

**AN INQUIRY INTO THE PARADOX OF IMPRISONMENT
FOR REFORM.**

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the award of the degree of Master of Arts in philosophy at the
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DECLARATION

This project is my original work and has not been presented for a degree at any other University.

Sign.....

Date.12/1/05

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This project has been submitted for examination with our approval as University supervisors.

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Date...12-1-05

DEDICATION

I gladly dedicate this work to my amazing hard working mum, Annastacia Maweu for her all embracing love, inspiration and support that gave me the drive to complete my course. Her encouraging words that I can make it, her believing in me; expecting and trusting that am capable of making the right decisions went a long way to keep me on track. THANKS A LOT MUM, WORDS FAIL ME TO EXPRESS MY UTMOST GRATITUDE FOR YOUR INSPIRATION.

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I must admit that when I started this work I could not explicitly state what exactly I wanted to investigate and it is through their informed guidance that I fully grasped my area of research.

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ABSTRACT

This work provides an insight into the philosophy of imprisonment for reform. For centuries now, the reform of the criminal has been one of the objectives of imprisonment. But it is apparent that the problems of crime and hard core criminals are still seriously afflicting mankind despite the introduction of more stern penalties in prison that are supposed to reform the criminal hence reduce these problems. This study therefore questions the veracity of the power of imprisonment to reform criminals. The assumption over time has been that imprisonment does reform criminals, and, that can be cited as the reason why it is still the most popular form of punishment. Our hypothesis in this study has been that imprisonment does not have reformatory significance for offenders.

This study established that reformation and imprisonment are incompatible and cannot be carried out at one and the same institution like the prison. To achieve our objective, we critically analyzed secondary data using the utilitarian theory of punishment. Sufficient available literature revealed that imprisonment in itself couldn't reform offenders. We therefore concluded that since imprisonment in itself cannot reform criminals due to its inherent nature, reform should not be one of its objectives and should only be used either for retribution or deterrence. This study therefore suggests that the imprisonment of the criminal for punishment should be carried out in a separate institution from the reform process; imprisonment to be the first stage in the punishment process then reform as the final stage.

CHAPTER ONE

GENERAL INTRODUCTION

1.0 BACKGROUND INFORMATION

The problem of the complexity of crime is far from being resolved. Crime is a scourge that has always seriously afflicted mankind just as poverty and disease. However whereas civilization and progress in science has somehow saved man from the evils of disease and poverty, we have not yet found a remedy for crime. It has been observed that advance in science and modern inventions in technology paradoxically lead to an increase in crime or rather the rise of new crime patterns. The response to criminal behaviour operates at the institutional and sub-institutional levels. As ordinary citizens we react to the criminals rather sporadically at sub- institutional level- we personalize our reaction to the perpetrators of crime as well as the victims. There is no universal way in which different individuals react to criminality. At the personal level, the reaction is mainly out of revenge and repulsion at the criminal. Criminal justice on the other hand, which is on the institutional level, is justified on the grounds that it contributes to the social order of the community. All societies in the world maintain social harmony by use of objective laws that regulate human behaviour. The criminal justice system falls under this system of objective laws.

Wherever human beings have lived, there has always been ways and means of restoring this social harmony by upholding the socially accepted aspects of social behaviour- the values, norms, mores, customs as well as those of repairing the damage done by the violation of those values. Those who

violate these socially accepted norms and values have been universally branded as wrong doers.

This means that

punishment is normally personalized, in that it is applied to particular individuals on the basis of their perceived wrongdoing

(Encyclopedia Britannica, vol, 15,1977:281).

As much as there is an element of personalization in punishment it is universalized in that it is only administered in all societies if there is an actual or perceived wrongdoing. The punishment of wrongdoers can be said to be as old as human beings and society itself. This can be traced back to the social contract theorists like Hobbes, Rousseau and Locke who felt that if man is to live harmoniously with his fellow men, he ought to be guided by laws; he has to willingly enter into a social contract to form an organized society whose laws are binding to all for the common good. They observed that a society devoid of laws would be chaotic; one of “war of all against all” to use Hobbes words. It is in therefore in the interest of man to punish wrong doers and reward those who live in accordance to societal norms.

Every society needs a system of rewards and punishments in order to maintain the status quo as far as society’s value system is concerned. Before the introduction of criminal law, punishment took the form of revenge or retaliation where the victim was allowed to inflict pain on the offender till he/she felt that justice had been done. In essence, the theory of punishment that was assumed prior to reflection was the retributive theory.

Imprisonment, which is our main concern in this study, is a comparatively recent idea. The prison as we know it today was constructed in the late eighteenth and early nineteenth centuries.

According to Calvert (1975), until the nineteenth century, prisons were used mainly to house detainees, who awaited trials at which they were sentenced to such punishments as whipping, maiming or execution. The Gaol Act of 1823 introduced an important step towards the establishment of the present prison. This act abolished all harsh prison conditions which included iron and chains on the offenders and public flogging. Imprisonment was introduced as a form of punishment to replace the existing barbaric forms like death penalty, flogging in public, mutilation, and banishment *inter alia*. In 1857, the penal servitude Act was introduced which governed the treatment of imprisoned prisoners. In 1948, the penal servitude Act was abolished and imprisonment was based on serving a sentence of years pronounced by the court and up to present imprisonment is still based on this principle.

Imprisonment is one of the accepted forms of punishment within the criminal law. Other forms of punishment within the criminal law are as Reid (97) outlines,

fines to the state, retribution
paid to the victim or others, probation
with or without supervision and community
service among others. Punishment within these
provisions of criminal law therefore refers to
the penalties that are inflicted by power of the state;

that is the authority of law after a court found the defendant guilty of a crime”(Reid, J.A, 1994:97).

According to the classical, neo-classical and the positivist schools of criminology, we have four main punishment philosophies: incapacitation (no infliction of pain, but hold offender till no risk of further crime), retribution, deterrence and rehabilitation. The classical and neo-classical thinkers like Cesare Beccaria and Jeremy Bentham argued that punishment should fit the crime and based their arguments on the doctrine of free will and the notion of hedonism. According to Beccaria, punishment should be assigned to each crime in a degree that results in more pain than pleasure for those who commit the forbidden acts. Retribution, which is perhaps the most ancient method of dealing with offenders, was based on the doctrines of the classical thought. . The positivist school on the other hand led by Cesare Lombroso (1835-1909) held that punishment should fit the criminal not the crime. This school emphasized on the scientific treatment of the criminal and it laid the basis for a scientific study of the criminal behaviour and the reformation of the criminal. The punishment philosophies of rehabilitation and reintegration of the offender into the society have their roots in this school. It is believed that we can scientifically and accurately predict the behaviour of the criminal and in this way we can administer the appropriate treatment to “cure” his criminal disabilities.

Imprisonment being one of the most widely used forms of punishment deserves some critical analysis in order to establish whether it reforms the offender, its other aims such as retribution and deterrence notwithstanding. According to one of the reports of the Administration of prison in Kenya

(1970) it is stated that, “Kenya prisons’ service is devoted to transforming self-willed outcasts into useful citizens, to protecting society and to deterring the strong and the weak from the world of crime, with fairness and firmness aimed at rehabilitation and deterrence.” In a Tanzanian annual report (1965), it is likewise stated that, “...make the prison administration service not only a punitive but essentially a reformatory one, capable of converting prisoners into good citizens after release from custody.”

These two reports clearly indicate that imprisonment has the reforming of the criminal into lawful citizens as one of its main objectives. In a nutshell, prisons do serve two legitimate functions:

the protection of the society (persons and property)
and the punishment of persons who have
caused significance harm and suffering to fellow
human beings (Calvert, 1975:247).

The first function can only be achieved if the prison is in a position to transform all those who go through it into responsible people free of their previous criminal tendencies. But how exactly does this form of punishment intend to achieve this objective? How can keeping a criminal in isolation only in the company of criminals some of whom are more vicious than he/she is transform him into a law-abiding citizen? It is apparent that when we punish, we mean to hurt; we want the criminal to suffer some pain, mental if not physical. Thus, as Moberly (1968) argues, ‘whatever the ultimate purpose of punishment, in the first instance it is imposition of an evil’. The act of inflicting pain whether this pain eliminates a greater pain or

not is inherently wrong hence an evil in itself. How do we determine that putting the criminal to custody is the only sure way to reform him? Statistics backed by evidence show that imprisonment does not ordinarily transform criminals to law-abiding citizens. We can say that at its best punishment and particularly imprisonment is aimed at making the criminal suffer as a way of revenge by the society.

It is apparent that punishment of the offender and the effort to reform him at the same time and in the same institution is incompatible. This is due to the inherent differences in operation of the two- reform and punishment. One reason is that we have no way of determining the length of sentence that is sufficient to reform a particular individual. Taking into account that the rules and regulations as well as the conditions which the prisoner is subjected to in prison are so unlike those in the society, how do we judge that he has reformed enough to go back to the society? The values of a closed system like the prison cannot and are not the same as those of the open society and they cannot be interchangeably used to rate criminals.

If any form of punishment is to reform, it must be such that it enables the offender "to see his offence as does the society by which or in whom it is inflicted" (Moberly, 1968:140). This means that reformation depends upon the offender recognizing and accepting his punishment as just. Most of the prisoners feel that they do not deserve to be kept in custody, so how can it help them to reform? Individuals are influenced by varied external as well as internal factors to commit crimes and unless these factors are addressed they still are capable of influencing the same individual to commit the same. Imprisonment does not concern itself with the acceptance of the offender or

the reasons why he/she committed the crime in the first place and cannot possibly be said to be concerned with the reform of the criminal.

The philosophy of imprisonment for reform is utilitarian; that we take criminals to prison because this will have good consequences of reforming the criminal. This is seen as producing a greater balance of good over evil both to the individual and society than any other alternative. But is it possible to determine prior to taking them to prison that this will be the case? Imprisoning prisoners with the aim of reforming them on these grounds is essentially defective since we have no way to determine whether or not it will reform the criminal. Although we do have isolated cases where criminals do not go back to their criminal ways after imprisonment,

we have no way of establishing if it was indeed imprisonment that made them law abiding for they may as well have done so despite their experience and because of it (Alper, 1974: xii).

If Alper's argument is anything to go by it is clear that prisons as correctional institutions or rehabilitation centers, or even the rebuilders of the men and women who enter them are not attaining their supposed goals. This is an indication that something is a miss in the prison system that needs to be looked into.

1.1 THE STATEMENT OF THE PROBLEM

The problem of crime and hardcore criminals becomes worse everyday despite the presence of stern penalties and new measures of improving our prison institutions. We have seen new sanctions been devised, prisons been improved and more prisons being built but this does not seem to transform criminals into responsible citizens as it should. The assertion that imprisonment reforms criminals is clearly negated by statistics, which clearly prove in general the permanence of the phenomenon of crime and recidivism.

Everywhere in the world, there is widespread increasing crime as well as new crime patterns despite the effort to pack more and more people in prison for even longer terms than before. Is it then possible that as much as imprisonment may deter and incapacitate the criminals while in custody, it cannot in essence reform them and that is why we are incapable of curbing crime? It seems that as much as the introduction of imprisonment marked a remarkable development in the penal system by abolishing the barbaric forms of punishment then, the ever threatening high rates of crime and recidivism clearly indicate that imprisonment has not achieved its supposed aim of transforming criminals into responsible citizens.

This is apparent even as prisons are being equipped with humanitarian measures. Why are criminals going back to crime even after being equipped with skills like carpentry, masonry, and dressmaking among others? Why isn't the improvement in prison conditions leading in the "improvement" of our criminals? Are the penal systems conducive to transform the criminals

morally? The foregoing considerations may suffice to show the grave defects of imprisonment for reform.

1.2 RESEARCH OBJECTIVES

1.2.1 General objective

This study generally examines the aspect of imprisonment as a form of punishment in order to determine if it has rehabilitative significance to the criminal.

1.2.2 Specific objectives

- 1. To establish whether reformation and imprisonment are compatible; whether they can be carried out at the same time in one institution.**
- 2. To determine if imprisonment is an obstacle to the rehabilitation of the criminal.**
- 3. To determine if the 'improvement' of prison conditions has a positive impact on the "improvement" of the criminals**

1.3 HYPOTHESES

- 1. Imprisonment does not have rehabilitative significance for offenders.**
- 2. Imprisonment and reformation are incompatible.**
- 3. Improvement of prison conditions does not necessarily lead to the reformation of criminals.**

1.4 JUSTIFICATION AND SIGNIFICANCE OF STUDY

The issues of crime and punishment have been of main concern to men for a long time. This is probably because they touch on the dignity of men directly or indirectly such that any time a crime is committed, the victim's rights are violated by the criminal and any time punishment is administered, the question of whether it is just comes up. A general survey on the available literature on the subject of imprisonment shows that lawyers and penologists who are mainly concerned with the problem of crime and punishment are not anxious to enter into the moral implications or the more fundamental questions of criminal justice due to their training which calls them to follow objective laws and not to critically examine them. As Oruka (1985) observes, we are in dire need of a new moral philosophy, which can support a new penal code since,

there is a great deal in the subject, which is of interest to the individual and the community but the lawyers, and sociologists are due to their training or profession unable to discuss. Questions that arise from the relationship between punishment, responsibility and free will (Oruka, *ibid*).

The reason why we want to address the issue of imprisonment is not therefore because it has suddenly become inhuman or destructive to human lives or even necessarily that the society has become more sensitive to the plight of prisoners. The reason for our inquiry is as Robert Martison observes that the

prison even as it is enriched and improved continues to produce the paradoxical result of increasing

recidivism-not directly by doing anything to the offender, but simply by removing him from the society, depriving him of his personal liberty (Martison, 1972:23-24).

Individual criminals are taken to prison because according to the criminal law that is where they should be; that is the form of punishment that can make them responsible citizens. It is unfortunate that criminal statistics seem to prove us wrong as increase in crime rate and recidivism still continues to threaten our well- being.

The study is intended to help the parole system in implementing a more humane system of dealing with offenders that will actually reform them. It should serve as an eye opener to the judicial administration that is concerned with the sentencing of offenders, the prison officers who take the responsibility of looking after the criminals when they are imprisoned and the society at large- that they should change their attitude towards offenders as a first step towards helping them. It also aims at helping the society in adopting a curative rather than a totally deterrent approach to crime, which has been there long enough to prove its ineffectiveness. It is undeniable that crime still continues to be one of the major social problems and there is dire need to critically examine our existing social control mechanisms in an order to point out their weaknesses so that we can be in a position to find a lasting solution to the problem of crime.

1.5 SCOPE OF STUDY

This study will be limited to addressing imprisonment as a form of punishment for reform and although it will touch on the other aspects such as incapacitation, deterrence and retribution, it will not concern itself with the details of these aspects of imprisonment. Although some aspects of punishment in general will be touched like general theories of punishment in order to explicitly expound on imprisonment, this study does not concern itself with punishment in general at all.

The study will focus on establishing if imprisonment has reformatory impact on criminals.

1.6 LITERATURE REVIEW

A lot has been written on the justification of punishment in general. On the one hand it has been argued that punishment does indeed aid in curbing crime since it does deter as well as reform criminals. Those scholars like Moberly, Alper, Oruka and Walker among others who feel that punishment is not playing the supposed role of reform and permanent deterrence do however argue on the contrary that punishment is an unnecessary evil that should be avoided. They argue that crime is not only an individual act for which the individual delinquent must answer; it is also a social fact which, particularly in its most wide spread and constant forms, indicates something

defective and unbalanced in the structure of society. Since those who advocate for punishment do not conceive crime in this way, antagonists therefore feel that punishment should be abandoned and replaced with what Oruka (1985) refers to as “society and criminal treatment”. According to Oruka, the only effective way to curb crime is by “treating” the society of its social ills, bad conditions or the obstacles to decent existence inherent in it” (ibid: 87). By treatment of the criminal he means “the use of curative and non-punitive ways in which we may help a criminal to change his criminal tendency or behaviour.”(Ibid: 87).

Oruka opts for this kind of treatment because he feels that the basis of punishment per se is the reciprocation of evil by evil and should be avoided. This is a remarkable point that he makes here since “ the universal principles of morality call us to do good always even where evil is involved. We cannot do justice by paying evil with evil” (Acton, 1969:198). Acton feels that the alleged absolute justice of repaying evil with evil as maintained by scholars like Kant is not convincing and should be discarded.

If we are to punish or even treat our criminals we should do so because we want to help them to abandon their criminal ways but not because we want them to pay for their misdeeds and we feel that they ought to suffer.

Some scholars like Morberly, Acton and Oruka *inter alia* frankly admit that punishment and particularly imprisonment cannot meet this objective. Moberly (1968) argues that reformatory punishment, so conceived, has grave limitations. He argues that one of the grave limitations of this theory is that habits formed in one environment may not survive in another or they may cease to be serviceable. If this be the case, it means that it is possible for a

criminal to be a “good prisoner” without necessarily being a good citizen after release. A criminal can easily adjust himself without friction to a prison regime in which the whole routine of his life is ordered for him. But the climate in prison is so unlike the one out in the society, so much so that the moment he is released he cannot adjust himself to the non-ordered free life where he is only expected to make the right choices. “Habituation to an all-pervasive routine does not therefore train the criminal to choose wisely and this may impair his capacity to choose at all.” (Morberky, 1968: 127)

According to Acton (1969), the reason why imprisonment has failed to reform criminals is because

our present penal systems are not conducive
to the improvement of our criminals.
in most cases they embitter them and
cause them feel a grudge against society.
provident and salutary as a work of moral
re-education might be, it is an illusion to
think that it can be carried out in prison.
(ibid: 199).

According to Acton therefore, we cannot expect prisons to make our criminals better citizens when all they do is turn them against the society. Most prisoners regard imprisonment as an undeserved misfortune, which bears no relation to morality and the experience they undergo, only makes them more determined to hit back at society as a way of revenge. Bentham who was the first penologist to suggest that imprisonment could be used to control social behaviour and at the same time to help to maximize the amount of liberty however feels different about the matter. He explains the effects of imprisonment on criminality by using the notions of punishment

and reward. He argues that criminals should not be detained beyond the point in time when the punishment has had its effects. But how do we establish that the punishment has had its effects? It is difficult if not impossible to detect the exact time that the punishment will have its impact before we take criminals to prison and even when they are in prison.

As Grupp (1971), observes,

the more isolated the prison is from the civilian society, the greater the mysticism created around it and the more serious are the effects on the institutional personnel and especially the inmates. (ibid: 268).

It is a fact that prisons are built as far from the rest of the society as possible. More often once criminals are taken to prison the rest of the society seem to forget about them; the further they are the better off the society thinks it is since this assures it of safety. Grupp observes that this is not the case since the more isolated the prison is the more incriminating it tends to be and the society is not safe at all. Clemmer (1940) that argues imprisonment is sure to “prisonize” rather than to improve the prisoner morally and the distance from the society does not matter so long as it is a separate institution with a completely different way of life from that of the ordinary society.

He further argues that it is common knowledge that by throwing offenders into contact with other offenders some of who are more vicious; totally isolating them from sources of support for non-criminal values, we should expect them to become increasingly criminal in their attitudes, ideas, habits

and world- views. Clemmer therefore views prisons as a part of a decadent system of justice which are harmful to the society and which should be discarded. This process of acculturation into the prison community corrupts the prisoner making him anti- social outside the prison hence increasing his criminality. So unlike the popular belief that imprisonment does provide the criminal with ample time to reflect on his criminal activities hence resolving to abandon them, what this does is to increase his resentment towards the society as he reflects on the losses and deprivations it has cost him. The stigmatization he meets once out there makes him to commit another crime so that he can go back to the only place where he is not looked upon with suspicion- prison.

As we strive to improve our prisons so that our criminals can get a better environment to meditate so that they can come out as reformed people, we should remember that the reason why our institutions are failing to reform is not because they are not “five- star hotels”, but because they are fundamentally defective simply because they isolate the criminal from the ordinary society, deprive him of his physical and psychological liberties turning him into a puppet in the name of reforming him. As Johnston (1970), notes,

of all the painful consequences of imprisonment
none is more immediate and obvious than the
loss of liberty. (Johnston, 1970: 363).

The criminal is immediately deprived of his autonomy and subjected to a fast number of commands, which are designed to control his behaviour. Most prisoners in response express an intense hostility against their far-reaching dependency on the decisions of their captors and the restricted

ability to make choices. The criminal is also deprived of security since the society condemns him to live among prisoners. If we are truly to reform our criminals, we should humanize the treatment of our criminals; respect their human dignity irregardless of the nature of their crimes. It is apparent that confining them in custody only in the company of other criminals where they are subjected to conditions so unlike those in the society in the hope of reforming them is the wrong way to treat our criminals.

As Mill argues, we cannot benefit a person by doing him an injury. We do not therefore make the wicked man less wicked by baffling and humiliating him. If we are to genuinely reform by punishing, we cannot compel. "We must convince and, at personal level, this involves some appeal to intelligence. Further, this appeal must be addressed to what is sound in the culprit's personality and not to what is base, to his conscience and not to his fears" (Moberly, 1968 :131). Reformation of the criminal starts when the criminal accepts that he is in the wrong and needs to change his ways. The prison has no measures to convince the criminal that he is in the wrong and it is in his interest to change and the idea of them reforming criminals remains impossible.

Hart (1968) poses the inevitable question of whether reform accompanies punishment or whether it results from punishment. In relation to this question, does imprisonment as a form of punishment accompany reform or does reform accompany it? Hart observes that it seems that reform accompanies some form of punishment. So do we have reform accompanying imprisonment?

It is therefore evident that any time we administer punishment we should so in such a way that reform itself accompanies the punishment. We should not assign punishment for its own sake for this as Oruka (1985) notes, “ is evil/and or useless and hence intrinsically bad and undesirable.”

Generally speaking punishment can be seen as important in re-affirming the society’s

**collective agreement on what is wrong and what is right
as well as re-invigorating the individual conscience
(Sommer, 1976:174)**

If then we are to successfully understand crime and prevent recidivism, the first step that we need to take is to try and understand the difference in function of the criminal and non-criminal mind. Is the reason why crime is so difficult to eradicate as Menninger puts it, that it serves the needs of offenders and non- offenders alike? He argues that

**the motives of offenders and non-
offenders are quite similar; what
distinguishes serious offenders is simply a
greater sense of hopelessness in the pursuit of their
goals (Sterba, 1997: 512).**

Durkheim, who viewed crime as a necessary and social event regards punishment as a ‘means of containing the demoralizing consequences of the crimes that could not be prevented. He argues that unpunished deviance tends to demoralize the conformists’. Although Durkheim’s concerns are noteworthy, he seems to emphasize on using the criminals as means of maximizing benefits to the society hence abandoning the plight of the

individual criminal. The punishment of offenders should act as an aid to moral education, a habit building mechanism, as a method of achieving respect for the law and as a rationale for obedience. It should focus on the advantages it offers the criminal not the society. If punishment provides a symbolic affirmation of public disapproval of the violation of the set norms and values by the criminal, it should focus on the criminal not the society as such.

The biggest opposition to imprisonment as a form of punishment is not so much about the restraint of freedom, but the destructive effects it has on the criminal; that of leaving him worse off than he was physically, psychologically and socially. Jeremy Bentham seems to capture these effects when he exposes the state of the inside of the prison where the offenders are condemned to spend their lives.

He argues that,

...all the inmates raise themselves to the level of the worst; the most ferocious inspires the rest with his ferocity... upon the ruins of social honor is built a new honor, composed of disgrace..... and hostility to man kind; and thus it is that, unfortunates who might have been restored to happiness, reach the heroic point of wickedness, the sublimity of crime.(Bentham, 1864:351-52)

Stephen Hob house and Brockway express the same sentiments when they argue that

in general the effects of imprisonment are of the nature of the progressive weakening of the mental powers.... Which renders the prisoner less fit for useful social life and instead make him more predisposed to crime

(Hob House&Brockway, 1922:561).

Following the above sentiments in this humane age, we should recognize the futility of retribution and instead seek to rehabilitate rather than insisting on the severity of punishment to retaliate.

The justice model for the justification of punishment, however, holds that imprisonment as it is now is still valid since the criminal only gets what he deserves and treating him otherwise would not be fair. But how do we determine what is a fair and just punishment for a particular offence? It is from this retributive understanding of punishment that we label the law-breakers as “criminals” to distinguish them from the law-abiding citizens. Those who justify imprisonment on the basis of its reformatory function do so by appealing to the utilitarian aspect of punishment of securing the greatest benefit for the greatest number; that imprisonment brings a greater balance of evil than any available alternative by maximizing social security after the criminal is reformed. But Oruka’s observation that the reason why we still experience the problem of crime despite our persistent practice of punishment is because we overlook the root causes of crime cannot go unnoticed. The forms of punishment that we have seem to concentrate on the social benefit of the public not of the criminal. However disallowance of imprisonment as an instrument of reform need not mean that this form of punishment is never justified; it might still be sometimes needed as a deterrent.

1.7 THEORETICAL FRAME WORK

Theories for the justification of punishment have been classified into two: forward looking theories and back ward looking theories. Forward looking theories like reformation which is utilitarian in principle hold that, punishment is justified because of its relation to what will occur- the consequences. Reformation as an objective in punishment is teleological in the sense that we are punishing the criminal for the good effects that punishment will have on him. Our study will therefore be guided by the teleological principle in ethics. When we punish criminals on the basis of reform we appeal to the teleological principle that the goodness or badness of an act depends on the consequences that act produces. The instrumental value of our actions is what makes acts good or bad. We take criminals to prison because we believe that such an act does produce the greatest balance of good over evil in terms of reforming the criminal hence maximizing social security by preventing the commission of further crime.

Imprisonment, it is believed, should have good consequences on the criminal and society at large. While in custody, the society is safe because the danger posed by the otherwise would be free criminal is reduced once he is incarcerated. Imprisonment as a form of punishment is expected to protect the society from the danger of crime by reforming criminals into responsible persons its other functions like deterrence, retribution and incapacitation notwithstanding and this is seen as a social control mechanism that produces a greater balance of good over evil in terms of controlling crime than any other available alternative. Whether this is true is however a different issue altogether.

Backward looking theories on the other hand hold that punishment is justified because of its relation to what has happened, for instance, the retribution theory. These theories justify punishment on the basis of the past act and do not concern themselves with the future impact of the punishment either on the society or on the individual. Backward looking theories view punishment from the point of view of “ a stern balancer seeking to achieve a moral balance between punishment and crime”(Sterba, 1997:502) and are none of our concern here. The doctrine of good consequences will help us establish if it is possible for imprisonment to have good consequences on the criminal by reforming him/her hence producing the greatest benefit for the greatest number of people in terms of maximizing social security.

1.8 RESEARCH METHODOLOGY

To achieve the stated objectives, the study will be based on library research. It will employ the philosophical method of logical and critical analysis as well as the synthesis of the collected data. Various relevant works on punishment in general and imprisonment in particular will be subjected to critical textual and rigorous conceptual analysis in order to comprehensively address the problem that this study seeks to investigate.

In conclusion, this study is concerned mainly with the effects of short-term imprisonment on the criminal in relation to the reform of the criminal in contrast to life imprisonment, which we see as serving no meaningful purpose at all. Keeping the offender away from the society for life neither corrects the wrong done nor helps him in any way. So why punish just for the sake of punishing?

CHAPTER TWO

AN ANALYSIS OF IMPRISONMENT FOR REFORM.

In the 19th century, reformists like Martison, Zimring, Clemmer, Bentham and Smith *inter alia* criticized the prisons for failure to rehabilitate offenders. They argued that the penal system was only concerned with taking criminals to prison for punishment and not as punishment. The penal system was designed to enable the criminal suffer for the offence committed. These reformists were against the fact that no reformatory mechanisms were in place in the penitentiary system. They therefore started the debate on prison reform and were for the idea that the prisoners deserve a 'fair' treatment by virtue of their being human. Fair treatment meant abolition of all cruel inhuman practice in the imprisonment process, which were purely retributive. In the contemporary philosophy of punishment the treatment of offenders as moral agents is still a central theme. Contemporary reformists take the cue from their predecessors and enhance the idea that those who have broken the law have not ceased being autonomous, responsible agents and punishment must respect the rights, which flow from these qualities. Incarceration does not reduce convicted persons into lesser beings and this should be manifested in the way we treat criminals.

John Howard (1726- 1790) who is given credit for the start of reform in the penitentiary system is recognized for traveling through out Europe and exposing the sordid conditions, which the prisoners were living in. Howard argued that,

we should have sanitary and 'secure' prisons,
moral uplift through influence of prison
chaplains and useful work for the prisoners (Carlson,1976:78)

Howard and other reformists at his time felt that the prison was only exposing offenders to corrupting environment that could not reform them in any way; their human dignity was being taken for granted. Other scholars like Thomas Buxton (1786- 1845), Jeremy Bentham (1748- 1832), James Mackintosh (1765- 1832) and Cesare Lombroso (1835- 1909) also played a significant role in the fight for prison reform (Carlson, 1976: 81)

The philosophy of punishment for reform has its basis in the positive school of criminology, which was founded by Cesare Lombroso. The positive school rejected the classical doctrine of free will, which had emphasized on the “punishment fitting the crime” propagated by Cesare Beccaria and Jeremy Bentham. The classical and neo- classical criminologists were basically concerned with retribution and deterrence, but the positivists disapproved this view and argued that “punishment should fit the criminal” and not the crime. The positive school focused on the individual criminal rather than the crime and believed that the only sure way to curb crime is by effecting the necessary changes in the social environment that influence the criminal. Oruka (1985) echoes this view in his argument for “the treatment of both the individual and the society” if we are determined to deal effectively with the problem of crime. The contributions of the positive school saw the development of the scientific approach to the study of the criminal behaviour hence the reform of the criminal. It emphasized on gathering information about the offender’s background- family ties, parental upbringing, educational and social status as well as the physical and psychological make up of the criminal. This scientific approach to criminology came about due to the widely held belief at the time that the

scientific method could be used to explain all behaviour. It was believed that if the scientific method could be used to study nature, it could still be used to study human behaviour.

Although punishment for reform has its roots way back in the positive school, imprisonment for reform is a relatively recent development in the history of penology. Originally prisons were mainly meant for retribution, incapacitation and deterrence. The fight for the inclusion of the reform of the criminal as one of the main objectives for imprisonment came much later when moral philosophers, criminologists and sociologists saw the need to address the issues of the rights and dignity of the prisoners as human beings. This recent development called for the abolition of severe punishment since this did not help in alleviating the problem of crime. As Hall Williams observes,

since the end of the nineteenth century, there has been a trend towards taking out of prisons those persons who are not thought likely to benefit from the experience, or who might be better dealt with else where (Hall Williams, 1975: 165)

With the increasing acceptance of the importance of having the reformation of the criminal as a main objective of imprisonment, the aims of the penal system have been restated and redefined as being no longer exclusively concerned with retribution and deterrence. We see that our prison systems are increasingly being regarded as correctional and or rehabilitation units rather than confinement units. The call for assignment of indeterminate sentences so that a criminal might be released when he is reformed rather

than when he has served a specific term is also becoming popular. It is apparent that Paterson's observation, that, 'you cannot train a man for freedom in conditions of captivity' is slowly gaining force.

As a doctrine, punishment for reform is for the restructuring of the penal policies in such a way that there is respect for the rights of the prisoners. The policies should be seen to respect the prisoner's inherent dignity as a person, and it should accord procedures and facilities for ensuring that his/her treatment at all times is fair, just and humane. This reformatory approach to punishment outlaws torture and other cruel and degrading punishments. Reformists regard criminals as victims of social, economic, political and psychological forces in our society. Smith (1974), for instance argues that,

Since society is responsible for the presence
of these deviants, it is society's moral responsibility
to make amends and help them to adjust to these
criminogenic forces (Smith, 1974:2).

The subjection of inhuman conditions to the prisoners as punishment is in no way a channel to help them adjust and abandon their criminal ways. The criminals according to Smith and other like-minded reformers feel that the criminals are not wholly responsible for their actions and the society should treat them like so. Grupp (1971) advances a rather interesting argument that,

just as Rousseau had seen man, the noble savage
as a creature whose imperfections stemmed from
the corrupting influences of the corrupt society,

so do the humanitarian reformers who see the problem
of prisons in terms of their corrupting influences
(Grupp, 1971:338)

Reformists in their call for “punishment to fit the criminal”, argue that we should humanize the treatment of the criminals; respect their human dignity regardless of the nature of his crime.

The reformatory approach of punishment is consequentialist hence forward looking in principle. This is in contrast to the non- consequentialist/ backward looking theories like retribution. As a consequentialist theory, the philosophy of punishment for reform is based on the doctrine that the rightness or the wrongness of any action or practice depends solely on its overall consequences. It is good/right if its consequences are good (better than those of any available alternative), and wrong if its consequences are bad (worse than those of any other available alternative). As Duff and Garland (1994) argue,

to justify any system of punishment we
must show not only that it does some good,
or prevents some evil, but also that no available
alternative practice would achieve as much or
more good at lower cost (Duff and Garland, 1994:12)

So when we take offenders to prison with the aim of reforming them, it is because we believe that this is the best way to achieve our objective We believe that the act of imprisonment will produce good consequences on the individual and the society at large by reforming the offender to a law abiding

citizen. Whether this is always the case is a different subject altogether. The reformatory view of punishment is therefore instrumentalist; it justifies punishment as a contingently efficient strategy of achieving certain beneficial effects first to the individual and the society at large. This is in contrast to the retributive view that punishment is justified due to its inherent pain.

A system of punishment based on the goal of the rehabilitation of the offender is principally offender oriented rather than offence oriented. Unlike retribution that advocates for the supremacy of the offence in the criminal process, reform focuses on the individual offender as the determinant factor. It is an individual approach which is seen as one that instantly makes one conscious of the importance of finding out the most effective way of dealing with each individual by getting relevant information about the criminal which might have led to his/her deviant behaviour. But are offenders taken to prison so that we can monitor them more closely to understand them or are they taken as punishment with no prior concern of their individual needs? As an objective of punishment, reform embraces the strengthening of the offender's disposition and capacity to keep within the law, which is intentionally brought about by the human effort to change rather than through the fear of punishment.

The individual approach to crime does not however totally disregard the relevance of the offence in the criminal justice. As much as the main objective is to strengthen the individual's disposition to keep within the law, the nature of the offence in rehabilitation is relevant in so far as it tells us

what is needed to effectively reform the offender. If for instance the offence committed is theft, the nature of the offence entails how, where and when it was committed. It can vary from robbery with violence, fraud, to pick pocketing. Such details about the nature of the offence will help in determining the intensity and duration of punishment that is required in order to change the offender's personality. Rehabilitationists like Menninger believe that a majority of the offenders can be cured from their willfulness to commit crimes as well as their viciousness and all that we need to do is to maintain a therapeutic attitude as we deal with them. This implies that the only way that we can justify imprisonment on the basis of the reformation of the offender is if we are in a position to know that the period that we sentence him to jail is appropriate for him to change his ways. But do judges as they sentence offenders have prior knowledge that that is the appropriate time to "heal" the criminal of his criminal ailment?

The question that arises from the notions of the intensity and duration of the punishment in healing the criminal has to do with the ability to predict correctly; whether human behaviour is predictable. The Underlying assumption in the philosophy of punishment for reform is that we can predict with certainty when the offenders have been reformed enough to be released from prison or a treatment program. We believe that the prison officers will be in a position to tell which criminal has changed his ways and is ready to go back to the society. Supposing this was possible, what criteria would he/ she use to tell, that he has reformed? How accurate are predictions when applied to individual cases? How do we accurately predict that if we take criminals to prison they will reform to law-abiding citizens? The notion of prediction is problematic in the social sciences and it is rather

complicated to base our justification for punishment on the power of prediction.

There is also the basic question of whether it is possible to carry on punishment and reformation at the same time and in the same institution? The argument of whether it is possible or not possible to reform criminals by punishing them is a controversial one in the history of penology. Now that we have an idea of what punishment is, it is only prudent we attempt to explain what we mean by treatment in correctional terms. In correctional terms,

treatment may be anything used to induce behavioral change. The goal is to eliminate dysfunctional or deviant behaviour and to develop productive and normal behaviour patterns. In prison, treatment includes diagnosis, classification, therapy of all sorts; education, religious activities, vocational training, and self- help groups (Pollock, 1989:127).

Reformists have often argued that since punishment is essentially concerned with causing pain on the offender it is not in a position to induce behavioral change in the prisoners. The only way to eliminate the dysfunctional behaviour according to this view is by “treating them” in the way Pollock describes above. Shaw who is one of the reformists against the use of punishment with the aim of reforming offenders argues that

if you are to punish a man you must injure him.

If you are to reform him, you must improve him.

And men are not improved by injuries (Moberly, 1968:121).

So do we punish (read imprison) as treatment or do we treat as punishment?

Does imprisonment 'injure' or does it 'improve' criminals?

The primary purpose of 'treatment' has been seen in terms of inducing a positive change in the individual unlike punishment, which often arouse feelings of resentment hence negatively impacting on the individual. As Packer (1969) argues,

There is always in the idea of treatment a calculus of benefit and detriment to the person affected.

Treatment involves the imposition of some short run detriment, such as loss of liberty in the interest of a long term benefit, such as personal improvement or the elimination of the disabling condition(Packer, 1969:23).

This means that the loss involved in treatment is for a good cause and cannot be viewed in retributive terms like in punishment. The pain caused in punishment is for the offence committed and is not meant to benefit the offender, but to act as a 'just desert' for the crime committed. In most cases punishment is associated with retribution and not the improvement of the offender. Any time we administer punishment it is because we believe that it is painful enough to cancel out the pleasure derived from doing a particular wrong. for the crime committed. All punishment is essentially retributive; the reformative function only comes as a by the way.

Unlike treatment that aims at eradicating the causes of criminality hence reforming the offender, punishment is said not to eradicate evil habits or desires but to drive them underground. Punishment does not teach dishonest

boy or man to be honest but only to be more circumspect in his methods of preying on the society (Moberly, 1968). The suffering that must necessarily accompany punishment does not automatically refine or educate the offender about non-criminal ways. Packer (1969) makes this difference clear by asserting that the difference between treatment and punishment stems from the fact that one is intended to be hurtful by those who prescribe or administer it (punishment) where as the other is intended to be beneficial (treatment). Any form of punishment does not intend the one being punished to enjoy his/her experience for it is in the pain/discomfort that it derives its meaning. If then treatment entails benefit in the positive sense; that it need not be repulsive though it entails some coercion, it is clear that it cannot be carried out at one and the same time with punishment due to the inherent conflict of interest.

Burt despite the above conflict of interest, these two practices seem to have a common ground that,

treatment like punishment is triggered by conduct that is universally accepted as abnormal. Although the conduct in treatment need not constitute an offense and often does not, the need for punishment just like treatment is attended to if the observable conduct is not in line with the normal conduct.(Packer, 1969:25).

Therefore all punishment can be said to constitute some form of treatment, but not all treatment is a form of punishment. They both focus on the future benefits of the individual and the society at large. But are punishment and treatment interchangeable? Can we substitute one for the other? Do we have

some instances where punishment does entail treatment and vice versa? Can they be carried out at one and the same time? Can we ever justify punishment on the basis of reform?

Reformists like Martison, HobHouse, Zimring and Walker hold that punishment per se cannot be justified on the basis of reform since it cannot improve or change the character of criminals. We should regard it as one among many influences, which in combination can contribute to moral change. Punishment does not directly reform but it may make a vital contribution to reform. Thus as Moberly argues,

A prisoner may receive moral benefit from the friendly attentions of the prison officer/visitor, from attending counseling classes, from reading books, from being equipped with various skills, but such improvement is not due to the penal aspects of prison life. This is achieved in spite of them if at all, though it is the prisoner's detention, which gives these other influences their opportunity of access to him (Moberly, 1968:125)

The power of punishment to reform the criminal therefore lies in the way we handle the criminal in the process of punishment and not punishment per se. If imprisonment by itself cannot like any other form of punishment cannot reform the criminal, then how do we put reform as one of the objectives? Is the "handling/ treating" part of the punishment itself, and which one plays a greater part in the reform process, punishment or the "treatment"?

2.0 A CRITIQUE OF PUNISHMENT FOR REFORM

Being a consequentialist approach to punishment, the reformatory view has the inherent weaknesses of teleological oriented theories. According to Duff & Garland (1994),

the common feature of all consequentialist accounts is that they justify punishment by its contingent, instrumental, contribution to some independently identifiable good (Duff and Garland, 1994:17)

If then the good that punishment promotes is identifiable without necessarily referring to punishment itself, it is questionable if punishment is necessary in achieving such a good and this poses a challenge. How do we establish that indeed the good consequences achieved after administering punishment is indeed as a result of the punishment and not any other external forces? If according to consequentialism, the only way to determine the efficacy of a certain form of punishment is through empirically appealing to the effects on the individual, how then do we justify punishment in a case where the offender does not exhibit the expected effects? Is this bad punishment or no punishment at all?

The reformatory view of punishment is faulty in that it is based on false assumption that it will produce desirable results both on the individual and the society at large. The reason we are contending this is that as we take the criminal to prison, we have no way of establishing that that will actually yield good results in terms of reforming the offender. We only take masses

to prison because they have been sentenced to that and expect them to come out of that jail "better" people. How and why they should come out changed people is not addressed. Actually what the judge says is that 'we are sentencing you to ten years imprisonment for instance so that this will serve as a warning to other like minded people out there and also so that it can be a lesson to you too'. So really reform of the criminal just goes unsaid but it is still part of the objectives of incarceration. It is easy to explain how taking a criminal to prison can possibly have good results by probably serving as an example but how do we determine the power of imprisonment to reform? This is apparently unjust to the offender since whatever sentence he is condemned to serve in jail is not based on concrete facts that they will help him change his ways hence producing good results to the society at large.

Public safety depends on rehabilitation of the criminals and if this is not possible upon their release, the society is just as worse off as it was before their imprisonment. This probably explains why evidence of crime is so ripe despite every day effort to keep people behind bars with the aim of producing greater balance of good to the society. It may be argued that other offenders in the past who had committed the same crime were sentenced to the same verdict and taken to the same prison and they reformed. The problem is that there is no past act that can be relied on to give the same results in the future with certainty hence we cannot rely on that to continually take criminals to prison when evidence and statistics negate our expectations.

If we are to convincingly justify taking offenders to prison for reform, we must be in a position to determine prior to taking them that it is indeed the

only way that we can reform him. We should determine how imprisonment would help in reforming him otherwise we will be doing a greater evil of injustice on the offender if not doubling the evil already done. If reform of the criminal is for the treatment of the criminal and punishment of the criminal, it should be established what a prison is for- treatment or punishment? Is the use of coercion in treatment the same as that in imprisonment and is it for the same goal; to change the criminal to a responsible person? It should also be determined as we mentioned earlier if the pains and loss in imprisonment are a necessary condition for the reform of the criminal.

Any power of punishment and specifically imprisonment to reform is strongly denied on the double ground of principle and experience. What is it in punishment that gives it its power to reform? Is it the element of suffering or that of deprivation since these are the most evident elements of punishment? How does the pain of being separated from the rest of the world in the case of imprisonment make a criminal to be a non-criminal? It should be noted that those humanitarian measures introduced during imprisonment are not part of the punishment hence even if they did have any impact on the criminal; we cannot credit imprisonment per se for the effect. Theoretically, a prison may be an excellent institution for the reformation of criminals since they are separated from their criminal forces, but in the light of its practical methods and actual operation, it is doubtful if this can be possible. Barnes (1930) laments that,

there could not have been a more vicious
method of protecting the society from the antisocial class...
It is the only place in the world in which to

expect reformative influences to be created and applied (Barnes, 1930:171)

The actual purpose of imprisonment is punishment (retribution) and not reform and as Tocqueville observes,

“If the penitentiary system has no other purpose than reform, the law-giver must abandon the system, not because it isn't admirable, but because it is too rarely obtained” (Moberly, 1968: 124).

Any efforts to provide a conducive environment for reform is always hampered by the general belief that prisons must remain unpleasant, if they are to be dreaded and so are to fulfill their traditional role of deterrence.

A case in point is the attempt to improve the Kenyan prisons to serve the reformative role, which has received a lot of criticism from the general public. It has been argued that if they are improved, this will increase the rate of crime for the good conditions will encourage potential and former criminals. In the *Sunday Nation*, December 2003, there was an article on how different prisons were restructuring the system so that at least those who spend their Christmas in prison will not feel very left out. The article explained how the minister in charge of home affairs had made tremendous efforts to ensure that prisoners are treated with dignity. In the same paper there was also an article on the move by the president in conjunction with the relevant ministry released eleven thousand five hundred and forty six convicts in a bid to ease congestion in prisons to pave way for reform. In the

Daily Nation April 2004, there was an article full of criticism for these noble moves to reform the prisons.

The minister in charge was particularly criticized for asking the public to donate sanitary ware for the women prisoners and for pledging to provide the prisoners with recreation facilities as well as better living conditions. The move to allow prisoners to have conjugal visits in future also came under severe attack. He was accused of inciting potential and previous offenders to commit crimes so that they can go and enjoy the “five star” facilities in the prisons. This is a clear prove that more often than not, any reformatory work carried out in prisons is hindered by the fact that prisons must remain unattractive places of residence to the possible inmates. If the practical and undeniable truth is that the criminal justice expects prisons to be repelling places how exactly do they profess to reform by sheer intimidation? Reform cannot be achieved through coercion and this renders any attempt to make prisons reformatory fruitless.

Another weakness leveled against imprisonment for reform is that it is pegged on the assumption that we can make accurate predictions about human behaviour. There is the assumption that the authorities around the criminal will detect through his changed behaviour that he/she has been fully re-socialized. Following the high degree of our inaccuracy in prediction especially with human behaviour, it is probable that we will make grave mistakes in our establishing whether a particular criminal has been reformed. We have had cases where the criminal fakes his behaviour to deceive the officials that he/she is ready to go back to the society only to commit a crime on his/her way home and is re-imprisoned even before he/she reaches his/her

home. Whom do we hold accountable for such a case; the officer for false prediction or the criminal for committing a crime immediately after release? Is that the criminal deceived the officer or the officer deceived the society that the criminal was changed?

Another problem associated with the above criterion of determining if criminals are fit to go back to the society is that this is done using the prison standards; that he has obeyed the prison rules and regulations. The problem with this is that the prison standards, rules, regulations, climate and the life in prison are so unlike that in the outside world. It is therefore disturbing to imagine that if a prisoner has conformed to the strict prison routine, he/she will adopt to the relatively flexible societal rules. It is argued that this conformity may even be harmful to the individual and as Newman (1975) notes,

prisons after all are self contained, 'total' institutions with rules, norms of behaviour, formal and informal sanctions, and a whole range of complex relations between keepers and inmates and inmates and their fellow prisoners (Newman, 1975:115).

It is feared that such an experience may even turn men into puppets who are creatures of their manipulators (prison authorities) and this makes it impossible to survive without this strictness. In most cases the conformity achieved in prison is produced by compulsory discipline rather than by punishment. This waters down our power to appropriately predict that it is safe to release these offenders.

Rehabilitation has also been criticized for being based on the wrong premise that there is something wrong with the offender that needs treatment away from the rest of the society. The doctrine of indeterminate sentence has been criticized for being synonymous to neglect;

the basis of indeterminate sentence is that the judge cannot sentence an offender to a definite term as it cannot be predicted in advance how much time is needed for treatment and rehabilitation (Reid, 1994).

In fact, 'the length of imprisonment often depended primarily on the sentencing authorities' judgments on prospective rehabilitation' (Duff, 1994:300). This means that a person is sentenced to prison from one day to life- till he reforms. This has been criticized for treating the individual as an object left at the mercy of whoever is in charge and this can result to injustice on the individual. Offenders never know when they will be released and this may cause hostility toward the criminal justice system.

2.1 CONCLUDING REMARKS.

It is apparent that as much as reform is an attractive approach to the problem of crime and punishment, it has its inherent weaknesses that have hampered penologists, criminologists, sociologists and moral philosophers among others to comfortably adopt it. As much as the idea of penal reform is noble, it has not been achieved due to the above limitations. The call for the reformation of the offender as a main objective of imprisonment as much as it has led to decreased torture and abuse of prisoner's rights has not yet truly transformed the criminals who go in them. The above limitations should not

however be taken to mean that all those who go to prison come out worse people than they went in or with no change at all. The problem is that we have no way of establishing that it is indeed the experience of imprisonment that made them to change.

The fact that in most cases first offenders become recidivists casts some doubt on the power of imprisonment to reform. The rehabilitative power of punishment has been questioned due to the failure of treatment programs in prisons. Owing to the fact that prisons still have the old structural basis, which was meant to carry out the old policy of punitive repression of strict separation, can we expect them to turn around and serve the reformatory function? Are the measures to improve prison conditions like vocational training, allowing free association among prisoners, providing better living conditions among others really reformatory measures or humanitarian measures? Are these humanistic exercises necessarily reformatory? Does the introduction of the "reformatory" measures make imprisonment less imprisonment? Can imprisonment as imprisonment reform? The next chapter will address the reasons why the humanistic exercises and any other attempt to reform criminals in prison is impossible.

CHAPTER THREE

THE PARADOX OF IMPRISONMENT FOR REFORM

Philosophical arguments on punishment tend to be instrumentalist and seek justification in terms of the state of affairs the application of a particular form of punishment is expected to bring about. In a sense, all legal punishments are conceived to some degree teleologically. Whether in the retributive or utilitarian sense, punishment is administered because it is expected to have some purpose or effect whether negative or positive. All correctional institutions that have a punitive element are considered to have two main tasks: one to protect the society from the dangerous criminal and two, to rehabilitate the same criminal so that he can go back to the society as a law abiding citizen. The effectiveness of any form of punishment is therefore analyzed in terms of these two objectives. Imprisonment has been greatly criticized as having failed on the basis of this. The rising crime rates and recidivism are widely cited as evidence to support the allegation that imprisonment has not fulfilled the above functions, and in addition, many reformists regard the prisoners' conditions as offensive to a civilized society.

It is a fact that all forms of punishment have the preventive task as the main objective. Whether we administer punishment for retribution, deterrence, incapacitation or reform, it is because we want to rid the society of crime. The failure of imprisonment is therefore largely pegged not so much on its deterrent or incapacitating power, but on its inability to reform criminals into responsible citizens. "Everywhere there is widespread increasing crime rate; we read and see clear evidence of the insecurity in the society.... Whilst at the same time we insist on packing more and more criminals behind prison

bars for longer and longer terms” (*Caribbean and penal reform international report, 1991*).

Being the most popular form of punishment for the serious crimes, imprisonment is almost exclusively blamed for the escalating crime rate and recidivism. But are we justified in heaping all the blame on imprisonment per se? What is it in imprisonment that we expect to reform our criminals hence helping in the fight against crime? Is it possible that we have all along been mistaken to think that imprisonment can indeed reform our criminals? And if it is not a mistaken belief, why isn't imprisonment playing this key role- is it intrinsically or extrinsically flawed? What do we exactly mean when we talk of reform in prisons? According to Duff (1994), rehabilitation can be defined as

a right to an opportunity to return to (or remain) in society with an improved chance of being a useful citizen and staying out of prison; the actions of the state or private institutions in extending this opportunity. (Duff, 1994: 286)

This clearly implies that once the criminal is sentenced to imprisonment, the prison institution has the obligation to make him a useful citizen and the criminal has a right to get this. In its historical forms, rehabilitation entails various forms of behavioral change through rewards and incentives for constructive action. In the context of punishment and specifically in prisons, it comprises of: psychological and psychiatric treatment, educational opportunities, justly remunerated work, vocational training and maintenance

of family and society links *inter alia*. A term of imprisonment without the above measures cannot therefore be regarded as having any reformatory effect on the offenders. The question is how do these measures reform criminals? It is fact that reform entails some change, so what is it in the criminal that these measures are meant to change that will rid him/her criminal abilities?

The above reformatory measures are considered to be of utmost importance for they help in transforming the traditional prison, which is characterized by cruelty into a problem-solving environment. It is actually often argued that any form of punishment, which does not have the reform of the criminal as a priority, is essentially defeatist and evil and should be discarded. The prison therefore has the obligation if it is to be morally justified, to offer each offender an opportunity to re-integrate himself/herself into the community as a useful human being.

Duff (1994) argues that this widely held belief that the prison has an obligation and the power to rehabilitate our criminals is mistaken. He contends that reform, as one of the purposes of imprisonment is based on the mistaken assumption that incarceration itself can be rehabilitative. It is important to note that incarceration is punitive whereas reform is a humanistic notion, which totally disregards any punitive measures. The underlying principle of punishment for reform calls for the treatment of the criminal and not punishment of the criminal. It can be argued that the introduction of humanistic measures in prison can help in achieving the rehabilitative objective. But if imprisonment is essentially a punitive measure of social control, how do we introduce these humanistic measures

and still refer to it as imprisonment? If these measures are supposed to pave way for the reform of the criminal it means that they are and cannot be reformatory in themselves. As a philosophy of punishment, the reform/rehabilitation of the offender emphasizes on the 'punishment fitting the criminal' not the crime. Reformists advocate for 'treatment' of the offender and not punishment per se for they feel that punishment is better described in deterrent and retributive terms. They advocate for imprisonment as punishment and not for punishment and call for the withdrawal of all retributive factors that are punitive.

According to the reformists, it is therefore a contradiction in terms to talk of punishment and reform at one and the same time in the same institution. Imprisonment is meant to be essentially punitive and not reformatory and it is contradictory to talk of imprisonment for reform. So the question is: Can imprisonment ever assume a rehabilitative purpose?

The argument we want to advance here is that the belief that imprisonment can ever assume a reformatory role is mistaken due to various reasons that we are going to outline in this chapter. We are going to advance arguments to prove that as much as rehabilitation is an attractive theory of imprisonment since it plays down its negativism, its inherent short coming is that it is easier to make the claim than to deliver it in prison. We want to prove that the reason why we have rampant crime rate despite packing more and more people in prison as well as building 'better' prisons that are meant to be more certain in eliminating crime is because those whom we take to prison in the name of reforming or even deterring are the wrong people;

those whom imprisonment does not have either the rehabilitative or the deterrent significance.

Majority of those who end up in prison belong to the low class in the society; the poor who do not value freedom. Imprisonment is based on the principle that all human beings value their freedom and the loss of it can make them abandon whatever it is that leads to the loss of such. What this doctrine overlooks is that if having or not having freedom does not impact on an individual's life in a significant way, he/she will not be anxious to preserve it. Such is the case with a majority of those who end up in prison.

They are actually better off confined if they are provided with the basics like food, shelter and company no matter how inadequate these may appear to be available in prison. Our argument is that imprisonment is very effective for the middle class people who are likely to commit white collar crime since they value their freedom, status, dignity and would not want to either commit a crime in fear of ending up in prison or if by any chance they end up there they would not dare go back. The problem is that these people never end up in jail because either they have money to buy their way out or because they are more cautious when committing any crime such that in most cases they are not caught. Nevertheless, we will later determine why prisons will be with us for some time despite their being an expensive way of making people bad people worse.

One of the obstacles to prison reform is structural; that most of the institutions are old or still insist on the old structural basis often designed in the eighteenth and nineteenth centuries for different ideological reasons

(retribution and deterrence) and cannot be transformed into rehabilitative centers. Prisons no matter how big or small, no matter how clean or even centrally located in the society, cannot reform the offender as long as it remains a prison. A well-rounded rehabilitative program in a rehabilitation center according to Bean (1976) should consist of the following:

individualized training and treatment,
adequate medical services having curative
as well as corrective significance, psychological
services properly related to the problems of
education, discipline and preparation for
parole, ...discipline that aims at not merely
the conformity of institutional rules, but
at the development of self control and
preparation for free life (Bean, 1976:117)

Prisons were originally designed to be purely retributive, hence deterrent and the physical conditions inherent in prison were perfect for these two functions of punishment. It was neither designed for individualized treatment nor for the preparation for the free life. As much as it is true that some prisons are better in terms of the physical conditions than others, it is also true that there are some universal conditions that are present in all prisons in the world. Conditions like lack of privacy, idleness and overcrowding are almost common in all prisons the relativity notwithstanding. Prisons were not designed to serve any of the above functions that Bean outlines that entail reform. But when the debate on imprisonment for reform started and it was finally decided that reform should be one of the

key objectives of imprisonment, these physical conditions were not changed to facilitate the implementation this new objective.

When you look at today's prison or yesterday's prison it doesn't make much difference, they are usually the same. No matter how "civilized" a prison is, it is still a prison and not a leisure camp. There are those most basic underlying conditions that give it the name prison and not either boarding school, hospital or camp and it is this conditions that are structural that make it totally impossible to rehabilitate. Aren't we then being illogical to expect the same prisons to reform our criminals when they are in essence meant for other purposes? Aren't we just being euphemistic to refer to prisons as 'correctional centers' when in essence they are 'total institutions' that are isolated with a totally different way of life from the ordinary? According to a report by *Penal Reform International (1999)*, it was observed that prisons through out the world are institutions that are isolated from the society and easily forgotten. Are these not isolated places that do not form part of the active society the ones that we expect to re-integrate criminals into the society?

The criminal justice system has also been cited as a stumbling block to prison reform. Pollock (1989) argues that,

our criminal justice system is retributive
in orientation- that judges sentence criminals
depending on the seriousness of the crime- the
determinate sentence. Treatment/reform
stands for indeterminate sentence- that the
judges have a great deal of discretion so that
they can tailor the punishment to fit the

individual offender- calls for individualized justice (Pollock, 1989:130).

The criminal justice therefore is not concerned with individualized justice but with justice as per the objective laws of the land. The criminal is sentenced to prison because the law says so but not because he will get individual treatment till he is fit to go back to the society. As Duff (1994), notes, the traditional belief “that rehabilitation was one of the aims of punishment upheld indeterminate sentencing in which rehabilitative considerations played a proponent role”. If the criminal justice system is premised on principles so unlike those of the traditional basis of reform, how can we possibly pretend that the same system can do justice by reforming our criminals? How does imprisonment, which is designed to fit the crime, turn around and fit the criminal at one and the same time? Imprisonment is based on determinate sentence and not indeterminate sentence, as is the case with reform. Once the criminal completes his/her term, he/she is released not because he has reformed or not reformed, but because that is what the objective law says.

Criminals are taken to prison because it is assumed that they are rational individuals who weighed their options before committing the crime, and who are in a position to likewise weigh their options while in prison- that it is better to abandon their criminal ways such that they will not go back to crime once released. The criminal justice takes the offence as the main determinant in sentencing and assumes that the objective laws have the same

impact on all rational beings and has no room for individualized justice and indeterminate sentences so that the progress and response to punishment can be monitored separately for every individual. If the criminal system took this into account it would be possible to determine that it is impossible to use it for the reform of criminals hence use it for other purposes are relevant.

The principle under which criminals are taken to prison is retributive in orientation; that men are rational and always guided by the pain- pleasure principle and if we are to curb crime, we should inflict pain to discourage /deter both the criminal and potential criminals alike. Reform is more consistent with the view that the criminal is somehow less responsible for his actions since he is influenced by forces beyond his/her control, which needs to be eliminated if we are to prevent crime. Reformists contend that effective treatment should get rid of these criminal forces, which are the real causes of crime. Imprisonment as dictated by the criminal system of justice can not treat the criminal forces hence cannot subsequently reform the criminal in actual sense.

Another reason why imprisonment is an obstacle to reform is as Dressler (1972) and Martison (1972) observe that imprisonment is a series of compromises and paradoxes. They argue that the prison system is based on contradictory principles and that is why it cannot achieve its supposed objectives. According to Dressler, prisons are expected on the one hand

To punish, on the other to reform. They are expected discipline rigorously at the same time that they teach self- reliance. All too

often the laws force prisoners into idleness
despite the fact that one of their primary
objectives is to teach men how to earn
an honest living (Dressler, 1972:593)

It is apparent with the above paradoxes inherent in the prison system that if rehabilitative programs are designed to help the offender rise above his/her social disabilities which are presumably responsible for his/her criminality, imprisoning him/her is no way to achieve this. In prison, leadership is blunted, assertiveness is equated with aggression and is repressed, and docility is rewarded. The criminal is expected to be self-reliant and develop confidence at one and the same time. Moft Osborne, the former chairman of the New York state commission on penal reform in one of his reports once said that the prison operates on cross purposes in that

the prison system endeavors to make men industrious
by driving them to work; to make them virtuous by
removing temptation, to make them to respect the law
by forcing them to obey the edicts of an autocrat; to make
them far-sighted by allowing them no chance to exercise
foresight, to give them individual initiative by treating them
in large groups; in short to prepare them for society by placing
them in conditions as unlike those in real society as they
could well be made(Report on weaknesses of contemporary
penal practice:1980).

This conflict inherent in the attempt to make prisons reformatory centers makes imprisonment incapable of achieving its supposed aim of reforming and punishing the offender at one and the same time. Imprisonment has not

succeeded in carrying out these functions and that is why crime will be with us for some time if we do not do something about it.

Criminals as Bean (1976) notes need to be rehabilitated because criminality is seen as defect that can be eliminated through non-punitive means. He argues that

because crime is by definition a symptom of maladjustment and to prevent recidivism, the causes of the maladjustment must be removed (Bean, 1976:116).

Imprisonment can only get rid of this maladjustment through punitive means and it is evident that it has not succeeded if the rate of recidivism and evident rampant crime is anything to go by. It seems that it is no longer popular to hold that imprisonment can be transformed into an effective vehicle of rehabilitation through the massive infusion of man power and treatment resources because despite these they still are prisons with no power to get rid of the criminal maladjustments.

The idea of rehabilitation in prison is based on the notion that certain judgment will be made at some key point in the rehabilitation process. During imprisonment the prison officer in charge is supposed to monitor the behavioral change in the prisoners, which in effect tell how the criminal is responding to punishment. This means that it is the prison officer who is entrusted with the duty to say when the appropriate 'treatment' has been given, how it should be given and to whom it should be given to necessitate

the release of the criminal back to the society. The question of appropriate punishment and /or treatment is a complicated one both for the reformists and retributivists alike. We have cases where, whereas prison may be a deprivation for one offender hence the best way to pay for his crime, it may not be the case for others. The extent to which the prison experience can reform the criminal is dependent on the criminal himself in regard to his class, status personality or even the criminal forces. The experience need not change him either.

Since every form of punishment affects individuals differently, our concern is that our present system of justice does not take into account these individual sensitivities to various forms of punishment and especially when taking them to prison. We falsely believe that the prison experience is first and foremost nasty to anyone who goes through it and that whatever is provided in the name of reform is bound to change their unacceptable ways. Before we take criminals to prison, we should address the question of, whom should we take to prison? This will help in determining that we are only imprisoning those people who truly belong to prison; those whom the prison experience will have a positive impact. Who decides which vocational training or educational training is sufficient to eliminate criminality? Does lack of skills and education necessarily lead to criminality?

Talking about who should actually be taken to prison, statistics show that only a very small minority of the individuals who commit crimes end up in prisons. According to a report by *Penal reform international* (1999), it was observed that imprisonment is often used for petty offences as a punishment of first instance rather than a last resort. The same report recommended that

there should be a program of public education to increase awareness of the limitations of imprisonment as a way of protecting the society against criminals. Most of the prison population consists of the poor, miserable and destitute people. As Pollock (1989), argues, "white collar criminals receive fines, probation or short stays in half way houses while the so called street criminals receive prison sentences". How then is imprisonment to be justified if only a small select group of offenders is being punished with even no aim of reforming them? In most cases criminals go to prison not because that is the only place they can be helped but because they have no money to pay for bail. More often the most dangerous criminals still are within the society and that is why crime is still in the increase. Those in prison in most cases do not deserve to be there and those who deserve to be there and need to be reformed are still being released unreformed.

Another reason why imprisonment cannot reform is because taking criminals to prison for reform takes an inferior place as compared to retribution and deterrence. Since the measures necessary for 'reform' are external to the normal terms of imprisonment, they may or may not be implemented since after all they come after the act of imprisonment has already acted as a 'warning' and the criminal has already experienced the pains of incarceration. In fact Leon (1978) argues that

Since prisoners serve as a warning example, the burden piled on their shoulders should be lightened. We must remember that prisoners are the scapegoats of the prevailing system. In the first place they suffer for all those Offenders who are never detected and Prosecuted. They are sent to prison for all those members of society who don't become

offenders due to their better education and social circumstances (Leon, 1978:192).

For whatever other reason a criminal is incarcerated for reform comes second send it is not given much thought even by the criminal. What is of immediate concern to the criminal is that he/she has lost their liberty and privacy and no amount of training can erase this. More so, we take in most cases the less advantaged to prison, those who cannot afford to be out on bail. Surely if these are the people who are bound to remain in prison, who will bother about reforming them since they are seen to be of no significant value to the society? It is in actual sense good riddance on the part of the society for they view them as an unnecessary nuisance.

Another argument we want to advance against imprisonment for reform is that the measures we take to ensure that the prison climate is conducive for reform are mistaken and cannot lead necessarily to the improvement of the criminal. As noted earlier, the rehabilitative measures undertaken in our prisons include: educational training, provision of recreational facilities, vocational training, allowing free association among prisoners and maintaining family and community ties among others. Our contention is that these measures are humanistic and not reformatory unless they are expected to facilitate reform. We cannot as is often the case confuse humanistic exercises with reformatory ones for as Bean (1978) observes humanistic measures are not necessarily reformatory.

It seems that implementing these humanistic measures is all that our prison institutions do in the name of reforming our criminals. Whereas their

implementation is supposed to be a means to an end, they are meant to be ends in themselves. It is therefore easy to explain why our criminals still go back to crime even after being equipped with various skills during their stay in prison. These humanistic exercises do not address the root causes of crime, hence when the criminals are released they encounter the same forces, which force them to go back to their devious ways. The point that the prison administration misses is that humanistic considerations can often conflict with reform and this is why crime still seriously afflict mankind despite the construction of more decent prisons with new sanctions.

A criminal may for instance be counseled and shown why his unbecoming behaviour is a threat to society, but if the reason why he engaged in crime is to draw attention; he feels that nobody appreciates his efforts, this might increase his desperation and even make him more determined to prove that he is not a nuisance by committing probably a more serious crime. If the reason why the criminal committed an offence is because he was underpaid for instance equipping with skills or more education is not relevant to his cause. Most of these humanistic measures are not relevant in terms of eradicating the criminal forces hence crime. The conditions under which they are provided even make it more complicated. Our emphasis is that rehabilitation is not the purpose of imprisonment, but that of a correctional system that seeks to minimize the harms of incarceration. If we want to neutralize the desocializing impact of prisons on our criminals we should as a civilized society put up an alternative correctional system which may be the criminals can be sentenced to after imprisonment if they must be imprisoned instead of pretending that we can achieve this through the same prisons we are fighting. It is important to note that if

Imprisonment is itself the punishment,
the unchecked harmful effects of incarceration
on the mental and social health of the inmate
represent illegal additional punishment
(Duff, 1994:297).

A point to note is that when we take criminals to prison as punishment and then we attempt to reform them, we are trying to impose two programs at one and the same whose manner of implementation is quite different. When we attempt to punish and treat at the same time, we are faced with the problem of not being in a position to establish within what limits one program should be used and from which the other should be excluded. How do we establish which precedes the other- punishment or treatment? When do we if for instance we start with punishment, stop and start the treatment? How do we establish that both tasks are achieved at one and the same time without concentrating on one at the expense of the other? Who determines when to administer punish or treatment at the appropriate moment once criminals are imprisoned?

In regard to how to treat criminals while in incarceration, rule 65 of the UN body of principles for the protection of prisoners and detainees,

the treatment of persons sentenced to
imprisonment or a similar measure shall
have as its purpose, so far as the length
of the sentence permits, to establish in
them the will to lead law- abiding

and self supporting lives after their
release and to fit them to do so. The
treatment shall be such that it will
encourage their self respect and
develop their sense of responsibility
(*Penal reform international*, 1999:79).

While in prison, criminals should be treated in such a way as to develop self-respect according to the above report. Imprisonment does not in any way encourage self-respect and a sense of responsibility in the prisoners. Imprisonment at best impacts on the offender negatively and this is asking too much of it. It appears that imprisonment is meant for one purpose and expected to achieve a totally different objective. Imprisonment is meant and has always been meant to punish but it is expected to reform. This is basically unattainable since imprisonment is such that whatever the criminal's original motivations to engage in anti social behaviour, imprisonment adds them by neutralizing his fear of losing the respect of the community; he has already lost it. The prison represents the ultimate in social rejection and that inmates develop increased anti social values in order 'to reject the rejecters' cannot be blamed on the criminals. So if we keep criminals for longer periods in prison thinking that this will teach them a positive lesson, we cannot be more wrong. We are only increasing their disgust for the society and this will definitely lead to rebellion. We have a moral obligation to correct immoral/bad people but not to punish them and expect them to reform automatically.

Imprisonment appears to be an official and public procedure through which the criminal is condemned and rejected by the society by being taken away

and put only in the company of other social rejects. This certainly arouses in him/her mixed feelings of guilt remorse then resentment and/or hostility towards the society, which he considers unjust. Isn't it therefore pretentious for us to claim that such an act can help in the reformation of the criminal? Given the difficulty in establishing any causal relationship between past punishment and future conduct, given the lack of solid empirical evidence to suppose that imprisonment does indeed reform, given that the reformatory measures in prison are mistaken and may entail just as severe restrictions on personal liberty as measures used either for retribution or deterrence, it is unfair to keep criminals in prison for no one defined goal that has been effectively achieved through this form of punishment. No matter how many times we convince ourselves that we can achieve reform in prison, the ugly truth is that the primary objective of imprisonment is confinement; training or treatment is still at the abstract level and do not even necessarily entail reform.

Rehabilitation is about discretion. In essence rehabilitation deals with personality facets, which by their very nature are oblique and cannot easily be subjected to objective assessment. Rehabilitationists calls for the understanding of the individual offender, his background and character and there is no way to subject them to objective laws. This is not possible in prisons; that every criminal has a personal officer who closely examines him in order to understand him before making any judgment or before keeping him under any rehabilitative program. The prison officers are not even trained for such tasks, but only to keep watch to ensure that the criminals do not escape or cause unnecessarily trouble. Punishment in the rehabilitation's sense is a dynamic process that involves the careful and continuous

assessment of our objectives and of the alternative consequences of a given judgment at any particular point in time. It is a tautology that imprisonment is incapable of this given the organizational and ideological inhibitions.

3.1 Concluding Remarks

It is interesting to note however, that few rehabilitationists advocate for the abolition of imprisonment. They accept that a type of a closed institution must be provided for offenders especially those who pose a danger to the society. They do not call for the abolition of the punitive position, but they want reform to accompany the punishment; they call for reform by use of punishment rather than reform as punishment. Criminals are taken to prison as punishment and not for punishment and according to the reformists that is the reason why the prison is the last place to expect reform to take place. What they mean by reforming by use of punishment is that treatment which is responsible for the reform of the criminal entails some sanctions and temporary loss of liberty which are features also common in punishment. The difference is that these 'pains' experienced during treatment are not used as punishment but only accompany the reform of the offender.

The reformists agree that a prison is necessary but not for the reform of the offender. The pain that prisoners experience while in prison is not in a position to reform since it is not intended for that. Reformists accept that within the penal system, there will be an element of compulsion and presumably, they do not argue that the loss of liberty necessarily lead to reform. They argue that after offenders are forcibly confined in an institution that is exclusively meant for the treatment of the offenders, they should be provided with reformist measures. If imprisonment is not in a position to

reform the criminals as it should how do we morally justify its existence?
Why is it impossible even for the abolitionists to call for its total abolition
despite its 'failure'? Why is the society so 'addicted' to prisons?

CHAPTER FOUR

A MORAL JUSTIFICATION OF IMPRISONMENT

If imprisonment as we have indicated in the previous chapter does not reform criminals, can we then ever morally justify its existence? Is imprisonment a means to an end or is it an end in itself? If it is a means to an end, to what moral end should imprisonment be directed? Traditionally, views about the circumstances, the severity, and the forms in which imprisonment is justified have been presented in form of theories of punishment. In the philosophy of punishment, theories are classified as either backward looking (retributive) or forward looking (utilitarian). Retributive theories are the oldest theories of punishment and focus on what happened in the past (crime) unlike the utilitarian theories which focus in the future; the consequences of punishment both on the individual and the society. The retributive position holds that man is a responsible moral agent to whom rewards are due when he makes right moral choices and to whom punishment is due when he makes wrong ones (Packer, 1969). The purpose of punishment is therefore to inflict deserved suffering on the criminal and failure to do this is to do injustice.

Proponents of this school of thought like Kant and Hegel hold that omitting the retributive factor in punishment means forgetting that a just punishment is deserved. Kant argues that

it is an evident moral principle requiring no justification outside itself that crime deserves punishment, and a punishment equivalent in kind to the evil done (Grupp, 1971).

But how do we get the proper equivalent for instance of theft- is it stealing from the offender an equivalent object? For the retributionist like Kant, punishment is an end in itself and needs no instrumental justification. Crime according to this view is an evil, which can only be prevented by reciprocating with an equivalent evil. But is it possible to cancel out the wrong done by inflicting an equivalent pain in form of punishment? Is the proper punishment for instance of robbery with violence of a thousand shillings violently getting the same from the criminal? The question of equivalent punishment to even the wrong done is controversial.

The utilitarian position opposes this view and argues that suffering for the sake of suffering or inflicting pain for pain's sake is evil and should be discarded. The only valid reason according to the utilitarian position for punishing an offender is not to avenge crime, but to prevent it. Prevention is the main rationale of punishment according to utilitarianism. This view is forward looking in that it assesses punishment in terms of its capacity to rectify the future behaviour of the criminals. Punishment according to this view is only justifiable if it looks to the future and not to the past. Punishment is not regarded as settling an old account but rather as opening a new one (Moberly, 1968). Utilitarian punishment focuses on preventing or reducing the incidences of antisocial behaviour by changing the criminal as well as deterring potential criminals. Imprisonment as a form of punishment is justified both on the utilitarian and retributive grounds. It is justified on the grounds that it confines dangerous criminals hence protecting the society, it deters potential offenders by serving as a warning and the pain that the offender experiences is a just desert for the wrong done.

In modern penology, the retributive justification of imprisonment has been discarded for the utilitarian position. The retributive position has increasingly been regarded as futile for it calls for punishment (infliction of pain for pain's sake) that is not morally justified. Retribution has been associated with revenge and makes punishment to have a subjective and personal element. Although just like utilitarianism retribution punishes on the basis that the criminal is a rational creature who calculated his/her move, retribution is discarded on the grounds that it is retrogressive; focuses on the past act and not concerned with preventing further crime. Utilitarianism on the other hand,

sees man as a rational pleasure seeking creature who can be prevented from engaging in antisocial behaviour by the prospect that the pain it brings him will cancel out the pleasure gained (Packer, 1969).

The pain experienced during punishment is a means to an end (prevention of further crime). Classical utilitarianism was exclusively concerned with deterrence; that punishment should be as unpleasant as possible so that it can discourage both the criminal and potential criminals from committing crimes. Classical criminologists like Cesare Beccaria and Jeremy Bentham argued that for punishment to attain its end, the evil, which it inflicts, has only to exceed the advantage derivable from the crime and that there should be certainty of punishment and the loss of the good the crime might have produced. Bentham particularly felt that for punishment to be justified, it must achieve both primary and general deterrence. He argued that

punishment like imprisonment could be used to prevent unwanted behavior by restraining the offenders in prison for a period of time, which will cause them to suffer the pains of restraint and render them harmless (Grupp, 1971:114)

Bentham however cautions that the confining of the offenders should not be over done; it should not be beyond the point in time when the punishment has had its effects. But how do we determine that the punishment has had its effect?

The view about the reform of criminals is also utilitarian in outlook; that the value of punishment lies in its having beneficial consequences either to the person punished or to the society in general. The treatment of the offender may be considered as one type of specific deterrence since it's an attempt to prevent future crime by changing the criminal. We have however already argued that imprisonment is not in a position to reform the criminal and imprisonment is only justified on utilitarian terms in the form of deterrence.

The utilitarian view of punishment gives deterrence and especially general deterrence preference to reform because according to the utilitarian, reformation of the offender even if accomplished, affects directly only one individual; but to punish him as an example may help in deterring many people who might otherwise be tempted to commit crimes. The effect of punishment on the offender himself is of much smaller social importance than its effect on the many.

Since we pointed out in the previous chapter that the prison is meant to fit the crime and not the criminal, it is better described in deterrent and retributive terms. Imprisonment can therefore only be morally justified on the deterrent and retributive grounds, whether this plays a significant role in the fight against crime is a different issue altogether. Like retribution, deterrence is often associated with the infliction of pain; pain enough to prevent the commission of further crimes. Utilitarianism as much as it condemns the use of pain and suffering of the offenders, runs into a contradiction when it calls for inflicting pain enough to deter both the criminal and potential criminals. If all pleasure is good and all pain is evil, then how do we use evil to eliminate evil? How do we use pain, which according to the utilitarian doctrine is evil to alleviate the evil of crime? How do we establish that the amount of good achieved by inflicting pain eliminates a greater evil? What parameters do we use to measure the intensity of evil committed? Our contention is that punishment should have a social utility for both the individual and the society at large and the benefit of punishment on the individual criminal should take precedence and this need not necessarily be accompanied by pain.

Utilitarianism is principally concerned with the maximization of happiness for the greatest number of people; maximum utility for the maximum number of people. According to this view, the utility derived from punishing or treating the criminal offender benefits society, and this benefit outweighs the negative effect on the individual offender. Punishment as a mechanism of social control should only be justified if it acts as a means to the happiness of the greatest number (society) by preventing crime. This is achieved in terms of imprisonment by confining the offenders hence

removing him from the criminal opportunities (incapacitation), the experience he undergoes while in prison; that of being deprived of his/her personal freedom is meant to act as specific deterrence, and the act of being taken to prison is expected to serve as general deterrence for potential criminals who would have imitated the criminal. As a theory, deterrence generally holds that the main purpose of punishment is to use the offender as an example; a warning to all those who are likely to be tempted to commit similar crimes. For punishment to serve its purpose, it should therefore be made as public as possible. Any effect of the punishment on the future acts of the criminal per se is secondary to the deterrent effect it should have on the general public. Are we morally justified to use the criminals as a mere means to an end- to achieve the happiness for the greatest number? This is a main critic of the deterrent theory of punishment.

Reformists and retributionists alike criticize deterrence for neglecting the plight of the individual for the public good. If we take criminals to prison because we want to maximize social security we should then be more focused on helping these criminals to reform as individuals so that we can have a crime free society. Retributionists like Kant also argue that deterrence uses individual criminals as a mere means to an end and this is against the universal moral principle of the categorical imperative. We should punish criminals not because they maximize the expected utility but because they have committed a crime and deserve that.

The deterrence theory is also criticized for assuming a perfectly hedonistic, rational actor whose object is to maximize pleasure and minimize pain. Deterrence holds that the criminal weighs the consequences of his act before

he commits a crime and it is only after he/ she realizes that there is more gain than loss that he/she acts.

The weakness of the above argument is that it is possible for a person to commit a crime not because he/she is likely to benefit more, but because forces beyond his control, which have nothing to do with the benefits of the crime forces him to do that. We have criminals who commit crimes because of psychological imbalances which have nothing to do with the benefit or whose surrounding wholly responsible for their criminality. When we advocate for imprisonment, it should therefore not be because we feel that this will incapacitate the criminal hence canceling out the pleasure gained from the offence, but to eradicate the criminal abilities in him/her. To justify the pain of punishment on the grounds that it will cancel out the pleasure of the crime committed is unjust since we have no way of establishing that the criminal derived any pleasure from his act or if it will deter the present criminal. If we do not do anything to reform him/her while in prison, he/she will come back most probably a more skilled criminal and will definitely go back to his/her criminal ways, probably more discreet to avoid being caught. As Acton (1969) observes,

in most cases punishment does very little to prevent crime for it even provides opportunities for criminals to learn from one another to commit crimes more effectively. This is true of imprisonment where criminals being only in the company of other criminals often learn how to perfect their vicious ways from the more experienced criminals (Acton, 1969:168).

The public safety from crime depends on the reform of the criminal and if we only take them to prison for deterrence only then the society will be as badly off as it was before the imprisonment if not worse as Acton observes above. We should focus on reforming the criminal hence deterring him/her from committing more crimes and this will solve the problem of others imitating his/her anti social conduct since he will no longer engage in it. Deterrence seems to be focused on punishment fitting the crime – more severe punishment for serious crimes and less severe for less serious crimes so that imitators are discouraged from committing serious crimes. But who exactly are these potential offenders that deterrence is so committed to discourage? If punishment is to effectively deter, we should be in a position to identify those whom we claim to punish, but is this possible? How do we establish that if a certain form of punishment is effective enough to deter one person it can deter another so that we can justify a certain form of punishment on the deterrent terms?

Punishment on the basis of deterrence has also been criticized for relying more on the threat of punishment than on punishment itself. As Duff (1994) notes, deterrence is

the deliberate threat of harm with the purpose of discouraging specified types of conduct: a threat which, if it is to be credible, has to be carried out.
(Duff, 1994:67).

To what extent are we able to direct people's conduct by the threat of punishment? How do we determine before hand that punishment will

eradicate the greater evil of crime by deterring the criminal as well as the onlookers? Deterrence emphasizes on the severity of punishment in regard to the intensity of crime. How do we measure the intensity of crime so that it is equal to the severity of punishment? Punishment is immeasurable in respect to the amount of suffering it actually causes to any given delinquent for this depends on circumstances beyond our knowledge.

It appears that it is the threat of punishment and not punishment that deters and can work if the supposed onlookers believe that punishment indeed took place even if it did not. So if for instance taking criminals to prison is expected to generate sufficient fear on potential criminals not to commit crimes, we will take criminals and non-criminals alike even if this does not have any significance to them in any way. If we believe that this will as well instill enough fear in the criminal for primary deterrence to occur, we will take them although we do not know that this will be the case. This is immoral and against the rules of natural justice. As much as deterrence might benefit the otherwise would be victims of crime, it is unjust in that it is not concerned with benefiting the criminals who suffer the deterrent penalties. It is also criticized for advocating the punishment of a bad man even if he is not a criminal (Acton, 1969). Acton poses the question : Is crime a legal, moral or social wrong? And is a bad man necessarily a criminal? A crime is a legal wrong and bad men are not necessarily criminals. We have a moral obligation to correct immoral/bad people but not to harm them as an example to others as is the case with deterrent imprisonment. If we do this we are unfairly using the criminals as a mere means to an end that we are not even certain to achieve.

It is apparent that if prisons are to act as effective deterrent means of social control the conditions must be such that they are repulsive so that those who enter into them will not want to go back and those out there who are potential criminals dread even the idea of being in prison. This means that no matter how much we try to humanize prisons deterrence will still call for some degree of harshness so that they can cause pain enough to deter. Although the main element of punishment in imprisonment is the loss of personal freedom, if the prisons are to serve the deterrent purpose certainly there must be an unexciting experience in there. To achieve deterrence, the severity of punishment is inevitable. It is therefore disturbing that the same severity we are accusing retribution of must still be present if we are to make our prisons deterrent institutions.

4.2 Concluding Remarks

The fact that imprisonment involves suffering mainly for the sake of the outside society in the name of deterrence is a moral embarrassment. Utilitarian punishment though more attractive than the retributive theory is a necessary but lamentable form of social control. This is because it inflicts suffering in the name of humanitarian goals whose achievement is a matter of chance. Whether in its classical form of reliance on deterrence or in its modern behavioral form of reform, utilitarianism inflicts the same pain it accuses retribution of. As Bentham notes, whether in the utilitarian sense or the retributive sense, all punishment is in itself necessarily odious; if it were not dreaded, it would not effect its purpose. Whether we justify imprisonment on the terms of deterrence or retribution it is a depressing experience which should be avoided whenever it is possible. In whatever form, punishment is not a virtue, only a necessity (Packer, 1969).

The prison can then be said to have persisted not because we can categorically point out its moral justification, but partly because a civilized nation can neither go back to the barbarism of an earlier time that imprisonment replaced nor find a satisfactory alternative. It is a fact that prisons are indeed quite depressing places although some prisons are better than others. But as the former Texas director of prisons commented ,

no matter what you call them, what colour you paint them, or the scent of the disinfectant, a prison is still a prison; a place of confinement and limited freedoms and exceptional freedom...Even under the best conditions, prisons are lousy places (Dilulio, 1987:140).

So whether we convincingly morally justify the existence of the prison or not, we should agree that prisons should be used as a last resort; only in those cases where no alternative can be used as means of behaviour control. We should not over emphasize the use of prisons as a mechanism of crime control since the apparent increase in crime rate and recidivism tell us loud enough that it is not an effective deterrent mechanism either.

The moral justification of imprisonment can therefore be summarized as prevention. The three possible goals of prevention are deterrence, incapacitation, and treatment. When we take criminals to prison, it is because we want to prevent the society from the dangers posed by crime and criminals alike through any of the three ways. Since treatment of the offender is not the only objective of imprisonment or the only means of protecting the society from criminals, we cannot call for the abolition of

imprisonment despite its incapability to reform criminals. The reform of the criminal is just one of the preventive functions of imprisonment and we cannot use it as a basis to call for the abolition of imprisonment. It is unanimously agreed that the society needs a control mechanism to protect itself from the danger posed by the existence of criminals. The incapacitating powers of imprisonment though temporary save the case of life imprisonment, still plays an important role of protecting the society.

The right of the society to protect itself and deter an individual offender from engaging in more crime can be traced back to the social contract philosophy. Individuals in the social contract doctrine submit themselves to society's decisions regarding its safety (protection). The implicit assumption of a deterrence philosophy is that,

in the absence of controls, society would
revert back to a jungle like dangerous war
of all against all; we need official punishments
and the police to keep us all in line.
(Pollock, 1989:131).

Deterrence as a justification of punishment has therefore been there right from the creation of the society and that is why imprisonment is so easily still justified on the basis of deterrence. All the weaknesses of deterrence as a theory notwithstanding, it still remains the most popular moral justification of imprisonment. And just as Pollock notes above, we cannot imagine of a society without the mechanisms of social control like imprisonment. As Durkheim observed, the importance of criminals and punishment is to

establish the parameters of acceptable behaviour. This means that punishment

is important in reaffirming society's collective agreement on what's right and what's wrong as well as reinvigorating the individual conscience.
(Sommer, 1976:174)

Imprisonment can be justified on the above basis that, if an individual wrongs the society, it collectively approves the criminal's confinement which is an acceptable way expected to re- invigorate his/her conscience so that he/she does not commit crime again. Imprisonment fulfills the public demand for retribution; that the evil doer ought to get what he deserves,; it provides a means of banishment or compulsory removal from the society no matter how temporary this appears.

Each of these goals of imprisonment must however be considered in addition to the relevant moral questions; it is a factual question if offenders can actually be deterred from further crime by imprisonment, but it a moral question as to how much we can do to an individual to ensure perfect deterrence. It is also a moral question if imprisonment is justified if we cannot establish that it does indeed deter and it is a factual question if it can reduce recidivism.

However due to the increasing failure of utilitarianism to achieve its supposed roles of deterrence and incapacitation its moral justification is increasingly being questioned. The argument is that since utilitarianism uses

the same method of inflicting pain on the offender in the pretext of benefiting the criminal and the society with no success, we would rather inflict pain as a just desert for the crime committed. The retributivists argue that it is only the retributive factor in punishment that justifies punishment since it is only being administered for the wrong done and not for some perceived good consequences that are not likely to be achieved.

However, utilitarian thinking still retains a powerful hold on penal policy. In this human age penologists are increasingly recognizing the futility of retribution and instead want to look for ways of making our institutions of punishment more humane and reformative. Prevention in terms of deterrence and incapacitation still remain the most appealing moral justification of punishment its inherent weaknesses notwithstanding. Imprisonment cannot therefore be abolished despite its failure to reform since it still has these other moral roles to play and the society needs it as a mechanism of behaviour control

5.0 CHAPTER FIVE

5.1 CONCLUSION AND RECOMMENDATIONS

If the reader closes this work with a sense of relief, I have failed. He/she must close it rather with disturbed feeling of shared guilt and responsibility. I will have succeeded if he has begun to feel that it may be up to him /her whether or not crime is to be better-controlled and public safety insured. Only through such a sense of disturbed concern on the part of the critical readers and leaders are the proposed results likely to be achieved (Grupp, 1971).

In the last four chapters we have examined the reasons why the problem of crime still remains a main threat to human life and development despite the existence of prisons as the most popular form of punishment for the most serious crimes. The problem that this study sought to investigate was why every where we turn the problem of crime faces us and the rate of recidivism is evidently high despite building more prisons to accommodate the increasing number of criminals, despite the efforts to make prisons better places to act as a conducive environment for the re- integration of criminals, despite equipping the criminals with vocational skills and education which is supposed to make them less prone to crime since their social status is elevated.

We have established that the reason why imprisonment has not succeeded in achieving its supposed role of reforming the criminals is because imprisonment per se cannot serve this rehabilitative role due to its inherent nature which can be cited as the short comings of imprisonment in terms of the reform of the criminal. We have established that imprisonment was meant and is still meant to serve the retributive and deterrent purposes of punishment; that it is a purely punitive measure of social control, which

cannot serve the reformatory role that is basically non-punitive. The study established why imprisonment and treatment of the offender at one and the same time is a contradiction in terms and cannot be carried out at one and the same time in the same institution- the prison that is not even designed for that purpose. Treatment of the offender is a complicated scientific process that requires expertise and the use of indeterminate sentence so that the sole determinant of the length the criminal takes before he is fit to go back to the society is the expert- the psychologist, counselor, psychiatrist, group therapist or who ever is closely studying the criminal in order to understand his reasons for engaging in crime. It is only after this that it can be said that the criminal has been treated and re-socialized enough to go back to the society.

It is apparent that imprisonment neither concerns itself with this scientific process that entails the treatment of the criminal in the way reform advocates for nor is it in a position to carry out this process due to its inherent nature. The prison is meant not to carry out such a scientific process but to protect the society from dangerous criminals by confining them. The act of confining offenders is basically meant to be a deterrent both to the offender and potential offenders alike as well as acting as a just retribution for what the criminal has done. The price the criminal pays for wronging the society is to lose his freedom as well as experience the pains that accompany imprisonment not because this can reform him/her as it is erroneously thought to be the case, but because that is what the society approves as a just way of paying back.

The principles on which the philosophy of reform and that of imprisonment per se are based on are quite different and there is no way we can assume that they can be substituted one for the other. The humanistic measures that are introduced in prison to pave way for reform remain just that- humanistic measure that every prison worth its name needs to implement since it has a duty to provide these to the prisoners by virtue of their being human beings whom the society leaves at its custody.

Every human being deserves to live in a decent environment where the basics of living like good food, shelter, medical care, and preoccupation among others are provided. So when these measure are put in place in prison they are not in themselves reformatory but only the basic minimum for the prisoners as human beings. Unfortunately in most prisons, this is all what is done to reform the criminals. We also examined the reasons why criminals still go back to their criminal ways despite being equipped with skills like masonry, carpentry, dressmaking, computer skills, education and eve after being provided with guidance and counseling services.

All these which are part of the supposed reformatory measures seem to have failed to help in the fight against crime by changing the character of the criminal because they are provided on the mistaken belief that the criminals committed crime because they lacked them. They are also offered not voluntarily on the request of the offender but may be because they are the only available measures and also because the prison officers believe that the criminals need them to eradicate their criminality. We pointed out that the causes of crime are varied and cannot be limited to lack of skills or

education as much as these might be some of the factors that influence people to commit crime.

It was established that imprisonment is a stumbling block to the rehabilitation of the criminal and in fact it does not have any rehabilitative significance for the criminal. This study established that imprisonment is sure to 'prisonize' than to rehabilitate the offender for it makes the criminal to resent and turn against the society since most of the criminal either do not deserve to be in prison or they allegedly feel that the society is being unfair by condemning them only to live amongst other criminals who have been branded social outcasts. If the reform of the criminal is geared towards the re-socialization of the offender back to the society, we pointed out that imprisoning the offender is no way to do this since the values that the criminal is bound to be exposed to is not any where near those in the society. We noted that the prison is a total institution that has its way of life and conditions so unlike those of the ordinary society that it defeats logic to imagine that this is the most suitable place to re-socialize social deviants back into the society. We argued that there is no way even if the prison had a rehabilitative power we could use the standard of criminals conforming to prison way of life, rules and regulations to determine whether the criminal is fit to go back since he is exposed to totally different conditions from those he will encounter once out of prison.

We observed that the reason why the conformity to prison rules cannot be used as a basis to establish that the criminal has been reformed to be released back to the society is because, enforced habits slacken as soon as the situation from which they arose no longer exists; where there is no power to

compel their observance. This probably explains why criminals are easily tempted to go back to crime despite their having comfortably conformed to the prison rules.

We have therefore examined the reasons why as much as prisons still retain the rehabilitation of the criminal as one of its main objectives, it is an impossible mission that cannot be possibly achieved. Any attempt to try and reform the criminal while under incarceration will definitely run us into a contradiction since the principles of reform and imprisonment have a conflict in interest. Treatment is in essence curative while imprisonment is punitive and we explained that though both of these processes involve some restriction and compulsion, imprisonment is such that the pain that accompanies it is an end in itself where as the pain in treatment is temporary and necessary for the treatment of the offender.

We explained that treatment, is offender focused, where as imprisonment is offence focused and therefore conflict in their approach to the problem of crime. Treatment calls for individualized justice whereas imprisonment is based on objective laws that rely on the nature of the offence to ensure the preservation of justice.

This study has therefore established that the reason why rise in crime rate, the development of new crime patterns and the increase in recidivism despite our effort to make prisons reformatory/ correctional institutions is because it is a mistaken belief that imprisonment can be such an institution. We have shown that prisons no matter how big or small, civilized, comfortable or expensive still remains a repulsive place, which can be best described in

retributive and deterrent terms. We have therefore come up with the following recommendations if we are to fight crime by reforming criminals.

5.2 Recommendations.

Our first recommendation is that prisons should not keep on insisting that they can indeed reform criminals. Reform as a process is too complicated to be achieved by an ordinary prison and should be separated from the whole process of imprisonment. Imprisonment is meant to be purely punitive and cannot be used as a treatment center unless prisons cease being 'real' prisons.

Due to the false attempt to make prisons to serve both the reformatory and punitive roles, imprisonment seems to be increasingly failing in achieving any of these roles due to the conflict of interest inherent in such a process. Our recommendation is that imprisonment should only be justified on the punitive grounds- the deterrent and retributive aspect of it but not on the reformatory function.

If Imprisonment is to be part of the reformatory procedure it should only be the first step and in separate such that the first thing that happens to a wrong doer is to deprive him of his/her freedom as punishment for a definite period of time where this loss of freedom is a stepping ground to the next stage- the treatment stage. During this first stage the prisoners will be under the custody of the prison officers who will hand them over to the treatment experts who determine the appropriate treatment and length where the criminal will be isolated from the society depending on his/her response to

treatment. This should however take place in a separate institution though the criminals will still be under sanctions; not free.

The punishment and treatment of the criminal will be one continuous process only that punishment (imprisonment) will come before the treatment. This should however be strictly for the truly perceived dangerous criminals who cannot be dealt with else where. We recommend that even as a first step towards treatment, imprisonment should be used sparingly and not for the petty offences as it is being used. We also recommend that the right people be the only ones to be taken to prison those whom it has a significant punitive impact, not the poor whom the loss of freedom does not have a significant punitive impact.

We recommend that if the right people are the only ones who end up in jail it will be possible to establish at the initial stage of confinement those who should proceed to the next stage for treatment and those whom confining will be significant enough to change their ways and need not proceed to the next stage which will not be relevant.

We also recommend that the criminal justice system should be regulated such that it is not the final authority in treatment process if it is to be part of the confinement process. The criminal justice system is based on the determinate sentenced and relies on objective laws that prescribe what should happen once a certain crime is committed. Treatment calls for individualized justice and focuses on the criminal not the crime and the treatment experts should have the final say on the length that is required for the criminal to be treated of his social maladjustments.

We recommend that the sentence that the criminal is sentenced to should only be aimed at achieving deterrence both for the individual and the society at large and once he/she proceeds to the next stage of treatment the experts should decide- the indeterminate sentence.

We also recommend that the humanistic measures should not be withdrawn from the prison for they form part and parcel of the basic minimum requirements that the prison should provide for the prisoners even as they are imprisoned for deterrence or retribution. They should however not be mistaken for reform itself.

Another recommendation that we put forth is that we should have specific prisons designed for specific offences so that it is easy to study the prisoners in order to determine those who need treatment and those who don't. If we have such prisons it will also be easy to establish those who have been wrongly imprisoned; whom both treatment and imprisonment do not have any purpose. If we take the wrong people to prison it will be defeatist since we will not achieve either the rehabilitative or the punitive goal.

Lastly, we want to point out that our concern in this study has neither been to understand crime and punishment in all its dimensions, nor to build an ideal theory of justice. Our focus was on why we are still faced with the threatening problem of crime despite our insisting on the power of imprisonment to reform our criminals.

This work has neither attempted to resolve the crisis of crime nor identified the causes of crime. Its main focus has been however to pose questions

about imprisonment as one of the most widely used form of corrections whose answers would help us understand the relationship between corrections and the crime rate as well as recidivism. We have tried to pose some of the most critical questions regarding imprisonment for reform; hopefully others will continue the debate.

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