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TOPIC

INSIDE KENYAN PRISONS: A CASE FOR REFORM

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DECLARATION

I, EMILY MAYIAMEI MUYAA, Do Hereby Declare That This Dissertation Is My Original Work And Has Not Been Submitted To Any Other University Or Institution For Any Award. I Do Hereby Submit The Same For The Award Of Bachelor Of Laws Degree Of The University Of Nairobi.

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Dated

31ST AUGUST 2006

DEDICATION

To the thousands of Kenyans who are confined in prisons where not only are the conditions inhumane, the prisons have also failed to achieve the aim for which they were designed. May your plight come to an end and may you see a new light where your rights will be protected and maintain your dignity as human beings.

ACKNOWLEDGEMENT

Thank you dad and mum for your love which I will forever cherish. When I felt like I had reached the end and could not go on, you were always there to encourage me, your love and providence kept me going even when the road was so tough. May God bless you richly and I will forever cherish the love that you have imparted in me. I also acknowledge the love and company of my siblings and especially Dama with whom I have schooled since I was in nursery school. You have been a great source of comfort to me and may God bless you.

I would like to acknowledge the efforts put into this work by my supervisor, Florence S Jaoko. Thank you for the time you devoted to correcting this work. Without your assistance, this work could not have been what it is. In this connection, I would also like to express my heart felt gratitude to the Kenya National Commission of Human Rights for allowing me to use their Library for this research. The information I got from you is invaluable and may God bless you.

For my beloved Joseph 'Caro' you will always remain the apple of my eye. Love you big time. And all my good friends; Hiram, 'Prof', 'Goldish', Carol Lajah, Tobiko, Sybil among others, thank you for always being there for me. Carol Cheruiyot my best roommate ever, thank you for the friendship you offered and for always making me feel that someone really cared, God bless you and carry you through campus successfully. For all the friends that we lost along the way, you still remain friends in my heart.

However, I am wholly responsible for this work including any mistakes, typographical, grammatical or otherwise.

Emily Muyaa
Candidate

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Table of Abbreviations

KNHRC	Kenya National Commission for Human Rights
NGOs	Non-Governmental Organizations
ODP	Open Door Policy
PRI	Penal Reform International
UNODC	United Nations Office on Drugs and Crime,
WHO	World Health Organization
SMRs	Standard Minimum Rules for the Treatment of Prisoners

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Foreword

“Man, when perfected, is the best of animals, but if he be isolated from law and justice he is the worst of all ... We assume that the man who is to become good must first be trained and habituated properly and then go on to spend his time, in the spirit thus engendered, on worth occupations-doing nothing base or mean either willingly or unwillingly. We also assume that this object can be attained if men live their lives in obedience to some sort of wisdom and under some form of right order-provided this order has sufficient force.”

Aristotle, ‘POLITICS’, BK 1, & ‘ETHICS’, BK X, in JJ Dilulio Jr. ‘Governing Prisons: A Comparative Study of Correctional Management’ The Free Press Inc. NY (1987)

CHAPTER ONE

HISTORICAL BACKGROUND OF PRISONS IN KENYA

Introduction

The concepts 'criminal justice' and 'reform' as used in this study need to be defined.

"Criminal justice" encompasses a wide range of activities and various disciplines are involved in its operation. The police who receive the first information of a crime, investigate it and apprehend the offender; the courts who, *inter alia*, determine guilt or innocence and assess an appropriate penalty; the prisons that receive and-it is hoped-correct and resocialize the offender; the after care agency that facilitates the reintegration of the offender into the community are some of the disciplines that play a part in the process.¹ I have however chosen to confine this study to prisons.

"Reform" can have many meanings. For the purposes of this study it will be understood as meaning change that has as its objective the establishment of a system which; (a) provides equal justice for all; (b) whilst directed at the protection of the society also aims at the rehabilitation of the offender, achieving the objective of protection with 'the minimum of suffering to the offender and those connected with him and which (c) provides effective safeguards for the due recognition and protection of the worth and dignity of each citizen.'²

Background

Before independence, some general features with regard to penal measures were common to most traditional societies in East Africa although prisons did not exist. In some communities, compensation for certain common injuries was fixed at a definite rate: Kenyatta records for Kikuyu law that nine sheep or goats had to be paid for adultery or rape, and one hundred sheep or ten cows for homicide, and that this rate did not vary with

¹ The Hon J Turner Minister of Justice of Canada in an address to the John Howard Society in Ottawa on 24th February 1971 reproduced in R Hood 'Crime, Criminology and Public Policy' (Heinemann Educational Books Ltd 1974) 527.

² R Cross 'Punishment, Prison and the Public' (London, Stevens 1971) in R Hood 'Crime, Criminology and Public Policy' (Heinemann Educational Books Ltd 1974) 528.

the wealth or the age of the victim, nor with the intention or motive of the killer.³ This compensation was seen mainly as a balancing payment, to restore the equilibrium of society. The fact that the payment was compensatory rather than penal in intention is reflected in the fact that the family of the offender was invariably held collectively liable to produce the payment.

These sanctions served particularly to promote public satisfaction by the reconciliation of offender and victim, sometimes by a formal process and often after payment of compensation, to remove the danger caused by an intolerable individual and to placate the spirits by expiatory rituals. These, then, were the kind of sanctions known to the African communities of East Africa at the time when the colonial intrusion brought with it the instruments of western penal policy.

In East Africa the penal system introduced by the British was largely based on the Indian Penal Code. The latter, was of course, based to some extent upon English law, with many variations; the penalties prescribed were essentially the same as those of 19th-century England. Fines and imprisonment soon became the staple diet of sentencing courts in East Africa. Imprisonment, under the Indian Code, was of three kinds: penal servitude, for Europeans and Americans only (for whom it was the alternative to transportation); rigorous imprisonment (which corresponded to imprisonment with hard labour); and simple imprisonment.

In the East Africa Protectorate (now Kenya), the earliest years of British rule saw the ancient Fort Jesus at Mombasa soon re-organized as a central prison on European lines, the prisoners being classified, supplied with regular rations (instead of, as formerly, depending on the charity of their friends or humane strangers), performing regular labour, light or

³ J Read '*Penal Systems in Africa: Kenya, Tanzania and Uganda*' in A Milner ed '*African Penal Systems*' (Routledge and Kegan Paul Ltd London 1969) 104.



hard, according to the nature of their sentence, and being permitted to earn by good conduct a reduction of their punishment.⁴

Prisoners sentenced to six months' imprisonment or more in any part of the Protectorate were sent here while those sentenced to less than six months served their sentences in the barracks or forts of the towns where they were convicted as well as in cells in the government stations. The prison was also used for the custody of vagrants, lunatics and paupers, who were accommodated separately from the convicts.⁵ Prison Regulations, based on the system of discipline in other British territories, were issued in 1897. The Indian Prisons Act was later applied, until replaced by the local Prisons Ordinance, in 1902.

The critical stage in the development of the colonial penal system in Kenya was during the Mau Mau uprising. Immediately following the declaration of a state of emergency in 1952, there was an enormous and rapid increase in the number of prisoners.

By 1960, it was clear that "home rule" for Kenya was imminent. Perhaps as a result, modern methods of treatment and training of prisoners began to be introduced to the Kenyan prison system. The new methods were based on the standard minimum rules agreed at the United Nations Congress on the Prevention of Crime and Treatment of Offenders in 1955. At the same time, new legislation to govern prison administration was also drafted providing for extra mural penal labour, an earnings scheme and short-term corrective training. This was enacted as the Prison Act of 1962 and came into effect in 1963 on the eve of independence.

The main concern of this study is to determine whether or not the continued use of prisons as a sentencing option has been effective and if not, what needs to be done to achieve the intended aim of imprisonment, namely rehabilitating the offender and subsequent reformation or reintegration into society. For that purpose, the present Chapter is divided

⁴ Hardinge 'Report on the Condition and Progress of the East Africa Protectorate from its Establishment to the 20th July 1897 (Parliamentary Papers Africa No 7 37 1897) *ibid* at 108.

⁵ *Ibid.*

into various parts; statement of the problem; justification for or use of this study; the objectives of the study; hypotheses; research questions; research methodology; literature review and finally the theoretical framework.

Statement of the problem

The effectiveness of prisons as a penal tool in most jurisdictions, including Kenya has remained an unanswered question for a long time. Various views have been expressed including the idea of 'deleting' it from the criminal justice system. It is questionable whether prisons can serve the two rather contradictory functions it undertakes; that of custody as punishment and the otherwise intended purpose of rehabilitating offenders into the society.

This study therefore attempts to contribute towards an understanding of the prison conditions by undertaking a relevant research into the prison system from a legal analytical perspective with a view of bringing to light the conditions inside the Kenya prisons and further offer suggestions and recommendations on a workable solution.

Justification/use of the study

There are genuine socio-legal concerns for the increasing rate of crime. This is what has increasingly seen prisons gain prominence as a way to curb crime. This notwithstanding, prisons have remained the same in terms of their floor (physical) area and many other facilities but nevertheless continues to receive more and more inmates.

Prisons have continued to become overcrowded and the conditions and service to inmates deteriorated. Basic requirements such as health, food and sanitation are wanting. The inmates tend to become 'hardened' by these rather harsh conditions and what this has done is to prepare the way towards release and subsequent reconfinement into the same prisons. This explains the recidivism rate in prison.

This study is justified by the fact that the prison conditions in Kenya are appalling despite the continued used of imprisonment. Reform in the criminal justice system in order to

address the plight of prisoners should be a priority. It is important to ensure that the purpose for which the punishment is meted out is met. This is especially so where inmates are 'dumped' into prisons and thereafter there is no concerted efforts/clear strategy to facilitate the rehabilitative and reformative purposes intended to be achieved.

It is in the light of these facts that this study will seek to suggest various reforms to the criminal justice system generally as this will be the starting point towards better prison conditions in Kenya.

Objectives

The objectives of this study include;

1. to spell out the problems faced by inmates while serving their terms;
2. to briefly outline the national provisions and international legal instruments (to which Kenya is a party), governing prisons and prisoners' rights;
3. to make recommendations and suggestions on the way forward both for the Kenya prisons and prisons in other jurisdictions especially in developing countries.

Hypotheses

It is a basic assumption of this study;

1. that it is public knowledge and no secret at all that the Kenyan prisons are in a deplorable state that needs urgent attention;
2. that the prison experience has adverse effects on the incarcerated individual as well as their families, and therefore, a solution is needed urgently;
3. that there are a number of health and safety issues associated with prison life, for example, drug use and unprotected sexual activity and these need to be addressed urgently.

Research questions

This study grapples with questions such as;

1. Is the use of prisons as a penal tool effective?
2. What are the conditions in the Kenyan prisons that call for reform?

3. What has been the Government's response to or intervention regarding the prison conditions?
4. Do the conditions in prisons arise from lack of resources, political will or judicial policy, and whether the conditions would be different had there been fewer people confined therein?
5. What is the way forward for the prison system in Kenya; are there any proper ways and alternatives of dealing with the problem currently facing our prisons?
6. What kind of post-release support should there be for prisoners?

Methodology

This study adopts an analytical as well as a descriptive and prescriptive approach to the question on Kenyan prisons. It draws from primary sources, such as, Statutes, Ordinances, Treaties, Conventions and secondary sources such as, books, thesis and writings of renown authors and writers on related topics and selected internet sources. Interviews will also be conducted mainly with people who have already been released from prison.

Literature Review

The penal systems in Africa are largely inherited from the colonial powers, and the legislative framework, as well as the infrastructure, remains largely unaltered. Although attempts have been made in several countries to improve prison conditions, in most cases they are still inadequate. A review of the literature on prisons in Africa suggests that these prisons are characterized by severe overcrowding. In most cases the prison capacity is very limited and has not been expanded over time. Although the inmate to population ratios may be small, the impact of overcrowding on inmates is nevertheless severe. Coupled with this, many of the facilities are rudimentary in nature, and there are shortages of food, bedding, medical supplies and treatment, and an absence of recreation facilities. Ill-treatment or torture of inmates is a common feature in many prisons.⁶

⁶ A Dissel 'Prison Conditions in Africa' a Research Report written for the Centre for the Study of Violence and Reconciliation September 2001 (<http://www.wits.ac.za/csvr/papers/papdis10.htm> assessed on 24th May 2006).

Prisons are under attack because of the conditions therein. Most prisons are merely caretaking or custodial institutions. They are overcrowded and completely devoid of rehabilitative programs. The criminal has largely been abandoned, and prisoners are insufficiently occupied, insufficiently trained, and insufficiently educated to new habits of thought and conduct. The prisoner serves his time and departs, noticeably not better and perhaps the worse for the experience.⁷ This author recognizes the fact that prison conditions, although bad, have the effect of ‘taming’ the criminal.

Customary criminal law in Africa views the use of prisons as a wasteful procedure. It was imported into the African scene, as a punishment for crime and in traditional African societies was almost unknown. It is observed that:

The payment of compensation, or blood money by the offender to the offended was customary in many cases, even in the unlawful killing of a human being. The reason for this is partly to be found in the social policy of the African peoples, which centres around the land and its produce in the largely agricultural communities on the continent.⁸

Some of the developed countries and their scholars-as seen in the quote below- are of the view that since most people are nonetheless poor outside prison (especially in Africa), then the prison authorities should be justified in regarding the physical conditions of their institutions as of high standard, compared with the outside. Even though the economic level of lower class prisoners in the developed countries is much higher, prison officials also often make much of the “greater opportunities” and the good living conditions of their prison facilities. This point of view ignores the African prisoner’s entire life before he entered prison and in my view does not necessarily depict the true position in the prisons. No wonder Tanner observes;

Life for many could not have been pleasant but the unpleasantness tended to be forgotten and the everyday affairs of life thought of as positive pleasures. Everything that he had taken for granted before... to have a considerable amount of personal independence, all of which immediately disappeared with imprisonment ... Every one of the prisoners outside had an identifiable role which

⁷ *Ibid.*

⁸ TO Elias ‘Traditional Forms of Public Participation in Social Defence’ in B Marshall *et al* ‘*Crime in Developing Countries*’ (John Wiley & Sons Inc 1973) 233.

differentiated him from the others, gave him some satisfactions and made him reasonably pleased with his life, if only in retrospect when he lost it by conviction and imprisonment.⁹

In other jurisdictions, for example Sweden, overall orientation of the prisons is apparent in the following description:

In Sweden, there is recognition that those who must be sent to prison are there for a limited period, that they will continue to be members of society and they must be prepared for effective re-entry into that society. For this reason, all prisoners have the availability of professional treatment, the right to a weekly conjugal visit with their wife or husband, and, for all except the highest security inmates, frequent access to temporary leave from prison after the first half of their sentence is completed.¹⁰

A sociological view of prisons is also important in this regard: When prisoners (inmates) remain incarcerated in their prisons, they form their own social system and sociologists have therefore argued that prisoners should be isolated from each other. As Gresham M. Sykes defined it, the inmate social system is “not simply the social order decreed by the custodians, but also the social order which grows up more informally as men interact in meeting the problems posed by their particular environment.” It is the “society within a society”, the “prison community”, the “society of captives” or “prison subculture”, that sociologists have argued, develops in prison settings unless inmates are kept totally separate from one another.¹¹

Regardless of theoretical intention and purpose, it is clear that prisons do little either to deter future offending or to rehabilitate offenders. Instead, they are oppressive and hostile sites where depression, self-mutilation, substance abuse, violence, despair, mistrust, and anti-social behaviour and attitudes are prevalent.

To support the above argument, Akinola Aguda, while arguing against public execution in Nigeria, suggested that life imprisonment is an even tougher punishment than death.

⁹ Tanner ‘An East African Prison’ 142 to 147 *ibid* at 241 to 242.

¹⁰ P Norden ‘Making Things Right: A Vision for Criminal Justice’ 19 in W Rob *et al* ‘*Crime and Social Control*’ (Oxford University Press 1997) 171.

¹¹ JJ Dilulio ‘*Governing Prisons: A Comparative Study of Correctional Management*’ (The Free Press, a division of McMillan Inc New York 1987) 16.

According to him, the case of an armed robber, or any convict, serving life imprisonment is only reviewed after every ten years, but for those executed, their punishment lasted only a short period of time. ‘Therefore’, he concluded, “an accused person serving a life sentence in a maximum security prison, would be facing the reality of a hard life ...”¹² A similar view has been expressed by Johnsen¹³ who argues that: “... in life imprisonment, there are long dreary days of pain and remorse that extent into months and years that seem endless ...”

The ‘reality of hard life’ as noted by Aguda, and the ‘dreary days of pain ...’ as indicated by Johnsen, are in line with Cohen’s and Taylor’s ‘deprivations’¹⁴. According to them, what is even more serious about imprisonment is the fact that the inmate is cut off from family, relatives, and friends. A prisoner experiences difficulties both within and outside the prison. Firstly, he is subjected to a vast body of rules and commands which are designed to control his behaviour in minute detail. Secondly, there are few people that he can relate to, and those people are of the same sex, which makes heterosexual relationship impossible. Thirdly, once in prison, outside loyalties quickly fade away.¹⁵

The above discussion is aimed at setting out the pros and cons of imprisonment. Although the use of prisons as a penal tool cannot be wholly disregarded as being unsuccessful, based on the above review, it is evident that prisons have fallen short of the purpose for which they were designed.

Theoretical Framework; Aims of imprisonment

It is necessary to begin with the nature of the justification for having a system of official and compulsory penalties; what Hart¹⁶ called ‘the general justifying aim’. Why is a general justification needed? Because the infliction of something which a person objects is

¹² Nigeria Herald 9/10/1987, *supra* note 9.

¹³ JE Johnsen ‘Capital Punishment’ (New York: HW Wilson 1939) 73 *supra* note 9.

¹⁴ S Cohen & L Taylor ‘Psychological Survival’ (Harmondworth: Penguin Books 1972) 51 *supra* note 9.

¹⁵ *Ibid.*

¹⁶ HLA Hart ‘Punishment and Responsibility’ (Oxford University Press London 1968) in N Walker and N Padfield ‘Sentencing: Theory, Law and Practice’ (Butterworths London Dublin & Edinburgh 1996) 110.

regarded, at least in societies which value individual's freedom, as morally wrong unless it can be morally defended. It is important to consider the two most important theories of imprisonment, which are viewed as being rather contradictory, those of punishment and rehabilitation.

The *Rehabilitative/Reformative Theory* aims at encouraging the offender to abstain from criminal behaviour in the future by providing him, for example, with social support while in prison. This theory finds basis in the notion that offenders are social misfits and engage in criminal activity, as they are mal-adjusted. To achieve the objective of rehabilitating or reforming the offender, prisons put offenders through various types of programmes, for example, tailoring, agriculture, thus helping the offender to acquire skills in other fields and to that extent help him to abstain and distance himself from criminal activity. Additionally, there are counseling services, both religious and social, offered to the prisoner to assist him in sharing the problems he faces, discuss his past life, that is, before imprisonment. This is mainly done by religious visitors (chaplains) who visit the prisons regularly. This is aimed at assisting the prisoner not only to safeguard his religious beliefs, but also provide a forum in which the prisoner can freely share his emotions with the religious visitor. The effectiveness or otherwise of these programmes will be considered in Chapter Three.

Conclusion

The present Chapter has set out the various reasons as to why it is important to consider the prison system in Kenya and especially as regards the conditions in the prisons. It has also attempted to set out the various uses of the study and the methods to be used to gather information on the subject of prisons. The remainder of this study will look into the national and international legal provisions regarding prisons, the conditions in Kenyan prisons as well as suggest various recommendations in the nature of reform to the prisons so as to be able to achieve the intended aim of prisons, namely that of rehabilitating the offender and reforming or reintegrating him into society after serving his punishment.

CHAPTER TWO

NATIONAL, REGIONAL AND INTERNATIONAL LEGAL PROVISIONS ON PRISONS

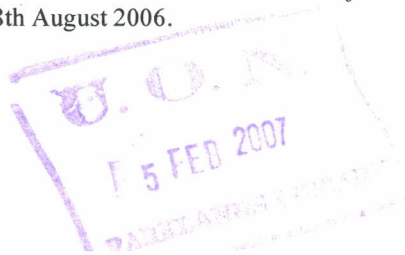
Introduction

Deprivation of freedom is one of the most severe infringements of a person's rights and therefore needs to be strictly regulated. Prisoners and other people deprived of their freedom are recognised as particularly vulnerable and therefore in need of special protection. Because prisoners and detainees are usually locked away from public scrutiny and are dependant on the prison administration for their everyday needs, as well as for their own protection, they are more likely to be vulnerable to abuse and maltreatment.¹ Therefore certain rights have been derived which protect these individuals. These include the right not to be subjected to torture, cruel, inhuman or degrading treatment or punishment; the right not to be subjected to arbitrary arrest, detention or exile; and the right to be subject to due process of law. These are rights which can never be restricted or limited in any way.² These rights are found in various national and legal instruments that have been formulated, signed and ratified by the member states party thereto to protect the rights of prisoners and also to guide the acts by enforcement officials in whose care the prisoner is entrusted.

The present Chapter seeks to review the corpus of laws applicable to the goal of management of prisons as well as the treatment of prisoners. It commences with an examination of national provisions under which will be discussed the Constitutional provisions that are directly relevant to prisons. The provisions of the Prisons Act will then be considered in detail in a bid to bring forth the rights that a prisoner can lawfully avail himself of as well as any restrictions that are legally provided for. The Borstal Institutions Act will also be looked at in detail and especially as it relates to young or juvenile offenders. The Prison Standing Orders will be considered briefly as the policy

¹ A Dissel 'Commentary on the Kampala Declaration on Prison Conditions in Africa' at <<http://www.wits.ac.za/csvr/papers/papkamp.htm>> accessed on 8th August 2006.

² *Ibid.*



documents used by the Prison Department to regulate and govern the prisons aside from being guided by the legal provisions mentioned above. It concludes with a study of the international legal provisions governing the treatment of prisoners.

NATIONAL PROVISIONS

The Constitution of Kenya

Imprisonment is one of the instances in which a person's freedom of liberty can be restricted under the Constitution. However, such restriction should only be to such extent as is necessary or incidental to the fact of his imprisonment. There are provisions allowing for the use of force in certain circumstances. Section 71 declares:

“... a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use of force to such an extent as is reasonably justifiable in the circumstances of the case ... in order ... to prevent the escape of a person lawfully detained.”³

Protection from inhuman treatment is dealt with under section 74, which stipulates that no person shall be subjected to torture or to inhuman or degrading punishment or other treatment.⁴

The Prisons Act

As regards the use of force in prisons, the Act provides that any prison officer may use such force against a prisoner as is reasonably necessary in order to make him obey lawful orders which he refuses to obey or in order to maintain discipline in a prison,⁵ and may use any weapons which have been issued to him, including firearms, against a prisoner in certain circumstances including where the prisoner is escaping or attempting to escape and refuses, when called upon, to return. Although the proviso to this section is to the effect that weapons shall not be used “... unless the officer has reasonable cause to believe that he cannot otherwise prevent the escape, breaking out or riotous behaviour, as

³ Subsection (2) (b).

⁴ Subsection (1).

⁵ Section 12.

the case may be,” this will be considered in Chapter Three as a gap that has led to an always available defence (by prison officers) to death in prisons.

However, Part V of the Prisons Rules require that if a prison officer strikes or uses force against a prisoner, he shall have the prisoner as soon as possible examined by the medical officer, and shall immediately report the incident to the officer in charge.⁶ It will be considered in next Chapter whether this happens in practice.

As regards the health of prisoners, there is provision for a medical officer stationed in or responsible for every prison.⁷ The medical officer shall be responsible for the health of all prisoners in a prison and shall cause all prisoners to be medically examined at such times as shall be prescribed. The medical officer is also required to see every prisoner at least once every month and at least once every month inspect the whole prison, paying particular attention to the cooking and sanitary equipment in the prison.⁸ The effectiveness of these provisions will be considered in detail in next Chapter.

Further, provisions dealing with the cleanliness of prisons require that the prison and every room and part thereof shall be kept clean.⁹ However, the strictness on this provision is not satisfactory especially considering that a prisoner is required to take a bath on admission and thereafter as ordered by the officer in charge or the medical officer. In my opinion, it might take a long time before such order is given and as will be considered in Chapter Three, such opportunities rarely come by. The clothes of a prisoner shall be changed and washed at least weekly, and bedclothes shall be washed and aired as often as the officer in charge may direct.¹⁰

Categorization of prisoners is provided for under the Prison Rules. The Commissioner may set aside prisons or parts of a prison for the detention of particular classes of

⁶ Rule 45.

⁷ Section 29 (2).

⁸ Rule 26.

⁹ Rule 33.

¹⁰ Rule 43.

prisoners.¹¹ Additionally, the prisoners shall be classified with a view of facilitating their training and of minimizing the danger of contamination, having regard to their age, character and previous history.¹² Whether or not the intended aim for categorization has been achieved so far in the Kenyan setting will be considered in Chapter Three especially due to the problem of overcrowding that has hampered any success of the prisons in Kenya.

The Borstal Institutions Act

Every borstal institution is required to provide proper sanitary arrangements, water supply, food, clothing and bedding for the inmates thereof.

As in the Prisons Act, there are provisions regarding the health of the inmates requiring that there shall be a medical officer who shall be responsible for the health of all inmates of the borstal institution, and shall cause all inmates of the borstal institution to be medically examined on such occasions as may be prescribed.¹³ The medical officer shall attend at the borstal institution for which he is responsible either daily or at regular intervals,¹⁴ and shall see every inmate at least once every month; and inspect the inmate at work from time to time; and at least once in every month inspect the whole institution paying particular attention to the cooking and sanitary equipment therein.¹⁵

Categorization of the inmates if provided for in provisions requiring the Commissioner to classify all inmates having regard to their character, previous history and other relevant circumstances.¹⁶

The Prisons Standing Orders

These are more of policy guidelines as opposed to legal provisions, strictly speaking. The Standing Orders are generally used to guide mainly the conduct of prison officers in their

¹¹ Rule 4.

¹² Rule 5.

¹³ Section 11 (2).

¹⁴ Rule 8.

¹⁵ Rule 10.

¹⁶ Rule 4.

relations with and service to the prisoners. In other words, the Standing Orders are more of an extension of the Prison Rules but explained in detail so as to govern and bind every single prison officer as an individual. They provide for instances in which the officer may use force on a prisoner, especially in order to prevent escape or to enforce a lawful order. The Orders also provide for instances when an officer can be terminated from duty, for example, if he allows prisoners to bring into the prison area prohibited materials, or when a prison officer receives a bribe in consideration for better treatment to a particular prisoner.

INTERNATIONAL AND REGIONAL LEGAL INSTRUMENTS

An Overview

The principal international human rights documents such as the Universal Declaration of Human Rights and the Convention against Torture clearly protect the human rights of prisoners. Several additional international guidelines flesh out the human rights of persons deprived of liberty, providing guidance as to how governments may comply with their international legal obligations. The most comprehensive such guidelines are the United Nations Standard Minimum Rules for the Treatment of Prisoners (known as the Standard Minimum Rules [SMRs]). It should be noted that although the SMRs are not a treaty, they constitute an authoritative guide to binding treaty standards.

Other documents relevant to an evaluation of prison conditions include the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, the Basic Principles for the Treatment of Prisoners, and, with regard to juvenile prisoners, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (known as the "Beijing Rules"). Like the SMRs, these instruments are binding on governments to the extent that the norms set out in them explicate the broader standards contained in human rights treaties.

The African (Banjul) Charter on Human and Peoples' Rights recognizes that human beings are inviolable. Every human being shall be entitled to respect for his life and the

integrity of his person. No one may be arbitrarily deprived of this right.¹⁷ Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly "... torture, cruel, inhuman or degrading punishment and treatment shall be prohibited".¹⁸

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment¹⁹ stipulate that all persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.²⁰ Additionally, no person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.* No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.²¹

These documents clearly reaffirm the tenet that prisoners retain fundamental human rights and some of them are considered in detail below.

Universal Declaration of Human Rights

It is the landmark catalogue of human rights and fundamental freedoms adopted by the General Assembly of the United Nations in 1948.²² Its inclusion signaled the desire 'to eliminate the medieval methods of torture and cruel punishment which were practiced in the recent past by the Nazis and fascists'.²³ Specifically, article 5 of the Declaration states: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' The same language is to be found in article 7 of the International

¹⁷ Art 4.

¹⁸ Article 5.

¹⁹ <http://www.unhchr.ch/html/menu3/b/h_comp36.htm> accessed on 31st May 2006.

²⁰ Principle 1.

²¹ Principle 6.

²² GA res. 217 A (III), 10 Dec. 1948 in NS Rodley "*The Treatment of Prisoners Under International Law*" (Oxford University Press Inc. New York 1999) at 18

²³ Robinson '*The Universal Declaration of Human Rights-its Origin, Significance, Application and Interpretation*' (1958), 108 *ibid.*

Covenant on Civil and Political Rights (the Covenant),²⁴ wherein the motivation for including the prohibition is similarly obvious.²⁵

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture)²⁶

This is based on the Declaration against Torture. The definition of “torture” for the purposes of the Convention is given thus;

... "Torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.²⁷

The competent authorities of a state party are required not only ‘promptly and impartially’ to examine allegations of torture by the alleged victim,²⁸ they are also, of their own motion, similarly to investigate ‘wherever there is reasonable ground to believe that an act of torture has been committed’ within the state’s jurisdiction.²⁹ Victims of torture (or their dependants if death results) are to have means of redress; among these are ‘an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible’.³⁰

²⁴ GA res. 2200A (XXI), 16 Dec. 1966.

²⁵ Dinstein “*The Right to Life, Physical Integrity and Liberty*”, in Henkin (ed.) ‘The International Bill of Rights-The Covenant on Civil and Political Rights’ (1981), 125.

²⁶ GA res. 39/46 10 Dec 1984.

²⁷ Article 1.

²⁸ Article 13.

²⁹ Article 12.

³⁰ Article 14.

Basic Principles for the Treatment of Prisoners³¹

They clearly reaffirm the tenet that prisoners retain fundamental human rights. They declare:

Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights ...³²

Endorsing this philosophy in 1992, the United Nations Human Rights Committee (UNHRC) explained that states have "a positive obligation toward persons who are particularly vulnerable because of their status as persons deprived of liberty" and stated:

[N]ot only may persons deprived of their liberty not be subjected to [torture or other cruel, inhuman or degrading treatment or punishment], including medical or scientific experimentation, but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons ...³³

Significantly, the Human Rights Committee has also stressed that the obligation to treat persons deprived of their liberty with dignity and humanity is a fundamental and universally applicable rule, not dependent on the material resources available to the state party.³⁴ In *Mukong v. Cameroon*³⁵, it was stated that minimum requirements regarding floor space, sanitary facilities, provision of food, etc., must be observed, "even if economic or budgetary considerations may make compliance with these obligations difficult".

³¹ GA res 45/111, 14 Dec 1990 at <http://www.unhchr.ch/html/menu3/b/h_comp.35.htm> accessed on 31st May 2006.

³² UNHRC, General Comment 21, para 3.

³³ UNHRC, General Comment 21, para.3. The Human Rights Committee provides authoritative interpretation of the ICCPR through the periodic issuance of General Comments.

³⁴ *Ibid para. 4.*

³⁵ No. 458/1991 (August 10, 1994), U.N. Doc. CCPR/C/51/D/458/1991

Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment³⁶

These principles are illustrative of the fact that personnel charged with the care of prisoners are responsible towards those prisoners under International Law. Health personnel, particularly physicians, charged with the medical care of prisoners and detainees have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained.³⁷

There may be no derogation from the foregoing principles on any ground whatsoever, including public emergency.³⁸

Code of Conduct for Law Enforcement Officials³⁹

This sets out the responsibilities of law enforcement officials in the performance of their duty. They shall respect and protect human dignity and maintain and uphold the human rights of all persons.⁴⁰ They may use force only when strictly necessary and to the extent required for the performance of their duty.⁴¹

No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment.⁴² Further, they shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required.⁴³

³⁶ GA res 37/194, 18 Dec 1982 at <http://www.unhchr.ch/html/menu3/b/h_comp40.htm> accessed on 31st May, 2006.

³⁷ *Principle 1.*

³⁸ *Principle 6.*

³⁹ GA res. 34/169, 17 Dec. 1979 at <http://www.unhchr.ch/html/menu3/b/h_comp42.htm> accessed on 31st May, 2006.

⁴⁰ *Article 2.*

⁴¹ *Article 3.*

⁴² *Article 5.*

⁴³ *Article 6.*

Standard Minimum Rules for the Treatment of Prisoners (SMRs)⁴⁴

The Rules emphasize the need for the classification and individualization of prisoners taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment.⁴⁵ Thus, untried prisoners shall be kept separate from convicted prisoners⁴⁶ and young prisoners separate from adults.⁴⁷ Classification and individualization of prisoners shall be carried out for two purposes; to separate from others those prisoners who, by reason of their criminal records or bad characters, are likely to exercise a bad influence⁴⁸ and to divide the prisoners into classes in order to facilitate their treatment with a view to their social rehabilitation.⁴⁹

The Rules require that all accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.⁵⁰ In Chapter 3, it will be considered whether this rule is really observed in the case of Kenyan prisons.

Cleanliness is provided for under the rules requiring that the sanitary installations in prisons be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.⁵¹ Additionally, adequate bathing and shower installations shall be provided so that every prisoner may be enabled and required to have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate.⁵² Furthermore, all parts of an institution regularly used by prisoners shall be properly maintained and kept scrupulously clean at all times.⁵³

⁴⁴ EcoSoC res 663 C (XXIV) 31st July 1957 and 2076 (LXII) 13th May 1977.

⁴⁵ *Rule 8.*

⁴⁶ *Ibid (b).*

⁴⁷ *Ibid (d).*

⁴⁸ *Rule 67 (a).*

⁴⁹ *Ibid (b).*

⁵⁰ *Rule 10.*

⁵¹ *Rule 12.*

⁵² *Rule 13.*

⁵³ *Rule 14.*

As regards the prisoners' personal hygiene rule 15 stipulates that prisoners should keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.

The rules also contain provisions regarding the health of prisoners and require that at every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.⁵⁴

Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.⁵⁵ The extent to which these provisions are complied with within the system of Kenyan prisons will be considered in Chapter 3.

Female prisoners also have special provisions applicable to them in addition to the ones already mentioned. The Rules require that there be special accommodation for all necessary pre-natal and post-natal care and treatment in women's institutions.⁵⁶ Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.⁵⁷

The Rules prohibit certain types of punishment, such as, close confinement or reduction of diet that shall not be inflicted unless the medical officer has examined the prisoner and

⁵⁴ *Rule 22 (1).*

⁵⁵ *Ibid (2).*

⁵⁶ *Rule 23 (1).*

⁵⁷ *Ibid (2).*

certified in writing that he is fit to sustain it.⁵⁸ Such punishments have been used on various occasions against the Rules as will be considered in Chapter 3.

Officers of the institutions shall not, in their relations with the prisoners, use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Officers who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the director of the institution.⁵⁹ A further requirement to this rule is that except in special circumstances, staff performing duties which bring them into direct contact with prisoners should not be armed.⁶⁰

The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.⁶¹ To this end, it is necessary that prison labour should ensure that the prisoner earns and saves money that will help him on living prison. Additionally, as will be seen in Chapter 4, there should be machinery to ensure that prisoners get a place to start their lives afresh at the end of their sentences.

My opinion above is supported by rule 64, which places a duty on society and which does not end with a prisoner's release. There should, therefore, be governmental or private agencies capable of lending the released prisoner efficient after-care directed towards the lessening of prejudice against him and towards his social rehabilitation.

Prison labour is governed by rule 71, which stipulates that prison labour must not be of an afflictive nature⁶² and that all prisoners under sentence shall be required to work, subject to their physical and mental fitness as determined by the medical officer.⁶³ So far

⁵⁸ *Rule 32.*

⁵⁹ *Rule 54 (1).*

⁶⁰ *Ibid (3).*

⁶¹ *Rule 58.*

⁶² *Rule 71 (1).*

⁶³ *Ibid (2).*

as possible the work provided shall be such as will maintain or increase the prisoners ability to earn an honest living after release. The rules require that prisoners should be remunerated for their work and thus there should be a system of equitable remuneration of the work of prisoners.⁶⁴

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”)⁶⁵

These apply specifically to juvenile offenders. Of relevance is Part Five which deals with the institutional treatment of juvenile offenders.

The rules deal mainly with the objectives of institutional treatment and state that juveniles in institutions shall receive care, protection and all necessary assistance-social, educational, vocational, psychological, medical and physical-that they may require because of their age, sex, and personality and in the interest of their wholesome development.⁶⁶ Additionally, juveniles in institutions shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.⁶⁷

The Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations are also applicable to juvenile offenders in institutions.⁶⁸

Conclusion

The present Chapter sought to review the legal provisions (national and international) in the area of prisons and especially as regard prison conditions. The extent to which the provisions have been complied with will be considered in the next Chapter. Where such provisions have not been complied with or where compliance is wanting, suggestions for

⁶⁴ *Rule 76.*

⁶⁵ GA res. 40/33, annex, 40 U.N. GAOR Supp. (No. 53) at 207, U.N. Doc. A/40/53 (1985), at <<http://www1.umn.edu/humanrts/instree/j3unsmr.htm>> accessed on 9th June 2006.

⁶⁶ *Rule 26 (2).*

⁶⁷ *Rule 26 (3).*

⁶⁸ *Rule 27.*

better compliance will be suggested in Chapter four depending on the reason for such lack of or minimal compliance.

CHAPTER 3

PRISON CONDITIONS: A BREACH OF LEGAL PROVISIONS?

Introduction

Prisoners should have living conditions which are compatible with human dignity. The International Covenant on Civil and Political Rights states that:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.¹

The conditions under which prisoners are accommodated are one of the major factors which determine a prisoner's state of mind, self esteem and dignity. How and where a person eats, sleeps and uses the toilet, have enormous effect on the person's mental and physical well being. In addition to violating a person's dignity, extremely poor conditions may in addition constitute cruel, inhuman or degrading treatment, or may be injurious to a prisoner's health.²

In many countries, the predominant purpose underlying imprisonment is punishment, if not in law then in popular and political discourse. In this context substandard, deplorable prison conditions are deemed to be acceptable. Prison conditions in many prisons in Kenya amount to cruel, inhuman and degrading treatment. Hundreds of prisoners die each year, some as a result of torture by prison officers, the majority from infectious diseases resulting from severe overcrowding, unsanitary conditions and shortages of food, clean water, clothing, blankets and adequate medical care. For those people living with HIV at the time of incarceration, a prison sentence may shorten their lifespan or even result in death, due to the lack of adequate health care, overcrowding and inadequate nutrition, and the presence of infections, in particular tuberculosis.

In September 2000 the Nyeri District Commissioner, Ali Korane, stated:

¹ Article 10 (1).

² A Dissel 'Commentary on the Kampala Declaration on Prison Conditions in Africa' at <<http://www.wits.ac.za/csvr/papers/papkamp.htm>> accessed on 8th August 2006.

"Our prisons are in very poor conditions. In all the provinces I have served as an administrator, all the facilities are pathetic. These harsh conditions end up hardening criminals rather than rehabilitating them".³

In these conditions, infectious diseases such as diarrhoea, typhoid, tuberculosis and HIV/AIDS spread easily. Prison Reform International reported in June 2000 that 90 prisoners die each month in Kenya.⁴

Prisons were not designed, and are generally not equipped, to deal with prisoners infected with chronic, potentially fatal diseases such as HIV/AIDS, hepatitis, and tuberculosis. They do not have adequate staffing levels, staff training, or equipment to meet the health needs of prisoners suffering from these diseases. When health services for prisoners are "captured" within, or subservient to, the prison administration, it is unlikely that prisoners will trust or have confidence in the health-care providers. This lack of trust contributes to substandard health care for prisoners.⁵

In all instances where monitoring was made possible, prison conditions in Kenya have been reported to be extremely harsh by many independent observers. The Attorney-General, Amos Wako, once described the conditions as "de-humanising"⁶ whilst an MP said that "the prisons have been described as "death chambers" where people are sent to die."⁷

There are aspects of accommodation over which the prison has more control, and which can be regulated without huge expenditure, issues such as ensuring basic standards of cleanliness and hygiene. Prisoners should be provided with the means to keep themselves

³ 'East African Standard' 20 September 2000 at <www.eaststandard.net> accessed on 30th May, 2006.

⁴ 'Daily Nation' 7 June 2000 in <www.nationnews.com> accessed on 30th May, 2006.

⁵ Supra note 2.

⁶ Y Sampoda, 'Communities to benefit prisoners', in ANB-BIA Supplement, Issue Nr 367, ANB, 1st May 1999 as quoted in 'No Upright Words: The Human Rights of the Women in Kenya' Refugee Women's Resource Project, Asylum Aid February 2001 at <<http://www.asylumaid.org.uk/Publications/Kenya>> accessed on 23rd May, 2006.

⁷ Ibid.

and their living areas clean. Improvements can be made in the conditions through commitment and political will.

In this Chapter, the various problems facing the Kenyan prisons will be discussed. There are those problems that not directly related to the institution of prisons itself but more of failure by the Government. These include; overcrowding, shortages of food, clothing and water; insufficiency of medical care; HIV/AIDS prevalence in prisons. There are those problems that have to do with the prison institution itself and include the acts or omissions by the prison officers, for example, torture; sufficiency or otherwise of the rehabilitative programs; prison labour and the wages paid to prisoners. There are also those problems which are not only related to the prison as a whole but also as a result of society's view of the prisoners both while in prison and after release and cases such as recidivism. Finally, we shall consider some of the issues that are viewed as a great contribution to the continued existence of such conditions in prisons, such as, obstacles to access to courts, legal shortcomings among others.

Overcrowding

As of today the prisoner population in Kenya stands at 50,034 as compared to an accommodation capacity of 16,000 which is about 312% overcrowding. The atrocities of this phenomenon cannot be overemphasised as inmates scramble for the scarce facilities. It has led to deaths, prisoner conflicts, disease outbreaks and general insecurity. For example Meru, Kisii and Kisumu Main Prisons which have an accommodation capacity of 229, 162 and 645 are forced to hold as many as 1569, 1138 and 1938 inmates respectively as indicated in a Prisons report compiled on 27th January, 2006.⁸ This is shown in Table 1 below.

⁸ A Paper presented by Gilbert Omondi, Commissioner of Prisons on 'Improving Linkages between Prisons and the Judiciary'.

Table 1: Prisoner Population as on 31st May 2006

Categories of Prisoners	Males	Females	Total
Serving 6 Months and below	8,543	860	9403
6 Months to 1 Year			1390
1 to 3 years			7563
Over 3 Years			8828
Capital Remand	7347	496	7843
Non Capital Remands	13384	653	14037
Mental Patients	69	2	71
Civil Debtors	55	5	60
Borstal Boys and YCTC	700 And 139	Nil	839
TOTAL	47,359	2,675	50,034

A number of factors combine to account for the rise in the prison population. Urbanization and other social and economic changes have progressively weakened traditional sanctions, which have been replaced by the new forms of sanctions. The courts have frequently imposed excessively severe sentences, whether of imprisonment or fines with imprisonment only in default; and in a society of poor people, fines occupy a relatively smaller part of the sanctioning machinery and imprisonment a larger area. The gradual improvement of the prison services and the expansion of prison buildings, however slowly, stimulated increased reliance upon imprisonment by magistrates; and for much of the early part of the century there were few alternative penalties available. The growth of recidivism reflected the inadequacy of imprisonment as a deterrent or reformatory influence and contributed to the rising figure.

Within the overall trends, certain specific short-term factors operated. For example, at times when judicial or police departments were under strain there was increased delay in bringing cases to trial and the population of remand prisoners awaiting trial rose. In periods of political stress during the progress to independence, political offenders were imprisoned and conventional crime also tended to escalate-the outstanding example of this being in Kenya during the emergency, which resulted in fantastic strains upon the

prisons service. The steady growth in size and efficiency of the police forces, with new areas continually being brought within the range of effective policing, meant that there was a regular increase in the number of crimes reported and investigated which might otherwise never have appeared in the official figures.⁹

Additionally excessive length and use of pre-trial detention is a major cause of overcrowding in prisons.¹⁰ In the Meru Prison alone, an official at the Prisons Headquarters expressed the view that about 57% of the prison population comprises prisoners awaiting trial. Most or a sizeable number of offenders are sent to prison on a short term basis, in most cases, these people fall under the category of persons awaiting trial and are sent to government prisons. The absence of alternative accommodations puts a severe strain on existing facilities and leads to overcrowding.¹¹

The Kampala Declaration on Prison Conditions in Africa¹² recommended that prisoners should be kept in remand detention for the shortest possible period, avoiding for example, continual remands in custody by the court. Prison administrations report average lengths of pre-trial detention varying from three months to five years. But often, this period is largely exceeded.¹³

Despite some reforms, prison conditions remained harsh. Chronic overcrowding continued to cause serious problems. Estimated 50,000-plus prisoners were held in the country's 92 prisons with a capacity of 19,000.¹⁴ Much of the overcrowding is due to the large number of people held on remand, many of whom are unable to raise the money needed to obtain bail, and who often wait up to three years for their case to come to court. Some prisoners on capital charges who do not qualify for bail have reportedly been held for over five years, awaiting trial. The length of time taken to process appeals,

⁹ J Read *Penal Systems in Africa: Kenya, Tanzania and Uganda* in A Milner (ed) *African Penal Systems* (Routledge and Kegan Paul Ltd London 1969) p 128.

¹⁰ *Good Practices in Reducing Pre-Trial Detention* at <<http://www.penalreform.org/>> accessed on 30th May 2006.

¹¹ MB Clinard et al *Crime in Developing Countries* (John Wiley & Sons, Inc. 1973) 231.

¹² <<http://www.wits.ac.za/csvr/papers/papkamp.htm>> accessed on 23rd May 2006.

¹³ <<http://www.penalreform.org/>> accessed on 30th May 2006.

¹⁴ Amnesty International Report *Harsh Prison Conditions and deaths in custody* at <<http://web.amnesty.org/report2005/ken-summary-eng>> accessed on 21st July 2006.

particularly for death penalty cases which can be up to seven years, also contributes to overcrowding.

To explain further the gravity of the matter, it is important to consider one such prison where overcrowding has continued to be a problem not only to the prisoners but also to the officials in the administration of the prison. We shall therefore consider the Meru prison in detail below. However, the officers blame the overcrowding, first on the Government for failure to build additional facilities to accommodate the increasing number of offenders who are sentenced to imprisonment. Secondly, the officers also blame the overcrowding on the community itself as seen below:

“The main reason why the Meru Prison is so crowded is partly attributable to the community. People from Meru have resorted to committing offenders to police custody for extremely petty offences such as theft of chicken, instead of dealing with such small problems. This has therefore seen the continued incarceration of persons who are awaiting trial for such offences and which in turn leads to overcrowding and a strain on the limited resources available in the prisons.¹⁵

The Meru Prison

Recently, the Meru Prison has featured on the news as being a densely populated prison so many times above its intended capacity. The officer in charge, Superintendent Daniel Mutiria M'Ikiugu, warned that unless urgent measures were taken to reduce congestion in the cells, there could be a disaster at the prison where 15 inmates died due to similar conditions in 2004. The institution is supposed to hold 350 inmates, but currently has 1,305. The situation makes it difficult for them to sleep, be fed, or even stand. He states: "The number is approaching the 2004 figure of 1,414 when 15 prisoners died under mysterious circumstances. The congestion poses a security threat to all."

Godfrey Kimathi, who has been in remand for a year after he was charged with robbery in a Meru court adds: “if there is hell on earth, it is here in the Meru GK prison. We spend days and nights bundled and cramped together with some acting like mattresses for others due to the congestion,”¹⁶

¹⁵ Gilbert Otiende, *An officer at the Prison Headquarters*.

¹⁶ ‘*The Daily Nation*’ June 11, 2006.

However, despite these claims by the prisoners, the prison officers themselves feel differently and claim that they have offered the best and are achieving their goal of rehabilitation. In an interview with a prison official who prefers to remain anonymous, he concurs with Gilbert Otiende above, that they are not to blame for the conditions in prisons. According to him anything that has to be done to ease the overcrowding is beyond their means and especially since most cases require budgetary provisions which lie squarely in the government. However, he does not deny the fact that political will has much to play in ensuring that the conditions are made better.

Shortages of food, clean water and clothing

There are frequent reports of shortages of food, clean water and adequate clothing. The food in Kenyan prisons is extremely poor. The portions are small, of poor nutritional value and often badly cooked. On 11-12 June 2000 over 200 inmates at Rumuturi Prison, Rift Valley Province, rioted over a food shortage.¹⁷ One prisoner died and scores were injured after prison officers intervened to end the riot. The prisoners were reportedly protesting about being starved by a prison officer. Four inmates suspected to have been leaders were brutally beaten and locked up in secluded cells. One prisoner had died the day before from dysentery. Prisoners complained in October 1999 that food rations were halved to 250 grams per day and three quarters of a pint of porridge in Kodiaga Prison.¹⁸

Water shortages are regularly reported. In February 2000 the Nyeri Water and Sewerage Company disconnected the water to King'ong'o Prison, Central Province because the government had failed to pay their water bill. No running water meant toilets could not be flushed and nothing could be cleaned. It was disconnected again in September.¹⁹ In October 1999 a magistrate²⁰ was so concerned about conditions in Kapsabet Prison that he publicly threatened to release all prisoners. Severe overcrowding and the disconnection of the prison's water supply, forcing prisoners to use untreated water from

¹⁷ Amnesty International Report on 'Harsh Prison Conditions in Kenya' at <<http://web.amnesty.org/library/index/ENGAFR320122001>> accessed on 21 June 2006.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

local rivers, had resulted in an outbreak of infectious diseases. In January 2000 the Kapsabet prison was still being described as unfit for humans.

According to reports, inmates are only provided with one set of uniforms and no extra underwear. The uniforms are generally in a very bad condition and often unsuitable for the climate. In Marsabit Prison, Eastern Province, no jumpers are issued and there are reports that deaths due to pneumonia are common. Judges visiting Kamiti Maximum Security Prison, Nairobi, in February 2000 were shocked to find prisoners almost naked.²¹

Medical Care

The prison is obliged to provide medical treatment to prisoners. The Prisons Act and the Prisons Rules contain provisions for a medical officer. There should be a medical officer stationed in or responsible for every prison.²² The medical officer shall be responsible for the health of all prisoners in a prison and shall cause all prisoners to be medically examined at such times as shall be prescribed. The medical officer is also required to see every prisoner at least once every month and at least once every month inspect the whole prison, paying particular attention to the cooking and sanitary equipment in the prison.²³ Further, SMR 25 (1) provides for a medical officer who shall care for all sick prisoners. This implies that a qualified medical doctor has at his or her disposal a well equipped surgery and treatment room with the usual facilities, and that he can treat prisoners as he would normal patients. They should act professionally at all times and prisoners should receive the same level of treatment as would be received by free individuals. Additionally, SMR 26 provides that (1) The medical officer shall (a) see every prisoner at least once a month; and (b) see every prisoner held on a capital charge or sentenced to death or in close confinement once every day; and (d) at least once every month inspect the whole prison, paying particular attention to the cooking and sanitary equipment in the prison.

²¹ *Supra* note 10.

²² Section 29 (2).

²³ Rule 26.

In spite of the clear provisions the reality on the ground is that prisoners have limited access to medical services and attention. Most prison medical units have few or no resources and prisoners or their families are reportedly often asked to pay for any medical treatment. When medication is given it is often inadequate, such as temporary painkillers for injuries requiring more intensive treatment. Very few prisons have a doctor and most instead rely on the District Medical Officer, based at District or Provincial hospitals nearest to the various prisons, who visits occasionally, and untrained medical orderlies. Private doctors who attempt to treat prisoners frequently report difficulties in gaining access to their patients. The law allows registered medical practitioners to visit their patients. However, the Officer in Charge of the Prison usually insists on a court order to allow the doctor to examine the patient, which can take up to a week to obtain, and even then the doctor may be refused access unless the prison doctor is available which, given there are very few prison doctors, compounds delays.²⁴

Access to hospital treatment is restricted by prison officers who reportedly either refuse to take very sick inmates to hospital or do so, so late, that the inmates are often extremely ill or dying by the time they arrive. The persistent coughing of a defendant during a hearing in the Mombasa High court in December 2000²⁵ caused a judge to raise concerns about the health of prisoners in Shimo la Tewa prison. The prisoner had been refused hospital treatment by prison officers on security grounds. Prisoners at Shimo la Tewa prison complained of a lack of essential drugs at the prison and said that most prisoners who needed hospital treatment end up dying at the prison's dispensary which was unable to treat chronic diseases.²⁶ Once in hospital, the prisoners are chained to the bed. Hospital doctors note that prisoners usually come to hospital to die.

Denial of the access to medical care is one of the measures taken by the authorities to conceal the extent of torture inflicted on people detained in police custody or in prison. As for medication, resources are extremely limited and many prisoners reported being

²⁴ *Ibid.*

²⁵ *Supra note 102.*

²⁶ *Ibid.*

given aspirin for any sort of condition, including wounds inflicted through torture.²⁷ Yet Rule 26 of the Prison Rules provides that:

(1) The medical officer shall (a) see every prisoner at least once a month; and (b) see every prisoner held on a capital charge or sentenced to death or in close confinement once every day; and (d) at least once every month inspect the whole prison, paying particular attention to the cooking and sanitary equipment in the prison.

HIV/AIDS in prisons

“I saw young boys being made the wives of other older men. They are lured with food and cigarettes. At a fee, prison warders organizes opportunities for sexual activities. This involves living the prisoners concerned behind in the dormitories while the rest go to work”²⁸

There have been rampant reports on the rate of HIV/AIDS in prisons. According to a report by the Standing Committee on Human Rights (Kenya)²⁹, at the Kakamega prison, the infirmary receives two to three HIV positive prisoners every month. The Committee was surprised to find neither guidelines nor policy on segregating (especially in view of the rampant sexual activity among prisoners) those suffering from HIV/AIDS, nor HIV/AIDS awareness programmes. At Bungoma prison, HIV/AIDS patients were accommodated in a cell with prisoners suffering from tuberculosis and scabies. These inmates complained of lack of proper medication, diet and bedding. The Committee was informed that for cases of full-blown AIDS, patients were released. However, the procedure for releasing these inmates as highly bureaucratic and lengthy and thus resulting in most inmates dying before release.³⁰

Homosexual activity takes place in prisons as it does outside. However, prison conditions create an environment that promotes it. These include; use of dormitories rather than single cells thereby encouraging close bodily contact; limited contact with the outside world and therefore the prisoners live in sort of “their own peculiar world”; inadequate

²⁷ Interview with Kamau Muchiri, an ex-prisoner at the Kapsabet Prison.

²⁸ Shaban Omari, ex-prisoner Kodiaga prison in KHRC, ‘Improving Prison Conditions in Kenya: Proposals and Recommendations’ 2002 p 20.

²⁹ ‘Special Report on Inspection of Kenyan Prisons’ 6th Special Report, April 2002 p 28.

³⁰ *Ibid* at 29.

food provision leading to sex-for-food trade; ban on addictive drugs and cigarettes that lead to trade of these items for sex; sodomy and other forms of sexual assault.³¹

World Health Organization (WHO) Guidelines on HIV Infection and AIDS in Prisons (1993)

The WHO Guidelines “provide standards – from a public health perspective – which prison authorities should strive to achieve in their efforts to prevent HIV transmission in prisons and to provide care to those affected by HIV/AIDS.” The WHO Guidelines outline general principles and cover areas such as HIV testing; prevention measures; management of HIV-infected prisoners; confidentiality; care and support of HIV-infected prisoners; women prisoners; juvenile detention; semi-liberty, release, and early release; community contacts; resources; and evaluation and research.

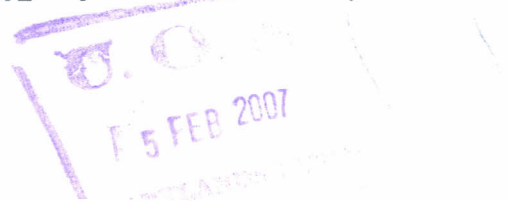
The International Guidelines identify the following specific action in relation to prisons: Prison authorities should take all necessary measures, including adequate staffing, effective surveillance and appropriate disciplinary measures, to protect prisoners from rape, sexual violence and coercion. Prison authorities should also provide prisoners (and prison staff, as appropriate), with access to HIV-related prevention information, education, voluntary testing and counselling, means of prevention (condoms, bleach and clean injection equipment), treatment and care and voluntary participation in HIV-related clinical trials, as well as ensure confidentiality, and should prohibit mandatory testing, segregation and denial of access to prison facilities, privileges and release programmes for HIV-positive prisoners. Compassionate early release of prisoners living with AIDS should be considered.³²

Torture

Kenya is a signatory of the African Charter on Human and People's Rights. It also subscribes to various United Nations instruments regarding human rights, some of the most important being, the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the UN Convention against Torture and other

³¹ *Supra* note 3.

³² <http://www.dgdc.be/documents/nl/themas/aids/bvo_aids_rap_sida.pdf> accessed on 30th May 2006.



Cruel, Inhuman or Degrading Treatment or Punishment. Some of the principles inherent in these instruments are also incorporated into domestic law through legislation and the Constitution.

These instruments all recognise that every human being has certain inviolable rights, such as the right to dignity; the right of non-discrimination; the right to life, liberty and security of person; the right to be equal before the law and to have equal protection from the law. These rights are applicable to all individuals including prisoners. Further, they require that all sorts of inhuman and degrading treatment and all forms of torture should be abolished.

Prisoners desire to be treated fairly and should not be subjected to torture or any form of ill treatment. Yet the artificial atmosphere prevailing in prisons often provides fertile ground for torture to take place.

Torture, inhuman and degrading treatment or punishment often manifest in many areas of prison life. To assess the possible manifestations, investigation of a wide range of issues is necessary, such as, rights possessed by persons deprived of their liberty; custody and interrogation procedures; disciplinary procedures; avenues of complaint; physical conditions of detention; healthcare and standards of hygiene. All these may point to an imminent risk of ill treatment or to conditions and circumstances that could degenerate into ill treatment. Instances of ill treatment of prisoners are abound and they take several forms. At the Kakamega prisons, for example, prisoners are subjected to artificial light from a 150 watts bulb for a period of twenty-four hours as a way of punishment.³³ This is in spite of the prohibition of such punishment by SMR 32.

Several people die in custody, allegedly as a result of ill-treatment. Five inmates died at Meru Prison on 26 September 2004. According to a post-mortem, they died following injuries caused by blunt trauma and had multiple soft tissue injuries. They were reportedly kicked and struck with truncheons, mainly on the head and joints, on the day

³³ *Special Report on Inspection of Kenyan Prisons* 6th Special Report, April 2002 at 31.

they died. They were then forced into a small cell which housed 18 prisoners on the fatal night. The five were discovered dead the next morning. Forty-five inmates reportedly died in suspicious circumstances in Meru prison during the first nine months of 2004, with 14 deaths recorded in September alone. Inquest files were opened at the Meru Court regarding the deaths of 26 September.³⁴ Torture in prison may take various forms and are discussed briefly below.

Official search

Official search is done in a manner that strips the prisoners of their human dignity. At the Shimo-la-Tewa and Kamiti prisons, the search is conducted in a heartless manner, cruel, humiliating and degrading as inmates are forced to strip naked, squat and frog-jump as they are searched in all possible orifices of the body for cigarettes and other so-called forbidden items. This is done inspite of the age variations among the inmates such that an inmate who is about fifty years old does all the above regardless of whether say an eighteen year old is present. This is terribly humiliating.³⁵ According to a report, although rule 35 of the Prison Rules allows for the searching of prisoners to be conducted with the purpose of discovering concealed articles and also as is necessary for security purposes, prisoners were adamant that the searches could be conducted in a more humane way.³⁶

Beatings/brutality

Beating starts when one arrives at the prison since one was unaware and ignorant of the prison procedures. Cases of warders slapping prisoners and treating them in an abusive manner were reported at the Kamiti Maximum prison. According to the Standing Committee's referred to earlier, no efforts are made by the prison authorities to acquaint the prisoners with prison regulations. This is contrary to SMR 35 that stipulates that every prisoner on admission shall be provided with written or oral information about the regulations governing the treatment of prisoners, the disciplinary requirements of the institution, the authorized method of seeking information and making complaints to the warders.

³⁴ *Ibid.*

³⁵ *Ibid* at 32.

³⁶ *Ibid.*

Additionally, according to the report, senior officers supposed to routinely visit and inspect the prisoners so that they can raise whatever grievances they might have were not accessible. In such cases redress is out of reach for the prisoners. These complaints were particularly raised by inmates at the Shimo-la-Tewa who claimed that by the time of the Committee visit (on 26th September 2001) the officer-in-charge had not visited the cell for over three months.

Cruelty and verbal abuse by warders

Female inmates at Shimo-la-Tewa prison had to constantly withstand verbal abuse from warders on the slightest excuse, further compounding their degradation. This happened especially when they raised issues that needed to be addressed, such as, the poor diet. Further, the warders have generally developed a habit of not calling the prisoners their names. Instead, they are referred to by numbers or even tribal connotations, such as ‘Maasai’, or other ways, such as, ‘chongo’ among others. All these result in degradation.³⁷ Warders also put in place cruel rules such as denying them access to a toilet until designated times causing them unnecessary distress.

Punishment within punishment

Ideally, people are sent to prisons not for punishment but as punishment. However, in certain instances, certain practices by the prison authorities result in punishment greater than the stipulated punishment in case of breach of prison discipline. The most common practices are solitary confinement and half rations of food.

According to SMR 34, solitary confinement should not be used except in the most extreme circumstances, it should not be combined with other punishment. However, in the Standing Committee’s Report, prisoners reported instances in which they were stripped naked, locked up in flooded cells upto seven days and being put on half rations for the slightest offence in addition to the solitary confinement. Rule 75 of the Prison Rules empowers the Commissioner of Prisons to supply a prisoner undergoing solitary

³⁷ Prison Outlook August-October 2005.

confinement with clothing and bedding, at his discretion. This is obviously open to abuse and often results in ill treatment.

Use of handcuffs and other instruments of restraint on sick inmates

These are normally employed in order to prevent the escape of prisoners especially when they are taken to health facilities outside the prison environment. This is inhuman as it forces a prisoner to lie in uncomfortable positions for long periods, restricts movement in addition to making the prisoner conspicuous. The prisoner experiences extra burden over and above his illness.

The use of such instruments of restraint is contrary to SMR 33 which prohibits the use of such instruments of restraint except in very serious circumstances where it is necessary to prevent the prisoner from escaping and it is shown that there is no other way to prevent the escape.

Conditions of incarceration

The conditions in which prisoners are incarcerated result in inhuman, degrading and ill treatment of the prisoners. Some of the conditions are such as the state of uncleanness and lack of sanitation in the prison wards. In most cases, prisoners are required to relieve themselves in a bucket in the same wards where they are leaving. The idea of having to answer a call of nature in the presence of other inmates degrades the prisoner and more so coupled with the fact that such buckets in most cases overflow and thus causing serious health problems.

Insufficiency of Rehabilitative Programs and wages on Prison Labour

Prisoners should be given access to education and skills training in order to make it easier for them to reintegrate into society after their release. One of the main objectives of the Prison Services is to carry out rehabilitation programmes aimed at training, counseling and reforming prisoners. In terms of the legislation, every convicted prisoner is obliged to engage in useful so that they learn new skills and are enabled to gain employment. Various rehabilitative efforts are seen especially in the case of the Naivasha prison where

a Catholic priest assists in the educational programme and the Langata women prison where there are periodic beauty pageants organized for the inmates. However, the extent to which the intention of rehabilitating the inmates is achieved is questionable. This is particularly so since in order for these programs to be effective, it is important to categorize prisoners to make it easier for them to learn as well as to know their educational background. However, effective categorization is hampered by overcrowding in the prisons which makes it hard to get room to 'segregate' different categories of prisoners requiring specific skill in a given area.

Prisoners are mainly engaged in farm work, and the women are engaged in cooking, cleaning, and taking care of the warder's dogs. A few limited vocational programmes exist in some prisons. However, in view of the appalling conditions of the prisons, it is difficult to see how this work contributes to the development of the prisoner. It does however serve the useful purpose of keeping them out of their cells.³⁸

Prisons are on occasions provided with employment and/or training. However, they earn almost no money for it. The money earned by the prisoners is not proportionate with the labour put in and the income generated by their work, and especially considering that prisoners engage in various arts that generate a lot of income. An example is the making of number plates for vehicles, which is only done by the prisoners, and the demand for such items is countrywide and also where the prisoners make furniture which is sold at high prices.

At the moment the amount paid to a prisoner in appreciation for his contribution to prison earnings is meager. The Prisons Act gives discretion to the Minister to set a prisoner's earning. The current earning rate has been set at 10 cents a day or Kenya Shillings 12.50 per month. This figure does not reflect the profound changes that have taken place in the country's economy. The question that arises is as to whether the prisoners are then able to successfully reintegrate into society after release keeping in mind the amount given to

³⁸ Kenya Human Rights Commission (2001) *'Draft Report of the Study of Prison Conditions in Kenya'* Nairobi 20 in A Dissel.

them and the responsibilities they bear among them paying rent and their basic needs.³⁹ In a report, the prisoners requested the Vice-President for an increase in the amount they earn so as to be sufficient to sustain the prisoners at least for a considerable time after serving their sentences and become integrated into the civil society.⁴⁰

Prison officers' conditions and their impact on the prison conditions

The conditions of prison officers are also very poor.⁴¹ Their salaries are low, their accommodation is often cramped with little privacy, if the prison water supply is cut off they have to use contaminated water, too and the food they have to eat is little better than the prisoners'. There are reports that prison officers sell soap, cigarettes, blankets and water to prisoners to augment their salaries.

These deplorable housing conditions are in certain cases worse than those of the prisoners and has continued to haunt the output of the prison staff.⁴² The conditions also result in lack of motivation on the part of the prison officers and raises questions of attitudinal problems that the prison officers have towards the prisoners. One prison officer confessed thus:

“There is no way you can expect me to provide a prisoner with a clean room and ensure his general welfare while I do not have food to eat, a place to sleep or even the basic wants in life. After work I retire to a place, which I can not even call a ‘home’. It is more of a paper house with no warmth, no expectation in life and children looking up to you to provide food and education-a perfect impossibility-and yet I am an employee of the State”.

The government is to blame for these poor conditions to the extent that it should ensure that its workers are well catered for if they are to perform their duties as expected of them. Due to these bad conditions also experienced by the prison officers, it has resulted in cases where the prison officers engage in ‘illegal’ dealings with the prisoners, for example, through selling certain items to the prisoners, so that the prison officers can get

³⁹ KHRC, ‘Improving Prison Conditions in Kenya: Proposals and Recommendations’ 2002 p 20.

⁴⁰ ‘The Standard Newspaper’ 24th June 2006.

⁴¹ A Dissel ‘Prison Conditions in Africa’ at <<http://www.csvr.org.za/papers/papdis10.htm>> accessed on 21 July 2006.

⁴² Prison Outlook August-October 2005 p 6.

money to cater for their needs. This presents a situation where the provisions of the Prisons Act are contravened and especially those prohibiting any such dealings with the prisoners.⁴³

Society's views, its effects on prisoners and Recidivism

When Kampala slum dwellers were asked what should be done to reduce crime, a common remark was "make the sentences longer." Principle rests on cultural attitudes derived from a more traditional view of the offender held over from colonial rule. One writer has analyzed the view of Africans who favour severe imprisonment. They feel, he states, that they themselves live under circumstances of social deprivation and are thus understandably hostile to any measure that might seem to be "coddling" the prisoners.

In the eyes of many Africans-whether educated government officials or simple peasants out in the bush-persons in prisons have been sent there because they committed some crime against society and therefore must be made to suffer and pay for it. It follows that prisoners must not be given advantages or pleasures which are not available to the population as a whole.⁴⁴ The African prisoner may not in general suffer great social stigma, but does suffer acutely from social isolation. One writer has described the inmates' feelings:

"... clothed conspicuously different from his brethren at large in shorts and often barefoot, numbered instead of named, and exposed to the ridicule of his fellow men by being forced to do prison work traditionally taboo or normally relegated to women, is clearly conscious of his lot."⁴⁵

In a labour surplus economy employers may be more selective and the ex-inmates' bargaining position is irreparably damaged. The better educated prisoners express greater concern over the affects of imprisonment.

⁴³ Section 21 Prisons Act.

⁴⁴ VD Du Bois 'A Visit to an African Prison' Fieldstaff Reports Vol XI No. 27 in note 1 above at 231-232.

⁴⁵ C Harwich & R Dust 'Memories of the Uganda Police 1935-1955' (London:V.Stuart 1961) at 145 in note 1 above at 243.

Kamau Muchiri, an ex-inmate at Kamiti prison states that he became fearful and angry when looking for a job because of the reactions of his friends: “I will find all my friends holding big responsible positions; hence they will take me for a spoilt man who can be good enough to dust their shoes.”

Public fears, prejudices, and ignorance also arouse hostility toward the ex-inmate, factors that may not only contribute to recidivism but may also offer the offender justification for reverting to crime.

Conclusion

This Chapter has undertaken a research into the prison conditions in Kenya in a bid to bringing out the areas that are in urgent need of reform. It is evident from the discussion that the conditions in our prisons do not meet the minimum accepted standards for the treatment of prisoners. Inmates’ human rights and dignity is compromised and eroded in prisons. Prisons do not effectively carry out their rehabilitative function.

The government has a responsibility to protect the lives of all Kenyans, particularly those who are in custody, as they and their health and well-being is entirely in the control of agents of the state, and to ensure prison conditions meet international human rights standards. Without adequate post-mortems, prompt, thorough and impartial investigations and the bringing to justice of those responsible in every case, torture and deaths in prisons will continue. All prison personnel must be made aware that they cannot violate human rights with impunity. The failure to tackle conditions in Kenyan prisons is perpetuating grave human rights violations, affecting the lives of thousands of Kenyans.

Additionally, the Prisons Act makes provision for visiting justices.⁴⁶ A visiting justice may inspect the several wards, cells, yards, punishment cells and other apartments and divisions of the prison, inspect and test the quality and quantity of the prisoners' food, hear the complaint, if any, of any prisoner, and question any prisoner or prison officer, and shall ascertain so far as possible whether the Prisons Act, and the rules made

⁴⁶ Section 72.

thereunder, and the prison standing orders, are adhered to, and shall call the attention of the officer in charge to any irregularity that may be observed in the working of the prison or in the treatment of any prisoner confined therein, and shall exercise and perform such other duties as may be prescribed.⁴⁷ Ministers and judges are also entitled to act as visiting justices and shall have such powers as mentioned above.⁴⁸

However, during the conduct of study, there were no records of any visiting justices and their findings as regards the prison conditions. This provision should be effected in order to ensure a proper monitoring of the prisons. Its presence in the Act makes no difference to the life of a prisoner if it is not enforced.

It is clear that reform should be embarked on so as to cure the 'ills' which currently hamper the effectiveness of imprisonment as a penal tool ineffective. In light of this fact, Chapter IV will suggest various measures that can be undertaken in reform.

⁴⁷ *Ibid subsection (4).*

⁴⁸ *Section 73.*

CHAPTER 4

RECOMMENDATIONS FOR REFORM

Introduction

Reform can only be possible in an environment where the rights of the prisoner are respected. Unattended to deplorable conditions that have become hallmarks of Kenyan prisons inevitably translates to human rights violations.

As events unfold, it is becoming increasingly apparent that despite a change of regime, demonstrated political will, and attendant positive changes, deplorable conditions in prisons and inmate mistreatment is still rife.

The problem of reforming prisons is further compounded by the lack of impetus for change due to society's limited understanding and scanty interest in the rights of inmates. Corruption, limited state funding, inept Prison Officers who are ill-motivated, and congestion are all factors that combine to impede progress in progressive prison management. While it is anticipated that more positive changes will occur in light of the prevailing political will, the problems highlighted in Chapter III are persistent and for which well thought out intervention mechanisms are required.

The urgent need for reform in the area of prisons is evident in phrase below:

“A prison is a different Kenya. Another Kenya . When inside, you just see the sun move across the sky not knowing where it has come from nor where it is going. A single day feels like 10 Years. I ask you, what kind of country do you think is like that?”¹

We shall first consider some of the achievements by government in its efforts to reform the Kenyan prisons. The general suggestions for reform will then be considered and ultimately proceed to suggest reform in respect of certain areas, such as, HIV/AIDS, overcrowding and then conclude with general recommendations for reform.

¹ Hesbon Mwangi Ng'ang'a, an ex-prisoner at the Naivasha prison in KHRC, *Improving Prison Conditions in Kenya: Proposals and Recommendations* 2002.

Current Achievements by the Government

Despite the deplorable prison conditions, there are certain notable achievements by the Prison Department. Chief among them is the Open Door Policy (ODP) which was pronounced in 2000 by then Commissioner of Prisons AM Kamakil². The ODP has encouraged collaboration with all agents in the criminal justice system as well as the media. It also created the Public Relations office to act as a point of reference between the media and the public in highlighting the functions of the Prisons Department and other issues arising therein.

The ODP also has the objective of educating the public on activities in prisons and to try and reduce the stigma of imprisonment which will automatically resort in ex-prisoners fitting better into the community once released. Additionally, it is intended to encourage the community at large to appreciate the needs of the prisoners in material and financial support needed to support the activities that are involved in the ODP itself.³

The ODP has in effect seen several activities take place in Kenya prisons. These include; invitation of the Press to cover events taking place in prison, for example the beauty pageant held in the Lang'ata women's prison, highlights of the open day at Kamiti Maximum prison. Both these have given the Kenya prisons an international recognition; the human rights activists have had their share of visits and interviews with the prisoners and as a result some of the harsh disciplinary measures such as caning, prisoners staying without shoes, women staying without panties, have all been done away with. The prisoners have also benefited from donations from both local and international well wishers. The support of the donors have seen some of the prisons benefit towards the adult education programme from; the Oxford press (donated books); commercial bank (donated computers, furniture, stationary, clothing; they have also received expendibles

² Prison Outlook August-October 2005 p. 8.

³ *Ibid.*

from Christian organizations, individual donors and ex-prisoners themselves just to mention a few. ODP has also brought good approach to the prisoners.⁴

Other achievements include the establishment of a Ministerial Committee by the Vice President Honourable Moody Awori, who is also the Minister for Home Affairs, to address congestion in our prisons. The mandate of the Committee is to proffer strategies for prison reforms.⁵

With regard to food, while the prisoners were provided with ugali, beans and sukuma wiki (kales) the whole year, today they have rice twice a week, and their porridge which was sugarless now has sugar. The provision of a tuck shop in Lang'ata women's prison has helped the inmates get variety to their diets as it provides fruits, juice, milk and loaves of bread. There is also provision of special diet for children imprisoned with their mothers.⁶

As regards accommodation, despite the overcrowding, preparations are underway to have double deckers in prisoners to help decongest the prisons. Prisoners can also enjoy their freedom of expression. With the ODP, prisoners are able to express themselves both to the administration, policy makers, potential donors and to the members of the Press. This has been achieved through speech, song, drama and poems.

As regards provisions of health services, the Government has provided twenty-four hours health services to the prisoners by establishing health clinics in the prisons. Special attention is also given to ante-natal mothers upto three months. This includes special diet and special accommodation arrangements which include hospital beds. The introduction of Voluntary Counseling and Testing (VCT) in the prisons provides the infected inmates with Ante-Retroviral Treatment (ART). Before the introduction of the VCT centres in the prisons, prisoners succumbed to death. This has helped the prisoners to undergo

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid* at 39.

HIV/AIDS awareness and counseling campaigns and have appreciated the need to know their status.

To cater for welfare issues, there is a welfare office in prisons whose objective is to ensure that the interests of the prisoners are well taken care of. Welfare issues include; facilitating the communication of the prisoners with their relatives, friends and to transact any official or personal emergency matters. The welfare office is also in charge of coordinating donation and has expanded to accommodate counseling service internship from Daystar University, Kenyatta University and the United States International University.

The role of religious leaders is very important in penal institutions in enhancing the reforms. It is important to expose the prisoners to spiritual matters as one way in improving their institutions. There is freedom of worship both formally and informally. Religious leaders also offer some level of counseling through interns from the National Institute of Bible Study and counselors from Imani. Besides spiritual support, they also give material support specifically to those who are on longer sentences and have no one to visit them.

Skill development is a key component of the rehabilitation process. For that reason the Government has put in place facilities for skills development, such as, industries, farming (horticulture and livestock), pottery, adult education. All these changes have improved rapport between the staff and the inmates. Some of the staff have undergone refresher courses to accommodate the above changes.

At policy level, the Government practice of releasing prisoners during key public holidays has been a key motivator in the rehabilitation process, which results in behaviour change as it makes it very clear to the prisoners that the release is on merit of good conduct. This practice has been an eye opener to the many challenges that need to be addressed to accommodate the widely accepted global practice. Some of these challenges include overcrowding, inefficient physical facilities.

The other great efforts towards reforming prisons is seen in the *Mount Kenya Declaration on Prison Policy in Kenya* in 'Towards Methods of Improving Prison Policy in Kenya'.

In a conference held by the Government of Kenya in conjunction with Penal Reform International between 14th and 16th October 2001, various recommendations were made for the development of prison policy in Kenya. As regards decongesting of prisons, short term measures, such as amnesty, periodical and medical reviews, should be used regularly as provided for by the law. The other recommendation in this regard was to speed up administration of justice through ways such as intensifying prison visits by judges, magistrates and other visiting justices.

The Conference also recommended various alternatives to custody among them Community Service Orders, probation, affordable fines as well as adequate time being given by the courts to the offenders to settle fines by instalments. Out of court settlement of disputes should also be encouraged with emphasis being given to traditional dispute resolution mechanisms.

The Conference also addressed and recommended the need for a re-examination of the existing legislation on prisons. In this regard, the law should be revised so as to decriminalize petty offences, for example, loitering with immoral purposes. Further, a National Sentencing Committee chaired by a Judge should be put in place to look into sentencing trends. Such a committee should oversee any disparities in the sentencing process. Additionally, the State should formulate a compensation scheme for people confined in prisons for long, and who are eventually acquitted for lack of evidence. This scheme will ensure that the police speed up their investigations. Police also need sensitization to the fact that they are not immune to prosecution for torture of crime suspects.

Despite the above efforts, the State has not been wholly successful in meeting its mandate. Although the welfare office in every prison is responsible for the welfare issues of the prisoners including ensuring that they are rehabilitated, it is not always the case

that the services offered are sufficient to meet the intended aim. According to a report by the Standing Committee on Human Rights (Kenya),⁷ during a visit to Kodiaga prison, the prisoners were dissatisfied with the provisions of welfare services though there is a welfare officer. The Committee visited a classroom which also serves as a ward where prisoners sleep. The “classroom” did not have adequate teaching or reading materials. The few materials in the library were not relevant to skill acquisition by prisoners in preparation for life at expiry of their jail terms. Even in prisons where some adults’ education takes place, there were no proper classrooms and the classes were conducted in an open space.

Due to the above shortcomings, it is important to suggest alternatives to custody and also suggest other ways of ensuring that the intended reform in the Kenyan prisons is met.

Introduction of other formal or informal procedures of criminal justice

There should be developed strategies which allow matters currently dealt with in a criminal justice setting to be resolved under other formal or informal procedures. A greater number of offenders who are at present detained in custody are likely to be dealt with in the community. This should lead to a reduction in prison populations. This, in turn, should give prison administrators the opportunity to assist prisoners to use their time in prison positively and to prepare for release. The conference identified the following nine strategies as central to the development of this new agenda.⁸ Some of these procedures are considered below.

Restorative justice

Formal criminal justice systems have marginalised victims of crime and have failed to oblige offenders to face up to the damage and harm which their actions have caused. The basic principle of restorative justice is a determination to restore the balance between the victim, the offender and the community. Restorative justice should be adopted in appropriate instances as a preferred form of criminal justice process because it

⁷ ‘Special Report on Inspection of Kenyan Prisons’ 6th Special Report, April 2002 p 23.

⁸ <<http://www.penalreform.org/>> accessed on 30th May 2006.

strengthens the social fabric and is likely to lead to a reduction in levels of imprisonment. Restorative justice should be promoted in each country as a legitimate part of the criminal justice process. There should be a programme to increase public awareness of the benefits of restorative justice.

Alternative dispute resolution

Alternative dispute resolution, as its name implies, provides options that may take disputes out of the penal justice arena and help the parties to resolve them with the assistance of a neutral person, such as a mediator. The option of alternative dispute resolution should be available to all potential users. Alternative dispute resolution should be recognised as a valuable and legitimate component of the rule of law.⁹

Informal justice

Informal justice contributes to improving access to justice in a manner which is reconciliatory, inexpensive, intelligible, participatory, language and value sensitive to local communities. Its emphasis on restorative and compensatory outcomes is a useful complement to the previous two strategies. Informal, customary and other community-based justice which accords with human rights laid down in international instruments should receive recognition and support from governments. Where appropriate, elements of informal and community-based justice should be incorporated into the formal systems with a view to making the whole system more user-friendly and accessible to the poor.¹⁰

Alternative ways of dealing with juveniles

The international instruments, particularly the Convention on the Rights of the Child, require that juveniles should be imprisoned only as a last resort. This means that there has to be an alternative strategy for dealing with juvenile offenders. There should be a co-ordinated and comprehensive response to juvenile offending. Governments should adopt a wide range of schemes for the prevention of juvenile crime. Restorative justice and other alternatives are particularly appropriate for juvenile offenders. Resources should be

⁹ *Ibid.*

¹⁰ *Ibid*

devoted to a comprehensive assessment at the point of arrest with a view to diversion from custody. When custody is inevitable, the basis of the whole regime should be rehabilitative.¹¹

Dealing with Violent Crime

Violence prevention is so crucial for society that special strategies need to be developed to deal with it. Violent crime requires both short term and long term solutions. Long term solutions should have priority. These should include preventive measures designed to change public attitudes, to encourage political dialogue and to remove economic and gender disparities. Recognising that in the short term certain numbers of violent offenders need to be imprisoned, we should look for a variety of alternative methods for dealing with them while in custody which are humane and in accordance with the international human rights instruments. Most violent offenders will eventually be released. Therefore, they should be encouraged to face up to the crimes they have committed and to acquire skills which will help their re-integration into society. When violent offenders are released and it is necessary for public safety that some record should be kept of their whereabouts, this information should not be used in such a way as to prohibit their social reintegration.

Reducing the prison population

International instruments on the treatment of offenders require minimum use of imprisonment. The strategies outlined above will contribute to the realisation of this end. In addition, further steps, which accord with human rights instruments, need to be taken to reduce inappropriate use of imprisonment. A planned reduction of the prison population is preferable to ad hoc amnesties.

There has to be a programme of public education to increase awareness of the limitations of imprisonment as a way of protecting society. Methods of evaluating the effectiveness of the police and the courts must be devised which do not rely on numbers of persons arrested and incarcerated. There should be a strict limit on the length of pretrial detention.

¹¹ *Ibid*

Non-custodial penalties should be genuine and effective alternatives to imprisonment.

The use of effective of pre-release methods should be promoted. Drug abusers should be diverted from the criminal justice system into the health care system.

The Proper Management of Prisons

Prisons must always be run according to the relevant international standards. In addition, there are a number of features which should be common to all prison systems. Prisons should be part of the civilian criminal justice system and not part of any military or police structure. The prison system should be regarded as a public service. It should be transparent and open to public scrutiny. Standards should be set for prisons covering all areas of activity, including matching numbers of prisoners to space available. Prison staff should be properly recruited, trained, remunerated and given adequate working conditions. They should be civil servants, not members of the military or the police.

Prisoners should be given the opportunity to work but this should not be punitive or demeaning. Prisoners should be properly prepared for release.¹²

The role of civil society and other players in penal reform

No strategy for penal reform can succeed without the involvement of civil society. Governments should recognise the need to involve civil society groups in all stages of criminal justice process. These civil society groups, such as NGOs, universities and religious groups, should co-operate with each other in the interests of penal reform. There is a need to educate public opinion on penal reform issues and contacts with the media should be developed. They should have access to the various sectors of the criminal justice system, including penal institutions. Local community organisations should be encouraged to scrutinise prison conditions and to contribute to prison activities.

Civil society should be encouraged to monitor and to report on the human rights of detainees and victims. NGOs and other civil society groups should be involved at local, national and international levels to promote penal reform. Examples are the provision of

¹² *Ibid.*

legal aid, legal education and training, community services, litigation, lobbying legislators, community policing and information about best practices.

Other key players and stakeholders, such as lawyers and doctors as well as religious leaders, should not stop agitating for better prison conditions as well as ensuring that they acquire access to the prisoners. This also covers the visiting justices who should ensure that they fulfil their statutory obligations of visiting prisons and ascertaining the conditions of the prisons. This will ensure a close monitoring of the prisons and will ensure that there is no breach of the rights of prisoners and also alleviate the harsh conditions now existent in the prisons.

The Judiciary have an important role to play. Firstly they should be aware of the problems caused by delays in trials and should avoid unnecessary postponements in their own courts, but they should also play a role in pressuring the lower courts to complete their trials within as short a time as possible, without interfering with the course of justice. Secondly, they have the important role of monitoring the conditions of remand prisoners, through regular inspections of the institutions in which they are held. The judiciary should also question the accused, or allow them the opportunity to express any grievance they have with their detention. In this way, abuses or even torture of detainees can be monitored and prevented. NGOs can also monitor the conditions of prisoners through regular visits, and through monitoring of court delays.¹³

The Prison Staff also have a role to play in the improvement of the conditions in the Kenyan prisons. A well-trained and committed staff is necessary to carry out the functions of a prison having regard to human rights principles. A prison department should nurture their staff development through training and career pathing. There should be a proper career structure for prison staff. Further, all prison personnel should be linked to one government ministry and there should be a clear line of command between central prison administration and the staff in prisons. Although this has been achieved to a certain extent, it is important that national legislation should make provision for this and

¹³ A Dissel 'Commentary on the Kampala Declaration' at <http://www.wits.ac.za/csvr/papers/papkamp.htm> accessed on 8th August 2006.

also for the development of rules and procedures which may be determined by the central authority. Hopefully, this would ensure that staff are then expected to implement policy emanating from one source which is consistent with the policy of the ministry. A clear line of authority is also an important means of accountability. Government, staff, and members of the public know to whom staff are responsible, and to whom they should be held accountable for their actions.

The State should provide sufficient material and financial resources for staff to carry out their work properly. The stressful conditions in prison make high demands on staff. Adequate remuneration and staff benefits should be seen as compensation and recognition for their difficult work. Staff should be provided with decent working conditions, at all times taking into account their own need for human dignity. They should also be provided with the opportunity to participate in recreational activities. At times the recognition of human rights and the treatment of prisoners is as much a matter of commitment and attitude of the staff as physical resources. However, to ensure compliance with minimum standards, staff should be supported through the provision of adequate facilities and resources. Adequate numbers of staff may be one of the primary requisites to fulfilling properly the aims of imprisonment. Where more staff cannot be employed, the careful deployment of staff in areas of need is important.

There should be an appropriate training programme for prison staff to which various NGOs such as the United Nations African Institute for Prevention of Crime and Treatment of Offenders (UNAFRI) should be invited to contribute. There should be a national or sub-regional institution to deliver this training programme. Training of staff equips members with the knowledge, ability and attitudes to enable them to fulfil their tasks. Therefore training curricula should be developed which take into account the aims of the prisons service, and which is mindful of a developing understanding of corrections.¹⁴

¹⁴ *Ibid.*



The penitentiary administration should be directly involved in the recruitment of prison staff. The prison administration is, or should be, responsible for overseeing the day-to-day functioning of prison staff. Through its practical involvement in prison administration, it has an awareness of the personal and professional requirements of staff working in prisons. It is essential that the penitentiary administration plays an important role in developing the criteria for selection of staff, as well in selecting applicants themselves.¹⁵

Reform in the context of the HIV/AIDS epidemic¹⁶

When governments fulfill their human rights obligations to prisoners they also promote positive public health outcomes. Measures undertaken to prevent the spread of HIV and other infections will benefit prisoners, staff, and the public. Prisoners should not, by reason of their imprisonment, be exposed to the risk of a deadly condition. Lowering the prevalence of infections in prisons means that the risk of exposure to these infections among staff will also be lowered. Most inmates are in prison only for short periods of time and are then released into their communities. In order to protect the general population, prevention measures need to be available in prisons, as they are outside.

In addition to longer-term advocacy (such as law reform and legal action), immediate action is needed to address the HIV/AIDS epidemic in prisons. Non-governmental organizations, international organizations (such as the WHO and UNAIDS), and other funders should consider prioritizing the following initiatives leading up to the International AIDS Conference in Toronto, Canada, in 2006 (AIDS 2006).

Building a movement based on human rights, prisoners' rights, and HIV/AIDS

There are numerous, long-standing organizations that advocate for human rights, and organizations that advocate for prisoners' rights. In the last 20 years, many organizations that advocate on behalf of people living with or vulnerable to HIV/AIDS have been created at national, regional, and international levels. At all these levels, human rights,

¹⁵ *Ibid.*

¹⁶ Glen Betteridge, 'Policy Initiatives for 2004-2006' at <<http://www.routledge-ny.com/ref/worldpolice/kenya.html>>.

prisoners' rights, and HIV/AIDS organizations should explore alliances and find ways to work together.

Review of the WHO Guidelines

The WHO Guidelines have not been adequately promoted and are in need of an update. The WHO, working in partnership with UNAIDS, The United Nations Office on Drugs and Crime, and NGOs, should revise the guidelines and develop and implement a promotion plan.

The WHO "3 by 5" initiative and other access-to-treatment initiatives

To ensure that prisoners with HIV/AIDS who need treatment benefit from access to treatment initiatives, the initiatives need to include a prison-specific component.

High-level policy dialogues on HIV/AIDS in prisons

High-level dialogues involving NGOs, domestic and international governments can play a role in advancing public policy. Consideration should be given to organizing a dialogue on HIV/AIDS in prisons. An effort should be made to work with the organizers of the various AIDS conferences both internationally and the regionally to ensure greater attention to HIV/AIDS in prisons.

Report cards and human rights audits

Report cards and human rights audits of prison systems can form the basis of cooperation among all stakeholders to bring about positive changes. Where violations and their root causes are identified, solutions can be formulated, and resources can be more easily obtained to implement these solutions.

Prison study tours and technical assistance

Experiences of successful responses to HIV/AIDS, including successful implementation of harm-reduction programs, need to be shared. As regards technical assistance although it depends on the good will of international funders as well as governments in high-income countries, they do have an obligation to facilitate the sharing of expertise and

experiences by funding and facilitating prison study tours and the provision of technical assistance.

NGOs declarations

Declarations can provide an NGO platform for the reforms and programs required to respect, protect, and fulfill the human rights of prisoners in the context of the HIV/AIDS epidemic. Consideration should be given to working with the drafters of existing declarations, such as the Dublin Declaration on Partnership to fight HIV/AIDS in Europe and Central Asia¹⁷, which recognizes, among other things that protecting the health of prisoners, and reducing the transmission of disease in prisons, also protects the health of prison staff and also the fact that HIV/AIDS in prisons is a major problem in many countries, and States must act collectively and co-operatively in the fight against the epidemic, to expand its scope to include the other regions of the world, and to promote the Declaration worldwide.

Reform in the context of overcrowding/ Alternatives to Custody

Prisons are holding about 3 times the capacity they are currently designed to hold. The Kenya Human Rights Commission view is that there are several approaches to decongesting prisons. These include, use of alternatives to imprisonment as a punishment and use of options to remanding offenders in prison custody. The approach is not only cheaper in terms of finances than constructing new prisons or expanding the existing ones but will also remedy the delay that attends the prosecution of cases.

Imprisonment has been a complete failure in the task of re-educating an antisocial person, a fact amply demonstrated by the rate of recidivism. Although the prison department could not avail a recent report on recidivism, most ex-inmates who were interviewed expressed the view that even they had been to prison at least twice for different or the same reasons as in the first instance.

¹⁷ <http://www.soros.org/initiatives/health/focus/ihrd/news/dublin_2004> accessed on 8th August 2006.

A judge, Maisels J. expressed enlightened views in respect of punishment when in *S v. V¹⁸*, he says:

“Punishment should fit the crime as well as be fair to the accused and to society, and be blended with a measure of mercy ... The element of mercy a hallmark of civilized and enlightened administration, should not be overlooked, lest the court be in danger of reducing itself to the plane of the criminal ... true mercy has nothing in common with soft weakness, or maudlin sympathy for the criminal, or permissive tolerance. It is an element of justice itself.”

Further, in *S v. Shange*, the court (per Steyn J., Watermeyer J. concurring) said:

“I am of the view that it is the duty of the court to seek, in so far as the nature of the offence, the public interest and the circumstances which are properly to be taken into account when assessing punishment, to impose short-term imprisonment (without the option of a fine) when in fact no other alternative exists ...”¹⁹

It is recognized that the ultimate way to reduce congestion in prisons is to deal with the problem at its root. It should therefore be endeavored to reduce imprisonment and ultimately the prison population. The below suggestions, if properly carried out, will ensure the achievement of that goal. In the first place, it is important to inform public opinion. Increasing use of imprisonment is often blamed on public demand for punishment. Yet the public are often misinformed about how the system operates and will support effective non-custodial measures.

Equally important is the need to improve access to, and co-ordination within, the criminal justice system. Increasing public access to the police, courts and prisons engenders public confidence and transparency. Co-ordinating and streamlining the work of the criminal justice agencies assists both efficiency and compliance with international human rights standards.

The government should invest in crime prevention and crime reduction. Problem solving partnerships between the police, other public agencies, businesses and communities can

¹⁸ [1972 (3)] S.A, 611 in R Hood ed. ‘*Crime, Criminology and Public Policy*’ (Heinemann Educational Books Ltd 1974) at 614.

¹⁹ R Hood ed. ‘*Crime, Criminology and Public Policy*’ (Heinemann Educational Books Ltd 1974) at 614.

produce effective plans to reduce the risk factors which lie behind much crime - drug misuse, family difficulties, school failure, unemployment. Also, many minor cases can be effectively dealt with outside the formal criminal justice system as explained above. There is need to reduce pre-trial detention. Alternatives such as bail and regular reviews of cases can reduce pre-trial detention.

It is important that the government should develop special arrangements for youth offenders that keep them out of prison. Children in conflict with the law (under 18) should be diverted from the criminal justice process. A term of imprisonment should be strictly a measure of last resort and for the shortest appropriate period of time. To treat rather than to punish drug addicts and mentally disordered offender is a viable measure. Courts should be able to order treatment for those whose crimes are often committed to feed their addiction. Prison is not a suitable institution for mentally ill people.

The government should endeavour to ensure that the system is fair to all. Imprisonment impacts disproportionately on the poor, the dispossessed and minorities who face discrimination outside. Monitoring should take place at every stage of the criminal justice system to ensure that discrimination does not take place and that the efforts to reduce imprisonment suggested in this plan are made in respect of all members of the community.

In addition to the strategies outlined above, it is also necessary to consider more traditional alternatives to custody in order to deal with the inappropriate use of imprisonment which has led to widespread prison overcrowding. Legislators, the executive, the judiciary and the public need to understand what alternatives to custody involve. Pre-trial detention and short term prison sentences should wherever possible be replaced by non-custodial alternatives. The rights of victims should always be taken into account when alternatives to custody are being considered. Training programmes should be offered to everyone who is involved in the process of imposing or implementing alternatives to custody, including those working in the criminal justice system, civic leaders and non-governmental organisations. Civil society needs to be made aware of the

role it can play in developing and implementing alternatives to custody. Civil debtors and fine defaulters should not be imprisoned but should be dealt with through non-custodial options.

Factors contributing to a need for alternatives include the need to decongest prisons; reduce the expense incurred in creating more and more prisons as a tool for crime control; not being able to offer or measure up to the standards required and the irrefutable evidence of high rates of recidivism.²⁰

It is logical that many of the more developed countries are seeking alternatives to imprisonment, and such programs have great implications for a developing country such as Kenya in which penal facilities are greatly overburdened and in which alternatives such as probation and institutional treatment in the community (service orders) would be much less costly, and might in the event prevent much recidivism.²¹

Some of these alternatives include; community based types of facilities, such as, probation hostels or living centers for probationers to enable offenders to work or attend school during the day rather than being confined in prison. Work release programs of various kinds should be introduced. These enable the prisoner to interact and work with non-criminals with the positive effect of changing his attitudes and his criminal self-conception and help to remove him from his former criminal associates. These programs provide for payment of regular wages, with deductions for food, clothing, travel, contributions to supporting dependants and payment of obligations.

There should also be programs that provide release from institutions to “halfway houses”, some run by government and others by private agencies, in which a period of residential treatment, supervision and assistance is provided while the offender works or attends schools outside. They can also serve as a mechanism through which ex-prisoners can reintegrate into the society. Currently, there are two such programs; one in Mombasa and

²⁰ *Supra* note 1 at 243.

²¹ *Ibid.*

another in Nairobi. Their effectiveness is seen in a statement by one of the ex-prisoners who is currently at the Philemon Ministries (one such halfway house). He states:

“The day I was released on a Presidential Amnesty, marked the beginning of my life after many years of ‘darkness’ and yet again an end in itself. I was happy to escape the harsh prisons but then I kept asking myself “What next?” I felt like the world was unfair, I did not know how to reintegrate into the society which held a misconceived attitude towards ex-prisoners. This halfway house has been everything to me. I can work and provide for my family as well as undertake whatever course that interests me. There should be many such facilities to cater for the released prisoners and ensure that recidivism is discouraged.”

It is important to recall the general non-violent profile of most prisoners before they enter into prison life and so the above alternatives should be seen as providing a way in which the ex-prisoner can be encouraged to reform.²²

Other General Recommendations

The government should ensure that domestic law and practice conform fully with international human rights treaties ratified by Kenya as well as international human rights standards, in particular, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the UN Standard Minimum Rules for the treatment of Prisoners.²³

Additionally, all the norms of the United Nations and African Charter on Human and People's Rights on the treatment of prisoners should be incorporated into national legislation in order to protect the human rights of prisoners. By incorporating the norms into national legislation, the government would be making a clear commitment to implementing human rights in respect of prisoners. Having the norms more easily accessible not only to lawyers, but to staff members of the prison departments, would ensure that they are applied at the local level. The national legislation should also be available for prisoners to scrutinise in order to ascertain their rights.

²² R White & S Perrone ‘*Crime and Social Control: An Introduction*’ (Oxford University Press 1997) 133.

²³ *Supra* note 2.

Any prison officers implicated in acts of torture or ill-treatment against prisoners should immediately be suspended from duty pending a full inquiry. Staff members found responsible for torture or ill-treatment should be brought to justice.

All detention centres and prisons should be opened to allow access for civil society. In particular, impediments against access by lawyers, doctors and family members should be removed. National and international human rights and medical groups should be allowed to visit and inspect prisons. Inspectors should have unrestricted access to all relevant records and be authorized to receive and deal with detainees' complaints. The inspection body should prepare detailed reports of each visit, particularly about overcrowding and the health of the detainees, and should ensure that appropriate action is taken to remedy all shortcomings relating to the treatment of detainees and prisoners. The inspection body should make recommendations for improving conditions of detention in accordance with the UN Standard Minimum Rules for the Treatment of Prisoners. These should be acted upon within a reasonable period.²⁴

Prison authorities are often overly passive in discharging their primary duty (keeping people sent to them by the courts in secure custody). Amendments to the law are required to provide prison officers with the means of drawing the attention of the courts to the issue of overcrowding. This can be on the basis of its success in South Africa and Malawi as set out below.

An amendment to the South African Criminal Procedure Act (s. 63A) allows prison heads to apply to court to authorise the release of people who have been granted small amounts of bail, but who have been unable to pay.

New provisions in the new Malawi Prisons Bill allow heads of prisons to approach the Chief Magistrate in their area when his/her prison is 'so overcrowded that the safety, human dignity or physical care of prisoners is being affected materially' to consider bail for any remand prisoner (s. 57); or when an unsentenced prisoner is seriously ill (s. 58);

²⁴ *Ibid.*

or when his/her trial has not begun within a reasonable period (s. 59); or when a prohibited immigrant has been detained for longer than 120 days to bring the matter to the attention of the Chief Immigration Officer (s. 60).

As already noted above, custody time limits are useful in focusing the minds of the prosecuting and investigating authorities on the requirements of 'due process'. Complex cases (conspiracies and serious fraud) will take longer to prepare than summary matters. Time limits place the burden on the police and prosecuting agencies to speed up the criminal process and limit adjournments.

In Uganda, custody time limits have been introduced with some effect. However, they depend on enforcement by the courts and proper resources being made available to the investigating bodies if they are not to fall into misuse. For instance, when the court discharges the accused, the police should not as a matter of course promptly re-arrest the accused so that the time period starts again.

Conclusion

The recommendations for reform set out above are measures, which are not too hard to be undertaken by any State since most of them do not involve a great strain on the economic resources of a State. In fact, they will serve to reduce the expense incurred by the Government in the construction of new prisons.

Although most of them require that additional staff be recruited, it is nonetheless, cheaper than constructing new facilities to host offenders and which can not, in themselves, meet the international standards.

It is, therefore, recommended that the above measures be implemented so as to ensure the general welfare of prisoners in terms of reducing overcrowding, HIV/AIDS pandemic and other 'ills' associated with imprisonment mentioned in Chapter III. This will ensure that the overall aim of the criminal justice system is achieved, namely, the rehabilitation of offenders and reforming them into the society.

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