THE UNSOLVED QUESTION OF CAPITAL PUNISHMENT.

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

BY

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QUOTE:

And if life is such, a valuable gift
From God himself, that even Science Marvels,
Have never created, nor breathed eternity
Why then should, some human beings
Take refuge in, the snuffing out
Brutally and arbitrarily, others sacred lives,
On earthy justice, never so absolute
Subject to interpretation, by nature so diverse,
That only the creator, may control its cycle
And may live, until fate does determine

ALBERTO LENY'
(1984)

****

Oh, you can perform this act of mercy
So easily, for in the absence of
evidence that is in anyway convincing,
You would find it too difficult
to pronounce: "Yes, guilty".
Better acquit ten guilty men than
punish one innocent man - do you
hear that majestic voice from the
Past century of our glorious
history? Is it for me, insignificant
Person I am, to remind you that a
Russian court does not exist for
Punishment only, but also for the
Salvation of a ruined man?
Let other nations, adhere to the
Letter of the law and exert punishment -
We will adhere to its' spirit
and meaning - the salvation
and regeneration of the lost.

Defence Counsel in
DOSTOYEVSKRY'S Brothers
KARAMAZOV

DEDICATION

To my illustrious, loving mother, the late ANNE SHIKANDA OSUNDWA, who was not only my mother but, my counsellor and my comforter. Her pride in hard work, and admirable qualities continues to be, the greatest source of inspiration, to my life.

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5. ELIZABETH and my sister LUCY, who did an admirable job when transforming my otherwise difficult handwriting into this beautifully typed script.

N.B. Any errors in this desertation are solely borne by the writer and are in no measure to be attributed to people mentioned above.

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LIST OF ABBREVIATIONS

BOOKS AND PERIODICALS

Am. Econ. Rev.	American Economic Review
Am. Soc. Rev.	American Sociological Review
E.A.L.J.	East African Law Journal
E.A.L.R.	East African Law Review
Em. L. Jnl.	Emory Law Journal
Jnl. of Afr: Law	Journal of African Law.
Jnl. of Crim. L. & Crimog.	Journal of Criminal Law and Criminology.
Jnl. of Crim. L. & Crimog. and Police Menance	Journal of Criminal Law and Criminology and Police Menance.
Jnl. of Crim. L. & Crimog. and Police Sc.	Journal of Criminal Law and Criminology and Police Science.
Mic. L. Rev.	Michigan Law Review
Mod. L. R.	Modern Law Review
S.A.L. J.	South African Law Journal
Soc. Theory and Prac.	Social Theory and Practice.
The Review: Int. Comm. of Jurists	The Review: International Commission of Jurists.
Tol.L.R.	Tolarado Law Review
Yale L. Jnl.	Yale Law Journal.

CASES

All. E.R.	All England Reports
E.A.C.A	East African Court of Appeal
E.A.L.R.	East African Law Reports

....cont

K.L.R.	Kenya Law Reports
N.Y (R)	New York Law Reports
Q.B.	Queen's Bench
U.L.R.	Uganda Law Reports
U.S. (R)	United States Law Reports.

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16. Rex v Komen Arap Chelala (1938), 5 E.A.C.A 150 at p 34

17. Rex v Muiga and others (1912) 4 E.A.L.R. 103, at p34

18. Weems v U.S. 217 U.S. 349, at p

INTRODUCTION

1.1. THE PROBLEM

Capital punishment in its present form has been a subject of controversy over many generations. Today, the problem still subsists. Generation after generation have endured the problem but not without anxiety. What is of concern, however, is the fact that though the problem hinges on the very existence of the human society the world remains divided in opinion as to whether this form of punishment should be retained or abolished. The paradox of the whole unfortunate situation is that, whichever approach has been adopted, statistical data reveal that violent crimes, continue to be a problem of our time. Yet, in the face of this conclusive evidence, both the legal and moral conundrums struggle of capital punishment continue to be waged on both sides of the issue with a degree of emotional intensity that tends to obscure the problem in waves of sympathy either for the victims or the murderers.

It is not the intention, however, of the author of this paper to offer quick solutions. What is of more concern is to attempt to divest the problem free of emotional overtures. Firstly, this paper will attempt to expose to the reader as much as possible against a historical background - the nature of the problem. What will be of concern in this connection will be to closely examine the objects of capital punishment and see whether in light of its performance it has lived up to its desired purpose.

Secondly, an attempt will be made to find reasons as to why world opinion as to the application of this penalty remains divided. The guiding question in this connection will be as to whether this division is caused by lack of appreciation of the problem on just other considerations beyond the legal framework.

Thirdly, this paper will consider the various attempts that have been made to solve the problem. Also to be considered will be to what extent the problem has been solved.

Lastly but not least, this paper will try to suggest the proper approach in which the problem could be solved. However, I must with haste, add that, this is done just in addition to what has been contributed in this field, and should in no way be seen as an attempt to overlook the contributions that have been made in this field. Infact, to say the least, it is only in light of such contributions that this paper proceeds.

A Proper approach would be to firstly put this question in a historical perspective. It is from this premiss that the present author intends to proceed.

HISTORICAL BACKGROUND

Not until the Enlightenment, 200 years ago, did societies seriously question the state's right to kill. Until then, the only dilemma had been to find the most ingenious and cruel methods of execution. Boiling, burning, choking, beheading, dismembering,impaling, crucifying, stoning, strangling, burying alive - all were in vogue to various times. The crucifixion of Jesus Christ was, for its day, only a routine execution. (1)

In ancient China, an occasional penalty was "death by the thousand cuts," the slow slicing away of bits of the body. A 19th Century French traveller described an excruciating method in India during the rule of the Rayahs as follows:

> "The culprit, bound hand and foot, is fastened by a long cord, passed round his waist, to the elephant's hind leg. The latter is urged into a rapid trot through the streets of the city, and every step gives the cord a violent yerk, which makes the body of the condemned wretch bound on the pavement.....He is released, and, by a refinement of cruelty, a glass of water is given to him. Then his head is placed upon a stone, and the elephant executioner crushes it beneath his enormous feet." (2)

What kinds of crime incurred such punishment? Murder and treason have almost always ensured death. Under the Mosaic law, capital offences ranged from gathering sticks on the sabbath and adultery to the sacrifice of children to the god Molech. The Romans decreed death by arson, perjury and murder, but also for disturbing the city's nocturnal peace; the condemned were often hurled 100 feet to their death from the top of the Tarpeian rock, which overlooked the forum. German code decreed: "should a coiner (counterfeiter) be caught in the act, then let him be stewed in the pan or a cauldron." (3)

England's response to the bewildering social evils caused by the industrial revolution was unique even in a world long used to such officially sanctioned slaughters as the Spanish inquisition when tens of thousands sof convicted heretics were burned. The English meted out the death penalty for more than 200 offences, including stealing turnips, associating with gypsies, cutting down a tree or pick pockets. "Hanging days" were public holidays, and in 1807 a crowd of 40,000 became so frenzied at an execution that nearly a hundred were transpled to death. Frequently both victims and executioner were drunk, and occasionally the job was botched with the condemned man being hanged two or even three times. Afterwords the crowds surged toward the corpse, because it and the scaffold were believed to have curative powers.

Death Sentences were often arbitrarily applied. The social standing, sex citizenship or religion of the victims usually determined the degree of horror they would suffer. Death alone was rarely considered a sufficient penalty unless it was preceded by terror, torture and humuliation, preferably in public. One of history's most spectacular executions was that of Damiens, the unsuccessful assassin of Louis XV, in Paris in 1757. His flesh was torn with red-hot piners, his right hand was burned with sulfur, his wounds were drenched with molten lead, his body was drawn and quartered by four hourses, his parts were set afire, and his ashes scattered to the winds. The execution was accomplished before a large crowd. (4)

"The more public the punishments are, the greater the effect they will produce upon the reformation of others," declared Seneca in ancient Rome. Over the centuries, many societies came to believe otherwise. The rituals of execution, rooted perhaps in a primitive need for sacrifice, catharsis and revenge, seemed less to cast out the evils of humanity than to feed its blood lust.

By the late 18th Century, a reform movement had taken hold in Europe, aided by the invention of such "humane" devices as the hanging machine and the gullotine. Since then similar movements in many countries have in part succeeded in banning the ultimate penalty.

For years, the capital punishment debate has been sporadic and mainly intramural - professor vs professor, lawyer vs lawyer. But now an old array of tough questions - practical, legal, moral, even metaphysical is being examined. Is the death penalty an effective, much less a necessary, deterrent to murder? Is it fair? That is, does it fall equally on the wealthy represented by lawyers of repute and the poor with court appointed (and possibly perfunctory) counsel? Most fundamental, is it civilized to take a life in the name of justice? (5).

This unending struggle, I submit, is due to the fact that the issue touches the core of moral belief in almost every citizen. This is so because we are living in an age in which the concept of life has acquired a meaning which differs profoundly from that which existed in times when concepts of penology were as crude as life was cheap.

Those who are conversant with the English legal history will remember King Henry VIII, who in his struggle to establish himself as the sole head of the Church of England, passed the emergency legislation decreeing that if any person should refuse to acknowledge him as such, he should be executed. The Bishop of Rochester went to the gallows before Sir Thomas More. He also felt reluctant to pronounce the King as the Head of the Church. His case is mentioned here to show how summary the judgements were. The Bishop was charged with high treason, found guilty and was executed on 22nd June, 1535 after the Lord Chancellor had summed up the case in a very telling manner:

> ".....the offence is so heinous and dangerous a treason that they (the Jurors) could easily perceive what verdict they must return." (6)

What disturbs, even today is that whichever side (retentionist or abolitionist) the problem of violent crimes continue unabated while the conditions perpertuating them continue to live side by side in harmony with society that brews them. In the words of Queletet:

> "It would be difficult to decide in respect to which of the two (physical world and social system) the acting causes produce their effect with outmost regularity - is there not a neccessity for deeply reflecting upon an alteration of t he system that breeds these crimes, instead of glorifying the hangman who executes a lot of criminals to make room for the supply of new ones." (7)

This, it is submitted, remains the central question: For

> "We cannot argue eternally over the advantages and ravages of the death penalty..... We must define ourselves here and now, in the face of the modern executioner."

Such was again the question which confronted Kenya Parliamentarians when debating on the Hanging Bill. Here I cannot help but borrow the words of the late J. M. Kariuki who when debating on the issue said: "Have we, infact gone into details to try to find the root cause of these serious crimes....?" (8).

Most West European countries have abolished capital punishment - Netherland (1870), Italy (1947) West Germany (1949), Britain (1965), Spain (1978) and France (1981), among others. Yet for the most part, the rest of the world views state - sanctioned killings as part of the natural order - as many anguishly debate over the issue with aloofness distaste or indifference.

In some countries, governments are eager to avoid the appearance of resorting too hastly to the death penalty. Surprisingly, Japan offically executed 140 criminals between 1966 and 1980. Yet Japanese officials are intensely secretive about carrying out death sentences and are reluctant even to discuss the matter. In Brazil, cover government death squards are presumed responsible for 1,800 deaths over the past decade, though capital punishment is illegal. (9)

Though the total number of formal executions appears to be declining, the outcry in favour of capital punishment is growing louder in many countries. In Britain's House of Commons, an attempt in May 1981 to restore the death penalty, particularly for terrorists, was defeated. One reason was concern that executions could backfire by creating martyred heroes, especially if members of the Irish Republican Army were involved. A similar attempt was made again in England in July 1983 but was again defeated. In Mexico, where capital punishment for civilians had been banned for five decades, economic instability has created a rush of kidnapping and calls for the reinstatement of the death penalty. In 1981 Italy's government considered a complicated initiative based on a clause in the 1947 constitution that would have activated capital punishment - "in cases foreseen by the military code of war" to combat terrorism. It too was turned down, despite considerable public support.

The toitus debate over capital punishment seems destined forever to ebb and flow with public passions. In India, the question has been widely argued for 20 years, without result. Most recently, a campaign early last year to ban the death penalty was silenced by public outrage at the brutal murders of two New Delhi teen-agers by well known criminals. Concluded India's supreme court: "such professional murderers deserve no sympathy even in terms of the evolving standards of decency." That paradox, the persistence of capital punishment in the face of civilization's advance, is, it seems, an all too human condition. (10).

This paper, therefore, attempts in a systematic fashion to unveil this paradox in light of the Kenyan situation - so that efforts could be directed towards solving the more relevant question - that of crime rather than the evasive approach of hiding in "Law and Order" to justify our failure to dissect the problems of our time. However, before proceeding, I intend briefly to give the chapter layout so as to give this paper its due format.

1.3 METHODOLOGY:

Research has been conducted through the questionnaire approach. Though an attempt was made to cover a large cross-section of views, this was unfortunately limited by considerations such as time, unwillingness by some instutitons. In this connection, I take great exception to the conduct of prison officials at Industrial Area Prisons who were quite unwilling to let me interview inmates facing the death penalty, also some sectors of the intellectual community decided to remain **'tight lipped'** when approached. Despite all this, however, it was still possible for the purpose of this study to carry out some research. The various views expressed by the various interviewees have in one way or the other been incorporated in this paper. But for a reproduction of the responses to the questionnaires see the appendix which has been affixed at the end of this paper.

1.4 CHAPTER BREAKDOWN

This paper is divided into four distinct chapters plus a conclusion. An attempt has been made in this paper to systematically build one chapter into the other as they follow each other in a chronological fashion. This is intended to enable the reader to easily follow the different strands of arguments and ideas as developed by the author. Such an approach , it is hoped, will be favourable to the reader.

CHAPTER ONE

It lays the fundamental framework upon which this whole paper is based. It examines the different theories of crime and punishment. Therein, it shall be shown that crime emanates from the very basic structures of society - that crime is a creation of society. That, therefore, the only way of eliminating criminal behaviour is by examining and changing the very structures that creatsit. It will be my contention that the various methods that have been employed to deal with crime are devoid of any historical justifications and are out of tune with modern times.

CHAPTER TWO

This chapter deals with the question of crime in the traditional African setting. What will be examined is to how criminals were dealt with in these societies. More important to be considered is as to whether the African penal institutions administered capital punishment. The intention of such study is to see as to whether there is any lesson from the past that can be of relevance today.

CHAPTER THREE

This chapter unveils the debate on capital punishment. Here, a survey will be carried out in each continent with the purpose of finding out the different stages that the debate has reached. Next, the arguments for and against capital punishment shall be analysed. However, such arguments will be limited to the basic strands as the intention here is not to dwell on such arguments but rather to expose them to criticism so that merits and demerits of each can be easily pointed out. The author of this paper will also make his stand as to which argument he finds convincing.

CHAPTER FOUR

It intends to examine the Kenyan experience viz-a-viz the capital punishment debate. To be highlighted will be the "**Hanging Bill**" and the legislative response, the exercise of the Prerogative of Mercy by the executive and lastly the attitude of the courts to the question of capital punishment. The intention will be to see whether capital punishment merits retention or abolition in Kenya.

CONCLUSION AND ALTERNATIVES

The question that will be determined is whether the death penalty should be retained or not. If retained - under what conditions. And if it be abolished, what alternatives can be suggested. What is hoped is that the recommendations given herein could catch the eye of the law reformers so that they be of help in the on-going exercise of reforming our laws to suite the changing time.

FOOTNOTES

1. Time Magazine, January 24th, 1983, No. 4, Page 24

2. Ibid, P.24

3. Ibid, P.24

4. Ibid, P.25

5. Ibid, P. 18

6. Massawe A.A.F.
   Notes on captial Punishment in East Africa Vol. 10 E.A.L.
   P.106 - 114

7. Qu'etet, L'Homme Et Ses Facalte's. See also, Camus Albert:
   Reflections on the Gullotine.

8. Kareithi Muriuki,
   J.M. Kariuki in Parliament, Vol. 11, P.16

9. Supra Note 1, P.26

10. Ibid, P. 27

CHAPTER ONE

THEORIES OF CRIME AND PUNISHMENT

The theories of crime, criminal responsibility and punishment which have held the field in various stages of human evolution have shown a close relation to the prevailing state of cultural development.

The first theory which was advanced to explain criminal conduct was the theory of diabolical possession and instigation. The view flourished in primitive and oriental societies. When metaphysics developed to the point where it became the dominant type of intellectual orientation and supplanted the theological interpretations of the universe among the Greeks, we find the use of a new, but related, doctrine of causation of crime. The individual was represented as a free moral agent who was at perfect liberty to choose between good and evil. One was held to be free to decide whether he would grant victory to God or to the devil; and that the criminal had obviously decided in favour of satan. The free moral agent theory, then, was only a metaphysical elaboration of the primitive interpretation of diabolical possession. (1)

With the rise of modern biology, it was natural that the more advanced thinkers should give up these theological and metaphysical interpretation of the criminal action and come to consider the physical causes of crime. This led the distinguished Italian physician and Anthropologist Ceasare Lombroso to work out a theory of the criminal based entirely upon physical criteria. He held that the typical criminal was characterised by certain definite physical stigmata, such as, among many others, a low slanting forehead, long ear lobbes or none at all, a large jaw with no chin, heavy supra orbital ridges, either excessive hairiness of the body or an abnormal absence of hair and extreme sensitivity or none sensitivity to pain.

He was brought to these conclusions by an observation of a large number of abnormal physical types in the Italian prisons of his day. He explained the presence of these triats among the criminals on the basis of biological reversion or "atarism." This somalological characteristics of the criminal, Lombroso held were also the physical triats of primitive man, and he looked upon the criminal as a biological "throwback" to a primitive type. (2)

Though some advanced thinkers of today, such as the late Thomas Mott Osborne deny almost in total the accuracy of Lombroso's theory, it would seem that this explanation of the criminal is not without significance. No one who has had any extensive contact with convicts can doubt the prevalence among them of these abnormal physical types which Lombroso so thoroughly described. (3)

The chief valid criticisms of this theory however, is that, it is not an adequate explanation of the entire criminal class. These physical stigmata, which he alleged to be uniquely characteristic of the criminal are found with even greater frequency among the feeble-minded and other defectives than they are among convicted criminals. This means, in other words, that they are associated with degenerated human beings in general and not with criminals alone. Moreover, Lombroso's theory does not account for the presence of a large number of relatively perfect physical specimens in our prison populations, or for the extensive manifestation of his classic stigmata among law-abiding citizens. (4)

The inadequacy of Lombroso's doctrine, led to the proposal of a large number of specific explanation of criminal conduct,chiefly psychological, as, for example, the pressure of physical want, the contagion of crime waves, the morbid suggestions or an unfortunate social environment, insanity and feeble-mindedness.

It was obvious that, all these interpretations possessed some value, but it was equally apparent that no single explanation was adequate, when taken by itself. We have many criminals who come from wealthy homes, others who commit crimes without any reference to a pattern or suggestion, and many who come from the best cultural groups in the community and who are neither feeble minded nor insane.

What was needed was some mode of approach to the interpretation of the criminal which would combine in discriminating fashion all those various theories from Lombroso to the present. One way out was provided by psychiatric or medical psychology. The advantage of the psychiatric approach is that it is possible for the psychiatrist to take into account all the possible influence operating upon the criminal, in as much as they all come to focus on his mental activities.

The net result of the application of psychiatry to the problem of criminology has been the entire repudiation and elimination once and for all, of all the theological and metaphysical interpretations of criminal conduct and responsibility.

This approach is reflected in violent crimes like murder. It has often been contended that murder is a product of abnormality of the murderer's mind. This means even when one kills after a normally negligible altercation there is something very wrong at the back of his mind. For, it is often contended that, murder represents unbridled agression which is the outcome of frustrations which the ego and the super ego cannot sustain. Hence the failure to handle them, results in the collapse of the inner self and the breakdown of the outer containment. When the outer containment collapses, the person's world crumbles, shrinks and become deflated or becomes too much of a whirlpool. Self realization disappears. (5).

It is submitted that any attempt to look at crime without full appreciation of the socio-economic background is bound to fail. For this would be tantamount to engaging in self defeating exercise, for then the causes of crime or the root cause of crime will remain mystic and unknown.

Then the question naturally arises: What makes people commit crimes or what factors cause one to be a criminal? To this question the retributionists would give no better answer than that people have a free will and those who decide to commit crimes do so wholly on the basis of their free will unless they are proved insane. This means that the cause of crime is the person who commits it, and he does so on his own "free will." However, this answer is very inadequate for us who are concerned to get to the root causes of crimes and who assume the rationale that such causes are not metaphysical (like "free will") but empirical, and that they are scientifically discoverable and removable.

Everybody (person) is born without having knowledge of good and evil and the character of every person is mostly a result of traits of his parents plus his social experience and existence. I am convinced that this assertion is empirically provable. (6).

Therefore, the factors which induce or influence people to commit crime do not originate from them, but rather from their inheritance or social environment. However, such factors, or criminal forces as we may call them, one may argue, affect the body, not the mind, and the tendency to commit crime is a product of ones mind, of his own free will. But this argument flops because the mind does not and cannot work independently of the body. In the criminal mind, Maurice de Feury writes:

> "The incarnation of the mind in the body is total and absolute. They are subject to a common plate, and are never differientiated by anything that can fall under scientific observation."

And he adds that at birth "No formal mental image exists in us other than those by sensation. There are no notions, no innate ideas, not even .....inner sense of good and evil.....which is, in reality only as a result of experience .....of education." (8).

Concerning the causes of crimes Fleury states:

> "Do not say that crime proceeds from atarism, from a moral madness, from epilepsy, hysteria, neurasthenia, a bad education or an original taint; say that each of these causes plays its part in turn, and that frequently several of them are concerned." (9).

Harry E. Barnes writes that according to psychiatry:

> "It has been shown that a criminal act is absolutely determined for the individual on the basis of his biological heredity, his past and present experience, or both." (10)

It follows that any belief therefore, that the will or mind is something that stands apart from and independent of the brain or body is an illusion. Hence we should seek factors which determine criminal acts or criminal behaviour not from the will, but from social experience, material existence and the psychological state of the deviant persons.

Modern methods of psychoanalysis prove that given the unconscious impulse or forces which in fact no one can completely be free from, the notion of free will is an illusion. In his article "Freewill and Psychoanalysis" John Hospers writes:

> "Suppose one says that a person is free only to the extent that his acts are not unconsciously determined at all....if this is the criteria, psychoanalysists would say, most human behaviour cannot be called free at all." (11)

"Cannot be called free" because, the author urges, all our impulses and volitions having to do with our basic attitudes towards life have their basis in the unconscience.

In his book criminality and Economic condition, (12) Bonger reports that people like Morelly, Owen, Turati, Mally, Rousseau, Engels etc., believed and argued that economic imbalances or conditions are mostly the factors which lead men to do crimes. "Take away property" says Morelly,....." Without ceasing, and you destroy forever a thousand factors which lead to desperate extremes." (13)

And Turati writes:

> "Among the numerous misfortunes from which the proletariat suffers, it must be reckoned, that it is almost exclusively from its ranks that criminals are recruited." (14)

Turati wrote these lines many years ago but this view is as true today as it was during his time. That the proletariat or the poor are forced due to their economic and social misfortunes to commit more crimes than the rich is strongly supported as of today.

The U.S. Riot Commission report states that: "One Low Income Negro District had 35 times as many serious crimes against persons as a high income white district." (15)

This view is also supported by Koest Ler when he states that:

> "The spreading of extreme poverty with its concomitant of prostitution, child labour, drunkeness and lawlessness, coincided with an unprecedented accumulation of wealth as an incentive to crime." (16)

This too was the view taken by the late J. M. Kariuki when giving his contributions in Parliament against the "Hanging Bill" in Kenya.

> "As long as our economic set-up is such that the majority of our people, including ourselves, continue to amass property and live side by side with the poor members of society, violent crimes will continue unabated."(17)

The question is: What makes people commit crimes or what factors cause or induce a person to adopt a criminal behaviour? Almost all crimes are actions which are performed under the impulse to satisfy an economic or a psychological need, or to fulfil the need or dictates of malevolent unconscious ego. We can thus assert that crime or a criminal act is an attempt to satisfy or fulfil a need. The need can be economic, psychological, or a command of the psychiatic self although most crimes are committed for economic reasons:

> "Crime represents the satisfaction of a need of the criminal, like satisfaction of any other need, and comes under the law of struggle for existence ..... in fact, a need not satisfied constitutes a pain, and pain..... first excites and then depresses and exhausts the functional power of organism." (18).

Marshall Clinard in "The Sociology of Deviant Behaviour" writes that in the U.S.A.

> "Property crimes like larceny, burglary, automobile theft and robbery constituted 94.5 per cent of all crime reported to police in 1954. The personal crimes of murder.....rape, assualt accounted for only 5.5 per cent of all crimes." (19)

The criminal forces or factors which induce people to commit crimes therefore can be said to be composed of such things as irresponsible parental care, belonging to a despised or poverty stricken class, discrimination and supression by the family or society, being a moral or social outcast, mental derangement, a bad education and many other things.

Everyone who commits a crime therefore, must have been forced or led to the act by one or more of the criminal forces regardless of whether or not the act was intentional. Hence although an individual may commit crime intentionally, he is always a victim of the criminal forces. Crime, therefore is not intended but rather a function of the multifarious environmental factors including the legal system prevailing in society. So guilt should be shared equally by both the criminal and his society. In case of crime, therefore, the primary causes are the criminal forces while the behavious or intentions of the criminals are secondary causes.

However, I must add that, though poverty is one of the major reasons it must not be seen as the sole cause of crime. There are other reasons too other than being poor - for there are poor people who are law abiding. One illustration is that the poor tend to predominate in the criminal population not because they are more criminal than others but because of the different treatment they receive from the police, courts and society. They are more prone to arrests, charges, being found guilty and sentenced. In this connection too, I want to add that crime can even be categorized - firstly crime for necessity most prevalent among the poor. Mathare Valley in Kenya is a glaring example. Here more often than not, one steals because he wants to make ends meet. The second category is criminality for greed. This is mostly for the rich - despite having more than necessary, they still engage in criminal activities to rise in social status. This is usually common with crimes against the economy - economic sabotage. This has often been witnessed in many third world countries in times of shortages of essential commodities. In kenya this point is illustrated during 1976-78 "Coffee Boom" when many rich people engaged in illegal activities as black marketeering and smuggling.

One of the other causes of crime relates to economic growth leading to urbanisation. This process - urbanisation leads to a breakdown in tribal ties leading to the weakening of the family and kingship ties. The youth now is influenced by values and codes of his contemporary group. As a result there is lack of parental care. The slum areas therefore become the breeding grounds for crimes in urban centres. (20)

Having exposed the causes of crime or how one comes to commit a crime, it now becomes fitting at this stage to examine the various methods that have been employed by society in dealing with this crucial issue of crime.

The commonest of the methods employed is the use of punishment. The following questions follow up for critical examination. What has "punishment" got to do with the criminal? Is it of any relevance at all to punish the criminal? And lastly, can punishment have an effect on the primary and changeable causes of crimes - the criminal forces.

Before looking at the different theories of punishment a historical background of punishment must first be given briefly with the aim of putting our analysis into context.

In the early 1800 a philosophy of punishment emerged that was based on the idea that pain should purposively inflicted on the offender because the pain had some curative value and that the punishment should be calibrated to fit the crime. Vengeance was permitted - even encouraged, in the interests of balance of proportionality. In sum, "Justice" was swift, arbitary and harsh, social solidarity, it was claimed, demanded punishment. (21).

The rise of the monarch's authority created the first "public" system for punishment. Some offences were now considered to have been committed against "the public" an abstruction but nevertheless a legal entity that transcended the victim and the insular community in which the victim and the offender resided. The public perception was less mystical than in preliterate times: There were little punishment in the names of gods. Moreover natural harmonies and transcendental balances were less important, less real than the social political order. The deviant was less a leper in the comic order than a threat to good government. (22).

Despite the Monarch's authority, the remedies were both not much different than they were in earlier times. The technology was still fairly basic:

> "A detected criminal was either fined, mutilated, or killed, but punishment, as we now understand the term, was seldom inflicted, that is to say, the dominant idea was neither to reform the culprit nor to deter others from following in his footsteps. If a man was killed, it was either to satisfy the blood-feud or to remove him out of the way as a wild beast would be destroyed; if a man was mutilated by having his forefinger branded with a red-hot iron or the brow, it was done not so much to give him pain as to make him less expert in the trade of theiving and to put him an indelible mark by which all men should know that he was no longer a man to be trusted; if a fine was levied, it was more with a view to the satisfaction of the recipient.....than with discomfort or loss to the offender." (23)

The classical theory of punishment that emerged from this crucible was a reaction to the brutality of feudal societies, and, in particular to the unbridled assaults of feudal institution on human dignity.

The theory's rise was associated with the increasing integration of the social order; systems and institutions were held together out of the remains of previously self sufficient community. The conception was a rational, enlightened scheme of punishments characterised by even and uniform application of rationally concieved laws, but in all cases commensurate with the gravity of offence. Classical theory promises a penal system emphasising the 'social contract' that binds people and institutions together. Classical theory, in short, springs from a measured and stable universe where regularity flows out of rational pursuit of happiness. To the extent that crime intrudes on regularity, the 'contract' is broken and punishment is necessary. (25).

Before proceeding to the various theories of punishment - I intend to give a working definition of punishment. However, I must point out that - be it as a theory of social defence, mode of elimination i.e. total removal from society, one's definition of punishment depends on one's approach to the goals justifying punishment. To this, therefore, I submit that there being many approaches to the goals justifying punishment - one is free to disagree with my working definition. To my critics I have one concession however, that the definition adopted is flexible and is in no sense restrictive. Plainly speaking therefore, and dispensing with all paraphrases, punishment is nothing but a means of society to defend itself against the infraction of the vital conditions, whatever be their character.

Punishment therefore can be of various kinds, and includes death imprisonment and fine. It is sometimes attended with disqualification and loss of civil and political rights. Balentine's Law dictionary defines punishment as "..... the penalty for the transgression of law" (26). Punishment has also been defined in legal terms as:

> "That which is awarded in a process which is instituted at the suit of the state standing forward as a prosecutor on behalf of the subjects on public"..... Once awarded can only be remitted by the state." (27)

However, as earlier indicated, there is no consensus as to the definition of punishment and that each definition depends on one's approach at justifying the use of punishment. It must be also added however, that punishment has different meanings depending on the different state of human development. It is submitted that, it was with this in mind, that the present author has given a working definition based on the approach adopted in this paper.

After tracing the historical origins of punishment, this paper proceeds to examine the different opinions that have been expressed in defence of punishment. But before embarking on this, a general observation needs to be made at this stage.

Rusche and Kircheimer's great work **Punishment and Social Structures,** provide a number of essential reference points. We must first rid ourselves of the illusion that penality is above all (if not exclusively) a means of reducing crime and that, in this role, according to social forms, the political systems or beliefs, it may be severe or lenient, tend towards expiation of obtaining redress, towards the pursuit of individuals or the attribution of collective responsibility. We must analyse rather the 'concrete systems of punishment,' study them as social phenomena that cannot be accounted for by the juridical structure or society alone, nor by its fundamental ethical choices; we must situate them in their field of operation, in which the punishment of crime is not the sole element; we must show that punitive measures are simply 'negative' mechanisms that make it possible to repress, to prevent, to exclude, to eliminate; but that they are linked to a whole series of positive and useful effects which it is their task to support (and, in this sense, legal punishment is carried out in turn in order to maintain the punitive mechanisms and their functions). (28).

From this point of view, Rusche and Kirchheimer relate the different systems of punishment with the systems of production within which they operate: thus, in a slave economy, punitive mechanisms serve to provide an additional labour force - and to constitute a body of **'civil'** slaves in addition to those provided by war or trading; with feudalism, at the time when money and production were still at an early state of development, we find a sudden increase in corporal punishments - the body being used in most cases as the only property accessible; the penitentiary (Hospital General, the Spinhuis or the Rasphuis), forced labour and the prison factory appear with the development of the mercantile economy. But the industrial system requires a free market in labour and, in the nineteeth century, the role of forced labour in the mechanisms of punishment diminishes accordingly and **'corrective'** detention takes its place. (29).

There are no doubt a number of observations to be made about such a strict correlation. But we can surely accept the general proposition that, in our societies, the systems of punishment are to be situated in a certain **'political economy'** of the body: even if they do not make use of violent or bloody punishment, even when they use **'lenient'** methods involving confinement or correction, it is always the body that is at issue - the body and its forces, their utility and their docility, their distribution and their submission. It is certainly legitimate to write a history of punishment against the background of moral ideas and legal structures. But can one write such a history of bodies, when such systems of punishment claim to have only the secret souls of criminals as their objective? (30). It is only in light of the above observations, it is submitted, that a proper study of punishment can be undertaken.

In discussing the concept of **'punishment'** there are two philosophical views that are strongly opposed to each other. On one hand is the view of the retributivists. Briefly stated, they hold that punishment is in itself a reward, a compensation or a kind of annulment, for a crime. According to the retributivists, therefore, punishment restores the balance that a crime has upset. They claim that this is the only ethically possible justification of punishment. Among the early Jewish worshippers when a man was alleged to be possessed by a devil the exorcizing of the devil was required as a religious necessity. This exorcism normally involved inflicting pain on the possessed and was justified by the fact that the victim was possessed. The retributivist's justification of punishment seems to correspond with this. (31).

On the other hand there is the utilitarian's view of punishment. According to them, punishment is in itself undesirable and ought never to be inflicted for its own sake or just because a crime has been committed. Only if **'punishment'** Promises to exclude some greater evil ought it be recommended. Jeremy Bentham, probably the founder of this view, states:

> ".....punishment is mischief: all punishment itself is evil..... if it ought to be admitted, it ought only be admitted in as far as it promises to exclude some greater evil." (32)

Thus according to utilitarians, **'punishment'** is an act whose value can only be extrinsic: If punishment has any positive value at all, its value consists in its having beneficial consequences either to the person punished or the society in general.

After an exposition of the two theories of punishment it is only fitting at this stage to expose this two views to some criticims to determine as to whether they have any place in the modern views appertaining to punishment. To sum up the retributivists view, it can be said that they take the view that punishment is a revenge, a reward or a compensation for a wrong done. But it is easy to see that something must be wrong with this view - for every wrong act cannot be compensated in the right sense of the word **'compensation'**. As A. M. Quinton says:- "Theft and fraud can be compensated, but not murder, wounding .....the destruction of property or reputation." (33)

Secondly, in so far as we hold the criminal forces to be the primary causes of the fact that one commits a crimes, can punishment in the retributivist's sense, eliminate such criminal forces? Definitely not: punishment in this sense ignores the real basic cause of the crime and concentrates only on the victim of these causes, the criminal, it ignores the causes or sources of crimes and only tries to deal with the effects or the outcome. For this matter punishment has little to do with the extinction or reduction of crimes.

For a long time, this view of punishment has been preached. But despite this, crimes have continued to increase. 'History shows', says H. E. Barnes, "that severe punishments have never reduced criminality to any marked degree."(34).And he adds, in the same book, "that criminality has increased greatly under capitalism, and is of the greatest importance to the whole social life." (35).

It is of course often argued that crime in the honorific, retributivist sense, is an ethical justification of punishment. But such an argument contributes nothing to our attempt to struggle to understand the real causes of criminality and the best ways to reduce or extinguish them.

And next, there is the utilitarian's view: punishment in itself is an evil, but if it promises to exclude a greater evil it should be inflicted. Punishment for its own sake or only because a crime has been committed, cannot be ethically justifed.

Morally the utilitarian's view of punishment is very attractive and sensible. That punishment is an evil is true; that punishment for its own sake is undesirable is acceptable; but the phrase "promises to exclude a greater evil" is very questionable. Here the utilitarians fall into difficulty when we ask the questions: (1) What criterion is there for differentiating situations in which punishment is likely to exclude a greater evil and situations in which it is unlikely to do so? (2) Greater evil to whom: to the the criminal or to society?

It may be the case that what exludes a greater evil from society imposes a greater evil on the criminal. Take the example of a poor man who lives by stealing. If he is caught, according to the utilitarians, he may be punished in such a way that he cannot steal again. In this case the society or those who own property get their evil exluded, But the thief himself is now reduced even to a greater evil, since he can no longer earn his living, he is reduced to a life of terrible poverty or squalor.

The third question is (3) since the end is simply to remove a greater evil why choose punishment as the means to that end? Can't we choose otherwise? Do we not have non-evil means of removing "a greater evil?" If we do, why don't we make use of such means instead of using punishment? If the utilitarians are to object to this view then they must first prove that punishment (an intrinsic evil) is the only means towards avoiding "greater" evil. There must be no alternative to the use of punishment. In which case Bentham would have to amend his maxim from "...it ought only be admitted in as far as it promises to exclude some greater evil" to "it ought only to be admitted in as far as it, and only it, promises to exclude some greater evil." (36)

The utilitarians need to be persuaded that punishing the criminal does not itself get down to the root of criminality, that the real causes of crime are not the criminals but the criminal forces. The criminals will, of course, still exist but we must deal with them from this position: The position that they are the victims of criminal forces. As Karl Marx said:

> "Men make their own history but they do not make it just as they please; they do not make it under circumstances chosen by themselves but under circumstances directly, found given, and transmitted from the past." (37).

(Substitute "criminals" or "men" and "crimes" for history, and then for "it." then repeat the quotation).

Another question to ask is that - for a crime to be punishable, must the act be morally wrong? In trying to answer this question Hadenius says, "the terms 'morally right' and 'morally wrong,' 'do not seem to have any fixed scope of denotation outside a system of ethical beliefs,' that is, a certain morality." (31) He asks: "Whose morality are we thinking of?" He says that those who cherish the honorific sense of punishment build their own moral creed in their usage of the words "crime" and "punishment". If every crime must be for some immoral act then it would appear as if everything that the authorities or the law commend or forbid in any legal system must be immoral to disobey. "It cannot be meant that all acts which are forbidden by our penal systems are morally wrong only because those acts are so forbidden." (38).

Both the law and morality the most common and plausible justification of punishment is responsibility. And by charging that the person is responsible for the action they always mean (or simply) that the person acted on his own free will.

However, the expression "free will" or "freedom of the will" is a very vague and ambiguos metaphysical notion. It is not for instance clear where by 'free will' we mean freedom of the self (freedom of the individual in his social-political environment) or freedom of certain 'part of the individual known as 'will,' which is the governor of engine of all the activities and conduct of the individual. (39).

Since free will is a very vague metaphysical notion, responsibility defined in terms of will is equally vague and impossible to determine in practice. We need to extricate criminal law (and even morality) from such indeterminate notions and obscurities as "free will." We should instead establish an empirical or a determinate criterion for holding one responsible for an offence. Such a criterion will in practice enable us to determine clearly and non-metaphysically whether a criminal is or is not responsible for his crime. There is an enlightened common sense moral principal or belief that a person ought not be blamed or punished for an action or a choice which he did not intend or could not avoid. (40). It is on the basis of this principle that babies and insane are often not blamed or punished for their offence. This principle, I believe is known to anybody who cares to reconcile his morality with a rational outlook to life, but it is often suppressed by emotions and partisan interests.

In criminal law the principle is expressed by the idea of men's rea. Unfortunately, in law, the principle often miscarries or flops because of the fact that acting intentionally or voluntarily is regarded as acting on a free will. And hence for the jurists or the prosecution to prove that a criminal acted voluntarily or intentionally, they have simply to convince themselves that the criminal was not, at the time of his action, insane or unable to exercise his free will. In Britain and those countries whose legal systems are based on the British legal model, like Kenya, the judges and the prosecutors always assume that every accused person is sane and able to exercise a free will until the contrary is proved. This is in accordance with the McNaughton Rules of 1843. (41)

In conclusion, it can therefore be said that, in the eighteenth century, one is confronted by three ways of organising the power to punish. The first is the one that was still functioning and which was based on the old monarchical law. The other two both refer to a preventive, utilitarian, corrective conception of a right to punish that belongs to society as a whole; but they are very different from one another at the levels of the mechanisms they envisage. (42).

Broadly speaking, one might say that, in monarchical law, punishment is a ceremonial or sovereignty; it uses the ritual marks of vengeance that it applies to the body of the condemned man; and it deploys before the eyes of the spectators an effect of terror as intense as it is discontinous, irregular and always above its own laws, the physical presence of the sovereign and his power. The

reforming jurists, on the other hand, saw punishment as a precedure for requalifying individuals as subjects, as Juridical Subjects; it uses not marks, but signs, coded sets of representations, which would be given the most rapid circulation and the most general acceptance possible by citizens witnessing the scene of punishment. Lastly, in the project of a prison institution that was then developing, punishment was seen as a technique for the coercion of individuals; it operated methods of training the body - not signs - by the traces it leaves, in the form of habits, in behaviour; and it presupposed the setting up of a specific power for the administration of the penalty. We have, then, the sovereign and his force, the social body and the administrative apparatus; mark, sign, trace, ceremony, representation, exercise; the vanguished enemy, the juridical subject in the process of re-qualification, the individual subjected to immediate coercion; the tortured body, the soul with its manipulated representations, the body subjected to training. We have here the three series of elements that characterize the three mechanisms that face one another in the second half of the eighteenth century. They cannot be reduced to theories of law (though they overlap with such theories) nor can they be identified with apparatuses or institutions (though they are based on them), nor can they be derived from moral choices (though they find their justification in morality). They are modalities according to which power to punish is exercised: three technologies of power. (43).

The problem, then, is the following: how is is that, in the end, it was the third that was adopted? How did the coercive, corporal, solitary, secret model of the power to punish, replace the representative, scenic, signifying, public, collective model? Why did the physical exercise of punishment (which is not torture) replace, with the prison that is its institutional support, the social play of the signs of punishment and the prolix festival that circulated them? An attempt is made in this thesis to unravel this paradox.

It is in light of the already presented problems that the author of this thesis intends to examine the question of **capital punishment.** For it is submitted, that, in order to succeed in any sentencing and treatment policies we must ensure that the judiciary is not only thoroughly aware of the causes of crime but more so takes them into account when sentencing offenders. However, before proceeding on to the capital punishment debate, an examination of traditional African's approaches to punishment particularly so, capital punishment is made. This is intended to offer this paper a wider basis for consideration from which useful conclusions may be drawn.

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TRADITIONAL AFRICA APPROACHES TO THE QUESTION OF CAPITAL PUNISHMENT

After tracing the various theories of crime and punishment in the previous chapter, an attempt is made in this chapter to briefly examine these theories before the advent of colonial rule. It will suffice to mention at the outset that such an attempt will for the purposes of this paper be limited to the determination of the question as to whether traditional Africa had capital punishment or approved of it. As a general overview, this chapter will also look at African penal institutions. Such overview, however, will be limited to the extent that it forms the background of this study. It also need be mentioned that this approach is in no way intended to limit the study of African penal systems, rather what is intended is to fit such study into context so as to give this paper its due format.

The importance of such a study is underscored by the fact that a study of the past cannot be overlooked when trying to understand the present. African definitely has a rich past that can be of benefit today. As one student of African studies once put:

> "Without that concentration of the past experience we find in history, without a proper understanding of our country's past, we are at the mercy of impulse and prejudice, lacking in balance and continuity." (1)

In this connection, it must be borne out that traditional Africa just like other continents has a rich past from which the present and future generations can learn. To this, I agree with the views expressed by one author that:

> "Africa has not been prominent in the evolution of modern techniques, but in the perspective of human relations, she has been, for many of us, not a pupil, but a teacher. Her human history is as old as mankind. She has something therefore so to say on the death penalty. (2).

It is in the light of the above observation that the present writer proceeds.

Starting off with African penal systems generally, it suffices to mention that indegenious justice was mainly concerned with the adjustment of civil wrongs. Even serious crimes like homicide and theft were in most cases treated as matters that could properly be settled by the payment of compensation. (3).

In Kikuyu societies, for example, all criminal cases were treated almost in the same way as civil cases. (4). However, the idea of crime was not entirely absent, for certain acts, such as incest or the practice of withchcraft were regarded as offences against the community as a whole, the only remedy for which was to eliminate the offender by death or banishment. (5).

Apart from such exceptional cases, however, punishment, whether retributive or deterrent, seems to have played little part in public life of an African community, particularly a community of the type which was characteristic of most Kenyan tribes. (6). This is attributed by Lord Hailey partly to the fact that "**Law (in those societies) represented not the act of a sovereign but the belief and practice of the community.",** and also to exceptional strength of the spirtiual sanctions derived from a belief in the potency, of ancestral spirits and in magic. (7).

In African communities the great diversity of political, social and juridical structures in the area resulted in great differences in legal procedures for treatment of offenders. In Bantu Africa, for example, there was no uniformity about the treatment of the murderer, for various Bantu peoples in various stages of community development had different ways of treating murderers. In large units with segmented tribes like the Kikuyu where the chief's authority was reduced to a minimum, it was very rare to meet legal death in answer to violent crimes, but the ideas which are covered by the very unsatisfactory term of witchcraft, often brought a collective action for the killing of the wizard.

In other communities, developed on the basis of petty chieftainships, without any strong centralisation, as the Tsonga people of Mozambique and the Transvaal - the people did not usually resort to capital punishment, but to banishment for life. In other communities with a strong monarchy, often highly centralised like Nabongo Mumia of Wanga, death penalty existed but especially so under a strong military regime like the one of Chaka, among the Zulu. (8).

Apart from the man accused of sorcery, there was little inclination to kill the culprit, and the idea of the executioner appointed by the state, and paid for the job, is something that wasn't there. Africa was iminently the land of respect and profound attachment to "Vital forces."

"The great thing," says the Tsonga proverb "is life." When a man killed another, he could hardly, in African terms, be considered normal. Something must have overpowered him. The idea of a man being bewitched seems to have some roots in that feeling. When one followed the way in which a murderer had fallen to killing his fellow man, one is amazed at the insidious instigation of the act often by intimate next of kin especially women. (9).

In the early days of tribal groupings, the death penalty was used to cleanse the society of a dangerous evil which they believed was caused by a breach of a taboo or commission of a sacred offence. For example in African societies there was a firm believe that witches are born and not made. They, therefore, according to this belief, can bewitch and harm other people despite their good intentions because the power of evil they possess is stronger than their own will power. That is why African traditional societies believed, and still believe in the killing of witches as the only practical way of riding the community of such undesirables. (10)

Otherwise, the penalties of African law whether punitive or by way of compensation were directed not against specific infractions but to the restoration of the equilibrium. The central concept within the African system was the reconciliation of the two parties. Cotran, talking about the Bunyoro of Uganda says that "there is no aim to 'punish' a wrong-doer, though a penalty can be imposed; rather, it is the object of the proceedings to dispose of a quarrel between members of the community and to reintegrate a wrong-doer into the community." Several authorities on penal systems in Africa support this view by drawing a distinction between punishment and compensation by regarding the latter as something which in traditional Africa does not involve penal sanctions. (12).

In certain cases Ostracization was applied. This was in very serious cases like adultery, rape or the killing of a relative. These were offences mainly related to the morals of a given society. Here the offender used to be sent away into exile for a specified period after which he would be free to return to his place of domicile. While in exile the offender was under no confinement. He was free to interact with people of the community of exile. (13).

In traditional Somali society, the killing of a member of a tribal group or clan by a member of another clan had the effect of disrupting the peace between the two groups. Unless appropriate satisfaction was obtained, the injured clan would take retaliatory action against the killers' clan. (19). According to some authority, prior to the advent of colonial rule the injured group sometimes exacted the life of the offender, who was then turned over to that group and executed according the the Lex talionis. However, the more common means to fend off reprisals was, and still is, for the offender's group to pay blood - money (Dia) to the group of the deceased as ransom in lieu of the life of the offender. Dia was payable by the group of the offender to that of the deceased for customarily "no man receives or pays compensation individually." The standard rate for homicide is a hundred camels for the life of a man and fifty camels for the life of a woman. This was in accordance with Islamic law (shariah). As the purpose of dia is payment of compensation rather than criminal punishment, in principle no clear-cut distinction is made between different types of homicide. (20).

The question that now arises for consideration is: Did traditional African societies have capital punishment or did they approve of it? The answer to this question is that - yes, they did have capital punishment. However this was meted out only in very serious offences considered to be anti-social. Hence, capital punishment was the exception rather than the rule. Death was commonly imposed as a last resort in cases of offenders who had, by the persistence of gravity of their crimes, made themselves dangerous beyond the limits of endurance of their fellow tribesmen. The death penalty was used to cleanse the society of a dangerous evil which they believed was caused by a breach of a taboo or commission of a sacred offence. (21).

Capital punishment, for instance, was meted out against witches. This was because, as earlier stated, African communities believed that witches are born and not made. (22).

To repeat, they, therefore can bewitch and harm other people despite their good intentions, because the power of evil they possess is stronger than that from will-power. This is why African traditional Societies believed, and still believe, in the killing of witches as the only practical way of ridding the community of such undesirables. (23). Certain common points between communities become discernable. It is common agreement that witches are viewed with adhorrence by the tribal communities. This is evidenced not only by the practice of putting witches to death but also by the likelihood of defamation when an accusation of practicing witchcraft is laid against a member of the community. (24).

In Kikuyu societies, the chief aim in proceedings was to get compensation for the individual or the group against whom the crime was committed. Since there was no system of imprisonment, the offenders were punished by being made to pay heavy fines to the **Kiama** and compensation to right the wrong done. Murder and manslaughter were treated in the same way, for the **Kiama** was not chiefly concerned with the motive of the crime or the way in which the crime is committed, but rather with the fact that one man had taken another man's life. Premediated murders were very rare among the Kikuyu, for it was a crime against society for a man to strike another without warning him unless he was a foreign enemy. Universal rules were made fixing the amount payable as compensation for loss of life, according to sex. The compensation for loss of life of a man was fixed at one hundred sheep or goats or ten cows. For a woman's life it was thirty sheep or goats or three cows. The inequality as to compensation was based on the Gikuyu conception of value of life which was according to services which a man or a woman would have rendered to his family group during their lifetime. For the services a woman could render to her family unit were limited by the act of marriage. (14).

Among the Nandi, the general principle in dealing with offences against the person was compensation to the injured party, or to his clan if he were killed. (15). The penalty inflicted, which was chiefly in the nature of compensation, varied according to the extent of the injury, the number of persons injured and the property of the offender. If one or two people were affected, it was usually an Ox, it is double this if three or more people suffered. A poor offender would be fined a goat or sheep or payment might be made in honey. The fine would be produced by the near relatives of his clan if he was unable to pay it himself. (16). In cases of homicide the general principle was that the clan of a man who was killed, whether deliberately or accidentally, had to be paid blood money - tugab muget - lit - meaning cattle of the vengeance by the clan of the person causing the death. (17).

However, in some tribes, indigenous law did recognise the need for deterrent penalties, but the need was met by increasing the amount of compensation payable to the injured party.

Among the Meru, for instance, a person whose goat has been stolen is entitled to sue the thief for seven goats by way of "compensation", and similar but even drastic provision existed in Masai law. (18).

The consequences of one falling within the attibutes of a witch in his society vary from one community to another. But in any African Society, they are invariably grave. (25). For instances, among the Akamba, witches (aoi) were traditionally dealt with through the Kingole Institution which is the meeting of the mass of the adult male population for the purposes of condemning and executing an evil doer, including proven witches. (26). The execution would mainly be carried out by the use of bows and arrows but only after the council of elders (Nzama) has first given its consent to the execution. (27). Among certain communities in East African suspected witches were killed by the insertion of unripe bananas into the victim's bowels through the anus. Such was the case in Regina V Fabiano Kinene. (28). In this case the defendants killed the deceased immediately after they had caught him performing an act which they genuinely believed to be an act of witchcraft. The manner of retribution was severe; death was caused by the forcible insertion of unripe bananas into the deceased's bowels through the anus. In their confessions to the killing, the appellants said "that they had ..... killed him in the way which, in the olden times, was considered proper for the killing of a wizard." This also happened in the case of Rex V Muiga and others (29) and the Rex V Karogi wa Kithengi and 53 others. (30). Both these cases arose out of the execution of death sentences passed by customary tribunals, purporting to exercise the "power which they had had from the beginning of things." The Headnote read:

> "A recognised native council, or Kiama, in Kikuyu country tried, sentenced and executed certain persons who were suspected of being witchdoctors. The sentence was death by burning, which was carried out by the members of the Kiama compelling the relatives of the deceased sto set fire to a hut in which the condemned men had been placed."

In other communities the killing may be effected by ordinary beating and, or strangulation. This is what happened in the case of Rex V Kelement Maganga (31).

As recently as 1983, a suspected witch was taken to a tree before a large baraza and hanged by two of the complainants while a considerable part of the gathering sat around the tree watching (32). To them, the killing of a witch was the only practical way of ridding society of such undesirables. This method of killing witches as earlier indicated, was based on the conception and attributes of witches, namely that, the witches are born and not made and further, that the evil power possessed by witches is considered very strong and usually overpower the witches themselves. The implications of this being that, witches could betwitch other people irrespective of their good intentions. (33). The power is supposed to have been heriditary and endowed upon only certain people within the clan concerned.

This attitude has been exhibited even more recently in what was referred to as a **'Burning Judgement'** in one of the local dailes (34). The case in Question involved a man and a woman deemed responsible for a lightening bolt in South Africa. Both were burned to death at the stake. The couple, one of them a witchdoctor, were killed in Molethane in the so called black homeland of Lebowa after tribal leaders decided that they caused the bolt which injured a woman and her daughter. A crowd of about three hundred people witnessed the burning occassion.

In may communities in Africa therefore, witchcraft was the most hated and unpopular magic. The possessor of such magic is looked upon as a dangerous and destructive individual. For witchcraft could be used exclusively for the nefarious purposes and, as such, its practice was against the ethical and moral laws of the community. Anyone guilty of the offence of practicing witchcraft was punished to death. The way in which a witch was executed acted as a great warning to other members of the community. (35).

However, it is worthwhile stating that it was not always the practice that all witches be put to death. In many communities death was used as a last resort. For in many instances an alterantive punishment was invoked. For example in Malawi among the Tyolo, proven witches were banished or forced to move to the outskirts of the village. (36). While among the Nandi's an incorrigible witch was sometimes expelled from the neighbourhood and her crops and dwellings destroyed, instead of herself being executed. (37).

Another offence that was punishable by death was theft. If a man became a habitual thief, he was looked upon as a public danger and was put to death publicly, sometimes by being beaten to death or burnt in the same way as a witch or wizard. Among the Kikuyu, for example, theft and witchcraft were both considered as very serious criminal offences often punishable by death. (38). But, generally speaking, theft was categorizable as a civil wrong, for more often than not redress was sought by way of compensation. The death penalty similarly was also administered on incorrigible and frequent murders. Similarly, too, a person accused of sorcery was put to death. But this was only as a last resort and was administered only when there was lack of an alternative punishment.

As it has been shown in this chapter, in traditional African communities there was little inclination to kill the culprit, and the idea of an executioner appointed by the state, and paid for the job is something that was never hear of. Capital Punishment remained an exception rather than a rule.

The reluctance to kill the culprit can be attributed to a number or reasons. Firstly, this reluctance can be attributed to the importance the African communities attached to life. "The great thing," says the Tsonga prover "is life." Secondly, when a man kills another, he can hardly, in African terms, be considered as normal. The idea of a man being bewitched seems to have some roots in that feeling. Hence the infliction of the death penalty was aimed at cleansing the society of a dangerous evil which they believed was caused by a breach of a taboo or commission of a sacred offence.

Death, therefore, was imposed as a last resort in cases of offenders, who had, by the persistence or gravity of their crimes, made themselves dangerous beyond the limits of endurance of their fellow tribesmen. This is so, because, the African penal system was not directed against specific infractions but the restoration of the equilibrium in society. This was only done by the payment of compensation to the injured party. The central concept was aimed at reconciling the two conflicting parties.

In conclusion, it can be observed therefore, that, though African societies administered the death penalty, this was an exception rather than the rule. All these being due to the exceptional importance attached to human life. If anything, a person who committed a serious crime like killing his fellow kinsman was not considered normal. Hence, the death penalty was inflicted rarely and for lack of an alternative. Unlike today, for the death penalty to be administered in traditional Africa, the offence must have been so grave to the extent that it touches the very core of the social fabric and thus upsets the social equilibrium.

FOOTNOTES

1. SNELL G.S.
   Nandi Customary Law, 1954, London, MacMillian & Co. Ltd. at p.5.

2. Junod, H.P.
   JUNOD, H.P. Reform of Penal systems in Africa: Notes on the Death Penalty in Subsaharan Africa, of English Tradition 10 E.A.L.J. 1966, at p. 34 - 36.

3. Aurther Phillips:
   Report on Native Tribunals, Crown counsel (Nairobi Government Printing Press), 1945, chapter XXX111 p.255

4. Jomo Kenyatta:
   Facing Mt. Kenya, Third Impression, (Great Britain), (The Hollen Street Press Ltd., London WI), (Heineman Publishers), (February 1965) p.226.

5. Supra, Note 3 at P.255

6. The matters is not altogether free from controversy:
   See: Professor Radcliffe: African Political Systems, p. XIV - XIX; Dr. Wagner and Brown p. 215 - 218. However, the present author concurrs with the already expressed view.

7. Lord Hailey:
   Punishment in Traditional Africa;
   An African Survey.

8. Junod H.P.
   Penal Reform in Society: Restitution and African Penal Conceptions, Dec. 1965. P.396. Paper presented to the East African Institute of Social Research Conference, Kampala, 1966 (Proceedings).

9. Ibid at p.397

10. Mutungi O.K.

The Legal Aspects of witchcraft in East Africa with particular reference to Kenya, East African Literature Bureau, Kenya Nairobi, (1971) p.12. see also O.K. Mutungi: "Witchcraft and Criminal Law in East Africa," Vol. 5, Valparaiso University L. Review (1971) 524 at p.532 - 533.

11. Cotran E.

Readings in African Law, Ed. by E. Cotran and N. N. Rubin, Newyork Africana Pub. Corp. 1970 (c 1969) 2V. p.122.

12. Routledge and Kegan Pual:

African Penal systems: (ed) Alan Milner (1969).
Several Contributions to this book confirm this:
See for example, J. S. Read of Kenya, Tanzania and Uganda, W. Clifford on Zambia and R. Seidman on Ghana Penal systems. However, certain estern scholars, cherishing retribution, view punishment of the offender as a negation of, and hence compensation for the offence doen. See for example, Hegal in his lectures on the philosophy of right and law. It is submitted, however, that this idea of compensation differs from the one in traditional Africa. The former is orientated towards punishing the offender while the later is orientated towards restituting the loss by means which need not involve punishing the offender - see for example, footnote 16.

13. This is clearly illustrated in Chinua Achebe's "Things Fall Apart," London Heineman (1958, repri. 1961). Okwonkwo who had accidently, killed a clans mate had to go into 'exile' in the land of her mother's people.

14. Jomo Kenyatta, Supra Note 4, p.226 - 227

15. Snell G. S. , Supra Note 1, P.62

16. The payment of compensation by the offenders' relatives, in a way disqualifies the equation of punishment to compensation in the Hegelian sense.

17. Snell G. S., Supra Note 1, p. 63.

18. Aurthur Phillips, Supra Note 3, P. 265.

19. Contini Paul:

The evolution of Blood money for Homicide in Somali, Journal of African law, Vol. 15, 1971, p.78.
Similar measures were also adopted retaliation in West African Communities. See Chenua Achebe Supra, where if a member of one tribe killed a member of another tribe, the killer community had to sacrifice a members or two (depending on status of person killed) from their own community as "compensation." The relating clan were free to deal with the sacrifice given - even to execute the person. (Ekemafuna's case).

20. Contini Paul, Ibid, P. 78 - 79

21. Mutungi O. K. Supra Note 10 p.533 - 535

22. See cap. 67, Laws of Kenya, (1962), S. 10

23. Mutungi Supra, P. 553 - 554.

24. Palack Book review, 47 L.Q.R. (1931), P.688 - 689

25. Mutungi Supra 10 p.20.

26. Penwill D, Kamba Customary Law (1951) at P.96.

27. Lindblom G.
The Akamba in British East Africa (1920) P.176 - 177.

28. Regina V Fabiano Kinene (1941), 8 E.A.C.A. 96

29. Rex V. Muiga and Others (1912) 4 E.A.L.R. 103

30. Rex V Karogi wa Kithengi and 53 others, 1913, 5 EALR 50

31. Rex V. Kelement Maganga (1943), 10 E.A.C.A. 49

32. Rex V. Komen Arap Chelala (1938), 5 E.A.C.A. 150.

33. Levine:
"Witchcraft and socery in a Guusii Community," in witchcraft and socery in East Africa, J. Middleton and E. Winter (ed), (1963), p.226.

34. The Kenya Times, "Burning Judgement," Johannesburg (Reuter), January 7th, 1984.

35. Jomo Kenyatta, Supra Note 4, p.229

36. Junod, H. P. Note 2, P. 35

37. Snell G. S.Supra, p.65

38. Jomo Kenyatta, Supra p.229 - 230

CHAPTER THREE

3:0 THE GENERAL DEBATE ON CAPITAL PUNISHMENT

The previous chapters of this paper were concerned with the general theories of crime and punishment. The intention of such an analysis was to offer this paper a background from which the current debate on capital punishment can now be discussed. This chapter, therefore, ushers in the capital punishment debate. Firstly, this chapter traces the histrical development of the capital punishment debate and then proceeds, secondly, to examine the state of the capital punishment debate as of today.

Before proceeding to discuss the above set objectives, it is very necessary to make some preliminary observations otherwise the whole of this discussion will be just another confused debate buried in the usual debris of misconceptions which have often characterized the debate of capital punishment the world over. In the first place, it suffices to mention that the problem of the death penalty, i.e. of its abolition or retention is not new, and has been said directly before the conscience of men in this century: but in different circumstances and a different climate from those existing in the last century or even at the beginning of this century. Secondly, that it is only in light of the new circumstances and climate that an attempt is now made in this chapter to analyse the current debate on capital punishment. Lastly, that the capital punishment debate has not been settled either by events, by legislation, nor by changing ideas. The author of this paper therefore does not pretend to offer quick solutions to the problem, however, all that is intended is to expose this controversy in light of the changing times; indicate the short comings inherent in the debate in general and if possible predict the direction of such debate in the near future. Such analysis of the debate, it is submitted, provides a better framework for any future discussion on the issue.

3:1 HISTORICAL DEVELOPMENT OF THE CAPITAL PUNISHMENT DEBATE

It suffices to mention from the onset that the debate on capital punishment is not new and that it has survived earlier generations. Each hanging incites a new debate about the wisdom on the death penalty in general. It ignites the old problem of capital punishment - all but dismissed formerly as a mere academic controversy. Everyone - and particularly jurists - can only look with anguish upon the existence of the death penalty and wonder what possible value it can have today.

Since 1949, when the Royal Commission was set up in Great Britain to examine it, the problem of capital punishment has taken on a new dimension: Studies, National and International seminars, individual action and demonstrations have followed one another in succession. And with the commemoration of the Universal Declaration of Human Rights, it became thrust, in all its acuteness, before the conscience of men living as of the present century!

It is impossible to review or even recapitulate here all the major efforts that have been devoted to the question by criminal lawyers and legislations criminologists and penologists. Suffice it to say that in recent years, the controversy has been rekindled. (2).

Legislation has been enacted: In 1965, Great Britain abolished the death penalty for capital murder, for a 'trial period' of five years which has led to the eventual abolition. In African, Zanzibar too through legislation abolished the death penalty for most crimes. Brazil too abolished the death penalty some time ago. Reforms have been made in other countries as well, to either abolish or limit the scope of applicability of the death penalty. While in others, the applicability of the death penalty has been extended so as to cover other crimes as well. Godd examples here are, Kenya (1973), Nigeria (1975), Uganda (1971).(3).

Meetings of experts have taken various stands on the issue: At the seminar held on Coimbra in September 1967 to celebrate the hundredth anniversary of the abolition of the death penalty in Portugal, a resolution condemming capital punishment was unanimously approved even by those who, in their preparatory reports or during the debates, had tried to uphold the anti-abolitionist thesis. It is also significant to mention that the United Nations Consultative Group on the prevention of crime and the treatement of offenders examined the problem again during its meeting at Geneva in August 1968 and adopted solutions recommending moderation. Also, an International Conference, by Amnesty International and held in Stockholm in December 1977 arguing for a case for abolition pointed out that:

> "The death penalty is increasingly taking the form of unexplained disappearences, extra-judicial execution and political murders."

The stand taken by the aformentioned Human Rights Committee for its part was clearly in favour of abolition.

order. At the turn of the century, the French public, worried about the new forms of delinquency typified by the hooligans known as **apaches** and soon after by the 'Bannot gang', demanded merciless repression. As a result, the attempts to abolish capital punishment, by legislation, or by the systematic use of the Presidential pardon, failed. The bourgeoisie of the **belle epoque** sought protection and, by an instinctive reflex - if not a complex - of self defence, it could feel protected only if capital punishment was established and enforced.

The third was an authoritarian current, which had a profound influence. In the first half of the twentieth century, sociologically, this influence first made itself felt as a result of the first world war which, by dispelling the euphoria of the early years of the century and confounding the tendencies of liberal criminal law upto then, led all the belligerent countries - and some others as well - to tighten repression. Should spics and traitors, after all, be given quarter? And when the innocent were sent to the slaughter, should outand-out criminals still be spared? At first somewhat diffuse, these attitudes were strengthened with the return of peace (which logically might have seen them disappear), but now they had the force of ideology. In Italy - where the abolitionist movement had had its most fertile ground, from Beccaria and Leopold II of Tuscany to Cavrara and Zanerdell's - Musollini's fascist regime re-established the death penalty and, of course, first of all for political offences. In the U.S.S.R. the movement brought about by the October Revolutioin (1917), which was hardly an 'authoritarian' movement as that term is understood in the West was certainly not 'liberal' one either, did away with capital punishment at the onset only to re-establish it under Stalin, and enforce it on a vast scale, with notorious results. And it is unnecessary to recall the use to which it was put by National Socialism when Europe was under its heel. (6).

Nevertheless, just before or just after the first world war the abolitionist movement, while encountering new adversaries, remained alive and active. The Europe that took shape at Versailles whatever its defects or shortcomings, was determined to be liberal and urged moderation in punishment. Abolition was not introduced unconditionally in the Scandinavian countries, like the Netherlands, Belgium and Austria. Certain socio-political events - and court decisions - worked to the advantage of the abolition, created so great a stir that two years later Great Britain set up a select committe, which even at that time proposed that the death penalty should be abolished, experimentally,

for a five year period. And the generous action carried out by the Howard league in this field is well known.

The second world war, even less than the first, did not help to further the abolitionist cause. Ruthless by nature, 'total war' allows the state every possible means of coercion. Capital executions then became current practice. When the hostilities are over, countries resolutely opposed to the death penalty may even re-establish it - or allow it to be used again - for punishing 'collaborators' or 'anti-social individuals'. In the countries liberated from the Nazi occuptation, the public demanded the death sentence for the oppressors and their accomplices. The new notions of the war criminal and of crimes against humanity seemed to call for the supreme punishment: and the Nuremiburg Tribunal delivered spectacular death sentences. Everywhere the attempt to introduce or strengthen economic and social planning by the state led to a disproportionate increase in penalties: In France, a law enacted in 1946 (but never enforced) went so far as to prescribe the death penalty for certain 'crimes' relating to food supplies. (7).

At mid-century, then, there were two movements. On the one side, the death penalty - and this is an undeniable sociological fact - won back some of the ground it had lost during the nineteenth century, when the efforts of such men as Sir Samuel Romilly were aimed essentially at reducing the s cope of capital punishment and limiting it to the most serious cases of wilfull homicide. At the same time, liberal criminal law in Europe, as in Latin America, had excluded the death penalty for political crimes. Here the Volte-Face was complete, though political crimes now were often made to appear as crimes under ordinary law of military offences. A state - or government - seeking to consolidate its strength looks for legal means of annihilating its enemies. The State has its own justifications, Lese -Majesty, special courts - everything that men fought against in 1789 - reappear. (8). The death penalty is no longer solely the punishment for having taken the life of an individual, and totalitarianism thus puts the cloak back. In the U.S.S.R. under Stalin, sabotage was assimilated to treason: and although the Soviet Code of 1960 maintains capital punishment only provisionally for exceptional cases, subsequent laws, some made retroactive, have introduced it for illegal trade in foreign currency. This movement, lastly finds new fuel in what American sociologists call 'panic legislation': by holding out the threat of the severest punishment, the law tries to reassure public opionion alarmed by certain acute and contagious

forms of criminality, such as gangterism, the use of motorcars equipped with fire-arms, kidnapping, and hooliganism. It then becomes almost normal to resort to the death penalty.

The same period, however, produced an abolitionist reaction. Excessive evil sometimes brings about its own remedy, before and after the last war, backlashed. The death penalty disppeared with the authoritarian regimes that had imposed or abolished it - in Italy, Austria and Federal Germany. The Universal Declaration of Human Rights proclaimed, the right to life and respect of the human person. In 1947, the First International Congress of Social Defence called for the abolition of a penalty incompatible with the demands - and the spirit - of modern penal policy. In 1948, the United Nations assumed the leadership in the 'Prevention of crime and treatment of offenders,' a phrase which in itself excludes measures of brutal elimination. During the debates, especially those of the Fourteenth Session of the General Assembly (1959), that led to the decision of carry out an inquiry on capital punishment, there was virtually no one who spoke up in its defence. The problem of the death penalty therefore, is still with us - but as it has been earlier said, in different circumstances, and a different climate from those existing in the past centuries. It is therefore in the light of the new circumstances and climate that an attempt will now be made to examine the second wing of this chapter: the State of the capital punishment debate today.

THE CAPITAL PUNISHMENT DEBATE TODAY

Rather than reverting to the terms of the old controversy, I shall simply proceed in examining the issue of capital punishment as it has now emerged. First of all, it need be mentioned that, the death penalty has not simply disappeared, as might have been expected in 1900. It has even picked up some new memontum, and the legal systems set up since the second world war still give it ample room: this is true of criminal law in the peoples' democracies - in most middle East countries - and in the ex-colonial countries of Africa and Asia. (10). Political events, revolutions, rebellions, coup d'e' tat, international tension and wars - whether called by their own name or another - still cry out for violence of every kind. The shape that the 'geography of capital punishment is now taking seems to be to the detriment of the abolitionist movement, despite a few outstanding successes.(11)Practically the only areas in the world definitely conquered by abolition are Western Europe - with the exception of Spain, France, Greece, Turkey - and in Latin America (except for a few passsing

setbacks). At the same time, it should be noted that in recent years the Anglo-American system has moved steadily towards abolition.

A second fact is that, again contrary to what was thought in 1900 or even 1930, little decisive evidence has been supplied by criminology that would help to settle the controversy. Abolitionist and retentionists continue to throw statistics at each other. Doubtless, as Mr. Thornsten Sellin has admirably demonstrated, a scientific study of crime rates and trends shows that the abolition, or the re-establishment, of capital punishment in a country has never led to an abrupt and appreciable rise (or fall) in criminality. (12). This is a strong argument for the abolitionists. The figures themselves, however, must be interpreted with care because of the conditions peculiar to each country, the forms and trends of delinquency, and the nature, make-up and action of the bodies responsible for investigation, prosection and punishment under each system. Much remains to be done here in the field of comparative empirical research. Nor have the criminal sciences yet yielded definite data that could serve as an unquestioned basis for legislative reforms in the classification of delinquents or perpetrators of capital crimes, the biophychic study of convicts, or the notions of abnormality, mental disorders, dangerous and different [and conflicting] cultural levels - in short, in the etiology of capital offences. The very most that can be said - and that much is encouraging - is that the notions of the constitutional evil-doer and the social moster - those offsprings of Lombroso's born criminal that still seduced many clear minds at the beginning of this century - have been abondoned. Besides, the use made by National Socialism of such notions - admittedly, warped from their original meaning - for justifying sterilization, death sentence and the extermination of thousands of human beings would be reason enough to discend them.

The third - and this time a clearly positive fact is the present character of capital punishment where it is actually enforced and the position of those who advocate its maintenance. These two aspects are extremely significant especially when trying to understand the nature and scope of capital punishment today. First, the death sentence is now maintained only as an exceptional, temporary or limited measure. Although apparently it is not seriously questioned in many independent countries of Africa and Asia, and at times, as in Iraq, is even used in an ostentatious and challenging manner, everywhere else it is carried out almost clandestinely. (13). The countries of Eastern Europe,

especially the Soviet Union in its reforms of 1958 - 1960 and Yugoslavia in its 1959 revision of the the 1950 criminal code, claim that it has been maintained only for exceptional cases, pending final abolition. In those countries of Europe - including Eastern Europe and of America where it is still in force, it is applied less and less, and there is a constant and significant decrease in the number of capital sentences and executions. In all advanced countries, executions are no longer public, and it is forbidden to report and at times even to mention them. It all takes place as if the state, even whole claiming it is obliged to put a criminal to death, were secretly ashamed of the act.

The capital punishment argument has changed. All looked with favour towards the day of abolition. Capital punishment thus becomes an 'exceptional' not a routine sanction, which should be justified legislatively, judicially and by the executive: to be used as sparingly as social circumstances permit, so that the provisions of article 3 of the Declaration of Human Rights may be implemented. Such a statement does not imply interference with national autonomy; it simply recognises that the burden of proof in relation to the need for capital punishment for any type of crime and for the execution of any individual criminal has shifted with the progress of social understanding and a larger recognition of the rights of man. (14).

A detailed account cannot be given here in this paper of the various means used to reduce the actual application of capital punishment. But it should be noted that owing to criminal ligislation, the administration of criminal law (and procedure) administrative policy and govenment action and prerogative of mercy) the number of the sentences actually executed, have reduced. (15). The death penalty - both its sentence and its execution - is now a quantitatively insignificant exception among the enalties in force. Thus the sociological reality of capital punishment is gradually approaching the point when it will virtually disappear - in particular.

THE CAPITAL PUNISHMENT DEBATE PROPER

After tracing the history of the capital punishment debate, we now move to look at the second question: What then, is the state of the capital punishment today. First, I intend to make a preliminary observation. That, the advocates of capital punishment are becoming rare, and the cases for which they would retain capital punishment are also exceptional. So writers do continue to assert that the death sentence is the only intimidating, the only expiatory, the only just punishment because an individual guilty of a capital crime must pay for it with his life. But the classical position, which was that of Beccaria's

opponents and, during the nineteenth centry, that of the staunch advocates of capital punishment, is gradually being abandoned. At meetings of expert,on the radio or television, or in public debates, those prepared to endorse the absolute maintenance of capital punishment are becoming increasingly scarce Its advocates usually declare their agreement with a penal policy of abolition and content themselves with carrying on a rear-guard battle.

Coming now to the debate, it need be said that, the controversy over the death penalty has generated arguments of two types. The first argument appeals to moral intuitions; the second concerns deterrance. Although both types of arguments speak to the morality of systems of capital punishment, the first debate has been dominated by moral philosophers and the second by empirical social scientists. (16).

Generally, the moral argument against the death penalty starts with the principle that it is wrong intentionally to take human life. For those who regard this principle as an absolute, the fact that it is wrong to kill does not make it right to take the murderer's life. Opponents of the death penalty correctly point out that in an era when the "eye for an eye" approach to punishment has been abandoned for almost every crime, no self-evident principle demands that it be retained for capital offences.

Both sides of the argument from morality are concerned with issues of justice. All that needs to be said is that, no principle of retribution allows the taking away of an innocent life.

Retributionists justify the death penalty despite substantial evidence that it has been inequitably applied by arguing that inequitable application is not inherent in the penalty, and that it is better that some receive their just deserts, however baised the sample executed than that none do.

For some opponents of capital punishment the inconsistency with which it is applied is enough to condemn it. These opponents need not confront the question of whether it is ultimately just to execute the murderer for regardless of ultimate deserts, extreme penalties cannot be allowed so long as aspects of personal disadvantages play an important part in determining who from among an equally culpable lot will be subject to the extreme sanction.

The argument concerning deterrence is of a different kind. If executions deter, it means that killing some who have behaved heinously will prevent the ultimely death of blameless others. Indeed, those who support capital punishment because

of its deterrent effect expect that one execution will save several lives, thus avoiding the nice philosophical question of whether an innocent life is worth more than a guilty one.

Many opponents of the death penalty implicitly concede that capital punishment is morally permissible if it saves more lives than it takes. The argument is over the empirical question of whether the death penalty actually deters and, if so, in what circumstances and to what extent.

It is difficult indeed, for those whose essential case against the death penalty rests on the value of life to maintain their position if an execution in fact trades one guilty life for several innocent ones . However, the intriguing argument that this trade - off does not justify capital punishment as a matter of human values because the life to be lost is known and the lives to be saved unknown seems to keep the abolitionist's argument intact.

Although retributionists trace their heritage to Kant and before him the Bible, utilitarianism is persuasive enough in modern thought that most retributionists would be troubled if a plausible case could not be made for deterrence. (17)

Death by execution is both brutal and final. It is hard to make the case for such a penalty when the only end promoted is the unprovable intuition that it is just. (18).

Nevertheless, modern retributivists have been less concerned than their opponents with the evidence bearing on deterrence. This may in part be because until recently, there was virtually no empirical evidence, that gave them comfort. (19). Indeed, a desire to justify capital punishment on grounds other than deterrence has probably contributed to the retributivist theories of punishment.

The opposing moral claim, from the value of life, pulls us almost irresistably to the question of whether taking an offender's life will be compensated by the preservation of lives that would otherwise be lost to say murder - the empirical question addressed by the research on deterrence.

One wrong thing with retributism is that it infers policy from philosophy and hence leading to unrealistic and far fetched conclusions. Despite my willingness to concede for the sake of argument that jutice by which I mean giving a person his just deserts - may be a value superior to life, I believe that the retributivist

attempts to escape. The deterrence question is inadequate, and that ultimately the moral decision on the death penalty must reflect on empirical assessment.

The most powerful retributivist argument for the death penalty fail as a moral justification for captial punishment because they do not address the crucial question. Retributivists have let their agenda be set by those who defend life as an ultimate value. Thus, they direct most of their attention to the question of whether murderers deserve to die. While an affirmative answer to this question is necessary to justify capital punishment, it is not sufficient. I say so, because, there remains the rather different question of whether the state should be allowed to execute murderers.

It is easy to imagine a person who is not troubled by news that an escaping murderer has been shot - yet quite disturbed by the news that a murderer is about to be executed. In chicago, for example, between the years 1934 and 1954, eight times as many criminals were killed by police or private individuals as were executed in the Cook counties jail. The executions, no doubt caused far more controversy and grief than did the other killing, even though many of the latter must have been involved crimes for which the death penalty could not have been given. In part, this is because the scheduling of executions allows those who value even guilty lives to become involved in efforts to save them, but this definitely cannot be the whole story. (21).

If lives were the only issue, efforts would be directed towards preventing police and shop owners from shooting fleeing felons than towards the abolition of capital punishment.

Once we acknowledge that not everyone who kills another should die and virtually all modern retributivists acknowledge this - doubts about the fairness of the process by which we select those we execute arise. For, then, absent is some self-evident principle separating murderers who deserve to die from those who do not.

If, then inconsistent sentencing prevents the derivation of a socially validating principle, the person who applauds the execution of the murderer is applauding what is literally unprincipled state action.

When one criminal is executed and another of apparently equal culpability spared, there is no self-evident reason why the sparing and not the execution is wrong. When therefore, a state cannot act consistently in such an important matter as determining who shall die, those who invoke moral philosophy to

demand that the state be allowed to make the determination should be able to point to a consensually validating principle. Since the criminal process is inherently incapable of consistently applying any "meaningful and clear" standard by which to "divide who are to die from those who are to live," the use of a procedure so standardless and error prone to make this most grave decision is inconsistent with the requirements that - "due process" attend the taking of life. The criminal process, Black argues, may be adequate as a basis for imposing imprisonment, but not for the irreversible punishment of death; even justices noted for their "principled conservatism" as Harlem and Frankfurter have indicated that the quantum of "process" that is "due" is greater when life is at stake. (22).

It is, Black concludes, the "infinity of special factors" one must take into account that precludes establishing an acceptable standard for imposing the death penalty. (23).

Retributivist can escape the delimma, and some do, by claiming that their purpose is limited to determining the characteristics of a just system of punishment in a just world. However, if the limitation is meant seriously, we know from the research of economists on the theory of the second best that a system which maximizes justice in an ideal world is not necessarily the most just system in an imperfect world. Retributivism is also haunted by those executions of the innocent which inevitably occur if the death penalty is allowed for as Bentham once observed:

> Error is possible in all judgements. In every other case of judicial error, compensation can be made to the injured person. Death admits no such compensation. (24).

Retributivism, on its own terms, allows life to be taken only when death is deserved; it does not tolerate killing as a means to some greater social good. Retributivists are proud of their Kantian heritage, which demands that life be treated only as an end. Thus, however good a just punishment system and however much such system demands the death penalty, the philosophy of retributivism apparently forbids the sacrifice of innocent lives as a condition for the maintenance of such a system.

Ideally, of course, a system of capital punishment would not take innocent lives, but we know as a statistical matter that if a state executes often enough, some innocent lives will be lost. For example, in 1879, Charles Peace, an Englishman confessed to the murder of policeman for which John Habron had

been wrongfully sentenced to death three years before. Daniel Leary also an Englishman, was sentenced to death for having poisoned his friend with whom he lodged. It was later discovered and proved that he had died of heart failure. Steven Tonka, an Hungarian, was hanged for the murder of a man who was later discovered to have committed suicide. Rowland was sentenced to death for having killed his woman friend, O. Balchin, while a year later John Ware confessed that he had killed her because she infected him with a veneral disease.

More recently, Tram, a mentally retarded van driver was charged in December, 1949, with the murder of his wife and child. He was convicted although the evidence was scanty and he kept on saying that "Christie" had done it. He was hanged on March 9th, 1950. Later, Christie, came along and said - "I strangled her." It was then found that Evans had been hanged in error. (25).

Even as recently as this year (1984), in Takamatsu, Japan, Shigeyoski Taniquichi had been wrongfully kept on the death row for 34 years for alledgely murdering a rice dealer in 1950 before the error was discovered this year. (25). Though acquited, one does not need to stretch far to notice the injustice inherent due to such delay. The question that one is poised to ask then, is, how many unlucky ones have been wrongfully executed due to failure of detecting such error.

The list is inexhaustible - for those maliciously killed for political reasons are excluded also that this be the people known killed in error - a troubling question is: How many more unknown have faced the same fate but it was not discovered! It is for this horrifying reasons that one cannot help agreeing with Lafayette when he said that:

> "I shall ask for the abolition of capital punishment until I have the infallibility of human judgement demonstrated to me." (26).

Hence, although, it may be a comfort not knowing what lives will be mistakently taken, nothing about retributivism allows us to sacrifice the lives of unknown innocents in the interests of just vengeance.

THE DEATH PENALTY AND THE ADMINISTRATION OF JUSTICE [THE COURTROOM SCENE]

THE STANDARD OF PROOF AND THE RELATIVITY OF THE CONCEPT OF REASONABLE DOUBT

One reason for the particularly low conviction rate for murder when capital punishment is available or mandatory is the evidentiary problems created or aggravated by the death penalty. Every civilized system of justice (if we may call a justice system retaining the death penalty civilized) accepts in many ways the exceptionality of a death sentence and the appropriateness of having higher requirements of due process for death than for other punishments. Harlan, a former Justice of the Supreme Court of the United Sates, is quoted by Professor Black from a concurring opinion:

> "So far as capital cases are concerned, I think they stand on quite a different footing than other offences. In such cases the law is especially sensitive to demands for that procedural fairness which inheres in a civilian where the judge and trier of fact are not responsive to the command of the convening authority. I do not concede that whatever process is "due" an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the constitution in a capital case. (27).

It seems evident, therefore, that the standard of proof required for conviction of a non-capital offence is usually less stringent than that required for conviction of a capital one. Jurisdictions affirm the uniqueness of a death sentence by making special procedural requirements or by setting standards different from the usual ones, for example, by requiring that the defendant in a capital case ; be represented by the defence counsel; by forbidding pleas of guilty to a capital offence, or by providing for automatic appeal or review of sentence, etc. These standards are intended to protect the rights of the defendant, to ensure a fair and due process and to reduce the probability of error. While such procedural safeguards are undoubtedly desirable whether the sentence is death or life imprisonment, they inevitably result in a lower rate of conviction in capital cases. Furthermore, because a human life is at stake and because of the irrevocability of the death penalty, the notion of "reasonable doubt" carries a particular significance and assumes new dimensions. Making a judgement about the physical facts of a criminal case, whether capital or not is deciding on past events, a reconstruction of what took place at some time in the past. Such a reconstruction can never be a matter of certainity but only one of probabilities. For this reason, the law requires that the guilt of the defendant be established beyond a reasonable doubt. But reasonable

doubt is neither an absolute nor constant concept. It is not a quantifiable and measurable standard. It is essentially relative and subjective. The concept of "reasonable doubt" can never be interpreted in the same manner. Its meaning varies according to jurisdictions and from one case to the next. What may be considered beyond a reasonable doubt in a non-capital case does not necessarily constitute sufficient grounds for a guilty verdict in a capital case. Because of the subjective nature of the concept, the assessment of what constitutes a reasonable doubt will inevitably vary with the person required to make the judgement. The same evidence may therefore be judged quite differently by the prosecutor, the defence lawyer, the judge, the member of the jury etc. And within the same jury various members may differ considerably in their evaluation of the evidence, in judging the credibility of witnesses, the reliability of expert testimony, etc. (28). The late Professor Packer summed it up best when he wrote:

> "We traditionally say that the defendant's innocense is assumed and that his guilt must be proved beyond a reasonable doubt. It is useless to try to define 'reasonable doubt'. What it suggests is not a quantifiable standard but an adjudicative mood. If there is any hesitation, which reflection does not dessipate, in deciding that what 'really' happened accords with the legal requirements for finding the defendant guilty of the offence with which he is charged, then the [judge] must acquit him. (29).

If guilt and innocence were judged by some immutable and unchangable criteria, and if the validity of evidence were measurable by some kind of mathematically fixed and invariable standard then the penalty prescribed for the offence would, in all probability, be irrelevant, to the final outcome. But this is not and will never be the case. Evidence will always be considered under the "reasonable doubt" rule. And the relativity of the rule will invariably lead to arbitrariness and capriciousness and will result in the disparity of decision on guilt and innocence. It will enable latent and manifest biases and prejudices to become operational and to influence the outcome of the justice process.

5:2 THE POSSIBILITY OF ERROR

Opponents of the death penalty argue that there is always a risk that an innocent man will be convicted and hanged. Although this argument is basically correct since such mistakes have occured in the past, it creates the false impression that judicial errors associated with the infliction of the death penalty are limited to those cases in which the wrong man is hanged. No wonder then, that the Literature devoted to the errors of justice focuses almost exclusively

on such cases. Yet the array of potential errors when capital punishment is retained in definitely more extended than the simple possibility of convicting the innocent. Mistakes regarding the physical facts may be the least frequent of all possible mistakes. It is true that in some cases, especially those in which the evidence is purely circumstantial, (30) , the factual question may be exceedingly difficult to determine, and this, no doubt, enhances the potentiality for error. In other cases, miscarriages of justice may take place induced by coerced confessions, mistaken identity, frame-ups, denial of due process, etc. More frequent still are the mistakes related to the psychological facts and/or the interpretation and application of the law. These mistakes are more subtle in nature and therefore more difficult to detect or to establish. Mistakes may occur when decisions are made as to whether the killing was with or without malice, with or without premeditation, whether it was deliberate or reckless, whether the defendant was sane or insane, whether the killing was committed in self-defence (actual or percieved), whether the murder was in the course of furtherance of theft or not, whether the accused was or was not deprived of the power of self-control by reason of provocation, etc. Needless to say, that all these decisions are susceptible to error led Professor Black to state that,

> ".....the penalty of death cannot be imposed, given the limitations of our minds and institutions, without considerable measures both of arbitrariness and of mistake." (31).

Paradoxically, the more sophisticated [or...] seemingly sophisticated] the law on homicide becomes, the more likely are the mistakes. Deciding whether the defendant was sane or insane when committing the crime is less complex than deciding whether he was under irresistible impulse or whether his responsibility was diminished. When the law makes distinctions between different categories of homicide, the judge or the jury have to decide not only whether the defendant has perpetrated the material act of killing, but also on the qualification of the act. The range of possible mistakes seems without an end. Black argues that mistakes are not limited to the physical facts nor even the decision on guilt for innocence:

> "But the possibility of mistake in the 'guilt' or 'not guilty' choice does not end with mistake either as to physical or unproblematically describable psychological fact. The jury (judge) is also called upon to pronounce upon mixed questions of fact of law, questions that have puzzled the most astute legal minds. One of these, perennially with us, is 'premeditation'. Premeditation is very often a defining characteristic of capital murder. (22).

Most of the mistakes outlined above may be described as unintentional errors. In addition, there are the "intentional errors" which are enhanced and augmented by the death penalty. What I mean by intentional errors are those occuring in cases in which the judge comes in with a verdict of "guilty" of some offence lesser than the one strictly warranted by the evidence. Black gives several factors which may account for such a "mistaken" decision: Sympathy, doubt of physical "guilt" in the narrow sense, doubt as to the other, less tangible factors going to make up "guilt", and feeling that extenuating circumstances exist, and so on - may motivate this behaviour.

> "But the pragmatic fact, visible from the outside, is that the [judge], in finding a defendant guilty, let us say, of 'second-degree' rather than of 'first-degree' murder, is, for whatever reason and on whatever basis, choosing that this defendant not suffer death". (33)

In view of all the above, it seems clear that if we use the death penalty we will be hanging some people by mistake. Supporters of the death penalty usually respond to the possibility of mistake by three counter arguments. They argue that, firstly, the risk of an error of justice is so infinitesimal that it may be safely ignored. To this, my response is that this argument is based on a restrictive view of what is judicial error. Secondly, they argue that the possibilities of error is an inescapable concomitant of every criminal trial. This argument is no doubt true. That human justice is not infallible is beyond argument. For, to be infallible means to make a mistake sometimes. This is not suprising. What is suprising is that we accept to make the issue of life and death dependent on decisions susceptible to a good number of errors. The third argument relied upon by the supporters of the death penalty is that the risk is one which should be taken in view of the unique deterrent effect of the death penalty. The problem with this argument is that this unique deterrent effect has not been established so far and there is nothing at the moment to show us that it shall be established. It can therefore be submitted that human justice will always be arbitrary and no standards or guidelines legislative or otherwise,, are likely to cure this fundamental and inherent defect. (34).

THE ARBITRARY AND DISCRIMINATORY NATURE OF THE DEATH PENALTY

Opponents of the death penalty have also argued that it can never be applied uniformly, that it it randomly and capriciously invoked, and that whether it is made mandatory or left to the discretion of the sentencer, it will continue to be inflicted in an arbitrary and selective manner. (35).

In the case of **Furman V Georgia** (36) one basic rationale explicit or implicit underlying all five majority opinions is that the death penalty has been applied in an arbitrary manner and thus constitutes cruel and unusual punishment. The three marginal judges, who concurred with Marshall and Brennan J.J., seemed to have held (with some variations in reason and in expression) that capital punishment as currently administered violated the American constitution because of the arbitrary selection of a small number of sufferers - a selection mostly made not on clearly articulated grounds, but on the basis of a "standardless" discretion lodged in juries and judges. Brennan J. compared the actual execution of those sentenced to death to a lottery system - a system where most of those who are in do not get called:

> "When the punishment of death is inflicted in a trivial number of cases in which it is legally available the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed it smarks off little more than a lottery system." (37)

In his dissenting judgement in **R V Miller and Cockriell,** (38), McIntyre of the British Columbia Court of Appeal in Canada addressed the arbitrariness issue holding that clemecy despite all precautions cannot be exercised but arbitrarily. In his holding he had this to say:

> "I intend no criticism of those who have faced the awaresome responsbility for the decision between life and death when clemency was considered. However, the best and most high principled of men exercising discretion in matters of this gravity will apply individual tests, individual ideas and believes, and the result which emerges will of necessity bear an arbitrary complexion" (39) [emphasis Mine]

Another problem in the administration of the death penalty is its discriministration nature. This discrimination is too flagrant to be denied even by the people's strong advocates. In the last two decades there has been a growing body of research lending empirical support to the alleged discrimination that occures in the imposition of capital punishment. The evidence shows that those who receive capital sentences are the poor and the minorities, and this is way out of the percentages that these groups represent in the total population and to the rate of criminal offences commited by these groups. (40).

AS usual, supporters of the death penalty have been evasive in their attempt to counter the argument of discrimination by stating that even if discrimination were proven:

> "it would be a mistake to argue that capital punishment should be rejected because some discrimination exists. The proper approach is to remedy the defect, not abolish the system". (41).

Unfortunately, it is submitted that, the defect cannot be remedied because discrimination is inherent in the death penalty and because of the impossibility of keeping its administration even handed.

Thus in the case of **Graffins V Illinois,** Justice Black observed that:

> "There can be not equal justice [for the majority] where the kind of trial a man gets depends on the amount of money he has....." (42)

Discrimination, is not only as a result of direct procedural violations of the defendants' right but also a result of the prejudical way jurors (judges view the defendant and weigh the evidence against him). Prejudices and biases do not usually operate at a conscious level. They influence people's decisions in a rather subtle and unconscious manner. They intervene into the decisional process at the stages when subjective judgement are made: assessment of evidence; choice between conflicting testimonies; evaluation of psychological facts such as malice, intent, premeditation, insanity etc. Discrimination therefore, results from social attitudes deeply sealed in the personalities, of judges and juries, attitudes which are an integral component of the judicial process. (43).

It can therefore, safely be concluded that discrimination will continue as long as prejudices and biases exist. It cannot be eliminated unless the whole social fabric of society and the whole web of social attitudes are fundamentally changed. And even if racial prejudices against blacks in the United States and Southern Africa are eliminated and even if male chivalry in Canada is eradicated, human sentiments of sympathy and antipathy, of attraction and repulsion, will continue to influence judicial decisions and to tip the scales of justice against the unattractive, the unsympathetic, the poor and the disadvantaged.

:5:4 CAPITAL PUNISHMENT AND THE INSANITY DEFENCE

Another disturbing problem that has confronted the supporters of the death penalty is the bottleneck created by the plea of insanity defence. Many, believe that the historical purpose of the insanity defence has been to avoid capital punishment (44). When capital punishment is retained, the assessment of the mental state of the defendant at the time of the crime and his fitness to stand trial become crucial evidentory issues. In deciding on these issues the possibility of error looms large because the insanity issue is settled not on the basis of objective, hard facts, but on a subjective and trial psychiatric diagnoses. Because our criminal law recognises insanity at the time of the offence as an exculpatory condition, we have to acknowledge that a judical error is made every time an insane offender is convicted or a "normal" offender is declared "not guilty by reason of insanity." (45).

The Potentiality for such error is enhanced and aggravated by the retention of death penalty. Firstly, capital punishment increases the frequency of insanity pleas and consequently increases the probabilities and the risks of judicial errors. Secondly, although the potentiality for error is ever present when this question of material guilt is decided, it is much greater with regard to the issue of moral guilt and the moral elements of the crime. Lastly, although the potentiality for error is ever present in any system of human justice, it is much more serious when the life of a human being is at stake.

Worse still, there is an absence of an adequate defination of the word 'insanity.' For judges and lawyers, insanity is a legal standard, for the psychiatrist it is a medical fact. Insanity, then, means different things to different people and the inevitable result is a lack of uniformity and a wide disparity in court decisions on the issue. The ambiguity of the defination and the relativity of the notion open the door to both intentional and unintentional errors. A judge (jury) having doubts, about the defendant's guilt, having scruples about the death penalty, or, for some reason, unwilling to send the accused to a way out of this dilemma and may declare the defendant insane despite the lack of strong evidence attesting to the irresponsibility of the accused. (46).

In another case, particularly that of a defendant admitting, to have committed a whole series of heinous crimes, the judge (jury) may deliberately disregard overwhelming psychiatric evidence on insanity in an attempt to rid society of a dangerous insane killer (47).

The legal provision of capital punishment, then, makes the life or death of a defendant in a captial case contingent upon the unprecise and relative notion of insanity, a notion which is neither susceptible to scientific assessment nor to accurate measure. In his usual eloquent manner, Professor Black summarises the situation thus:

> "The upshot of the best writing on the subject is that we have so far failed in defining exculpatory insanity and that success is nowhere in sight. Yet we have to assume, unless the whole thing has been a solemn frolic, that we execute some people, and put others into medical custody, because we think that the ones we execute fall on one side of the line, and the others on the other side. (48).

Another question that is posed is: How reliable is the psychiatric diagnoses? In answering this question it needs mentioning that psychiatry is probably the least developed and the least reliable branch on medicine. The lack of precision and the use of vague terminology which often characterise psychiatric reports do not reflect any lack of professional expertise on the part of the individual psychatric, but rather the, deficiences of the discipline and the imperfections of current knowledge of the human mind. A part of the difficulty is, without doubt, attributable to the fact that a large number of mental diseases do not result from organic causes and are not accompanied by physical, recognisable symptoms which would allow an easy and accurate diagnosis. (49).

Quite often, therefore, the psychiatrist has to rely on the defendant's own statement and on behavioural symptoms which are not impossible to simulate. The judge and the jury, are faced with the formidable task of weighing the psychiatrist's testimony and of assessing the reliability of his diagnoses. The task becomes even more complex, when there are, as is often the case, conflicting psychiatric testimonies regarding the defendant's mental state at the time of the offence.

One of the problems associated with the insanity defence is the need to establish that the mental disease existed at the time of the offence. Many of the so-called functional psychoses are cyclical in nature. They oscillate between acute episodes with more or less detectable symptoms and remission phrases characterized by an amelioration of disappearence of the symptoms. When an insanity defence is made, the judge or the jury are asked to decide on what the accused was really thinking when he committed the offence, with all the difficulties and uncertainities involved in an attempt to penetrate another

man's mind, and to recapture his mental condition as it may in the highly dynamic situation of the crime. This process, it is submitted, is stewn with pitfalls. In capital cases, therefore, an error regarding the insanity defence may mean the difference between life and death. (50).

DOES CAPITAL PUNISHMENT SERVE ANY OF THE MODERN AIMS OF SENTENCING?

Before setting out to answer this question it is necessary first, to make a few preliminary observations. In the first place, there is no agreement as to what the goals of sentencing are or should be. Secondly, that, despite this wide variations of opinion, however, five major goals can be singled out as having guided legislation and judges at one time or another. These are: rehabilitation, deterrence, incapacitation, retribution and denunciation. The first three are utilitarian goals while the other two can be regarded as moral imperatives or moral idea deterrence as an aim of sentencing policy will be given preference since, it is submitted, that it is the deterrence arguments that forms the cornerstone of the protagonists of capital punishment. (51).

Starting off with the retributive view, simply put, natural justice demands that the criminal be punished with severity equal to the evil of his crime. Death is, therefore, the only fitting punishment for murder. This old argument of retributivist has been rejected by philophrs and legal scholars, by judges and by lawyers, by social and behavioral scientists. Plato declared in 'Protagoras' that wrong-doers should not be punished for what they have done in the past as this would amount to blind vengeance:

> "No, punishment is inflicted by a rational man for the sake of the crime that has been committed - after all one cannot undo what is past - but for the sake of the future, to prevent, to prevent either the same man or, by the spectacle of his punishment, someone else, from doing wrong again. (52).

The British Royal Commission on capital punishment emphatically dismissed retribution and announced that "modern penological thought discounts retribution in the sense of vengeance." Several American courts have ruled that retribution has no place in a contemporary system of criminal justice. The New York Court of Appeals stated in People v Oliver that:

> (T)he punishment or treatment of offenders is directed towards one or more of three ends: (1) to discourage and act as a deterrent upon future criminal activity, (2) to confine the offender so that he may not hurt society, and (3) to correct and rehabilitate the offender. There is no place in the scheme for punishment for its own sake, the product simply of vengeance or retribution. (53).

Today, modern retributivist, would not insist on punishment for its own sake. As I have noted earlier, few modern retributivists believe that all killers deserve death. They respect the law's determination that capital punishment should be reserved for the most morally culpable: those who fully intended, and perhaps rejoiced in the suffering and death they inflicted and who, in some meaningful sense, could have done otherwise. Moral culpability, thus concieved, is a subjective state. To truly determine, who are the most deserving of death one would have to search people's minds. Our inability to do means that in deciding whether to inflict the death penalty we often attend more to the circumstances of the crime than to the circumstances of the criminal. The person who slays in a peculiar or brutal way is more likely to receive the death penalty than one who dispatches his victim with a single bullet, yet the former may have been insane under all but the narrowest legal test while the latter was cool and calculating.

It need be also observed that the presence of the death penalty may also contribute to the unjustified infliction of less than death sentences on the innocent. A guilty plea by an accused may be more likely in a death penalty jurisdiction where one does not risk death by asserting his innocence, and a bench qualified to impose the death penalty may be more likely mistaken to convict of a less than capital offence than one which has not been so qualified.

The time lag between the time of the crime and the time of execution also poses problems for retributivism. Executions are justified only when the offender deserves to die. Assuming that all those sentenced to death deserved to die at the time they committed the crimes for which they were sentenced, it does not follow that they deserve death at the time it arrives. People so change with their experiences that one may sensibly concieve of individuals as different people deserving different fates at different points in time. Being on death row may be an experience that is especially likely to promote such a change in moral identity. (54).

In short, there is a fundamental irony to the usual retributivist position. Basic principles of moral justice that are believed to justify or even demand the death of those who maliciously kill others are necessarily offended by the attempt to impose a system of state executions in an imperfect world. The emphasis that retributivists place on human beings as ends and not as means, the high value they place on innocent human life, and their insistence that retributivism - (unlike revenge) respects the bounds of law combine to form a philosophy from which one cannot derive a policy that trades the wrongful execution of a few for the proper execution of many. Capital punishment impliments such policy. Conversely, any policy derived from a philosophy that is rooted in our intuitions regarding justice will be suspect if the system it prescribes distributes rewards or punishment in an invidious or inconsistent fashion. Capital punishment is such a system.

The question that need to be posed is: Why do we feel there is honour in repaying death with death? I believe the reason was largely cultural. Both our history and fiction are replete with characters and communities that are thought to have acted admirably in securing the death of grievious offenders. But it was not the fact of revengeful killing that we admire, rather, it is in the process by which retribution is achieved. We honour individuals not because they redress some cosmic balance sheet, but because they risk their lives for the idea of justice. The Arthurian epic nicely highlights the way in which the degree of honour depends on the element of personal risk. The legend is also interesting for its message that the honour sought by the avenging champion is secondary to that which may be found in search of the holy. (55)

It is not the fact that a death was repaid with a death which is salutory, rather, it is the process necessary to bring this about. Just as the linkage of a positive reinforcer with a neutral stimulas will give the stimulas a positive quality, so do the efforts associated with past accounts of retribution give retributivism its lingering good name. But once the state assumes the burden of executing , the character of the retributive process is fundamentally changed. There is no honour in watching the State execute one who in the past would have been a just target of the watcher's vengeance, nor does honour attach to the person who sets a noose or straps a convict into a chair. The meaning of executions has also changed considerably for communities. Specialised law enforcement means that citizens no longer have to come together to secure retribution, and the execution itself has become a source of passionate controversy

rather than the occassion for a reassertion of communal solidarity.

In his book entitled 'For Capital Punishment', Walter Berns (56), uses the example of shakespeare's Macbeth to make a strong intiutive case that some people's crimes are such that they must die. One may agree with Berns that there is justice, both poetic and otherwise, in Macbeth's paying with his life for his crimes. But Bern's desired conclusion, that a system of State executions is appropriate and satisfying does not follow.

Consider an alternative ending to Shakespeare's play. Macduff, instead of taking the field against Macbeth, calls the police to report Macbeth's murders. Macbeth is arrested and tried. He rejects a plea bargain that would have spared his life, and the case proceeds to trial. During the course of the lengthy trial, the man or people who hated Macbeth for his action begin to understand the character that led him to so act. He is no longer just the killer of Duncan and others, but is again, in almost impossible juxtaposition, one of Scotland's - noblest lords, himself deserving to be king. The people learn of Macbeth's instinctive revulsion at the idea of turning of his guest and king, they hear of lady Macbeth's constant prodding, and they realise that Macbeth's remorse is geniune and that he fully accepts the values his actions threatened. Nevertheless the court (jury) convicts and the judge, who is up for re-election that year sentences Macbeth to die. An opinion poll indicates that 44% of the people surveyed believe the sentence is just, 39% believe Macbeth should be spared, and 17% have no opinion. Immediately, a committee to save Macbeth is formed. The next two years are taken up with judicial appeals - often on technical matters that have no relation to the core moral issues - and with pleas for executive clemency. From time to time a story appears in the newspaper emphasizing that whatever Macbeth was, he is today a decent man. Eventually the last appeal is dismissed and the king, after dropping hints that he might spare Macbeth, decides it would be politically inexpedient to do so. On one cold morning, with fifty members of the spare Macbeth Committee marching outside the prison walls in protest, a warden, a church minister, a doctor, an executioner and two reporters watch Macbeth dangle on the end of a rope for twenty-five minutes until he chokes to death. The reporters note in the evening, papers that "the drop was not handled well," but they do not mention the urination and defecation that took place while Macbeth was dangling. Television news uses the occasion to review the

story of the assassination and to interview tearful members of Macbeth's family who, in their grief, accuse the State for murder.

Our satifaction with Macduff's slaying of Macbeth, which Berns plays on so effectively, reflects not the fact of retribution but the way it was accomplished. Had an impersonal, devisive, state-controlled execution like that described above been the only way of dispatching Macbeth, the play, no doubt, could not have been written. Yet in contemporary society, with the importance we attach to personal freedom, trial justice, and the safeguarding of the innocent, this is the only way that the State may act retributively. There is nothing noble about it. As with the basic philosophical argument, the existence, and to that extent the self-evidence validity, of the retributivist intuition that certain killers ought to be repaid with death tells us only that there is some good in killing evil-doers. However, if we understand the intuitions cultural roots, we see; that it does not follow that there ought to be a State system of capital punishment. The retributivists instinctively applauds Macduff because he bravely killed a man who deserves to die. (57).

Today, State executions not only destroy our consensus as to what fate is deserved, but they also eliminate the possibility of honour. Our instinct for revenge - and that is what retributivist intuition is, at base - was shaped by and is meant for different world. For justice, even retributive justice, can be satisfied without torture, maiming or shedding of blood. None of our current penalties is of the same kind as the offences they punish. We do not burn down the houses of arsonists. Rapists are not raped, assaultes are not assulted and most property offences are punishable by a prison term. Still these penalties are seen as befitting the crimes and as serving the retributive ends of criminal justice. And, except for some loud voices demanding a return to the noose, nobody is calling for a reversion to a system of justice based on the Talion law. (58).

Next comes the question of incapacitation. The guiding question will be: Is capital punishment needed as an incapacitating tool? Retentionists argue that the penalty of death has an absolute incapacitating power since it ensures that a person executed of a capital offence will not commit further crimes. Such an argument would, no doubt, have been a strongly convincing one if: First, capital punishment were the only means of effectively incapacitating dangerous criminals and secondly, if such dangerous criminals as a group were know to have a high recidivism

rate. It is submitted that neither of these assumptions is true. (59).

The issue that now comes for consideration is the question of denunciation: Is capital punishment the best means of showing society's abhorrence to murder? Supporters of death penalty argue that murder is the most abhorent of crimes, striking at the sanctity of life of which it is the first duty of a law abiding society to protect. The punishment for this crime of crimes should, therefore, adequately reflect the revulsion felt by the great majority of citizens towards this horrible act. More than any other punishment, so the argument goes, the death penalty marks society's indignation, detestation by the community of the crime of murder and other violent crimes. Thus, by retaining capital punishment for the greatest crime, the law fosters in the community a special abhorrence to such crimes.

In response to this argument, the abolitionist maintain that it is difficult to see how the official killing of a murderer by the state can promote respect for human life. As Baroness Wootton puts it: "to imitate immoral actions does not seem a very sensible way of discouraging them." (60). If one of the major aims of the criminal law is to denounce the crime then this aim can be better achieved by means other then repeating the same act for which the offender has been convicted.

The death penalty neither fosters nor promotes reverence for human life because it effects on the public mind is one of brutalizing and not of humanizing. It is, regardless of what its proponents say, a mode of vengeance rather than a means of expressing society's disapproval. A special commission established in Massachusette for the purposes of investigating and studying the abolition of the death penalty declared that:

> "The existence of capital punishment tends to cheapen human life. It tends to encourage both children and adults to believe that physical violence, the ultimate form of which is putting an individual to death, is a proper method of solving social and personal conflict." (61).

This view was a re-affirmation of a similar belief held by the British select Committee on capital punishment which observed that:

> ".....We venture to say that, as in the past, there will come, through the carrying into law of proposals, we are bound to make, an ever increasing respect for human life. Humanity and security, indeed, will walk hand in hand. And as it is more human spirit in our people that makes more humane penal code possible; so, on the other hand, in humanizing our punishment, we will yet further humanize our people. On the one side, and on the other side, humanity will beget humanity, as nobless enkindles nobleness." (62) [Emphasis Mine].

The last question for determination is the deterrent one. It is here that most supporters of capital punishment lay their emphasis by arguing that capital punishment is a unique deterrence. The question hence becomes: Is capital punishment a unique deterrent? The general observation to be made here is that the right question in this connection is not whether the death penalty is a deterrent, but whether it is unique deterrent that is significantly more effective than other alternatives.

The argument from deterrence does not share the deficiences of the retributivst position. Its central premise - that executing murderers and other violent crimes will save more lives than are taken - provides a reasonable moral basis for a system of State executions. As presented, it is usually assumed that one execution will deter several homicides, and it is the argument in this form that will be examined most closely (63). The inevitable biased, mistaken, or inconsistent application of the death penalty that makes retributivism a philosophy fit only for ideal world pose no special problems for the argument from deterrence.

So long as they system of capital punishment saves more lives than are lost there is a virtue in maintaining the system. Indeed, the argument from deterrence can justify the execution of the innocent, for even a mistaken execution might prevent more than one murder. But it has been counter-argued that it is not necessarily the case that an execution is justified within the premises of deterrence theory whenever more than one murder is thereby deterred. It may be that we should value the known life of the condemned higher than the unknown lives which will be preserved at some future time. (64).

This possibility has been taken by some as a ground for denying deterrence any place in the moral debate on capital punishment. But to so reject deterrence misses the crucial point, which is that deterrence as a moral justification for capital punishment is a necessary but not sufficient condition. The virtue of the net saving of human life that deterrence promises may be outweighed by the injustices of inconsistent or error prone systems of capital punishment. (65).

Supporters of capital punishment are fond of quoting Sir James Fitzjames Stephen, who once observed that:

> "Some men probably abstain from murder because they fear that if they committed murder they would be hanged. Hundreds of thousands abstain from it because they regard it with horrow. One great reason why they regard it with horrow is that murderers are hanged." (66)

The argument is reasonable. It may be that the main benefit of capital punishment is that it teaches people that it is wrong to kill. But the opposite position is also reasonable. It may be that capital punishment teaches people that life is not sacred and that killing is not always a moral wrong. (67).

When I speak of the deterrent effect of capital punishment in my review of the empirical literature, I will generally be using the term as a shorthand reference for all the preventive effects associated with a system of capital punishment. Data relating to capital punishment has never been analysed with an eye to separating deterrence from normative validation effects, although the distinciton might have important policy implications. If capital punishment reduces homicide predominantly through deterrence, frequent executions must be justified. If the reduction occures primarily through normative validations, an occasional execution every few years might prevent as many deaths of a larger number.

Normative validation through exemplary punishment has never actually been shown to exist, and murder, particularly the kind of murder that results in the death penalty, is so generally disapproved of at all levels of society that there is little apriori reason to believe that the death penalty must be substituted for life imprisonment to drive home the message that murder is wrong.

Instinctively, one would expect the death penalty to deter. Most of us are sufficiently afraid of dying that we would take extra action to avoid a clear threat death and most of us remember occasion when the fear of punishment caused us to refrain from taking actions we deeply desired. However, our instincts regarding deterrence, like our retributive instincts, are insufficiently attentive to the system in which capital punishment is embedded. They hold no necessary implications for the expected deterrent efficacy of capital punishment. (68)

One important aspect of capital punishment that suggests a minimum deterrent effect is that relative infrequency within which the death penalty is applied. Rarely has a State executed 50 percent of its capital offenders, and in most States at most times the proportion executed has been quite low. (69). This reflects, in part, the fact that not all killers are caught and not all homicides are capital. Low execution rates suggest limited deterrence because, however much people fear death, they commonly prefer immediate gratification to a statistically higher chance of survival.

Such application falls short of the deterrent theory which suggests that if punishment is to act as an effective deterrance to crime it must be firstly severe enough to outweigh the potential pleasures crime might bring, secondly, it must be administered with certainity, thirdly, it must be administered publicly and lastly it must be applied with the proper judicial attitude. It is submitted however, that in practice the application of capital punishment falls short of the components of these deterrent theory. (70).

Supporters of capital punishment might argue that the lession to learn from low execution rates is that all killers should be executed, but in reality we are unlikely ever to execute a large proportion of our homicide offenders (71). The United States Supreme Court has been reluctant to interfere with the state procedures that do not allow adequate consideration of mitigating factors, (72), and most of the modern retributivists who have made the intellectual case for restoring capital punishment believe death is the deserved sanction for only a minority of homicides.

The second reason why we should expect little deterrence from the death penalty is that the threat of death can only deter potential criminals who loosely calculate the costs and rewards of their behaviour. Many homicides, for example, occur when the offender is highly emotional or under the influence of alcohol - situations in which rational calculation appears unlikely (73). Ironically, the very factors that inhibit rational affect premeditation, so that homicide when rationality is impaired is not likely punishable by death. To the extent that nonpremeditated murders predominate in homicide statistics, we can expect that deterrence will be relatively unimportant in determining homicide rates (74).

Other kinds of homicide that one might think particularly likely to be deterrable by the threat of capital punishment are murders of police and prison wards, contract killing, and murders by terrorists.

The murder of police and prison guards appear more amenable to deterrence than ordinary murder because potential killers might anticipate a higher than average probability of the death penalty for such slayings. However, at least in the case of police murder, the incentive to kill to avoid all punishment may be so strong as to overwhelm all deterrent effects. Contract killers too, appear a good bet for deterrence because the rationality of the decision to kill - can calculate - means that our second reason for being skeptical of deterrence does not apply. Here, however, our instincts probably betray us because contract killers are apparently like most professionals in that, they are specially skilled. Hence, they are rarely caught. Concievably the presence of capital punishment could raise the market price of contract killing and thereby save a few lives by reducing killers. The number of lives saved would be a function of the elasticity of that demand. One would expect that number to be small, for those who dislike others intensely enough or who are otherwise so interested in their death as to hire a killer are unlikely to be dissuaded by small increases in price.

Capital punishment might also prevent homicide if holding "political prinsoners" stimulates terrorist assault to free them. Strictly speaking, this is not a deterrent effect, but rather the removal by execution of an incentive to crime. Here, however, the system of punishment is again crucial. While killing terrorists immediately would prevent attempts to trade their lives for others, according to terrorists, due process of law before their execution would provide ample time for further terrorist

activity, and impending executions might encourage other terrorists to take retaliatory action. (75).

It is possible that the death penalty deters but that its deterrent impact is offset by homicidogenic effects. The early research on capital punishment before Fuman V Geogia, (76) failed to show that capital punishment deterred homicide. The work of one man, Thorsten Sellin, dominates this period. Schuessler summarises Sellin's view of finding in the conclusion that:

> "[T]he fact that men continue to argue in favour of the death penalty on deterrent grounds may only demonstrate man's inability to confuse tradition with proof, and his related ability to justify his established way of behaving." (77).

Thorsten Sellin's basic methodology was to compare the yearly homicide rates of neighbouring retentionist and abolitionist jurisdication. One would expect neighbouring jurisdications to be alike with respect to factors other than the death penalty that lead people to commit crimes. If so, and if the death penalty deters, retentionist states would have lower homicide rates than nearby abolitions jurisdications. Sellin shows that they do not. (78).

Trends in homicide rates tend to be similar in neigbouring States, suggesting that contigious State are affected in much the same way by changes in social or environment conditions that are conducive to or inhibit homicide.

A brick is not a wall. Sellin did not stop with his paired comparison. He looked at the way homicide rates changed when States abolished or reinstituted the death penalty. Data form Maine, Arizona, Colorado, Iowa, Missouri, Tennessee, Oregon, Washington, Kansas, South Dalnota, Delaware, all fail to provide evidence that the presence of the death penalty deters. These results, when coupled with the contigous State research, provide more powerful evidence of non-deterrence, for the methodologies are compementary. (79).

Sellin reports a number of other statistics as well. He collects information on homicide or murder convictions before and after changes in the death penalty in Sweden, the Netherlands, Austria, New Zealand, England and part of Australia and Germany. Nothing in these data suggests that the existence of punishment has a deterrent effect. (80).

Sellin also addressed the question of whether the death panalty is needed to deter those serving life terms. It may be that the prospect of a lengthy sentences gives one a special incentive to kill either in the process of escape or out of frustration. If so, lives might be saved within prisons by reducing the sentences of serious felonies. The problem is finding the point at which these savings are counter-balanced by increased crime outside the walls. (81).

Fattah finds nothing in Canadian data which suggests Canada's 1982 moratorium on the death penalty or its decision in 1967 to abolish the death penalty for all but police murders had any effect on Canada's homicide rate. (82).

If the death penalty deterred, one would expect formerly capital crimes to increase at a faster rate than the rate of crimes whose penalties had not changed. Deterrent effects of capital punishment have been given many different kinds of chances to appear. If capital punishment has any strong deterrent effects, it is likely that some deterrence would have been evident. While it is impossible to prove a negative, this failure to find a deterrent effect provides reason to believe that non exists.

In 1975 an economist, Isaac Ehrlich, published in his profession's most prestigous Journal what is probably called the most important article on capital punishment to date. (83). Ehrlick's study was important because it was explicitly based on economic theory and because it brought the techniques of modern econometrics to bear on the problem of deterrence and capital punishment. His finding that executions dettered homicide effectively reopened the deterrence controversy. Its immediate effects were reflected in Justice Stewart's leading opinion in Gregg V Georgia (84), the case that restored death penalty in America as a permissible penalty.

Ehrlich's is the only empirical study suggesting deterrence that Steward J. cited in support of his proposition. While it is unlikely that the court would have decided Gregg V. Georgia differently but for Ehrlich's research, his results did mean that some justices were able to avoid confronting the difficult question of how to justify a penalty that within the scientific community was generally acknowledged to take lives without compensating savings.

To call an article the most important in its field is high praise but this is about the last praisewe shall have for Ehrlich. To anticipate briefly, Ehrich's 1975 articles provide no support for the preposition that death penalty deters. It has stirred up the pond, but only to muddy the waters at a time when we need to see clearly. There is now a substantial body of research criticizing Ehrlich on technical and conceptual grounds. The criticism are strongly persuasive and hold much more water (85).

That the replications of Ehrlich's analysis revealed that his evidence of deterrence depends upon a restrictive assumption about the mathematical relationship between homicides and executions, (86), the inclusion of a particular set of observations, the use of a limited set of control variables, and a peculiar construction of the execution rate, the key variable. One of the strong criticisms of Ehrlich's study was his use of time series data for 1933 to 1939 in which homicides and executions were aggregated for the entire United States. The Panel of the National Academy of science noted that Ehrlich's findings were particulary sensitive to the time period included. This sensitivity results largely from the fact that during 1962 to 1969, executions ceased and homicide increased but no more than did other crimes.

Yet, there are a number of ways in which we might plausibly expect a system of capital punishment to increase the homicide rate. (87). The hypothesis that state executions degrade life and thus brutalise is intuitively as plausible as the theory of normative validation. There have appearently been cases in which people sought execution as a means of suicide and so, presumably, would not have killed in a state with no death penalty. Those who think they are going to be executed for a crime may kill more recklessly to avoid capture than those who believe that life imprisonment is the maximum punishment. Even killing terrorists without due process may cost more lives than it saves, for revenge may be more likely than attempts to take hostages for ransom. (88).

Most governments especially in the developing world that have been confronted with violent crimes have reacted by using violence as a means to general deterrence. In Kenya, for example, the death penalty was in 1975 made mandatory for robbery with violence by the so called "Hanging Bill" which was passed by Parliament and has since became operational. (89). In Nigeria the military government promulgated in 1970 the Robbery and Firearms (special Provisions) Degree No.47 which provided for death by hanging or firing squad as the military governor may direct for those

robbers who, being armed with firearms or offensive weapons, use violence on their victims. By 1976 a total of over 205 convicted armed robbers in Nigeria had been executed by firing squad, some publicily. (90).

As recently as this year (1984), over 40 condemned criminals in Nigeria's Southern Bendel State are to face public executions in their home villages as a deterrent to violent crimes. Cases of armed robberies in Nigeria have risen steeply since the army take-over on the New Year's eve, bringing an uncomfortable belief that criminals are so confident as to be deterred by the soldiers' return. Many people had hoped that the military's resumption of power would cause violent crimes to subside, but instead it has escalated to become a chronic, widespread problem which is the second major anxiety for the country after national economic problems. The seriousness of the situation was expressed by the State Policy Commissioner's order that his men would now shoot robbers on sight. (91).

The President of the Central African Republic dealt with the violent crime problems by leading an army detachment in July 1972, to a prison, lined up forty-five convicted thieves and ordered the soldiers to beat them to death. He then put the three corpes and forty-two battered prisoners with their gaping wounds infested with flies for public view. (92).

In Uganda, the Robbery Suspect Decree of 1972 [Cap 2] in assence empowered the members of the armed forces, police and prison to kill robbery suspects on sight. However, on 12th April, 1979, the new government of Preisent Yusuf Lule repealed decrees of former President Amin creating special military tribunals empowered to impose the death penalty for a wide range of security and economic offences. The new government however, stated its desire to retain the death penalty for the same offences as under previous civilian rule. (93).

In Tanzania, capital sentences were passed by the High Court on thirty three person in 1968. In 1969, the number of people convicted of murder increased to 78 persons. It more than doubled. Who can tell us the reason? The fate of 46 out of 78 went to the President for his consideration as to whether he would execise his prerogative of mercy. Ten of them were executed. Ten sentences were commuted. (94).

In Zambia, since independence in 1964, the death penalty has been retained under the Zambian penal code on a mandatory basis for treason and murder. In 1974, the mandatory death penalty was also introduced for "aggravated robbery," this being defined as theft involving the actual or threatened use of violence. In Malawi the death penalty is mandatory for treason and murder and discretionary for rape. In Algeria the death penalty exists for a number of offences, including c rimes against the State security, economic espionage and, since February 1975, drug smuggling. In March 1976, a State security court sentenced to death three people described as being part of an "International Anti-Algeria subversive network" and in May 1975 a defendant found guilty in absentia of economic espionage received the same sentence. South Africa has one of the highest rate of judicial execution in the world. In 1974, for example, 86 people were sentenced and 40 executed. The following year, 103 sentences were passed by the courts, and 68 executions carried out. The death penalty is imposed for a wide range of serious crimes such as murder, rape or robbery with aggraving circumstances, and for certain political offences covered by the Terrorism Act and related security legislation like Internal Security Act and the so-called "Sabotage Act" (95). On 16th January, 1979, the Minister of Justice reported in Parliament that a total of 132 executions had been carried out in South Africa during 1978. Only one of those executed was white. (96).

In Argentina, though the death penalty was re-introduced in 1976, it was never formally applied until March, 1979, when a court sentenced to death by firing squad a man accused of double murder. In Iran, after the revolution of February 1979, special courts known as "Islamic" Revolutionary Tribunals", were established to try persons not only to the torture and killing of dissenters and demonstrators, but also to being actively involved in the running of the country under the Imperial Government. By lst May, 1979, approximately 160 people had been reported executed by firing squad. On 29th April, 1979, in the aftermath of several violent incidents which followed the signing of the Israel-Egypt peace treaty, popularly known as the 'Camp David accord', the Israel Cabinate sanctioned the use of the death penalty for "act of inhuman cruelty."(97).

The Mozambique government introduced the death panalty in February, 1979, following sporadic acts of sabotage in Maputo and other towns. Under the new criminal code crimes such as treaston and acts of terrorism or sabotage involving loss of life were made capital offences. The first executions under the new law were carried out in Maputo on lst April, 1979, when ten people convicted of espionage and treason before a Revolutionary Tribunal were shot by firing squad. In Somalia, seventeed people were executed on 26th October, 1979, after being convicted by the National Security Court of "endangering the unity, freedom and security of the nation." (98).

The list is inexhaustible. However, it suffices to mention that many countries have stuck to the death penalty as if it were their own saviour to the problem of violent crimes. (99). The question that now need be posed is: Have violent crimes been so deterred in view of the desparate attempts made by rententionist countries to curb them? If the answer be in the negative, then, what useful purpose does the death penalty serve? In response to this question, I concur with William Vailey, a sociologist when he said:

> "People are frightened and upset about crime in the street..... Nothing seems to be done to solve the problem, so the feeling that if we cant't cure murderers something we can do is kill them." (100.

This idea of deterrence, if anything, can be reduced toi very personal rudiments. If I know I will be punished so severly, I will not commit the crime. The logic is undeniable. Yet in the thickest of real life and real crime this cannot be the case.

Before concluding, let me clear the doubts on the minds of those who still stand in delimma as to whether the death penalty should be retained or abolished. A few words featuring the processes of execution may clear this doubting minds.

In April 1982, John Louis Evans was shocked for half a minute. This broke the leg electrode, which was re-attached. A second shock failed to kill him, and smoke was seen coming out of his mouth and his left leg; he was given a third dose. It took 10 minutes before the attending physician certified him as being dead. After an earlier

electrocution, at post mortem the temperature of the leg electrode was found to be 54°C - about the temperature of a very hot bath. An observation made by an Austrianborn physician Hans Selye about the stages of dying reinforces this further. He observes that, acute dying proceeds through a number of stages irrespective of the agent which causes it. First, there is the "stress syndrome" - the person hyperventilates (breathes very rapidly), the heart beats faster, the muscles contract and the whole sympathetic nervous system is activated. Catecholamines (adrenaline and non-adrenaline) and corticosteroids (hormones produced by the adrenal cortex) in the blood are elevated. The concentration of "high-energy phosphates" in brain and muscles falls. Glycogen in liver and muscle decrease.

In the second stage, the autonomic nervous system seems to become dominated by the parasympathetic nervous system, or the sympathetic response fails. The pupils dilate. The hairs of the skin erect. The person urinates and defecates.

In the third stage, dissolution supervenes. The temperature of the skin falls and then the cooling spreads centrally. The organs begin to lose their function - those like the brain with high oxygen consumption dying more quickly than the more slowly metabolising, cornea. The body loses its resistance to infection, and anaerobic and aerobic organisms proliferate. The tissue autolyses (digest itself) and the protein lose their structure. (101). The question that one needs to pose and consider is: Why retain such a cruel and unusual punishment - which revolts against human consious?

I conclude that, the death penalty is unnecessary excessive and unusually cruel. We have to admit that, it is the last remnant of an archaic, primitive and brutal penal system. It is a vestige of a bygone era, an era during which punishment, either for lack of humanity or alternatives or both, was physical, violent, cruel and irreversible. It is a relic of the past which is not concordant with any of the contemporary aims of sentencing. (102).

The next chapter discusses the capital punishment debate in the Kenyan context. Highlighted will be the capital punishment debate in Parliament, the attitude of the courts in the application of capital punishment and finally the exercise of the prerogative of mercy.

by the executive in capital punishment cases. It is from here, that conclusions will be made and alternatives suggested as a final seal to the capital punishment debate.

FOOTNOTES TO CHAPER THREE

1. Marc Ancel:

   Capital Punishment in the second half of the Twentieth Century (SPECIAL STUDY) The Review: International Commission of Jurists (1969) at P. 33.

2. See: The British Parliamentary Debates on Capital Punishment (May - July 1983)

3. Both Kenya and Nigeria have enacted Legislation making Capital Punishment mandatory for armed Robbery: SEE: the Kenyan "Hanging Bill"(1973), and the Nigerian Robbery and Firearms (special provisions) Degree No. 47 (1970)

4. Hebert L. Packer:

   The limits of the criminal sanction. See generally chapter 1 - 2.

5. Marc Ancel, Loc. Cit. P. 34.

6. Marc Ancel , Ibid, P. 35

7. Ibid, P. 36

8. The French Revolution (1789) which had the theme of 'liberty, Equality and Fraternity.

9. Supra, Note 2.

10. Supra, Note 3.

11. See: The British Parliamentary Debate (1983) where a motion to bring back the hangman was thrown out.

12 Sellin Thorstein:

   Capital Punishment (Ed) 1959, P. 152.

13. The hanging in Baghdad (1969)

14. Report of the United Nations Consultative Group on the prevention and Treatment of Offenders (Geneva 6 - 16th August 1968)

15. Practice shows that most executions are delayed with the result that they are rarely carried out.

16. Lempert O. Richard:

Dessert and Deterrence: An Assessment of the Moral Bases of the case of Capital Punishment, Mic. L. Rev, (VOL 79) Part 1 1980-81 P. 1177

17. Immanuel Kant:

Argued that morality would be impossible if free will or Freedom of the will were none-existent. According to Kant the laws of morals, unlike the laws of nature are the laws of Freedom. For a detailed exposition of Kant's view see Charpter One of this paper.

18. Amnesty International Report:

The death penalty, International Publications, 10 Southampton Street London, WC 2E, 7 HF, England P. 1.

19. Sellin, Supra Note 12, P. 152

20. Ibid, P. 162.

21. Black L. Richard Jnr.

Capital Punishment : The Inevitability of caprice and mistake (New York: W.W. Norton & Co, Inc. 1974), P. 35.

See Also: Brian Grosman:

New Directions in Sentencing (1980) Buttherworth and Co. (Canada) Ltd, P. 172 where he observes that the court practice of distinguishing between murder and Manslaughter has more often than not created problems in legal circles.

22. Black C.L. Jnr, Supra P. 35

23. Black C.J. Jnr, Supra P. 36

24. Bentham Jeremy:

The Principles of Morals and Legislation, Hafner, Pub. Co, 1965, see Chapter 3.

25. The standard (Newspaper), Monday, March 1984 - P. 7.

26. Massawe A.A.F.

Notes on Capital Punishment (VOL. 10) E.A.L.Y, P. 106-114

27. Black C.L. Jnr, Loc. Cit Note 21, P. 35.

28. Brian Grossman, Supra Note 21, P. 165.

29. Packer H.L. Supra Note 4 at P. 137.

30. Brian Grossman, Supra, P. 166.

31. Op. Cit, Note 21, P. 24.

32. Ibid, P. 48.

33. Ibid, P. 16 - 17

34. Brian Grossman, Supra Note 21, P. 167 - 168.

35. Ibid, P. 169.

36. Furman V. Georgia 408 U.S. 238 (1972)

37. Ibid, P. 238

38. P.V. Miller and Cockriell (1975), 63 D.L.R. (3d) 193.

39. Ibid, P. 270

40. Brian Grossman, Supra Note 21, P. 174 - 175,

See also: Bruening:

The Death Penalty and the U.S. Supreme Court 7975; Greensberg and Himmelstein JJ: " Varieties of attack of the death penalty ", 15 crime and delinquency (1969), P.115; Amnesty International Report P. 5 - 18.

41. Hochkammer W.O. Jnr,

" The Capital Punishment controversy" 60 JNL of crime L. and Criminology and Police Science, (1969), P. 362.

42. Graffins V. Illinois, 351 U.S. 12 (1956) P. 19

43. Brian Grossman, Supra 21, P. 177.

44. Ibid, P. 178. Also, the authors own experience while in custody in Industrial Area Remand Prison (October - January), 1983, most in-mates facing the death penalty said that they pleaded insanity as a last resort to avoid proceedings for murder.

45. Brian Grosman, Supra Note 21, P. 178.

46. Ibid, P. 178.

47. Ibid, P. 180

48. Black C.L. Jnr. Loc, Cit, Note 21, P. 53

49. Brian Grossman, Supra Note 21, P. 180

50. Ibid, P. 183

51. Ibid, P. 183

52. Ibid, P. 187

53. People V. Oliver I N.Y. 2d 152 (1956)

54. Richard O. Lampert, Loc. Cit Note 16, P. 1184

55. Ibid, P. 185

56. Walter Berns, For Capital Punishment P. 167.

57. The criminal law does not, however, applaud such action. Macduff would today be guilty of premeditated murder, and in some jurisdictions could be sentenced to death.

58. Brian Grossman, Supra Note 21, P. 188.

59. Ibid, P. 184 - 185

60. Wooten B:

" Morality and mistake" in L. Blum Cooper (ed), The Hanging Question (London: Duckworth & Co, 1969) P. 14

61. United States: Massachusette, Preliminary Report of the Hoe Special Committee established for the purpose of Investigating and studying the Abolition of the Death Penalty in Capital Crime, Boston, (1958) P. 45.

62. The British Select Committee on Capital Punishment (London: HM 50, 1930)

63. Richard O. Lempert, Loc. Cit. Note 4, P 1187.

64. See: Mckee and Sesnolvitz P. 9.

65. See:, e.g. Schehedler, Capital Punishment and its deterrent effort, 4 Soc. Theory and Prac. (1976) P. 47 - 56.

66. Stephen J:

A History of the Criminal Law in England, (1883) as quoted in E. Van Den Hang, Punishing Criminals at P. 68 - 69.

67. Sykes and Matza:

Techniques of Neutralization: The theory of delinquency, 22 Am. Soc. Rev. 664 (1957). Juvenile deliquents learn to neutralise portions of dominant norms and values, thus making their actions not seem morally wrong to them

68. Richard O. Lempert, Loc. Cit Note 4, P. 1191

69. Bowers W:

Executive in America 24 (1974) Bowers estimates, that only about 2% of all homicides before 1950 and few than 1% after 1950 resulted in executions.

70 Bailey C. william:

Murder and the Death Penalty, Journal of Criminal law and Criminology (VOL 65) 1974 P. 416

71. See: Morris Hans Mattich:

The Death Penalty: Sentimental notes on two topics, 10 TOL. L.R. 299, 311 (1979), Murchison, Towards a perspective on the Death Penalty cases, 27 emory law Journal 469, (1978) P. 552-53.

72 Lockett V. Ohio, 438 U.S. 586 (1978)

73. This is particularly true in Kisii District (Kenya) with probably, the highest homicide rate in Kenya.

74. High Court decisions (Kenya) reveal this. Most persons originally charged for murder plea bargain it for manslaughter at the commencement of the trial.

75. CF. A. Bill introduced in the British Parliament early 1983 to hang various categories of murderers was defeated. The categories suggested were: murder by gun,by explosive or of a Policeman or a Prison Officer. However it was the issue of hanging of 'IRA terrorists' which generated most heat in the delgate. Many were of the view that hanging such

terrorists would fan the flames of violence and sectarian hatred. Others expressed the view that it would be invidous to distinguish between a "Political" and a purely Criminal motivation. It was generally observed that the argument on deterrence should not be dominant over society's abhorrenes of those at war with it, See: The Economist, 16 - 12 July, 1983, P. 32, also see Newsweek, July 11, 1983, an artical by Spencer Resiss with Tony Clifton (London)

76. Furman V. Georgia, Supra No. 36, P. 238

77. Schuessler:

The deterrent influence of the Death Penalty, 284 Annals 52 (1952) at P. 62.

78. Ibid, P. 13

79. Ibid, P. 38 - 48

80. Ibid, P. 49 - 50

81. Thorsten Sellin:

The Death Penalty and Police Safety, in Capital Punishment; at P. 138.

82. Fattah:

The Canadian Experiences with Abolition of the Death Penalty, in Executions in America at P. 121.

83. Ehrlich:

The deterrent effect of Capital Punishment: A Quest of life and death, 65 Am. Econ. Rev. 397 (1975)

84. Gregg V. Georgia 428 U.S. 153, 184-86 (1976)

85. See: Richard O. Lempert, Loc. Cit Note 4, 1207 - 1215 - gives a Critique of Ehrlich's work in detail.

86. Bowers J.W. and Pierce G.,

" The illusion of deterrence in Ehrlich's Research on Capital Punishment ", 85 Yale Law Journal (1975), P. 187 - 208;
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87. See e.g Diamond:

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Capital Punishment as suicide and as murder, in Capital Punishment in the U.S. at P. 432;

See also:

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91. Daily Nation, Monday, February 20 (1984) P. 2:" Criminals to be executed in Public", Lagos Sunday.

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98. Ibid, P. 7 - 9

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100. Time (Magazine) No. 4 of January 24, 1983

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4:0 CAPITAL PUNISHMENT: THE KENYAN EXPERIENCE

The idea of capital punishment as known today was part of the foreign concepts imposed by colonial masters on the indigenous community. There has been numerous debates in Parliament on the viability of the death penalty.

Given the circumstances, therefore, the application of capital punishment in our local courts has been far from uniform. As a result, the exercise of the prerogative of mercy by the executive has been clouded with a lot of uncertainity.

This final part of my thesis is broken down as follows: First an attempt is made to give a background on the subject under discussion. Secondly a discussion will follow on the debate in Parliament; thirdly there will be the court scene and finally the executive and the Exercise of Prerogative of mercy.

4:1 Background

It is worthwhile noting, that the term 'legal imposition' is much wider and does not merely concern itself with the normative and institutional legacies of colonialism:

> "It encompasses any situation where fundamental change is contemplated in society through the medium of laws or legal institutions whose content is clearly contrary to the percieved and accepted normative order of those whose behaviour it seeks to regulate (1)".

Imposition thus implies, first, an attempt to induce fundamental change, secondly, the application of norms that are external to society, and thirdly, an absence of democratic consensus from the society. Legal imposition therefore, is both epistemological and ideological in nature. From a epistemological point of view the process of imposition may be seen as an essentially intellectual exercise. Simply put, in law making situations, draftsmen, legislators, and administrators always resolt to models that have been transmitted to them through the educational process.

Further, still, because the basic training of most lawyers and policy makers in Africa remains foreign, Western concepts, ideas and models, it appears, continue to dominate the Kenyan legislative process.

The process of imposition is also ideological in the sense that it is a function of the type of political economic system the state elite identify with. This explanation can be taken at two levels; at the macro level, continuous imposition of the law can be seen as an expression of dependancy relations between the Third World (the periphery) and Industrialised nations (the Metropolitan centres). In other words, the impetus of imposition of law can be seen at this level as being generated from without rather than arising from within (2).

At the micro - level the imposition of law in Kenya can be seen as an overact of commitment by policy makers to particular values. These values (or norms) require the development of an institutional frame-work either through direct transplant from societies with similar ideology or, as is more usual in post-colonial states, by making incremental adjustments to the existing structures to bring them - gradually into tune with similar institutions in the ex-metropole. This is particularly true of the Kenya penal system.

The colonial era which saw the adoption of English Penal method and system also saw the most slavish aping of English sentencing policies. Historical empirical evidence shows that the general trend was characterised by substitution of the African Penal Sanctions by thosefamiliar with the Western notions, e.g. imprisonment. Further Western notions of justice and treating of offenders were also advanced through the training of judges (legal personnel) where emphasis was laid on the British idea as opposed to the promotion of traditional modes of treatment e.g. restitution. The net result being a total subjugation of customary criminal law to subordinate role: to be applied only as far as it was not repugnant to 'justice' and 'morality' - or inconsistent with any written law (3).

Thus, it is submitted that, the Kenya Penal system is a colonial importation. The system developed on lines generally reflecting development in the motherland (Britain) although it was unable to keep pace with the changes, i.e. while the British kept on modifying their sytems to suit the changing circumstances e.g. abolition of the Capital Punishment, Kenya, has failed to make such changes within its system. What is of worry is that, despite clear evidence that capital punishment was extensively applied during the emergency period to wipe out the "Mau Mau" [Freedom Fighters Movement in Kenya] its scope of application has been extended in independent Kenya. (5).

It will also suffice to mention that capital punishment is available for murder and treason under the Kenya Penal system. (6).

4:2 THE DEBATE IN PARLIAMENT

It need be pointed out from the onset that the debate on capital punishment in Kenya has only been in relation to robbery. There has been no general debate as such, that covers other offences like treason and murder. Hence the discussion that follows is centred on the debate on capital punishment in relation to robbery with violence. However, the argument used, can be of general application and can therefore be of relevance to some extent to other offences not covered by the debate i.e. murder and treason. But, more important, this two offences have been covered elsewhere in this paper. (7)

Coming back to the debate it suffices to mention that, the criminal law (Amendment) Bill was first introduced into the House in May 1970.(8)The Bill consisted of clauses amending various sections of the Kenyan Penal code and Criminal Procedure codes. Clause 5 of the Bill referred to punishment for robbery - S.296 of the Penal code - and attempted robbery - S.297 of the Penal code. It is this clause that is the subject matter of discussion for it sought to introduce the death penalty for certain classes of robbers and also of those who attempt to rob.

This Bill was however shelved for six months to give the Attorney-General and his office time to set up a study group to examine the root cause of violent crimes and the need for such legislation. One of the Parliamentarians, the late Hon. Morara speaking on the Bill then said:

> "The government has a duty to conduct research into crime and find ways and means of reforming criminals". (9)

However, when the Bill was reintroduced in October it became Law as of 22nd October, 1971 when it received Presidential assent. (10). A new subsection was added to section 296 of the Penal code. The new subsection read:

> S.296 (3) "If, during the cause of, or immediately after, the commission of an offence under this section, any grievous harm is inflicted upon any person other than a participant in such offence, every person convicted of that offence who is shown to have inflicted such harm shall be sentenced to death".

Section 297 was also amended by the addition, Mutatis Mutandis, of a similar subsection 3 as that in S.296.

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The new subsection turned out to be short-lived, one for in 1973, Parliament struck at the section again by Act 1 of 1973. The amending Act received Presidential assent on the 4th of April, 1973 and has as its date of commencement, 6th April, 1973. The amendments affected subsections 2 and 3 of both sections 296 and 297 respectively. Subsection 3 of each introduced by the 1971 Amendment, was deleted. (12).

The 1973 amendment made some drastic changes to the law relating to robbery. In order to highlight these changes, the two sections are produced below as they read after the 1971 amendment and the 1973 one.

AFTER 1973:

S. 296 Robbery

(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) If the offender is armed with any dangerous weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other person violence to any person, he shall be sentenced to death.

S. 297 attempted Robbery

(1) Any person who assults any person with intent to steal anything, and at or immediately before or immediately after the time of assaults, uses or t hreatens to use actual violence to any person, or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen is guilty of felony and is liable to imprisonment for seven years.

(2) As in S.296 (2), Mutatis Mutandis

AFTER 1971

S. 297

(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons or if at or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he is liable to imprisonment with hard labour for a term not less than fourteen years together with coporal punishment.

(3) If, during the course of, or immediately after, the commission of an offence under this section any grievous harm is inflicted upon any person, any person convicted of that offence who is shown to have inflicted such harm shall be sentenced to death.

Subsection 1 of section 297 read as subsection (1) of S. 297 after 1973 above. Subsection 2 of that section read, Mutatis Mutandis, as subsection 2 of S.296 above. Subsection 3 of S.297 was identical to subsection 3 of section 296.

This then was the law that emerged from what was commonly referred to as the **'Hanging Bill'.(13).**

Throughout the 1970 second reading the debate was characterised by lack of coherent, well argued philosophical, moral and factual issues that are inherent in debates on the subject elsewhere (14). It is clear from the debate that the majority of the Members of Parliament who spoke, were largely ignorant of debates on the subject in other parts of the world. They contended themselves with citing isolated incidents from their constituencies of Nairobi and repeating what others had said. On the whole, with the exception of a few Members of Parliament (15), the debate was carried on an emotional plane not entirely devoid of extraneous pressure for the enactment of capital punishment for robbers (16).

Introducing the motion for its second reading, the then Attorney-General, Mr. Charles Njonjo, perhaps set the pace for the lack of any analytical rational debate on the subject. His introduction speech was a short one and the bulk of it is reproduced below:

> "Clause 5 is as a result of a debate in this house, and relates to armed robbery.....
>
> Honourable members will remember the case of robbery at the Metereological Department where the people who attempted to stop the robbery, one of them at least, as a result of an attack with panga and shotgun died. This clause is aimed at this type of people. We have now very clever gangs who go armed with revolvers, pangas injuring people, sometimes maiming innocent people in the course of the robbery. (17)

No mention is explicitly made as to the objective of the section. Is it deterrence, elimination of convicted violent robbers, revenge or what is the objective? No doubt the Attorney-General was aware of the various arguments for the death penalty in general, but he chose not to enlighten the House on this matter.

From the debate, one can gather three main cases for the imposition of the death penalty for violent robbers. These are the rational case, the emotional case and the political case. The line between the three is at times hard to draw, particularly when emotions rather than reason reign supreme as they did in this debate. The debate was devoid of empirical data from other countries that have had the issue of the death penalty in general researched on. (18)

The Rational Case:

Four main arguments in support of capital punishment for violent robbers can be gleaned from the debate in parliament on the subject. These are; first, that it is a better deterrent than any other form of punishment so that its enactment would lead to a reduction in the incidents of violent robbery; secondly, that it physically eliminates undesirable elements from society once and for all; thirdly that there is no better alternative; and, fourthly, that public opinion demanded its imposition.

Of these, by far the greatest emphasis was laid on the deterrent argument. All the four arguments were poorly put forward by their protagonists. It is not clear from the debate whether the special deterrent is in reference to violence in the course of a robbery, or to the robbery itself.(19)

We may gather from the Attorney-General's speech quoted above that the death penalty is a final punitive measure expected to generate deep fear in would be violent robbers. Of course no empirical study preceeding the Bill and therefore much of the expected results are mere hypothesis on the part of the protagonists of the special deterrent theory.

Though not explicitly put, the deterrent argument for the death penalty for violent robbers seemed to rest on the premise that it was a last option. The speakers did not even seem to distinguish between the argument that the death penalty is a special and unique deterrent and the general one of just a deterrent measure. Also the distinction between the two types of deterrent - i.e. special and general - seemed lost to the speakers on the subject matter of the death penalty for violent robbers.

Special deterrent is specific and directed to a given individual in society while general deterrent is directed to society and aims at an overall reduction in crime due to the inhibitory effect of sanctions on an aggregate of persons. Punishment that relates to general deterrent is of a demonstrative character and rests on the philosophy that a few must perish so that the many may learn (more approprietely - fear). In order to be preventive rather than curative, sanctions aimed at general deterrent must constitute a standing threat. (20). At least this fact seemed to have been consciously or otherwise appreciated by the protagonists of the **'Hanging Bill'**. One speaker spoke thus:

"I do not think that anybody can convince me that by hanging these people, by passing the death sentence, this is not going to educate them (21)

Implicit in this statement is that a standing threat in the form of a legal sanction will instil the necessary fear that would be violent robbers would be apprehensive of the consequences of violent robbery to the perpetractors. Of course, we are here presuming that the phrase 'educate them' refers to would be violent robbers and not to those actually hanged.

One Member of Parliament had no doubt that the fear of hanging would deter many people from committing violent crimes. He referred to this as a 'psychological deterrence'. He said:

'I also mentioned something to do with psychological deterrence....If people are to be hanged particularly if this had to be done in public many people would fear that they would be hanged the same way.(22)

This belief, shared by many others, is of course based on no emphirically verifiable truths. People simply believe it is so and hope that it is. I have argued elsewhere in this paper that this is not so.(23)

This type of unsupported argument was not only prevalent among Members of Parliament or used to get the Bill through to become law. It has also been used by the prison authorities to rationalise the hanging of people under judiciary sanctioned state violence. Following the hanging of two convicted persons, one for robbery with violence and one for murder on March 19th, 1976, the then Commissioner of Prisons, Mr. Andrew Saikwa, told a press conference:

"These executions affirmed the government's determined efforts to rid our society of those who, continue to pester law-abiding 'Wananchi'.....It is hoped that these executions will clearly spell out to criminal elements who are still at large and those who have a tendency or propensity to use violence to achieve their ends that their activities will be short-lived.(24)

This was all a pipe-dream. The crimes of robbery with violence continued unabated and the authorities had to resort to making the cop on the beat, the prosecutor, the judge and the jury and the verdict all too often being "suspected criminal" and therefore guilty. Sentence? A fatal bullet.(25)

The only factually supported argument in favour of the death penalty for violent robbers was that it would eliminate convicted violent robbers. Nobody can deny that once a person has been deprived of his life he cannot be a menace to society any more!

The former Attorney-General's opening speech could also be interpreted to mean that the death penalty would serve the purpose of ridding the society of 'bad apples'. However, others were more explicit in their propagation of the elimination theory. One Member of Parliament, rather naively and emotionally put the case thus:

> "....I feel that Members of Parliament if they want the Attorney-General's chambers to help the magistrates to make sure that, at least within a certain time, we eliminate these people, should support this Bill" (26)

Rejecting the idea of political re-orientation for 'thieves' he insisted that rehabilitation was not the objective, but rather punishment. "We want to punish them" (27) - he said. Implicit in this argument is the feeling that criminals in general cannot be the subject of reformation. Rather their criminality is generic and not influenced by the prevailing social, economic, political and general human environment. The logic is that one is born a criminal and dies a criminal. Once a criminal for ever a criminal and the only way out of it is by hanging:

> "....they give them strokes and then they stay there for about four years because they have done grievous bodily harm, but then they are discharged and they come back and [do] the same thing ....." (28)

Thus robbing and crime in general is characterised, rather cynically, by some as a hobby for the more often than not unfortunate victim of our inequitable socio-economic system.

Yet another reason put forward in support of eliminating violent robbers was that "the government cannot continue wasting money on rehabilitation." (30) The fashionable view of the haves in general was well stated by an Assistant Minister in the Vice President's office and Ministry of Home Affairs when he stated that:

> "Prisoners want to stay in. When released they commit another crime in order to go in. (31)

His rediculous basis in reaching this conclusion was an example he gave of a person who had been in prison for 35 times and then serving 14 years jail term. These kind of assertions, it is submitted, beat any kind of intelligible imagination and are purely products of a snobbish look at the lives of the less fortunate in society from an ivory tower or a dreamer's vision empirically detached from the miseries of the human race. It in effect purports to absolve society from any responsibility

in the criminal behaviour of its lot, an attempt that militates against the sociology of humanity and the likes of Robert Owen who declared that the environment modes human characteristics an asserion we hold to be true and hitherto unchallenged by facts, but vehemently denied by thos who hold the reins of state powers. (32).

Others argued that the death penalty was the final option. Their argument stemmed from the view that Parliament had earlier provided for stiffer jail terms with hard labour and strokes for robbers, armed robbery remained unabated and even worse, was growing rampant. They argued, that the robbers, by failing to be deterred by long jail term with hard labour and strokes, had deprived them of any other choice.

Also underlying the whole debate on the death penalty for robbers is the unverified belief that most robbers are incorrigible and that after they serve their jail terms, they will be back marauding and maiming people on the street. Jail terms, they contend, do not seem to be appreciated as being adquately punitive by the robbers, they have no impact on recidivism and therefore are of no rehabilitative value, and of course, they have not had the desired impact on would-be robbers. So the argument, as general as the allegations may sound, goes. Therefore, we impose the ultimate penalty that we can. This is, the death penalty. Our ruthlessness is ample evidence on our determined effort to eradicate the scourge of robbers. (33) But, it is submitted that, available statistical data has shown otherwise. The other rationale used to pass the Bill was that public opinion demanded that robbers be hanged. Although no opinion polls or referendum were ever conducted in Kenya to determine public opinion, several Members of Parliament, particularly ministers claimed that public opinion demanded the hanging of robbers. ".....the mass of our people approve today....." (34). No attempt was made to present the case for and against the death penalty to the public. The public opinion that was most constantly referred to was that of chorus answers to leading questions asked by the President in public meetings. These meetings were, of course, held only in a few centres yet they were taken to have been of a representative character to the extent that one senior Cabinet Minister asserted that "the people in the country give full support." An allegation that could very well be right, but obviously unsupported by any empirical evidence. (35).

Emotional Case:

The arguments under this category have largely religious or moral underpinnings. The most easily used argument in the emotional case for the death penalty is 'an eye for an eye' doctrine. It finds its support from several verses in the Bible. The argument was not entirely lost on the speakers:

> "....these robbers who use violence, undue killers.... should be hanged or should abide by the law of Moses, that is an eye for an eye" (36)

Other than reciting the Bible or simply repeating the adage, the propounders of an eye for an eye doctrine have usually no argument to back the doctrine. This remained true in the parliamentary debate on the "**Hanging Bill.**" Put in a less biblical term, this doctrine can be termed the revenge doctrine. (37)

The other emotional argument advanced by the retentionist is that the victim deserves sympathy. In the Kenyan debate the issue was raised by an Assistant Minister thus:

> "If we say hanging is not enough .... are we just going to say that sending them to prison is enough? Are we not going to take into account the misery of the family of the people who were butchered to death and their property taken? Are we forgetting the fact that those who died have left behind their children and so forth? (38)

This presumes of course that there is loss of life in the course of robbery. If this were the case, then the question would no longer be one of death penalty for robbery, but for murder. In the heat of the moment, following the commission of a robbery in the course of which a victim gets maimed, this argument may sound rational, but as we shall see later, it is indeed an irrational one.

The Political Case

The political case for the introduction of the death penalty for robbers has its foundation in the informal de facto relationship between the legislators and the Chief Executive, the President. Unlike in developed countries, the introduction of the death penalty for robbers in Kenya did not attract any organised pressure groups. The closest it got to was the former President's constant reference to hanging for robbers in public gatherings. As with all other issues he has raised in public meetings, he pledged that his government would see to it that the "people's demands" would be met. This pledge was interpreted in parliamentary circles to represent a promise made to the people by the president and therefore required only parliamentary rubber-stamping. Referring to this kind of meetings, one Member of Parliament stated:

> "I would have thought that a resolution carried at a public meeting would have been sufficient representation, especially when it was of this calibre", (39)

Reference to 'calibre' here means where the President was involved. (40).

There was a tremendous amount of pressure on Members of Parliament to pass the Bill as failing to do so would have failed in honouring a pledge made in various public meetings. One Member of Parliament put it thus:

> "His Excellency the President said this would be done (protecting the public) when speaking at Kamkunji, and he was given the peoples' mandate to bring this law here, the mass of our people approve it today and.... it was going on to become a formality." (41).

Certainly this Member of Parliament did not see much room for going contrary to the President's pledge to the people. He saw Parliament as being asked to endorse a decision already made in order to comply with formalities. Even senior Cabinet Ministers deemed it fit to give an element of conclusiveness to the debate as one of them put it:

> "Even the President has given his full support, and the people in the country give full support. (42).

If the President approves, who are you not to approve? Seems to be the implicit message in the likes of such statements.

In addition to this, the impact of the **KANU** Parliamentary Group meeting should not be under-estimated. Although we do not have the proceedings of that meeting, we suspect this is where the party whip machinery was put into effect to mobilise party support. (43).

The Case Against

The voices that were raised against the introduction of the death penalty were definitely in the minority. However, some of the few who spoke presented a better overall approach to the issue of criminology and penology. Theirs was a cry in the wilderness right from the beginning. There are other Members of Parliament in whose speeches it was not possible to be sure where they stood in the debate. Those who spoke against the death penalty for robbers contented themselves with registering their opposition.

One Member of Parliament declared that the death penalty is not a unique deterrent put it thus:

> "It has been found that killing somebody for an offence that he has committed

does not actually help, it does not reduce the incidence of murder as such."

He does not provide his source of information, but there is an enormous pile of evidence from countries that have seen it fit to conduct a thorough research on the subject matter. Some of them as of today have since then abolished capital punishment for most crimes. (44).

The other objection raised against the death penalty is its finality. One Member of Parliament put it thus:

> "One objection I have about hanging is that it is so final. Evidence can be juggled and no human system is perfect in any criminal case..... Somebody who is innocent may be found guilty. (45).

In other words, the death penalty is irrevocable. This raises two separate but related issues. An innocent person may be convicted of a capital offence under a genuine mistake or he may be convicted as a result of a deliberate frameup or even a misuse of police powers of interrogation of suspects. History painfully reminds us that this is a real possibility rather than a mere hypothesis. (46). The question therefore is: who are we in Kenya to claim infallibility? With the populace largely ignorant of its legal rights and poverty barring them from the best available legal counsel, it is not possible in this country, I believe, to devise a fool-proof trial process in order to avoid such errors or fraud. Also there is the prospects of torture and use of force during interrogation of suspects, an allegation that the judiciary in Kenya has tended to reject without much thought. This could reach to drastic miscarriage of justice. (47)

The vengence based on the doctrine of an eye for eye is always interpreted with a bias in capital cases. In rejecting its validity, one Member of Parliament said:

> "I do not see how, by killing somebody you have helped the dead to come back to society. This..... is an old tooth conception, 'a tooth for a tooth or an eye for an eye', and it does n ot help." (48)

This argument - the lex talionis of Moses - was a reflection of the advance in the administration of criminal justice during the primitive times in which it was formulated.(49). The hanging in Kenya of Hassan Said, on the 26th March, 1976 for threatening a woman with a sharp knife and violently removing her wrist watch, constitutes a monstrously disproportionate price for his role in that robbery. It smacks of Constantine Demilles (50) philosophy of "a head for an eye, and a heart for a tooth."

Closely related to and similar to the "eye for an eye" doctrine is the argument that pupports to balance the sympathy between the victim and the villian by executing the latter. Killing a robber may express sadistic sympathy with those left behind by the victim, but it does no more than that. Whilst on the other hand the State sadism in the name of justice creates more victims. Thus:

> "Society pays a heavy price for the death it imposes. Our emotions may cry vengeance in the wake of horrible crime, but reason and experience tells us that killing the criminal will not undo the crimes, prevent other crimes or bring justice to the victim, the criminal or society" (51).

The truth remains that two wrongs do not make a right and neither are two orphans or widows better than one! Line in the 'eye for an eye' argument, this argument is irrelevant where no death occurs in the course of a robbery. (52).

Perhaps the greatest contribution to the matter was the attempt by a few Members of Parliament to address their minds to the root-cause of the crime. To look at the criminal rather than the crime. J. M. Kariuki speaking on the Bill when it was re-introduced said:

> "Have we, infact, gone into detail to try to find the root-cause of these serious problems? The task of solving violent crimes is, infact, as urgent as it was during the time the House rejected the Bill, although it is over a year ago that the Bill was shelved." (53).

He further abserved that the Attorney-General and his staff in the department had not even analysed the reason behind the increasing violent crimes in the republic. Another Member of Parliament speaking on the same issue put it:

> "Before we consider the appropriate penalty we should ask ourselves: 'why do they become criminals' do they become thieves because there is a necessity to steal or because they are born thieves?" (54)

He observed that many people who steal in Kenya are jobless. This is a fact that the government has been wont to deny vehemently, but still the reality stands glaringly stark. Clear evidence of this phenomenon is in urban areas. Many areunemployed and because urban areas afford opportunities for crime commission e.g. shops, hotels, banks, factories, petrol stations etc., the crime rate becomes high in urban centres. (55). Yet this aspect of societal responsibility of its citizens criminality found very few voices in our esteemed Parliament.

One Member of Parliament cautioned the House not to take the Bill merely at its

face value, but to consider the background of robbers in the country. The violent crimes, especially those involving murder or theft are, he said:

> ".....in those countries where there is a definite disparity in economic wealth within the community. In Kenya, you will not find an Asian being accused of robbery with violence. You will not get a European being accused.... It is because they have it - they have the wealth. It is only among the Africans where you will get stealing .....with violence.... and it is because we are the have nots in this country. (56).

He could not have been more right. Cases have occured in Kenya as little as 120/= to be split among three poverty-striken people, a fellow was able to get the services of the three to kill an enemy! People have been jailed for years for stealing 10/= and using violence in the process. In 1971 the Standard newspaper reported that a Nairobi magistrate sentenced two people to the mandatory sentence of 14 years for robbing a person of 20/=.(57). In the same year, the Daily Nation reported that two youths aged nineteen years were sentenced to 14 years for robbing 15/= from a woman. (58). In 1971 the Daily Nation reported that a person had been sentenced to 15 years and ten strokes of the cane for stealing 93/=.(59). The list is inexhaustive, a glance at our local dailies reveal that such cases have become a daily phenomenon. It is submitted, that, this is not stealing to amass wealth, it is robbing to service! Hanging is no cure and there is no cure better than removing the major root-cause of crime - poverty. There may be a few exhibitionist criminals, but the bulk are moded by their environment of untold misery and human suffering. The government should publish statistics of the monetary worth of each convicted robber in order to compile a record and to determine whether on average, extreme poverty is a common factor in the majority of cases. We are convinced it is.(60).

Speaking during the 1966 Canadian debate of capital punishment, B. S. MacKasey said of murderers:

> "Murderers, with very few exceptions are victims of certain circumstances such as mental illness or to our shame, are the products of man's inhumanity to man. I hope when hanging is abolished, public opinion will demand that the pockets of poverty in this country be eradicated, that the slum areas in our big cities be demolished, because society will then realize, in their search for some other form of protection that the areas of poverty and slums in big cities create strong forces that breed crime and criminals." (61).

This could be even more forcibly repeated in the case of robbers in Kenya. Whether the death penalty is meted to robbers or not, whether hangings are frequent or not,

it is our belief that the rate of robbery will be conditioned by other factors than the death penalty.

Just as we need to get rid of unhygienic and filthy living conditions to be rid of cholera, so also do we need a better fed and clothed people to largely rid ourselves of robbery. (62).

Ironically enough the argument that imposing the death penalty for robbers would encourage robbers to eliminate possible witnesses, because they would have nothing to lose came from none other than the then Attorney-General. He raised this objection to the death - penalty for robbers, not in the debate on the "**Hanging Bill**" but during a debate on an amendment of the sections in 1968 (63), when he said:

> ".....Many voices have been demanding the death - penalty for the vicious thugs in our society ... At first sight, this may look attractive but it is necessary to weigh the probable deterrent effect of a death - penalty against the safety of the victims of crime. Dead men do not tell tales, and if a robber faces the death sentence, if he leaves a witness alive, then simple logic would suggest that if a criminal can take no higher risk than death, he increases (64) his chance of escaping the gallows by ensuring that no eye witness can testify against him. (65).

We think that this reasoning is correct and that human nature did not change within the 18 months duration that separated the "**Hanging Bill**" in 1970 and the 1969 Bill. In other words, the death - penalty for robbers might very well lead to an increase in homicide with a corresponding decrease in convictions due to lack of witnesses. Where one or more suspect is still at large, witnesses may be reluctant to give evidence. This in turn leads to a decrease in the real deterrent - the certainity of conviction. (66)

In that same debate in 1969, the then Attorney-General referred to the Bill thus:

> "This Bill ..... may be called the death knell of armed robbers and those criminals who think they can get other people's property by attacking them."

The bill sought to lay a minimum sentence of 14 years and a maximum one of 20 years with hard labour and strokes. Thus admitting that imprisonment was as effective a deterrent as you could get. When he introduced the "**Hanging Bill**" in 1970 the then Attorney-General did not give any indication of the reasons behind his total reversal of his position as regards the death penalty for robbers. (67).

As the late Jean Marie Seroney told the House, it was not 18 months since they had amended the law in order to increase the penalty for robbery and it was therefore too early to determine the effectiveness of this measure. The amendment has not been given a chance to work.

This prompted the late J. M. Kariuki to ask the House: "is it true that the only solution, the only way, to deal with armed robbers is by hanging the criminals?" To this he replied:

> "As long as our economic set up is such that the majority of our people in this country including ourselves, are continuing to amass property and live side by side with the poor members of our society - even if passed today, armed robbery will never miss in this country." (68)

So long as social injustices are permitted to exist and so long as the country is divided between those who have and those who do not have armed crime will continue with or without the death penalty. To this I find no better words than those expressed by the late J. M. Kariuki when he once remarked that: "life is not worth living if it is a life of misery!" (69).

Yet another argument against the death-penalty is its inherent barbarity. In the late Seroney's words:

> "I believe it is a mark of primitiveness and savagery to think that by imposing harsh sentences you can thereby reform society and reduce crimes. (70).

He wondered, and we do too, whether, by the same analogy as in the case of the death-penalty for robbers, in the case of rape we should prescribe castration of the offenders so that they will not be able to commit rape again. (71).

In the case of **Furman V. Georgia** (72), the U.S. Supreme Court did hold that the imposition and carrying out of the death penalty constitutes a "cruel and unusual" punishment.

The argument advanced by retentionist Members of Parliament that public opinion demands the death penalty cannot be taken seriously in Kenya for three main reasons for robbers. The first is that the issue had been publicly raised by the President and Kenya has no precedent - at least not recorded - of an opposition to a Presidential suggestion in a public meeting. As Mushanga puts it, public opinion represents the opinion of the political leadership. (73). In this situation, it

represented an expression of loyalty to a greatly respected leader. This loyalty was also well manifest in Parliament. Secondly, the public opinion is usually a uniformed one and therefore geared towards emotions rather than rationalism. It is in such situations that public opinion is used to legitimise brutality and general inhumanity for political or economic exigencies. And finally, it is hypocritical on the part of the Members of Parliament to fall back on public opinion which they have too often ignored when it affects their privileged positions. Thus no public opinion has been sought on crucial issues like land, the opting for a one party system or the question of increased benefits for Members of Parliament. It is obvious to many what the public opinion would be. Basically, to the Kenyan politician, public opinion, in practice, is "**the clamour of the ignorant mob**" when it does not support his view and "**the voice of the people**" when it does. This in effect leads to the position which may be summarised as "heads you lose, tails I win" doctrine. My own research carried out especially among the elite reveals that they were totally against the death penalty. (73).

Finally, the death penalty for robbers can be applied discriminately. In the first place, it is, in our view, discriminative in its substance against the poor as we have seen above. It was enacted with full knowledge that it would mainly apply to the poor lot. What are the desperate poor lot of this country expected to do to get out without being driven by their sufferings to commit crimes? The answer reflected in the hanging clause, seems simple but cynical - get rich. (74).

The other discrimination may occur and has occured in relation to the prosecution to charge an accused under the hanging section or another section. This provides the scope of discriminating between persons in the same class of offenders. Another form of discrimination is where the police withdraw accused's case so that he may testify against his accomplices. (75).

In conclusion, the offence under the relevant sections is usually referred to as 'armed robbery' or robbery with violence. In fact as the law stands after the amendment by Act No. 1 of 1973, a robber could be legally hanged without having been armed or inflicting any injury on a person. It, therefore, follows that if an armed person walks into a house in a company of a fellow robber, places his weapon on the table and proceeds to break the occupant's hands and jaws using his bare hands, he qualifies for the noose under Section 296 and 297. Since robbery is distinguished from theft by the element of use of force required in the latter, the force required may very well be covered by the phrase "any personal violence" in our hanging clause. The judges have the final say and they have not stated their position. (76).

In this section, we have endeavoured to bring to light the reasoning or factors that

culminated in the death penalty for robbers being enacted into our laws. We have also endevoured to show that the debate in Parliament was shallow and the reasoning put forward cannot withstand serious examination. It is also our belief that the extra-parliamentary involvement of the President in this issue was not in the best interests of a rational discussion of the issue leading to free vote. Thus, the debate in parliament on this issue, was rather reminiscent of the "Mbwa kali" feature which is a common one in residential areas where the affluent few in this country live. It smacks of panicky arguments of a class that feels threatened by robbers. Their property is threatened, their lives, the car insurance premiums for theft go up etc. The result was a panic legislation that carries the message "beware sheria kali?" It smacks of a law geared to the protection of property and also does remind one of B. S. Mackasey's words when he said:

> "Hanging to me is a symbol of the imperfections and hypocrisy of our affluent society. I say this because I know too many people who find security and salve for their conscience in the mistaken belief that hanging produces for them at least a degree of protection against what they seem to think is a segment of society with which they have nothing in common, and will nevercome into contact." (77)

This security is of course, more apparent than real. (78). And therefore the terror of death continues to stalk further and further afield:

> And so, to the end of history, murder shall breed murder, always in the name of right and honour and peace until the gods are tired ofblood and creat a race that can understand." (79).

THE COURT SCENE

The drama of the whole difficult problem of capital punishment is finally transfered to our courts. The problem being that to judge is no longer just establishing the truth of crime, nor is it simply determining its author and applying a legal punishment. It is no longer just knowledge of the offence, knowledge of the offender and knowledge of the law. But now a quite different question is inscribed in the course of the penal judgement. The question is no longer simply: 'Has the act been established and is it punishable?' But also: 'what is this act, what is this act of violence of this murder? To what level or to what field of reality does it belong? Is it a phantasy, a psychotic reaction, a delutional episode, a perverse action?' It is no longer simply: 'who committed it?' But: 'How can we assign the causal process that produced it? Where did it originate, in the author himself? Instinct, unconscious, environment, heredity?' It is no longer simply: 'What law punishes

this offence?' But: What would be the most appropriate measure to take? How do we see the future of the offender? What would be the best way of rehabilitating him?(80)

The net result being a whole set of assessing, diagnostic, prognostic, normative judgements concerning the criminal have become lodged in the framework of judgement. Another truth has penetrated the truth that was required by the legal machinery; a truth which entangled with the first, has turned the assertion of guilt into a strange Scientifico - juridical complex:

> "Thoughout the penal procedure and the implementation of the sentence there swarms a whole series of subsidiary authorities. Small-scale legal systems and parallel judges have multiplied around the principal judgement: Psychiatric or psychological experts, magistrates concerned with the implementation of sentences, educationalists, members of the prison service, all fragment the legal power of punish...."(81)

And, today, the sentence that condemns or acquits is not simply a judgement of guilt, a legal decision that lays down punishment; it bears within it an assessment of normality and a technical prescription for a possible normalization. Today the judge - magistrate or juror - certainly does more than 'judge.' And he is not alone in judging:

> "....But as soon as the penalties and the security measures defined by the court are not absolutely determined, from the moment they may be modified along the way. From the moment one leaves to others than the judges of the offence the task of deciding whether the condemned man 'deserves to be [hanged] or placed in semi-liberty or conditional liberty, ...one is handing over to them mechanisms of legal punishment to be used at their discretion: Subsidiary judges they maybe, but they are judges all the same." (82).

The above observations are strikingly true of the trial of capital offences. In most cases in such cases where the standard of proof required is much higher than in ordinary offences, experts are usually called to testify: Doctors, psychiatrics etc.

Before proceeding to look at the performance of our courts viz-a-viz the death penalty, it is necessary to highlight briefly the objectives that determine the sentence imposed is appropriate. Theoretically, punishment of criminals is supposed to serve one or more of four main purposes: Deterrence, rehabilitation, isolation from the public, and finally material compensation for the victim. (83).

In Kenya, courts have in practice, applied rather different criteria in passing sentences. They have used two main considerations. Viz: firstly the gravity of the crime in question and secondly, the responsibility that could be attributed the accused for the offence in question. (84).

In considering the gravity of the offence the courts have been greatly influenced by the legislature and their personal and social backgrounds. Where the legislature provides for stiff penalty, the offence is usually considered a grave one. Thus courts have usually referred to murder as a heinous crime. A judge who has been mugged or been a victim of a pick-pocket or a careless driver may, being human, be influenced by his personal experience in passing sentence in such offences. A judge who is a staunch believer in the institution of private property will generally award stiff penalties in offences against property. While a judge whose wife, daughter or herself (if woman) has been the victim of a rapist is closer to the victim than to the criminal and this relationship is usually reflected in the stiffness of his or her sentence to a rapist. A racist judge will be influenced by his racial bais in the sentences he may award. The social and political environment also matters. For example in colonial days the courts which essentially supported the racial set up in the country considered any offence that was deemed to pause a threat to the racial set up a grave offence. (85). A particularly vivid example of this is the case of **Kuruma s/o Kaniu V Regina:** (86).

> "In this case, Kuruma was stopped and illegally searched by police at Chania bridge near Thika. Two rounds of ammunition were found on his person. He claimed that the bullets had been planted. He was charged and convicted of unlawful possession of the said ammunition. The penalty was death."

Given the disproportionate penalty involved one would have expected that, Law, Ag. Judge sitting in the supreme court of Kenya would have exercised his discretion using a technicality that was open to him to avoid a manifestly unjust law. He did not and neither did the court of Appeal and the Privy Council. They all served under a regime that deliberately denied justice to Africans in Kenya and they articulated the policies underlying the racial foundations of the body politic prevailing them. There are many other background considerations that might play a role in the determination of the gravity of a crime in a court of law.

With regard to the responsibility that could be attributed this is where matters such as drunkeness,self-defence, provocation, etc. came into play. These have been used by courts to reduce the degree of responsibility. (86).

Starting off with jurisdictional problems in the application of the death penalty, it has been argued that if the Resident Magistrate's courts continue to try capital offences it would amount to the violation of a constitutional provisal. That the 'Hanging Bill' purports to confer on a court consisting of persons appointed as Resident Magistrates a jurisdiction (sentencing to death) which under the provisions of the constitution is exercisable only by a person qualified and appointed as a judge of the High Court. This was the reasoning in **Hinds V The Queen** (87) as adopted by Kamau Kuria (Counsel for applicant) in the High Court decision of **Charles Okang V Republic** (88). The question at issue was whether Parliament is entitled by an ordinary statute to strip the High Court of all jurisdiction - in both civil and criminal cases? Though the High Court ruled that it was possible for Parliament to do so, this decision is being challenged by counsel for the appellant in the court of appeal. Though the judgement has been reserved, I concur with the views expressed by council for the applicant that this cannot be the case especially when deciding on a serious question like armed robbery, carrying a sentence of death. Infact, the problem had been foreseen during the debate in Parliament when one Member of Parliament remarked that:

> "If passed, the Bill would confer to Resident Magistrates - who are not vastly experienced in legal practice to decide who is to die."

The question that then naturally arises is: Does the method of their appointment and the security of their tenure conform to the requirements of the constitution applicable to judges who, at the time the constitution came into force, exercised jurisdication of that nature. The answer to this question is more than obvious. Another dilemma is that even if the jurisdiction of such cases be shifted to the High Courts, another problem still arises. The High Court are already overburdened with murder and manslaughter cases that our judicial machinery will be too overloaded to deal quickly with all these cases. The case of **Edward Kariuki and Nganga Kahinda V R** (90) best illustrates this point: Kariuki and Nganga were convicted on January 6, 1971 by a Senior Resident Magistrate for robbery with violence and sentenced to 20 years imprisonment. After serving for 14 years their appeal was allowed on the grounds that there was no evidence on which the conviction and sentence of either appellant could be sustained. What a delay! Fourteen years to unveil an error! This case definitely violates

a well known equitable doctrine: Justice delayed is justice denied.

Could anyone tell us of the fate of the wife and children of such persons. Remember all this is not because of the accused person's own fault but because our judiciary machinery is already overloaded. Thank God, death penalty had not been made mandatory for armed robbery! For it is beyond imagination the torture that could be suffered by the accused persons while awaiting their final appeal. Yet another question that is posed: What criterion or classification was used when leaving armed robbery cases with the Resident Magistrate's court when they carry the death penalty just like the offence of murder? It is our submission here that this particular decision was unconstitutional.

Another problem that has arisen in the application of the death penalty by our courts is in relation to the discretion of the prosecution to charge an accused under the hanging section or another section. This has opened the door for a lot of discrimination and malpractices. All this is due to the fact that although it is mandatory to impose the death penalty on conviction,there is no imperative clause requiring a magistrate to impose the penalty where it transpires that a person has been charged under a non-capital section although the facts are clearly within the capital clause. In one case, a magistrate was reported to have said:

> "It was fortunate for the accused that he was not charged under the hanging clause though the facts of the case are sufficient to bring a charge under the clause." (91).

He sentenced the accused to 7 years in prison. The police discretion here made all the difference.

This is probably a blessing in disguise for it enables a loophole for mitigating the rigours of a draconian law, but neverthless, it provides scope for discriminating between persons in the same class of offenders. On 18th November, 1975 two robbers were sentenced to death for robbing a person of his wrist watch, shoes, 120/= and in addition slashing the victim with a panga. (92). Three months before, 2 robbers had been sentenced to a total of 18 years when they were found guilty of robbery with violence, assault, causing grievous bodily harm and escaping from police custody. (93). Could the sentencing be more discriminative?

All this is so done, yet justice and principles of sentencing would demand that, other things being equal, crimes of parallel gravity should receive sentences of similar severity. Any difference in the sentences awarded should be fully justified by particular circumstances of a case and reasons for such a discrepancy should be

fully set out. In other words, equal criminals should be treated equally. This principle would imply that there should be consistency in the severity of sentences unless relevant prevailing circumstances dictate otherwise. (94).

The other form of discrimination is where the police, intent on securing a conviction, withdraw the case of an accused in order to use him as a witness against his accomplices. In one case it was reported that the prosecution withdrew a case against two women so that they could give evidence against four accompliances. (95). Apart from the obvious question involving credibility of such a witness, we fail to appreciate the cause of justice served by such a manifest discriminative practice.

Another problem that arises with the application of the death penalty is the disproportionality of the offence and the penalty. Why should a robber who has not killed when robbing be hanged? This disproportionate practice by our courts is illustrated in the recent case (unreported) where three robbers were convicted to hang. All they did in the cause of the robbery was to threaten the victim with a knife and tieing his legs and hands. (96).

It is my submission that the above position is wrong. I concur with the view of Saldanka J in **Uganda V Wilson Wambobu** when he observed:

> "The accused is charged ..... with a capital offence carrying a mandatory death sentence. There can be no doubt that the robbers in this case were armed with a panga, which fortunately they did not use.... I [thereafter) find that the evidence falls far short of the standard required in a capital case and I therefore acquit the accused. (97).

On further consideration, therefore, one cannot help to side with the courts' view. If a man's life is going to be taken, the court must guard against possible exaggerations by witnesses who in the panic of a robbery, most likely imagine the worst and testify to the presence of weapons that may never have been present.

The inherent problem in sentencing generally has been discussed in this paper and I do not intend to repeat them here save for the fact that a few observations need be made in conclusion .(98).

Firstly that sentencing to death does not in any way serve the modern aims of sentencing. The penal system as it is today has been focused on the criminal per se leaving out the root causes of the criminal elements. Secondly, that the judicial

attitude in reference to hanging sections is that of lip service, rather than that of suggesting any constructive changes. Thirdly, that the administration of the death penalty by the courts is unconstitutional for it discriminates against persons in the same class of offenders. Lastly, but not least, that capital punishment has no place in a perfect system of justice and more important still, that it has no place in a human, fallible, and imperfect system of justice.

The last part of this chapter deals with the executive and more particularly in relation to its exercise of the prerogative of mercy.

The Executive and the Exercise of the Prerogative of Mercy

The government has inherited all the prerogative powers that the Queen could exercise in relation to Kenya in 1964. (98). However, the constitution Act of 1969 makes no mention of prerogative powers except the prerogative of mercy. (99).

It has been held that since the prerogative is part of the common law, and Kenya, during her dependent status had received the common law, the Queen's prerogative powers were in some respects as extensive as in Britain, with minor exceptions, though in other respects they were even wider. (100).

But the prerogative that the President can exercise on behalf of the government are those that belonged to the Queen in relation to an independent Kenya. It is, for instance, clear to legislate by orders in Council. (101). Again, the prerogative being part of the common law, is liable to be displaced or repealed by written law. Thus, many of of the former prerogatives are either regulated by law, or have been repealed. An example of the former is the exercise of the prerogative of mercy. A look of Sections, 27, 28 and 29 of the constitution reveals these development. (102).

The prerogative of mercy is a very important power because it gives the President authority to deal with cases in his own discretion. For example the president may grant any person convicted of any offence a pardon, either free or subject to lawful conditions, also he may grant any person a respite either indefinitely or for a specific period of the execution of any punishment imposed on that person for any offence. Lastly he may substitute a less severe form of punishment imposed on any person for any offence.

This power can either be used arbitrarily or it can be used in a discretionary manner. A President can decide to pardon the offender not on the grounds that the offender deserves it, but because he is a supporter of the President and in the case where the two have been political mates for a long time it would cause the President some embarrassment. This results in favouritism because the President can use the powers as he wishes without such control. However, an Advisory Committee on the prerogative of mercy has been provided for, which consists of the Attorney-General, and not less than three nor more than five others members, including at least two ministers, and at least one medical practitioner. Though, they do not offer much limitations since they are themselves appointees of the President and can be removed at the President's pleasure. (103).

It is of course true that the President pardons a larger number of convicts each year to mark independence celebrations who are not his political associates. While it is desirable that the President should in some cases grant such pardons they should in most cases be limited to special cases where the convicts face the death penalty. But to pardon an offence for which the ordinary citizen would not be granted pardon would undermine the confidence of the vast majority of Kenyans in the exercise of that power. (104). To this, I submit there has hardly been any case of which I know where such prerogative has been used to pardon a person facing the death penalty for either murder, robbery with violence or treason.

In the case of **Biddle V Perovich** it was stated that:

> ".....A pardon when granted was the determination by the ultimate authority that the public welfare will be better served by inflicting less punishment than the judgement fixed. In this case it is clear that public interest formed the basis for the exercise of the prerogative of mercy". (105).

It was also held that the constitutional power of the President to grant reprives and pardon for offences that extends to the commution of a sentence of death for murder to imprisonment for life, which power is exercised often in murder cases where there are mitigating factors.

In conclusion, I concur with the learned opinion expressed in the above case and I see no reason why the same should not apply to Kenya. For in Kenya, there are many cases which merit the exercise of the powers, for example capital punishment cases and detention cases. But since the exercise of the prerogative ultimately the responsibility of the President; and furthermore its exercise is a matter for this personal discretion; it is hard to question it.

Footnotes:

1. H.W.O. Okoth - Ogendo:
   The Imposition of Property Law in Kenya in "The Imposition of law", Academic Press, Inc, 1979, 147

2. Ibid, P 148

3. The Judicature Act S 3 (1) [Kenya]. See also: Allott Antony:
   New Essay in African Law, Butteworths African Law Series, Butteworths & Co. (Pub) Ltd. 1970 at Pp 145 - 179.

4. Colony and Protectorate of Kenya:
   Report on the treatment of offenders, Annual Reports, 1954 Govt. Printer, Nairobi (1953 - 1956).For example in 1953, 150 people were executed for Mau Mau offences.

5. Criminal Law (Amendment) Bill, (1973).

6. See: Sections 25 and 40 respectively:
   The Penal Code, Cap 63 of Laws of Kenya, Revised (Ed) 1970 (1962) Printed and (Pub) by the Govt. Printer, Nairobi.

7. See: Chapter three of this paper.

8. Kenya Bills, 1971.

9. National Assembly Official Reports Vol. 20 Part 1 at P. 150 - 200.

10. Act 25 of 1971, S. 2.

11. The Penal Code (amendment) Act - Act 1 of 1973

12. Ibid, S 2 (d) and S 3 (b)

13. Gachuki D. W.:
   "The Hanging Bill:" Kenya's Legislative Response to the Crime of Robbery, A paper presented at the Kenya Law Society conference, 6th to 8th April, 1978 at P.2.

14. See for example, K.B. Christoph, Capital Punishment and British Politics; Louis Filler, "A Canadian Debate, 1966" in T. Sellin (ed) Capital Punishment, P76; also chapter three of this paper.

15. Notably, the late Jean Marie Seroney, Mr. Mwangale, Mr. Nthenge and Mr. Koigi.

16. Ibid, note 13, P 3.

17. Supra, Note 9, at P. 236.

18. See: Generally chapter three of this paper.

19. Loc. cit, Note 13, P 4.

20. Ibid, P.5.

21. Supra, Note 9 at P. 245

22. Ibid, at P. 307

23. See: : Chapter Three

24. The Standard, March 27, 1976

25. Gachuki, Supra Note 13, P6. Also the former Attorney-General's [Charles Njonjo] that suspected robbers should be shot on the spot. (1980).

26. National Assembly Reports Op. Cit. at P. 245.

27. Ibid 246

28. Ibid.

29. Supra, Note 13, P.7.

30. Supra Note 26, P 311

31. Ibid at P. 315.

32. Loc. Cit. Note 13, at P. 8.

33. Supra Note 26, P. 246

Footnotes (cont'd).....

34. Ibid, at P.242

35. Loc. Cit. Note 13, P9.

36 Supra Note 26, P. 307

37. See Chapter 3 of this paper for a detailed discussion on the issue.

38. Supra Note 26, P. 316

39. Ibid at P. 237

40. Gachuki, Loc. Cit. Note 13, P. 11

41. Supra Note 26, P. 243.

42. Ibid at P. 581

43. Loc. Cit. Note 13, P. 11.

44. See: Chapter 3 of this paper

45. N.A Official Report Vol 20 Part 1 of P 260

46. See chapter 3 of this paper for a detailed discussion of the issue.

47. Gachuki D, Loc. Cit, P. 18.

48. N.A. Official Reports Vol 20 Part 1 at P. 608

49. see: Chapter 3 of this paper for a futher discusion on the issue.

50. The Multi-millionaire tycoon in the film entitled "The Other side of Midnight."

51. U.S. Attorney-General, Ramsey Clark's testimony in hearings before the subcommittee on criminal law and Procedures of the committee of the Judiciary, U.S. Senate, 90th Comm. 2nd Session, 1968 at P. 92.

52. Gachuki, Loc. Cit. P.20, See also chapter 3 of this paper.

53. Kareithi Muriuki :

J. M. Kariuki in Parliament, Vol II Chapter XX111, P. 31.

54. N.A. Official Reports Vol. 20 Part 1 of P. 324.

55. Erasto Muga:

Robbery with violence, Kenya Literature Bureau, Nairobi, P. 105.

56. N.A. Official Reports Op. Cit. P. 404

57. EAst AFrican Standard, 26th August, 1971.

58. Daily Nation (Kenya) 31st of August, 1971.

59. Daily Nation (Kenya) 21st September, 1971.

60. Gachuki Loc. Cit P. 21.

61. Louis Filler,

"A Canadian Debate, 1966," in T. Sellin (ed) Capital Punishment P. 93, also, chapter one of this paper for a more detailed discussion on the issue.

62. Gachuki, Loc. Cit, P.22.

63. Criminal Law (Amendment) Bill, No. 66 of 1969.

64. The Hansard edition reads lessens but we believe it was meant to read increases otherwise the sentence makes no sense.

65. N. A. Official Reports Vol. 16 at P. 5259.

66. Gachuki, Loc. Cit. P. 22, Also see chapter three of this paper for a more detailed discussion on the issue.

67. Ibid, P. 23

68. Kareithi Muriuki, Supra Note 53, P. 40 - 53

Footnotes (cont'd).....

69. Ibid

70. N.A. Official Reports, Vol. 20 Part 1 at P. 258.

71. Ibid at P. 259.

72. Furman V. Georgia 408 US 238 (1972) for an analysis and impact of this case, see "The Future of Capital Punishment In Florida: Analysis and Recommendations." In (1973) Vol. 64 J. of Criminal law and Criminology, p.2 and, "Florida's Legislative Response To Furman: An Exercise in Futility." P. 10; See also chapter three of this paper for a general discussion on the issue.

73. Gachuki, D. W. Op. Cit. P. 24 see also the addenges to this paper where the research on views by various members of our society are recorded.

74. Ibid at p. 25.

75. This argument is developed further in this chapter in the section of application of the death penalty by the courts in Kenya

76. Gachuki, Supra, P. 27.

77. T. Sellin, Op. Cit. at P. 92

78. Gachuki, Supra, P. 26

79. Ceasar in Antony and Cleopatra, Act IV, (Quoted in Gardner, Op. Cit. at P.90)

80. Foucault Michel,
Discipline And Punish. The Birth of Prison, (Penguin Books Ltd. Harmondsworth, Middlesex, England) 1975, P. 19.

81. Brian A. Grosman:
New Directions in Sentencing; Butterworth & Co. (Pub.) Ltd., London (1980) P. 194.

81. Ibid, P. 19 - 20

82. Ibid, P. 20

83. See Chapter One for a more detailed analysis.

84. The law is silent as to the aims and objectives of punishment. Courts have thus developed the theories of sentencing over a long period of time.

85. David Wainaina Gachuki,

The Sundstrom Case: A Legal Note, presented in a Kenya Law students society symposium - On the Sundstrom case, Nairobi University, 22nd October, 1980, P2 - 3.

86. Kuruma s/o Kaniu V Regina (1954) 21 E.A.C.A. 141

86. Gachuki E. W. Loc. Cit Note 85, P. 3.

87. Hinds V The Queen (P.C.) 1976 1 All. ER 353

88. Charles Okang V Republic Crim. appeal No. 76 of 1983 in the High Court at Nairobi).

89. Kareithi Muriuki Op. Cit. P 50 - 53

90. Edward Kabui Kariuki and Joseph Kahinda V Republic Crim. Appeals No. 15 and 18 of 1971.

91. The Standard, February 3, 1975.

92. The Standard, November 19, 1975

93. The Standard, July 29, 1975

94. Gachuki, Op Cit Note 85, P. 5.

95. See The Standard April 19, 1976.

96. Daily Nation, April 3, 1984 at P. 20

97. Ssehandi, F. S.

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98. See, chapter three generally for a detailed discussion on the issue.

Footnotes (cont'd).....

99. Constitution of Kenya (Amendment) Act No. 28 of 1964, S. 16.

100. Nyali Ltd. V. Attorney-General (1956) 1 QB. 1 (C,A); reserved on another ground in (1957) A.A. 253.

101. Ghai Y.P. and McAuslan U.P.W.B.:

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102. Constitution Sections, 27, 28 and 29.

103. See the Ngei case (1974 - constitutional Amendment); Also see, National Assembly Debates, Vol. X1 (7 April 1967), Cols. 2208 - 2209; Vol. XIV (21 March 1968), Col. 713.

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105. Biddle V Perovich (1927) 274 U.S. 480

CONCLUSION AND RECOMMENDATIONS

In this chapter we have endeavoured to bring to light the reasoning or factors that have led to the introduction and retention of the death penalty. We have also endeavoured to show that the reasoning cannot withstand critical examination. However, since the subject is wide, focus has been necessarily selective, schematic and panoramic. Be that as it may, the major themes emerging from the paper are summarized below.

Firstly that, Western influence through colonial rule has imposed the Western system of combating crime, which has notably failed even in western countries. Hence, inspite of heavy budgets to combat crime, there is no progress in preventing crime.

Secondly that, the penal system as it stands today, has been focused on the criminal per se leaving out the root causes of the criminal elements. That, therefore, efforts have been misdirected and hence the problem remains unsolved. A proper approach to the problem would be to help criminals avoid the criminal elements instead of subjecting them to a punishment that is simply aimed at inflicting pain and suffering.

Thirdly that, most crimes in developing countries are rooted in the socio-economic political structure of a particular society. The causes of crime therefore, are more often than not found in the material conditions existing in that society. The best way, therefore, of combating crime lies in the total removal of these material conditions that breed them: poverty, unemployment, unequal distribution of both wealth and opportunities, illetracy to mention but just a few among many others.

Fourthly that, our courts are ill-equipped to administer the death penalty. This has been summed up best as follows:

> "Today, the judge - magistrate or [assessor] - certainly does more than 'judge'. Throughout the penal procedure and the implentation of the sentence there swarms a whole series of subsidiary authorities. Small-scale legal systems and parallel judges have multiplied around the principal judgement: psychiatric or psychological experts, magistrates concerned with the implementation of sentences, educationists, members of the prison service, all fragment the legal power to punish..."(1)

The net result being that a whole machinery has been developed for years around the implementation of sentences, and their adjustment to individuals, hence creating a proliferation of the authorities of judicial decision-making and extending its powers of decision well beyond the decision.

Fifthly that, the death penalty is irrevocable and yet there is the possibility of error. That there is always a risk that an innocent man will be convicted and hanged. Mistakes thus occur when decisions are made as to whether the killing was with or without malice, with or without premeditation, whether it was deliberate or reckless, whether the defendant was sane or insane, whether the killing was committed in self-defence (actual or percieved), whether the murder was in the course of furtherance of theft or not, whether the accused was or was not deprived of the power of self-control by reason of provocation and many other unthinkable questions that usually do not form part of the courts inquiry. Needless to say, the penalty of death cannot be imposed, given the limitations of our minds and institutions, without considerable measures both of arbitrariness and of mistakes.

Sixthly, that the death penalty is often applied disproportionately. In Kenya, for instance, the death penalty for robbers is not only for "armed" or "violent" robbers, but also for robbers who attain any one or more of the prescribed "qualifications" - wounds, strikes - as provided for under sections 296 and 297. Yet it is a precept of justice that punishment for crime should be graduated and proportioned to the offence. (2).

Seventhly, the death penalty is unconstitutional. This is specifically so in relation to the constitutional provisions relating to discrimination. In Kenya this is provided for under S82 which prohibits discrimination on any grounds be they on race, religion or otherwise. This section read together with S3 of the constitution leads one to this conclusion. An example of such discrimination is that the death penalty discriminates between classes of offenders. It also seems to contravene S71 (1) of the Kenyan constitution which states that no one shall be deprived of his life intentionally. Ironically, there have been intentional killings for political reasons in cases of political crimes etc. Examples of this are the loosely defined treason cases. Here the justifications being 'Preservation of Public Security', 'Public Order' terms that cannot be defined by any accurate certainity.

Eighthly, the death penalty is far from effective. One would expect, applying rules of logic and charity, that with such a drastic and final punishment as the death penalty, the onus of proving its efficacy should be on the retentionist, however, except for blind affirmations of an almost maystical belief in the efficacy of capital punishment there is little, if any indeed, indications that retentionists can effectively discharge the onus of proving the supposed deterrent effect of capital punishment by proving that it has an unmistakable overall deterrent effect on the commission of capital crimes or, conversely, that abolition has had the effect of increasing the frequency of such crimes. It is an onus which, to the best of our knowledge, has never yet been discharged anywhere.

Ninthly, it is submitted that, capital punishment can only be seen as an extension of the class laws that are aimed at suppressing the socially disadvantaged and oppressed groups in our society. This was succintly put by the late J. M. Kariuki as follows:

> "So long as social injustices are permited to exist, - accumulation of property by man, so long as the country is divided between those who have and those who do not have, armed crime will continue with or without the death penalty". (3).

Seen in this context, the death penalty against robbery for instance, is the poor man's punishment.

Finally, it can be said that the advent of Westernization, Christianity, Urbanization and Industrialization in the developing countries like Kenya brought with them cultural norms which were in conflict with the relatively homogenous tribal codes and norms. The result of all these was a corresponding advent of new values and aspirations, new economic and political structures which have therefore, created a normative conflict between the various groups. Some of these groups use armed robbery, for instance, as means of resolving such conflict. Martin and Fitzpatrich add that,

> "The norms, values, and behaviour of the lower class do not differ from those of the middle class simply because of faulty socialization or because of the rejection of the middle class way of life by the lower class. To a much greater extent, differences between the cultures of the two classes seems to be primarily attributable to the differential life situations, problems and needs." (4)

RECOMMENDATIONS

Before proceeding to offer recommendations a few preliminary observations need be made. Firstly, that the availability or the non-availability of alternatives need not be seen as a prerequisite for the abolition or retention of the death penalty. For it is noeasy task fashioning a humane and realistic alternative to all these other solutions, one tailored to fit the prisoner's actual situation, the requirements of public safety, and the available resources in punctive and therapentic institutions. Given our ignorance of how to cope with (1 hesitate to say 'cure') such persons, I am not optimistic that a truly effective alternative can be found. However, so long as we insist on retaining capital punishment, we weaken the very motive needed to find it. Secondly that, since there has been no novel solution to the old problem of capital punishment an attempt will be made to give recommendations not only at the practical level but also at the academic level. Thirdly that, the death penalty being a single episode of the penal system, any serious recommendations must include a thorough re-examination of the whole penal system. Though, a desirable exercise, such re-examination is beyond the scope of this paper. However, for the purposes of clarity a word or two will be given on the penal system in general.

At the academic level, some academicians have recommended that instead of punishment for revengeful purposes a rehabilitative programme should be adopted. The emphasis here, is on the treatment aspect of the offender. The hope being that once rehabilitated, the criminal can be easily re-enter society a better citizen. Though attrative at first sight, such a programme has proved unworkable. For the ugly truth is that a very meagre number of countries can boost of facilities to impliment such an ambitious programme - at the level at which their policy insists on treatment under terms of confinement. Moreover, financial constraints and lack of technical know-how in the technical and administrative field to man the rehabilitative institutions makes the whole programme a none starter.

It has also been argued at the academic level that, any alternative to captial punishment should carry with it or reflect the enormity or the offence. From this standpoint many have recommended total confinement meaning life imprisonment. The underlying justification being that the offender should never be allowed to enjoy life again and that his total removal relieves society of dangerous element. Far form solving the problem, this recommendation is faulty since it is based on the wrong premise that there is no cure to the problem. It also assumes that criminals cannot reform and are for all practical purposes beyond

educational measures. Such a recommendation is also devoid of knowledge of the harsh and appalling conditions in prisons. (5). Life imprisonment in this sense therefore, means sending the criminal to his death, for under such conditions survival is a matter of chance than anything else.

At the practical level there seems to be a general consensus that punishment should at least be meted out. What is not in agreement is what mode of punishment should be inflicted. It is in this connection, that, I have a few suggestions to make.

Firstly, solitary confinement is recommended. This is not a new idea for it has been used even during the colonial days where one was taken to an Island like Kismayu or Manyani. Also in traditional communities this could be equated to banishment - going to live in a totally different community. A modern day example is in the U.S.S.R. where offenders are taken to Siberia to work for the State.Though in solitary confinement to a large extend were left free so long as they stayed within the confined area. Applied in present day, such confinement can be married with traditional practices so that the prisoner is allowed some form of freedom and be engaged in productive work to compensate the victim and society in general but with the aim of giving meaning to their lives.

Secondly, capital offenders could also be taken to arid areas like North Eastern Province in Kenya. This recommendation stems from an observable study that most people view staying in North-Eastern under arid conditions as a form of punishment. Most civil servants for example, fear and resist the idea of working in North Eastern Province and see it as a disciplinary measure. Perhaps, it is possible to transform such belief more purposefully into a mode of punishment so that capital offenders are sent there to experience the hardships created by the arid conditions. One limitation, however, is that such punishment may prove ineffective to capital offenders whose domicile is North Eastern Province.

Thirdly, denunciation properly applied has proved effective especially in our African setting. This is clearly depicted in Sembene Ousmane's "God's Bits of Wood" where before an eight member jury characterised as the Bamako trial, the following words were directed at a man condemned of betraying his people before a big public gathering.

Arguments favouring life improsonment meaning perpetual imprisonment are therefore evasive and do not help at all in solving the problem. The harsh and intolerable life in prison may not allow the prisoner 'live' to serve the life sentence. It has been asserted that:

> "The transition from the public execution, with its spectacular rituals, its art mingled with the ceremony of pain, to the penalties of prisons buried in architecural masses and guarded by the secrecy of administrators, **is not a transition of an indifferentiated, abstruct, confused penalty; it is the transition from one art of punishment to another, not less skilfull one. It is a technical mutation"** (8). **(Emphasis Mine).**

It is doubtful whether life imprisonment solves the problem. At its best it postpones the problem by being evasive rather than offering a more realistic framework within which to cure the problem.

It is even more useful to start a programme of institutional labour. For, it considers crime as a social disease which needs social ways of counteracting it, not only in the culprit, but for the welfare of the victims. The prison, therefore, should be the place where the power to punish, which no longer dares to manifest itself openly, silently organizes a field of objectivity in which punishment will be able to function openly as treatment and the sentence be inscribed among the discourses of knowledge. (9).

Further, where the practice condemns the law, the law ought to be altered. There is certainly something wrong when the law, which is made for the good of the multitide, instead of arousing gratitude, continually arouses its discontent. This, it is submitted, is not only the case with capital punishment but also for a large number of offences in our Penal Code. Time is ripe for a re-examination of the whole penal system. The philosophy behind the old classification of offences into felonies and misdemeanous needs a thorough re-examination of the whole penal system. What might have been considered a serious crime a century ago might not as of today be serious when taking into account more serious crimes that have cropped up with changing times. Examples of which are economic sabotage, abuse of public office, corruption etc. Such offences greatly offends society generally, yet the penal code fails to reflect their seriousness. Rigid adherance to the old classification therefore, could lead to grave injustice as punishment could easily be applied disproportionately to the offence. We believe that we are at a cultural watershed. We are beginning to see that the tools and institutions we have created to solve our social and economic problems no longer work. This recognition may lead in turn to the recognition that we have the opportunity and the resources to recreate ourselves,

and in turn, our institutions, corrections, and indeed the entire criminal justice

process, is a derivative system - it only reflects dominant values. If those values change, our means of dealing with crime will change as well. We cannot pour new wine into old wine skins if our intention is to correct the entire criminal justice system.

We need not copy the Western world, more so in their failures. Restitution, for example, which is an African living concept, in a spectacular manner to inject a more humane punishment, if it is made the centre of penal and penitentiary policy. This is not pious or wishful thinking - for it is quite possible to develop an African policy in this important field of social action. For, it is not just the question of capital punishment alone, but also the penal system as a whole which to a great extent has failed to work. It is a clear case where the practice condemns the law. It is clear now, that the great hope is that all forms of punishment have suddenly and dramatically been put on the defensive.

In conclusion, young African States like Kenya, whose foundation is deeper than the declaration of independence, must refrain form looking towards Western ways in their attempt to curb crime. As a nation, our attitude towards the death penalty is a matter reflected in our scheme of values. As such it has to be weighed against other possible conflicting values to see which has priority. The choice is yours. For my part, I believe it to be wrong to kill human beings. Not only because I think life is **'sacred'** but also because I consider what I call **'quality'** of human lives.

FOOTNOTES

1. Michael Foucault

   Discipline and Punish: The Birth of the Prison Op. Cit, P.21

2. Weems V U.S., 217 U.S. 349

3. Kareithi Muriuki,

   J. M. Kariuki in Parliament [Vol.II]. P. 50 - 53

4. Martin and Fitzpatrich,

   Delingquent Behaviour P.58 as adopted by Alexander B. Smith and Louis Berlin in Treating the Criminal Offender : Issues and problems p. 3-4

5. Authors own experience in Industrial Area Remand Prison in Nairobi between September 1982 and January 1983.

6. Sembane Ousmane:

   God's bits of Wood, translated by Fracnis Price (Heinemann) London (Pub) African Writers Series (Re-print) 1980, p. 95 - 96

7. Bernard Shaw:

   The complete plays of B. Shaw (Pub) Constanble & Co. Ltd., London (1931) p.1000.

8. Michel Foucault, Supra Note 1, See generally p.231 - 304.

9. Ibid

APPENDAGE

A. QUESTIONNAIRE

FACULTY OF LAW
DISSERTATION WORK
(1983 - 1984)

Q1. Do you think capital punishment should be:-
Retained or abolished?

Q2. What are your reasons?

Q3. Why, in your opinion, do we have capital punishment in Kenya?

Q4. How do you explain the increase in murder and other violent crimes like armed robbery in Kenya although we have capital punishment?

Q5. If capital punishment should be retained, what methods do you think best for executing it?

Q6. Do you think Kenyan societies traditionally had capital punishment or approved of it?

Compiled by:
KADIMA F.M.O

SUPERVISOR:
PHEROZE NOWROJEE
(ADVOCATE /H.C OF KENYA).

APPENDAGE:-

B. RESPONSES

RESPONSE: (written)

Q1. It should be abolished.

Q2. There is no justifiable reason for taking away a person's life as it serves no purpose in society.

Q3. Because of the capitalistic orientation of our legal system (stress on protection of property rights).

Q4. (a) Reflects the increase in population
(b) The deteriorating economic conditions of most Kenyans.
(c) Increase in the population of the unemployed.

Q5. Not applicable.

Q6. Yes, traditional societies had capital punishment - depending on the local feudalists at the time. There are reported cases in Western Kenya where local rulers used to bury alleged criminals alive. The approval question did not arise because it was done at the whim and will of the ruler of the day.

MOSES WETANGULA
Advocate/H.C. of Nairobi.
2.4.84.

RESPONSE: (written)

Q1. It should be abolished.

Q2. It serves no purpose. It is not effective as a deterrent.

Q3. There is a misconception based on the capitalistic nature of our economy and our colonical history that capital punishment deters would be criminals.

Q4. The increase is socio-economically based.

Q5. Not applicable - for I am against its retention.

Q6. Yes, traditional African societies had capital punishment. But unlike now, it was more effective as a deterrent because of the more close-knit nature of those societies. The approval aspect was immaterial as it was largely determined by the rulers.

T.S. OMONDI
(Advocate /H.C. of Kenya)

RESPONSE: (oral)

Q1. The answer to the question as to, whether capital punishment should be abolished lies only in looking at the causes of crime. If this be established, then, with this in mind, it becomes easier to determine the appropriate punishment. Looking at specific offences that bring capital punishment one can say most are caused by great stress and frustrations, poverty, sickness e.g. mental instability, social inequalities etc.

Q2. Capital punishment is not deterrent. Instead it sometimes increases the incidence of crime e.g. in robbery cases where the criminal has to wipe out any shred of evidence (witnesses killed). Also capital punishment is not applied with certainity. It also results in injustice, innocent people may be wrongfully killed.

Q3. Because of our colonial legacy. It is a creation of the western world with its social institutions. There has been no meaningful debate on the question in Kenya - hence the question whether it should be retained or abolished has hardly been given any serious thought in Kenya.

Q4. Capitalistic trends in our society. No equitable distribution of wealth. Experience and criminologists have shown that where property is more equitably distributed e.g. in socialistic countries there is less robbery with violence. In the U.S.S.R. for example there are less crimes against property than in the United States. Even in countries with almost equal distribution e.g. where the peoples livelihood is of main concern (e.g education, employment, health, housing etc) there are less crimes.

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Q5. If retained - then it will be only for purposes of 'deterrence'. But how to instil this deterence has been a difficult question. Even where these hangings are public - it does not deter. One thing that is clear is that the way these punishment is administered is too cruel and inhuman.

Q6. Traditional societies more concerned with reconciliation. This was a better way of solving the problem. For why should we today assume that the criminal is beyond reform ?

PROFF. ERUSTO MUGA
Chairman/Dept. of Sociology.

RESPONSE: (oral)

1. Capital punishment should be abolished.

2. That it is archiac and not in tune with changing times. It does not serve the modern aims of sentencing. It is a part of the capitalistic development where the society is characterised by inequalities.

3. That in Kenya - capital punishment in its present form is a colonial importation.

4. Capitalistic trends open the door for inequalities in distribution of wealth. Those left out by such distribution resort to violent crimes as a result of frustrations or to armed robbery as a means of earning a living.

5. The method of executing does not matter. It is just like a variation of the same thing. It doesn't change anything.

6. Traditional Kenya had capital punishment. It was applied to dangerous elements in society, who threatened the existence of society.

ADDITIONAL VIEWS.

That the aims of punishment are not achieved by the present penal system. The old classification of offences into felonies or misdemeanors must be wrong. Time has reached for a re-thinking. Probably, the whole penal structure should be overhauled - if the punishment provided by it is to be responsive to changing times. Since each country has its own political and economic system it must have its own legal system that takes into account such differences.

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It is wrong to impose a legal system that is alien to the socio-economic realities. Kenya should stop aping the western world in its attempt to solve its problems of crime.

ESHIWANI
Lecturer/Law Faculty

RESPONSE: (oral)

Q1. Capital punishment should be abolished. It is out-dated and should be removed from the statute books.

Q2. Firstly, it does not conform to modern aims of sentencing i.e. it does not deter. It offers no solution to the question of crime. That the origin of crimes should be traced in the material conditions and any attempt of curbing crime should be takled from a socio-economic angle.

Q3. It is a colonial legacy. The Kenyan penal code is a direct importation from Britain. But in past independence times capital punishment has been extended to robbery with violence.

Q4. That offences like armed robbery originated in socio-economic conditions. The inequalities in our society upon the doors for criminal behaviour.

Q5. The mode of applying the death penalty does not matter.

Q6. Traditional societies had capital punishment but it was an exception rather than a rule.

OTHER COMMENTS

An alternative to capital punishment - long period of confinement to be released subject to reform. In Kenya there has been very little debate on the question of capital punishment.

MWESELI T.M.
Lecturer /Advocate.
Faculty of Law

RESPONSE: (oral)

Q1. Capital punishment should be retained.

Q2. Reasons: The wilful killing of another is outragious. Murder is obnoxious. We cannot let free such criminals for then we would be extending our generosity too far. It is more of a moral question.

Q3. Because it has a purpose. It is useful to striking a balance in society.

Q4. Firstly, it is wrong to relate punishment to the rate of crime. It is wrong in a way of analysis of the problem. Afterall the imposition of the death penalty is not a device for reducing rate of crime - it is more concerned with the question of justice. The increase in crime can be attributed to: increase in population, unemployment, urbanization, harsh economic realities etc.

Q5. Once a sentence of capital punishment is imposed, the method of administering it becomes irrelevant.

Q6. Traditional societies had capital punishment to rid society dangerous criminals.

DR. OJWANG J.B.
(Lecturer /Law Faculty)

RESPONSE: (written)

Q1. It should be abolished.

Q2. It is no longer a deterrent sentence.

Q3. It is a colonical relic.

Q4. Because of the socio-economic trends in our society.

Q5. Not applicable.

Q6. Yes, traditional socities had capital punishment - but it did not receive wholesome approval from the population.

G.M. SIMIYU
Advocate/H.C. of Kenya
2/4/84.

RESPONSE: (written)

Q 1. Capital punishment should be abolished.

Q2. Reasons:

(a) It is suffered more by the unfortunate in society.

(b) Does not give the criminal chance to change.

(c) Taking ones life is "murder" whatever the reason.

(d) It is not sanctioned by the whole society.

Q3. In Kenya - Capital punishment is there to protect the haves from the have-nots.

Q4. Reason for having armed robbery in Kenya is because the social forces (material conditions) encourage it.

Q5. It would not be retained, but if retained it should be administered in public.

Q6. Some traditional societies had capital punishment, but was wholly sanctioned by society especially to those criminals who were dangerous to the community as a whole.

NJIRU D.K.M.
Sociologist Student.
B.A II (1984)

RESPONSE: (written)

1. Capital punishment must be abolished.

2. The reasons being: That there is a possibility of executing an innocent person, that the state has no right of committing 'murder' (executing the criminal), that taking away of life is forbidden by God: Exodus 20:13 'Thou shall not kill'.

3. That the reason behind capital punishment in Kenya is the wrongful belief in its deterrent value.

4. There are many reasons that lead to murder and violent crimes. Among them are: that murder is often as a result of political, ethnical and religious differences. These differences bring grudges among people. That murder among neighbours and family members is usually a result of jeolousy. Violent crimes and armed robbery in Kenya result from class differences due to social inequalities. Poor people do not have a way of earning a living and threfore are forced into committing robbery for survival. Hence these violent crimes become inevitable.

5. That if capital punishment should be retained, then a more human method of executing the criminal must be adopted i.e the killing must be quick to avoid pain and agony.

6. In traditional Africa - capital punishment was applied as a means of deterring anti social elements.

CATHERINE OLUNGA
Form Six Student.
(1983)

RESPONSE: (written)

Q1. Capital punishment should be abolished.

Q2. It offers no solution to the problem or crime. There is always a possibility of error - an innocent person could be wrongfully hanged. Also that, killing a criminal does not bring back the life of the deceased, neither, does it undue the crimes committed. That usually the families of the criminal are left to suffer and in cases where he was the sole "bread winner." Capital punishment also does not deter would be criminals. Killing somebody just because he has killed another is escapism, for how else does it compensate the injuired party.

Q3. That the death penalty is institutionalished in Kenya as a reaction to a class of criminals who 'society' would want to rid of.

Q4. Capital punishment is in Kenya because of the materialistic approach to life. It reduces human behaviour to nothingness; acquiring or material values rank higher than life itself. What follows is the naked competition for wealth. Yet the reality is that very few can get this material wants. This leads the people who cannot live up to such 'competition' to look for other ways (even illegal) of acquiring wealth. Hence they commit crimes like robbery. On the whole the unbalanced distribution of wealth is a prime contributor to the high crime rates.

Q5. A more humane punishment should be administered.

Q6. Yes, traditional society to some extent had capital punishment. A case in point is among the Luo - where heineous offences like having canal knowledge with one's sister was punishable by being burnt to death.

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However, banishment was the one most used for serious offences against society.

ADDITIONAL COMMENT

That the root-cause of crime must be established if any corrective, rehabilitative measures are to be launched.

MUKOYANI NGOME
B.A. 1.
(1984)

RESPONSE: (written)

Q1. It should be abolished.

Q2. That a human being (judge) is not justified to take away another human beings life. Capital punishment does not deter and even further does not give the culprit a chance to reform. There is a possibility of mistake as to the guilt of an otherwise innocent person during the trial. Courts are not infallible. Humanity revolts against such a punishment. Civilised societies elsewhere have abolished capital punishment.

Q3. The Kenya society is ridden with gross inequalities - unemployment, landlessness, lack of social amenities and general despondency. The rich are too rich, and the poor too poor. Hence a feeling of insecurity arises, hence the need of capital punishment - a punishment that is a tool used by one class to protect itself from the class impoverised by poverty. This class interest find expression in the legislative that enacted the law against such 'criminals'

Q4. Colonialist brought their laws together with their socio-economic system. Land became alienated from the Africans who became labourers and 'squatters'. Everything collapsed - Africa was no longer Africa. At independence the same socio-economic set up continued (some Africans now stepped in the whiteman's shoes); landlessness (few grabbed and for themselves). Many Kenyans no alternative resort to violent crimes.

Q5. Capital punishment should not be retained. Question of mode of executing it does not arise.

..../2

Q6. Capital punishment was rarely applied in traditional Africa. The inequalities talked of never existed. There was the little cause for violent crimes. However, if violent crimes arose or anti social crimes - banishment or exile were usually resorted to.

ADDITIONAL COMMENT.

That the judiciary should be looked at as part of the superstructure. That in the neo-colonial stage capital punishment will continue to be used as a class law against the oppressed.

MWANGI Z.W.
B.A. Student (Literature)
(1984)

RESPONSE: (oral)

Q1. It should be abolished.

Q2. It is not a just punishment. The legislative process of enacting capital punishment was suspect. There were no opinion polls carried out. It cannot be applied with fairness nor any certainity.

(a) Due to the categorization of an offence like murder into wilful murder and manslaughter the decision on whether a criminal is to hang or not depends on the policeman.

(b) This same process of plea bargaining in murder cases opens the doors for corruption.

(c) That the question as to whether the offence of murder is to be reduced to manslaughter depends on the prosecution. Meaning they hold your life at ransom! It's discriminatory. For example murder cases are handled by the High court while robbery with violence is administered by the magistrate's courts. Yet both offences carry a capital punishment!

Q3. It is a colonial hang-over. Mostly an emotional case. There has been no meaningful debate in Kenya on the question whether to retain or abolish capital punishment. Most people are poor. There is no equitable distribution of wealth. Also there is the question of frustrations in life.

Q4. Poverty among the populance majority for example rob for survival - kind of earning a living. The economic set-up is conducive for the breeding of crimes.

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Q5. Not applicable: The death penalty is inhuman and nothing can humanise it.

Q6. Though capital punishment existed - it was rarely applied. Society was concerned more with the question of reconciling the parties by compensation There could be no better humane way of dealing with human being then this.

ADDITIONAL OBSERVATIONS

The extended meaning of 'robbery with violence' to cover robberies happening each day is a dangerous development. Many will have to die in the name of the law. I suggest that imprisonment could be usefully deployed as an alternative of capital punishment. But the prison should be rehabilitative. That the only way of solving this problem however is be equatable distribution of wealth. This remains the only true solution.

DR. D. GACHUKI
Lecturer/Faculty of Law.

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