. Punishment should first be seen as an aspect of social control. I quote Karlson on this aspect carried out according to some traditional and recognized procedure. It is a significant fact that in all human societies, the negative sanctions are more serious than the positive sanctions.

... Every society has a definite purpose to achieve. Any deviant behaviour which interferes with the achievement of the real task of the society must be controlled. Deviant behaviour disturbs the equilibrium of the elements which go to make up the society ... Deviant behaviour frustrates effective role performance in common task and reaching it's common goal. When such behaviour occurs, a certain amount of energy must be diverted to it's control in order to restore the original equilibrium. Among several ways of maintaining social control is by fixed ways of social punishments.

Together with the aspect of social control is the related idea of social sanctions. I quote Radcliff - Brown's Lucid statement on the latter:

- (2) In any community, there are certain modes of behaviour which are usual and which characterise that particular community. Such modes of behaviour may be called usages. All social usages have behind them the authority of the society but among them; some are sanctioned and others are not. A sanction is a reaction on the part of the society or a considerable number of it's members to a mode of behaviour which is thereby approved (Negative sanctions); Sanctions may further be distinguished according to whether they are diffuse or organized; the former are spontaneous expressions of approval by members of the community acting as individuals while the latter are social sanctions carried out according to some traditional and recognized procedure. It is a significant fact that in all human societies, the Negative sanctions are more definite than the positive sanctions.

It is clear that the concept of punishment is close to the rather more general concept of negative sanctions. Radcliff, further points out that in exercise of these sanctions, the society or community recognize the principle of compensation. He states

- (3) The various forms of sanctions constitute the machinery of social control... such sanctions are carried out by a community generally through its representatives when recognized rights have been infringed. They are based upon the general principle that a person who has suffered injury is entitled to satisfaction and that such satisfaction should be in some way proportioned to the extent of the injury. One class of such procedure consists of acts of retaliation, by which is meant socially approved, controlled and limited acts of revenge.

Radcliff then gives examples of different procedures acknowledged by different societies, of satisfaction. He says that in preliterate societies, procedures of indemnification are carried out under diffuse sanctions of public opinion which compels an individual to indemnify one whose rights have been infringed. In some societies, there are recognized rights of an injured persons to indemnify himself by forcible seizure of the property of the offender. When society is politically organized, procedures of retaliation and indemnification give place to legal sanctions backed by the power of Judicial authorities to inflict punishment. Thus arises civil law by which a person who has suffered an infringement of rights may obtain reparation or restitution from the person responsible.

Radcliff's concepts of punishment and compensation are modified and probably improved versions of the classic statement of ⁽⁴⁾Durkheim. In his concepts of punishment, he viewed the empirical facts of 'punishment' not as he wanted to see them, but as he thought they actually existed, as a 'Social Necessity' in all social systems. To him, law or the legalised range of social sanctions mostly operated to 'reproduce' the principle forms of 'Social solidarity, but he discussed mainly 'Negative' sanctions in particular the characteristic of what he called 'penal sanctions'. For him these negative sanctions are of two kinds:

Some consists in suffering or at least a loss inflicted on the agent. They make demands on his fortune or on his honour, or on his life, or on his liberty and deprive him of something he enjoys. We call them repressive. They constitute penal law. It is true that those which are attached to the rules which are purely moral, have the same character, only they are distributed in a diffuse manner, by everybody, indiscriminately, whereas those in penal law are applied through the intermediary of a definite organ; they are organized. As for the other type, it doesn't imply suffering but consists only of the return of things as they were; in the re-establishment of troubled relations to their normal state, whether the incriminated act is restored by force to the type whence it deviated or is annulled, that is deprived of all social value.

Durkheim tries to relate both the sociologically functional and the psychologically functional in his analysis of punishment. His societal definition of the actions that provoke punishment is related to the theory of Sentiments. He states:

- (5) We must not say that an action shocks the common conscience because it is criminal, but rather that is criminal because it shocks the common conscience.

We do not reprove it because it is a crime but it is a crime because we reprove it. As for the intrinsic nature of these sentiments, it is impossible to specify them. They have the most diverse objects and can't be encompassed in a single formular. We can say that they relate neither to vital interests of society, nor to a minimum of justice. All these definitions are inadequate. But this alone, we can recognize it; a sentiment, whatever it's origin and end is found in all consciences with a certain degree of force and precision and every action which violates it is a crime...

This formulation crops up again and again in modern sociological theories of punishment.

Durkheim contributes another modern sociological theory of punishment; the close connection between punishment of any kind and the idea of Vengeance which is condemned in many societies as a morally reprehensible procedure when considered in the abstract. He states

- (6) And in truth, punishment has remained at least in part a work of Vengeance. It is said we do not make the culpable suffer in order to make him suffer; it is non the less true that we find it just that he suffer. Perhaps we wrong but that is not the question. We seek at the moment to define punishment as it is or has been. It is certain that this expression of public vindication which finds it's way again and again into the language of the courts is not a word to be taken in vain. In supposing that punishment can really serve to protect us in the future, we think that it ought to be above all the vindication of the past. The proof of this lies in the minute precautions we take to proportion punishment as exactly as possible to the severity of the crime; they would be inexplicable if one did not believe that the culpable ought to suffer because he has done evil and in the same degree...

Durkheim further sees punishment in its passionate character. He says,

(7) It is sufficient moreover to see how punishment functions in court; in order to understand that its spirit is completely passionate, for it is to these passions that both the prosecutor and Defence-Attorney address themselves. The latter seeks to excite sympathy for the Defendant, the former, to awaken the social sentiments which have been violated by the criminal act, and it is under the influence of these two contrary passions that the Judge pronounces sentence. Thus the nature of punishment has not been changed in essentials. All that we can say is that the need of vengeance is better directed today than heretofore. The spirit of foresight which has been aroused no longer leaves the field so free for the blind action of passion. It contains ~~it~~ within certain bounds. It is opposed to absurd violence, to unreasonable revenging, more clarified, it expands less on chance. One no longer sees it turn against the innocent to satisfy itself. But it nevertheless remains the sole penalty. We can then say that punishment consists in a passionate reaction of graduated intensity ... that society exercises through the medium of a body acting upon those of its members who have violated certain rules of conduct.

He sees no place where punishment is expressed as compensation except in particular cases. He says that what puts beyond doubt the social character of punishment is that once pronounced it can't be lifted except by the government in the name of society.

" If it were a satisfaction given to a particular persons, they would always be the Judges of its remission."

He contious with an obvious extension of Durkheins theory of sentiments, which we have already looked ~~out~~ at.

(9) Imposing severe penalties in criminals may also serve as a convinient and acceptable outlet for the pent-up hostilities and hatreds of general population. Although the purgative effects may be temporary, pressure is still derived from the knowledge that the criminal has gotten what he deserved.

Salvitz concludes.

(10) If the premise of retaliation were carried to it's logical extreme, a code of justice, founded on it would extend corporal and capital punishment, increase periods of imprisonment and make prison life even more miserable than it presently is.

It is necessary to note here that when these sociologists refer to "Society", they have in mind the members of the society. It becomes logical therefore to say that when one member of the society offends another member then punishment imposed on the offender should in some way or other satisfy the offended member as well as the rest of the members of the society. In this way, then there will be 're-establishment of things as they were' according to Durkhein. In the Reme reasoning. 'If payment of an offence is appropriate according to Salvitze (to both the individual member and the society) then 'Society is appeased and somehow gotten even.' The society will punish to defend itself (ie it's members). Durkheim has this to say on this preposition

(11) ... it is no longer to avenge itself that society punishes. It is to defend itself. The pain which it inflicts is in it's hands no longer anything but a methodical means of protection.

It punishes not because chastisement offers it any satisfaction for itself, but so that the fear of punishment may paralyse those who contemplate evil. Punishment destroys that which is a menace to society. It consists then in a veritable act of defence although an instinctive and unreflective one. Although punishment proceeds from a quite mechanical reaction, from monuments which are passionate and in great part non-reflective, it does or else serve quite **secondarily** in correcting the culpable or in intimidating possible followers. Its true function is to maintain social cohesion intact, while maintaining all its vitality in the common conscience. The result is this,

- (12) There exists a social solidarity which comes from a certain number of states of conscience which are common to all the members of the same society. This is what repressive law materially represents at least in so far as it is essential. The part that it plays in the general integration of the society evidently depends upon the greater or lesser extent of the social life which the common conscience embraces and regulates. The greater the diversity of relations wherein, the more also it creates links which attach the individual to the group, the more consequently social cohesion derives completing from this source and bears its mark.

The (13) art of punishing then must rest on a whole technology of representation. The undertaking can succeed only if it forms part of a natural mechanics ... the ideal punishment would be transparent to the **crime** that it punishes; thus for him who contemplates it, it will be infallibly the sign of the crime that it punishes and for him who dreams of the crime, the idea of the offence will be enough to arouse the sign of the punishment.

- 10 - E. S. Carlsson, Law and Structure of Social Order
(1956) (Stevenson, London) p. 2-3.

This is an advantage of the stability of the link, an advantage for the calculation of the proportions between crime and punishment and the quantitative reading of interests, it has the advantage that by assuming the form of natural sequence, punishment does not appear as the arbitrary effect of a human power. In this way, penalties will no longer proceed from the will of the legislation but from the nature of things. The punishment must proceed from the crime, the law must appear to be a necessity of things and power must act while concealing itself beneath the gentle force of nature. Punishment must bring with it a certain connective technique... Punishment must be adjusted to the individual character and to the danger it bears within him for others. The system of penalties must be open to individual variables. Having looked at sociological treatment of punishment and compensation, we shall now proceed to look at punishment and compensation under customary law in Kenya.

10 - Ibid p. 118

11 - Campbell and Miles, Law and Society, (Martin Roberts & Co. Oxford) p. 78
(1979)

12 - Ibid p. 80

13 - Michael Foucault, Discipline and Punishment
(1972) (Ferguin Books, Russell Watson, London) p. 104-107.

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FOOT NOTES

1 - K. S. Carltsen, Law and Structure of Social Action
(1956) (Stevenson, London) p. 5-9.

2 - Radcliff - Brown, Structure and Function in Primitive
Society, (Cohen and West - London)
(1952) p. 205.

3 - Ibid p. 209

4 - Durkheim, E, The Division of Labour in Society,
(1933) (Collies - McMillan, New York and
London) p. 69.

5 - Ibid p. 81

6 - Ibid p. 88

7 - Ibid p. 90

8 - Salvitz, L, Dilemmas in Criminology (McGraw - Hill
Book Co. New York and London) p. 113
(1967)

9 - Ibid p. 115

10 - Ibid p. 118

11 - Campbell and Wiles, Law and Society, (Martin Roberts
& Co. Oxford) p. 78

12 - Ibid p. 80

13 - Michael Foucault, Discipline and Punishment
(1972) (Penguin Books, Hezell Watson, London) p. 104-
127.

The Law can't be separated from the Religious Sanctions.
The Law is obeyed because only upon obedience will society
function and it is in everybody's interest to subscribe to its
regulations. Behind everything lies the religious sanctions
which depend on its validity on the theory that the society
is a continuous entity comprising the living and the dead.

CHAPTER II

PUNISHMENT AND COMPENSATION UNDER CUSTOMARY LAW IN KENYA

To customary or traditional Africa, Law comprises all those rules of conduct which regulate the behaviour of individuals and communities and which by maintaining the equilibrium of society are necessary for it's continuous as a corporate whole. African customary law is positive and not negative. Law doesn't create offences, it doesn't make criminals, it directs how individuals and communities should behave towards each other. It's whole object is to maintain an equilibrium, and the penalties of African Law are directed not against specific infractions but to the restoration of the equilibrium. There is no written code but the law is the an organic growth inherent in the body politic and accepted just because it is organic, coherent and traditional. In Hartlands words "primitive law is the totality of the customs of the tribe". It is always constructive and palliative.

A crime consists in the disturbance of individual or communal equilibrium and the law seeks to restore the pre-existing balance. The deterrent or purely penal theory does not enter into the question. Even homicide isn't punishable from this point of view. When a member of the family is killed the result is that the equilibrium has been disturbed. The law steps is to restore it either by the execution of the murderer or payment of compensation. The law is not penal or vindictive. The idea is to make punishment fit the crime. The law is interested in maintaining the status quo.

The law can't be separated from the Religious Sanctions. The law is obeyed because only upon obedience will society function and it is in everybody's interest to subscribe it's regulations. Behind everything lies the religious sanctions which depends on it's validity on the theory that the society is a continuous entity comprising the living and the dead.

It's therefore the duty of every member of the community to see that the law is obeyed. The law has the moral support not only from the living but the dead as well. This terrific antiquity, remote but ever present is itself a very potent force in securing due regard for the law: but it does more: it introduces a religious sanction which is perhaps the most potent factor of all. No compensation for an offence, no reparation is complete without sacrifice. Every offence has to be legally compensated and ceremonially purged and until both are done, the offender and his community are in danger of spiritual retribution.

Another reason why law is respected is that everyone of the same age group and status is answerable to an offence committed by one member, it is everybody's business to see that the laws are obeyed and if an offence has been committed, the group is equally liable to the spiritual retribution and sees that the requisite penalty is forthcoming, collective responsibility is therefore a potent factor in the prevention of crime and in the liquidation of the offence without extrenuous pressure.

Fear of ridicule and ostracism makes people respect their laws. This is effective because status is of peculiar importance in African society. The effect of ridicule and ostracism is to put the victim out of status and so no longer in a position to participate in communal activities until his offence has been purged and his his status restored. That incidentally is the reason why defamation is always one of the most serious of private offences, requiring a heavy compensation because the effect of defamation is to cut at the very root of group corporation and to deprive the defamed man of his proper status in the community.

It's therefore the duty of every member of the community, owing to the fact that he is one of the collective responsibility to report any breach of the public law of which the chief or group of elders take cognizance. As it may take some time for the process of the law to be put into action there is an obvious danger the culprit might suffer summary justice at the hands of the injured party, but provision is made for this by the establishment of sanctuaries, where an accused man may await in security the slow movements of the law. Everyone knows the law and the law is universally accepted. Only questions of fact are in dispute and once these have been established by arbitration, the legal sanctions are normally sufficient to secure compliance. African laws are changing and are more adaptable to changes. The system is living, a sentient organism, part of a general cultural complex based on the sanctions of its own which are not penal.

Each case of injury and of any offences required compensation to the injured party. There was no overriding monarchs or massonaries who would regard offences as acts against their authority. So every case was a civil one for damages, restitution or compensation. To punish an individual for a crime didn't equally settle any claim by an injured party (2) The principle of compensation was certainly equitable in a rough and ready made way and is certainly more intelligible to the layman than the complex precedents of English equity. The intervention of the government to punish the wrong does was a novelty.

Among the Turkana the Panel of elders decided the amount payable as compensation normally by a number of heads of cattle. If any one refused, the clan of the injured would enforce by taking such number of cattle.

A feast followed and reconciliation was effected. There was no distinction between civil and criminal cases (3) indigenous justice was mainly concerned with the adjustment of civil wrongs and in this category were included most of those acts which were regarded as crimes, such as homicide, theft etc. Those were treated as matters which could be properly settled by the payment of compensation. The idea of crime was not entirely absent for certain acts such as incest or practice of witchcraft were regarded as offences against the community as a whole, the only remedy for which was to eliminate the offender by death or punishment. Apart from such exception cases, however, punishment whether retributive or deterrent seems to have played little part in the public life of African community particularly among the Kenyan tribes. (4) Actually in some tribes, indigenous law did recognize the need for the detement penalties, but the need was met by increasing the amount of compensation payable to the injured party. Among the Meru, for example a person whose goat had been stolen was entitled to sue the thief for seven goats by way of compensation. Similary among the (5) Maasai, where a Maasai Moran stole a bull from his neighbour to slaughter and feast on it, the owner of the bull was entitled to recover five heifers and one bull from each of the persons connected with theft and from each of the persons who feasted on it regardless of wheather he knew the bull was stolen or not. Blood vengeance, that is, the death of one member of the tribe. The amount sought as compensation varied from tribe to tribe. Quantum of damages demanded for verbal and physical assault was largely arbitrary. (6) Among the Kamba, the whole judicial process was in two categories; private and public delicts. All private delicts were settled by arbitration and compensation although self help was resorted to in the unlikely event of failer of this process. Public delicts were settled both by arbitration and compensation or penal sanctions usually expulsion or death. Drastic measures were resorted to only if the offender persistently committed such an offence.

Alternatively the offender was expelled from the local community after which his homestead was destroyed. Death was the penalty only for punishment thieves, sorcerous or murders. A grave decision such as this was taken on oath and permission was to be obtained from the offenders nearest relative. If the relative refused, death could not be executed but he had to swear that the culprit will not repeat the same and that if the culprit repeats the same, consent to execute the sentence will not be withheld.

Thus the rare decision to apply this sanction was referred partially to the Super Natural, through the oath and hence responsibility for the death sentence was shifted to powers outside human control. We can therefore see the operation of organized restitutive sanctions. Among the Kamba, for example in the case of homicide, it was invariably settled with "Blood Money" or compensation. Blood Money was explained as follows:

- (7) Blood money exacted for a man's life ... is eleven cows and one bull which later goes to the elders ... about half as much is paid for a woman's life... four to five cows and one bull to the elders ... For children the same is paid as for adults of the same sex.

Blood vengeance, that is, the death of one member of the offender's kin group may be exacted for the crimes which result in death. But only the "younger men" who were hot tempered, hot blooded warriors were eager to follow this procedure, while the elder and more discreet and prudent elders of both parties tried to arrange an amicable settlement. This was a carefully calculated list of compensation. Payments for criminal assaults resulting in bodily harm were also settled by way of compensation.

Instead of an eye for an eye and a tooth for a tooth, the Kamba thought it more reasonable to argue "an eye for one bull and a goat." Lindblow comments in his book

(8) One of the most strongly predominating features of the ... Africans) ... intellectual endowment seems to be his legal mind. Thus the ... (Africans)... have legal customs and prescriptions corelated with the administration of the law which testify to extream penetration and a good power of judgment. The punishments inflicted are human and just. African law has accordingly attracted the attention of investigators and many of the modern European Jurists have not found it beneath their dignity to spend time in studying it. Many new ideas have been obtained from this source which it has been possible to incorporate into the law systems of Europe and thus is of special interest for the History and philosophy of law.

In the (9) Gikuyu society all criminal cases were treated almost in the same way as civil ones. The chief aim in proceeding was to get compensation for the individual or group against whom the crime was committed. Since there was no system of imprisonment, the offenders were punished by being made to pay heavy fines to the "Kiama", the deciding elders and compensation to right the wrong done. Murder and Manslaughter were treated the same way for the "Kiama" was not chiefly concerned with the motive of the crime nor the way in which it was committed but the fact that a man had taken another man's life. Premeditated murders were rare among the Kikuyu for it was a crime against the society for a man to strike another without warning him unless he was a foreign enemy. If a man killed another in cold blood, the murder was treated with the greatest contempt not only because he had disgraced himself but also his age-group.

Where two men were engaged in a fight and one of them died the murderer would be treated leniently. Normally the family of the deceased could invade and attack the family of the wrong doer with the intention of killing the murderer or one of his relatives. Alternatively the family of the deceased could invade the farm of the other family and cut down all the crops as a sign of mourning for the dead. But this was rare. The elders of the Peace Council always intervened to keep peace.

Universal rules were made fixing the amount payable as compensation for loss of life, according to sex. The rules aimed at punishing a murderer irrespective of whether he killed a man instantly or caused him to die of the wound inflicted in a fight. If a man wounded another seriously, he was asked to provide a male goat which was killed to supply nourishment for the wounded man. If the wound healed, that was the end of the matter, but if he died, the man was charged with murder because the providing of the male goat was regarded a way of pleading guilty to the charge.

The compensation of loss of a man's life was fixed at one hundred sheep or goats or ten cows. For a woman's life, thirty sheep or goats or three cows. The only exception was only when a man or woman was killed by poisoning or witchcraft. This was looked upon as a crime against the whole community and the penalty was by death or burning. Cases of personal injury involving any bodily hurt or cut without loss of a limb was not considered a serious crime for it was common especially for the Gikuyu or Maasai, where quarrels between two individuals or groups were always settled by a fight. In the case of loss of a limb or part of it there was a payment for compensation fixed for each limb or part of it.

As for loss of a finger, it was compensated with ten sheep or goats, for a tooth, one sheep or goat. The rules varied according to the wealth of each district.

The punishment for adultery or rape was that the man paid a fine of three fat rams to the Kiama and Nine sheep or goats to the husband or parents. In some cases, the offender was ostracised. This was a worse punishment. As for theft, much depended on what was stolen and the fines were fixed according to the article or the animal the thief had taken for example if a man stole a sheep, he was required to bring the original and another one to purify it. If the stolen sheep was slaughtered and eaten, the offence became serious and the thief and each of the participants were fined ten sheep or goats each. If a man stole honey from another's beehive, the fine was thirty sheep or goats. If a man found a thief stealing his property, he had the right to take the law into his own hand and beat the thief to his satisfaction, then living the thief to the kiama to be fined. The offender gave one fat ram to the kiama as court fees. If he became a habitual thief, he was killed publicly or burnt to death. In Gikuyu society, thieves and wizards were considered serious criminals and were to be killed.

Among the (10) Nandi, the general principle in dealing with offences against the person was compensation to the injured party or to his claim if he was killed. A man could retaliate if assaulted provided he did so at the time of attack, but assault when drunk or a result of mild provocation was not a defence and the assailant would pay compensation for any injury inflicted. A man could seek the forgiveness from the injured person otherwise he would be arraigned before the Kokwet elders. The most serious type of asult was that by a man of one age group upon a person of senior grade, next was asult by a person on another's wife. for a female, five head of cattle and four sheep or goats. One animal was paid to the kokwet elders.

Assault!

- 23 -

The penalty inflicted which was in form of compensation varied according to the extent of the injury, the number of persons injured and the property of the offender. If one or two people were affected, it was usually an ox. It was double this if three or more people were injured. A poor offender would be fined a goat or sheep or payment might be met by honey. If an animal was demanded it would be given to the injured person who would eat its roasted flesh or drink the blood which would give him more strength, the Kokwet elders a small portion. The same exaction was made even if the injury was accidental.

A man who injured his wife killed a goat and gave it to her to eat. The same applied if he injured his child. The clan of the person who was injured by assault and who subsequently died could claim blood money from the assailant or his clan. A man guilty of repeated serious assault was executed.

As for homicide, the principle was that the clan from whom a person was killed, whether deliberately or accidentally had to be paid blood - money by the clan of the person causing the death. Hence blood money was not payable if the person killed was of the same clan as the killer. In the latter case, a reduced compensation payment of two to three animals would be payable according to the circumstances of the case.

As soon as possible after the killing the person responsible of the killing or his near clan relative would pay one heifer to the deceased's family which served as an injunction against retaliation. The matter had then to be regarded as sub-judice until decided by the Kokwet elders. The amount varied slightly as follows: blood money for a male, five head of cattle and five sheep or goats; for a female, five head of cattle and four sheep or goats. One animal was paid to the Kokwet elders.

Distinction was also made according to whether death was caused by accident or deliberately.

Apart from exaction of blood money, there was no punishment except that a habitual offender was executed. After the Kokwet elders passed decision and ordered the blood money to be paid, it then had to be done fairly quickly if the offender had the goats and cattle to do so. If he had not enough he was allowed to pay in instalment until final claim was settled. If he refused to pay the clan of the deceased member was allowed to seize his livestock and transfer the ownership to the injured except in cases of borrowed animals which were allowed to be returned.

(11) Among the Wanyika, the penalty for murder is that from two to ten persons of the murder's family to be taken and given in the family of the murdered person. In default of this, the murderer himself must be handed over to be put to death. Boys handed over in the above manner among the Wandigo, were on coming of age permitted to return home but not so with girls.

The Wandigo drew a distinction between a murder committed in the heat of passion and in cold blood, the number of persons demanded in the latter case being four times that in the former. In the latter years (1897 - 1910) blood money was reckoned at one hundred "Joras of americane". Other smaller offences were punishable by fines.

Among the (12) Galla, blood, could only be wiped out by blood. This not infrequently led to length vendettas which disceded from father to son and one murder led many deaths. Manslaughter not amounting to murder could be forgiven. In cases of rape adultery the offender could be publicly thrashed by the offended father or husband.

In case of Wahoni (North Kilifi Creek in the South), in case of a murder, the murderer was handed over to be dealt with should the death have been caused by accident the person who caused it bound to produce another person to fill

the place of the dead man.

For rape, seven goats and if there was leech, fourteen goats. Among the Taita, the place of man murdered must be filled by another or compensation paid in cattle; in default of these two methods of compensation, the murderer is handed over to the family from who a man is murdered and put to death. If the death has been caused by heating with a club, compensation is reckoned at ten goats and a bullock; if by wounding with a knife, sword or arrow at one girl, one hundred goats and one hundred head of cattle. If any poison is administered internally the murderer is compelled to take the same poison. In the case of accidental homicide, the compensation payable is one child or two head of cattle and five goats. Other minor offences were punished by fines of which one-half go to the elders and one-half to the party injured, for example the fine for assault is one bullock and for rape, 2 bulls.

(13) Payment for blood money among the Luos was usually arranged among all the Kavirondo tribes by consultation among the elders. Should they decide that a man is guilty of causing the death of one of their people, he is required to pay anything upto twenty cows, according to his wealth. A man owning one or two cows would probably be required to pay all, if five, to pay four, if ten to pay seven and so on. The most usual number appeared to be ten head of cattle and five goats. If the murder paid half, the friends of the deceased could kill him or one of his relatives but the debt could be fully discharged by deviding the payment of the whole or the balance among the murderers relatives.

Punishment for murder among (14) Thaaka people (in Kitui) was by payment of compensation which was; for a man, sixty goats, for a woman fourty goats. For a child, the same number of goats was paid according to sex. There was no difference made for accidental killing, compensation being the same in murder.

ity, of the principles of right and justice. The law embodies these principles as they embody themselves in the incorporate community in the exercise of it's sovereign power.

For rape, seven goats and if there was issue, fourteen goats were paid. If the child died forty goats were paid for a male and twenty-eight goats for a female child. Any kind of injury to and part of the body was treated with some seriousness. For instance if injury resulted to loss of one finger, seven goats were paid to the injured person. If an eye or toe was lost, the same number of goats was paid. If injury resulted to loss of one leg, twenty-one goats were paid, and double that sum if both legs were lost. For loss of arm, the same number of twenty one goats was payable.

It is clear from the above discussion that each indigenous group had it's own custom, by which several types of modes of punishment and compensation were recognized preserved, accepted and respected. Why then shouldn't we attribute to custom the force of law?

In the first place, ⁽¹⁵⁾ custom is frequently the embodiment of these principles which have commended themselves to the National Conscience as principles of justice and public utility. The fact that any rule has already the sanction of custom, raises a presumption that it deserves to obtain the sanction of law also. Speaking generally, it is well that courts of justice, in seeking for those rules of right which it is their duty to administer, should be content to accept those which have already in their favour the prestige and authority of long acceptance, rather than attempt the more dangerous task of fashioning a set of rules for themselves by the light of nature. The national conscience may well be accepted by the courts as an authoritative guide and of this conscience, national customs is the external and visible sign.

Custom is to society what law is to the state. Each is the expression and realization to the measure of men's insight and ability, of the principles of right and justice. The law embodies those principles as they embody themselves to the incorporate community in the exercise of it's sovereign power.

Custom embodies the man acknowledged and approved, not by the power of the state but by the public opinion of the society at large. Nothing therefore is more natural than that where the state begins to evolve out of society, the law of the state should be in respect of its material contents be in great part modelled upon and coincident with the customs of the society.

When the state takes up its function of administering justice, it accepts as valid the rules of right already accepted by society of which it is itself a product and it finds those principles already realized in the customs of the health. In this connection, it must be remembered that at first, the state is so weak that its judicial authority depends partly at least on voluntary submission, whilst custom is so closely linked with religion and taboo that any departure from it is almost unthinkable.

When the state has grown to its full strength and sature, it acquires more self confidence and seeks to conform national usage to the law rather than the law of national usage. Its ambition is then to be the source not merely of the form but of the matter of the law also, but in earlier times it contents itself with conferring the form and nature of law upon the material contents supplied to it by custom.

Justice demands that unless there is good reason to the contrary, men's rational expectations shall so far as possible be fulfilled rather than frustrated. Even if some customs (eg. infanticide) aren't ideally just and reasonable, even if it can be shown that the national concience has gone astray in establishing them, even if better rules might be formulated and enforced by the wisdom of the Judicature,

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it may yet be wise to accept them as they are rather than to disappoint the expectations which are based upon established practice.

Considerations such as these are sufficient even in modern times and in fully developed legal systems to induce the legislature on due occasion to give express statutory authority to bodies of national or local custom.

Bearing this in mind the colonial government did recognize the modes of compensation that existed for long among the indigenous groups. (16) Provision was made in the colonial legislation for the African courts to award compensation for criminal offences and this was done often in situations where traditionally it would also have been appropriate. But customary law was to be applied only so far as it was not repugnant to justice or morality. The colonial government failed to realize that justice and morality are abstract conceptions and many community probably has an absolute standard of it's own by which to decide what is justice and what is morality.

As early as 1904, all magistrates were reminded to apply compensation in criminal cases. The (17) High Court circular Notice of that year provided as follows:

Magistrates are reminded that in all criminal cases, when it appears just that a sum of money should be paid to the injured party... the Court will impose a fine and will direct that a part or the whole of it when collected be paid to the injured party ...

The following circular, sent to all magistrates provided as follows:-

(18) Officers should be careful to remember that fines are only to be inflicted in proper cases as a punishment for offences and not to be looked upon as a source of revenue.

There are two circulars go to indicate the compensation was recognized at the early times and was the intention that this method should not die.

The case of A.I. M. Mwangera further illustrates Customary way of settling disputes was also safeguarded as early as 1919. The (19) circular to magistrates of that year provided:-

The attention of magistrates is invited to section 5(1) of Native Tribunal Rules 1913 (page 54, Laws of 1913) in which it is laid down that

"A council of elders shall have jurisdiction ... in petty criminal matters when both the complainant and the accused are members of the community over which the Council exercises jurisdiction".

This can be illustrated by the case of (20) R.V. Musinde. The case involved a Luyiah woman Mrs. Musinde who lived in their village with her children. Her husband was working in Nairobi at that time. She was known to be quarrelsome and bad. One evening she returned home to find that her children had poured sugar into the lunch porridge. To punish them, she tied their hands and pushed them into the hot embers of the fire place. They were badly injured. They ran to their grandmother who when she saw them cried hard and attracted the attention of the neighbours.

Mrs. Musinde used abusive language to everybody. The children were taken to the local hospital. She ran away back to her parents. The matter was taken to the local Mugutu (a Council of elders), who sent his young wingers to go and fetch her. They brought her back and proceedings commenced. It was found as a fact that she was the mother of the children and the children needed her care. She was fined one hundred and fifty shillings to be consumed by the Mugutu.

Her husband swore to see that she doesn't maltreat the children in such a manner.

The case of (21) R.V. N.K. Nyangera further illustrates recognition of customary mode of payment of compensation. In this case, the Plaintiff sued the Defendant and the Defendant's daughter for one-thousand shillings as damages because the Defendant had blinded the eye of the Plaintiff's daughter by accident. The parties agreed that under Luyia customary law, compensation for such an injury was a cow and a sheep. Nevertheless the trial magistrate awarded six-hundred shillings only because the injury was accidental.

However as is already pointed out earlier, after 1897, in Kenya, there was established a unified system of courts applying to basically unified systems of procedure and evidence, a unified procedure of criminal law. The penal sanctions availed are of Western type but there are some provisions^{ns} which still reflect the African altitude's thus the High Court and the lower courts are authorized to promote the settlement, of criminal cases by reconciling the parties and compensation may be awarded to victims of the crime on a scale much wider than that applicable in English law. Section (22) 3(2) of the Judicature Act provides:-

The High Court and the subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it and so far as is not repugnant to justice and morality and isn't inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

innovation. We wish to give no shock to the prejudices of any part of our subjects.

Section 2 of the ⁽²³⁾Magistrates Courts Act outlines customary claims which also include ⁽²⁴⁾customs recognized under customary laws of any tribe in Kenya.

This was reiterated by the then Chief Justice in a circular to all magistrates which read as follows:-

Customary law is part of Kenya law. It was in the past administered by and large by African courts whose members were part of the general population of the arrears served by such courts ... It is necessary that in cases involving customary law trial courts should place on record all the evidence on such law that is offered by the parties. In the event of an appeal, the record will be useful to the parties as well as the Appellate courts... ⁽²⁵⁾

Under customary law, social conformity therefore was ensured by positive sanctions. Tort and "Criminal" offences were in general regarded as disturbances of social equilibrium and treatment was therefore concerned fundamentally with restoring the status quo. The principles employed may be summarised as follows:-

reconciliation, restitution, compensation to the individual or his family, compensation or fine to the community, social ostracism or public ridicule.

Speaking on inadequacy of imported English principles, ⁽²⁶⁾Arthur Phillips, pointed out that the object should be to encourage and promote the adaptation and amendment of customary law rather than to superimpose an alien and conflicting "European Law", Reporting on an earlier observation, he concluded

"Whether we assimilate those systems or not, let us ascertain them, let us digest them. We propose no rash innovation. We wish to give no shock to the prejudices of any part of our subjects.

Our principle is simply this: Uniformity where you can have, it, diversity where you must have it, but in all cases certainty."

Journal of Comparative Law and Legislation

We shall now examine punishment and compensation in Kenya today in the next chapter.

- 1 - Journal of Comparative Law and Legislation, 1962 p. 192 - 209
- 2 - Arthur Phillips - Report on Native Tribunals (Government Printer 1945) para. 255
- 3 - Ibid para. 4795
- 4 - Ibid para. 419
- 5 - Siaby Peter, - Fundament in Africa
- 6 - Siadblon G., - The Akamba, An Ethnological Monograph 1970: 154
- 7 - Ibid p. 152
- 8 - John Kenyatta, - Facing Mount Kenya. (Martin & Secker, London 1938) p. 123 - 125.
- 9 - Brell, - Gadi Customary Law (Kampala, East Africa Literature Bureau, 1974) p. 5265
- 10 - I K.L.R. 98
- 11 - I K.L.R. 101
- 12 - II K.L.R. 141
- 13 - III K.L.R. 119
- 14 - Atiyah Gerald - Salmond on Jurisprudence 12th Ed. 1966 p. 189 - 193, 198 - 203. "Reasons for reception of customary law."

CHAPTER TWO

FOOT NOTES

- 1 - The African Conception of law
Journal of Comparative law and Legislation
vol 16, 1934, p. 230 - 245.
- 2 - 6E.A.L.J. 1962 p. 192 - 209
- 3 - Arthur Phillips - Report on Native Tribunals
(Government Printer 1945) para. 255
- 4 - Ibid para. 4795
- 5 - Ibid para. 419
- 6 - Rigby Peter, - Punishment in Africa
- 7 - Lindblon G., - The Akamba, An Ethrological monography -
1920: 154
- 8 - Ibid p. 152
- 9 - Jomo Kenyatta, - Facing Mount Kenya.
(Martin & Sockar, London 1938) p. 123 - 125.
- 10 - Snell, - Nandi Customary Law
(Kampala, East Africa Literature Beureau, 1954)
p. 6265
- 11 - I K.L.R. 98
- 12 - I K.L.R. 101
- 13 - II K.L.R. 141
- 14 - III K.L.R. 119
- 15 - Fitzgerald - Salmond on Jurispudence
12th Ed. 1966 p. 189 - 193,
198 - 203. "Reasons for reception of customary
law."

- 16 - Milner, - African Penal System p. 184
(Routledge & Kegan, London, 1969)
- 17 - High Court circular notice number 15 of 1904.
- 18 - High Court circular notice number 16 of 1904
- 19 - High Court circular notice number 2 of 1919.
- 20 - Kakamega Magistrate court of Africans criminal case No. 140 of 1966.
- 21 - Kakamega magistrate court of Africans criminal case No. 132 of 1966.
- 22 - Chapter 8 Laws of Kenya.
- 23 - Chapter 10 Laws of Kenya.
- 24 - 6 E.A.L.J. 1968 p. 14 - 20.
- 25 - Circular to magistrates number one of 1968.
- 26 - Arthur Phillips; - Report on native Tribunals para. 853

No doubt, as was pointed in case of Wainwright v. Muriuki, the Attorney-General these alien laws were unfit in African society and careful examination was required before expecting any good results from their application. In the above case, the following was observed ...

... it is a recognition that the common law can not be applied in a foreign land without modification. Just as an English oak, so with the English common law,

You can not transplant it to the African continent and expect it to be of the same character which it has in England. It will flourish indeed but it needs care-
CHAPTER III
PUNISHMENT AND COMPENSATION IN KENYA TODAY

Prior to colonization the indigenous African tribes enforced their own customary laws through their own courts. As has been seen in the earlier chapter, in Africa, no clear lines were drawn between criminal and civil wrongs. The law was dominated by the idea of compensation to counterbalance the loss and restore amity in the local residual group.

During the colonial period, a (1) penal system was introduced that dealt with punishment and compensation. This is the system that is still applied today.

Generally speaking, the aim of penal sanction is to reduce crime and maximize social security and harmony. This is based on the wrong idea that the government is entrusted with the task to punish the individual for the offender and that the pain suffered by the offender satisfies the offended person. The colonial and post - colonial government failed to realize that Kenya had a different legal thinking and therefore ought to have cautioned themselves while applying their alien laws in Kenya. Any person convicted of murder shall be sentenced

No doubt, as was pointed in case of (2) Nyali LTD. V. The Attorney-General these alien laws were unfit in Kenyan society and careful examination was required before expecting any good results from their application. In the above case, Lord Denning observed ...

... it is a recognition that the common law can not be applied in a foreign land without considerable qualification
Just as an English oak, so with the English common law.

You can not transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending. So with the common law, it has many principles of manifest justice and good sense which can be accepted all the world over; but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far off lands, the people must have a law which they understand and which they will respect.

Looking at the various penal sanctions under the penal code, it will be observed that Kenya's treatment of both offenders and offended has been nothing less than inflicting pain on the offenders.

(a) PUNISHMENT FOR MURDER AND MANSLAUGHTER:

Under Section 203 of the Penal Code,

Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.

Section 204 of the same code provides the sentence for murder:

Any person convicted of murder shall be sentenced to death.

Under Section 25(1) of the same code, death shall take effect by the manner prescribed by the law. This is normally done by hanging by the neck until the victim dies. Only two categories of people are exempted from capital punishment. These are under section 24 of the Penal code, a pregnant woman and or a persons under eighteen years of age.

Why did the colonial government apply this new method of 'murder for murder' instead of blood money for murder? This is a question that was asked by the colonial magistrates as early as 1907. The circular ⁽⁴⁾ to magistrates of that year replied the question as follows:

The question you raise is one of great interest but the solution of it presents difficulties that need careful handling. When the old order changes giving room to new and especially where civilized forms of thought and government are imposed upon the traditional ideas of rough justice common among African natives!! it is necessary to proceed slowly and with care. The idea of blood money being paid as compensation to the relatives of a man who has been killed is very old and exists today pretty nearly everywhere among uncivilized or semi-civilized natives. But as soon as a government on an ordered basis assumes control and is able to maintain the peace and punishes breaches of it, the matter assumes a somewhat different aspect. It is no longer a question of compensation, to a private family that has been weakened by the loss of some of it's members but it is a question of the government making life and property secure and maintaining the Kings peace. The wrong done ceases to be merely a private wrong and becomes a public wrong for the prevention of which the government makes laws and where these laws are broken, it is the government that prosecutes, so long as the government has not the power to enforce it's laws, it is bound in order to maintain some semblance of order, to counterbalance and enforce the native systems of punishment; but this is only until it is in a position to exact obedience to it's own laws...

The circular explains the purpose of applying murder instead of blood-money.

Can we then justify such a kind of punishment that is incapable of compensating either the deceased or deceased dependants? The answer is No!

Moreover empirical evidence is abundant that the majority of murders are abnormally psychological men who should not be held responsible for their actions and if they are abnormal, they need treatment. Murder is the result of abnormal mental reactions which are in existence before penetration into the crime.

(7) Infliction of the penalty has no proper justification. It greatly violates the offenders fundamental right to life. It is contrary to the highest concept of Judicial Christian Ethics - "thou shall not kill."

(5) Martin Ennals, secretary of Amnesty International asserts that the death penalty is in all it's 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 violation of fundamental human rights. He says

"... Every execution whether it takes place on the gallons or in the street, whether it results in a decision taken publicly by 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 principle victim came from the poor and members of the minority and oppressed groups within the society."

Capital punishment has achieved nothing more than revenge. Capital punishment does not compensate the deceased in any way or form or his dependants.

Today the state is looked upon as too new a political entity or too old a traditional alien body to inspire confidence in relieving the aggrieved. A criminal remarked in capital punishment;

(6) "It seems that by killing a murderer the government is making the murderer suffer. But for me if my son has been murdered there is nothing, neither the government or the murderer pays me anything."

(7) Jeremy Betham has also remarked this;

"Error is possible in all judgments; in every other case of judicial error, compensation can be made to the injured person, Death admits of no compensation."

This is true if we take into consideration that the offender who is supposed to compensate the complainant or his dependants is no more. And when the offender is killed it becomes nonsensical to apply the provisions that provide for compensation.

I am of the opinion that capital punishment be abolished and a better sentence be provided where the aggrieved party or parties may be compensated. I would suggest that any person convicted of murder serve a life imprisonment with hard labour. The convict must be paid for the work he does and the payment should be on a monthly basis or in accordance with ordinary or normal course of business, for example, if the convict works in a carpentry department, after the sale of the goods that he makes the money realized must be paid to him indirectly. The money should be proportioned as follows:

One third of it to meet or support himself in prison, one third to support his family or dependants at home and one third to support the family of the deceased or his dependants. A scheme on this kind of payment can be effected as I will indicate later. (8) *→ No. there will be many ppl willing to murder & esp. the desperate unemployed - point (use your brains!)*

Closely associated with the offence of murder is that of manslaughter. Section 202 (1) of the Penal Code provides

Any person who by an unlawful act or omission causes the death of another person is guilty of a felony termed manslaughter. *to imprisonment for life.* Section

The sentence under section

Any person who commits the felony of manslaughter is liable to imprisonment for life, under Section 202 (2).

An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

Looking at the above two sections dealing with murder and manslaughter, it will be seen that when punishment is inflicted, there is a guiding presumption that the convict acted wilfully, voluntarily or intention^{ally} any. It is contended that though acting intentionally might be necessary for the charge of responsibility, in some cases, a person is unable to resist criminal forces which induced him to commit a crime. For instance, where a man finds another man in bed with his wife and kills him - this one who kills will be guilty of manslaughter and will be sentenced to life imprisonment. The sentence no doubt is unnecessarily harsh and this man should go free.

My suggestion then is that the sentence of manslaughter is unnecessarily harsh. It should be reduced to a number of years the courts find just and reasonable to impose taking into account the merits and circumstances surrounding each case.

Under Section 253, any person who with intent to commit
The same way of compensation as suggested above should also
be applied.

PUNISHMENT FOR ASSULT: (Assault)

The Penal Code defined several types of assault. Under
Section 250, any person who unlawfully assaults another is
guilty of a misdemeanor and if the assault is not committed
in the circumstances for which a greater punishment is
provided, is liable to imprisonment for one year. Section
257 of the same, provides that any person who commits an
assault occasioning actual bodily harm is guilty of a
misdemeanor and is liable to imprisonment for five years
with or without corporal punishment.

Under Section 298 of the same, any person who assaults
any person with intent to steal anything is guilty of a felony
and is liable to imprisonment for five years. Under Section
234, any person who unlawfully does greavious harm to another
is guilty of a felony and is liable to imprisonment for life,
with or without corporal punishment.

Under Section 236, any person who unlawfully, and with
intent to injure or annoy another causes any poison or noxious
thing to be administered to, or taken by, any person and
thereby endangers his life or does him greivous harm is
guilty of a felony and is liable to imprisonment for
fourteen years. Under Section 237, any person who unlawfully
wounds another or unlawfully and with intent to injure or
annoy any person, causes any poison or other noxious thing
to be administered to or taken by any person is guilty of
a misdemeanor and is liable, to imprisonment for five years,
with or without corporal punishment.

Under Section 253, any person who with intent to commit a felony or assaults any Police Officer in execution of his duties or assaults any person in pursuance of any unlawful combination or conspiracy to raise the rate of wages or to assaults any person in execution of his lawful duty or assaults any ^{person} ~~lesser~~ on account of any act done by him in the execution of any duty imposed on him by law, is guilty of a misdemeanor and is liable to imprisonment for five years.

It is necessary to point out here that the above outlined crimes are referred to as criminal cases. Criminal cases were intended to be cases against the state. That is why whenever a person complains of murder or assault, the state is always the complainant through the various police stations that we have in Kenya. This is a colonial mentality. To imagine that when any one or more persons assaults any other one or more persons the state feels the bodily and psychological pain is a serious misdirection. This kind of procedure should be amended so that a person complains against a person in criminal cases; through the various police stations. May be in this way the courts will see the sense of adequately compensating the complainant in regard to the degree of blame if any, injury and pain suffered in commission of the said offence.

The most peculiar punishment indicated in the penal code is imprisonment. Prison institution is alien to Kenya. Imprisonment is one of the various custodial sentences. The institution is directed at transforming "self-will" outcasts into useful citizens, at protecting society and detering the strong and the weak from the work of crime, with fairness and firmness aimed at rehabilitation and deterrence. It involves the holding of a person from the time of his conviction to the time of his discharge from prison.

The institution has grown steadily as the standard mode of treatment. It is an exercise of force (implied or express) by which a person is deprived of his liberty, compelled to remain where he does not wish to remain or to go where he does not wish to go.

Imprisonment originated from an interest to put an end to inhuman brutality that was characteristic of punishment at a particular period in Europe. It advocated an eye for an eye and a tooth for a tooth.

The proponents of imprisonment have said that this aims at rehabilitating the prisoners. Supporting this view, the then Minister for Home Affairs, Mr. Stanley Ole TipTip said:

"Prison duty is to rehabilitate the 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."⁽⁹⁾

Reiterating the same point, Mr. Andrew K. Saikwa, the then Commissioner of prisons said,

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 interest in protecting itself, and yet would provide maximum opportunity for individuals 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 discouraging in each individual inmate his positive potentials and developing them as far as possible in the settling of a penal treatment towards his rehabilitation.⁽¹⁰⁾

Prisons are here to stay and there is no way we can abolish them. But the institutions should be seen from a productive angle.

The question that is raised here is wheather the system takes into account the position of the offended party. As indicated earlier, the wrong assumption is that the state feels the pain when a person injures another. This assumption must be dropped.

Prisons have not succeeded in helping the prisoner to respect himself or others. That explains why there are cases where the individual offender has more than one previous conviction and some go to more that ten previous convictions. ~~The pinch of compensating the offended.~~

It is observed that there are so many serious ills of imprisonment. Among them, is for example, denial of liberty, freedom of what to eat cloth or need. Prisoners are forced to adopt a different kind of live. For those who have families, they are denied right of access to their families, deprived of sexual gratification or rights of consortiam. They are physically and psychologically tortured. Among the many evils, they are forced to take to homosexuality.

All this destroys the offenders confidence in life. Many ever after completing their jail terms continue to live as outcasts and hence failer in life.

Even the so called training program, where prisoners are taught some kind of skills are short sighted and short lived. The trainings are given to all inmates unrespective of crimes committed and sentences being served by each. This is quite absurd. Some go in for quite a short time that they will have learnt almost nothing by the time they complete their terms.

Prisons are here to stay and there is no way we can abolish them. But the institutions should be seen from a productive angle.

The issue of flogging was discussed in colonial time. They should be seen as a means through which the offenders are made to understand that they are doing what they are, so as to compensate the wrong they have done to the offended parties. They must be shown that they are restoring and putting back to normal the social equilibrium that they have disturbed only in this way can we then talk of rehabilitating the offenders.

Prisoners should cease to be treated as outcasts. Conditions in prisons must be improved for instance, Rule 58 that prohibits visitors and letters to and from the prisoners should be relaxed. Prisoners should be allowed to be visited more frequently by their relatives and friends than they are allowed today. As for married men and women, should be allowed to go and see their wives and husbands once in a while so as to fulfil some of the basic necessities of marriage.

Prisoners should be more decently dressed and among others, shaving of the head should cease to be applied. This was a colonial mentality that was supposed to make the offender feel ridiculed by that practice. Today, we are talking of rehabilitating and compensating the aggrieved, an affair more centred between the offender and the offended. And therefore there is no need of unnecessarily subjecting the offender to more torture. The cost he is paying to the offended person through that institution called prison is enough.

The other kind of punishment especially for assault is corporal punishment. This is administered in accordance with section 24 and 27 of the Penal Code. Males under eighteen years old or where the offender is unfit are exempted. Flogging for different ages of persons is administered as may be approved by the minister. Flogging should not be administered in default of a fine.

The issue of flogging was discussed in colonial time and as early as 1905, the attention of magistrates was called to the fact that more discretion should be used in awarding the punishment of flogging. In certain cases for brutal crimes, flogging was applied within bounds as a useful and salutary form of punishment. Magistrates were therefore requested when awarding sentence to consider each case with reference both to the offence committed and the position in life of the offender, whether it requires punishment of flogging.

The circular to magistrates of 1911 also read as follows:

- (12) Her majesty's secretary of state desires that magistrates should be instructed that they must not regard flogging as an everyday occurrence to be freely administered, but a serious and exceptional form of punishment to be employed only in special cases ...

The objective of flogging is to inflict pain and suffering upon a convict for deterrence, expiation connection and to bring reform.

It is nothing more than revenge. It simply damages the body, it's administered violently and mercilessly. It brings hatred to officers administering it, the magistrates and the police. It should be abolished since it doesn't not help in any way either to redress the wrong done or compensate the offended party. It should be administered only and only if the offender is a total nuisance or scare to society or where offender has lost his sense of humanity and mercilessly attacks and injures everyone he finds around him. If it helps the offender to settle in society without violating the interest of the other members of the society, it should be applied, otherwise should be abolished.

Before dealing with compensation in Kenya, let us first look at the purpose of punishment in Kenya.

The purpose of punishment in Kenya was discussed at length in the case of ⁽¹³⁾ R V. Abdul Mohamed Rahim, Simpson J. said:

"Reformation is a fair enough consideration but not the main object of penalties in criminal cases. One of the aim of punishment is to deter the individual offender and to deter others who may be tempted to commit similar offences. It is an important function of any state to protect it's citizens. This involves protection of the society from crime and criminals' courts being an important organ of the state have the duty to see that members of the society are protected from the repetition of offences. It then becomes right for them to achieve this by imposition of preventive sentences and particularly long terms of imprisonment; one consideration that plays an important role is the need to remove the offender from the Society. However the punishment for great crimes should adequately reflect the revision felt by the great majority of the citizens for them."

No mention is made here for the aggrieved party's interest. No compensation is provided for.

COMPENSATION

Section 31 of the Penal Code stipulates as follows:

"Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence and such compensation may be either in addition to or in substitution of any other punishment."

This section may be ^{read} ~~need~~ together with section 24 which provides:

The following punishment may be inflicted by a court:-

(g) "Payment of compensation." Section 175 of the ⁽¹⁴⁾ Criminal Procedure Code has this to say

"Whenever any court imposes a fine or confines on appeal, on revision or otherwise a sentence of a fine or a sentence of which a fine forms part, the court may when passing judgment order the whole or any part of a fine recovered to be applied.

(b) "In the payment of any person of compensation for any loss or injury caused by the offence when substantial compensation in the opinion of the court is not recoverable by a civil suit".

At first sight, section 175 of the Criminal Procedure Code gives power to court to award compensation from a fine. The courts have not taken this view. In the case of ⁽¹⁵⁾ Ahmed Mohamoud V.R., The court observed that;

"in a criminal case involving compensation, the court can't determine whether damages are recoverable and the Plaintiff could file a civil suit."

Similar in the case of ⁽¹⁶⁾ R.V. Kondone, the court of appeal held that

"the imposition of a fine to an award of imprisonment so as to provide a fund out of which compensation is to be paid has always been discouraged in East Africa. There is no provision whereby the court can order the prosecution to pay compensation to an injured party."

As would be expected, the section has ceased, for all practical purposes, to be applied in Kenya.

the acts of the litigants by the measure of certain legal norms.

The Section 176 of Criminal Procedure Code speaking on promotion of reconciliation between the two conflicting parties provides as follows:

At this stage there is little room for reconciliation because In all cases, the court may promote reconciliation to encourage and facilitate the settlement in an amicable way of proceedings for common assault or for any other offence of a personal or private nature not amounting to a felony and not aggravated in degree on terms of payment of compensation or other terms approved by the court and may there upon order the proceedings to be stayed or terminated."

It has been (17) observed in social life, courts are a ^{means} mesne of social control aiming at preservation of peaceful co-existence of the members of the community despite divergent interests. This is not the ^{truism} truism it sounds particular with regard to the study of law and the court. If one considers that

"In Western (or at least English) legal procedure (which one might add is in some categories of courts largely in the hands of a highly specialized class of professional lawyers), litigation is treated as a sort of game, with the Judge as empire holding the wistle, blowing when one party gets off-side and awarding the victory to the side that scores most goals."

On provisions relating to reconciliation when a dispute reaches the court, it enters on a more formal stage of judicial process viz, the judicial examination.

Any court hears the litigants stories, determines the legal points at issue, selects the appropriate legal rules and applies them to selected facts. Finally the courts must pronounce on the rights and wrongs of the case, judging the acts of the litigants by the measure of certain legal norms.

The courts uphold the law in order to fulfil its task of regulating relationships.

At this stage there is little room for reconciliation because though legal rules may be bent, for example, by interpretation, they can not be ignored; the court is primarily concerned with interests lying beyond, those of the litigants and it's concerned with the rights and interests of all persons who organize their lives on the assumption of the general and persistent validity of the rules which the court is called upon to defend.

It has been pointed in case of R.V. Abdul Mohamoud Rahim that among other purposes of punishment is the need to remove the offender from society. Bearing also in mind that the courts ^{are} ~~use~~ primarily concerned with interests beyond those of the litigants, the talk of reconciliation loses meaning. Moreover the section above quoted provides that only in those cases where the offence doesn't amount to a felony or/and not aggravated in degree on terms of payment of compensation. The courts are therefore limited on where to reconcile the parties and where not to reconcile them.

Reconciliation therefore might be attempted before the case opens up for hearing. My view is that except in cases of murder or manslaughter, all other cases, no matter what the parties agree to pay to one another as compensation, reconciliation should be allowed. For this purpose, the courts should encourage more reconciliation, while doing so, highlight the advantages of doing so, before they decide to open up the case for hearing.

Section 171 (1) of the Criminal Procedure Code, referred, provides as follows:

It shall be lawful for a Judge of the High Court or a magistrate of subordinate court of first, second or third class, to order any person convicted before him for an offence to pay to the public or private prosecutor as the case may be such reasonable ^{costs} courts as such Judge or magistrate may seem fit in addition to any other penalty

provided such costs do not exceed two thousand shillings in case of High Court or five hundred shillings in case of a subordinate court.

What causes alarm in this section is the limitation imposed on the amount payable as costs. It can be said that this amount was meant to apply when we started applying the criminal Procedure Code. As such, as of today, the amount should be for more than that in the provision since our economy has risen so high. That two thousand shillings of those days could be equivalent or something like twenty thousand shillings of today. Therefore the sum in the provision should be increased as time goes by ^{leaving} in mind ^{and} taking into consideration such matters as current expences incurred or injury, pain and suffering caused the complainant.

As far as anests ~~On~~ insufficient grounds is concerned, Section 64 (1) of Civil Procedure Code provides:

Where is any suit in which an arrest in attachment has been effected, or a temporary injunction granted under section 63 of this act -

- (a) It appears to court that such arrest, attachment or injunction was applied for on insufficient grounds; or
- (b) the suit of the Plaintiff fails and it appears to the court that there was no reasonable or probable ground for instituting the same, the Defendant may apply to court, and the court may upon such application award against the Plaintiff by it's order, such amount not exceeding two thousand shillings as it deems a reasonable compensation to the Def' for the expense or injury caused to him.

Again the sum is manifestly inadequate and the question of limitation of the same payable becomes paramount. As Lee ⁽¹⁹⁾ said earlier, the amount was meant to apply at a particular economic period that was totally different from this one of today. This small amount causes the section to fall into disuse. Additionally, the fact that if compensation is awarded under it, no other sum can be sued for, leaves this section unused.

When any innocent persons suffer any injury of this nature, the court in considering the amount payable should consider among others the pain suffered both physically and psychologically, any form of torture, social status, social embarrassment and any other inconveniences disclosed by any such person. The amount payable should be increased so as to satisfy the complainant and that which will leave as little bitterness as possible that he might have heard in such an arrest.

The new Section ⁽²⁰⁾ 47(A) of Kenya Evidence Act introduced in 1969 provides assistance in proceeding on a claim for compensation of injury suffered. It provides as follows:

A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall often expiry of the time limited for an appeal against such judgement or after the date of the decision of any appeal therein, whichever is the latest be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.

This section was discussed at length in the case of ⁽²¹⁾ Moses Chege V. Beth Njoki. In this case, the Plaintiff sued the Defendant for civil damages for an assault allegedly committed jointly with two others on him on the 9th February, 1975. The Defendant who had been convicted of unlawfully causing grievous harm and was ultimately fined one thousand shillings or six months in default now sought to deny the said assault.

It was pointed out that she could not do so because of section 47 A of Kenya Evidence Act, infra. On the authority of (22) Queens Cleaners V. East African Community and others, the Defendant, having been convicted with two other persons on the 25th June 1975 in criminal case (Nairobi 1235 of 1975) is not estopped from denying the assault upon which that conviction was based. I quote the following passage from the judgement of Trevelyan, J. provided that when one fact

is declared by law to be conclusive proof of another fact I can see how the law can have the effect of making the proof and conclusive evidence of the subject matter of dispute, qualification or challenge. The word "Conclusive" has a number of meanings, such as final, that closes the question, and decisive, and in the content of the section "Conclusive evidence" is evidence of such a nature. It would therefore be wrong to admit evidence to explain why a plea of guilty was tendered for it and would at least go to qualify if not to nullify what the legislative has decreed shall be conclusive".

That decision is therefore as clear as anything can be, that however much a court may feel that anybody would not be shut from arguing his case, whatever may have transpired in the earlier proceedings, the subsequent court is not entitled to go behind the decision and enquire into the reasons for conviction.

So in this case, the fact of the assault of which the Defendant was found guilty, jointly with others cannot now be denied.

The meaning of the words "Conclusive evidence" was at issue in the case of (23) Kev V. Mottran, Simonds, J. did say: will be left uncompensated for, even after conviction of the offenders. This is what I observed in Nyeri District Magistrate court, where I did my fourth term program.

In the case of (24) R.V. Lawrence E. Nyori, a dispute arose "I have no doubt that the words 'Conclusive evidence' brother mean what they say; that they are to be a liar to any to use evidence being tendered to show that the statements brother in the minutes are not correct." According to look for it Accordingly the words in our statute admit of no doubt and the foregoing lends further support to the finding of Trevelyan, J., if such were needed; for sub-section 3 of section 4 of our Evidence Act provides that when one fact is declared by law to be conclusive proof of another (and I can see practical distinction have between conclusive proof and conclusive evidence). The court shall, on proof of the one fact, regard the other as proved; and shall not allow evidence to be given for the purpose of disproving it.

In those circumstances, the Defendant may not give evidence to ^{assault} the contrary of what the criminal court found against her, namely the assault on the Plaintiff.

PUBLIC KNOWLEDGE OF RIGHT TO CIVIL DAMAGES.

It is clear that the system in Kenya is so British that the assaulted person has to start all over again to sue the offender for damages. Moreover very few people know that they can open up a civil case for recovery of damages after the offender is convicted. For others who may know, they are afraid that the procedure of opening up a civil case may be too expensive to follow or else the courts might take so long before they finally award such damages. For other who would wish to hire advocates the fee required by those advocates, that has to be paid before an advocate can attend to those proceedings is so high that few will afford.

It is in those circumstances that many offended people will be left uncompensated for, even after conviction of the offenders. This is what I observed in Nyeri District Magistrate courts, where I did my fourth term program.

In the case of (24) R.V. Lawrence K. Kingori, a dispute arose between the accused and the complainant who was the accused brother's wife over a shaving machine. The accused wanted to use the machine which was at the material time in his brother's house. He wanted the complainant to look for it and give it to him to put it in use. She refused to part with the machine as her husband would have been furious with her if she parted with it without his consent. There followed a bitter exchange of words after which the accused started beating the complainant.

The complainant tried to flee for safety and the accused took a piece of wood, threw it to the complainant and hit her on her forehead. She sustained a serious injury. The accused was charged before the court with common assault contrary to section 250 of the Penal Code. He pleaded guilty and was fined three hundred shillings. The parties went home. No civil case was ever opened up. That was the end of the matter.

A similar case was that of (25) R V. Gakuru Mathenge, where the accused and the complainant were brothers. The two had long term land dispute which was settled by the clan elders. The accused was dissatisfied with the award of the elders and decided out of sheer malice, to take revenge in inflicting harm against the complainant. He therefore attacked the complainant with a panga. He inflicted a deep cut on the complainant's head.

The accused was arrested, brought to court and charged with assault causing grievous bodily harm contrary to section 234 of Penal Code.

He pleaded guilty. Unfortunately the medical examination form indicated the name of the accused instead of the complainant as the one with a deep wound.

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Clearly this was a technical error and the learned magistrate went ahead and acquitted the accused basing his reasons of doing so on this error.

Erastus Mwangi, the accused and the complainant were

The complainant whose age appeared to be more than sixty years old, went home. He never brought a civil suit for recovery of damages.

The above two cases are ones that involved relatives. The court should have shouldered the responsibility of trying to reconcile the two conflicting parties and encourage them to agree as to what award of damages each should pay to the other. This the court failed to do, exemplifying a serious weakness in our Kenyan courts. That is why it has been argued earlier that it's almost impossible to see the courts as institutions that will bring about any form of reconciliation. Reconciliation can only be attempted before the court open up the case for hearing.

In the case of (26) R.V. John Gakui and Another, the two accused persons attacked and beat up the complainant who was selling in a bar. The two were charged with assault causing actual bodily harm contrary to section 251 of the Penal Code. They were both convicted and each sentenced to three and a half years imprisonment. They did not appeal. The complainant did not file a civil suit for recovery of damages.

One common feature in these three cases is that the parties were not legally represented. If they were, they would have been advised to open up a civil case. Since majority of the people (complainants) can not afford the fees of a legal council in every court, ^{there should be an advocate} to represent the interests of the injured party when such matters as compensation or compromise arise. Among other things, the council should advice the injured parties on their rights and claims in courts.

However if we look back to the old days, we find that if a man committed a crime, he was often forced to come to a compromise in court. In the case of (27) R.V. Erastus Mwangi, the accused and the complainant were schoolboys, over the age of eighteen years. They were cousins. A brief argument arose between them. They disagreed and one wanted to fight with the other. The complainant held himself together but the accused, whose fury overpowered him pushed away the complainant. The complainant fell down, broke one of his teeth. The accused was charged with assault causing greavious bodily harm contrary to section 234 of the Penal Code.

The parents of those young boys decided to compromise, they begged the court to allow them to do so. The charge was substituted for a lesser charge of common assault under sections 75 - 79 of criminal Procedure Code so as to reconcile under section 176 of Civil Procedure Code. The parents of the accused agreed to shoulder the responsibility of replacing the broken tooth with a nother one.

This case illustrates the failer of the courts to do their duty of encouraging parties to reconsile. This kind of irresponsibility by the courts may be explained by the fact that all the magistrates and the prosecution are interested in seeing the accused suffer pain and humiliation. Time is now ripe for the courts to take seriously the interests of the injured party.

OTHER OFFENCES.

There are several offences against morality that deserve mention here. These include indecent assault on females, rape, defilement of young girls and defilement of idiots. These are cases where reconcillation is impossible. The offences are of a more serious nature.

However if we look back to the old days, we find that if a man committed such an offence with unmarried girl, there was payment to the father of the victimised girl which was followed by a religious ceremony to cleanse that evil. There could also be made such payments as of today. I would also suggest that people who are guilty of such an offence receive a heavier sentence than in those cases of assault. The reason here is that the person so convicted must suffer for what he has done since on the other hand, the victim of such offences may take so long to forget that such a thing happened to them.

While awarding compensation to such injured parties, regard should be had to the following among other things; injury, pain and suffering, mental torture. In case of virgins, that they have been deflowered against their will. That their feelings and pride have been wounded, their social and may be marital status have been dishonoured, for social embarrassment and the scar of bitterness that may never heal. All these considered together should call for a large sum of compensation.

CASES WHERE COMPENSATION HAS BEEN AWARDED.

There are situations where there has been actual compensation. In the case of ⁽²⁸⁾ Omunge V The Attorney General and Others, the Plaintiff was assaulted, imprisoned for three hours and then maliciously prosecuted on a charge of creating a disturbance. He was then acquitted. He brought a civil suit for recovery of damages for assault, false imprisonment and malicious prosecution. Under section 171 (2) of Criminal Procedure Code, it is quite in order for the lower courts or the High Court to order payment of costs in such a case as this one. The High Court awarded general damages at four hundred shillings for assault, seven hundred shillings for false imprisonment and two thousand shillings for malicious prosecution.

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Similarity in the case of (29) Samson Ayiego V. Stephen Kanyingi Waithaka, the two parties were at all times fellow employees. The Plaintiff acted as a foreman and had a number of workers under him including the Defendant. The Defendant in work struck the Plaintiff with a metal bar without reasonable cause of justification. The Plaintiff retaliated and assaulted the Defendant. The Defendant complained to the Police that the Plaintiff assaulted him. The Plaintiff was arrested, placed in custody and charged with assault. He was acquitted holding that there was no case to answer.

The Plaintiff brought civil suit claiming damages for assault which were awarded at one thousand five hundred shillings for assault, two thousand shillings for malicious prosecution one thousand five hundred shillings for false imprisonment and one thousand five hundred and sixty seven shillings as special damages.

In the case of (30) Ndungu Kamode V.R. a quarrel developed between the complainant an elderly woman and the Defendant's wife, where the Defendant came out with a hockey stick and hit the complainant causing injury to her. She sued the Defendant for damages and the trial Judge awarded four thousand five hundred shillings as general damages and one thousand seven hundred and forty shillings as special damages.

On appeal it was held that damages would not be reduced when it is not shown that the assessment appealed against was based on any error in principle or that it was so clearly erroneous that it should be altered.

These three cases show that compensation can only be recovered through civil suits. I do not see any justification for restricting compensation to this procedure. There is no need of hearing a single case in two different versions; in one version it is criminal and in another version it is civil yet the same parties will be involved and in the same facts.

I suggest that the matter be settled by the court once and for all.

It appears therefore that the imported British model was unsatisfactory. The provision to section 171 (1) of Criminal Procedure Code should be effectively applied and referred to often so as to allow the courts to order compensation after the case is settled. The current system where there is a day for a criminal case and a second day for a civil one has proved both expensive and waste of time. Bearing in mind how many cases are pending in our courts, it's true that a lot of time is needed to hear them all. Most of all because the two proceedings are mostly in two different courts, the separate steps system leaves a lot of people ignorant of their right to compensation. I strongly urge the courts to seriously consider the question of compensation immediately after conviction of any person for a crime against a person.

Another consideration is that, previously there has been cases where the accused has been acquitted on technical grounds. Time is now ripe for the courts to stop following blindly this kind of approach. Each case must be decided on its own merits and where need be the blame be balanced between both the complainant and the accused persons. Only in this way will punishment imposed to an accused person adequately compensate the aggrieved person.

It can therefore be said that the system in Kenya has failed in total to consider the interests of the aggrieved party. This is so ~~ever~~ as we look at our Kenyan evidence act which is seen as the criminal's principle defender in comparison to the range of evidence permitted in the customary courts. It normally restricts witnesses on what they can say which the criminals appreciate very much. They also appreciate being tried in localities other than where they reside or where the crime was committed. The imported criminal procedure is very sympathetic to the criminal.

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Criminals go free because of procedural technicalities.

1- It appears therefore that the imported British model was unfit to the African environment. It should not be abandoned wholly but there is need for imagination and adaptation. Kenya should be open minded and be prepared to adopt useful approaches from other countries and improvise within the present limitations. Thus those who will deal with this task,

(31) "must be in^vorators studying ways in which the country can get the best not only by ^{borrowing} ~~benorcing~~ ideas but by grafting methods from traditional [^]modes of living"

Our system has therefore failed to compensate adequately the offended persons. The offended person has only be used as an instrument of exposing law breakers to the hands of the state. Once the offenders get their due; the offended is forgotten unless he is aware of opening up another civil suit.

The court must use all possible means of ensuring that the offended persons are adequately compensated for. In the next chapter, I will indicate how best the offended can be compensated. 1966 p. 25 "An approach to Penal Administration in East Africa".

- 11- Circular to magistrates number one of 1905.
- 12- Circular to magistrates number six of 1911.
- 13- Unreported, High Court of Kenya at Nairobi, Criminal Revision case No. 10 of 1976.
- 14- Chapter 75 Laws of Kenya.
- 15- 1959 I.A.L.R. 1087.
- 16- 1964 I.A.L.R. 185.
- 17- Van Velsen - Procedural inferiority, Reconciliation and false comparisons" in Gluckman Ed. Ideas and procedures in Africa - customary law (1949) p. 137 - 149.

CHAPTER III

18- Supra.

FOOT NOTES

19- Chapter 21 Laws of Kenya

- 1- See introduction - legal basis of application of C.P.C, Cr. P.C. and P.C.
- 2- (1956) I.Q.B. I. of 1976.
- 3- Chapter 63 Laws of Kenya
- 4- Circular to magistrates number 4 of 1904, Hamilton, J. (1941) ch. d. 657.
- 5- The Journal of Criminal Law and Criminology, Published for North Western University School of Law vol: 69/N2 P. 183.
- 6- Tanner R.E.S., Three studies in East African Criminology, Uppsala; Scandinavian institute of African studies 1970: 13.
- 7- Joremy Bentharn, - The Principles of morals and legislation, Hafner Public Co. 1968 p. 180.
- 8- See chapter Four.
- 9- Daily Nation July 20th 1979 p.20. Case No. 9 of 1971.
- 10- 2 E.A.L.J 1966 p. 25 "An approach to Penal Administration in East Africa".
- 11- Circular to magistrates number one of 1905.
- 12- Circular to magistrates number six of 1911.
- 13- Unreported, High Court of Kenya at Nairobi, Criminal Revision case No. 10 of 1976.
- 14- Chapter 75 Laws of Kenya.
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- 16- 1964 E.A.L.R. 185.
- 17- Van Velsen - Procedural informity, Reconciliation and false comparisons" in Gluckman Ed. Ideas and procedures in Africa - customary law (1949) p. 137 - 149.

18- Supra.

CHAPTER IV

19- Chapter 21 Laws of Kenya

20- Chapter 80 Laws of Kenya

21- Unreported, High Court of Kenya at Nairobi, Civil Case No. 1504 of 1976.

22- 1972 E.A.L.R. 229

23- (1941) ch.d. 657.

24- Unreported, District Magistrate Court at Nyeri Criminal Case No. 58 of 1983.

25- Unreported, District Magistrate Court at Nyeri, Criminal Case No. 88 of 1983.

26- Unreported, District Magistrate Court at Nyeri, Criminal Case No. 63 of 1983.

27- Unreported, District Magistrate Court at Nyeri, Criminal Case No. 126 of 1983.

28- Kenya High Court Digest Civil Case No. 9 of 1971.

29- Unreported, High Court of Kenya at Nairobi, Civil Case No. 1562 of 1970.

30- E.A.C.A. Digest of Decisions, Criminal application Number 93 of 1971.

31- The Uganda Law focus. Vol 2. No. 2 p. 138- 147.

CHAPTER IV

COMMENTS AND RECOMENDATIONS

The reasons why the British Colonialists introduced and applied British law can be summarised as follows:-

- To help the British colonial government achieve it's imperialist purpose and not to administer justice as seen by the Kenyan people ⁽¹⁾
- To accomplish the ⁽²⁾ civilizing mission. Racism took the form of seeing the "process of civilization" of man moving from African stage via the muslim stage to the European way of life, which racism involved virtually all the actions of the Judges, Chief administrators and governors who were empowered to make law for Kenyans from ⁽³⁾ 1897 to 1906 and again in 1902. ⁽⁴⁾
- But of all this, ⁽⁵⁾ Lord Lugard had this to warn his counterparts:-

"The practice of the High Court in it's original We should abandon the idea that methods and policies found suitable to ourselves are necessary the best suited to the ancient civilizations of the East and to the evolution of African tribes. The pre-dominant characteristics of the English speaking races are individual initiative, willingness to accept responsibility and believe in the value of compromise in the settlement of affairs without strict adherence to logic. From these characteristics have sprung our systems of representative government through Parliaments. We are prone to assume that our methods of government, our religious formulae, our systems of education, the lessons of our history, our appraisment of the degrees of criminality and our codes of punishment because we have proved them best for ourselves, must be best for all the world.

It was held that even if there was a customary law that
It may be so in the far future but the attempt to
bridge the centuries without adequate study of other
mentalities, traditions and beliefs is more likely
to lead to failure than success.

Despite this sound warning, the colonial government expressly
provided that the application of English penal laws was to
be in conformity with English interpretation. Section 3 of
the Penal Code reads as follows:

"This code shall be interpreted in accordance with the
principles of legal interpretation obtaining in
England and expressions used in it shall be presumed,
so far as is consistent with their context and except as
may be otherwise expressly provided, to be used with
the meaning attaching to them in English criminal law
and shall be construed in accordance therewith."

Similarly Section 261 of (7) criminal procedure code provides
as follows:

"The practice of the High Court in its criminal
jurisdiction shall be assimilated as nearly as
circumstances will admit to the practice of Her Majesty's
High Court of justice, in its criminal jurisdiction
and of courts of Oyer and Terminer and General Gaol
Delivery in England."

This means that application of penal laws was to be accordance
with British Jurisdiction. The case of Gwao Bin Kilimo V.
Kisunda Bin Ifuti illustrates this fact.

In this case, the questions to be decided by the High
Court were whether there was any native law in Turu tribe
which allowed the seizure of a father's property in
compensation for a wrong done by his son. If so was this
law one by which in accordance with terms of article 24 of
Tanganyika Order in Council 1920, a British court may and
should be properly guided.

of making and administering the law and for a slow convergence
of the customary law and present law dealing with punishment
and compensation.

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It was held that even if there was a customary law that required the father to meet the wrongful action of his son, this was against British jurisdiction, repugnant to justice and morality and therefore inconsistent with the British rules.

The above sections indicate also that approaches such as the application of case method was to be adopted.

Kenya is in a period of rapid transformation. She needs a dynamic approach to law, keeping in mind a certain degree of stability and certainty. Application of case method for instance, means that the Judge has to refer to cases far away not only in time but in space as well. He frequently decides modern Kenyan cases on the basis of old precedents. This in Kenya makes it difficult to realise that law is a product of a given society. It makes it impossible to show the people that law is not something and blind but it is part of their culture and one of their weapons in their efforts to achieve their aims.

(9) "In these far of lands the people must have a law which they respect..."

Statutes that we use embody the law as it existed in England prior to a certain date. Moreover they are drafted in English tradition and English drafting means drafting in traditions of a country which is accustomed to case law approach: giving all the details and refraining from broad principles or orientation from legal policy. This kind of drafting conserves the case approach in a modern form and doesn't help the arbiter to become a social engineer when fulfilling his duty as abiter.

It is suggested that the codification of broad rules concerning punishment and compensation, and in general rules governing the conduct of citizens and of organizations, might serve as a beginning for a slow transformation in the methods of making and administering the law and for a slow convergence of the customary law and present law dealing with punishment and compensation.

Such rules could be found both in customary law regulating corporation in the community and in the codified legal system as well.

This codification might have to combine modernization with preservation of what can survive from the traditional legal concepts and solutions. Such a code or codes would of course be binding but as they would in the beginning only contain broad rules, the old ways and means of the method of precedents could be carried on within the limits of the code. The rules laid down there would prevail where the application of a precedent would own counter to the rule and the same could be the solution in respect of customary law.

This no doubt might cause some uncertainty in the beginning but does the precedent system in itself not cause a great amount of uncertainty? This kind of uncertainty could serve social development and could have as a consideration the fact that the courts would be obliged by law to carry out the legal policy laid down by the legislative body, to enforce the conduct required from citizens and organizations in Kenya. What the courts may lose in this affair, they might regain if this kind of codification were supplemented by reforms in the administration of justice which would empower and oblige the supreme court to analyse the practice of all the courts and to implement these principles.

In current implementation the court practice could be adapted by the High Court to changing conditions and more detailed rules may emerge which ultimately could lead to a more detailed codification. Meanwhile members of the legal profession could organize seminars where the Judges, magistrates, advocates etc could prinde ideas and discussions for the purpose of working on new methods discussing the main methodological and substantial problems of the creative implementation of broad codes.

A legal research centre could provide for materials, translations, analysis concerning problems of drafting and interpretation in the partly new situation. The law faculty could adapt itself to the changing methods and develop legal education also in partly new directions becoming more national than it is now.

The next step would be drafting of more detailed codes on the basis of experience gained by the High Court in the first phase. This would further reduce the field of operation of the old style case law method and where conditions are ripe for it, customary law. Perhaps by this method the above mentioned contradiction might be solved step by step.

It is true, we can't go back to customary mode of compensation. In our modern Kenyan circumstances and social economic conditions dictate otherwise. But we must refrain from looking towards Western ways of punishment and compensation ie attempt to curb crime. We must return to restitution or compensation. We know that demographic explosion and the necessity of ^{urbanisation} urbanisation and industrialisation are creating new and spectacular changes in the very structure of Kenya and the production at a much faster pace is necessary; but with all this development, crime increases rapidly. The education of the young people in Kenya has often had the direct effect of decreasing parental ^vcase and authority. Parents are at times afraid of their own children. There must be a sharp turn in daily teaching in the schools.

There is no simple coming back to old days. A flour mill can't be moved by an empty river. There is no coming back either to certain forms of brutality; cutting hands or ears, harsh and brutal corporal punishment. But there is an urgent need to come back to restitution. Flogging, legal killing imprisonment and payment of fines is not restitution. What is needed is restitution in kind through an overhauled penal system in which institutions become productive.

In our country one hears of the word "conection" and it's a good word. But the program of "correction" is largely inadequate if there is no material restitution because restitution is based on the fundamental moral nature of man even if this has disappeared in the hardened criminal or gangster of "Murder Inc",

It is to be observed that if customary law were to be applied today, it would be subject to modernization. Moreover today only the older men in many communities retain any extensive knowledge of customary law. The use of studies carried out by social scientists when published may be utilized by the courts in ascertaining the content of customary law rules.

Acceptance by the courts, of studies of customary law done by lawyers or perhaps by social scientists who aren't lawyers come close to equating such books functionary to statutes or judicial decisions as authoritative sources of law. Kenya has legislation broad enough in it's terms to authorise the courts to utilise text books and other documents in ascertaining customary law. The relevant sections are 33(d), 41, 54 and 60(2) of ⁽¹⁰⁾Kenya Evidence Act.

Section 33 (d) states
"When the statement gives the opinion of any such person as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen."

Section 41 provides as follows

"When the court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the government of such country and to contain any such law, and any report of a ruling of the courts of such country contained in a book purporting to be a report of such ruling, is admissible."

Section 54 stipulates as follows:

"Whenever the opinion of any living person is admissible, the grounds on which such opinion is based are also admissible."

Section 60 (2) reads as follows:

"In all cases within subsection (1) of this section and also on all matters of public History, literature, science or art, the court may resort for its aid to appropriate books or documents of reference."

As all the Judges in ⁽¹¹⁾Kimani V. Gikenga recognized, it is appropriate for a court either on submission of a party or on the courts own initiative to hear oral statements on the content of customary law rules. But what are the necessary or appropriate qualifications of the persons presenting such statements and what weight is to be given to them by the courts?

In answering the foregoing question, it is necessary to distinguish the role of witnesses and assessors. Section 48 of Kenya evidence Act, which deals with evidence in form of opinion of experts doesn't contain any reference to customary law. On the other hand Section 51 reads as follows:

"When the court has to form an opinion as to the existence of any general custom or right the opinion as to the existence of such custom or right of persons who would be likely to know of it's existence if it existed are admissible,"

Thus opinion relating to custom and rights" makes admissible the opinions of persons who would be likely to know of the existence of the asserted general custom or right.

Section 52 also provides that

"When the court has to form an opinion as to -

- (a) the usages and tenets of any association, body of men or family; or ... are from two tribes, the result the opinions of persons having special means of knowledge thereon are admissible."

Thus this section renders admissible "the opinions of persons having special means of knowledge" of the usages and tenets of any association of body of men or family.

Since these two sections are carefully delimited from that dealing with expert testimony, the implication appears to be that witnesses testify on the content of customary law rules would not have to be qualified as experts in the conventional way. Of course the court may enquire into the qualifications of witnesses and probably should do so on it's own initiative.

It is within this framework that I feel that it's is possible to establish customary law courts which will deal with among others, punishment and compensation in Kenya. I suggest that such courts be established at Divisional and District levels.

The urban customary courts may play a role in interpreting the standards and norms they are expected to follow in their new environment.

In such courts, it is possible that the litigants will rarely speak about the law; they will address themselves to "facts" leaving it to court to decide whether these "facts" disclose a cause of action and what the appropriate remedy should be.

Moreover these customary law courts will be concerned with social relationships rather than law puzzle. The customary courts will thus deal with patterns of right doing and wrong doing within the context of a given social relationship rather than the enforcement of specific legal rights and duties.

In cases where litigants are from two tribes, the result may be the development of an urban common law growing out of customary laws. In shifting gear to a new understanding of customary law in the urban context, we are helped by ⁽¹²⁾ Lon Fuller's refreshing observations on the concept of customary law. He argues that the phenomenon called customary law "can best be described as a language of interaction". It originates in social interaction and serves the purpose of organising and facilitating interaction. Thus not only can customary law be seen to have social context by which it is shaped and which it helps to shape. But it can be seen as a phenomenon which is not peculiar to traditional societies.

The actual and potential role of customary courts and customary law in the urban setting relates to what ⁽¹³⁾ Herskovits calls the process of "reiteration" whereby "sanctions and values of a given tradition under contact with another and applied to new forms, combining and recombining until syncretisms develop that rework them into meaningful, well functioning conventions."

The urban customary courts may play a role in interpreting the standards and norms they are expected to follow in their new environment.

No doubt these types of customary courts may be better suited to solutions of certain problems relating to punishment and compensation than the magistrate's courts or even the High court. These kinds of courts will be more acceptable and applicable than those set on the Western model.

The question as to what is custom may arise. In addition to what is discussed in chapter two, the question may also be answered by the following decision of why custom should be recognized and acted upon.

Innes C.J. in ⁽¹⁴⁾ Ocallaghan V. Chaplain

"It is the duty of a court - especially of an appellate tribunal - so to administer a living system as to ensure - without the sacrifice of fundamental principles - that it shall adapt itself to the changing conditions of the time and it may be necessary sometimes to modify or even to discard doctrines which have become outwork".

It is in this light that we have to refer again the judicature act which has already been referred to in chapter two. Under the old colonial system, the African courts were required to ⁽¹⁵⁾ "administer and enforce African customary law..." Under the new system, all courts are required to "be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it..."

The provision that the courts shall be guided rather than apply or administer, customary law confers the same discretion on all courts to depart from the rules of customary law. The courts already have discretion to decline to be guided by customary law if it is repugnant to justice or morality whatever the merits of that provision, a considerable change is required.

The section should be amended, words "Justice and Morality" be deleted, and the courts to administer and enforce" Customary laws as opposed to be "guided".

But what will be the legal, basis of application of customary law in our todays urban customary law courts? Section ⁽¹⁶⁾82 (4)(c) provides as follows:-

No law shall make any provision that is discriminatory either of itself or in it's effect

(c)for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons;"

This means that customary law has been put at for with all the other laws and therefore should be administered and enforced in the manner described earlier on.

As for compensation, the courts can't be expected to apply the rules as they were in the old days. No number of goats or bulls is to be required. These have disappeared from our society. Neither shall we exchange people to fill the gaps of those who become victims of murder. Nor shall we require that direct compensation be made by persons who can't afford to pay directly. We will not either let go free the offenders or even let those offenders go away without realising that they have done wrong and must

We therefore will not do away with prisons. Prisons should be turned into productive institutions. Through them, we can creat National Insurance Funds for restitution by criminals to their victims, habours in prisons can be turned into productive channels. A program of institutional labour can be developed which alters the very nature of imprisonment in certain of it's features.

For all offenders, prison treatment must perforce continue. But all prisons should be turned into productive institutions where authentic and uplifting labour is performed. For that purpose, the first step is to diversify prisons into various productive channels; factories of all kinds, workshops for specialized labour, agricultural undertakings etc. In order to do so, a national approach must be made to trade unions so that they firstly admit that such lines of national production are earmarked for prison labour and then supervise this labour so as to bring it within the rules they have imposed for such labour in the outside world.

Once trade union rules are accepted in prison labour and proper equipment of prison factories is available, the full programme of labour apprenticeship and full gratification become possible and it can be as diversified as outside labour. This means that there will be no lack of employment on release of such individuals.

But then the profits of such institutions should be treated in such a way that they fulfil a three fold purpose; they must assure that administration costs are met; they then must help to provide a means of living for the family of the inmate who suffers more than he does; and they must be used to build up the National Insurance Funds suggested.

All this is no wishful thinking. It can be made a reality if Kenya keeps her eyes fixed on "restitution" as the lever of an enlightened penal policy and the lever of rehabilitation in the offender who knows he is doing something to repair the damage done.

For such a plan, it is necessary to consider crime as a social disease, which needs social ways of counteracting it not only in the culprit, but also for the welfare of his victims. We propose the establishment of National Insurance Funds which will be maintained mainly by the product of labour inside prisons and similar institutions. Prisons rightly conceived can be productive. No person injured by a criminal would normally expect to be helped by direct restitution from the criminal. But the impersonal state can be the means of indirect compensation.

We insist that Kenya does not need to continue copying the Western world in its failures. Restitution is an African living concept which can be used to spectacular effect if it is made the centre of penal and penitentiary policy.

CONCLUSION

It has been indicated with certainty why we should punish. Whether punishment can be seen as a reaction of passion or as a work of vengeance, one thing remains clear. We punish in sociological sense and in customary way so as to restore social equilibrium; to bring back to normal what was disturbed and to heal the wound that was inflicted.

Present times I doubt but in traditional methods it would apply of dispute settlement

In a small group of people, in an organized community, in a highly centralized nation, people will express their desires and hopes in different ways. They will react differently to various things. Some will love others, some will hate others, some will fight others and few will kill others. There will always be offenders and offended. Justice requires that the interests of both offenders and offended be protected.

This is how it should work. For the offenders, to be shown that they have done wrong, that they must recorrent themselves and redress the wrong they have done. They must therefore compensate the offended persons. It's for this reason that the old customary ways of punishment and compensation should be revived and applied as close as possible even in our modern social economic conditions.

Likewise the colonial and post colonial practice of treating offenders should die out. We should not punish for the purpose of inflicting pain and humiliating offenders. Many of the rules for instance in area of evidence which are strange to African mind should also die out. Many of the rules and regulations which form part of the paraphernalia of administration in a highly organized state and which are in our opinion unreasonable and irksome restrictions on our liberty should also die;

One thing we should do look back in old days research into the law, propose for reform and apply those reforms in on present society.

If there is to be any connection between National Unity, economic development and law reform, then law reform should be regarded as a high and continued priority.

12- Smith - Customary Courts in Urban Africa,
20 - A.J. C.L., 223
233 et seq (1972).

13- 1911

14- (1927) A.D. 310, 327.

15- Section 15(a) of African Courts Act.

16- The Kenyan constitution.

CHAPTER IV

FOOT NOTES

- 1- Ghai and Mc Auslan; - Public Law and Political Change in Kenya. chp. 9 and 10.
- 2- Milner; African Penal Systems p. 94.
- 3- The 1897 East Africa Order - in - Council. Articles 45 and 52. (Evansons, London, 1958)
- 4- The 1902 East Africa Order - in - Council Article 12. (Collier No. 111111, New York & London 1912)
- 5- Lugard; The White Man's task in Tropical Africa; reprinted in Quigg (Ed.) Africa - a foreign affairs leader 1964 p. 5-16. (Heiner Public. Co. Oxford, 1968)
- 6- Chapter 63 Laws of Kenya
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- 8- (1938) I Tan L.R. 403
- 9- (1955) I Q.B. 1.
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- 11- (1965) E.A.L.R. 735. (reprinted in Quigg (Ed.) Africa - a foreign affairs leader, 1964)
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- 13- Ibid
- 14- (1927) A.D. 310, 327. (African Penal System (Penguin & Co. London, 1969)
- 15- Section 18(a) of African Courts Act.
- 16- The Kenyan constitution. (Cohen & West, London, 1967)

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