THE PROBATION SERVICE
A STUDY OF ITS USEFULNESS AND EFFECTIVENESS IN THE ADMINISTRATION OF CRIMINAL JUSTICE.

Dissertation submitted in Partial fulfilment of the requirements for the LL.B. Degree - University of Nairobi.

By

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DEDICATION

To the family

Whose belt-tightening

And endurance

Saw me come

See and conquer!

To my late Father

Whose abrupt

And sad departure

Still Pains

For Him

We strive to make

His Dreams come true.

ACKNOWLEDGEMENTS.

I would like to thank my Supervisor Dr. Shaman Lal whose help and guidance made this work possible. And also to friends and colleagues whose discussions helped in understanding the subject better.

STATUTES

Probation of Offenders Act Cap.64.

The Children and Young Persons Act Cap.144.

The Penal Code Cap.63.

The Constitution.

CONTENTS

ABSTRACT

The treatment of Offenders in society has never been uniform in all the stages in history. It has developed from the harsh and revengeful to the humane and reformative.

In ancient Babylon, for example, the Code of Hammurabi held sway. The punishments were severe and often cruel. Death was frequently inflicted, mutilations were even more usual, lextalionis (the rule of tit for tat) was still in force and even the corpse of the Offender was desecrated. In early times in England mutilations were common and William the Conqueror preferred them to capital punishment. In the days of Henry VIII poisoners were boiled alive. Even in France, then the most civilized part of Europe, at so late a date as 1762 Jean Calas was broken alive on a wheel and then burned to death!

In those early times a person could be hanged on flimsy grounds and the circumstances in which he committed the offence never came into play. A writer of the sixteenth century H. Fielding gave, in his book Amelia, of instances when offenders were committed to jail on such grounds as their appearance, their tribe, class etc. A lay magistrate told an accused: 'Sirrah your tongue betrays your guilt. You are an Irishman and that is always sufficient evidence for me'

Today however the emphasis has shifted from retribution to reformation and from punishment to rehabilitation. Modern penal law has moved from a position of looking at the criminal himself to looking at the crime he (criminal) has committed. Enrico Ferri in his book "Criminal Saturation" says that the individual is a product of his environment. Anithus the modern trend to try and find out what is in the society that could have contributed to the criminality of the individual is a 'pedagogical example' to be bandied about for the benefit of the wider public.

The main aim of any penal system is to prevent or at least reduce crime. The system has to be applied in such a way that offenders are 'treated' or 'cured' of their tendencies to commit crimes again and thence become law-abiding. Probation is one of these methods of treatment and has been hailed as the best alternative to prison. Probation seeks to train and educate the offenders in freedom and in society.

This dissertation is comprised of three chapters. Chapter I surveys in a brief way the various theories of punishment.

Chapter II deals with the history of probation in the Western World. I shall also survey its introduction and subsequent development in Kenya.

Chapter III will deal with how the probation service is organized in Kenya, how it functions and its effectiveness in the criminal justice process. Lastly there will be a conclusion and recommendations.

CHAPTER ONE

APPROACH TO CRIME AND CRIMINALS

THE PUNITIVE APPROACH:

Reactions to crime has been different at various stages of human civilizations[1]. Thus the attitude of a society towards crime and criminals at a given time in history represents the basic values of that society at that historical juncture.

Hence punishment has developed from the infliction of pain in revenge (in primitive society) to the use of science to rehabilitate. Retribution, Deterrence and Rehabilitation are traditionally the aims of punishment. All three involve suffering and deprivation, but these are primary in retribution and deterrence; the primary emphasis of rehabilitation being treatment. For retributive and deterrent purpose the nature of the crime determines the type of punishment to be meted out, whilst the personality of the offender determines the type of treatment an offender will undergo to be rehabilitated.

There is however no unanimous consensus as to any of the goals of punishment. Each goal has been praised and criticized in the development of penal history. In the following pages I shall examine each of the aims individually and theories underlying each one of them.

RETRIBUTION

The instinctive reaction to a criminal act is retaliation by the injured person (lextalionis). This vengeance, expressing hostility to the criminal and his conduct was both immediate and savage. The victim demanded punishment in kind and his 'inner peace' was not restored until the wrongdoer has been made to suffer. Emile' Durkheim viewed crime as that which violated the 'Collective Conscience' of the soci ty which in this case means the values held in common by the members of a society.

Sir James Stephen, that great Victorian Lawyer said that the:[2]

> '—— punishment of common crimes —— may be justified on the principles of self-protection and apart from any question as to the moral character. It is however not difficult to show that these acts have in fact been forbidden and subject to punishment not only because they are dangerous to society and so ought to be prevented, but also for the sake of gratifying the feeling of hatred - call it revenge, resentment or what you will - which the contemplation of such conduct excites in healthily constituted minds.

> --- criminal law is an emphatic assertion of the principle that the feeling of hatred and the desire of vengeance --- are important elements of human nature which ought in such cases to be satisfied in a regular public and legal manner.'

Thus punishment was not inflicted for the good of the criminal but was inflicted as an end in itself. An eighteenth century philosopher, Emmanuel Kant observed that:[3]

> 'Judicial punishment can never be used merely as a means to promote some other good for the criminal himself --- but instead it must in all cases be imposed on him only on the ground that he has committed a crime, for human being can never be manipulated merely as a means to the purposes of someone elae and can never be confused with the objects of the law of things.'

The criminal is treated as an end in itself because retributive theory seeks to restore the social equilibrium which has been disturbed. Aristotle[4] says that the Law looks only to the difference created by the injury and treats mean as previously equal, where the one does and the other suffers injury---

And so this unjust, being unequal the judge endeavours to reduce to equality again because when one party has been Wounded and the other has struck him------ the suffering and the doing are divided into equal shares; well the judges tries to restore equality by penalty and thereby taking the gain.

The retributive theory has not escaped criticism. It is not fit for modern society. The idea of revenge as atonement for the guilt of the offender has been described as asking the penal system to do the work of the church; saving lost souls for the hereafter. Blackstone asserts that atonement and expiration are the province of the Supreme Being not the Law.

Another snag is the difficulty of measuring the revulsion of society towards the criminal. How does a court decide on this basis the punishment that is most befitting the particular offence. The scales so used are in most cases fortuitous.

UTILITARIAN THEORY

This approach views punishment, not as an end in itself, but as a means to achieving certain specified objectives with the aid of criminal law.

Deterrence:

Punishment is used in this instance to prevent the offender from committing the same offence (specific deterrence) and also to demonstrate to other offenders the consequences of committing such crimes (general deterrence). The deterrence theory was first advocated by Plato who said that:[5]

> 'No one punishes a wrongdoer on account of his wrongdoing unless one takes unreasoning vengeance like a wild beast. But he who undertakes to punish does not avenge himself for the past offence since he cannot make what was done as though it never came to pass; he looks to the future and aims preventing that particular person and others who see him punished from doing wrong again.'

Punishment was aimed at tipping the balance towards the desired conduct. Thus despite widespread skepticism as to its efficacy, deterrence has many followers and especially in the Judiciary.

The apocryphal statement of an eighteenth century judge to the effect that 'You are to be hanged not because you have stolen a sheep but in order that others may not steal sheep in future; will take a lot of displacing.

The criminal law has not only to deter but also maintain values of a society. Thus the moral condemnation of the community which most people wish to avoid and the respect for the legal ideology and its administration may determine the effectiveness of deterrence. Hence Sir James Stephen[6] said that if in all cases criminal law were regarded only as a direct appeal to the fears of persons likely to commit crimes it would be deprived of a large part of its efficacy; for it operates <u>not only on the fears of the criminals but upon the habitual sentiments of those who are not criminals.</u> A great part of the general detestion of crime which apply prevails among the decent part of the community in all civilized countries arises from the fact that the commission of offences is associated in all such communities with the solemn and deliberate infliction of punishment whenever crime is proved.

One snag however is the use of deterrence as an advertisement to effect fear in the potential criminal. This objective can be served by punishing the innocent as well as the guilty.

It is therefore questionable whether an individual should be punished in excess of 'just deserts' for the benefit of a wider public. There is a limit to which an individual can be used to benefit others.

THERAPEUTIC APPROACH

REHABILITATION

Tsonga Proverb: Musasi Wa Nxandzu i Kuriha (The Redemption of Crime is Restitution).

I quote in full the opinion of Sir Winston Churchill[7] which he made while he was Home Secretary regarding Crime, Criminals and the place of rehabilitation in society:

> The mood and temper of the public in regard to the treatment of Crime and Criminals is one of the unfailing tests of any country. A calm, dispassionate recognition of the rights of the accused, and even of the Convicted Criminal against the state - a constant heart-searching by all charged with the duty of punishment - a desire and eagerness to rehabilitate ---- those who have paid their due in the hard coinage of punishment: tireless efforts to the discovery of curative and regenerative process: unfailing faith that there is a treasure if you can only find it, in the heart of every man.

> These are then the symbols which, in the treatment of Crime and Criminals mark and measure the stored up strength of a nation and are a sign and proof of the living virtue within it.

Rehabilitation recognizes the worth and dignity of each individual person. One approach to rehabilitation believes that the individual can be rehabilitated best in a prison enviroment. Here the aspects emphasized are the training of in-mates to acquire skills which can be of use to them when they leave prison. Where the Criminal suffers from psychological disorders, psychiatrists will be employed to diagonise how best he should be rehabilitated.

The other approach to rehabilitation is that it is best done in the community. The society is best protected by not incapacitating the offender but by releasing him into society. And the society should expend its time and energy in rehabilitating the offender. The Criminal is not an appendage to satiate the feelings of society but a whole person whose criminality is not of his own making. The society is the breeding ground for crime and the Criminal only commits them. Mahatma Gandhi said that had he '... been the King' he 'would have sent all the patients to jail and Criminals to the hospital.'

The movement for reformation began as a protest against the physical conditions in prison and also the moral, spiritual degeneration which took place in these prisons. And one of the humane method of treatment which has emerged has been probation. It is the best and the only alternative to prison.

Footnotes

1. (1968) 58 J. Crim. Law, Criminology and Police Science. 595.

   Punishment has historically been defined as an infliction of evil, pain or deprivation of good. Jerome Hall has defined it thus:

   - A privation (evil, pain, disvalue)
   - It is coercive
   - It is inflicted in the name of the state
   - It presupposes rules, their violation and more or less formal determination of that expressed in a judgement.
   - It is inflicted upon an offender who has committed a harm and this presupposes a set of values by reference to which both the harm and punishment are ethically significant.
   - The extent or type of punishment is in some way related to the commission of the harm and aggravated or mitigated by reference to the personality of the offender, his motive or temptation.

2. Liberty, Equality and Fraternity (1874) pages 161-162.
3. The metaphysical elements of Justice page 100.
4. Ethics Book V 112 (E.P.Dutton & Co. edition 1950).
5. Ibid.
6. History of Criminal Law Vol.II 79.
7. Parliamentary Debates, House of Commons 1910 XIX Col 1354. (Found in Dickens and Crime P.23).

CHAPTER TWO

HISTORY OF PROBATION

The Probation System has been developed during the middle of the last century due to the harsh and cruel punitive reaction of the common law. Courts therefore found ways of mitigating the severity of their sentences by recognizance; the binding over of persons on their own undertaking, whether or not strengthened by Sureties to be of good behaviour till he is called back to the court for trial or sentencing. (The practice was applied during medieval times as a preventive measure for those who seemed likely to breach the peace). In the nineteenth century in England and New England (U.S.A.) recognizance was used for the young and petty offenders both before trial and as a conditional disposition upon conviction.

Individual attempts were made by Judges to make the punishment fit the Criminal as well as the Crime. The Magistrates of Warwickshire Quarter Sessions in the 1820s were passing sentences of one day's imprisonment on young offenders and restoring them to their parents or employers for closer supervision. The Recorder of Brimingham went a step further; the police were used to check the future behaviour of young offenders he had handed to the care of guardians. In Portsmouth a special inquiry officer supervised people the court released on their own recognizance.

A Counsel at Warwickshire describing the practice of conditional release of young offenders thus:

> Magistrates were in the habits of sending boys and girls after conviction when they had reasons to believe that they were not hardened prisoners back to their masters or parents. So I adopted a similar practice with an additional: that the names of the guardians or parents to be entered into a book and the guardian or parent signed it as an obligation that he would do his best. I also caused the police to make inquiry from time to time (at no certain interviews in order that their time might be unexpected by the boy and his master) as to his treatment and conduct.

Bail was originally used to ensure the return of the defendant to trial or provisional suspension of sentence. Today bail is used more often for the former purpose than for the latter. In early times however those who provided bail exercised some form of supervision of the bailed person. The provisional release is a rudimentary forerunner of probation.

Filing of cases was common in the nineteenth century. After conviction in a criminal case the court suspended disposition of the case if there were extenuating factors or if a decision on a similar case was awaited from a higher Court.

When a Judge 'filed' the case with the consent of the defence and the prosecution he set down certain conditions. Thus no action was taken, unless there was a motion on the part of the prosecution or defence. Such a motion might result in imprisonment if the defendant did not comport himself properly or if the case be on file indefinitely the individual become a free man.

However the earliest recorded use of probation in its modern sense was in 1830 in America. A woman pleaded guilty to stealing from a house. Her friends made an application asking the court to let her free on her recognizance to appear when called upon by the court. The first Probation Officer was a Spectator Cobbler John Augustus. In 1841 he begged the court in Boston not to send an offender to jail for failure to pay a fine. The offender had been accused of being a drunkard. The court agreed to his request and fixed a date for the offender to reappear. In the meantime Augustus helped him to find employment and persuaded him to keep the pledge and by the time the Probation was over the offender was rehabilitated.

Probation spread to other states, from the United States it spread Australia and New Zealand in 1886 and in England in 1907.

In Britain it is claimed that some use of voluntary supervision in suspended sentence cases occured well before the work of John Augustus. However the first British Law on conditional supervision of sentence was enacted in 1887. The modern form of British probation providing state assistance and supervision was not established by Law until 1907 by the Probation of Offenders Act. This Act formed the basis for the development of the probation system and for the wide discretion which the courts exercise in its application. The court was to take into account the Offenders age, the offence committed and his character. No absolute restrictions were placed on the use of probation. Probation was also available to any offender.

INTRODUCTION OF THE PROBATION SERVICE IN KENYA

In Colonial Kenya, the main forms of punishment were Corporal, Penal Diet, Solitary Confinement, Loss of Remission, Leg Irons, etc. For a first offender he/she could, under the Prison (Amendment) ordinance 1918, be released on licence on completion of two thirds of a sentence of not less than three years[1] (see table).

FIRST OFFENDERS ON LICENCE (1926 - 1935)

Year	1926	1927	1928	1930	1931	1931	1932	1933	1934	1935
RELEASED	62	40	59	84	53	81	67	80	129	126
BREACHES	2	3	2	2	1	-	3	-	6	6

The number of first offenders released on licence was very small when compared to the overall number of convictions made. Breaches were also few and in 1931 and 1933 there were none. But it could be said that the release on licence (a form of parole) was only available to those though, first offenders had been given heavy sentences. This meant that those minor offenders who had less than three years teemed in colonial prisons. (see Table). Next page

PRISON ANNUAL REPORTS 1926-1935

YEAR	CONVICTIONS	RECIDIVISTS			AS A PERCENTAGE OF COMMITAL	SENTENCES			
		ONCE	TWICE	THRICE OR MORE		OVER FIVE	ONE TO FIVE	THREE MONTHS TO ONE YEAR	LESS THREE MONTHS
1926	7545	439	139	148	9.5	76	606	1306	5557
1927	8117	472	169	213	11	70	652	1595	5800
1928	5975	353	112	202	11.2	97	605	1433	3840
1929	6385	463	159	258	13.0	86	549	1202	4548
1930	6762	617	182	287	16.0	63	597	1364	4788
1931	6752	603	227	356	17.5	96	581	1574	4505
1932	7054	712	305	411	20.2	108	739	1531	4676
1933	7292	808	346	163	22.1	89	789	1655	4764
1934	8748	1084	407	647	24.4	117	598	2122	5911
1935	6325	872	372	643	29.8	43	512	1675	4095

Juvenile convicts increased from 200 in 1928 to 316 in 1931. The usual practice was to be sent to a reformatory, imprisoned, caned or sent home. In connection with Corporal punishment for juveniles, Mr. Alexander Paterson[2], Commissioner of prisons for England and Wales, in a report on prevention of crime in Burma observed that:

> ---- the use of Corporal punishment is the easiest and, therefore at times the laziest way of dealing with a case. It is quickly carried into effect and it costs nothing. In the case a young offender ---- the court is vitally concerned not merely with the crime itself but with causes which produced the conditions of which crime is a symptom. The infliction of pain may provide the offender with a useful association of ideas. He may carry with him for a time the wise reflexion that a certain act, if detected is apt to produce certain consequences. But this by itself will, as a rule, effect no permanent result, for the causes which led to that act may still be operative. To beat a lad and send him back to the same environment which caused the crime is too short sighted a form of punishment to deserve a cure. It is therefore well to accompany a sentence of Corporal punishment with a probation order or a committal to a school. Should this fail, the offender could, without having another specific offence, be sent away to a school for a more thorough training than can be given in the surroundings of his home.

Jails teemed with first offenders. In 1940 it was observed that 'owing to the overcrowded conditions (in prisons) it is quite impossible to enforce any real system of classification or segregation'. It was further stated that 'it is a matter for regret that none of the 8,220 first offenders who were sentenced to imprisonment during 1940, could benefit from probation which had not been introduced into the colony'.

The Bartley Committee was on 30.7.1941 to look into the advisability of introducing a probation service in Kenya. The Committee gave its report in 1943 and the Probation of Offenders ordinance (1943) was passed. Because of World War two it never came into effect until 9.4.1946 by proclamation number 14 of that year.

Such a service would solve the problem of lack of segregation in prisons since first offenders were put in the cell with hardened criminals. Alexander Paterson's report on prisons in East Africa puts it aptly:[3]

> There is no leper in the world so contagious as the hardened offender and the accustomed prisoner ---. Any newcomer to prison should be kept at a distance from him. Still more urgent is that the newcomer who is in no way a Criminal should never cross his path, and certainly not consort with him daily in the narrow confines of a common goal.

NUMBER OF PERSONS PUT ON PROBATION BETWEEN 1946-1948

Year	Cases inquired into		Dealt with	Placed on Probation	COMPLETIONS		Remaining on Probation
					Satisfactory	Unsatisfactory	
1946	Adult	72	43	29	3	8	18
	Juvenile	49	39	10	1	3	6
1947	Adult	269	175	94	-	1	93
	Juvenile	83	68	15	-	1	14
1948	Adult	526	342	184	45	6	133
	Juvenile	113	77	36	8	5	23

(The success rate in this period was 83%).

Probation was to apply to all races, to children, juveniles and adult offenders; whether first or recidivist and to all offences for which an offender could be sentenced to imprisonment or fine or both or detention in an approved school.

Probation expanded more rapidly during the emergency days in 1952-1960. Thus in 1952, 450 Mau Mau prisoners were released on probation and this was despite the trying moments of that time.

The department has since its inception in Ken . expanded and consequently more and more people are being placed on probation. In 1973 3400 males and females were placed under probation. By 1982 the department had 12,240 probationers under its care.

Footnotes:

1. Kenya Colony and Protectorate: Prison Annual Report 1926 para. 13.

2. Kenya Colony and Protectorate: Prison Annual Reports 1931 para 12.

3. Alexander Paterson: Prisons in East Africa Part III page 7 para. A.

"I am firmly convinced through my 30 year experience of Administration of Justice that more than 3000 County Jails and more than 2000 City Lockups cannot solve the problem of crime unless we understand the Criminal."

(Sheriff of Chicago)

CHAPTER THREE

PROBATION - A METHOD OF TREATMENT

> With ready made opinions one cannot judge crime. Its philosophy is a little more complicated than people think. It is acknowledged that neither convict prisons, nor the hulks, nor any system of hard labour ever cured a Criminal (emphasis mine).
>
> Fyodor Dostoyevsky (1821-1881)
> The House of the Dead Part I Chp.2
> (Prison Life in Siberia 1861-1862).

Probation is now a generally accepted and a highly valued method of dealing with offenders. The categories of offenders deemed suitable for probation ranges from those found guilty of minor offences to those who are guilty of what most people would regard as heinous.

Probation is a treatment reaction to crime and its end is to reform the Criminal and give him another chance to lead a honest life in society. Eligibility for probation goes to those who are reformable. Generally the first offenders and others whom the court think may benefit. There are however certain offences which in their nature are not probationable, for example sex crimes. In the case of professional Criminals, recidivists, pickpockets etc; it is entirely on the discretion of the court.

Furthermore, there are other offences which are not probationable not because of their nature but because probation would tend to impair the public respects for the law. These offences are treason, murder etc.

How is it then that just over eighty years this essentially simple and humane process has fired the imagination of many and become universally accepted? Is it because this method of dealing with offenders is believed to be and seem to be effective by Magistrates, Judges, Penal Administrators and the State? Or is it unthinkingly accepted as a cheap and a relatively painless alternative to other forms of punishment or treatment? My task in the subsequent pages will be to endeavour to answer these questions.

PROBATION SERVICE DEPARTMENT

Probation service is one of the four departments in the office of the Vice-President who is also Minister for Home Affairs. Nationally the Headquarters is in Nairobi and is run by a Principal Probation Officer.

The Probation Offices found in each Province (for North-Eastern until November 1986, were being served by Officers from Kitui and Malindi) are headed by a Senior Probation Officer who is in charge of the whole Province.

There is an office at District level and further Sub-Divisions to the lowest Sub-Stations. This decentralization it is hoped brings the service closer to the people by having it where they are. The long-term objective is to have a probation office where there is a court.

Outside the vertical structure there are two Committees, the National Committee and the Case Committee whose members shall consist of a Chairman who shall be the Chief Justice and the other members representing respectively:[1]

1. Ministry for the time being responsible for probation services;
2. Ministry for the time being responsible for labour matters;
3. Ministry for the time being responsible for social services;
4. Kenya Police Force;
5. The Community;
6. The Nairobi City Council;
7. The Christian Council of Kenya;
8. The Roman Catholic Church;
9. The Salvation Army;
10. The Nairobi Chamber of Commerce

and not more than seven other members appointed by the Minister.

DUTIES OF THE COMMITTEE

The duties of the Committee shall be:-

a) To make recommendations to the Minister concerning the allocation of the services of probation officers to various areas.

b) To receive and consider the recommendations of the Probation Case Committee of any area concerning the needs or working of the Probation Service, and to advise the Minister on all matters;

c) To make recommendations to the Minister relating to the duties of the Committee and of Probation Case Committee;

d) To advise the Minister on any question of policy and upon any other matter relating to the Probation Service as he may refer to it for advice.

FUNCTIONS OF THE SERVICE

Probation

S4 of the Probation of Offenders Act Cap.64 states that:

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

a) Convict the offender and make a probation order;
or

b) without proceeding to conviction make a probation order

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

2) Where any person is convicted of an offence by the High Court and the Court is of the opinion that having regard to the youth, character, entecedents, home surroundings, health or mental conditions of the offender or the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the Court may in lieu of sentencing him to any punishment, make a probatcn order and may require the offender to enter into a recognizance, with or without sureties, in such sum as the court may deem fit.

3) Before making a probation order under subsection (1) or (2) the court explain to the offender in ordinary language the effect of the order and that if he fails in any respect to comply there with or commits another offence, he will be liable to be sentenced for the original offence and the court shall not make a probation order unless the offender expresses his willingness to comply with the Provisions of the orde

4) Where any offender against whom a probation order has been made commits a subsequent offence or fails to comply with any of the terms of the probation order, any sum as sureties in the discretion of the court be forfeited.

5) A probation order shall have effect for such period of not less than six months and of not more than three years from the date of the order.

The Court having taken into regard the youth, antecedents, home surroundings will then pass sentence, since in Kenya a probation order is made before sentencing but after conviction. The probation officer must therefore give a report in regard to the above matters in lieu of sentence. The pre-sentence report (as it is called) is of import and: a) enables the court to understand the offender in his social enviroment; b) suggests possible causes of the offender's criminal behaviour c) recommend to the court whether or not probation would be appropriate bearing in mind the security needs of the community and the resources available for the rehabilitation of the given offender.

The report of the probation is crucial in the administration of criminal justice because ~~the~~ apart from the following; a) the charge and the facts and evidence surrounding the case; b) physical appearance and estimated age; c) manner of behaviour in court and d) the previous criminal record of the offender, the court knows nothing else about the offender.

It aims at changing the attitude of the court from one of utter condemnation or 'a matter of fact' to one not of sympathy but of clear appreciation of the issues involved in their entirity. The report is not to demonstrate the guilt or innocence. On the importance of a pre-sentence report a judge of the American Supreme Court once observed:[2]

> Probation Worker's reports have been given high value by conscientious judges who want to sentence persons on the best available information rather than on guess work and inadequate information.

A Sample of a Probation Report (1972)

Name : Mwangi

Age : 30 years

Charge : Robbery with violence.

Family Background:

Mwangi was born in Murang'a District around 1942, but his parents moved to Nairobi when he was only seven years old. The family settled in Majengo but later moved to old Kariokor which was demolished about 1962 as being unsuitable for human habitation. The family then moved to their present home in Bahati.

Mwangi's father Njora Njue is currently employed as a Cook at Lobster Pot Restaurant in Nairobi and earns Kshs.400/= per month. Apart from maintaining his whole family, he has managed to send all his seven children to school, none of them has done well. Mwangi himself went upto standard seven. He failed his K.A.P.E examination. During my interviews, it was interesting to note that though the parents readily paid school fees they did not know the names of the schools to which their children went. On the whole I got the impression that the parents are not committed to any high ideals and consequently the children have grown without any sense of direction and responsibility.

Personal Life:

Mwangi secured employment in 1964 as a casual labourer with the Post Office. A year later he was absorbed into full time employment earning Kshs.405/= per month as a Store Packer. He held this job until he was arrested.

In 1966 he married Wanjiru Mugo, but they separated three years later on the advice of the father. The wife went away with their two children whom he has never seen since then. Mwangi indicates that his present income is inadequate to maintain a family and has no intention of marrying until his earnings have increased. The reports from the employer and two reliable businessmen confirmed that Mwangi drinks excessively.

Associates:

Since 1966 Mwangi has been living in Mathare Valley. He disclosed that his friends are unemployed and are known to be of criminal behaviour. It appears that Mwangi prefers a carefree approach to life and shirks responsibility.

Circumstances of the offence:

On the evening of 11.7.72, Mwangi with three friends went to Eastleigh Section III where they drunk beer the whole night. The following morning at 5 a.m while leaving for Mathare Valley, they met the Milkseller Mr. Waithaka whom they decided to rob there and then. Mwangi who was too drunk, was not able to run that far when the members of the public descended upon him. He was beaten thoroughly before the Police came.

Recommendation:

Interviews with different people indicated that though Mwangi is a drunkard, he is known to have no criminal record. He is not criminally inclined yet and that commission of the present offence was a consequence of drinking the whole night. His associates too, who are described as criminals are exerting significant influence on him and sooner or later his behaviour might deteriorate. Post Office Management has indicated that it is not prepared to reinstate him, but not all the possible avenues for appeal have been exhausted. Despite this two problems, I am of the opinion that it would be possible to rehabilitate Mwangi on probation if he is ordered to reside at the probation hostel where his association and drinking habits would be under control while still at the hostel all possible attempts would be made to get him employment. In view of the foregoing, I would respectively recommend that Mwangi be placed on probation for three years, with an order to reside at the probation hostel for the first twelve months.

SUPERVISION OF PROBATIONERS

The offender cannot be released on probation unless he shows his willingness to comply with the provisions of the order. It will have been explained to him in ordinary language the effect of the order.

The order is revoked where the probationer breaches it where he fails to comply with of the terms of the order or he/she commits another offence.[3]

The duty of the probation officer[4] is to ensure that the probationer entrusted to him, understands the terms and conditions stipulated above. And endeavour by encouragement, persuasion and warning secure his observance of them.

The probation officer has to note the progress of the probationer and where there are hitches he should strive to solve them. Whenever the probationer makes a visit to the office or the probation officer goes to visit the probationer in his home, place of work, at school, etc; the officer must make a report of such a visit in his file. When a probationer fails to report, he has to go out of his way and find the cause. He does not need to issue a warrant of arrest anytime the probationer does not show up. If the probationer has absconded, then a warrant of arrest can be issued by the court.

It will therefore be evident that the misconception that probation is a 'let-off' or a 'mere second chance' or a standard form of leniency applicable to harmless offenders has no basis. Probation as a form of treatment is not a 'let-off' but a chance given to an offender to prove himself in free society and the probation officer makes sure that the probationer adheres to the terms and conditions of that order.

The officer in exercising his powers, strives to show that his interpretation springs from a concern for his client and not from a desire to wield arbitrary power. This is the authoritarian aspect of his power.

The guidance aspect of supervision does mean that the officer has to advise, assist and befriend. The basis of his work having remained to be these three elements show that when performed efficiently it leads to thorough rehabilitation of most probationers. The probation officer has to recognize that 'there is an unquenched spark of the divine fire in the worst villain --- and that, 'no human be ing is inmately wicked or in capable of improvement.' By constant efforts the officer can make, by constant effort, that 'spark' to glow.

Completions.

A satisfactory completion shows that the probationer reported well and completed the probation period being a free man. Unsatisfactory means that the order was discharged for breach. Probationers who abscond are those who cannot be traced and the probation period expires before the probationer has been traced. The latter two completions make the failure rate of probation.

The success rate for probation is above 70% whilst that of prisons is between 40-50% and the rate of recidivism is high. The recidivist rate for probation has not since its inception in this country been empirically verified.

PROBATION AND JUDICIAL ATTITUDE

The judicial attitude can be appreciated with reference to some decided cases by the Kenyan Courts.

In the case of Chengo Mwambengo[6] the accused was charged with rape. The probation report declared him a very uncooperative person, with a bad reputation. He was sentenced to three years in jail, five strokes of the cane and hard labour. The court held that the crime does not merit mercy. The accused appealed.

On appeal Mwambengo pleaded that he was a first offender. Counsel argued that he deserved to be put on probation being a first offender.

The High Court upheld the conviction of the lower. It said that in rape cases the protection of the public is paramount and the best way to do it is by locking him behind bars. The mere fact that he was a first offender was not enough.

M.R.V Hasham[7], the respondent was convicted on his own plea of breaking into a bank with intent to rob. The offence was committed with an older man but nothing was stolen. The respondent, at the time of the robbery, was 18 years, came of good family and was a first offender.

The Magistrate in the Lower Court put the respondent on probation for twelve months, while on probation he took up employment and was contiming with his studies.

The Republic applied for the sentence to be enhanced contending that the offence was serious and that sentence should be increased to serve as deterrence. The Court held that the fact that an offence is serious does not outweigh the circumstances of the individual offender. Biron J:[8]

> —— the offence is serious, yes. That however is a general proposition and cannot be used simply as an umbrella to cover all offences of such nature irrespective of the particular circumstances of each individual offence and offender. (emphasis mine).

On punishment the judge added:[9]

> One of the main objects of punishment is the reformation of the individual convicted, in order to make him a good citizen.

--- association with hardened criminals by a youth in the circumstances of this case is hardly calculated to ensure that the accused comes out of prison a good and honest citizen. Naturally it is incumbent on the courts to discourage crime and punish criminals not just for the sake of punishment, but in order to deter others and --- to reform the particular culprit. --- if in such cases, the probation service is not utilized --- it is a waste of public money to have the service at all.

At a seminar on Planning Services for Offenders in the Community[10] held in November 1986 at K.I.A, Justice Emmanuel Okubasu of the Kenya High Court observed that amongst the other methods of treating offenders in the Community, probation was the most effective. He however lamented that probation officers were idle because there was no work to do. He said that it must be considered 'seriously how to utilize our probation services in the treatment of offenders and here we are talking of all types of offenders.'

In Republic V Elijah Munene Ndundu[11] the two respondents were house servants and on or about 9.10.1977 they had stolen their employer's property.

The Magistrate noted that the offence was serious but due to strong mitigating circumstances, each was placed on probation for two years.

It was argued for the republic that in the circumstances probation was inappropriate and the two accused had shown no remorse whatsoever. If a Court is weakly merciful and worse so in a case like this where the offenders show no willingness to reform and neither are they remorseful, and does not impose a sentence commensurate with the seriousness of the crime, the High Court observed that a Court fails in its duty to see that the sentence is such as to operate as a powerful factor to prevent the commission of such offences.

In Republic V Njue[12] a Magistrate at Embu convicted an accused aged 17 years of arson. He ordered that he be placed on probation for two years and to receive seven strokes.

The Court of Appeal held that an order of probation is not any other punishment and accordingly an award of strokes may not be combined with an order for probation. It observed that S4 of the probation of offenders Act empowers subordinate courts to release an offender on probation that he may prove himself. It cannot be satisfactory that a person who is released to prove himself shall, first, or at any time, while the order is in force, receive Corporal punishment or any other punishment for that

The case of Mulwa Munyalo V. Republic[13] showed the procedure to be followed before sentencing a probationer for breach of an order. The Kenya Court of Appeal quashed the conviction of the appellant for housebreaking and theft because the proper procedure had not been complied with.

The procedure should be that when a probationer is brought to Court for breach of the order, the breach should be put to him in the very clearest possible way and asked whether he admits it or not. He should be told the grounds on which he has broken the terms of the probation order. If he has committed another offence, he should be told. If he admits the matters put to him, the Court should proceed to deal with him. If he denies those matters they must be proved. He should be asked if he wishes to give evidence (or make a statutory statement) and call any witnesses. It is then that the Court can proceed to pronounce whether the breach is proved or not.

In the case of Cosmas Ochieng[14] the Court of Appeal sitting at Kisumu placed him on three years' probation. The appellant was convicted of killing Walter Otieno on December 8, 1984. The Kisumu Resident Magistrate committed him to be tried for murder on November 28, 1985.

Mr. Justice Butler Sloss of the Kisumu High Court, then sentenced Cosmas Ochieng to three years' imprisonment for manslaughter.

The Court of Appeal sitting at Kisumu on 5.12.86 ordered that the sentence of three years be set aside. That Cosmas Ochieng be placed on probation for a period of three years because he was sixteen years old when he committed the offence and that he is also a first offender.

From a review of the cases it can be suggested that the factors which influence the judiciary to use or not to use probation are; a) the attitude of the Judges towards the concept of probation as being useful to the adult or young offender b) the use made by the Magistrates of the probation service for adding to their knowledge of the offender; c) the confidence which the Judges have in the abilities of the probation officers; d) what they consider to be in public interest.

Footnotes:

1. Subsidiary Legislation (Cap.64) S3.
2. Williams V People of the State of New York 337 U.S. 241 (1949).
3. Probation of Offenders Act S4 (2).
4. Ibid. Subsidiary Rules 3f.
5. High Court Criminal Appeal No.70/1980.
6. (1971) EALR 348 (T).
7. Ibid at 349 para G-H.
8. Infra: at 350 para F-F.
9. Daily Nation Nov.26, 1986 page 3.
10. (1978) KLR 163.
11. (1967) EA 479.
12. (1978) KLR 14.
13. Daily Nation Dec. 24, 1986 page 5.

CONCLUSION

In his address to the annual meeting of the American Law Institute, the Chief Justice of the United States emphasizing the importance of Probation in the reformation and rehabilitation of criminals said:-

> ---- Probation protects both individual and the society. If a person has been in jail, he is considered by the rest of society as a social misfit. But by having the offender in society he will realize that crime will not pay and people will not take his character seriously. By keeping offenders out of jail, something is achieved. People hear of tales on how terrible life in jail is. By awarding Probation we justify the doctrine of 'fear of the unknown.'

Hence Probation gives the offender a chance to re-examine himself. In jail the prisoner gets stigmatized as a jail bird, he suffers mental torture, economic loss and loses the support of friends and family. Probation makes it possible for the offender to remain on his job, attend school, college or University and be with the family.

Furthermore, Probation is relatively cheaper to run. A lot of money is being spent on jail buildings, food, prison staff etc.

The objectives of any penal or treatment programme is to rehabilitate the offender and protect the society. Probation fulfils this criteria. And the advantages of probation over all forms of punishment are threefold; financial, humanitarian and social. The Report on crime and Deliquency (1965) states at page one:

> From the economic point of view alone treatment at liberty represents a considerable gain. From the point of view of social adaptation it is immeasurably superior to correction in penal institution and from the humanitarian point of view it represents a considerable advance on the moralist and expiatory tradition on which penal methods have hitherto been based, the social implications of which are difficult to over-estimate. A Probation order is a preventive measure of the same order as placing a case of infectious disease under guarantee, thus, it prevents mixing first offenders and those who can still be claimed by this treatment from incorrigibles.

Chapter one dealt with the approach as to crime at different junctures in history. In classical times, punishment was punitive than reformatory whilst at the present reformation has held sway.

Chapter Two dealt with the historical developments of probation in England, U.S.A and later Kenya.

Chapter Three dealt with the functions of the probation service in the field and also how it is organized. The Judicial attitude towards the probation was examined with the help of decided cases.

CONSTRAINTS.

Probation Service is beset with transportation problems. There are no enough vehicles at all their stations and probation officers are hampered in their supervisory work which involves on the whole, visiting the probation at his home, his place of work, at school, etc. Even during his research for pre-sentence report this can be delayed because of transport. Besides having enough vehicles, there is the problem of the roads being a hindrance.

Shortage of Staff: Probation Service now covers the whole country but still this decentralization has not meant that it is closer to the people and able to service them better. There is a shortage of staff at all levels. The majority of whom joined the profession after leaving other jobs, form four school leavers form six school levels and a smattering of graduates. The training capacity at K.I.A is only twenty five and the course takes two years.

Too short a period to master a course that is so vital to the course of Criminal Justice.

A shortage of staff invariably leads to a heavy case-load. In Kenya the case-load is above 60 whilst internationally it is between 40-50. This leads to probation officers having little time to meet their clients, discover more of the community services that may be available and useful to the probation.

CASEWORK ON AVERAGE - 1981

PROVINCE	NUMBER OF COURT INQUIRIES	PROBATIONERS	AVERAGE INQUIRIES	AVERAGE CASELOADS
RIFT VALLEY	1775	1787	53	73
CENTRAL	1394	1243	52	73
NYANZA	993	979	52	85
EASTERN	971	923	52	77
WESTERN	907	919	42	67
COAST	854	842	50	77
NAIROBI	1288	705	99	88
	8182	7398	54	74

Communication barrier especially since the officers normally deal with illiterate Kenyans who either do not know English or Kiswahili or have a smattering knowledge or those who speak no other language except as their mother-tongue. Unless the officer is of the same ethnic group his work is hampered.

The department does not have an after-care service for for probationers who complete successfully. After-care is available on a small scale to juveniles and special cases like psychiatric sufferers. During my interview with one of the probation officers, he told me that lack of after-care makes it difficult for them to know the recidivist rate of probationers.

There is little awareness on the part of the public and many professionals of the importance of increasing probation activities. Making the public aware of its advantages will enhance its success since the probationer who is released lives in the community who should make it possible for him to rehabilitate not see him as an outcast.

SUGGESTIONS

The Criminal Justice System involving a probation scheme is structurally dependant on the enforcement agencies; that is the police, magistrates, prosecutors and prison wardens. This is the chain of institutional officers that an offender must pass through. A radical departure from the conventional intra-penal and intra-mural treatment of offenders demands for an overhaul in the structure of these enforcement agents.

The Court System which depends on police investigation for gathering its information is not without its difficulty in informing itself of the totality of circumstances surrounding what is referred to as Criminal Offenders. Probation Officers only apply to courts to consider the alternative treatment of offenders only after an offender has gone through the traumatic system of remand and custody. It is urged that the circumstances which the probation service is normally called upon to lay before a court its report on a criminal should be furnished immediately after apprehension of the offender for a suspected offence. The advantage of such a method emerges when frivolous prosecutions are avoided. Such a report will help the prosecution decide whether the offender should be prosecuted through the court system or be served into the probation scheme before he undergoes the trauma of remand.

The prosecution of offenders should be withdrawn completely from the police department. A paralegal person with training in sociological trends should replace the regular police prosecutors.

It is a common complaint that Magistrates disregard the recommendations made by probation officers. Magistrates have a statutory discretion in regard to such recommendations. Such a report more often than not is abused and reports which have entailed painstaking work are thrown overboard. If this benevolent purpose is defeated by discretion that is now void of functional utility, it is only correct that the discretion be scrapped from the statute.

In regard to pre-sentence reports, it is suggested that they be made mandatory. This, though it may not necessarily lead to being put on probation, it will enhance the decision reached by the court and minimize post-conviction errors.

Traditionally disputes among African Communities were settled by a Council or a tribunal of elders who adjudicated cases, taking into account the social and economic background of both the offender and the victim before awarding appropriate sentences. But this has been relegated in favour of the present penal policy in modern statutes. This method was an effective preventive and deterrent method and that apart from being less costly, it allowed the community to participate actively in penal matters. Today the same institution could be revived and revitalized.

The community can solve petty crimes and civil cases. This will immensely relieve the already over-loaded criminal justice system so that it can pay more attention to more serious criminal cases.

Prisons should not be seen as the ultimate in protecting society. Prisons are expensive and they are also centres of misery, suffering, bitterness, of agony, of despair and of desparation. 95% of the men and women in prison should not be there at all. There are also very dangerous men in prison, for whom the prison is the proper place, but you have many more who committed crimes just because there was no alternative and these are men and women, just like most of us, no better and no worse.

Thus other alternative methods should be employed more often. Thus such non-custodial measures like fines, discharge (conditional and unconditional) extra-mural penal employment and probation should be pursued more vehemently.

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