

RECIDIVISM; THE FUNDAMENTALS THAT OUR
PENAL INSTITUTIONS DISREGARDS.

A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS
FOR THE L.L.B. DEGREE, UNIVERSITY OF NAIROBI.

BY,

MURAYA JULIUS NJIRE.

NAIROBI.

APRIL, 1990

UNIVERSITY OF NAIROBI
LIBRARY

C O N T E N T S

I N T R O D U C T I O N

PART 1

THEORIES OF CRIME CAUSATION

1. a) THE NEED FOR THEORY IN PRACTICE
- b) DEMOLOGY
- c) POSITIVE SCHOOL OF THOUGHT
 - i) Lombroso and the physical type Theory
 - ii) Raffaele Garofalo
 - iii) Enrico Ferri
- d) MENTAL TESTERS AND FEEBLE MINDEDNESS THEORIES
- e) GENERAL HEREDITY AND DEFECTIVENESS HYPOTHESIS
- f) PSYCHOPATHY AND ORIENTATION FOR THEORY
 - i) Early psychology
 - ii) Freudian psychol Analytical Theory.
- g) ECONOMIC CONDITIONS AND CRIMINALITY
- h) CRIME AS A NORMAL LEARNED BEHAVIOUR
 - i) Surther Land's Differential Association Theory.

PART 11

RECIDIVISM AND THE KENYAN PENAL INSTITUTIONS:

1. a) What is Recidivism?
- b) Why on Revidivism?

- ii) THE PRISON - AN INSTITUTION OF REFORM ?
 - a) POST -INDEPENENCE PRISONS
 - b) PRISON CONDITIONS AND PRISON LIFE TODAY
 - c) THE INMATES AND THE INMATE SUB-CULTURE
 - d) THE PROBATION SERVICE

PART III

RECOMMENDATIONS

- i) THE COURTS AND THE SENTENCING POLICY
- ii) BARN ALL PRISONS?
 - a) Prison structures And Design
 - b) Prison Labour
 - c) Treatment of the Offender
 - d) Prison staff
- iii) AVOIDANCE OR IMPRISONMENT
- iv) ALTERNATIVE MEASURES
 - a) Probation service
 - b) Suspended sentence
 - c) Community service Orders
 - d) Fine And Compensation
- v) INTO THE FUTURE

TABLE OF CASES

1. Nilson V.R. 1970 E. A. 590
2. O' Keefe V.R. 1 AKER, 426
3. Sajile Sale muly V.R. 1964, E.A. 343

TABLE STATUTES

1. Criminal Code cap 60
2. The (English) Criminal Justice Act, 1948
3. Kenya Prisons Act, cap 690.
4. Probation of offenders Act, cap 64

DEDICATION

To my parents:

for their unwaivering efforts
to see me through.

To Rosie;

for her unfailing encouragements.

To J.R.;

all ~~they~~ labours are dedicated to thee.

I N T R O D U C T I O N

The problem of evaluating the effectiveness of^a penal measure is inevitably a complex one. Even a straight forward penal sanction such as a fine, an absolute or conditional discharge, it is submitted, is still difficult to say with clarity how effective the measure has been. The task obviously becomes more difficult when one is concerned with a penal measure such as probation or institutional training on an individualized basis; for one is no longer concerned with what is done in a fairly standardized or uniform way, but rather with a whole series of social interactions between treatment personnel and convicted offenders - but in so far as the primary aim of a penal sanction is preventing individual recidivism; it is the believe of the writer that the first step and an important one too, in evaluating its effectness should be the examination of reconviction rates of those who have been subjected to it.

The writer considers reconviction as sign of gross failure of the penal sanction administered upon the person - high reconviction rates therefore means failure of the penal institution for it is them who dictate upon the sanction and carry out the actual implementation of the same. The Institution undoubtedly fails to achieve the purpose for which it exists. However, it is clearly recognized that one subsequent conviction for a criminal offence does not necessarily mean that the whole period of institutional training should be written off as a complete failure: it is the crude reconviction rates especially on closely related offences such as reconviction of violent offences and property offences, that spell doom on the measures taken.

The writer's aim is to show that in Kenya today, in proportion to the spread of education, the increase of wealth and extension of social advantage, the retention of a compact mass of habitual criminals in our midst is a growing stain in our civilization. There are more criminals than our prisons can hold, crime is growing at an alarming rate every year and the method used to deal with offenders appears to have a

depressingly slight effect. In any thorough enquiry on this growing problem one would surely probe the penal institutions in our country particularly the prisons treatment giving the closest regard to its physical and moral effect on prisoners generally. But the number of criminals in and out of prison must form one of the standards by which the system must be tested and judged. Indeed, recidivism definitely becomes one of the most important of all prison questions, though it is admittedly one of the most difficult and complicated.

The underlying argument of this paper is that the failure of our penal institution cries for penal reform and the adoption of more humanitarian and effective methods of treatment of criminals if a reduction of crime will be realized in our society. The paper raises a number of important practical criminological questions viz:

- (i) Is what are doing in our prison theoretically sound and correct with a high degree of failure due to inadequate and unskilled implementation of the theory followed, or;
- (ii) Is what we are doing basically and theoretically unsound and essentially useless and incapable of bringing about the much desired objective of rehabilitation and lastly;
- (iii) The persistent question and the practical problem of what should actually be done with the criminal.

It is to be submitted emphatically that failure of our penal Institution is to be attributed to the very foundation of the existing penal system which is not only inadequate but is short of requirements in that it attempts to solve the criminal problem without destroying the causes. The system as it stands today has been focused on the criminal per se leaving out the root cause of the criminal elements. The paper therefore recommends that what is needed in Kenya today is a revolutionary and radical appraisal in the fundamental assumptions of our penal system, a new rational and coherent approach to Kenya's criminal law - this is necessary to give our penal system a comprehensive philosophical base.

The theories of crime causation are provided as a necessary foundation to the aim of the paper. The theories form the basis upon which the criminal ought to be treated as they tell us the probable causes of criminal behaviour. An analysis will also be made of the professed goals the Kenya penal system, it is in the light of these goals that the present system will be criticized.

The conclusion part headed "Recommendations" has tended to be relatively long since it serves as the crest of the objectives of the theories namely: giving a pragmatic note to the rather theoretical body by presenting suggestions as to possibly suitable penal reforms (in the writer's view) which could give better results on offenders as well as improving the image of our present penal institutions. A heavy leaning on current developments in human behavioural sciences mainly psychiatry, sociology, psychology and closely related and dependent disciplines of penology and criminology will be portrayed, much of which has been implemented or put to trial in the western world. The writer has intentionally avoided to give hard and first rules as to the procedures of implementation of those suggestions mainly because a great deal of research has not been done in this field particularly in this locality neither could it have been done by any one single person in view of costs, time, space and lack of readily available data. The same was not attempted neither could it have been possible in such a paper. Just a little more than simple armchair speculation on a reductivist penal policy and measure will be presented.

Secondly it is the writers genuine feeling that in certain areas of the recommendation should be left to discussion and as mind - provoking hypothesis in a possible future research. To enable this, the writer has avoided sharp conclusion where his own and other available research could ^{not} lead him to any. Again a transplant of the western practices and conclusions of their research could only be successful where the recipients condition and environment is appreciated and necessary adjustments made.

T H E O R I E S O F C R I M E C A U S A T I O N .

The pages that follow will portray the writer's endeavours to briefly outline some popular theories of crime causation. The prevalent questions ^{as} to why people commit crimes is as old as history and so are the explanation; but for a paper whose ultimate goals is to recommend for the restructuring of our present penal. Institutions with the aim of waging an effective war against criminal tendencies, the question why one needs a theoretical background in practice preceeds reasons wherefore the immediate sub - topic is a necessity.

RELEVANCE OF THEORY IN PRACTICE.

There is an obvious logical inter-dependence between what is done about crime (penal practice) and what is assumed to be the reason or explanation for criminality (criminological theory). But penal practice cannot await on theory. Organised society must do something about crime; it must deal with the criminal. Theory therefore often may be little more than a subsequence of what at the time was deemed a practical necessity and not a rational deliberation and knowledge of cause and effect. This can be clearly understood in view of the fact that the desire to punish for a wrong against the person is instinctous and spontaneous: if you hit me, my immediate reaction might be to hit back at you.

Without prejudice to the foregoing paragraph, emphasis of present day penology has shifted from punishment to treatment; by

punishment meaning intentional infliction of pain and suffering upon the offender by some official authority for the sake of some good assumed to be produced by the pain. On the other hand the word treatment has come through analogy with medicine. A sick patient is to be treated that he may recover from his illness and be restored to normal functioning. A patient is not to be punished for having become sick, nor taught a lesson that he will not again fall sick. The treatment procedure varies with each case depending on the understanding and diagnosis of what is wrong, which is in turn based on accumulated knowledge about disease causation and experience with appropriate action to be taken for different kinds of illness.¹ By the same logic, treatment in penology implies a knowledge of crime causation together with the procedures by which the criminal may be studied, understood and subjected to the appropriate action to be taken for control and change of behaviour to restore him in a normal functioning society i.e. rehabilitate. The term naturally follows from the general point of view that understands crime as the product of antecedent conditions, circumstances, and events thus to be dealt with in terms of the conditions that produce it.

Any legitimate reform properly so called must therefore be based on our understanding of crime causation factors. A firm grip and proper appreciation of the causation theories, it is submitted, is not only a necessity, but a fundamental knowledge upon whose background, the panel or body of persons authorised to deal with the offender should have. It is on this understanding that the select causation theories find their proper place in this paper.

The explanation of crime causation are indisolubly linked to those commonly accepted in the past, therefore a flash through historical backgrounds and continuities therefore become necessary.

Causation theories can be broadly categorised into two namely:

- a) Those which seek explanation from within the person; comprising of Demology and Biologicaldeterministic theories.
- b) Those which seek explanation from without the person: comprising of social - cultural theories.

A) DEMOLOGY

Before the systematic and intellectual study of human behaviour, presently known as the positive or scientific study, the dominating explanation of criminality turn on the proposition of some spirits or demonic infulence upon the offender.

The Principal back of all demological explanation is some "Other world" power or spirit. The spirit transcends this world, it is not bound by material and physical restrictions and operates in ways not subject to control or understanding of the finite human mind. Since the spirit itself is unexplainable and not to be understood, it is perfect 'explanation' sought for all difficult to understand phenomena. The spirit is capable of infusing into objects or beings and to control its behaviour. Its all powerful and can do anything it wants. Crime or criminal behaviour in this view is simply evidence that the individual had become "possessed and driven by the "Devil".

Demonism is a lost explanation amongst positivists in fact the theory is regarded as anti - scientific but Hebrews and Christians present organized thinking about the concept in their belief of an Omniscient, Omnipresent and all powerful God. Primitive and preliterate animists in many parts of the world to date believe and have made magic the practical procedure to do something to effect the future conduct of things or persons. The middle age Europe saw the period of witchhunting as confusion raved with the fusion of intellectual conceptions of demonism and political and social organization of feudalism. Penal practice clearly reflected contemporary beliefs and attitudes of these concepts as evidenced by trial by battle; trial by ordeal; compurgation; testimony under oath; miraculous signs of innocence etc.

THE POSITIVE SCHOOL OF THOUGHT AND THE PHYSICAL TYPE THEORY

The positive school of thought marks the beginning of systematic and scientific study of crime causation with a marked emphasis on the nature of the criminal person. Rather than the nature of the criminal act per se. The school is closely associated and often spoken of as the "Lombrosianschool" in recognition of the earliest and most earnest and industrious advocate, Cesare Lombroso (1836 - 1909) and his pupils. The positive school marked the end of the view that man is a puppet of the supernatural and the naturalistic approach that a man is a self-determining being acting on the basis of reason and intelligence and therefore responsible for his behaviour. The school saw the birth of present day criminology by extending to

the same the ideas of human behaviours then beginning to dominate other behavioural sciences like biology, medicine, psychiatry, psychology and sociology. For the first time the idea of diminished responsibility was seen viable and the act or Actus Reus was accepted as supplementary to the state of mind or Mens Rea. Thus the subsequent differential treatment of the insane, minors, mentally disabled was a legitimate reform of contemporary penal practice.

Lombroso's theory of causation, it will be seen, was in consonance with the contemporary intellectual atmosphere whose wind of change had been spear headed by works of Charles Darwin (1871) when he wrote "Descent of Man" designed to show that man was the same creature with animals except that he was more highly evolved or developed, had more skill and ability but nevertheless indissolubly linked to his animal past. Just like the Homo Sapiens never developed to the level of man likewise some people it was thought, were less highly evolved and thus shows characteristic and dispositions like their ape - like ancestors.

Lombroso affirmed the atavistic origin of the 'born criminal' and expressed a close relationship between crime, epilepsy, insanity and degeneracy as a whole in his book "The criminal Man" in 1876. This was the man more primitive and savage than his civilized counterpart. During his early times of study Lombroso made illustrations of the dispositions characteristic of a criminal essentially pointing out a less evolved man, a degenerate atavistic type man, viz:

- (a) Deviation in head size shape from type common race and region from which the criminal came.

- (b) Assymetry of the face.
- (c) Excessive dimensions of the jaw and chick bones.
- (d) Eye defects and peculiarities.
- (e) Ears of unusual size, occasionally very small, or outstandingly out from the head as do those of a Chimbanzee.
- (f) Abnormal dentition.
- (g) Nose twisted, upturned, flattened in thieves⁵ aquiline or beaklike in murderers etc.

It should be noted that this was Lombroso's original doctrine of evolutionary atavism which today sounds naive and much disapproved by science. This idea used by Lombroso that structure determines the function had been advanced years before Lombroso.⁶ The Later and more mature thought was that criminality was the result of many factors other than the physical or anthropological which ranged from physical climate,⁷ price of grain, sex and marriage, customs, criminal law etc. Unfortunately his name came to the limelight with first scientifically infamous physical type theory.

Though present day criminology has developed its own system of ideas which little of Lombroso per se remains, his name is the one that will be long recognised. Per Dr. Goring (1912), the English prison doctor whose careful work finally destroyed the theory of physical type criminals finally admitted that nothing can diminish Lombroso's genius:

" The whole fabric of Lombrosian theory and doctrine judged by science, is fundamentally unsound but all thinking

people today, legislators, judges as well as the general public, the morality of the age as well as the will of the voice of science, attest the truth which Lombroso was first to enunciate ... the principle that it is the criminal and not the crime that we should study and consider". 8

ENRIC FERRI (1856 - 1928)

Ferri is the most famous of Lombroso's pupils. He was a statistician applying statistics to study crime. The main cast of Ferri's thinking about human behaviour appeared in his publication "The theory of unputability and Denial of free will".⁹

Though interested in Lombroso's ideas of basic Biological causation, he, nevertheless, consistently placed more emphasis on interrelatedness of social, economic and political factors. In his "La sociologia criminale" (the criminal sociology), he argued that crime was caused by a great many factors, mainly sociological. He classified them as (i) physical, inclusive of race, climate, geographical location, seasonal, effect etc (ii) social, inclusive of population density, customs, religion etc.

He recommended preventive measures inter alia free trade, abolition of monopolies, better street light, birth control, freedom of marriage etc.

His measures reflected his sociolistic orientation and his positivistic theories with a distinct departure from the classical doctorines. In his socialist liberality he rejected the concept of punishment or retribution for moral culpability. His thought was further exemplified by the life and work of Garofallo.

RAFFAELE GAROFALO (1852 - 1934)

Garofalo was also an Italian born positivist who significantly contributed to present - day thinking in criminology. He was a professor of criminal law in the university of Naples and acted as a high ranking officer in the Italian government, for example he was appointed Minister of justice in 1903, in which position he helped in drafting a revised code and reformation of criminal procedure.

Garofalo portrayed his wide spectrum of interest in criminal law in his major work "Criminology".¹¹ Like his contemporaries, he was a firm positivist supporting the position that crime can only be understood as it is studied by scientific methods. To be more scientific he struggled to formulate a sociologic definition of crime as one that no civilized society can refuse to recognise as criminal and repress by means, of punishment for such acts violate the two basic altruistic sentiments common to all people in all ages, namely, the sentiments of probity and pity. Such acts would constitute "natural crime".

Garofalo's thought of crime causation had a clear psychological orientation unlike Lombroso's physical - type anthropology. He submitted that "It should be granted that of these sciences criminal psychology is the most important chapter".¹² His thought was dominated by the contemporary belief that criminal behaviour was out of psychological degeneracy a moral anomaly to the extent that they had no sentiments of pity or probity. He therefore advocated for harsh

deterent punitive measure of eradication of criminals unable to adapt themselves to civilized life. To him this was the only hope for the future because the punishment was sufficiently intimidating and offered what he termed as "social selection" by slow eradication of criminals and their otherwise inevitable prolific progeny.

Despite Garofalo's ingenious and his consistency in the application of his point of view, he has been widely disapproved by subsequent research and scholarship. It can in no way be said to be universal. His emphasis on deterent measures and eradication of criminals and contraly to the spirit of present day penology as will be discussed later.

MENTAL TESTERS AND FEEBLE MINDEDNESS

The proponents of this theory argue that there is an element that characterise all criminals namely low intelligence; that criminals are characterised by a stigmat^a of constitutional inferiority a low intelligence. Researchers in this field include in their literature the use of words insane, feeble minded, morons, idiots, imbeciles etc which words and phrases describe both the mentally defficient and the mentally derranged. The result of these polular studies is that criminals are what they are because they do not know enough to understand the hazardous nature of criminality or the satisfying rewards of law abiding.

This theory calls for accurate comparissons and therefore a critical investigations of the relation between crime and mental ability. This inturn calls for acceptance and exact

measurement of individual's mental ability. In this sphere of psychological laboratory such figures as H. Ebbinghaus (1850 - 1909), a German psychologist who devised a test of ability to memorize in such a manner that individuals ability difference could be expressed numerically, are well recognised. Works of the re-known Alfred Binet (1857 - 1911) with Theodre Simon, distiguated French psychologist are known for coming up with a scale of tests popularly known as "The Binet-Simon scale of Intelligence". Later came up the concept of mental age and its corollary "Intelligence Quotient" or I.Q widely used today.

The major problem in this field is acceptability of the devices or method used, an American scholar H. H. Goddard gives the results of various tests of inmates in his book "Feeble Mindedness: Its Causes and Effects" by use of I.Q. method seemed to proof the theory right by indicating that 70% of the prisoners were classified as feeble-minded. But with the introduction of the concept that those with a mental age of 12 years and below are feeble minded, Goddard's Report on tests for those fit for world war II military service in his Article "Who is a Moron",¹⁴ in scientific monthly, he said

"The war led to the measure of Intelligence of the drafted army with the result that such an enormous proportion was found to have an Intelligence of 12 years and less to call them feeble-minded was an absurdity of the highest degree..... We only thought that 12 was a limit, but we now know that most of the 12 even of 10 and 9, are now defective".

When such gross contradictions and expression of doubts by the exponents of the theory themselves are pronounced, then the inevitable conclusion is that the methodology of mental tests has

been a failure. Moreover, when comparisons are accurately made, they show only a slight difference between inmates and surrounding general population and it has therefore gone behind the curtain as a basis of explaining criminality. It can only serve as one of the many measured characteristics that need attention in dealing with an individual criminal in the cause of therapy.

HEREDITY THEORY

The underlying notion in this theory is that of the continuity of the germ plasma whose result is the commonsense observation that children tend to resemble their parents appearance, mannerism and disposition. Crime and criminal behaviour naturally has this sought of an explanation. It has been proved that after fertilization the Ovum is preserved unchanged during development to form the rudiments of the productive cells of the new organism, with no external environmental influences. Consequently the germinal faults and defects will tend to be transmitted to the offspring in the same way as the desirable characteristics. It logically follows that the weak and degenerate parents will pass their afflictions to their children. Briefly this is the theory of "defective hypothesis".

Charles Goring, a famous exponent of this theory in his book "The English Convict" extensively used statistical methods to assert the familial inheritance in criminality whereof he used imprisonment as a measure of criminal tendency. He showed that 60% of the sons of imprisoned fathers end up in prison which

Johannes Lange, a leading scholar in this theory, in his book "Verbrechen als Schicksal", 1929 (Crime and destiny) compared 13 monozygotic twin pairs and found out that where one holds a record of imprisonment the other had been imprisoned in 77% and only 12% if Dizygotic cases. Lange's conclusion ran without any reservations as follows:

"As far as crime is concerned, monozygotic twins react on the whole in a definitely similar manner, Dizygotic twins behave quite differently. In accordance with the significance of the twin method we must conclude that heredity plays a quite
18
preponderant part among the causes of crime.

On the other hand A. M. Legras, writing in 1933 though in general favouring heredity as the decisive factor, admitted that his 4 concordant monozygotic twins may have influenced one another, because they had not been reared apart. Moreover one recent British research should serve as a caution in that a single pair of identical twins were found looking alike but having very different personality types; while one was aggressive and unstable the other was on an entirely different disposition.

There is the persistent problem of environmental influence whose measure has not been accurately qualified. Moreover, the fatal weakness of this approach lies in the failure to demonstrate consistent differences of a biological nature between the criminal and non-criminal and thus the theory remains relatively inadequate and unsatisfactory.

PSYCOANALYTIC THEORY

This is the psychiatrists version of the "why" of crime and the "what to do with the criminal".

In this field of psychiatry much respect has been accorded to one Sigmund Freud without reference of whose works this causation theory would be sketchy and unsatisfactory.

SIGMUND FREUD AND THE DEVELOPMENT OF PSYCHOANALYSIS

Freud was a medical doctor in Austria and later he became a lecturer of neuropathology i.e. the science of neurosis in vienna University in 1885.

Conventional psychiatry was devoted to the explaining of the difference between deviant behaviour and insanity, questions had already been addressed to disturbed persons due to organic disorder e.g. brain injury causing loss of memory (blank mind), disturbed vision etc but little was known of functional disorders e.g. where there is a strange behaviour with no known organic involvement; though distinguished from the later. This is the pre-Freudian psychiatry.

Freud's research brought about evidence of actual existence of the psyche (the mind functioning as the centre of thought, feeling, and behaviour and consciously or unconsciously adjusting and relating the body to its social and physical environment), into independence prominence. He further postulated that the central core of ideas involves the notion of basic mental conflict due to certain incompatible elements of the personality with the unacceptable portions of being repressed to the unconscious and kept there by the Censor. But the repressed

ideas, impulses, or reflexes continue to exist and considerable part of the ordinary mental activity consist of roundabout ways in which the repressed elements of the personality seek to evade or outwit the censor and achieve some sort of indirect expression e.g. in dreams and other substitute responses and behaviour. ²¹

The foregoing Freud's argument seeks to explain all human behaviour without special reference to crime. It forms the backlog of psychoanalysis whose core idea is that all behaviour is purposive: Its meaningful and significant to the personality no matter how absurd and contradictory it may seem. If the behaviour is not direct expression of the purposes of the conscious then it must understood as the substitute or symbolic expression of those repressed truths and thus dreams, slips of the tongue word association tests etc become important indicators of the areas of the problem involved. ²²

Criminal behaviour is understood simply and directly as one such substitute response, some form of symbolic release of the repressed complexes. Psychoanalytic criminology then follows the sketch of the above theory of psychoanalysis viz; mental conflict Repression, crime is a substitute behaviour myriads of elaborate case studies all trying to make sense of elaborate sequence of events fill our library shelves all reflected in characteristic phrases in common usage such as Oedipus - Electra complexes, prepotency of death wishes, frustration - aggression and release of build - up hostility, birth trauma fears and anxieties, penis shy etc. Criminal behaviour inclusive of the particular criminal act in question as explained as a necessary

part of basic personality orientation, and the specific criminal act take on meaning and make sense in terms of the content of the particular individual's entire life history. ²³

The major weakness of this theory is that it can hardly be put to test of its accuracy or the validity of the analysts interpretations at least within the framework of accepted scientific methodology. This line of the fact that only the psychoanalyst and his patient knows the 'facts' of the case and only the analyst understands those 'facts'. This does not give room for an impersonal verification or to generalization beyond the limits of a particular case.

B ECONOMIC THEORY AND CRIMINALITY

Little can be doubted of the truth of the statement that economic life is a fundamental aspect of human life, and its an obvious important influence upon which all social and cultural adjustments are made. The production, distribution, consumption, and exchange of goods and services every where occupy major parts of human activities. This is a simple but far reaching fact which in the extreme is taken to be the basic or determining factor; that it dorminates and controls other aspects of living. This is what is referred to as Economic determinism.

Since theories of economic influence or determinism assume that social arrangements generally are profoundly affected by existing system of economics, it follows that the problems and maladjustments of society, such as crime, are likewise a product of and affected by existing economy arrangements. The most

famous proponent of economic determination is Karl Marx (1818 - 1883) as evidenced by his major works like "The critique of Political Economy (1859) and "Das Capital" volumes 1 3 (1867 - 1894). The avenue to such direction of thought and interpretations was opened by the keeping of more accurate and dependable official records by systematised National Registries of for example births and deaths population census and various other items. These items in the official records began to be counted and compared in numerical terms. Quantative studies of social and economic conditions and their probable consequence was the resultant. Figures like Adam Smith (1723 - 90) and Thomas R. Malthus made the first useful utilization of such records.

May be the first systematic review of the relations between economic conditionss and criminality, was explored by Thursten Sellin (soon after the London Committee for Investigation of the causes of Alarming Increase of Juvenile Ocliquency. In the Metropolis (1816), George Von Mayr, correlated fluctuations in price of rye with fluctuation in certain type of offences in Bovania for the period of 1836 - 61. He found high positive correlation between offences against the person and price of rye. Prices of stapple foodstuffs like what in Germany rye in the scandinavian, Rumania and the Balkans, Corn have been used as indices of crime variations and later the prices of low materials, exports and imports were used as relevant indexes raising and lowering crime curves. In Kenya the prices of coffee, tea and maize could be the probable indices to be

used as basis of watching the variations in the crime curves. Unfortunately no such research has been done in this part of the world.

But these conclusions were arrived at on making simple relationships that seemed so clear during those early times through less carefully handled studies.²⁵ Familiar contentions usually made and often buttressed by references to the Von Mayr's conclusion are known to be contradicted, most strongly by Paul Wiers²⁶ who after a long time of careful comparison, he reported that correlations which are generally good and positive between indexes of good economic conditions and high delinquency ~~instead~~ of delinquency being high in bad times and low in good times as in Mayr's conclusion.

That poverty and unemployment are major factors producing criminality are some of the conclusions that are usually taken for granted by many scholars of this theory. The conclusion has been made by such scholars as Cyril Burt²⁷, Ivan Nye and James Short²⁸ R. Dentler and L. J. Monroe²⁹ but their findings that most delinquents in correctional institutions are from the low socio-economic classes because there is little access to conventional and legitimate means for becoming successful and the result in marked tendency towards deviant behaviour with the promises of power and high income from organized vice, rackets and crime³⁰, have been made subject of considerable criticism by later studies. Their logic get more muddled up when one hypothesizes that the rates of illegal conduct among the social-economic classes vary with the type of community in which they are found. J. P. Clark and E. P. Wenninger probably have the

best version of this when they submitted that

" In addition to the matter of social class concentration and size, there is obviously more than one 'king' of lower class and each does not have rates or types of illegal behaviour identical to that of others. For example, most rural farm areas, in which, occupations, incomes, and educational levels are indicative of lower class status, as measured by most social class indexes, consistently have been found to have low rates of misconduct - in fact lower than most urban middle class communities".

To them, the general conclusion was thus somewhat premature, without a thorough examination of a variety of community situations. It is my submission that in Kenya, with the present corruption rates amongst the law enforcement agents, the delinquents in our correctional institutions are of the low social economic classes as the rich have the means and ways of bailing out their own delinquents through corrupt means. It can only be logical to conclude that this theory has to date been over emphasized as major discrepancies such as inconsistent extremes have not yet been reconciled. Contradictory coefficients of correlation of economic success and variations in crime curves are still prevalent in this literature.

CRIME AS A NORMAL LEARNED BEHAVIOUR

This theory seeks to explain crime as an ordinary learned behaviour of normal human beings and completely objects the idea of "abnormality" or "degeneracy". The rules in play here are those of the psychology of learning - that all behaviours beyond the simplest reflexes involves more or less complex and interrelated responses to a variety of stimuli developing patterns

other than isolated acts of responses. "Unlearned" or "Instinctive behaviour" patterns are those which are pre-determined by heredity and all others are acquired through learning as a result of adjustments of the organism to the surrounding environment. These laws or rules of the psychology of learning are as formulated and polished, with little variations by E. I. Thorndike, the American celebrated educational psychologist.

The "curve of learning" and the "curve of forgetting" are some of the well documented phenomena in study of the psychology of learning. To learn there must be some non-overt element to back up behaviour, the readiness or willingness to learn precede the behaviour itself because mere repetitive behaviour without attention cannot lead to learning.

It is further postulated that intimacy group contact with a way of life contrary to the law and offensive to conventional morality may thus condition the individual just as those occurring in more conventional setting. The principle that we learn by association is held with high esteem as applying to both criminality and in life otherwise. The principle can be clearly understood with reference to E. H. Sutherlands's works but due to time and space only a sketchy outline of his work is possible.

SUTHERLANDS'S DIFFERENTIAL ASSOCIATION THEORY

Edwin H. Sutherlands is an American sociologist who formulated with clarity and care a theory of differential association which attempts a logical chain of interrelations that makes crime reasonably understandable as a normal learned

behaviour in terms of frequency, intensity and meaningfulness of association rather than individual traits or quality. He used the idea of "Social Organization" or the assembly of common purposes and common interests of members of a group. A group can either subscribe to support criminal patterns of behaviour or anti-criminal or self-consciously law abiding. The existence of a differential social organization in the surrounding society is the principle point in bringing about criminality of the individual. The deviant group will form a delinquent subculture and providing an avenue to illegitimate activities to new members absorbed by way of association. Faithful scholars of this theory, like R. A. Cloward and L. E. Ohlin loudly attested to this principle when they wrote that:-

The criminal subculture, like the conflict and retreatist adaptations, require a specialized environment if it is to flourish. Among the environmental supports of a criminal style of life are intergration of offenders at various age-levels and close intergration of carriers of conventional and illegitimate values. ³⁵

These scholars show the need and importance of the illegitimate act's support by the immediate neighbourhood milieu which affords an opportunity to discharge a stable criminal role.

The theory's consistency and logic cannot be doubted, nevertheless there is a persistent weakness which the researcher's avoid or vaguely explain. This is the fact that not everyone who is in contact with criminality adopts or follows criminal patterns and the question as to the difference in nature and quality of association that in one case leads to acceptance of attitudes and behaviour by one individual, but in case of another leads to acquaintance remains unanswered. Sutherland's

attempt to explain this problem in terms of frequency and consistency of contacts was only an assertion and not an empiracally established fact. D. R. Cressey's work undoubtedly calls for a more serious presentation of the theory by his negative submission that:

"despite frequency and consistency of association, much cirminal behaviour can still be said to be impulsive and irrational with little ressemblance to anything that could be called "systematic" behaviour and such conclusions are still largely a matter of opinion and
36
obscure rationalization."

It can be said that the theory has been unable to deliver as much as it offers, till it answers the question as to why there are such qualitative or selective differences in human association: the theory has no doubt provided an exciting episode in criminological thinking.

As previously stated herein above, the few theories presented in this paper are just but a choice amongst a world of theories which in the writer's view are some of most important and popular with present day Criminologists. Indeed, only a skeleton of the theories has been presented in view of time and space. It is a fact that we can have as many explanations of crime causation as we have ead\$probaly because crime is a phenomena we have to live with and everyone of us commits a crime and/or witnesses criminality at least one day in the flow of time.

And where will it lead us, this survey and understanding of theories of crime causation? Perhaps the conclusion must be that the emergence of socio-psychological sciences will help us to

understand ourselves better. This understanding will do little unless it leads to action. If we structure our penal or correctional institutions in conformity with present day penology of treatment, to promote personality growth in an individual, then we might prevent some crime and treat some offenders with better results, we might save a first offender from being a life-long recidivist! This is a modest aim, which modest aim might by this spirit eventually be realizable.

1. See: Prins Herschell, Criminal Behaviour An Introduction To Its study And Treatment.
2. See: Vold G. B, Theoretical Criminology, New York Oxford University Press, 1958, Part 1.
3. See: Holmes R. Witch Craft In British
4. History, Fredrick Muller Ltd, London 1974
5. Vold G. B. Supra Pg. 50
6. See: Havelock Ellis, The Criminal, Scriber, New York, 1900, 2nd edition. P.27
7. Vold G. B. Ibid P. 50
8. Kamenka et al (ed.) 1978 Law & Society Dr. Charles Goring, Ch. 4 "New Criminology and Penology" P. 81 - 127.
9. See: Enrico Ferri theory of unputability and free will 1878.
10. See; Enncó Ferri; Criminal sociology, Tunin 1856 - 1929
11. Raffaele Garofalo; Criminology, Little Brown, Boston, 1914 (English Translation)
12. Raffaele Garofalo; Criminology, Littele Brown, Boston, 1914 (English Translation).
13. See Isaac Ray A treation on medical Junsprudence of Insanity, Littele & Brown, 1838.
14. Scientific monthly vol. 24, May 1927. Pg. 41 - 6

15. See Generally Law Society Review Vol. 14 No. 3 1980. "The Legislation of Crime and delinquency; a review of Theory, Method and Research" Pg. 348 - 383.
16. Dr. Charles Goring: "The English Convict"; London, 1913.
17. Dr. Charles Goring, Ibid, P.62
18. Johanness Lange, "Crime And Destiny"; Charles Boni, New York, 1930 (English Translation by Charlilote Haldane Pg. 121 - 122)
19. George Thiene; "Vervreche al Schicksal"
Leipsing 1929 (As adopted by Roger Hood in
"Crime, Criminology, and Public policy")
20. The British Journal of Delinquency Oct. 1951. PP.130-43
21. See Generally "Criminality and psychiatric Disorders."
22. Guze Supra PP.510
23. e.g. Robert Lindner, "Ribel without cause, grune and stratton, New York, 1944.
24. See Generally; Erastus Muga; "Crime and Deviance in a Kenya Town, A study of Kisumu."
25. George Bryan Vold, Supra p.167.
26. Paul Weirs; "War Time Increase in Michigan Delinquency, American sociological Review," Vol. 10 PP515 - 23.
27. Cyril Burt; "The young Delinquents," Appleton, New York 1925 P.92.
28. See: Ivan Nye and James Short (Essay) "Socio - Economic status and deliquent behaviour". American Journal of Sociology, Vol. 63 (January, 1958), PP 381 - 389.
29. See: Robert A. Dentler and J. Moroe (Essay) "Early Adolescent Theft" American Sociological Review, Vol. 26 (October 1961), 733-743.
- 31.
32. Edward L. Thorndike; Educational Psychology: Brief Cou^rse, Teachers College Columbis University, 1925.
33. But see; Donald R. Cressey; "Application And Verification of the Differential Association Theory" (Essay) Journal of Criminal Law and Criminology. Vol. 43, pp 51 - 52.
34. Edwin H. Sutherland; "Principle of Criminology," 4th Ed. Lippincoth, Philadelphia 1947.

- 35 Carl A. Bersani: Crime And Delinquency, Macmillan Ltd,
London, 1970 P. 155
36. D. R. Cressey, Ibid P. 52.

RECIDIVISM AND THE KENYAN PENAL INSTITUTIONS

The sole objective of this chapter is to investigate the Kenyan Penal Institutions on their ability and/or disability to tackle the problem of recidivism but before delving into the domain of our penal Institutions, **the writer wishes** to be clear of the terms as they are to be understood in the paper and over and above meaning and usage, the essence of their use.

What is Recidivism?

The term recidivism is a word derived from the pronoun recidivist which term has been, subsequently, coined and widely used in the two dependent disciplines of penology and criminology. To describe the habitual criminal or the jail-bird in common parlance.

As to whom the term can appropriately be employed in the world of criminals has been a generally ignored subject, but the literature on the subject is clear that the person must show a tendency of breaking the criminal laws in operation in such a manner that it can be described as a habit. He must portray a criminal behaviour. But the phrase criminal behaviour is not devoid of criticism, one can always ask - what is involved in the idea of criminal behaviour; of course a single act or Commission contrarily to the criminal code cannot per se be said to constitute, criminal behaviour, but we should look into a pattern of behaviour in order to establish a fact of Criminal behaviour. This suggests that the offender must have committed a series of related acts. It is this idea of a series of acts that depict the offenders continuity and persistence in commission of crime. He is one who relapses into crime as a habit.

Nigel Walker, a famous English penologist, puts this message a cross in better words when he described a recidivist as;

" an offender who neither ammends his ways spontaneously, nor learns to avoid detection, and who is neither deterred by experience of conviction nor reformed by any of the methods in the courts' repertoire..... He is the offender upon whom the regime has no effect however frequently made.... he seems to be determined not be taken alive when again at large.... " 1

The question that still persists is; how many acts need there be in succession to establish the pattern of behaviour that is to be called criminal. The significance here lies on the issolated act which takes in meaning only in relation to the pattern of behaviour to which it is a part. An English statute, the criminal justice Act of 1948,² described the subject of its extra-ordinary sentencing principles, the recidivist as to include:

"..... the offender who had been convicted of a crime after three previous convictions of crime since attaining the age of sixteen and the court was of the opinion that his Criminal habits and mode of life were such that his detention for a lengthened period of time is expedient for the protection of the public." 3

The mode of determining who^{is} and who is not a recidivist, as per the English Criminal justice Act, 1948, was conviction of a crime by a court of law, the preliquisite mumber of convictions being three. Criminologists have differed on the point of actual significance

of the number of acts which can be called criminal. Those arguing in disfavour of the importance of the number of acts use the fact of undetected crime as the basis of their argument. There has been much crime or acts and omissions contrarily to the criminal code that has not been put down to record mainly due to weaknesses in our police force in investigation and detection of crime and secondly due to the fact that many criminal acts are tolerated by the society and lastly due to corruption of the guardians of the law i.e. the police force and the judiciary. This argument logically puts a cross the message of "non-criminal Criminals" highly multiplying the number of recidivists from those in official record.

But the turning point is that a recidivist is not merely that person who tends to be criminally disposed by frequent and persistent Commission of acts which are described as Criminal, but one who has been subjected to the existing penal measures (whether punishment or treatment inclined) with little or no positive response hence his persistence in Commission of Crime. He therefore enters the category of the Criminals in official records of courts and prisons as reported by the English Advisory Council's Report on penal Reform in 1952 which reporting on the recidivists submitted that:

" A third group consists of the persistent petty thief or false pretence offender who is often quite old and who has failed to make a satisfactory adjustment of to life generally. He has few ties, he holds on a job for a short time only, he tends to have no roots and lives day to day in hostels, lodging houses or on the streets and he tends to be a drain on the social services whether in prison or not. Moreover he has been in and out of prison most of his life and appears to be better adjusted to prison life than to any other."4

Apart from his general unresponse to the penal measures taken against him, the above report brings out a few things which characterise a habitual completing the whole picture as to who a recidivist is. Such, prominent features as social failures or failures in life characterise the group. That they are a group unable to socially adjust themselves is undisputed. It is my humble submission that the habituals are a group that has not made up its mind from any active intention to plunder their fellow creatures or from being Criminals for the sake of Crime. They are more probably, an unfortunate group having fallen victim of fits of nature, mental disturbances and psychologically unsettled. They are a group quite in contrast with that often termed as professional or white collar Criminals. "The professionals being men with an object, sound in mind, and in body, competent, often highly skilled and who deliberately, with their eyes open preferred a life of Crime and knew all the tricks, turns and manouvres necessary for that life."⁵

It has also been generally observed that most habituals pludge into their delinquency at an early age of the teens and by middle age he is a fully grown and ripe recidivist. They most often than not committ petty offences sometimes making little profits at great risks. As Rupert Cross puts it, they are mostly petty offenders who;

".... live by robbery and thieving and petty larceny, who run the risk of comparatively short sentences with comparative indifference. They make money rapidly by Crime they enjoy life after their fashion, and then on detection and conviction they serve their term quietly with the full determination to revert to crime when they come out.... when under sentence they complicate prison management,

when at large they are responsible for the commission of the greater part of undetected Crime, they are a nuisance to the community. To punish them for the particular offence which they have committed is almost useless. "5

Such is the subject of this paper. Undoubtedly, the recidivist forms only one of the many possible categories of Criminals. As noted in the introductory note, the writer picked on this category of Criminals as one of special significance as will be paraphrased herein below.

Why on Recidivism

Recidivism, as the writer will endeavour to show, is one of the most fundamental questions in both present day penology and criminology forming the philosophical foundation of most penal policies and the practical implementation of these policies i.e actual penal institutions' administration. As it will be noted in the rest of the paper, the writer invariably submits and maintains though not repeatedly mentioning the importance of recidivism in the following three phases:

- i) The importance of recidivism as an evaluative factor of a penal measure;
- ii) The importance of recidivism as a basis of penal reform and
- iii) The recidivist as the subject of study with an objective of a better understanding and to recommend the type of treatment to be accorded to him.

As an evaluative factor, reconviction rates of those who we have committed to our penal institutions whether in the name of punishment or correction are of course of special significance. Whether these people we call offenders will in the final analysis be victims of our vengeance or mercy is a truth loudly attested by the way they fall prey of the same measures. This is especially true in Kenya when the institution in consideration, the prison, is one whose sole objective and the purpose of its very existence is:-

" At all times the treatment of convicted prisoners... to encourage their self- respect and sense of personal responsibility so as to rebuild their morale, to inculcate in them the habit of good citizenship and hard work, to encourage them to do so."7

So the banner of our prisons reads. To say the least, the objective is most humane, noble and a most enlightened one. It would be expected that the prisoners are to join the public as better persons than they went in - rehabilitated men ready to be law abiding and well adjusted to social life than ever before. It is a most logical conclusion that such an institution is basically structured, or styled and equiped to fight the problem of recidivism at its very primary levels viz: to avoid a second reconviction. The wisdom of this policy cannot go unnoticed by scholars and Mc Clivitock and Bottoms are no exceptions, they noted this basic expectation when they wrote; that:-

" Simple reconviction rates may, however, be justly regarded as a natural point of penological evaluation, and not essentially a misleading one..... Two British studies..... have confirmed the value of basic reconviction rate, in that it correlates very closely with any other criteria that may be developed."8

Thus if by fact there happens to be gross reconviction rates any serious penal reformer would come to the conclusion that we are either sending the offenders to the wrong institutions altogether, and/or that we are sending them to the right institutions but giving them the wrong treatment. The right alternative will come out strongly in the next part of the paper.

As a subject of study, recidivism has presented a special problem in criminology and indeed in all forensic sciences. The aspect of approach in this field is upon the personality of the recidivist. The question usually posed in this area is, if some people after the first experience of the penal measure taken against them never re-appear before the courts of law being charged of a second offence, then those who reappear must be unusually unresponsive to these measures. The issue then becomes one of a difference of either a psychological nature or a biological one.

This has been the Spring board of most biological and physical theories of Crime causation. The phrenologist postulates a difference in structure, which structure determines the function and seek to identify those who are Criminally disposed by their physical appearance specifically the assymetry of the head (as discussed in part one). Others point out on differences in mental ability, as in the theory of feeble - mindedness while others are psychiatric oriented.

The writer views the problem of recidivism as an all-round question; that nothing meaningful can be done in prevention of Crime

if the reform is not addressed to reduction of individual recidivism. It is the belief of the writer that if the problem of recidivism is successfully dealt with by our penal institutions then the right treatment to Criminals of all levels and categories will have been attained. We shall have washed clean the growing stain of criminality in our midst and by the same act, have protected the society of injurious acts by fellow human beings. The institutions enabling this will have justified their very existence and maintenance to the future.

THE PRISON - AN INSTITUTION OF REFORM?

Of all our penal institutions, the prison is admittedly the biggest, the oldest and the most resorted to by our courts of law. Every other minute, an offender is being committed by our magistrates and judges in the law courts, to serve ^a term of penal servitude in a prison. Imprisonment is a standard penal measure against Criminals which has not only received wide recognition but has been generally accepted as the rightful place for a Criminal. Yet these prisons are sometimes referred to as Jails. Jails because of their harsh conditions and treatment but one thing is clear, we have lived with and maintained the institutions we fear in the name of committing an offender to ~~them~~ for retributive or deterrence purposes.

The idea of incarceration as a penal measure is a very old one. It traces its history in the Greek cities of Athens and Sparta, high walls surrounding these cities had special notches where intruders and Criminals would be locked away. Special watchtowers would sometimes be used for the same purpose. Later, in the middle ages, correction

or work houses developed in Europe, particularly in England in the sixteenth and seventeenth centuries. These work houses are the forerunners and indeed constitute a major antecedent of modern systems of imprisonment. They became a deep seated phenomena with the end of feudalism and a succession of wars when poverty and theft became a deeply embedded phenomena in the newly developing urban environment.⁹

By 1779, a penitentiary Act was passed in England whose effect was to introduce a prison system of slavery: Confinement and hard labour. Religions instruction remained a principle feature of these institutions for the morally degenerate and socially irresponsible people. Criminals were believed to be lacking in the basic human sentiments of probity and pity therefore socially dangerous. They were to be hated and punished for the wrongs they committ.

In 1865 the English prisons' Act was passed. This is the Act that the prisons Act, chapter 90 of the laws of Kenya, traces its origin. During this period the prison was viewed as nothing more than a preparatory stage for infliction of other penalties, people were therefore sent to prisons to be punished and were not sent to prisons as a punishment reasons wherefore the prisons were characteris ed by vile conditons, promiscous use of torture and mutilations. With a better understanding of human behaviour in the late 17th and early 18th centuries several attacks and criticism were directed towards these retributory geared methods of punishment, the poor conditions and inhumane treatment, by a great number of scholars. Geffrey Mynshull who lived to witness such institutions and possible described their conditions fairly when he wrote;

" A prison is a grave to bury men alive... it is a microcosmos, a little world of woe, it is a map of misery... it is a place that hath more diseases predominant in it than the pest house in the plague time, and it stinks more than the lord Myer's dogge - house, or Paris Garden in August... "10

Scholars of the day found these conditions inhuman and the harsh treatment as evil. Jeremy Bentham, Montesquei, Rouseau and Voltaire, amongst others contributed much by their criticism towards the improvement of European prisons and treatment of prisoners. Despite their criticism, degrading labour, poor nutrition and poor clothings still characterised the English prisons and the ill treated and despised prisoners had very poor relations with the free outside world. Indeed Sir Alexander Patterson, the celebrated English prison reformer saw no much improvement when he visited one Dartmore Prison in 1895 when he made the following observation:-

" As I walked along the endless landings and corridors in the cellular block. I saw..... the 1,500 men who were then in the Dartmoor. The drab uniforms were plastered with broad arrows, the heads were closely shaven, which might have taken them of interest to the phenologist, but would have baffled any portrait painter. Not even a safety razor was allowed so that in addition to the stubble on their heads their faces were covered with a sort of dirty moss, representing the growth of hair that a pair of clippers could not remove. The prison regime, resting primarily on considerations of safety custody and security determined to minimise the chances of violence or suicide had succeeded in making a large number of human beings objects of contempt. No child could have recognised his father in such a condition, no girl or wife believe she ever loved a man who looked like that."11

This was the idea of a prison that was embodied in the 1865 English prisons Act as imported to Kenya by the prisons Act chapter 90 of the laws of Kenya. It should however be realised that the Kenyan

prison system though primarily founded on the English system took its own independent line of development. The cardinal question here is whether these institutions by the name prisons were introduced and developed in Kenya as penal or correctional institutions and more importantly, what picture they portray today.

It is beyond doubt that the prison system is an alien idea which was not only new to the Africans but novel. The first prisons were introduced in Kenya and in fact in all African countries, by the colonialists. In Kenya, the first prison was introduced in Fort Jesus where prisoners of war could be kept and tortured for information by the Portuguese. Later with the legalisation of the European settlement of the interior and the declaration of Kenya colony under the British Government saw the dawn of the white man's government in Kenya. The colonial government had to advance its economic motives for which it was set. There was a dire need for cheap labour and money to finance the building of the railway. The consequence of this was the introduction of taxes and the obvious civil jail to those who could not raise it. Those persons who couldn't honour their "duties" to the colonial government were put to forced labour. As a result there was a rapid growth of prisons in the interior to cater for their great demand. These prisons were being regarded as mere care taking institutions and centres of cheap enforceable labour. The prison officers were not trained in any manner to handle the prisoners but on the contrary they were mainly successful ex-military men known for their harshness and meanness. The prisons therefore portrayed a merely custodial role which persisted to the 1945.

From the end of the second world-war there was a general political awareness throughout the country and a marked rise in Nationalism. By 1950 co-ordinated armed resistance ear-marked by taking of Oath set the stage live in the colonial Kenya's political scene especially in the central province. In 1952, a state of emergency was declared whereof a full-scale armed uprising was staged by the "mau-mau." During this period, thousands of 'wananchi' were rounded up to prisons and detention camps without trial as anti-government. The prisons were over-crowded with political prisoners and detainees. Extreme inhuman treatment and deaths marked every other day in the prisons and detention camps. The re-known ~~Hoi~~^{Hoi} incident where of political prisoners were reported dead "mysteriously" while digging ditches is clear evidence of the harsh treatment they were being accorded.¹² It is said that while some died of over working and hunger most were buried alive in the ditches.

At this stage in the history of our prisons, there was a great turn on the role played by the same institution, the previous custodial role instantly gave way to a political one. Many rules to govern the prison administration were introduced to keep the political prisoners (who were mainly imprisoned as offenders of colonial laws of vagrancy and Oathing) completely cut off from the outside developments. These rules included those concerning communication by letter writing,¹³ oral communication between the prisoner and his visitors specifically on their privacy of communication which was completely distorted,¹⁴ and communication amongst themselves was highly restricted. These

rules are still being observed with the same vigour in the independent Kenya as they used to during the colonial times as will be revealed later. It is a matter of interest to note how easily the same institutions can be used for a completely different purpose. This should remind us that the law enforcement departments are still an arm of the executive organ of the state, it should be realised that what actually goes on in the prisons depends so much on the reigning whims of the government and not the well stated and righteous objectives of penal reformers and prison wardens.

POST - INDEPENDENCE PRISONS

The pertinent question to answer here is; what picture did the post - independence Kenyan prisons paint?

The independent government, like it did to many other colonial institutions, ratified the idea of a prison system to deal with criminals though previously unknown to the black Africans before the advent of colonialization. The suitability of this institution to deal with the African offender or otherwise is not made subject of analysis here but the writer submits that the prison regime in spite of its alienness seemed quite comfortable with the equally alien Criminal law and Criminal justice system. All in all the immediate years preceding independence saw the prison regime make developments for the betterment of prison conditions and prisoner treatment in various spheres. In 1960, for example, proposals embodying and in line with the modern objectives of prisons such as rehabilitation and reformation were introduced and by 1961 contemporary approach to treatment and training of offenders became

an established Departments' policy. A new prisons Ordinance, No. 49 of 1962 was the result. The ordinance came into operation in 1963, 1st day of February.¹⁵ The prison Rules, part 1 D.3 (c) and the prisons Act were amended to evidence this objective.

To date, the prison regime is abundant and prisons are indeed, a widespread phenomena all over the Republic. These institutions have been frequently resulted to forming one of the traditional modes of punishing offenders in Kenya. In 1970, for example, there were 77 penal institutions with a daily average population of 20,252 prisoners.^{16 (a)} The prison population has shot up sharply to over 30,000 inmates by 1986.^{16 (b)}

Enlightened view of reformation and rehabilitation has been, since independence, a point characterising the speeches of various prison commissioners, prisons administration officers and of course political figures whenever they get the right audience. Particular emphasis has been laid on day to day activities in the prison which points to the direction of rehabilitation. Of particular interest is the prison training in the workshops which is offered as a means by which the prisoner is to learn some vocational skills which he can use to earn a decent living after release. Mr. R.N. Mutua portrays with clarity the importance of this training as an aspect of reformatory training in prison when he noted that;

"... prisoners were employed in useful trades which were intended to help them settle down after discharge.....The principle of encouraging prisoners to work hard through our rehabilitation programmes is not merely a regression of the former concept of imprisonment with hard labour, its main rationale derives from frustrating experience from demoralizing aspects of confinement such as idleness and boredom. Hundreds of offenders are trained in prison farms, workshops, and building sections in such skills as carpentry, embroidery, taidormy, sign writing....

The idea behind this training is to create better citizens out of these deviants in order to turn them into useful human resources upon discharge."¹⁷

While working in the farms and other areas the prisoner is to be kept busy to avoid boredom and idleness as the commissioner believes strongly an idle mind is the workshop of the devil. But the question remains whether this work in the farms is useful, purposeful and skilled for instance spending considerable times on earth shifting by pick, shovel and hand cart method cannot really be said to be skilled nor purposeful; on the contrary it is laborious and degrading. Secondly training in the workshops is only for those who are serving a long term of imprisonment otherwise the short term prisoners cannot be expected to have learnt any skill within this short period he is in prison. Unfortunately 75 % of our prisoners are in for a short period of imprisonment as they are mainly misdemeanants, they therefore cannot benefit from this programme. Moreover a great number of inmates cannot benefit from this programme which assumes that the major factor leading to crimes is economic condition and lack of employment. The graduate inmate who is in for political reasons and any other skilled prisoner would not benefit from either carpentry or masonry, just as the psychopath won't.

It is generally forgotten that one can only make use of the skills learnt if he has some money to start himself off. The problem is that once he was imprisoned, the inmate was cut off from the more affluent world and not unless he had saved enough before he was committed to prison, which is not likely, he might never get to use what he learnt in the prison and circumstances might force him to revert back to Crime.

It is my submission that this vocational training and work experience does little to assist the offender, this has also been observed by United Nations after a thorough study in Uganda: which reported;

"It has been found in many countries, especially in the highly industrialized ones with extensive and developed prison systems dating back many years, that vocational training within the prison has a dissappointingly low correlation with successful social readjustment and Crime free careers on the prisoners afterwards.... The assumption that fitting the prisoners with a certain skill and the experience of regular work habits will lead to his non-return to Crime are ones which require testing extensively over time. 18

It might be argued that the foregoing criticism of the reformative measures taken by our prisons is not enough to write off the whole idea of imprisonment but the problem of recidivism is on the rise, we are committing the same people to these prisons over and over again. The published annual figures bear the truth that there has been a steady increase on the rate of recidivism over years. As early as 1977 there were 1, 480 convicts sentenced to imprisonment for the second and subsequent times for serious offences. In 1978 2,475 offenders were convicted for serious offences for the first time compared to 1,580 convicts for the serious offences for the second and subsequent times.¹⁹ From these figures it is evident that there was an increase of serious offenders committed to prisons for the second and subsequent times by 100 convicts. Cases have been reported of people with up to 20 previous offences all relevant to each other.²⁰

It is hard to contest that Crime is not on the increase in view of the Criminal statistics as above portrayed. One wonders why the prison system has been such a failure. The writer contends that the

greatest contribution to the failure has not been due to the short sighted reforms which have ended up being themselves a failure but the prison organization and the treatment of offenders. This can only be realised after a close ^{look} at the operation of this traditional regime in its attempt to fulfil this cardinal task of rehabilitation. These efforts will be made with an objective of showing the reader why the system and its operation are destined to fail.

PRISON CONDITIONS AND PRISON LIFE TODAY

This part of the paper is to critically examine the so called improved prison conditions and the extent to which they are conducive to reform. It is an account of every day's prisoners experience in the process of his rehabilitation as gathered from an ex-prisoner, the writers own experience ^{on} a visit to Kamiti prison and the statutes specifically the Kenyan Prisons Act.²¹

Once a sentence is announced in court to the effect that the offender has been committed to a term of imprisonment, he is immediately in the hands of prison staff and he is whisked away to a waiting police "black maria" at the backyard of the court. Somewhere along the line, he is handcuffed and joins the rest of the convicts who he realizes are going to be his colleagues for the rest of his prison life. He no longer manages his life, the idea of a free will fades away giving way to that of commands. A life of penal servitude begins.

On entering the prison gates, the prisoner is taken to the reception where he parts with all the Civilian clothes including the most dear of all under clothings. As the rest are being registered

and issued with a drap, uniform the prisoner finds his identity with the group and in that state of ~~nud~~^{ness} he is commanded to do some few exercises' within no time his life has changed into a completely different one, it becomes one strictly controlled by the law. The prisoner is the true subject of the prison's Act.²² His civilian clothes and anything of value that accompanied his person are to be kept away safely under S.35 rule 40. He is then dressed in a prison uniform and given a number which he is to be responding to. The convicts' head is cropped down to the skin and the prison uniform are an ill fitting dress of shame.

This role- stripping ritual makes the prisoner loose his identity and personality he had in the free society. He is to be ordered around and expected to comply without questioning. A man of full age and high mental capabilities is expected to take a bath by orders of an officer-in-charge as:-

"Every prisoner shall unless exempted by the officer in charge or the medical officer, take a bath or a shower on admission and thereafter as ordered by the officer in charge."²³ (Emphasis mine)

The type of food to be eaten is predetermined by law and one has no choice. The food is actually of low quality, usually half cooked and at times unpaletable inspite of the hard work the prisoner does.

After a whole days work the prisoner sleeps in conditions which are far from comfortable. A mat is spread on the floor and the lucky ones gets an occassional blanket to cover his head; lice, fleas and bed bugs are common predators in these dungeons. This is quite contrally to S.47 (1) which states that every prisoner shall be supplied with beddings adequate for warmth and health. However as per rule 47 (2), additional or alternative beddings may be supplied to the prisoner on recommendation of a prison medical officer. A rule 48 (2) which provides that prison

clothes and beddings discarded by a prisoner upon discharge are to be thoroughly washed, dried and disinfected before being returned to the store seems to be a dead letter.

There is an intense atmosphere of complete incarceration from the outside world. The prisoners contact with the free members of the society is strictly controlled. There are to be three visits in one month by a maximum number of three people in any one visit. D.57 provides that the officer in charge shall be within a hearing limit during such a visit and if the language in use is one which he doesn't understand, he shall have an interpreter besides him. In other words, the prisoner is not entitled to any private communication. Papers are unheard of (especially in the medium security prison) and one has to depend on his visitors even for football results.

As concerns letters and letter writing S.58 (1) is clear;

" Every letter to or from a prisoner is to be read by the officer in charge or by a responsible officer deputed by him and it shall be within the discretion of the officer in charge to stop any letter on the grounds that its contents are objectionable or that it is of inordinate length and in case of an outgoing letter, the prisoner shall be informed and given the opportunity to ~~rewrite~~ the letter."

Rule 58 (2) goes further to provide that;

" No prisoner shall be permitted to write a letter or receive a letter from an ex-prisoner without the permission in writing of the officer in charge."

This puts it a cross in plain language that the system is not confident of its results. The ex-prisoner who is deemed to be rehabilitated is a subject of suspicion.

One of the salient features of our traditional closed institution is security. Structurally, virtually the whole prison compound is fenced with high barbed and mashed wire. Those in maximum security wings find them enclosed by an outside very high and smooth wall plus other subsequent smaller walls - they are caged like fatal snakes in a park. An adequate number of watch towers are ever occupied by armed guards, alarms and flood lights are a common sight. Armed wardens keep alert as a severe punishment awaits them if a prisoner miraculously escaped while he is on duty. Communication amongst prisoners is highly discouraged, just in case they talk crime or plan something subversive like an escape.

Prisoner staff Relationship; the relationship between the prisoner and staff is to say the least a very poor one. The warden is to constantly police the prisoners actions and behaviours, he (the warden) is seen as a sovereign source of command. Members of the prison staff do not take interest of the individual inmates charges and they do not become involved in their problem. Such a relation can fairly be referred as a tense slave-master one with no rehabilitative tinge.

The prisons are staffed with no professionals at least for those who are most immediate to the prisoners. No special training is offered in the direction of behaviour therapy or psycho-analysis of the prisoners, on the contrary these officers are simply taught some basic criminology and penology, and clerical work like record keeping otherwise the rest of the training is purely para - military with the usual emphasis on physical education. This training prepares, them, at least psychologically for some physical combat with the prisoners. The only professional in any one prison is a medical officer who is mainly concerned with the other odd-man out whose presence is necessary for the valued spiritual rejuvenation of the in-mates who are assumed to be morally degenerate.

These are the kind of persons who are entrusted with the divine role of rehabilitating the offenders and not merely punishing him. Those who would have expected an enthusiastic, industrious and a highly skillful tolerant prison staff ready to and capable to prepare the inmate for his ultimate return to the free society as a respectable citizen.

THE INMATES AND THE INMATE SUB-CULTURE

On the very first day, the prisoner, upon reception, undergoes the highly degrading role-stripping ritual and for the first time is treated like a prisoner. As he is ~~commandeered~~ ^{commandeered} around hides at the back of the others, he learns to fear the prison officers he will. Like a child in a peer group he learns to identify himself with fellow inmates. As he works, eats and spend together with other inmates and as he strains to know some few things about this strange world he finds it difficult to be a loner and joins the primary group to form the inmate system. This inmate system is marked by a general feeling of consensus and solidarity amongst prisoners. There is a general feeling of hatred and antagonism with the administrative system. Usually there exists an inmate code which stress on the desirability of actions which do not adversely affect the interests of other inmates and the need to keep staff members out of in-mate affairs - in other words they advocate for in-mate solidarity to diminish the depriving and frustrating aspects of incarceration. By the use of this code, things like cogarrates and some prohibited intoxicating drugs like bhang (cannabis sativa) are smuggled in, food and additional beddings for the leaders in this underworld organization are smuggled. There are sub cultural prescriptions against close involvement with the staff, any one closely associating with the staff is regarded as a traitor and must be in for a lesson during the obscene hours of the night.

There is a prestige given a special name as an indication of the general values of the social group. Such names as "star" and original are used to show the degree of seriousness of crime that one has committed, the length of prison term that one is to spend, the number of times one has been committed to prison before and other variables which are associated with recidivism and/or gravity of the offence.

This is an underground current that exists in almost every prison which is in most cases known by the administration but cannot be broken from without. The writer submits that the system is created and sad encouraged by the treatment of the in mates under our present prison regime as once the in-mate was stripped off his symbiosis of personal identity there is an obvious impromptu dearth of positive relations with the world outside the walls, he (the in-mate) begins to attach new meanings, to all the new conditions of life which were previously taken for granted. These new meanings are provided by the prison culture, the prisoner's power to resist association crumbles before the willingness to identify himself with his comrades - in - sufferings. This functional state of readiness makes the prisoner learn these sub-cultural norms and accept their values. This is the process clemmer calls "prisonization"²⁴ or the process of assimilation of the prison culture by in-mates as they become acquainted with the prison world.

Dangers of the sub-culture: whenever a chance avails they talk crime and the law in intimate informal discussions as they relax on lunch, break or before sleeping - this can be well in view of the willingness, frequency, intensity and meaningfulness of association which leads to moral deterroriation of the in mates.²⁵

The willingness to join this deviant group may have sprung long before the convict was imprisoned. It could have been a function of what is usually referred to as 'Social Definition' or social labelling. Social labelling occurs the time the offender committed the crime and ended up in the hands of the police, the process is enhanced by public announcement in court that the offender is a thief, murderer, rapist e.t.c in court on his conviction.²⁶ It may also have sprung when one labelled himself as a deviant,²⁷ for instance when a prostitute realises that her new life is sometimes rough and unpredictable and that arrest is a hazard, but it is not a life of shame and the will to revenge upon the public for having punished him by imprisonment and experiences in the past evaluated as degrading may shift full arch to become rewarding. With such loss of status conventional punishments may lose their efficacy. This can be the genesis of deviance and once deviance becomes a way of life the personal issue may become the costs of making a change rather than the higher status to be gained through rehabilitation or reform. The one time first offender now enters a vicious - cycle of recidivism.

This rather sketchy submission garners support from the general consensus that prison experience is criminogenic in nature i.e prison breed crime. Exposing one to prison experience and the irresistible prison. Sub-culture increases the probability that he will engage in criminal behaviour. Frank Tannenbaum²⁸ loudly attested to this truth when he wrote:

"Every time the apprehension of a child involved throwing him in contact with other young criminals who are confined together there is an increased stimulus in the education of Crime...The institutional experience is thus a concentration of stimuli adapted to develop delinquent interests."²⁹

Moreover, Donal Clemmer, a major proponent of this theory pointed out succintly that:

"Even if no other factor of the prison culture touches the personality of an in mate of many years residence the influence of these universal factors are sufficient to make a man characteristic of the penal community becomes next to impossible."30

It is in the light of the foregoing: ~~invincible~~ armchair doubts of the extent to which a prison can be said to be reformatory that the writer can be said to be in part three proceeds to make recommendations for the restructuralization of our penal institutions as well as our criminal justice system which the writer believes are not only desirable but also feasible reforms to be adopted.

THE PROBATION SERVICE

This is a system of administration of justice under which one has been tried and found guilty of an offence, but the offender is given a chance by the court of law to change his Criminal behaviour and become a law abiding citizen. The offender is let free on condition, that he is to be under the probation staff. The probation officer is to try to diagnose the problems of the offender and those of his family, his social and economic problems with the sole aim of trying to rehabilitate the offender in the community while at liberty.

In Kenya the probation service was started in 1946 as was recommended by the Bartley committee which had been appointed to give an advice as to the suitability of a probation of service in Kenya. The committees recommendation was to the effect

of implementation of the same without delay. The result was the probation ordinance of 1946. This ordinance was based on the English probation of offenders Act of 1907 and is the true predecessor of present day Kenyan probation of offenders Act.³¹ To date the probation service is widespread and it has involved a wide range of factors of a social nature, than had been envisaged by the legislators who enacted the ordinance of 1946.

The probation service was started as an alternative to imprisonment and in the words of the committee:

"The essence of the system is that certain offenders instead of being fined or bound over, are placed on probation...."³²

The functions of the probation were expressed to include to advise, ~~befriend~~ befriend and supervise the offender³³ committed under his hands to see to it that he leads a law abiding and profitable life. In case he fails to observe the probation order the probation officer may undertake to bring such an offender before the court to be sentenced to his original offence. The officer is on being referred to by the court to render services to the court as to making of preliminary enquiries to enable the court to decide whether a probation order is desirable and if so, what terms are appropriate. This enquiry is important to make sure that only those who are likely to benefit from a probation order get it, secondly, it allows the probation officer and early contact with the offender securing his confidence on him.

However it was also recognised that the success of the probation service will depend on the use made of it by the court, The courts

are concerned in two aspects; first seeing to it that full use is made of probation as an alternative to keep offenders out of prison and, secondly, in seeing that only those offenders who are likely to profit from the service are committed to probation and that conditions attached to probation orders are of reasonable nature.

SHORTCOMINGS

The probation service is one in sweet harmony, with the rehabilitative policy and one which is placed strategically to reform the offender while at liberty. It is one measure that runs contrary to the popular primitive policy but unfortunately it has been one which has remained generally unknown. This has been due to various shortcomings which have inhibited its full exploitation and possibly reduce the level of criminality in our country.

First and foremost has been the communities feeling towards Criminals. The Kenyan Community portrays a sentimental inclination to punishment of offenders. Unfortunately this general public feeling has expressed itself through our statutes which provide in extense for the sentence of imprisonment. Again the magistrates also tends to dismiss the idea of probation as too lenient an order - this explains why there are so many short term prisoners who, with a favourable policy, would be under probation.

The government has also tended to down play the probation service by not remitting enough funds for the service- the officers have thus remained generally under paid and the job is unattractive to a highly qualified personnel.

The probation officers have also not had enough time for those committed to them. This has been mainly due to the much work in the form of preparing reports for the courts. Moreover, the staff is not properly trained to handle Criminals in a really ~~therapeutic~~ ^{therapeutic} way. After undergoing a mainly administrative course in the Kenya Institute of Administration for a period of two years, it cannot be said that the officer has really been prepared for the wide range of criminals that he is to meet in the field a group which he has to be-friend, advice and prepare" for a law abiding life. In addition to inadequate pre-service training there are ~~no~~ seminars which are arranged for them neither are refresher courses offered as would be expected.³⁴

In conclusion therefore, the writer submits that if we are to be more successful in the future, if we are at least to reduce the rate of criminality and the level of recidivism in our society, something more than just a refinement of our prisons and our probation service is to be done - a complete restructuring of our penal institutions is needed, a wider range of alternatives to imprisonment is to be implement and above all our ~~attitude~~ attitude towards criminals must change to a more humane one.

RECOMMENDATIONS:

The foregoing discussion in this paper shows that our criminal justice system as it stands is not only inadequate to solve the problem of general Criminality but it is unworthy of retention. By this the witer suggests that there is every need for a radical restructuralization for this system which has been in operation for well over a century to date. The restructurini of the system, has been described as radical because in the writer's wisdom, only a few features of the 'old' regime would remain. But the writer is well aware of dangers of a 'blind-reform', the viability of every idea should be seen in the light of rehabilitation of the offender, reduction of Criminality and the inevitable improvement of the conditions of the existing penal Institutions if they are to remain. Again it would be dangerous if we considered our territory as a social island having completely different enviroⁿs and social interractions completely different and incompatible with any other. We should, on the contraly, look up on the developments in other parts of the world, borrow their successes and heed to the warning of their failures. We should try to consider the loopholes of their reforms and cover them up to be confident of the parth of reform we are to take. Though the parth need not necessarily be a sure and true one it need be least illusionary and more realistic.

A reform, like every new venture involves risks, risks as against failure and success, speculation of which becomes more difficult in such a social reform like the one at hand. This can clearly be understood in the light of the fact that a penal reform goes beyond the percincts of a mere ideology, it has to be translated into practice and expenditure not forgetting that the resultant in trodution of innovative approaches requires not only significant changes in practices but also extensive re-organization and substitution of existing facilities and personnel. But we should not adhere to an out dated regime which bears no fruits. Indeed as the utaritarian arguement goes, if what we have been trusting and working on has proved inefficient and unsatisfactory to our present needs and the alternative bears more promise and does not at its worst k

show the possibility of the same degree of failure then the risk involved using the new method however radically different, is overriden by the failure of the present practice. The new venture in our case is a true penal reform and not simply a change in the mode of punishing offenders. It involves a trial of an innovative technique of treating offenders and in prevention of deliquency as stressed in theory reflecting more fully some of the accumulated knowledge in the behavioural sciences concerning the nature of man in the society.

Moreover, the Kenyan penal reformers would not be the first ones to so "risk" on this non-punitive and rehabilitative ideology, a host of penal measures based on this philosophy have been experimented elsewhere (especially in Europe and America) and evidence that some aspects of this approach have been successful in respect to certain offenders warrants continued experimentation.

The favoured cultural criteria in the world of penal reformers is effectiveness and practicality but the available historical - empirical evidence does not indicate that the practices in the traditional punitive-repressive ideology are effective- on the contrary it does provide evidence that they are harmful both to the offenders and to the community. For instance, in spite of our severe sentences for those adults who are incarcerated and in spite of the increasing number of juveniles who are institutionalized, over 95% will eventually be released back into the community. Considering community safety and the limits of correctional resources, we can ill afford to continue to experience a return engagement of these offenders. The end results have been high recidivism rates, congestion and overcrowding in our ill-funded, disorganized and brutal prisons. The administrators of these institutions from the view point of efficiency and practicality, have ~~resorted~~ to reliance either on lax supervision or on a punitive and repressive policy which, as has been observed, results in not preparing the offender for life in the free community and in the final analysis, not protecting the community at all. It is on the basis of this awareness that the writer calls for a more serious regard to reforming our system.

On the very outset we should therefore understand what we mean whenever we talk of penal reform. Indeed, the Kenya administrators of the penal institutions have tried to hide behind the term reform making it almost devoid of meaning. Despite the fact that ^{of} little has changed in our penal system since the colonial times and that the little change far too little can, strictly speaking be said to fall under the reform blanket- but to feel at ease with our system we have through our prison Commissioner resorted to calling the same ^{things} by different names so as to draw suitable veil over the whole subject- we have cleared the house by pushing the dirt under the bed, this kind of masking is what one Nils Christie in his essay "Utility and Social value in Court Decisions on punishment"

¹ Criticized when he wrote:

"..... I, like so many others try to get out of this dilemma by using words like sanctions instead of punishment, inmate instead of prisoner, attendant instead of prison warden, single room instead of cell, and of course, first and foremost training or treatment instead of punishment"

But this is of course, quite wrong. It separates us from the core of the problem. We style a prisoner a patient when we do not treat him as one and call jails schools when when there is no proper training, we employ terms terms but do not lead to treatment that gives them a proper meaning but have an effect of persuading us to accept conditions which we would not have accepted, if the terms employed had been less misleading! A true and genuine reform must be free of stumbling over words, instead. We should have goals which are well founded and which put to the front line the important tasks relating to administration of justice and in harmony with the spirit of the time. Rupert Cross² is an undoubted champion in the field of penal reform, the writer had little choice but to respect his idea of a penal reform as that which has a rehabilitative tinge in it. He succinctly puts it that "not every change in a penal system that would ordinarily be described as a penal reform even if it were thought to make a reduction of crime"³. Under this Rupert Cross expresses his genuine doubts as to whether re-introduction of murder and corporal punishment in his country, Britain, on account of newly discovered evidence concerning their deterrence merits would be described as a penal reform. This is due to the lack of the rehabilitative element in either forms of punishment. On the same reasoning, few would doubt that introduction of branding, amputation of limbs and other deterrent oriented punishments employed in some countries today would not fit under the title - penal reform. Stressing on the importance of a rehabilitative element, Rupert Cross says that:-

"There is undoubtedly a close connection between the notion of penal reform and the reformatory theory of punishment. I think that any aimed at rehabilitation of the offender can properly be described as a penal reform. This seems to be true not only of the introduction of a new penal method, which is, like Borstal training aimed directly at rehabilitation, but also introduction of rehabilitative concomitants of punishment, such as the provision of education and vocational training in prison"⁴.

But his idea of a reform is not just restricted only to rehabilitation and introduction of rehabilitative concomitants, but he includes with a special note of importance the noble aspect of humanitarianism. In his own words he put it that;

" I would like to take this opportunity of protesting against the tendency to be little humanitarianism as a yardstick of ^{progress} in penal matters The tendency is not only ^{discernible} in 'hangers and floggers' (sic); I have noticed it many an advocate of penal reform. For example it is all too common for people to understress the ^{argument} that probation is preferable to imprisonment because it is more humane, and to ^{overstress} the argument that probation is not soft option on account of the ^{magnitude} of the demands made on probationer" .

Thus to honour what Rupert Cross contributes we should see to it that what we refer to as reformatory should bear either or both of these two basic attributes of rehabilitation and humanitarianism. The writer prefers to call it " the rule laid down by Rupert Cross" which should be the test of our action plan. Any change of the penal system which does not have either a sense of rehabilitation or humanitarianism cannot be properly described as a penal reform.

Being clear in our minds of what we mean by penal reform, the writer now wishes to point upon some of the measures ^{he} genuinely feels should be reformed in our criminal justice system. A discussion of each proposal is to be made of the merits of taking the recommended measure in the particular area in replacement of the present practice with an objective of showing the degree of promise they hold in the treatment of our criminal society. The measures carry the less obvious advantage of improving the image of our penal system not only before the eyes of penologists and criminologists but more importantly to the public. It is hoped that by making the system more rehabilitative conscious and by presenting a more humane treatment to the offenders we can win the public's confidence and repress the general punitive policy towards criminals. We would, by achieving better results, fight against the public labelling of " ex-convic but instead draw a feeling of pity and repress that of vegeance and hatred towards criminals.

1. THE COURTS AND THE SENCENCING POLICY.

Sentencing in courts presents a critical stage in the treatment of the offenders. One might wonder why the court falls under a paper whose main subject is penal institutions, but it is to be remembered that the importance of coherence and ^{rational} approach towards our criminal justice and penal rehabilitation. Proper reform cannot be achieved if penal rehabilitation is to be seen as a mere series of connected events. But we must see it as a convict does, - as a total system.

We must work to achieve clearly enunciated goals that work for the entire system. The criminal justice system must be seen as a rounded cog-wheel, the courts who, inter alia, determine guilt or innocence and assess an appropriate penalty; the probation officer who investigates, reports on and makes recommendations in respect of an accused; the prison that receives and - it is hoped - correct and resocialize the offender into the community and myriads of other institutions and processes must be seen to be the cogs of the wheel.

The role played by the courts therefore becomes an appropriate point with which a serious penal reform. Can have full effect since sentencing should mark the beginning of the corrective process and set the wheel nothing. It is generally accepted and it has long been the prerogative of the Bench not only to determine the guilt or the innocence of the offender but also to mete out the sentence. In the past the primary considerations in a sentencing decision have been the community's attitude and the sentence prescribed by the law. The result has been an individualized judgement by the Bench, with consequent variations in sentencing amongst different courts and jurisdictions. Such divergence has reinforced the offender's belief that no matter how carefully a decision is weighed by an individual magistrate, the end result will be a capricious sentence. Indeed the magistrate is figurative of the public's attitude whenever he exercises his discretion in any one case. But the public seeks satisfaction from the punishment of the offender to which there is no justification. As Peter Rigby explains,⁶ punishment is an irrational work of vengeance,

"....Punishment (is) at least in part a work of vengeance it is said that we do not make culpable suffer in order to make him suffer; it is nonetheless true that we find it just that he suffer...."⁷

In most cases than not the magistrates judgement reflects on this vengeance only limited by the statutory provisions. But the only justifiable sentence is that which does not dwell on the past offense but one which portrays an understanding of the offenders' personality, his background and ^{seeks} on the peculiar circumstances of the case. It is undoubted that a magistrate who takes pain of informing himself of such extraneous issues like the family background and the offenders' previous brushes with the law gives a more appropriate sentence. As Kirk Patrick and Mac Grath in their book "Crime And You" observes;

"..... a desirable sentencing process should take into account the needs of an offender; the result would be individualization of sentencing based on correctional consideration designed to produce an economically productive citizen rather than a **recidivist**." 3°

It is generally accepted by advocates of a rehabilitative penal policy that the best judgement is that which the magistrate pronounces after a careful study of not only the circumstance of the offence as given by the evidence before him but also about the offenders' **persons**. This as a policy, has been given **recognition** and attested widely by the East African Courts. As early as 1970 in the case of NILSON V. R., the East African Court of Appeal sitting in Nairobi expressed the opinion that:

" On passing a sentence, the magistrate should always put into account such extraneous issues like family background and previous Criminal records if any.... It would be unfair to the accused for the magistrate to ignore such extraneous facts in favour of directing his minds to the general problem of deterrence!" 9°

But it should not be forgotten that matters of policy differ greatly from practice. The tradition of magistrates is to, in an appropriate case such as one of a criminal with a previous record, adjust the length of a prison sentence the gravity of the offence and increase it disproportionately on account of the offenders' record. This gives an assurance that the habitual offender goes for the statutory **maxima**. The usual justification for such a sentence is the protection of the public from future depredation of the offender and for his own deterrence from committing such crimes. This is nothing short of morbid dwelling on the offenders past sins without giving consideration to his future needs. It is evident that our law courts are taking the wrong line yet they are to give the sentence that is to bind the rest of institutions. However, it is in court that the Criminal law manifests itself at its best. It thus becomes impossible to figure out any policy fitting our Courts' sentences to be in line with the rehabilitative ideology without a reform of the criminal law. Infact reform of the criminal law must now reflect the total criminal justice system including rehabilitation programmes. The court is bound and is to go by the words of the statutes in its sentencing even a discretion is to be exercised within the limits of a statute. This is well illustrated by the **dictum** of Biron J. in the case of SAJILE SALEMULU & ANOTHER V.R. Which he said;

"Punishment and penalties are prescribed by the parliament, not by the courts. Where parliament has provided a specific penalty for a specific offender, that penalty is appropriate punishment for that offence. And it is not open to a court to consider whether such penalty is appropriate, let alone say, the less or punishment is appropriate!" 10 (Emphasis mine)

It is clearly put that the criminal code.⁴⁴ Contributes greatly to the sentencing practice in Kenyan Courts. Indeed, the hands of the magistrates are tied by any clear and unambiguous worded provisions of the statute as regards sentencing otherwise he shall mete out an unlawful sentence. The cardinal question at this stage therefore becomes, did the legislature while passing such a proviso address itself fully to the objective and policy of rehabilitation of the offender? The answer is obviously to the negative as is attested by the criminal code itself. The statute is characterised by anachronistic cobwebs of retribution and deterrence. Sanctions have been widely used as the principal means of sustaining law and order. There are several clauses making imprisonment mandatory, in some instances it is coupled with the inhuman and degrading flogging. A death penalty by hanging is carried by the offences of treason, murder and robbery with violence, Manslaughter demands incarceration of the offenders for extended periods which might extend to the whole of the offender's natural life. The Court has no alternative but to mete out these fatal sentences. Harsh legislations which sought to rely significantly upon broadly cast penal provisions and prescribed minimum sentences as a means of controlling offences particularly prevalent. This is true of burglary, the offence of stocktheft, poaching and handling of stolen goods. These provisions indicate openly the legislature's objectives in enacting these statutes namely to deter by punishment. The past has unquestionably shown that harsh and inhuman prison sentences have not brought about a decrease in crime. In consequence the conviction has arisen and the recidivism rates are becoming higher. It is today accepted that the offender should rather be treated positively effort to rehabilitate him as should be reflected by the court orders. But despite isolated protestations from the judiciary and constant blames from the academicians, there has been no perceptible change in the attitude of the legislature towards punishment over the past 27 years (since independence).

The writer submits that what is enacted by our legislature should be relevant for the present purposes and should not act as a genesis of misdirection of the penal institutions. In the reformed system. Reforms

in the right direction should be founded on the results of reasearch and reliable information which should see an end to our outdated sentencing practice. Any legitimate sentence is that which is to be guided by the objective of reformation and rehabilitation of the offender by as humane treatment as possible.

ii) BARN ALL PRISONS?

The second stage of reform should be the prisons. These are the institutions which we most oftenly commit the offenders. Prisons are the most widely reognised penal institutions not only by the Kenyan community but also by the greater percentage of the global village. It has the greatest historical standing of all penal institutions, it has stood the test of time serving many varying and different roles at various stages of its evolvment and development. These ranged from merely custodial roles for persons awaiting trial to agents of punitive measures for personsconvicted of offences. Today prisons are used in many parts of Europe and America as correctional institutions and some as psychiatric prisons at the experiental stage. All these changes reflect the reigning penal policies and practices. Today, as has been discussed in the previous chapter, prisons conditions and treatment of offenders therein have gteatly improved. In Kenya a contrast can be made as against the colonial times and the independent era whereas, in other parts of the world, especially Europe, comparison can be drawn as against the middle ages and present day.

Unfortunately, there is a marked rise in criminality and recidivism in most parts of the world. This has casted grave doubts as to how far the prison can be said to prevent crime and scepticism has been expressed as to the reformative capabilities of the prison institution. The greatest handicap has been pointed out as its very custodial feature. Sir Alexander Patterson says that " It is impossible to train men for freedom in the condition of captivity" ^{12.} Sir Edmund Du cane in an article to "fortnightly Review" in as early as 1894 observed that, " a prison system is no" Aprison system which has no effect whatever in removing the conditions which produce a criminal, a prison system which aggravates these conditions, is bound to fail as a deterrent agency, it is certain to swell the ranks of the habitual criminal population. And this ^{is} what is happening in our ^d mist today". ^{13.}

What is the right action towards the prison? Should we burn them and forget about the whole idea of imprisonment in favour of other non-custodial measures?

Perhaps Howard has the best idea of what should be done, which idea the writer subscribes, when he introduces his book by saying:

" If we are to be more successful in dealing with the problem of crime in the future than we've been in the past, We must devise some more effective forms of institutional treatment for known offenders than simple imprisonment. We may continue to call the institutions of the future by the name prisons the treatment applied in them must be quite different from that which the name applies today." 14.

Mr. Howard therefore feels that we should retain the prison institution a name which is to be employed to describe institutions radically different from those we have today. This suggestion therefore advocates for a revolutionary restructuring of these prisons from their very fundamental assumptions; - shaking their foundation and all superficial policies that governs them today.

The law now states that the prison shall reform men committed to them, 15. and the prison commissioners are devoted, at least by their words and writing in the Annual Reports, to this noble object; but still a large number of recidivists come back to their gates again and again. It seems what penal reformers said centuries ago still sound modern to a big section of the public today. The distinguished lawyer Sir James Fitzjames Stephens 16 held in 1853, that " it is morally right to hate Criminals" This is a view that still holds today to a great case section of the Kenyan community. This population wants prison to be strictly instruments of punishment and punishment alone. They believe that criminals should not be sent to prison as a punishment in itself, but they should be sent to prison to be punished so that one experience of them shall deter him from ever committing crime again. But view is neither enlightened nor effective to meet violence with violence, destructiveness with destructiveness aggression with aggression - Nevertheless we in Kenya still continue treating half-crazed murderers by breaking their necks by hanging in the name of law and order.

It is clearly evident that the public might find it hard to buy the concept of criminality and delinquency as questions of training and treatment rather than punishment. This public opinion finds it difficulty mainly because of its method of expression, to associated mental illness primarily with physical illness rather than weakness or moral decadence. The reformers must fight against this general punitive policies and the public apathy if they (reformers) are to find recognition by the masses and the politicians - this is one area that is quite delicate because crime must always relate closely to public opinion since it is closely defined by this opinion.

However the write recommends that it is is the right time to strike as the public is now slowly taking a different and a more enlightened view to some behaviours notably drug addiction, alcoholism, homosexuality and the chronic petty offenders together with some psychotic offenders - the feeling of sympathy has been more frequently expressed as opposed to that of hatred and revenge towards an entirely voluntary activity in which any one at any time might chose tojoin. The reformers should drive the public towards regarding criminality not as a conscious act of hostility towards the society but as a type of deviance arising, at least in its persistent aspects, from a predisposed and handicapped group of the society. A group composing of persons who cannot lead their personality. It is a social group in need of treatment:- of psychiatric or medical attention or guidance into the new fileds of work and opportunity where it can work in harmony with conventions and behaviour we all accept.¹⁷

The most immediate problem is that the Kenya prisons as they stand today sadly ressemble hospitals or a correctional institution in which the few proven methods of treatment available are applied to a small propo rtion of patients who need them.¹⁸ This problem is not only a local one but as D.L. Howard informs;

"it is almost unbelievable that in 1959 the majority of English prisons should have not a single psychologist on their staffs, nor any any on who had any formal training in the social sciences!"¹⁹

The aim is to improve these penal dungeons into therapeutic institutions even by their very outlook.

a) THE PRISON STRUCTURE AND DESIGN:

Most Kenyan prisons today stand as they were constructed by the colonialists, these structures do not only look bizzare, ugly and haphazardly designed but also brutal and scaring. These buildings were constructed during times when the aim of the administration was to deter and oppress the prisoners. As had previously been described, the highwalls, the alarm system and the watchtowers and infact the whole design was for the well calculated purposes of appression and safe-custody of the offender. These buildings are completely incompatible with the new methods of treatment of their occupants. The professed goal of inculcating self-respect and a sense of personal responsibility²⁰ Cannot be carried out with success in structures designed for the very contrarily purpose. Howard on "English Prisons" observed the same problem:

"None of our existing 'closed' prisons (sic) is suitable for the practice of really modern therapeutic methods. None of them is a place which by its very shape and internal arrangement helps prisoners to overcome their resentments and gain their self-respect. The huge impersonal blocks of cells where the individual is always by the overpowering sieze of the structure ..."²¹

One might argue that the English prisons are at least different from the Kenyan ones but this argument does not hold much truth in view of the fact that the very Britons build the local prisons and over and above all it is hard to present a better picture of the small dimly lit and stuffy cells which, though originally designed for one inmate may be occupied by as many as three inmates. The cells are heavily ridden with an atmosphere of custody and isolation from the free world. Neither can we with ease and accuracy describe the open and military-barrack-like halls of residence of short term prisoners in the medium security prisons as really a therapeutic design.

Little doubts can be cast on the suggestion that the highwalls which surround every prison in Kenya only serves to exaggerate the feeling of isolation from the rest of the society. These thick walls have surely outlived their purpose and nothing more than a wire fence is really necessary on the boundaries of most of our prisons. The number of offenders who are undoubtendly dangerous to the public can be confined to only a small part of these prisons. We should avoid making the prisons look like impregnable fortlesses as this very idea makes the staff develop an equally "fortless psychology"²².

Shifting their concentration to security, the characteristic continual locking and unlocking of doors and the steel gated, on counting and recounting heads to make sure that no one has jumped over the wall and the real purpose of the institution is pushed to a secondary level.

It is wrong in principal to put new wine into old wine skins likewise the new methods of treatment can only be attempted in modernised institutions with buildings which respect the quality of the individual by being attractive to the eye, modern and as normal in appearance as possible- they should be buildings which the occupant may want to be recognised with. However this does not mean that they should be as posche as a hotel but they should not be grotesque structures of scheme.

The new prisons should be small in scale and designed (the internal partitions) in such a manner as to influence positively, the degree and quality of the personal relationships both amongst the staff as well as the inmates. This is the only way in which the strong undercurrent of a prison subculture can be broken and most importantly, it is the only way we can have a small group of inmates which we can possibly make a true and meaningful segregation of the different types of offenders making it easier to conduct an individual treatment under close observance.

b) PRISON LABOUR

Whereas the inmate community should not be let to lie around idle, the prison administration should avoid to give out cheap and highly monotonous tasks which are boring or laborious and degrading hard labour which is both non-purposive and unskilled, as is today usually directed by courts in sentencing.

The writer submits that such clauses should be repeated henceforth. Secondly the work given to the inmates should not be of a nature or type that will interfere with definitely rehabilitative aspects of their training. It should preferably be a type of work that can be done without loss of self - respect. However, it might be practically impossible to give work that is skilled and purposive at all times, supplementary work given by these authorities should be well calculated as closely related to the individual mental and physical capabilities - the work should benefit the inmates either physically and/or mentally when they are once more dependant on their own labour for a living.

Next in the agenda is the thorny issue of payment of a remuneration for work done, the writer diviates from those schools which advocate for a competitive pay of prisoners favourably comparable to those working in the outside free labour markets. This is because, the prisoners production cannot be equally competitive in the free produce market as those produced without, this mainly because the tools used are less efficient and secondly he should partly meet his cost of up keep. Neither does the writer recognise himself with those conservatives who argue in favour of a meagre pay of prisoners as is the present practice. This kind of a pay is miserable and discouraging. The writer submits that prisoners should be paid at reasonable rates directly related with their basic necessities for a comfortable and hygienic life, for instance the pay should be able to meet the cost of tobacco for smokers, shaving creams, tooth paste, soap, underclothes all toilet needs, etc. This will help to restore self - respect and and self - image.

This can also break the problem of traffickers of such basic necessities and growth of a prison subculture - these things should be readily available in an easily accessible prison canteen.

c) TREATMENT OF THE OFFENDER:

To echo the previous chapter, inhuman and degrading treatment has been the daily experience of the prisoners. But this has not brought about the desired deterrence of the offender, neither has it brought about a decrease in crime. It is today widely accepted that the prisoner should rather be treated positively in an effort to rehabilitate him. This view is being adopted in many parts of the world and the prejudices on the past have to a great extent been replaced by such a positive approach. A scientific approach to this problem of criminality has gained popularity and in consequence the concept in respect of treatment of offenders must at least be forwarded on the results of research and reliable information. Firstly a newly arrived offender should be thoroughly diagnosed. Relevant information as including his family background, his working history, his schooling, his general disposition, his previous convictions or mere brushes with the authority etc should be explored thoroughly by a social worker of a remarkable experience, with the help and not reliance of the court file.²³ This is to establish what can be termed as "case history"

From the case history record's analysis the needs of the individual offender should be established and an individual training plan or treatment plan should be drawn. This plan should be used as a device for helping the staff to focus on efforts more preciously on those identified problem area of the personality or the social maladjustments that were ear-marked as most closely related to potential recidivism.

It is obvious from the foregoing that it is from the 'case history' records that the possible problem areas should be identified.

Identifying of such problem areas can be simplified by having a well settled list of hypothesis which is to work like a P.H. Chart. Such list should however, be closely linked with the known theories of crime causation and their specific variables. Thus, some important aspects like family ties and the degree of stability, work instability and/ or dissatisfaction, leisure and personal associates, educational attainments, personality and psychiatric difficulties etc reflecting famous theories should be included. Those requiring special attention should be identified, for example, those in need of intensive psychiatric diagnosis, those in need of medical attention like the drug addicts - such special attention should be accorded on individual basis.

The treatment plan should be free of bias on social and economic case work concept as has been evident of the present prison system - room should be given for individual psychotherapy of every offender but preference should be given to those whose case history points towards a psychopathic disorder or a fairly persistent disorder or a disability of mind resulting in abnormally aggressive or seriously irresponsible conduct. Behaviour therapy for established psychotic offenders should be reflected by their training plan possibly under cases requiring intensive treatment. It should be noted that though the training plan should be drawn only after being clear of the best strategy of intervention, it should not be so rigid as not to accommodate any new development.

A
d) PRISON STAFF:

The charged role and structure of the prison definitely needs a staff with a new and fitting understanding. This should be a staff all set for the goal of rehabilitation and reformation of offenders only. The preparation of such a staff in terms of training also needs

to be completely different, the present emphasis on para-military type of training should be eased if not completely done away with. This would go a long way to avoiding the ranking of the uniformed members of the prison society with the usual rigidity of conduct and decision making. The modified regime needs a full minded, highly flexible and industrious staff ready to recognise itself with the prisoners in order to bridge the gap between the inmate community and the staff.

Probably the most far reaching measure to break the prison sub-culture is abolishing the uniform of the prison staff. As long as the staff is in a completely different and uniformed attire, they will tend to form a different social group from that of the inmates. It would also help to create an air of coolness in the prison stimulating to weave a more dynamic social structure and even help to build up enthusiasm on the basic philosophy of the modified regime of the staff in the transitional stage. On the complete take over, the cross section of the prison staff should show a highly qualified staff composing of Social workers and psychiatrists of a wide range of experience. The prison institution should present a really challenging place for any devoted and industrious social worker and psychiatrist. To create the much desired interest to attract such a personnel, there should be established a close link between the prison department and local universities - prisons should form a field of research in criminology and penology. A healthy co-ordination should be encouraged as between academic researchers and prison administrators, this would go a long way to evolve helpful literature which is at present scarce.

iii) AVOIDANCE OF IMPRISONMENT:

It has been evident in other parts of the world that there has been enthusiastic response of magistrates to meet out imprisonment sentences upon introduction of a rehabilitative treatment on correctional training in prisons when such a reform is still in its embryonic stage. The end results have been total failure or miserably low positive results.²⁴ It has been frequently mentioned that one of the most undesirable conditions in our prisons is overcrowding. This overcrowding can inhibit any attempt to have an individualised treatment encouraging the impersonal dealings with a crowd of inmates.

As has been mentioned herein above the sentencing practice is in favour of imprisonment for a wide range of offences. The policy would be undesirable since it is, first and foremost, costly to build up such ideal prisons. as is suggested and secondly, the desired inmate - staff ratio would be disrupted.²⁵ The penal reform should reflect a policy that encourages the use of other non-custodial to curb criminality for reasons which the writer feels merit mentioning.* The first and most obvious is to minimize the suffering of the offender. The prison even in its reformed form involves deprivation of the prisoner's liberty, independent thought and action of his work and remuneration and the consequential suffering of his family and other dependants. The second relates to training, indeed both psychotherapists and Social therapists might find it hard to make some important observations and evaluation of their work if they work behind locked doors. In order to allow such evaluation for those committed to prison must have suitable case incorporated in their training plan, a pre-release programme which puts them in an almost free

condition whereby they can go on their daily work freely and report in the prison hostels in the evening (This should not be an alarmist development as it has been in practice for years in Grendon Psychiatric Prison in Britain ²⁶ and the Dover institution in the U.S.A. ²⁷)

Though Alexander Patterson's statement that is

* The problem of winning political support is ~~discussed~~ ^{discussed} under "Probation Service."

true of first offenders who show no sign of being criminally disposed except for being circumstantial offenders. Such offenders should not be within the precincts of prison for the reasons that the well meaning objectives of the prison institution cannot have any impact on offenders who need no reform!

IV ALTERNATIVE MEASURES:

With the repeal of all statutory provisions that ties the court's decision making as regards sentencing (The mandatory clauses in favour of imprisonment) and all punitive policies that encumber the discretion of the magistrate, the legislature should direct the judiciary on the alternative should form a pleasant range beginning with some of the existing measures which are presently under used and introduce new ones, of course after a serious research and deliberations on recommendations made preferably by an elect probe committee or the law Reform Commission.

The writer endavours to provide some of the alternative measures whose use could ^{be} intensified, coupled with a correction of existing or probable weakness.

a) PROBATION SERVICE:

The courts should make maximum use of the probation service that is already existing. Despite the fact that the probation system was introduced with much enthusiasm back in 1946, the probation of offenders Act ²⁹ has remained largely unknown to the public and quite unpopular with courts. The reason behind this can be understood if consideration is given to the fact that during the times it was introduced in Kenya and even up to date, there was and there has been nothing that was happening within prisons which can be termed as treatment proper- the purpose of the sentence whether long or short has always been to deter. Secondly, in the ^{Light} of what the writer regards as widespread punitive policy or public anxiety about crime, alternatives without a deterrent ^{tinga} may not have been politically popular as genuine alternatives to imprisonment - hence the probation service proved quite unfashionable since it lacked the deterrent value.

Thirdly and perhaps most important, in these circumstances it would have been and it still is hard for the government to justify a vastly increased expenditure on "treatment" of offender, on measures which were undoubtedly generally regarded as soft. Indeed, expenditure on controlling crime is not in competition with expenditure on social services where those who have offended, a clientele with no political power, consistently have the lowest priority. In political terms it is not so surprising that the repeated claim that intensive social work is far less expensive than imprisonment still falls largely upon deaf ears.

On the contrary, the probation service is one which promises to provide within the community a degree of supervision, control and social aid. It is one in line with the enlightened policy of rehabilitation and reformation of the offenders. The conditions attached to the probation order makes it one which is strategically placed to rehabilitate the offender and to socially adjust him while at liberty. His probability of being cut off his family and friends or loosing a job or minimising his chances of getting a job in future are minimised almost to zero. The probation service is one which can deal with a wide range of offenders as has been observed in Britain ³⁰ thus it should be put to test in Kenya.

Unfortunately, the probation service is faced with a host of problems almost completely crippling its service; it is one in great want of attention to alleviate some of its problems barring its staff from rendering services in the proper manner, foremost the probation service should be up graded to the noble service it is supposed to be. The personnel should be a highly qualified and most devoted social workers and psychiatrist able and willing to ^{deal} ~~clear~~ with a wide range of an often unwilling clientele of course for a good pay. Mobility ^{of the most important aspects of the Service} is one, therefore the government should avail cars to every probation post with which to make to the offenders. The probation officer needs to be aware of the details pertaining to the social environment in which the offender operates. The staff should not only be increased to meet the increased demand of the service, but also the probation offic~~s~~ should be spread out fairly in the country to cater for all areas.

The probation services is also strategically placed to undertake the needed after care supervision to those offenders who have been released from custodial treatment and make an appropriate feed back

to the prison administration. This is specifically true of those prisoners whose term of imprisonment ends before the prison administration is confident that the offender has completed his treatment or training plan successfully or those whose training plan has been accomplished successfully but their term of imprisonment is yet to be over. (this jurisdiction to release/^{on} condition for both cases should be provided by the reformed legislations). In these instances the nature and type of after-care supervision should be directed by the prison administration.

The other overwhelming advantage of the probation service is the low establishment cost especially when opposed to the prison. The probation office need not be more than a normal residential house in scale divided into small rooms to serve as the offices which room should be occupied by only one officer for privacy - there should also be a library, conference room and a psychiatry clinic. No hostel expenses are necessary neither is a large staff comparable to that of prison necessary. This makes the probation service, even in its expanded state, one which should be within means of a third world country like Kenya.

b) SUSPENDED SENTENCE:

This is a measure whereby if introduced, the court may suspend a prison sentence of preferably not more than two years for an operational period of say between one to two years. The prison sentence is thus not to be activated unless the offender commits another imprisonable offence within this operational period - if such an offence is committed then the suspended sentence should take effect unless the court thinks it would be unfair in view of all circumstances including the facts of the subsequent offence. 31

The suspended sentence is best to be understood by the recipient because the consequences of re-offending are known and certain and it is for this reason that its advocates thought it would be a more effective deterrent. Sir Leo Page and Sir Brian Leighton the strongest advocates of suspended sentence ³² argued that the suspended sentence should be seen as a form of mitigated imprisonment rather than a new form of non - custodial measure this was supported on the grounds that " it was an additional deterrence to imprisonment and not a replacement for it " ³³ The suspended sentence has on many occasions been compared with the efficacious image of the " Sword of Damocles". May be the strongest argument is that advanced by Page when he argued that in cases where it is used, its use " would allow courts to avoid sending an offender to prison and at the same time show a sense of gravity of his offence" ³⁴ by announcing an imprisonment.

The rather obvious advantage is that it is more humane and economical measure which can be invoked conveniently on first offenders who have committed a misdemeanour. As Sir Leighton in his memorandum of Royal commission on the penal system submitted;

" As some 80% of first offenders never return to prison the suspended sentence must be equally effective as a deterrent with little cost to the state in majority of cases " ³⁵

Lastly, to avoid confusion of the sentences, it should be realised that the suspended sentence is not to be used as an alternative to other non-custodial measures but only to imprisonment. The words of the court of Appeal in the case of O'KEEFE ³⁶ should be taken as an authority. The court emphasised that before arriving at a suspended sentence:

" The court must go through the process of eliminating other possible courses such as absolute discharge, conditional discharge probation order, fines and then say to itself; this is a case for imprisonment, and the final question, it being a case for imprisonment is immediate imprisonment required or can I give a suspended sentence?" ³⁶

c) COMMUNITY SERVICE ORDERS:

Accomunity service order should entail, with the consent of the offender, rendering of non-payable service to the community during the offender's free hours. This order would be most appropriate to young offenders between the ages of 16 years and 21 years who are convicted of an offence punishable with imprisonment, The order should give the details as to hours or days of service spread out within a given longer period say 46 hours of community service within one month. A probation officer supervises the order - the task may vary considerably but it should be of a practical nature, depending on the offenders age, physical abilities, occupation and/or skills.

A break of the order may result to the offender re-appearing before the court during which time the court may either order for continual of the order, re-sentence or fine the offender.

The community order has two major merits namely that it gives an opportunity for constructive activity in the form of personal service to the community - this may also be viewed as a reparation to the community, secondly there is a high probability of a charged out look on the part of the offender.

FINE AND COMPENSATION ORDERS:

The process of reformation may sometimes be effected through a completely different angle from the foregoing. Usually a great number of offenders are conscious that they have been acting wrongly, this guilty consciousness may arouse a "serve me right" feeling which demand nothing more but a recognition of the agent that his act must not be repeated - This is usually effectively done by the trial process by an independent and impartial body. Such a body e.g. the court, makes the guilty consciousness prodorminant by calling attention to the badness of the ^{act and} ~~act~~ by the same words condemn the offender. 38

This carthic process whereby the offender is brought to see his moral errors may quite effectively reform when coupled with a fine or a compensation order.

A fine can be quite effective on misdeneanours whose sentence is not fixed by the law. It can be practical specifically on traffic offenders and indeed, in all strict liability offences. A fine should generally not be coupled with imprisonment but in default it should be coupled with community service order. A wealthy person should not be allowed to avoid a custodial sentence merely because he has means to pay a heavy fine. The merits of a fine are rather obvious and acceptable first is its utility as a considerable source of revenue which can be used in support of the penal institutions. Secondly, it is flexible and seem to combine elements of both reperation and deterrence.

Compensation orders entails reperation to the victim of criminal activities. This has the advantage of incorporating the victim instead of making the litigation far one sided activity.

It is appropriate for personal injuries, loss of property or damage to the same as a result of the offence. The compensation order would therefore allow the victim a simple and effective means of obtaining compensation from the offender without resorting to the expensive and time consuming civil of litigation. These two measures namely fining and compensation of victims can be put into use for the very purpose of arousing the predominance of guilty consciousness without efforts to arouse the deterrent value in them to the offender through a good worded judgment by the court.

The list of possible non-custodial measures should never be considered as exhaustive but provided the new alternative proves more efficient and promises better results it warrant experimentation.

V) INTO THE FUTURE:

" But one thing is certain; that although many difficulties are due to lack of knowledge about how to help offenders many more would be removed at practical level if there were facilities for doing what we know could be done" 39.

FOOTNOTE - PART TWO (2)

1. Nigel Walker "crime and punishment in Britain;"
Edinburg university press, 1968.
2. Criminal Justice Act, 1948 (English)
3. Supra S.21 (2).
4. Advisory Council's Report, 1963 para. 66 as quoted by Rose G.
"The struggle for penal Reform", 1961
5. Rupert cross, " punishment, prison and the public" stevens and
sons, London, 1971. at p.45.
6. Supra at page 144
7. The prison Act cap. 64 S. 3 (c).
8. F.H. McIntock and A.E. Bottom " Criminals coming of Age - A
study of institutional adaptation in
the Treatment of Adolescent offenders"
Heinemann, London, 1973 at p.266.
9. T.M. Mushanga " Crime and Deviance." Nairobi, E.A.L. B.
1976, p 178 - 9
10. Geoffrey Hynshull, "English prisons" 1893 as quoted by jerome
H. Skolmick, "justice without trial, New York,
1966, p.240.
11. Alexander Matterson "patterson on prisons," as cited by Rupert
cross, ibid at p 30 - 1
12. Rosendo R. Abreo " Historical Review of the Kenyan prison service
1911 - 1970," Nairobi, (Kenya prisons
Headquaters Library), 1970
13. The prisons Act, cap 90, Ss., 58 (1) and (2)
14. Supra Ss., 57 9(1) and (2).
15. Annual Report on Administration of prisons 1970, Nairobi,
Government printers, at p.23.

16. a) Annual Report on Treatment of offenders (Government of Kenya Ministry of Home Affairs) 1970.
- b) Annual Report on prisons Administrations, 1986 Nairobi Government printer, at p.26.
17. Annual Report on Administration of prisons in Kenya, Government Printer, 1971 at p.9
18. United Nation on Social Defence in Uganda pp 72 - 73.
19. Annual Report on Prison Administration, 1978 p.12
20. Daily Nation 18th November 1986 p.4
21. Chapter 90 of the laws of Kenya.
22. Supra.
23. Prison Regulations Rule 40 (i).
24. Donald Clemmer "The prison community," New York, Reinhart, 1958 at p.322
25. See: Infra Part One "Theories of crime Causation"
Sub-topic: Crime as a normal learned Behaviour.
26. See: James F. Short et al "Group process and Gang Delinquency." Chicago, The University of Chicago press, 1965
pp 248 - 264.
27. Carl Werthman "Crime and Delinquency"
Essay: The function of social Definition and
Self - definitions in the Development of Delinquent
Careers. Edited by Barsani C.A Toronto, Collier-
Macmillan Ltd, 1970 pp 326 - 342.
28. Frank Tannen baum "Crime And the Community," Boston, Ginn and
Co., 1939.

29. Frank Tannenbaum Supra at p.71.
30. Donal Clemmer et: al. Supra P. 299.
31. Probation of Offenders Act, Cap 64 of the laws of Kenya.
32. The Bartley Committee's Report: Committee to Consider
suitability of Establishing The Institution of
Probation in Kenya, at P.10.
33. Supra
34. Huxby D., "Probation A changing Service 1978 P. 14.

FOOTNOTE PART 111

1. Roger Hood et. as. "Crime Criminology and public policy," London, Heinemann ltd 1st Ed. 1974 - Essay.
" utility and social values in court Decision or punishment", by nils Christie at p. 281.
2. See; Rupert cross " punishment, prison and the public," London, stevens 1971.
3. Supra. p.43
4. Supra p. 43 - 4
5. Supra. p. 45
6. Peter Rigby "Punishment: An African view?" N. P. 1971, mimeographed.
7. Supra at p.8
8. A.M. Kirk Patrick and L.T. Mc. Grath, "Crime and you"
9. 1970, E.A. 590 (k), at p.592
10. 1964, E.A; at p.345
11. Cap. 63 of the laws of Kenya.
12. Alexander patterson "patterson on prisons" As quoted by Rupert cross
Supra at p.33
13. Sir Edmund Du Cane's Article published by "fortnightly Review, as quoted by Rupert cross, Supra, p.1
14. D.L. Howard "The English Prisons," London methuen and company Ltd, 1960 p.149
15. S. 3 (c) of cap. 90
16. Sir James Fitz James stephen "History of Criminal law" 1883 as quoted by Klare H.J. "changing concepts of crime and its treatment," pergamon press, (scotland) Ltd, 1st ed. 1966 p.10
17. Klare H.J. Supra pp 120 - 40
18. Vold G.B. " Theoretical Criminology," New York, Oxford University Press 1958 Chapter 15.
19. D.L. Howard Supra at p.129
20. Ibid

21. Ibid
22. Howard Supra at p.130
23. See: Mc Clintock and Bottoms, " Criminals Coming of Age'Heinemann Ltd, London, 1st ed. 1973, Part 1.
24. Rupert cross Supra pp. 145 - 156 Ltd, London, 1st ed. 1973 Part 1.
25. See: Herman Mannheim. " The Dilemma of penal Reform." London, George Allen & Unwin Ltd, 1939, parts 11 & 111
26. See: Rupert cross Supra pp. 78 - 80
27. See: McClintock and bottoms Supra.
28. Supra
29. Cap. 64 of laws of Kenya.
30. Rupert cross Supra p.30
31. See: Roger Hood "Crime criminology and public policy" Londong Heinemann, 1974 pp. 375 - 418.
32. Roger Hood Supra at p.391.
33. Ibid
34. Ibid
35. Roger Hood - Supra Essay on p. 392
36. 1 All ER. 426
37. Supra at p.428
38. See A.C. Ewing " The morality of punishment" (1929).
39. H.J. Klare Supra at p.96