

PROBATION AS AN ALTERNATIVE TO IMPRISONMENT  
(WITH SPECIAL REFERENCE TO UASIN GISHU DISTRICT).

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## II

### C O N T E N T S

Acknowledgement .. .. .	I
Contents .. .. .	II
List of cases .. .. .	IV
Articles .. .. .	V
Introduction .. .. .	VI

#### Chapter 1 : EXPLORATION OF CAUSES OF CRIME.

Causes of Crime .. .. .	1
The biological approach to crime .. .. .	1
The psychiatric approach .. .. .	3
Crime and economic conditions .. .. .	4
The aims of the penal system .. .. .	11
Retribution .. .. .	12
Individual and general deterrence .. .. .	14
Protection of the public .. .. .	15
Rehabilitation .. .. .	15
Comparison between imprisonment and probation .. .. .	16
Conclusion .. .. .	25

#### Chapter 2 : ANALYSIS OF THE PROBATION OF OFFENDERS ACT

##### Introduction

Historical background of Probation .. .. .	26
Kenyan Probation history .. .. .	28
Administration of probation under cap. 64 Laws of Kenya .	31
The probation order .. .. .	34
Duration, Variation and discharge of probation order ..	35
Commission of a further offence .. .. .	37

### III

Breach of Probation Order .. .. .	39
Probation of Offenders (Central Committee Rules .. .. .	42
Conclusion and Discussion .. .. .	46

#### Chapter 3 : CRITERIA FOR GRANTING OR DENYING PROBATION

Criteria related to probation adjustment of probation ..	58
Age, family relations and other consideration .. ..	62
Miscellaneous other criteria .. .. .	64
Classification of offences of those placed on probation (1979) (Males) ..	68
Classification of offences of those placed on probation (1979) (Females) ..	70
Conclusion and Discussion .. .. .	73

#### RECOMMENDATIONS

Viability of the probation service .. .. .	78
Parole .. .. .	81
Extra mural Penal employment .. .. .	81
Planned use of hostels .. .. .	82
Probation and after-care service .. .. .	83
General recommendations .. .. .	84
Conclusion .. .. .	86
Footnotes .. .. .	91
Bibliography	

## IV

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4. Joseph Kibet V. Rep. : Court file No. 2092/81
5. Robert Kintai Kipsanga V. Rep: Court file No. 3324/81
6. Dinah Koe Arap Kogo V. Rep. : Court file No. 3056/80
7. Phillip Kororei V. Rep. : Court file No. 1431/81
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### ABBREVIATIONS

C.L.R. : Criminal Law Reports

### LIST OF STATUTES

1. Children and Young Offenders Act - Chapter 141 Laws of Kenya
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3. Probation of Offenders Act - Chapter 64 Laws of Kenya
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V

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PROBATION AS AN ALTERNATIVE TO IMPRISONMENT(With special reference to Uasin Gishu District).INTRODUCTION

The aim of this paper is to show that probation is a better and a more preferable method of rehabilitating the offender as opposed to imprisonment.

The question of whether imprisonment does reform, correct, rehabilitate or re-integrate criminals is a question on which leading criminologists are not agreed. What seems to be known, and what appears to be true, is that the prison hardens the offenders. Prison sentences are costly to run. It costs the prisoner about £200 per annum, for maintenance, whereas it would cost the same person about £50 per annum, if he were placed on probation.<sup>(1)</sup>

The offenders are victims of social situations over most of which the individuals have no control. Most of the people in our prisons are there for petty offences, some are first offenders and timers, while yet, many more are there due to "ignorance" and, or, poverty. Here, it is necessary to remember that "ignorance is no defence in law," while at the same time we should realize that most of the laws are in truth unknown to the common man. This is because most of our laws are foreign laws, and they also involve technicalities which the common man is not familiar with.

There have been cases where a person has done an act which his community views as the right way of dealing with the circumstances of the case, only to find himself charged with an offence which he did not intend to commit. This can be illustrated by witchcraft cases where some communities believed that the best

way to rid themselves of a witch, who was a menace to the community was to kill him or her. After the act they saw themselves facing a murder charge.

This brings to light the fact that laws of different societies differ, and if laws of one society are to be imposed on another society, then there is a need to teach that society some aspects of that new law. This attempt has never been made in Kenya, and the little attempt that there is, serves little or no purpose at all. For example, the legal aid centre broadcasts over the radio, which are aimed at teaching the citizen his rights under the Kenyan Laws, only helped a small section of the community which understands English. The broadcasts would achieve their goals better, if they were in the National Language, so that a higher fraction of the community learns their rights. It is for these and many other people that a community-based form of treatment needs to be practiced.

Research has proved that the longer a person stays behind bars, the higher the probability that he will go back to the same prison after release. Longer prison terms tend to facilitate recidivism. According to the Kenya Prisons Annual Report for 1977, nearly 87 per cent of convicted persons were sentenced to imprisonment of less than twelve months and that was about 2.25 per cent recidivism.

For any preventive programme to be effective, it must be based on very sound knowledge of the causes of crime, because to embark on prevention without such knowledge is like driving in the dark.

It is with the above points in mind, that I seek to prove that probation service should be more encouraged or resorted to, more frequently than is the case presently.



METHODOLOGY OF INVESTIGATION

In dealing with this topic, I intend to resort to cases which I came across in the probation files of Uasin Gishu District. I will also use data which I collected and interviews which I carried out both in the court and in the probation office. Text books will also be used to help bring out some points and to clarify others. Finally some recommendations will be advanced, as to how probation service in Kenya can be made more viable.

SCOPE AND SEQUENCE OF ANALYSISCHAPTER 1

Part (a) will deal with the causes of crime. This will include views and theories advanced by scholars and social scientists. This will serve to show why crimes are committed and hence, how they can be dealt with.

Part (b) will deal with the aims of the penal system, and the justifications advanced for the use of punishment. The latter part of this chapter will be a comparison between probation and imprisonment, with the hope of showing that probation has more merits than imprisonment and should therefore be used, instead of imprisonment.

CHAPTER 2

This chapter will contain two parts:

Part (a) will discuss the historical origins and development of probation service in England and its subsequent incorporation in the laws of Kenya chapter 64.

Part (b) will discuss the administration of the probation system under chapter 64 of the laws of Kenya. This will necessitate an examination of whether the Act as presently structured

and administered achieves the purposes and objectives of probation. This discussion will therefore be an analysis of the Act, and will hope to establish, whether there is any need for reforms in the Act and if so what reforms are necessary.

### CHAPTER 3

This chapter will deal with the question of who is placed on probation and on what criteria probation is granted. This question will be answered by looking at a list of probationers and their offences plus their pre-sentence reports. A table of offences and probationers will be used to help determine which offence gets its offenders placed on probation. This table will also help us to conclude as to which is the most highly committed offence, and for what reasons.

### CONCLUSION

The conclusion will be <sup>a</sup>run-down of what has been discussed in each chapter, and how probation has been brought out in the discussion as the best alternative to imprisonment.

CHAPTER 1 (PART A)  
THE CAUSES OF CRIME

In my introduction, I pointed out that for any preventive programme to be effective, it must be based on sound knowledge of the causes of crime, because to embark on dealing with criminals without this knowledge is like driving in the dark. In this chapter, I will look at the views held by different groups of people at different times in history as to the causes of crime, I will then look at the aims of punishment and then compare imprisonment and probation.

All societies have rules that specify appropriate and inappropriate ways of behaving. These rules, often called "norms" or "conduct norms," are sets of directions for behaviour, and members of a society are expected to follow them. Ordinarily, appropriate behaviour is rewarded, and inappropriate behaviour has some form of punishment as its consequence.<sup>(1)</sup>

THE BIOLOGICAL APPROACH TO CRIME CAUSATION

An Italian physician of the nineteenth century, Cesare Lombroso and his followers greatly stimulated the development of criminology both in the United States and abroad. Lombroso's theory held, essentially, that criminals are by birth a distinct biological type and can be recognised by characteristics such as a long lower jaw, flattened nose, sparse beard, and low sensitivity to pain.

At first the work of Lombroso and his disciples was directed against the "classified school" of criminals law and criminology, which assume that men choose between the pleasures anticipated from the same act. The criminal was assumed to have a free will which enabled him to make his choice with

reference to his balance of pleasures and pains. In contrast, the Lombrosian position was a deterministic one, holding that criminality is determined by something that the actor cannot control. Later Lombrosians directed their work against the ideals of Gabriel Tarde, a French social psychologist who attempted to refute the prevailing biological notions by developing a theory emphasizing the idea that people behave according to the customs of their society; if a man steals or murders, he is just imitating somebody else. The controversy here was on the question of biological determinism versus social determinism rather than on the question of determinism versus free will.

There are many more people who advocated for this school of thought, but I need not go through them. It should, however, be recalled that the wide variations in crime rates cannot be accounted for by the inherited characteristics of the persons involved. It should also be recalled that crime, by definition, contains three elements. First, a value which is appreciated by a group or a part of a group. Second, another part of this group is isolated or in conflict with the first group, so that they do not appreciate the value or regard it less highly and, thus, tend to endanger it. Third, the first section of the group resorts to coercion, applied in a disinterested manner in the name of the entire group to those who disregard the value. Since rule violations come to be called crimes by this process, what is "crime" and what is not crime is quite arbitrary. One cannot inherit a biological predisposition to behave in a manner that is criminalistic only because it has arbitrarily been so labelled, by a social group.

### THE PSYCHIATRIC APPROACH

With the development of psychiatry there has been an increasing tendency to apply psychiatric and psychoanalytical techniques and theories to the crime problem. The publication of William Healy's "THE INDIVIDUAL DELINQUENT," in 1915 maybe taken as the event which signalized the liberation of psychiatry from Lombrosian preconceptions, opening the way for research and theorising about crime in a manner which has profoundly influenced criminological thought.

Bernard Glueck provided another impetus when he published the results of his investigations of 608 inmates of Sing Sing prison in New York. (2) He stated at about that time that:

"It is now universally recognized that the pauper, the prostitute, and the criminal classes are primarily the product of mental defect and degeneracy and as such must come within the purview of mental medicine."(3)

The early preoccupation of psychiatrists was with the assumption that criminals constitute an inferior type, characterized by feeble mindedness, mental disease, alcoholism, drug addiction, psychopathy, epilepsy, neuroticism and the like. Unfortunately, in the effort to demonstrate the truth of this contention by statistical means, control groups were at first rarely used, and many key concepts were vaguely defined, for example, "constitutional psychopath," "inadequate personality" and so on. This looseness of definition made it especially easy to fall into error in the use of these terms.

Psychiatrists at present are, to some extent, abandoning their efforts to demonstrate the prevalence of deviations from the normal among delinquents and criminals in favour of trying to describe the process involved in the development of

the criminal mentality. Psychoanalysts by the study of cases which characterizes their technique, have furnished particularly detailed case histories, which they have interpreted in accordance with the doctrines and concepts of their approach, emphasizing the effects of repressed conflicts, early traumatic experiences, especially those concerned with sex, and other motivational aspects of behaviour emphasized by the various branches of the psychoanalytical school of thought.

The above approach explains crime as the result of genetic defects, emotional imbalances, psychiatric disorders, anti-social strives, ego or faulty socialization and education. This approach to crime sees the individual and the family as the most important entities in the treatment of offenders. Probation would play a big role here.

#### CRIME AND ECONOMIC CONDITIONS

##### THE NATURE OF ECONOMIC MOTIVATIONS.

In a materialistic culture it is logical to look for economic roots of crime. Our law defines as criminal some methods of achieving economic success, but fails to penalize other methods often quite as injurious to social welfare. Stealing is crime, but much human exploitation is not. More important is the fact that the economic or competitive rather than the social attitude of the mind is tolerated and expected in our present imposed culture, which is more individualistic as opposed to the earlier communal culture. The man who does not strive to shoulder his way through a crowd of competitors is often rated by his fellows as lacking in initiative enterprise and drive. The mental set of a competitive society is often unsocial or even antisocial.

To Adam Smith an economist, economics implied that man is a rational animal who seeks material satisfaction or ~~util~~ utilities, in competition with his fellows. This selfish, competitive search for personal gain was socially beneficial, and should be left unhindered by government. Led as by an unseen hand, he urged, "the individual seeking his own welfare will achieve the welfare of the nation." Later study has shown that Adam Smith's view misinterpreted the real nature of human motivation and underestimated the social ills resulting from unregulated individualism.

Research into the actual behaviour of men seeking a living, and the influence of psychology and sociology have largely undone the economics of Adam Smith. Even in their business activities men have been discovered to be perhaps as often emotional as rational, and as eager for power and the approval of their associates, as for full stomachs, elaborate shelter and a superabundance of material satisfactions. Moreover, the social nature of man, though often given little chance for expression, is now known to be as real as his individual goals.<sup>(4)</sup> Even in our materialist culture, men are observed to get joy through cooperation. In our society and most societies, however, men may act from more purely individual economic motives up to the point when their basic physiological needs are met. Perhaps in the face of some social disapproval most starving men would take food and most freezing men would take clothing or seek shelter that did not belong to them. Yet, at least a man who is not at the moment suffering the torments of long time lack of food may sincerely declare that he "would rather starve than steal."

In the light of such considerations we must revise our notion of an economic factor in the causation of crime. An economic factor in the causation of crime is some influence relatively closely associated with the efforts of men to make a living. Men are dissatisfied with incomes that leave unsatisfied <sup>needs</sup> of which they are conscious, with incomes lower than <sup>them</sup> those they have been accustomed to, and with incomes below those of other men with whom they customarily compare themselves. Under these situations, men suffer economic discomforts and an economic motive for action arises. In addition, in a culture which gives prestige on the basis of material success, men have positive ambitions even when not suffering actual discomfort. They seek to raise their plane of living.

The broadest approach to an economic explanation of crime is that which characterises the nature of the productive system of a society and derives crime from its effect upon the attitudes, motives, and behaviour of the people living under it. The most striking of analyses is that presented by the socialist or the communist. We illustrate this approach below by summarizing the argument of W. A. Bonger.

"Crime almost by definition is an expression of human selfishness. Man has the capacity both for selfishness and for altruistic conduct and at all periods of history has given some evidence of these capacities. However, some periods more than others have stimulated the selfish capacity of man. So long as production was chiefly for use men were not brought into conflict with one another in their economic activities. When, however, modern industry and production for exchange developed, men worked not for themselves but to satisfy the wants of others. They were not conscious of their interdependence, however, for they produced for a market in competition with one another. This competition has become very intense, and has four chief aspects. There is competition between sellers and buyers which stimulates selfishness by the struggle of



sellers to sell for as high a price as possible, and likewise, there is competition between sellers of the same similar commodities, each trying to undercut the other and even to injure one another in the struggle to capture lucrative markets. Thirdly, there is competition between labour and capital. Employers try to purchase labour at the lowest possible wage; working men try to sell themselves for the highest obtainable price since the commodity for sale is human labour, this competition no doubt involved still more intense emotions of hostility and the methods used at times are unscrupulous. Finally, as by products of this economic competition, there are two parasitic classes which evidence motives as selfish as those of men actively engaged in the struggle. At the bottom of the social scale are the independent classes who live upon the efforts of others; at the top of the scale are the idle rich who are equally parasitic." (5)

Such being the nature of competitive systems, like our Kenyan system, Bongor goes on to describe in more details certain of its specific aspects and institutions, emphasizing the significance of each for crime. He continues:

"Thus the system entails child labour. Child labour takes the young person out of the home and away from the socializing influence of his parents and other members of the family, and exposes him to the criminogenic atmosphere of modern industry. Moreover, it puts children, at their most impressionable age, into the midst of this tooth and claw economic struggle and makes of them selfish beings, potential criminals ..... Similarly, the system takes women out of the home-women, upon whom society depends to teach its children the social lessons necessary for cooperation. This not only means the lack of parental care for children, but it exposes the homemaker to the selfishness - stimulating influences of modern industrialism. Likewise this system produces actual need through the exploitation of labour; and it creates those great inequalities in reward which stimulate the jealousy and hatred of the less privileged classes. Poverty has scores of direct and indirect influences upon crime .... Unemployment causes crime by greatly increasing poverty, inequality, and resentment; and also through the well known criminogenic effects of idleness and dependency themselves." (6)

That there is much truth in Bongor's argument is almost self-evident. That this approach is one-sided rather than

synthetic will be clear to all except those who attribute the whole of social life and culture to its very basic economic aspect.

The argument of Bonger, based upon Marxian principles, is naturally similar to that accepted by the earlier leaders of Soviet Russia. The Soviet leaders contended that, since crime was an outgrowth of class struggle, it would largely disappear in a classless society. They then explain the continuance of crime in Russia after the revolution in various ways. For a time, they admitted, but one class - although the largest class, was in control in Russia and hence some crime would continue because some struggle must go on between this dominant class and remnants of other classes. Moreover, they plausibly pointed out that the attitudes and behaviour of the working class themselves could not be changed overnight and that therefore crime would continue for a time as an outgrowth of conditions existing in Russia in the previous capitalistic system. They granted also a communistic state but held that it would be easily controlled by the people themselves. Particularly they admitted that a certain amount of crime is the result of mental disease rather than of the economic system and might continue under communism.<sup>(7)</sup> The Russians also at first derived from Marxian doctrines a philosophy of determinism, leading them to put into effect a penal system which, so far as it affected civil rather than political prisoners, approximated an application of scientific criminological principles. Later when an increase of crime and political changes led to a basic modification of this penal system the change was justified by a re-interpretation of the teachings of Mark and Lenin.<sup>(8)</sup>

I have tried in this part of chapter 1 to show some causes of crime. This is important especially to people like Judges who issue punishments to know the causes of crime and to understand them, because this knowledge can be helpful in determining what sort of punishment or retributive treatment an offender needs to reform him and make him acceptable in society.

It should be noted that the approaches discussed above are not exhaustive. They are the major approaches advanced but nevertheless there are more explanations of crime causation by textbook writers which could not all have been included in the discussion. For example; Edwin Sutherland<sup>(9)</sup> explained the increases in delinquency in terms of it being learned from friends and associates. Briefly stated, this means that if an individual is exposed to more criminal than non-criminal influences in his immediate environment, the chances of his breaking the law are greatly increased. During my fourth term clinical programme in Eldoret 1980/81, I noticed that the crime rate had increased from 1978 to 1980. On reading probation case-work reports of these years, I noted that in 1978, 942 criminal cases were referred for pre-sentence probation officers' reports but in 1979 the number increased to 1,098. In 1980, the courts in Uasin Gishu District registered total of 6,474 cases.<sup>(10)</sup>

The provincial probation officer for Rift Valley, under which Uasin Gishu District falls expressed her view on this issue in the following terms:

"Uasin Gishu District which is our area of operation is relatively a small district but crime rate tends to be quite high especially within Eldoret municipality. This could be because of many industries which have been put up such as Rivatex, Raymond

Woollen Mills, furfural, Rift Valley Bottlers, Ply-wood factory and others, which have attracted many people from the rural areas to come looking for employment, and when they fail to get the employment they resort to committing crimes." (11)

People like Merton R.K. hold the view that in communities where standards and restraints were weakening; a condition of "normlessness," would account for increases in crime and other forms of deviance. That is to say that, if culturally prescribed goals were untenable (sic) as in the case of many working and lower class young people, then, there would be a discrepancy between what was held out to be the "ideal" and what was attainable which could result in frustration and subsequent rebellion.

I personally tend to agree with most of the theories advanced, however, I reject the biological view advanced by Lombroso and his disciples, which held that criminals are by birth a distinct biological type and can be recognized by characteristics such as a long lower jaw, flattened nose, sparse beard and low sensitivity to pain. I hold this to be a ridiculous view, and I cannot accept that a person's appearance can have anything to do with crime. I do understand that people not content with their appearances may tend to be violent and even destructive, but this is more a medical case of psychology than a criminal case, and should be treated in a mental institution aimed at making one accept himself as he is, rather than in jail. I see this view as a mystification of issues, especially conditions brought about by the industrial revolutionary process of that time, when men were fighting to keep alive after being replaced by machines at their places of work. This reinforces the view that social conditions are more conducive to crime than any other advanced view.

Having said the above I conclude that social conditions will be more causative of crimes relating to property, like theft, arson, stock theft and related crimes. I also think that some crimes such as sexual assault and prostitution and in some cases, murder, are as a result of mental defect and degeneracy and as such must come within the purview of mental medicine.

## CHAPTER 1 (PART B)

### THE AIMS OF THE PENAL SYSTEM.

#### INTRODUCTION

This part will deal with the aims of the penal system in a bid to show justifications given for punishment. The later part will be a comparison between imprisonment and probation, in which I hope to demonstrate that probation is a better alternative to imprisonment.

Men desire to be rid of injury, whatever its cause. The expected reaction to crime is punishment. The actual reaction today is still mainly penal but with varying admixtures of non-penal elements.

For our purposes we may define punishment as the conscious infliction upon a disturbing individual of undesired experiences not solely in the interest of his welfare. Such a definition includes punishment for the sake of vengeance or abstract justice, but also punishment inflicted solely in the interest of social protection, without any element either of blame or vindictiveness. Society punishes a robber when it sends him to the toughest prison in the country; but he is also punished in the most progressive prison, or even on probation, so long

as he does not wish these restraints.<sup>(12)</sup>

One of the initial developments of penal theory is towards the idea that the punishment should fit the crime. Today, however, the trend is towards an increasingly individualistic approach to sentencing as distinct from punishment with the object of arriving at a sentence which is appropriate to the individual. This is no longer justifiable, but is simply to emphasize that punishment in the forms accepted by society, is merely one of the means of dealing with those convicted of criminal offences; means which also include training, support and forgiveness. This is also a trend towards complication, as offences tend to be easier to analyse and classify than the personalities, backgrounds and needs of those who commit them. The consequence is that the process of sentencing has itself become increasingly complex not only as regards the theories and principles, but also in the methods and means available for the disposal of those convicted.<sup>(13)</sup>

Nowadays, sentencing has five commonly identified aims. These are, retribution, individual deterrence, general deterrence, protection of the public and rehabilitation. It is arguable that when dealing with a case a sentencer may consciously or unconsciously be influenced by one or other of the above theories. Let us examine them briefly.

#### 1. RETRIBUTION

The notion of retribution is to be found in the idea that punishment should fit the crime or that the offender should get his deserts. It is sometimes used in the sense of meaning "revenge", the collective revenge that society takes upon the

2. INDIVIDUAL AND GENERAL DETERRENCE

Whereas retribution can be said to be mainly concerned with past conduct, deterrence is directed towards future behaviour. Jeremy Bentham in his "PRINCIPLES OF PENAL LAW" described the distinction in the following terms:

"General prevention ought to be the chief end of punishment as it is its real justification. If we could consider an offence which has been committed as an isolated fact, the like of which would never recur, punishment would be useless .... But when we consider that an unpunished crime leaves the path of crime open, not only to the same delinquent but also to all those who have the same motives and opportunities for entering upon it, we perceive that punishment inflicted on the individual becomes a source of security to all. That punishment which considered in itself appeared base and repugnant to all generous sentiments is elevated to the first rank of benefits when it is regarded not as an act of wrath or vengeance against a guilty or unfortunate individual who has given way to mischievous inclinations, but as an indispensable sacrifice to the common safety." \*

The object of individual deterrence is to <sup>e</sup> deter the particular offender before the court from offending again and although it is not always easy to distinguish it in practice from other theories of sentencing, the principle of individual deterrence can be best observed in sentences which are expressed as being designed to teach the offender "a short, sharp lesson." Such a case was R. V. TAPPIN,<sup>(17)</sup> where a boy of 16 years pleaded guilty to house breaking and larceny after a previous conviction for collecting alms under false pretences. The court observed that the boy appear<sup>ed</sup> to think that he was entitled to be put on probation, but what he needed was a sharp lesson. The sentence of 3 months' detention was upheld.

It is clear that general deterrence is closely connected with the retribution theory of punishment for, the courts proceed on the assumption that general deterrence will be achieved

by fixing a sentence proportionate to the offender's culpability, but occasionally the need to deter others is regarded as so pressing that it becomes the dominant consideration and the court passes a sentence which is specially designed to be exemplary. For example, when a first offender is convicted and sentenced for an offence common in the neighbourhood. But in this case it is desirable in fairness to the offenders dealt with in an exemplary manner, that the courts should have reasonable grounds for the supposition that the example will have the result intended.

3. PROTECTION OF THE PUBLIC

Sometimes referred to as the prophylaxis theory, the objective here is simply to detain the offender and by so doing physically to prevent him from repeating his offences. Its success depends upon the powers of the courts to impose adequately long sentences and upon the ability of the institutions themselves to prevent escape. The length of the detention is calculated not according to the tariff of blame or gravity or to individual or general deterrence, but according to the need to protect the public and the courts' estimate of the duration of this need.<sup>(18)</sup>

4. REHABILITATION

The object here is to encourage the offender to abstain from criminal behaviour in the future by providing him, for example, with social support in the form of probation or a second chance in the form of an absolute or conditional discharge.

If crime must be paid for, the payment must be assured and verified. Once identified as a correctional client, the offender must be controlled until officially restored as a



participating member of society. A variety of reasons prescribe control. It is the prime consideration in institutions. To reconcile humanitarian and rehabilitative activities to the requirements of control in the first order of business in any kind of correctional planning. Decision makers will first reckon the client's need for control before deciding what else to do with him. Control makes rehabilitation possible.

Correctional workers know that criminals cannot be rehabilitated by absent treatment. They must be present in person to receive the benefits of a correctional program. Rehabilitation must depend on favourable processes going on within the individual, or upon some kind of systematic intervention designed to bring about change. The intervention may in the end be completely ineffective, but it cannot take place in the correctional context without accompanying control.<sup>(19)</sup>

Having looked briefly at the aims of punishment, under which imprisonment and probation fall, we can then confidently compare the two types of punishment.

#### COMPARISON BETWEEN IMPRISONMENT AND PROBATION

It is the use of imprisonment as an incapacitating technique that gives rise to most controversy. Imprisonment is the most conveniently ambiguous of all penal measures, since it can be claimed that it functions as a general deterrent, an individual deterrent, opportunity for reformation, a reinforcer of social stigma, and an efficient form of temporary elimination. In its eliminatory capacity it is, of course, less economical than, say castration or disqualification from driving; but superior to them in certainty and in the variety of offences against which it gives protection. Few prisoners escape; there are

few offences which they can commit inside; and their victims are usually their fellow prisoners or custodians. The only incapacitator which is superior to imprisonment, as to all other measures in universality, efficiency and economy is the death penalty. The deprivation of liberty is still costly both in terms of resources and in terms of unwanted side effects on the offender, and there is an increasing tendency to ask, "when is it justified as a means of protecting society?"<sup>(20)</sup>

The use of imprisonment rests on the widely held belief that crime deterrence is achieved by severe punitive Justice. The expenditure of billions of dollars in the construction of numerous and costly prisons has probably been the greatest mistake the more developed nations have made in crime - control practices in the last 150 years. The use of prisons as a method of crime control is under serious attack in the United States and Britain and even in Sweden, which was thought to have the best system in the world. The most serious charges are the irrefutable evidence of high rates of recidivism which range from 50 to 80 percent and the high costs of construction and maintenance in terms of poor results achieved. In fact, the most hardened criminals appear to be "produced by the prison system." Research has indicated that men in prison are trained in more sophisticated crimes at the expense of the state, that homosexuality is rampant and that the prison environment itself has a degrading effect on the prisoner.<sup>(21)</sup>

The question is whether a prison is able to change a person. Today, the prison's meaning is for the security of the public. It tries to bring to the prisoner order and discipline, to teach him, to help him improve his educational status. But

the prison is never a life like environment; this is the main reason why we should see probation and parole as a distinct part of the whole system of penal treatment. We must look ahead to the point that probation and parole are not merely ways of bringing freedom to the offender, but are necessary ways to help him. Normally, what the offender has done is the result of his inability to make good decisions, we must see how he behaves in normal life. We cannot see that when he is in prison.

In Kenya imprisonment is one method of treating offenders. It is used as a correctional institution. It is as it were, giving the offender time to do penance for his sins. The prison is on the receiving end of the judicial process and characterise the final step in the "revolving door" problem after the offender comes into contact with law. It is to be remembered that imprisonment is an imposed practice which is a result of colonialism. Africans had their own ways of dealing with offender, which we need not go through.

Clinard Abbott has observed that; most prisons in developing countries are merely care taking or custodial institutions. They are overcrowded and completely devoid of rehabilitative programmes. He writes:

"Overcrowding is a common, if not universal problem in the developed countries. In developing countries it is likely to be severe, an obvious consequence of the marked increase in crime, the failure to build new institutions particularly since independence, the number of prisoners awaiting trial and the absence of the alternative programs found in developed countries. Although the prisons department may appear to be making a reasonable progress in the effort to treat prisoners humanely and as far as possible, to apply measures directed towards rehabilitation, the appalling overcrowding frustrates both these objectives." (22)

Even if regarded as an <sup>e</sup>attempt at reforming, a custodial sentence presents problems. One of these is the difficulty, under conditions so unlike those of real life of telling whether and if so when, reformation has been achieved. Conformity with the strict regime of a prison is no indication that the prisoner has become law-abiding. The other problem is the unwanted by-products of custody. The inmate loses his job, is separated from relatives, friends and the community, he loses his initiative and becomes bitter and filled with hatred for society. Most of all, he is labelled an "ex-convict," a stigma that interferes with job procurement and family life and often destroys his own self-respect. A man's term in prison is held against him much more than his own conviction of a crime. The police and the courts tend to react negatively to a person with a prison record and this treatment by the legal system and by the community often leads to a first time offender embarking on a secondary or career deviance. The ex-convicts commit increasingly serious crimes and those who become gang leaders on release from prison indoctrinate non-criminals into criminal ways.

Even in the best run prisons, prison work is seldom more than a way of reducing the economic burden which prisoners represent. Therefore, they are made to grow their own food to reduce the expenses. It is also a way of reducing their idleness. As A.K. Saikwa (the then commissioner of prisons) put it:

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

There is a problem here because the prison work will not do anything for the offender. If he is sent in the garden, it will be done in the name of rehabilitation but the actual aim is that the administration is beating inflation. The inmate

pays for his stay by growing his food. If this is to remove idleness, it is only a temporal solution to his problem if his offence had been due to idleness and lack of a steady job. His going to the garden does not mean that he has reformed his bad ways, nor does it remove his criminality.

According to Rule 3 of the Prison's Regulations Section (c) the treatment of the offender should be such as to encourage their self-respect and personal responsibility, so as to build their morale, to inculcate in them the habit of good citizenship and hard work, to encourage them to lead a good and useful life on discharge.

The above rule deals with the presumption that there is something wrong with the offender which needs to be put right-first and foremost self-respect. One then wonders what kind of self-respect and responsibility are recognized, if a person is liable to imprisonment for assaulting someone who was about to molest his friend or relative.

Another technique used in the correction system of prisons is spiritual ministering. A.K. Saikwa<sup>(24)</sup> says that it is hardly possible to achieve any meaningful rehabilitation without giving spiritual instructions its rightful place. The essence here is to adjust the mind and soul of the offender. In recognition of this spiritual need therefore, the Prisons Act<sup>(25)</sup> provides for chaplains and catechists whose main duty is to minister to the prisoners. On the success of this method the Prison Annual Report of 1974 p. 7. recorded that there was peace and calm in the prisons due to the number of offenders who had responded to spiritual ministrations. One wonders what kind of effect this

technique has on a criminal with a determined mind, or one who does not choose to believe or accept this method of treatment.

The effectiveness of penal constitutions is dependent to a greater extent on conditions within these institutions. The approach used by prisons officers determines greatly the response of those committed. In Kenya the officers follow the directions in the Prisons Act and Regulations.

The inmate has no choice on what he eats or does. On entering prison, he parts with his civilian clothes which, together, with any valuable items he might have, are stored in the safe. He is then dressed in prison uniform. He loses his dignity, position and identity as he is ordered around and required to comply with the many prison rules, unlike the world outside where he had his own free will to do or not to do something. He is no longer identified as a person but by a number. Orders characterise his life which he no longer controls.

After being exposed to the kind of life in prison, no doubt, the prisoner's initiative is crushed. He has had life managed for him without having a say in it. When he comes out he feels like an outcast. He is altogether a stranger. There is such a big time gap that cannot be ignored. He is labelled an "ex-convict," hence the interference with his job chances and self-respect. Instead of gaining respect from the prison he has lost what he had. The society does not even believe he has been cured, to them he is unfit for life outside an institution. With a prison record behind his name, he is a good for nothing fellow. Nobody is ready to trust him.

My conclusion on prisons as a method of treatment is that, as a method of rehabilitation, it does not work to the maximum. The main reason is that the offender is treated outside the society, under conditions of captivity. He ends up as the victim of the ill-effects of an expensive and no good system.

Having arrived at this conclusion, I can now introduce probation as an alternative to imprisonment. As a form of community treatment, probation can be defined as a means of protecting society by assisting individual offenders to make a more satisfactory adjustment to their environment. This adjustment can come about in two ways; by integration and adjustment of the person and by the relief of detrimental pressures. The two are connected.

To this end, an understanding of the individual and his environment is necessary. This understanding must come from expert investigation. Without this, the court cannot make sound decisions and the probation process is stymied. (26) The probation officer is charged by law with responsibility for these investigations.

The utility of probation as a correctional device must be evaluated in terms of what it accomplishes as compared with other correctional methods. This can be measured in an abstract way in the comparative implications of imprisonment and community supervision for the prisoner, his family, and the state and more concretely in the rates of recidivism of probationers as compared prisoners.

For the offender, probation in contrast with imprisonment means an opportunity to engage in constructive employment to support himself, and sometimes to improve his economic stability

and status. He can make more profitable use of good work habits both during and after probation than can his prisoner counterpart. Either willingly or involuntarily under support orders, he can maintain his dependents generally and assume responsibilities in the community.

In Kenya, probation is a community based method the imported system of rehabilitation. If intensely supervised, it can be used as a better alternative to prison terms. In its essential sense, it means the opportunity for a person to prove himself. This method would help keep offenders outside prison, especially short term prisoners. The further advantage is the threat of a rigorous imprisonment for a repeated offence. The fear of the prison coupled with the stigma attached to imprisonment will help to a great extent to prevent the offender from reverting crime.

Several community-based type of facilities offer possibilities of rehabilitating the offender. Probation hostels or living centres for probationers would enable offenders to work or attend school during the day rather than being confined to in prison. They would return to these centre at night or on week-ends and remain under supervision of a correctional worker. Work release programs of various kinds offer other possibilities for reformation. This approach combines an institutional program with participation in free society during the day, a significant factor, since nearly all offenders sooner or later return to free society. In work release programs, they associate with non-criminals rather than with other offenders in prisons. It is theorised that the non-criminals with whom they work may have a positive effect in changing his attitude and his criminal



self-conception and to remove him from his former criminal associates.

It is sometimes said that probation is neither punishment nor giving offenders another chance. Good probation is never intended as an easy way out for the criminal or delinquent, but is often received by them as such. The statement that probation is not punishment is misleading. However, much preferred by the delinquent, probation may involve restrictions upon freedom and requirements to refrain from disapproved behaviour or to perform required acts which may be irksome and even painful to the probationer.<sup>(27)</sup>

More specifically probation, whether juvenile or adult, permits a more normal social experience than institutionalization, but makes possible varying degrees of control over the delinquent together with the possibility of sentencing him to an institution if probation proves ineffective. Probation permits contact with the other sex, with the family, and with constructive social agencies of all kinds. It means a less routinized and more self-directed existence. It does not, like imprisonment make the offender a dependent but leaves him responsibility for self-support. Moreover, even when there are social dangers in the probation community, it furnishes for that very reason a better test of ability to adjust than does life in the socially isolated prison or institution for juvenile delinquents.

The comparison brings out probation as a better alternative and I think that our courts should be influenced by this method of rehabilitation than they are at present, for it is economical, and more easily adaptable than imprisonment.

## CONCLUSION

This chapter has dealt with causes of crimes and the aims of the penal system. We have seen how approaches were advanced from early times starting with simple advances like those which state that biological appearances do cause crimes, to the most accepted ones of psychiatric disorders and social conditions as causes of crimes.

In part (b) the aims of the penal system are dealt with in which justification for punishment comes out clearly. This part also contains a comparison between probation and imprisonment, in which I have advanced the uses of each corrective system, in a bid to show that probation is a better or more useful corrective program than imprisonment. It came out clearly that probation is more helpful, not only to the offender, but to the government in terms of saving the tax-payers money and putting it to a more better use.

We saw that imprisonment not only hardens the criminal, especially first offenders, but is also an expensive institution to run; it is not always successful and leaves the prisoner with a stigma which is hard to abandon as it is always "rubbed" in by his being an "ex-convict".

The advantages of probation also came out clearly. We saw that since offenders under probation are treated in a free society they have a better chance to adjust and integrate into society much more quickly and easily. The offenders can engage in constructive employment to support themselves and their dependants, which they cannot do if they are imprisoned.

CHAPTER 2

(PART A)

( INTRODUCTION )

This chapter will contain two parts (a) and (b). Part (a) will discuss the historical origins and development of probation service in England and its subsequent incorporation in the laws of Kenya chapter 64.

Part (b) will discuss the administration of the probation system under chapter 64 of the laws of Kenya. This will necessitate an examination of whether the Act as presently structured and administered achieves the purposes and objectives of probation. This discussion will therefore be an analysis of the Act.

HISTORICAL BACKGROUND OF PROBATION.

Our Probation of Offenders Act chapter 64 of the laws of Kenya, is an adaptation of the English Probation of Offender Act of 1907. It will thus serve our purpose to trace the historical development of the probation service in Britain.

Probation is especially the development of the last a hundred and ten years, representing a reaction to the harshness of the eighteenth and nineteenth century penal systems. It is based firmly on the ideal of rehabilitation. It is the foremost example of a method of dealing with an offender which concentrates on him as an individual and tries to bring about his personal adjustment to the problems of his society. It represents the minimum interference with his life and liberty that is consistent with social protection and the disapproval of the crime.

The supervision which he receives tries to strengthen him so that he may play a more responsible part in the community.<sup>(1)</sup>

Probation, as a corrective system in England, grew out of the practice of binding over offenders to keep the peace and be of good <sup>to</sup> behaviour for a specified time. With the critical examination of the penal system in the early nineteenth century came a growing mistrust of the prison system, and a willingness to use binding over to keep the offenders out of prison when they showed promise of reformation. The same was true of the United States where Massachusetts unofficially practiced probation as early as 1840 and later became the first jurisdiction to appoint officially paid officers.

The positive elements in the English system were introduced by voluntary enterprise. From 1876, the church of English Temperance society began to appoint "police court missionaries" to attempt the reclamation of drunkards appearing in the London magistrates' courts. The activities of the missionaries grew slowly; they had not made a great impact when in 1887 the first British probation legislation was passed, providing merely for conditional discharge of certain first offenders on recognisances to keep the peace, be of good behaviour and come up for judgement when called upon by the court. It was, however, a statute which had reformation in its mind and with the growth of the police court missions, which had nearly a hundred and twenty workers by 1900, and the expansion of their services to all criminal cases, a formal beginning could not long be postponed. It came with the Probation of Offenders Act in 1907. This Act was to be the basis of the probation law in many British territories. A new scheme of probation was introduced by the

Criminal Justice Act of 1948.

KENYAN PROBATION HISTORY

In Kenya, the adoption of the probation system was largely through recommendations made by a committee appointed to consider the advisability of introducing a system of probation to the colony in 1942.

The committee first considered the colonial office memorandum on probation and, as a result it was decided that information should be sought from as many sources as possible, so as to enable it to make the required recommendations as to the institution of the probation system in the colony. In paragraph 14 of the recommendations the committee noted:

"The prison and approved school systems are only partially complete without a system by which discharged convicts and inmates can be found suitable employment on release, and be supervised until they have readjusted themselves to the world outside. In the very first instance this work may be done by the probation officer, but once the courts have realized the benefits of probation and the system has proved successful it will be possible for the probation officer to deal with both probationers and discharged prisoners. We are unable to suggest, therefore, that this work be made a definite duty of the probation officer, but recommend that he be asked to assist when a probationer, who has proved a failure is discharged from prisons of approved school, as the probation officer will have already had contact with the delinquent." (2)

From this recommendation, the probation service was to deal not only with probationers but with discharged prisoners and delinquents. We now have children's officers who deal with delinquents, although they still work under the wing of probation service.

By paragraph 16 the committee recommended:

"... Following the advice of our chairman..., we recommend that, as the institution of probation will necessitate the drafting of an ordinance and

the revision of certain existing law; the Honourable the Attorney General be requested to draft the legislation necessary to give effect to such of our recommendations as the government may approve. In this connection we recommend that the supreme court and subordinate courts of the first, second and third class be empowered to make probation orders for a period of not less than six months more than thirty six months."

Paragraph 17 recommended that if the probation system was adopted by the colony, all new appointments to the judicial service from Great Britain should be followed by a course in one of the London or Provincial courts, and that resident magistrates already serving in Kenya, should be required to attend one of these courses during their home leave. The probation committee found relevance in the following quotation:

"...We need in every court of summary jurisdiction, magistrates who will take pains to understand the comparatively simple principles which underlie the organisation of an efficient probation service and who will give the necessary time and trouble which membership of a probation committee or case committee involves....These objects can only be attained by close co-operation between the home office, the justices and the local authorities."(3)

Probation treatment of offenders was introduced into Kenya by the Probation of Offenders Ordinance of December, 26, 1943. However, the first group to benefit from it did so in 1946 due to the second world war. Thirty nine offenders were released on probation that year. The system was gradually expanded in the following years by a series of subsidiary legislations, and it was extended to more offenders. Salaried probation officers attached to the courts were appointed to do the work of supervision for the purpose of rehabilitation. In 1962, the Ordinance was revised and gained the new title of: The Probation of Offenders Act ( Revision 1962 ), Chapter 64 Laws of Kenya. This is the Act still in force in Kenya.

Probation officers have to take a two year course at the Kenya Institute of Administration, Kabete, before being appointed as probation officers. There has also been an increase in trained staff to man the department thus enabling it to expand fairly rapidly and making it possible for more offenders to be placed on probation. To help us understand the progress of probation, I will quote the probation case work report of 1979 for Rift Valley Province:

"In 1978, 942 criminals were referred for pre-sentence probation officers' reports but in 1979, the number increased to 1,098. Upon enquiries made throughout the province, 733 offenders were found suitable for rehabilitation on probation compared to that of 573 placed in 1978. This is approximately 66.8 per cent of all the criminal cases referred. From the entire load of enquiries 60 juveniles were committed to borstal institutions, 77 to approved schools and only 1 was committed to Kamiti Youth Corrective Training Centre.

Others were dealt with in other ways by the courts as they deemed reasonable. There were 899 probationers brought forward from 1978 and 111 others were transferred in during 1979. These, plus the new placements in the year summed to 1,743 probationers under supervision in the year. In the course of the year, however, 515 probationers completed their period.

449 of the probationers completed satisfactorily; 35 unsatisfactory and 31 completed as absconders. Based on these figures, I am happy to note here that the success rate was 87.4 percent; with adults showing better response than the juveniles, and women in general responded best. There was therefore only 12.6 per cent unsuccessful completions, including 6.6 per cent unsatisfactory and 6 per cent abscondee completions.

At the end of the year there were 1,047 probationers under supervision in the province. In addition, there were 108 ex-borstal inmates, 2 special category criminals, and 2 probation and discipline cases under probation service supervision. In total there were 1159 persons under supervision at the close of the year." (4)

These figures are only from one province and show that the idea of probation is fast catching on as a method of treating

offenders. However, 1980 case-work reports show a decline in the use of probation, especially in Uasin Gishu district of the Rift Valley Province. The magistrates' courts registered a total of 6,474 cases during the year and out of this number 210 cases, that is, 3.2 per cent only were referred to the probation service for enquiries and reports made to the courts. Among the 210 cases referred, only 131 were found to be suitable to be placed on probation. 17 were committed to Borstal institutions, while 5 were sent to Approved schools, the rest were dealt with otherwise.<sup>(5)</sup>

A classification of the offenders in the above annual reports would give us an insight of the people placed on probation. This classification will appear in chapter 3 when I deal with the criteria for use of probation service.

Having looked at the development of probation service, I will now proceed to discuss the administration of probation under our Act.

## CHAPTER 2 (PART B)

### ADMINISTRATION OF PROBATION UNDER CHAPTER 64 LAWS OF KENYA

The precise form taken by probation varies throughout the world. The United Nations Study of Probation and related measures in 1951 found such a variety of ideas involved in it that it could only be described in general terms as a "method of dealing with specially selected offenders" consisting of "the conditional suspension of punishment while the offender is placed under personal supervision and given individual guidance or treatment."<sup>(6)</sup>



For Kenya<sup>^</sup> purposes, the probation being based on that of England, it is simpler to adopt the narrower definition given in a report on the English probation service in 1962, namely:-

"... the submission of an offender while at liberty to a specified period of supervision by a social case worker who is an officer of the court; during this period the offender remains liable, if not of good conduct, to be otherwise dealt with by the court." (7)

Section 4 (i) of chapter 64 Laws of Kenya provides:

"Where a person is charged with an offence which is triable by a subordinate court, and the court thinks that the charge is proved but is of the opinion that, having regard to youth, character, antecedents, home surroundings, health or mental condition of the offender; or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may:-

- (a) convict the offender and make a probation order; or
- (b) without proceeding to conviction, make a probation order.

and in either case may require the offender to enter into a recognisance, with or without sureties, in such sum as the court may deem fit."

It is to be noted that from the beginning probation was not limited to juveniles, first offenders, or to a restricted range of offences, character, antecedents, age, health and mental condition of the offender. From our historical discussion of probation service, we saw that the committee on probation even recommended ex-prisoners, juveniles and other offenders. I believe that a progressive judge or magistrate would take even the trivial nature of the extenuating circumstances into consideration. I also think that probation should be used by both the magistrates and higher courts, for offenders of any age and with no absolute restriction as to criminal record.

The above section leaves the maximum discretion to the court.

Section 4 (3) provides:

"Before making a probation order under sub-section (1) of (2), the court shall explain to the offender in ordinary language the effect of the order and that, if he fails in any respect to comply therewith or commits another offence, he will be liable to be sentenced for the original offence, and the court shall not make a probation order unless the offender expresses his willingness to comply with the provisions of the order."

Probation orders, have followed the tradition of the recognisance in requiring the offender's consent. There are those who argue that, since the offender will usually agree to probation rather than risk anything worse, consent is another fiction that should be dispensed with. I feel that even if this consent is given under pressure it has a real value. It is the fear of something worse that induces people to agree, for example, to a course of medical treatment, but this does not make their consent less valid, or their cooperation less essential.

The court has the duty of explaining to the offender what a probation order will involve and the probation officer is required afterwards to make clear to him his rights and obligations. It has been suggested that the element of active participation and responsibility involved in a recognisance could be restored by requiring the offender to sign, perhaps in court, an acknowledgement that he understands and accepts the order. In view of the requirement of consent by the offender, it is important that he understands what is meant by probation, what his obligations are and what is likely to happen to him if he fails to meet them. In this, it is especially important that he understands in details what the requirements of the order are.

Section 4 (4) provides that:

"Where any offender against whom a probation order has been made commits a subsequent offence or fails to comply with any of the terms of the probation order, any sum the subject of any recognisance entered into by or on behalf of the offender may, in the direction of the court, be forfeited."

From the above quoted sections, one sees that four conditions exist for the use of probation.

- (a) That the circumstances of the offence and the offender's records are not such as to demand, in the interest of society, that some more severe method be adopted in dealing with him;
- (b) The risk, if any, to society through setting the offender at liberty is outweighed by the moral, social and economic arguments for not depriving him of it;
- (c) The offender needs continuing attention, since otherwise, if the condition in section 5(1) (which should be explained to the offender in a language he understands), is not complied with, the offender on committing another offence is liable to be sentenced for the original; and
- (d) the offender is capable of responding to this attention while at liberty.

#### THE PROBATION ORDER

Section 5(1) in addition to requiring the offender to be under supervision of a probation officer for a specified period of not less than one or more than three years, a probation order may require the offender to comply during the whole or any part of the probation period with such requirements as the court, having regard to the circumstances of the case, consider necessary for securing his good conduct or preventing him from committing further offences.

The standard requirements call upon the probationer to be of good behaviour and lead an industrious life, to report at once any change of address or employment and also to keep in

touch as instructed by his probation officer. In addition, the court is free to delete, modify or supplement these standard requirements by the insertion of any condition which might be expected to assist in ensuring the probationer's good conduct and avoid the repetition of his offence.

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#### DURATION, VARIATION AND DISCHARGE OF PROBATION ORDER

The length of a probation order as per section 5(1) of our Act, may be up to three years, depending on the requirements of the individual offender. Sometimes the limit of the order may be indicated by certain stages of the offender's life for example, in the case of a boy at school, it might be appropriate for the order to be of such length (subject of course, to the limit of three years) as to cover the period when he leaves school and starts work.

It is usually advisable to make an order for a longer rather than a shorter period, although many probation officers seem to believe that often in the case of adult offenders if an acceptable pattern of life has not been established at the end of one year, it is unlikely to be achieved in more. However it is probably wise to err on the side of safety because in any event it will always be possible to shorten the order by an application to discharge to the supervising court, by the probation officer, where he thinks that the progress made by the probationer is sufficient.<sup>(8)</sup>

Courts, which have the power to discharge an order may, on the application of the probation officer or of the probationer himself, substitute a conditional discharge for the order, the

condition being that the probationer commits no offence between the making of the order of conditional discharge and the expiration of the period of the probation order. The reason for this may be progress which falls short of that which the supervising officer thinks sufficient to justify discharge but which, to be continued, needs some form of trust or independence which is inconsistent with probation.

The probation order may also be amended or varied by the supervising court subject to the consent of the probationer himself and a number of special qualifications as follows:

- (1) The length cannot be reduced (except by a separate application to discharge) or extended to a period in excess of 3 years;
- (2) The length of a requirements as to residence or mental treatment cannot be extended to a period in excess of twelve months;
- (3) A requirement as to mental treatment may not be inserted after three months from the date of the original order.(9) (This is the position in England. I have not come across a Kenyan case which has dealt with this aspect.)

The parts of our Act (cap 64), which deal with duration, variation and discharge of a probation order are section 11 and 12, under the sub-title of Amendment of probation order.

Section 11 (1) provides:

"Subject to the provisions of this section, where, on the application of a probationer or of the principal probation officer, the court which made the probation order is satisfied that the provisions of the probation order should be varied, or that any provisions should be inserted or cancelled, the court may by order amend the probation order accordingly;"

Provided that no order shall be made under this section reducing the period of duration of the probation order, or extending that period beyond a period of 3 years from the date

of the probation order.

By section 11 (3) :

"The court shall if it is satisfied or the application of the principal probation officer that the probationer has changed, or is about to change, his residence from the district or area named in the order to another district or area, by order vary the probation order by substituting for the reference to the district or area named therein a reference to the area where the probationer is residing or is about to reside, and shall transmit to the court for the new district or area all documents and information relating to the case and thereupon the latter court shall be deemed for the purposes of this Act to be the court by which the probation order was made."

As to discharge of the probation order section 12 (1) provides:

"The court by which a probation order was made may, on the application of the probationer or of the principal probation officer, discharge the probation order and where the application is made by the principal probation officer, the court may deal with it without summoning the probationer."

By section 12 (2) where an offender in respect of whom a probation order has been made is subsequently sentenced for the offence in respect of which the probation order was made, the probation order shall cease to have effect.

#### COMMISSION OF A FURTHER OFFENCE

Section 7 of chapter 54 deals with this aspect and provides by section 7 (4):

"where it is proved to the satisfaction of the court by which the probation order was made that the probationer has been convicted of an offence while the probation order was in force, then-

- (a) If the probationer was not convicted of the original offence in respect of which the probation order was made, the court may convict him of that offence and pass any sentence which it could pass if the probationer had just been convicted before that court of that offence; or

- (b) If the probationer was convicted of the original offence in respect of which the probation order was made, the court may pass any sentence which it could pass if the probationer had just been convicted before that court of that offence."

In the situation where (section 7 (5) (a) ) the case comes before the High Court, the high court, may convict him of the original offence in respect of which the probation order was made, but the sentence must be equivalent to that which the court which made the probation order could pass if the probationer had just been convicted before that court of that offence.

Broadly speaking, it is probably preferable that the court which deals with the offender for the subsequent offence should also deal with him under section 7 of our probation of offenders Act, especially where that court wishes to do something fundamentally different from a probation order. Where that court does not for any reason deal with the original offence, it is for the original court to decide whether or not to issue process to bring the offender before it. It is a discretionary power, but it is suggested that only rarely should a probationer not be brought back in this way although again the probation officer's advice on the subject will normally be very influential.

In the English case of R.V. THOMPSON,<sup>(10)</sup> the court of Appeal emphasized that where there has been a clear "breach of probation" by the commission of a further offence, the court should pause for careful reflection before making a fresh probation order otherwise, as the court observed, the force of probation is weakened, its machinery is brought into

contempt and public harm results.

In the above case, the probationer pleaded guilty to burglary and larceny and was placed on probation in June 1967. In April, 1968, he again pleaded guilty to shopbreaking and larceny and asked for three other offences to be taken into consideration and was fined. In June, 1968, he was sentenced to six months' detention for burglary. On appeal, it was submitted on his behalf that the sentence would interfere with his apprenticeship and that he had learned his lesson. However, his probation officer was not optimistic about his future conduct and the court decided that the offender had shown contempt for probation, and detention was both in his interests as well as those of the public.

BREACH OF PROBATION ORDER

By section 8 (3) if it is proved to the satisfaction of the court by which the probation order was made that the probationer has failed to comply with any of the provisions of the probation order then -

- "(a) without prejudice to the continuance in force of the probation order, the court may, if no moneys are liable to forfeiture by the probationer under subsection (4) of section 4, impose on the probationer a fine not exceeding shilling 200/-;
- (b) if the probationer was not convicted of the original offence in respect of the probation order, the court may convict him and pass sentence which it would have passed.
- (c) if convicted the court need only pass sentence which it could have passed had he just been convicted."

Breach of probation order relates to breach of the requirements of the order, such as failure to keep in touch with the



probation officer or giving up a job without good reason or breaking a condition of residence or something of that kind. Breaches<sup>c</sup> of the order fall under the discretion of the probation officer and should thus be distinguished from commission of further offences which are dealt with by the courts directly. It is the view of some people that except for the most trivial breaches of probation conditions, the offender should be brought back before the court if only to be warned of the serious consequences of a further lapse on his part.

Proceedings for the breach will have been brought, with or without consultation, by the probation officer concerned who will normally have a view on what course he thinks should be adopted. The decision to sentence or commit for sentence on the original offence will obviously be employed only in cases where the probation order has demonstrably failed in that the offender has by his actions refused to co-operate with the supervising officer.

In England, the Court of Appeal has repeatedly been obliged to make the point that jurisdiction to deal with a breach of probation (or even the commission of a further offence) depends upon proper proof of the breach. First by putting details of the alleged conduct constituting the breach to the probationer so that he clearly understands what is being said against him, and then either by his admission or, where he denies it, after the hearing of the oath. This is not to be regarded as an empty formality in either situation for the risks in terms of individual liberty are, broadly speaking, the same on this occasion as when the offender originally appeared before the court.

Section 13 deals with the transmission of copies of orders for amendment of discharge of the probation orders. Section 14 deals with the **selection** of probation officers, where by section 14 (1) the supervising probation officer is to be selected by the principal probation officer. By section 16 (1), the Minister of Home Affairs, under which probation falls, shall appoint:-

- "(a) a principal probation officer,
- (b) a sufficient number of probation officers, qualified by character and experience to be probation officers, who shall perform such duties as may be prescribed by rules made under this Act."

By section 17. The minister may make rules prescribing;

- (a) the duties of the principal probation officer;
- (b) the duties of the probation officers;
- (c) the constitution and duties of a probation committee or probation committees;
- (d) the forms of records to be kept under this Act;
- (e) what shall be an institution for the purposes of this Act;
- (f) the remuneration of any person appointed to carry out any duties under this Act, and the fees and charges to be made for any act, matter or thing under this Act to be done or observed.
- (g) generally for carrying out the purposes and provisions of this Act.

And by section 18, the Principal Probation officer, may in writing delegate all or any of this powers, duties or functions in relation to a probationer, to any probation officer who is responsible for the supervision of the probationer.

The Act concerning probation of offenders is a short one but despite this fact, I think it has outlined the basic requirements of probation service in full and leaves no loop holes. The rest of the pages of the Act deal with subsidiary legislation,

rules under sections 16 (2) and 17, concerning the probation of offenders (central probation committee) rules, probation of offenders (case committees) rules and also outlines the duties of principal probation officers and probation officers. I shall now look at a few of these rules.

RULES UNDER SECTION 16 (2)

THE PROBATION OF OFFENDERS (CENTRAL PROBATION COMMITTEE RULES)

Section 16 (2) of the Act itself provides:-

"The minister may appoint a probation committee or probation committees, consisting of such persons as the minister shall think fit, who shall review the work of probation officers in individual cases and perform such duties in connection with probation as may be prescribed by rules made under this Act."

The rules are as follows:

Rules 3 (1) deals with the constitution of the committee and provides that the committee shall consist of:-

- "(a) a chairman who shall be the chief justice.
- (b) ten members appointed by the minister representing respectively -
  - (i) the ministry for the time being responsible for probation service;
  - (ii) the ministry for the time being responsible for labour matters;
  - (iii) the ministry for the time being responsible for social services;
  - ( iv ) the Kenya Police;
  - ( v ) the Nairobi City Council;
  - (vi ) the Christian Council of Kenya;
  - (vii) the Roman Catholic Church;
  - (viii) the Salvation army;
  - ( ix ) the Nairobi Chamber of Commerce and

(c) not more than six other members appointed by the minister."

The members of the committee appointed under sub-paragraph (i) shall hold office for 3 years, but shall be eligible for reappointment. Such a person may also resign his office by notice in writing addressed to the secretary of the committee, who shall forward it to the minister as per rule 3 (3).

It is important to note that the above quoted rule 3 (1) involves a number of ~~ministries~~ and institutions ranging from the police, the church and the city council. Each of this institution has a role it can play in making probation successful in dealing with offenders. For example, it is the police who are sent to look for a probationer who has absconded or has breached the probation order, and their duty is to produce him before the magistrate. The church may be used to instil moral values in a probationer, but the question of the choice of denomination arises. The Kenya constitution by section 78 allows freedom of worship, and thus a choice of denominations, so that to put one particular denomination in a statute would seem to me to be inconsistent with the constitutional provision as to freedom of worship. The rule also involves some ministries like those of labour and social services. The ministry of labour works in conjunction with probations services in helping to provide some sort of jobs for offender to keep them from being idle. It is usually said that a lazy mind is the workshop of the devil. The ministry of social services may offer advise especially to probation officers concerned with difficult probationers, or in dealing with the community problems in the community from which a probationer comes from.

Rule 4 of section 16 (2) deals with the duties of the committee which are:

- "(a) to make recommendations to the minister concerning the various allocation of the services of probation officers to various areas;
- (b) to receive and consider the recommendations of the probation case committee of any area concerning the needs or working of the probation service and to advise the minister on all matters arising therefrom, other than administrative matters;
- (c) to make recommendation to the minister relating to the duties of the committee and of the probation case committees;
- (d) to advise the minister on any question of policy and upon any other matter relating to the probation service as he may refer to it for advise."

It can be seen from the above duties that the central probation committee hold the key to the success of probation in their hands. They can either retard the development of probation or make it progressive. I would thus suggest that the members of the committee should be well acquainted with the meaning and requirement of probation service in order to expend their duties more fully and satisfactorily. Rules 5 and 6 concern the meetings of the committee and their procedure. Rule 7 concerns the quorum of the committee meeting which shall be five. Rule 8 (1) concerns voting and provides that the decision of the committee shall be by a majority of votes, while rule 8 (2) provides that the chairman of the committee shall have a casting as well as a deliberative vote.

There are also rules concerning the probation of offenders case committees, whose constitution requires a chairman and seven members appointed by the permanent secretary and the

principal probation officer, who shall be an ex-officio member (Rule 3 (1) ).

Rule 4 deals with the duties of the committees which are:

- "(a) to examine and review the work of probation officers in relation to individual cases;
- (b) to receive and consider reports from probation officers;
- (c) to make or direct the making of any communication which it may be necessary to make to the court.
- (d) to make or direct the making to the central committee of recommendations concerning the probation service;
- (e) to advise and assist probation officers in the execution of their duties;
- (f) to ensure that probation officers perform their duties in a satisfactory manner."

These case committees are an important branch or organs of the probation service and ensure that the individual case reports have been done thoroughly and that recommendations concerning the service have been passed to the central probation committee to deal with.

The duties of the principal probation officer are outlined in Rule 2 (a),(b),(c),(d),(e) and (f) of section 17 under the heading; The Probation of Offenders Rules. The duties of a probation officer are outlined in Rule 3 and I will quote them, as the probation officer is the one who deals directly with probationers. His duties are thus:

- "(a) to make preliminary inquiries as the court may direct into the antecedents, home surroundings and other circumstances of an accused person;
- (b) to undertake supervision of probationers <sup>as</sup> may be assigned to his charge;
- (c) to visit the home of every such offender and make inquiries as to his conduct, mode of life and employment.

- (d) to keep in touch with probationer and to arrange to meet him at least once a fortnight during the first six months of the period specified in the probation order and thereafter at such intervals as he may deem necessary, having regard to the conduct, mode of life and needs of the probationer;
- (e) to ensure that the probationer has understood the terms and conditions of the probation order and to endeavour by encouragement, persuasion and warning to secure his observance of them;
- (f) to advise, assist and befriend the probationer and where necessary, endeavour to find suitable employment;
- (g) if the probationer is under 18 years, to endeavour to secure his association with some suitable youth movement or other welfare organization;
- (h) to keep proper and up-to-date records of every probationer for whom he is responsible, including notes of visits and interviews and relevant details as to the conduct and progress of the probationer."

In my view, the probation officer is one of the most important persons in the probation service. He is the one who decides whether an offender is suitable to be placed on probation, and later helps him to come to terms, as it were, with his community. In fact, the probation officer does all the work that could either make probation successful in terms of success rates, that is, the number of people who come out of probation fully reformed. It is due to his important role in the probation service that I intend to deal with the probation officer's role at length in my conclusion to this chapter.

#### CONCLUSION AND DISCUSSION

All that has been said above begs the question:

Is probation treatment of punishment? Probation is a combination of both treatment and punishment. It is a legal disposition. An offender is sentenced to serve time on probation. At the

same time, it is a process of treatment in the context of community based corrections ideally, offenders receive guidance and counselling in an attempt to ensure their adjustment to free society. In reality, probation is punitive because restrictions are placed on the probationer. But it is also to be noted here, that many authorities would deny the punitive aspects and instead would argue that all their policies are rehabilitative.

In the United State of America, some states allow judges to utilize "split sentencing" or "shock sentencing." Offenders are placed on probation with the stipulation that they may be confined for a portion of their probationary period. The assumption is that a "taste of confinement" or the "shock" might lead to a modification of behaviour.<sup>(11)</sup>

The twin objectives of probation are protection of the community and rehabilitation of the offender. These objectives create a dilemma and role conflict for the probation officer. The probationer and probation officer are legally thrust into a potentially intimate relationship. Each participant - officer and probationer defines the situation differently. The probationer brings to the counseling or supervision situation a natural apprehension. Sitting on the other side of the desk is an official representative of criminal justice system who has the power to further restrict the probationer's freedom and possibly initiate probation revocation proceedings which could result in a trip to jail. As one probationer put it; "A probation officer is just a wolf in sheep's clothing."<sup>(12)</sup> This is especially true in Kenya, where people are still not fully aware what probation really is, and some think that the probation officers are plain clothes policemen or a branch



of the police force.

The probation officer is also apprehensive about the encounter. Will the probationer be cooperative or, by violating the conditions of probation, cause trouble? Past experience may put the officer on the defensive not to be conned and to watch for signs of rebelliousness on the part of the "client". Given the ambiguity of their roles, there are two neutral positions probation officers may take to reduce their anxiety. First, probation officers may see themselves as authority figures who can control probationers simply by showing them "who is boss." The structure of their interaction is defined by the legislatively enacted condition of probation. Given this role the probation officer explains the rules firmly, issues a paternalistic admonition to be good, and may end the interview with the old saying: "If you work with me I will work with you."

On the other hand, the probation officer may reject the role of an authority figure and assume that of a helpful friend. From this stand, rules are seen as relatively unimportant and the probationer's approval as all important. In effect, the probationer now controls the probation officer, for the latter can withdraw approval at any time. The "helpful friend" approach means that the probation officer will suppress any critical remarks or even overlook violations of probation rather than risk incurring the probationer's disfavour, and perhaps damaging their counselling relationship.<sup>(13)</sup>

Given the above uncompromising situations, I would think that a middle position between these unsatisfactory extremes

would be for the probation officer to try and show the probationer that power or domination is not the issue, but that, within the limitations of their legal relationship, the officer would like to find ways to help the probationer to complete the terms of probation successfully.

In addition to being of help in sentencing, the probation officer serves as something of a jailer-at-large by supervising probationers to protect the community. This role involves the talents of a criminal investigator, as the officer must discover if probation violations and, or crimes have been committed by those under supervision. But one of the probation officers social-work functions is the preparation of a pre-sentence report.

Information secured in a presentence investigation can be utilized at every stage in the administration of criminal justice for example, by the courts in determining an appropriate sentence, by the prison classification team in assigning custody and treatment; and by correctional researchers as they try to locate those variables which are associated with success on probation. The primary object of the pre-sentence investigation is not to determine the guilt or innocence of the defendant, which has already been determined legally, but to give anyone who may be working with these people insights into their personalities and some understanding of the social milieu which produced them.

When a probationer violates the conditions of probation, care should be taken to determine whether the violation was the

result of unrealistic probation rules or an arrogant or indifferent attitude on the part of the probationer. The probation officer should ask: To what extent is this violation reflective of deeper hostile attitudes? Probation officers should be careful to remain objective and not revoke probationers because of a personal dislike for an argumentative probationer.

As concerns the revocation of probation order, it is only justified when the probationer defies an order of the court or when they become threats to the community. Few violations should result in an automatic revocation of probation. One guideline question to ask is: How would we have responded to this act had the person not been on probation? All violations should be judged in the light of the probationer's total adjustment to society.

Advocates of probation justify its continued use on two central grounds; that probation is an effective means of individual treatment and that it is a tax bargain for the state. To determine whether probation conforms, in practice, to the high ideals it espouses in theory, the American Bar Association conducted a nation wide survey.

The report listed some of the following criticisms:-

- "(1) Probation was granted without sufficient knowledge of the defendant and his background;
- (2) Pre-sentence reports often may contain a bias either for or against the offender.
- (3) Probation is often used to clear the docket, to induce the defendant to plead not guilty and to alleviate crowded prison conditions.
- (4) Probation is often used as a collection agency to induce payment of fines, restitution and alimony.
- (5) The cost of probation is sometimes borne by the probationer in effect, a probation tax. The offender pays for the privilege.

- (6) There was inadequate supervision of probationers on the part of probation officers due to heavy caseloads or apathy.
- (7) There was an over identification on the part of the probation officer with the social work expectations of his role to the neglect of law enforcement responsibilities.
- (8) There was inadequate and unreliable statistical research, making it nearly impossible to discover the success or failure of the system." (14)

The above proposition<sup>s</sup> are very true of the short comings of our own probation service. But despite these shortcomings, probation remains a superior method of dealing with many offenders, specially as opposed to incarceration in a dehumanising institution like prison. It is axiomatic that to function as a normal person, one must live in a relatively normal environment. Institutionalisation should be utilized only when the offenders are dangerous to themselves and to the community.

In this chapter, we have had a look at the historical development of probation service not only in Britain, but also in Kenya, culminating in our Probation<sup>of</sup> Offenders Act, chapter 64. Under this Act many categories have been dealt with, for example juveniles and ex-prisoners. We have seen that it is becoming a popular method of dealing with offenders, and does not only save a lot of money which could be used in their maintenance in prison, but also gives the offenders a chance to harmonise with society and become a part of it, through the help of that same community.

Under, the Act, we saw how probation is administered and the rules regarding the duties of probation officers, the central committee and the probation case committees. Under all these, it has come out clearly that the offender in need should be seen in his social setting and attempts to solve his problems should

take into account the whole situation. When a probation order is made the need for a solution satisfactory to society as well as to the individual is made explicit. The offender, under the Act, is often explicitly required to meet his several obligations, to lead an honest life and to be of good behaviour. It is the job of the probation officer to stimulate the offender to want this for himself and to find ways of doing it that give him satisfaction without infringing the rights of others. The probation officer should try whenever possible to plan and act with his client, to enable him to talk about his feelings rather than leave him to work them off in ways that damage others or himself, to encourage him to plan and act for himself rather than do things for him.

One of the pre-requisites for the effectiveness of probation is the availability of well trained and qualified personnel to do the actual work of guidance and not just for 'paper work'. There is need to have well-trained psychologists and sociologists who are also social workers. These people must have experience and be keenly interested in the welfare of man in society. They must also be resourceful, imaginative, initiative, considerate, patient, fair and honest. These are qualities which are a very rare commodity and only helps to demonstrate the difficulty of the work. In other words, probation officers must be, for all intents and purposes, more qualified than the magistrate who places the probationer on probation. It is the probation officer, who has to diagnose his problems and find a cure while the magistrate merely pronounces from the chair that the offender is placed on probation. The whole process of rehabilitation and its effectiveness rests solely with the probation officer, and not with the court.

In regard to the above, the Kenyan probation system has a problem in that, we do not have enough probation officers to deal with the heavy caseloads and supervision, meaning that the probationers do not get all the attention they need. In my interview with Mrs. Kamuren, the principal probation officer of Uasin Gishu District, she expressed her dissatisfaction with the training system, which she said seemed to work against the development of probation service. I learnt from her that every year only twenty probation officers are trained, except for 1981 when, she said, twenty-five had been accepted for training. It appears to me that this fact cripples the aim of probation, which I think should be used more extensively than it is used at present in Kenya. Mrs. Kamuren complained that women probation officers were few, due to discrimination in the intake for the training. She also said that due to the shortage of staff, there were situations when a probation officer could handle as many as 150 cases single handed, while she felt that to even handle 50 cases alone was too much work.

Since case work approach is the essence of the guidance it means that a lot of attention must be paid to the social and economic conditions of the client together with that of the family. Employment opportunities, which in our case, the labour ministry sometimes consider, health facilities, recreational facilities, educational facilities and many others, must be available locally so that the probation officer can use them whenever need arises. Otherwise, it means simply taking the person back to the social environment where he committed the crime. New opportunities should be open to the probationer through the efforts of the probation officer. It is the society to provide these opportunities, the probation officer only

deploys them as best as he can to assist the probationer. It is thus the probationer, who in the final analysis helps to decide whether probation treatment has helped him or not. This can be deduced through his general response to the treatment.

The Act as it is presently structured and administered is alright as concerns the provisions. It is only the practical side of it that should be improved for example, by training more probation officers. This will be dealt with, in my recommendations.

CHAPTER 3

In this chapter, I will deal with the criteria for granting or denying probation. In so doing, I will resort to cases I collected during my research, to see whether our magistrates and probation officers actually use these criteria. Annual reports and data will be used to help us find out which crime is highest, and which classification of probationers commit it most. My conclusion to the chapter will include a run-down on what elements a probation officer should look at in order to be able to compile a pre-sentence report and hence a recommendation as to whether the offender is suitable to be placed on probation.

CRITERIA FOR GRANTING <sup>OR</sup> DENYING PROBATION

Rehabilitation is not the only concern of persons who make probation decisions. Trial judges and magistrates reflect their assessment of the seriousness of the offence in probation decisions. Offences they view as very serious are likely to result in a prison sentence despite the fact that the defendant's potential for rehabilitation looks good. It is thus not surprising that most of the people who commit offences viewed as minor are likely to be placed on probation, without regard to their prospects for rehabilitation. In part, this attitude reflects concern over the seriousness of the offence the defendant may commit if he were released on probation. But it also reflects a judgment that probation is leniency, and that some offences are so serious that they require full community condemnation hence, a prison sentence.



Some guidance on what criteria should be applied in deciding whether or not to place an offender on probation was given by the Morrison Committee, in its conclusion that there was an a priori case for the use of probation where four conditions existed:

- " (a) The circumstances of the offence and the offender's record must not be such as to demand, in the interests of society, that some more severe method be adopted in dealing with him.
- (b) The risk, if any, to security through setting the offender at liberty must be outweighed by the moral, social and economic arguments for not depriving him of it.
- (c) The offender must need continuing attention, since, otherwise, if condition (b) is satisfied, a fine or discharge will suffice.
- (d) The offender must be capable of responding to this attention while at liberty." (1)

Most probation authorities believe that there should be no rigid and arbitrary limits upon the court's discretion to employ probation as a sentence, provided that a pre-sentence investigation is made to discover whether the offender is proper material for this disposition. In its Model Penal code the American law institute has put forward a set of criteria for courts to consider in employing the suspended sentence with or without probation as follows:

"Section 7.01 criteria for withholding sentence of imprisonment and for placing defendant on probation.

- (1) The court may deal with a person who has been convicted of a crime without imposing a sentence of imprisonment if, having regard to the nature and circumstances of the crime and to the history and character of the defendant, it deems that his imprisonment is unnecessary for protection of the public, on one or more of the following grounds:

- (a) The defendant does not have a history of prior delinquency or criminal activity or

having such a history, has led a law-abiding life for a substantial period of time before the commission of the present offence;

- (b) The defendant did not contemplate that his criminal conduct would cause or threaten serious harm;
  - (c) The defendant's criminal conduct neither caused nor threatened serious harm;
  - (d) The defendant's criminal conduct was the result of circumstances unlikely to recur;
  - (e) The defendant acted under the stress of a strong provocation
  - (f) The imprisonment of the defendant would entail excessive hardship because of his advanced age or physical condition.
  - (g) The victim of the defendant's criminal conduct consented to its commission or was largely instrumental to its perpetration;
  - (h) The character and attitude of the defendant indicate that he is unlikely to commit another crime.
- (2) When a person who has been convicted of a crime is not sentenced to imprisonment, the court shall place him on probation if he is in need of supervision, guidance or direction that it is feasible for the probation to provide." (1a)

The Americans seem to be more liberal in dealing with their offenders, but in practice the British also include some of the above criterion for deciding whether an offender shall be placed on probation. Let us now look at the Kenyan situation.

In assessing whether the conditions referred to above exist in the case of the offender before it, the court will normally, have the benefit of a report of a probation officer who during a remand for inquiries will have made a careful evaluation, on the basis of his professional knowledge and experience, of the offender's need for support and the likelihood of

his responding to supervision. Although, I did not come across this practice in the courts where I did my research, it seems that a court may make a probation order without the advice of the probation service. This practice, in my view, should be discouraged because court assessments are, from the very nature of the circumstances in which they are made, hardly likely to be reliable; it also seems unfair to put an offender on probation, without the service having had an opportunity to make its own research on the probationer; also where probation is being considered, it is often useful to allow a pause to occur before the order is made. The point is that this is a procedure that requires the consent of the offender and it is important that he should be given an opportunity for proper reflection.

Criteria for use of probation can be divided into a number of categories. We are now going to look at them and use some of the case studies I collected during my research to try and explain a particular category.

(a) CRITERIA RELATED TO PROBABLE ADJUSTMENT ON PROBATION

One of the central concerns of trial judges and probation officers is assessing the likelihood that a defendant will successfully adjust to community-living under probation supervision. The focus is primarily upon the likelihood that the offender will violate the criminal law if placed on probation and the question is whether the offender will be able to lead a law-abiding life if he is given the assistance of probation supervision. In practice, a number of indicia of probable adjustment are used, for example, criminal record,

personal characteristics of the offender and Professional criminality.

If an offender has seriously violated probation previously, it is unlikely he will be placed on probation again, and an offender who has served a prison sentence, whether as a result of probation revocation or a direct commitment, is unlikely to be given probation upon subsequent convictions. It has been noticed that there is a tendency to use the offender's records in a rather mechanical fashion in making probation decisions. This results in probation for almost all offenders with prior convictions. In reality, the record is closely related to other considerations used to make probation decisions.

It is to be noted that the absence of prior convictions may reflect the fact that the defendant is a youth who simply has not had time to accumulate prior convictions or that his family has been effective in controlling his behaviour, before the commission of the present offence. Yet, the offender's age and his family relationships are factors that, independently of the criminal record may be sufficient indication of good rehabilitation potential to result in probation.

One of the cases decided upon the above criteria, is that of JOHN LOKIM<sup>(2)</sup> who had been charged with stealing.<sup>(3)</sup> The boy was aged 15 years. The circumstances of the offence were as follows:

On the one hand, the mother had said that the offender had gone to Naivasha to search for employment and that when he could not procure one, he came back to Eldoret where he committed the offence freely and said that he was easily swayed into committing the

offence by other Kikuyu children with whom he was keeping company on the material day. As they were passing a shop block, they came across a long trouser which was hanging on a rope to dry. One of the gang members rushed to the ropes and removed the ~~trouser~~ very hurriedly. He folded it and gave it to the offender to carry. Within a short time, they were spotted by the owner who shouted for public help. They were arrested by the police after trying to flee.

The criteria for use of probation will come out clearly if we look at the probation officer's recommendations which were as follows:

"This teenager has just started becoming delinquent in character, although this is the first time to appear before the court. He has once been engaged in anti-social activities, when in 1974, he let off his destructive instincts, characteristic of adolescents, by smashing up a vehicle windscreen. He was arrested for this by the police and given four strokes of the cane. Due to the interval of time between these activities and in view of his age, I note his criminal tendencies are mild. He appears remorseful and sorry for what he did. His mother has wilfully expressed the will to assist in his rehabilitation, therefore, the court should give him a chance on probation."

I noted that, in most cases where the offender appeared remorseful and sorry, he always got probation. But there are cases where a clever criminal could use these expressions to get a chance on probation. But this would be hard, because the probation officers do a thorough research into the background of the offender, before they can even recommend him to the court as a suitable person to be placed on probation.

The best example from one of our cases which follows the criteria related to probable adjustment on probation, is that of JOSEPH KIBET.<sup>(4)</sup>

Joseph was charged with stealing by servant.<sup>(5)</sup> The particulars of the offence were that on 26th April, 1981 at Rivatex factory in Uasin Gishu District, jointly with others not before the court, being the servants of Rivatex, stole from the said factory 125½ Khanga Lessos valued at Kenya Shillings 3,765. In his recommendations to the court, Benedict Mutoro, the probation officer at Eldoret said:

"The offender is a young man with a family of three children. He is apparently the sole bread-winner. As parents and next-of-kin have spoken favourably of his past socialisation process and although his behaviour has been tarnished, he was apparently acting under the wrong group influence of his work-mates and his superiors. He looks remorseful and sorry for his anti-social behaviour. In the light of this, I think that his criminal tendencies are still remote and can therefore be contained through constant counselling and strict supervision in an open community."

Another case decided on this criteria is that of

PHILLIP KOROREI,<sup>(6)</sup> who was charged with rape.<sup>(7)</sup> The probation officer, after considering the offender's life history and circumstances of the offences recommended that:

"The offender's current deviant and delinquent acts seem to emanate from emotional maladjustment and emotional pressures. These have made him desperate and non-conforming to the acceptable norms of life in his community. However, his non-conformity to the acceptable standards of decent life is still very potent, therefore, through constant counselling and effective supervision in a free community, the offender can most possibly be rehabilitated and as such probation treatment is recommended."

This probationer was placed on probation for 2 years.

His last summary report was recorded on 30-9-81 and reads:

"Phillip reports regularly as instructed. He seems to be maturing up and making an all round process in his personality and response to supervision. He is currently reading hard for his K.J.S.E. examination, which he is preparing for through self-tuition. If he continues as he is doing, I can foresee him benefiting from this home-based rehabilitation."

(b) AGE, FAMILY RELATIONS AND OTHER CONSIDERATIONS

The next criteria to be discussed, is that related to age, family relations and similar considerations. One of the primary considerations in sentencing a youthful offender is the anticipated negative effect of exposing a young defendant to the environment of an adult prison. If at all possible, a prison sentence is avoided.

Although age is the most conspicuous and frequently encountered personal characteristic that influences the probation decision, other similar considerations may be important in a particular case. The aggregate of these characteristics is sometimes referred to by trial judges as the "defendant's rehabilitation potential." They include family stability and whether the family is attempting to control the defendant's conduct, if the defendant is married, whether he supports his family and has a sense of responsibility for them, his employment stability and performance and school attendance and conduct.

The following cases show that our courts and probation officers also use this criteria.

In the case of YUNIS CHEPTOO<sup>(8)</sup>, who was charge with stealing,<sup>(9)</sup> the probation officer recommended:

"... Yunis is a young unmarried woman with one child to look after and expecting a second one soon. She readily admitted her offence and explained that she had stolen the money for the purpose of buying a piece of land since her family of eleven people until now have no place to live. She was actually doing the right thing but unfortunately through the wrong means. She is very sorry for her offence and pleads to this court for leniency promising never to steal again. I would recommend that she be given a chance on probation."

The probationer in this case was 21 years old at the time of the offence. She had been working as a house-girl for the complainant. She admitted that she took the Kenya Shillings 6,720 from one of the drawers in the complainant's house, and took it to her uncle, whom she cheated that she had been sent by her father, to ask him to buy them a piece of land with the money. In my view, this young girl seems to have been led into her act by compassion for her landless family.

In Kenya, there is usually a problem as to whether young offenders should be dealt with under the Children & Young Offenders Act,<sup>(9a)</sup> whereby, they can be sent to borstal institutions or approved schools, or whether under the Probation of Offenders Act,<sup>(9b)</sup> where they can be supervised by a probation officer. I think this will depend again on the finding of a probation officer as regards a young offender. By looking into the historical background of the offender, the probationer may recommend that such a case be dealt with by the children's officer, if it is a hopeless probation case.

I think that we should mention here that our probation officers have also taken up the voluntary duty of supervising, among others, ex-borstal inmates and young offenders from approved schools. This is because there are no other people to ensure that such an offender, on release, conforms to accepted social standards. Hence, the ex-in-mate is expected to keep in touch with the probation officer. He must be of good behaviour, and lead an industrious life. The aim of this supervision of ex-borstal inmates is to detect certain ex in-mates who might prove a nuisance to society; others need protection and others need to be discouraged from further criminal behaviour.<sup>(10)</sup>



In the case of PETER INDAGA INZAI,<sup>(11)</sup> charged with attempting to obtain money by false pretence,<sup>(12)</sup> family considerations were taken into account in granting him probation. The probation officer in his recommendations noted that the 38 year old offender was married with 8 children. He went on to say:

"The offender is the sole bread-winner for the family but has failed to conform to a normal lifestyle that benefits a responsible citizen. Although he has several previous convictions my understanding of his present attitude is that he is remorseful and sorry for whatever he did. It is apparently due to poverty that he finds himself at variance with lawful means of earning a living. In view of his age, family expectations and the circumstances of the offence, the court should give him a chance on probation and warn him to behave."

(c) MISCELLANEOUS - OTHER CRITERIA

Probation decisions also reflect the seriousness with which the offence is viewed. Some offences are regarded by magistrates and judges as too serious to permit the use of probation, no matter how great the offender's prospects for rehabilitation may seem. These offenders are held to require full condemnation for their acts and this means imprisonment. The seriousness with which the community views the offence, reflected largely in newspaper articles and editorials also influences the probation decision. So does lack of moral blameworthiness of the offender, as for example, when the offence is committed under strong provocation, or by a mentally disordered person.

The above case of PETER INDAGA INZAI,<sup>(13)</sup> suggests that our courts will overlook the criminal tendencies of an offender, if there are other antecedents which are in favour of his being on

probation. In this case, the offender had a chain of previous convictions for which he had been punished. On 29, May, 1967 he was charged with assault causing actual bodily harm under the name of Petero Andeka and was imprisoned for 3 months. On 10, April, 1971, he was charged with stealing and was imprisoned for 6 months. In 1978, he was charged with careless and dangerous driving of a tractor occasioning death of another person. The probation officer's report says that the offender was imprisoned for 15 days, but paid a fine of 50 shillings for the last charge. It was noted that the offender had a very bad reputation at home. The court seems to have given him a chance on probation on the grounds that this offender had been led to commit the offence due to poverty and also due to the fact that he was the sole bread-winner for his family.

In the case of ROBERT KIMTAI KIPSANGA,<sup>(14)</sup> charged with assault causing actual bodily harm,<sup>(15)</sup> the court took a number of factors into consideration. The first consideration was that the offender, had been provoked by the complainant, who had grabbed the offender unexpectedly from the behind and had called other people to come and apprehend the offender for no apparent cause. A struggle ensued and the complainant was hurt and the offender tied with ropes and taken to the police station. The second consideration was that the offender was apparently a hard worker in so far as farming is concerned. The probation officer noted specifically that "the offender has been an important factor in increasing the family's economic out-put."

In another similar case; DINAH KOE ARAP KOGO,<sup>(16)</sup> was granted probation because she had been provoked by the complainant.

The complainant and the offender were both drunk. The complainant had slapped her very hard on both cheeks because she refused to give him a cigarette. She had then assaulted him and caused him harm.

In one case of attempted suicide<sup>(17)</sup> in which CHRISTINE CHESUMEI<sup>(18)</sup> was the offender, the court granted probation in order to save the marriage and the couple's attitude towards one another. In this case, the husband was a drunkard and a wife-beater and the woman was hot tempered. Whenever there was a quarrel, a fight ensued, and the woman always took a rope to hang herself on nine previous occasions but was always saved by neighbours. The quarrel leading to this offence was a small domestic one concerning the refusal by the husband for the wife to sell some maize. She threw it into the grass, and gained a beating from the husband. The probation officer recommending probation, noted that both of them were to blame for having contributed to the committal of this offence. None wanted to live with the other any more. The probation officer noted that the case was suitable for probation supervision, where the woman could be given the necessary advice to lead a normal life.

After two months the probation officer (ONKOB BORIGA) talked to the couple about their material problems. The couple agreed to reconcile and live together again. The monthly reports thereafter showed that the couple's relationship had improved considerably.

In an English case, R.V. ADSETT,<sup>(19)</sup> the court emphasised that probation should also sometimes be used in the case of offenders with long institutional histories in an effort to

prevent them from becoming completely institutionalized. It has been held that a long interval since a last conviction could be regarded as a reason for placing an offender on probation. However, there must be some evidence of willingness to respond to supervision and as was held in R. V. DAVIES,<sup>(20)</sup> probation is inappropriate where the offender appears to have neither the will nor the inclination to stop committing offences.

The ultimate basis, however, of the claim that offenders should be given the chance of constructive personal help, whether in the community or in an institution, is faith in the value of the individual person. Even were the chances of reformation less than they appear, or the financial cost to society higher, it would remain true that the opportunity of recovery rather than punishment alone should be held out to those who offend, and this in the interests not only of the offenders themselves but of the standards and values of our society as a whole.

To help us understand the criteria used to place offenders on probation, it will be useful to reproduce a classification of those placed on probation in Uasin Gishu District in 1979. This will at the same time help us to conclude which is the highest crime which gets most of its offenders placed on probation.

CLASSIFICATION OF OFFENCES OF THOSE PLACED ON PROBATION  
DURING 1979: (MALES)

(Table A)

Penal Code Section	NATURE OF OFFENCE	Adult	Juveniles	Total
95 (1) (b)	Creating disturbance	21	4	25
105	Impersonating a public officer	2	1	3
129	Giving false information	3	2	5
135	Working in hotel without a medical certificate	-	1	1
140	Rape	-	7	7
142	Abduction of a girl	1	1	2
144 (1)	Indecent Assault	14	9	23
145	Defilement of a girl	-	4	4
162	Unnatural offence	4	2	6
203	Manslaughter	1	-	1
204	Murder	1	2	3
208	Possessing a harmful instrument	1	-	1
226	Attempted suicide	4	2	6
234	Grievous harm	8	9	17
237	Wounding an animal	-	1	1
251	Assault causing actual bodily harm	61	18	79
251 & 263	Assault and wrongful confinement stealing	69	37	106
278	Stock theft	16	4	20
279	Stealing from person	18	19	37
280	Theft by public servant	3	-	3
281	Stealing by servant	28	9	37
296	Robbery with violence	2	1	3

Penal Code Section	NATURE OF OFFENCE	Adult	Juveniles	Total
299 (2)	Attempted Robbery	4	-	4
304 & 279	House-breaking and committing a felony	18	18	36
305	Entering a dwelling house to commit a felony	10	4	14
306 (a)	Store/shop/house-breaking to commit felony	19	28	47
307	School-breaking to commit a felony	3	2	5
313	Obtaining by false pretence	1	-	1
322	Handling stolen property	6	2	8
332	Arson	10	-	10
339	Damaging property	18	4	22
349	Forgery	4	-	4
384	Personation	1	-	1
403	Causing death by dangerous driving	2	-	2
s.3 cap 360	Cruelty to animals	1	2	2
s.4(a)cap 114	Possessing home made gun	1	-	1
No.8 cap 141	Being in need of protection and discipline	-	4	4
s.10(a) cap 128	Disobeying chief's order	2	-	2
s.8(1) cap 335	Being in possession of farm produce	3	-	3
s.10(e)cap 245	Being in possession of bhang	4	8	12
s.20 cap 359	Buying and selling hides	1	-	1
s.26 cap 144	Being in possession of part one poison	1	-	1
s.44(1)cap 403	Driving a motor vehicle under influence of alcohol	1	-	1
	T O T A L	365	205	570

In the above group of probationers 35 committed more than one offence.

CLASSIFICATION OF THOSE PLACED ON PROBATION 1979: (FEMALE)

(Table B)

Penal Code Section	NATURE OF OFFENCE	Adult	juve- niles	Total
159	Procuring on abortion	1	3	4
203	Manslaughter	1	-	1
226	Attempted suicide	8	-	8
234	Grievous harm	3	2	5
251	Assault causing actual bodily bodily harm	28	3	31
275	Stealing	15	17	32
279 (a)	Stealing from person	1	-	1
279 (b)	Stealing from a dwelling house	1	1	2
281	Stealing by servant	12	8	20
332	Arson	9	2	11
339	Malicious damage to property	4	-	4
s.95(1)(b) cap 129	Creating disturbance	10	2	12
108	Perjury	-	2	2
3(2) cap 327	Wilfully and negligently kindled fire	1	-	1
23(a) cap 141	Neglecting children	3	1	4
181	Infanticide	-	1	1
14(1)cap 107	Obtaining another identity card	3	1	4
1(e) cap 128	Disobeying chief's order	3	1	4
306 (a)	Store-breaking	1	-	1

(Table B continued)

Penal Code Section	NATURE OF OFFENCE	Adult	Juveniles	Total
19 (c)	Requiring exercisable goods	1	2	3
s.4 cap 65	Corruption	1	-	1
367 (a)	Mutilating currency notes	1	-	1
322	Conveying suspected stolen goods	1	-	1
174 (1)	Stealing a child	1	-	1
304 & 279	House-breaking burglary & stealing	4	3	7
	T O T A L	112	50	162

In the above tables, a whole range of offences are covered, from murder to disobeying chief's orders, and neglecting children in the case of female offenders. Among the male offenders, stealing contrary to section 275 of the penal code was the most highly committed offence, with a total of 106 offenders, as compared to that of the women which totalled 32, again, this being the highest crime in that group.

It is important to note that only juveniles who committed rape were placed on probation while no adults got that chance. Assault causing actual bodily harm was the second highest offence among the male offenders with 79 placed on probation. This was followed by store/shop and house-breaking to commit a felony under which 47 offenders were placed on probation. The female offenders also had assault causing actual bodily harm as the second highest offence, with 31 offenders placed on probation.



Stealing by servant followed, with 20 offenders being placed on probation.

The probation officers noted that women probationers respond better to probation than their male counterparts. It was also noted that the high increase of stealing, especially by servants is due to low wages which do not meet all the needs of the offenders. Stealing generally was noted to be on the increase, and the reasons advanced were that this had been caused by the fact that many factories had cropped up in Eldoret town, thus attracting people to the town. Unfortunately, the factories cannot employ all the people, and those not employed resort to stealing to survive.

The tables show that the courts will generally grant probation for any offence, as long as the antecedents of that offence are in favour of the offender. The court has of course to take into account the pre-sentence report by the probation officer who usually recommends the criteria under which such an offender should be granted probation.

Our tables also demonstrate that although the court will grant probation for almost any offence, serious offences like murder and manslaughter are not among the most popular ones in this exercise. The case has to have very good justification for it to be considered fit for probation, for example, provocation. We observe from the tables that only 3 male offenders were placed on probation in that year for committing murder and 1, on manslaughter. Similarly, only 1, female offender was placed on probation for manslaughter.

On serious offences related to property, only 3 offenders were placed on probation for robbery with violence, contrary to

section 296 of the penal code. This can only be understood in respect of the sanctity attached to private property. In Kenya, private property is held dear, and any offences related to interference with it carry very heavy sentences. However, as we saw above, our probation officers realize that offenders are sometimes forced to violate laws especially those touching on property because of their state of poverty. This poverty is as a result of accumulation of wealth by a few people to the exclusion of others who have no other means to survive, except by their labour. However, not every unemployed worker in Kenya can get a job, and hence the increase in stealing and robbery with violence.

It is also to be noted that offences against the person are also very high with a total of 79 male offenders being placed on probation for assault causing actual bodily harm contrary to section 251 of the penal code. In my view, this offence is brought about by social tensions caused by lack of jobs which drives people to drinking places to "drown their sorrows." I noted that almost all the assaults arose due to the parties being drunk.

From the above tables and cases we can thus conclude that probation services is doing quite well, as shown by the range of offences covered.

#### CONCLUSION AND DISCUSSION

In concluding this chapter, I would like to give a few elements that a probation officer would look for in an offender before he recommends him as suitable for probation.

A person put on probation usually remains within his normal social setting; he lives at home, carries on with the sort of work to which he is accustomed and remains in touch with his old associates and interests. In some cases, of course, he may have lost lodgings, a job, perhaps his friends as a result of the offence, and in a few, he may be required to go away to live in a hostel for a time. He thus remains exposed to all the stresses, problems and temptations of the situation in which he committed the offence. This may imply greater risks but it also offers special opportunities. The probation officer is able to look at his (offender's) difficulties with him as they arise, to consider their significance and the personal and social resources available to meet them, and to help him cope with them in ways that continue unbroken after probation ends.

The probationer's childhood provides clues as to the help he has had to enable him to develop, as to how he felt and feels about his parents, brothers and sisters, as to his attitudes to marriage and family life if he is an adult, as to his attitudes to authority whatever his age. Many of those coming to probation officers have had little chance of helpful relationships with their parents. There may have been a lack of love and so no real basis or security for learning. The probationer himself may have early manifested some personality defect making him unresponsive and setting up a vicious circle of rejection. There may have been lack of consistency in discipline or in values on the part of the parents. The probationer may simply have adopted the outlook of a family or neighbourhood in which occasional offences are taken for granted.

There may have been poverty and overcrowding, driving him outside the family circle and on to the streets. He may have responded to a sense of being rejected by acting out his hurt and angry feelings and showing early symptoms of defying his parents' control. He may even have kept out of trouble with the law for as long as he has had his parents to protect him, appearing for the first time as an adult offender, when home has ceased to act as a refuge and control.

The ability of probationer to form relationships, and their willingness to change are obviously of great significance at any age. There are those whose immaturity, impulsiveness are limited. Willingness and ability to co-operate make case-work a time consuming and often unrewarding process. There are those whose consciences are undeveloped, who can be deterred only by fear of consequences, and who need constant support and reminders of the consequences of failure. There are those who have been so grossly deprived in their early relationships and have so little capacity for entering into a case-work relationship because they fear further rejection, that it is hard even to begin. There are those who have no desire to change and hold society entirely to blame for the predicament in which they find themselves. There are professional criminals who appear to have consciously chosen a life of crime as profitable, agreeable and adventurous, and who have no intention of abandoning it, in spite of its risks.

Courts have, in effect, been advised, when deciding whether to use probation, to consider whether the offender needs continuing treatment and whether he is capable of responding to it while at liberty. (21) This seems to imply that offenders

selected for probation will have social and psychological difficulties. In deciding this, and the likely response to treatment, the court will normally take into account a probation officer's assessment. Yet it is not always possible at the outset to estimate either need or response. With some offenders these become fully apparent only after a probation order has been in force for some time. This has to be borne in mind in deciding whether probation should be tried and in estimating what can realistically be expected of treatment, and what methods should be employed. Many of those on probation do not, in fact, prove to be facing any serious failure in their social relationships, apart from the fact of their offences, and have no marked psychological abnormalities.

They may have been put on probation because they needed help in obvious personal problems and also because the court regarded their offences as of some gravity and felt they needed a period of discipline and supervision by way of warning. Nevertheless, they share with other offenders whose social or psychological problems go much deeper, the problem of having experienced a direct clash with society, of having been found guilty of breaking its rules. How much they mind this will depend partly upon the social class and the particular group of family friends and neighbours from which they come. It is very important, therefore, to discover how far their behaviour is condemned by those amongst whom they live, and who are most important, to them; how far they are following a pattern and how far they are deviating from it.

At one extreme the offence may have produced severe shock and rejection amongst associates (as in the suicide case of

RECOMMENDATIONS

Before giving my final conclusion, I will give some views and recommendations which I think would make the probation service even more effective than it is at present.

VIABILITY OF THE PROBATIONS SERVICE

It is difficult to know exactly how many families are ruined because of the institution of imprisonment and how many people take to delinquency and crime because of the stigma, absence of the parent and the general disorganisation that accompanies imprisonment. If possible, avoidable incarceration should not be used on any human being in whom society still has some hope. It should be reserved for hardened and dangerous criminals for whom it is the only choice.

Probation service is functionally, a family-centred rehabilitation method, by which the offender's problems and difficulties whether, social, economic and psychological are carefully diagnosed in order to assist him or her to face them and solve them in the context of family, community and society as a whole, as opposed to institutionalisation. In welfare terms, this means helping the individual offender to retract from the criminalistic ways and instead visualise a more objective and both socially and legally accepted mode of life for his own good, that of his family and society.

On the above grounds, the service virtually seeks to upgrade the dignity and basically reform the offender which, in to the whole society. Probation service can thus be depended doing, gives better protection and greater security and dignity upon for all-round development with the least social disruption especially in the family and crucial primary social units.

Apparently, however, our Nation's overriding attitude towards criminals is still rather punitive. May I observe that this sentimental inclination to punish unfortunately tends to override rational considerations on the cost and effectiveness of the rehabilitation of offenders. More than 75 % of the prison population today, are serving sentences ranging from one month or a few days to six months. This means that they are being incarcerated for very petty offences, with the consequent disadvantages to their families and the society, for surely, it costs the government a lot of money to feed, clothe, shelter and guard the short-term prisoners who pose no real danger to the community and who benefit the least from institutionalization.

It is high time that it was crystal clear, that institutionalising petty offenders poses the greater risk of exposing them to more vicious and hardened criminals with the possible consequence of the former being initiated to professional crime life. But if the 75% petty prisoners were to be rehabilitated through the probation service and any other planned open community programs there would be a huge monetary saving, since this is the only cheapest correctional program and one which seems to hold promise in re-integration of the offender into the community. The huge savings would be deployed to fund more worthy National Programmes, with infact, added advantages in crime preventive work through families and communities.

Society has often indirectly taken on the additional burden where the imprisoned person was the sole bread-winner for his family. Usually, the family, and especially the children, turn to the state, (some become the so-called 'parking boys') and also to voluntary organisations for material assistance.

If such an offender had been rehabilitated in the open-community he would continue to meet his economic and social obligations and yet remain an asset to the society rather than a liability.

In the interest of national economy as well as for effective rehabilitation of the offenders, it is recommended that cheaper open-community alternatives in handling crime problems be strengthened. That the tendency to increase and expand prisons in response to crime-increase seems not to be the answer. Rather, probation service and other community-based alternatives are more viable, more humane and it should be noted at this point that a human approach invokes more positive human response.

To facilitate the above view of dealing with offenders humanly, it is suggested that annual joint conferences by the departments that deal with administration of justice, for example, the judiciary, lawyers, police, prisons, social services, childrens' and probation departments should be organised for the purposes of curbing crime and reviewing rehabilitational devices. The Rift Valley Provincial Probation Officer in his annual report for 1978 had the following to say about this view:

"... Exchange of ideas is vital if we are to see offenders well rehabilitated. The policies that we inherited on independence were imported by the Europeans to suit the bindings of their time. Some of these policies might have been "good" and adequate for the societies in which researches were conducted and for the period during which they were done but they have since gone out of date. "Common Sense" views and ideas about the cause, the nature and prevention of crime cannot work in this scientific and rapidly changing age. Proper and up to date research is badly needed on which more sound policies relating to crime-prevention can be based. It is in these seminars or conferences that we can know for example, what goes on in prisons that have sprung up like mushrooms all over the country; or how effective is capital punishment as a deterrent measure against crime according to prison Annual Report for Kenya Prisons, 1977, there were roughly 29,000 prison-in-mates and nearly 80 prisons in Kenya." (1)



There are many ways that an offender can be rehabilitated other than being imprisoned. I will look at some recommended methods by probation officers, which should be adopted in Kenya to help make probation more viable.

1.

### PAROLE

This method differs from probation in that in parole, the offenders serves part of his sentence in prison. Parole system (which does not formally exist in Kenya), may be compared with ex-berstal in mates or special category criminals who are released on licence before the expiration of their periods to serve the remaining period in the "open" community. Most, if not all, the after-care work available in Kenya is done by the probation department. Probation is the foremost alternative when an inmate has been released to complete the term in the free society. I learnt also that the probation department also notably conducts home reports for Limuru boys centre, sometimes for the children's department officers.

It seems that probation officers do a lot more work other than the basic probation work and that is why I feel parole should be introduced in our country. Alternatively, the probation service department could be extended to be known as probation and after-care Department. In this way, the policy makers may be persuaded to give them more funds and more personnel to man the departments.

2.

### EXTRA MURAL PENAL EMPLOYMENT

EXTRA MURAL PENAL STUDENTS - ADMITTED TO FACULTY OF LAW, 1998/

This is another economical method of dealing with offenders. Some probation officers feel that this system should be reorganised and expanded to all provinces and districts where

the final home supervisory period. We also recommend strongly purpose build probation hostels in every province to cater for males and females. Trained personnel and technicians are needed in our present hostels. Teaching of simple hand skills are very necessary." (2)

4. PROBATION AND AFTER-CARE SERVICE.

At present, the probation service informally undertakes some after-care work for prisons to assist the desperate cases such as psychiatric ex-prisoners and ex-borstal in-mates. The department also undertakes to supervise ex-approved school boys where there are no children's officers. Apart from these, all other ex-prisoners return to try and re-settle in their communities without any assistance at all consequently, there is a high rate of recidivism among long-term ex-prisoners.

The Principal Probation Officer for Uasin Gishu District in his annual report for 1979 said of after care service that:

"The Prisoners Aid Association which was a voluntary organization seems to have collapsed and so this area of after-care work is badly and urgently in need. This means that the resources spent in training these ex-prisoners are wasted just because of lack of that very essential follow-up assistance to help them to re-adjust to free life in their communities again. Probation department can cope-up with this After-care work if expanded and allocated sufficient funds to execute the work. May I, in fact observe that, at the close of the year, Rift Valley Province had under its supervisions 99 ex-borstal inmates, 2 Protection and Discipline cases and 2 special category criminals receiving after-care from the probation officers. Hundreds of prisoners were discharged during 1979, and there is no doubt that these would have benefitted from such service during that year. There is therefore real need for the re-organisation and expansion of after care services in Kenya." (3)

From the above propositions, it is clear that after-care services are very essential if prisons, and borstal institutions are to realize their aims in re-integrating the offenders into the society. Prison may have taught the offender that what he did was wrong, but the offender needs to be taught to harmonize with the members of the society. A follow-up service could be

helpful in making the ex-prisoner fit into society by finding him some work to do, and turning him into a self-reliant person.

The above, are recommendations which I think would help probation serve the society more fully. However, in Kenya, we have a few problems brought about by wholesale adoption of foreign laws which leaves the average citizen at a loss as to what is law and not law. There is also a principle in our law that "Ignorance is no defence". Due to this, I have a few more recommendations, of which the first concerns this principle.

#### GENERAL RECOMMENDATIONS

Many people have only a little knowledge of the probation services and its functional role and position in society today. I recommend that many seminars, conferences and barazas beginning at divisional level be given priority to teach the society what probation is all about, and for general enlightenment as to their legal rights. At the most, people learn of probation service when they are referred to the probation office by the court. I, however, believe that with the communities having knowledge about the useful role of the probation officer in society, the work will be a lot easier and effective, to the benefit of the offender and society as a whole.

I also recommend that no individual who does not absolutely require institutionalization for the benefit of others should be confined. I further recommend that no individual should be subjected to more supervision or control than he requires. Accordingly, probation officers should be allowed to terminate a probationer's period as long as there is reason to believe that the individual, probationer does not require any more supervision assistance.

The principle that no person should be kept in a more secure condition or status than his potential risk dictates or receive more surveillance than he requires clearly demands for the creation of alternatives to institutional handling, at every stage of judicial and correctional processing. This is where services like probation, parole, after-care and these as recommended above would be useful.

Incarceration seems not to deter crime or recidivism, and prisons appear to interrupt the normal occupational and life progress of individuals and the society. Indeed, society has outgrown prison, and deprivation of individual liberties on commission of offences, should be self defeating measure in a modern industrial economy, (which, in any case, is the cause of some crimes) and in a state where the welfare of the people is paramount as of the times in Kenya today, we would, however, not forget, that prisons are necessary for the hard-core and dangerous criminals. Consequently, open community-based rehabilitation alternatives should be sought now and intensified, for they are definitely more viable.

With the expansion of probation services, more personnel in the form of probation officers are needed, we noted that already, the problem lies in not having enough officers to man the department, as compared to the work load. This problem goes back to the training institute at Kabete (KENYA INSTITUTE OF ADMINISTRATION) whose policy is to train 20-25 probation officers per year. These are then meant to be distributed all over the country.

I would finally recommend preventive services to be up both in urban and rural areas by both the central government

and local authorities, social services, probation and church organisations. These, could in fact, take up the duty of teaching the citizen what is or is not law, and provide projects to keep the idle people busy.

### CONCLUSION

I have tried in this study to show that probation is the better alternative to imprisonment. This is because its merits outweigh those of imprisonment. We saw that imprisonment leaves the prisoner with a social stigma which becomes very hard to discard. He is referred to as an "ex-convict," and this label makes him unacceptable in society. This then leads to the ex-prisoner committing more crimes either to survive, because he cannot find work with such a label associated with him, or to get even with society for labelling him an "ex-convict." This makes him a social outcast and leads to what are referred to as hard-core criminals.

In chapter one, we saw the causes of crimes in theories advanced by different groups of people, who lived at different times and under different socio-economic systems. We noted that such approaches are not exhaustive. It was shown that social conditions largely explain the commission of crimes related to property, e.g. theft, arson, robbery with violence and many more. I disagreed with the view advanced by Lombroso to the effect that criminals are by birth a distinct biological type and can be recognized by characteristics such a long lower jaw, flattened nose and sparse beard. I argued that this an attempt to mystify the fact that the social conditions brought about by the industrial

the probation officer is the boss, and is therefore in control. In this "authority figure" role the probation officer explains the rules firmly and issues a paternalistic admonition to the offender to be good. There is also the "helpful friend" approach in which a probation officer may suppress any critical remarks or even overlook violations of probation rather than risk incurring the probationer's disfavour, and perhaps damaging their counselling relationship. I agreed to a middle-position between these two unsatisfactory extremes. In which the probation officers would try to find ways to help the probationer to complete the terms of probation successfully.

In chapter three, I dealt with the criteria for granting or denying probation. It was evident that many factors help the probation officer and judges to decide on whether a person can be placed on probation. Age, family considerations and probable adjustment on probation were among the factors which contribute to the likelihood of an offender being placed on probation. I considered a few Kenyan cases and saw that the same criteria is followed in Kenya.

From a classification of offenders of those placed on probation in Uasin Gishu District in 1979, I observed that the highest offence with its offenders placed on probation was stealing contrary to section 275 of the penal code. I also observed that our courts are ready to grant probation for most offences. The most important thing is what is contained in the pre-sentence report of the probation officer, who might discover some extenuating circumstances in an offence, acting in favour of a person being granted probation even if the offence was serious, for example, provocation before murder.

In connection with the classification of offences of those placed on probation, it should be noted that only one year and one district have been taken into account and hence a comparative approach is not possible. This means that a generalized conclusion cannot be attained. This can only lead one to conclusion, that this could be the beginning of a trend in other districts. In concluding the chapter, I advanced some elements that a probation officer may look for in an offender, which might help him in deciding whether an offender is suitable for probation or not.

Overall, it has been shown that probation is the better alternative method of dealing with offenders than imprisonment. Although the probation system is doing well in Kenya, it could do much better if some other aspects were taken into consideration. These aspects form the content of my recommendations.

As the emphasis shifts from the obsolete thinking of "make the punishment fit the crime," to provide treatment to fit the offender; it appears also that it is opportune time for initiating a planned preventive service. A practice of convening National as well as local conferences, or seminars embracing all relevant ministries, departments, voluntary organisations and the local people for purposes of discussing ways and means of preventing delinquency and criminality is now highly recommended. The likelihood is that this method will throw light onto the causative areas of crime and thereby merit assistance to mobilize community interest in problems which clearly should be the concern of as large a community as possible.

The other possibility is that there could result establishments at local levels of schemes which have prevention of crime and delinquency as their major objectives. In view of the inevitable weakening of the reliable extended kinship systems to shoulder

this responsibility, the role for welfare upkeep rolls back to the state. The state should thus be able to delineate clear policies on this matter to meet the needs of the society.

I have in mind cases of school-age children roaming the streets of our urban areas. These are the "parking boys," and criminals in the making but if there were a preventive service, the situation could be avoided.

Thanks May God bless you wherever you are. Amen.



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