

The Kenya Hanging Act: An Appraisal
and a Plea for its Abolition

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Introduction

This treatise is a study of the Hanging Act, 1973. The study is focused on a single controversy; the question of the relevance and desirability of the death penalty in contemporary Kenya society with special reference to the crime of robbery with violence. An attempt is made to treat in some detail the debates encompassing the clash of ideas and interests which eventuated into a new legislation, providing for the death penalty for a guilty offender in a robbery with violence case.

It is common knowledge that the sole object of the Kenya Legislature in enacting the piece of legislation was to curb and possibly eradicate the crime of robbery with violence which had of late pervaded and traversed the entire length and breadth of the Republic, the rural and urban sectors alike. The crime of robbery with violence entails forceful deprivation of property from the person, coupled with violent overt acts geared towards infliction of harm to the person of the victim by the assailant. This occurs when the victim is intimidated to give up the property and when thereafter the victim offers resistance.

In as much as the intention of the Legislature may be well founded, the machinery employed, that is, capital punishment, has not enabled Parliament to achieve its goal. There have been, recently, numerous instances of robbery with violence, be they immense or diminutive in quantum. Quite a substantial percentage of the Kenya populace is well aware of the death penalty in Kenya. The late President of Kenya, Mzee Jomo Kenyatta was given a renewed mandate, by the people -

wanainchi - to deal sternly with "all thieving robbers."¹ The people had told him "Hang the thieves."

On another occasion² the late President addressing a large delegation from Kiambu led by the Provincial Commissioner, Mr Simon Nyachae said that for Kenya to gain a world-wide respect and admiration, her people must first and foremost develop a maximum degree of co-operation and strive to achieve peace and Unity "without which there could be no talk of prosperity." He stressed on the importance of uprooting crimes and hoeliganism from Kenya's society so that an atmosphere of peace and stability could ensure the nation's guaranteed stability.

The fact that these utterances were from the public and reiterated by the late President over the radio, it presumably reached the entire nation: then why do we have these crimes, especially armed robbery despite the death penalty involved?

In conjunction with the late President's call for the need of stamping out crime and the people's urge to the Government to curb crime, the Parliament enacted the Hanging Act, 1973. Despite this Act, still instances of robberies with violence now and again reported in the daily newspapers have neither diminished, nor show any sign of decline. If this be the case, one is inevitably driven into posing the question: Since the objective of the Legislature has not been achieved, should not the Legislators devise an alternative measure of curbing this specie of crime, taking into account the punishment, its traditional theories and modern approach?

This treatise tries to offer a unified proposition for the failure of the death penalty as a deterrent measure and an argument for the abolition of capital punishment using the theories of punishment as reflected in the prevailing ideologies and the abolitionist's arguments.

This work may not be exhaustive in its attack on capital punishment under the Hanging Act in Kenya but offers suggestions which merit consideration.

CHAPTER I

1 (1) The meaning of punishment

This short discussion of what punishment is, must be prefaced with the warning that there is no substantial measure of consensus as to the definition of punishment. This branch of law, criminal law, is bedevilled by slovenly terminology. As such one expects variance in the meaning of punishment as different proponents advance strands of opinion purporting to give the definition of punishment. One might say that the diversity ensues as a result of conflict and confusion between the conservative legal writers and philosophers and the modern legal writers over the use of related terms, punishment, treatment and sanction. There is an appreciable gap between what the conservatist term traditionally as "punishment" and what the modern writers use as methods for coercing conformity. Gerber and McAnany observe:

"The change in public sentiment, the progress in science, the advent of a full fledged police force, all have contributed to an adaptation of methods of punishment. We can no longer speak of the simple process of punishing a man by putting him in a prison. The least reflection will indicate that we punish by a variety of deprivations, including the trial process itself." 1

Thus we must attempt to move towards an agreement of what punishment is by way of general definition before we can hope to put order into the welter of different applications of public coercion to the individual in the name of health, education and general welfare.

Legal punishment is defined as follows:

"Punishment awarded in a process which is instituted at the suit of the State 'standing forward as a prosecutor on behalf of the subject on public grounds'. This process when instituted can only be stayed at the instance of the Attorney-General acting on behalf of the State, and the punishment when awarded can be remitted only by the State. Legal punishment is of various kinds, and includes death, imprisonment and fine. It is sometimes attended with disqualification and loss of civil and political rights." 2

Another attempt gives the definition of punishment as follows:

"Physical or mental distress inflicted... The penalty for a transgression of law. The suffering or confinement inflicted on a person by authority of law and the judgment or sentence of a court for some crime or offense [sic] committed by him." 3

A further attempt is as follows:

"Punishment is an act of a superior or of public authority. To cause an offender to suffer for an offence: to subject judicial chastisement as retribution or requital; or as a caution against further transgression....." 4

Professor Jerome Hall set out a detailed description of punishment in these terms:

"First, punishment is a privation (evil, pain, disvalue). Second, it is coercive. Third, it is inflicted in the name of the State; it is 'authorised'. Fourth, punishment presupposes rules, their violation, and a more or less formal determination of that, expressed in a judgment. Fifth, it is inflicted upon an offender who has committed a crime or harm, and this presupposes a set of values by reference to which both the harm and the punishment are ethically significant. Sixth, the extent or type of punishment is in some defended way aggravated or mitigated by reference to the personality of the offender, his motives and temptation." 5

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These definitions are neither conclusive nor exhaustive. They usually have got flaws in them. For example, Hall's definition is too narrow by reason of its inclusion of pain. Today there are many explicitly punitive sanctions which are neither painful nor devaluing. For example, prisons in some legal systems run a series of rehabilitative programmes for inmates which are in part or whole required of them.

We can conclude this aspect of definition of punishment by an assertion that one's definition of punishment depends on one's approach to the goals justifying punishment. This is what is set out in the next section.

I (2) The aims and objects of punishment

It is generally agreed upon that punishment is a process of elimination of crime in a society. That the society is to be protected and guarded against evil men. Following this, there have evolved from the early ages certain views striving to justify punishments.

First, punishment is viewed as a mode of redress for the victim. This is an attempt to limit or undo, if possible, the wrong done by some evil person. The justification is the search for maintenance of status quo. We need to note here that the basic problem would be the determination of the amount of compensation payable to the victim in relation to the amount or extent of injuries he or she received.

Secondly, there is the theory of social defence. This has its basis the fact of protection of society. It is based virtually on prevention rather than cure. This is where a person will be got rid of from society when he is likely to cause harm to others by being detained. The justification for this is that where a person has got criminal tendencies and given any chance he would commit a crime, therefore he should be confined before he even does an explicit overt act.

Thirdly, there is punishment as a form of elimination. This involves total removal of a person from the society. This arises where a person is notorious for committing a considerable number of severe crimes and gets away with it. The society sees him as a dangerous person, therefore he is ostracised by banishment or transportation. This is the cleansing of a society by weaning off polluted elements. This theory leaves room for lawlessness in a society when the people take the law in their own hands in a bid to cleanse the society of impurities as in the cases of mob justice.

We now turn to the traditional theories of punishment.

① → First, the theory of deterrence. The ^{profounders} ~~founders~~ of this theory assert that the basic idea of deterrence is found in many legal systems, where penal sanctions are designed with the major aim of deterring the offender himself or potential imitators from commission of the same kind of offences.

This is effected by inflicting fear in the potentially dangerous persons and thus maintain peace and order in society. The assumption underlying this theory is that what discourages the would-be imitators would also discourage the offender himself from repeating the offence. Some deterrent measures take the form of corporal punishment, deprivation and confiscation of property, fines and forfeiture of articles used in the commission of the crime and the withdrawal of civil rights. The loss of liberty is aggravated by physical discomforts and inconveniences of prison of which Du Cane⁶ says that the deliberate deterrent aspect of prison regime is "hard fare, hard labour and a hard bed." As early as 1923 the Annual Report of the Prison Commission of Britain enunciated that;

"..... the prison day should be hard, but the object is not mere [sic] severity. It should be interesting but the object is not to make it pleasant." ⁷

The refutations and objections of this proposition, i.e. deterrence, are not wanting. Its critics ask: What is the nature of the value we are seeking in some to deter others? In discrediting the deterrence theory, these critics say that the social benefits to be realised do not in themselves justify the imposition of a penalty, no matter how successful this punishment is in terms of decriminalizing others.

They further say that according to the deterrence theory, it means that punishing the innocent can serve the purposes of systems of sanctions bearing on deterrent objective as easily as punishing the guilty. What is the rationale, so they ask, of using a person even though he is a criminal to benefit the society at large? The proposition does not take into account the social detriments which arise in a community where draconian enforcement is insisted upon. That efficiency could hardly justify the terror-ridden state of popular conformity. These critics have employed social scientists to show that deterrence does not work, no matter how severe the punishment. An illustration is the situation in England during the Elizabethan times where even petty offences were punishable by death. On one occasion a criminal was to be executed. While the convict was being blind-folded a very important official was busy lifting the skirt of one of the ladies in the crowd. This was indecent assault punishable by death. At the same time pick-pockets were busy relieving by-standers of their money. This was a very serious offence at the time, punishable by death. These two illustrations show how deterrence is not effective, however severe the punishment. This was a successful argument in capital punishment debate which I shall allude to later on.

On the other hand the proponents of the theory say that deterrence theory is still strong because even the justices of the peace still speak of it.

Professor Andeanes has called for a rediscovery of deterrence on the basis of mere empirical research. He says:

"..... deterrence has been judged by the wrong standards, since the convicted person is already a refutation of the deterrent effect of punishment Deterrence must first be more carefully analyzed and then tested on all of the 'law abiding' who may have continued such only because of the multiple tugs of fear, moral conviction, and social stress which compromises the deterrent ideal." 8

② → The second traditional theory is Retribution. The assumption underlying this theory is that the criminal is a dirty fellow; and therefore some kind of suffering must be enforced on him for the act he committed. Taft ^{9A} says that such a punishment entails "the conscious infliction upon a disturbing individual of undesired experiences not solely in the interest of his welfare." This is punishment for the sake of vengeance. The vital consideration here is retaliation, for generally men desire to be rid of injury. This theory is sustained on the principle of "an eye for an eye" and "a tooth for a tooth." This is most pronounced in cases of mob justice where the courts do not even get a chance to deal with the criminal.

Retribution bears an element of vengeance or abstract justice.

An Example, ^{is where} society punishes a robber when it sends him to the toughest prison in the country, or as in the ancient times in England specific devices were concocted to bring suffering

upon those who were convicted, such as being mutilated, branded, torn limb from limb, fed to wild animals, slowly starved, burned, exposed in pillories to the insults of passers-by, enslaved in galleys, crucified, and pressed to death. Knowledge of such cruelties of the past should help us to appreciate the decline of such crudities in modern times.

Retribution has been denounced as being sadistic, immoral, out-dated, wasteful and sick. That pain in itself, is a negative value to be employed only in cases where there is evidently greater value to be realised just as a medical operation is approved only when there is an advantage to be gained, not for the sake alone of spilling blood. Thus we should consider the criminal as sick and needing treatment, not simply as a wrong-doer deserving punishment. Therefore we should not support a programme that is painful to others just for the sake of retaliation. The critics of retribution pose a question: How can we determine how much an individual should suffer for a crime? The ready answer they give is that there is really no safe guide on how to mete out justice when it is known that it represents at best irrational motives in the punisher.

Retribution is out of phase with current scientific and humanitarian sentiment. The "desire for revenge" does not explain the long history of man punishing his fellow man.

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But the upholders of retribution in turn buttress their justification for desirability of retribution by asserting that while retribution has been unpopular, it has never been entirely "out." That it has a long and tenacious history with human race, and that although there is a march towards rehabilitation, as a total trend, punishment has to be meted out, it is inevitable.

Professor Cohen said:

"Socializing of a natural tendency in man to strike back at one who has injured him should be fostered by allowing its expression in official criminal punishment." 9^b

In tune with what Cohen said Professor Hellen Silving¹⁰ says that retribution is not vengeance but rather a symbolic assertion of legal prohibition, an assertion which at the same time indicates by the degree of the severity of the punishment imposed upon a crime what rank it occupies in the hierarchy of the negative value system in a "free-society."

③ We turn to an analysis of the third theory, Rehabilitation. Rehabilitation or reformation was first established in the West in countries like U.S.A. and Britain, and is slowly seething into Africa. Lord Gladstone observes:

"Prison treatment should be effectively designed to maintain, stimulate or awaken the higher susceptibility of prisoners and turn them out of prison better men and women both physically and

morally than when they came in." 11

According to Gladstone prison should not only be aimed as an institution for punishment of an offender: there should be a reformatory attitude towards the offender.

This theory has been attacked on various grounds. First, that rehabilitation has frequently been employed as a coverage for neglect. Inmates in the penal incarcerations under the pretext of social reform have been discarded there interminably because they were being "cured." The ugly truth is that a very meagre number of countries have facilities to implement a rehabilitation programme at the level at which their policy insists on treatment under terms of confinement. This is invariably attributed to financial restraint and lack of technical know-how in the technical and administrative staff to man the rehabilitative institutions called reformatories. As such the result is far worse than an entirely ^{punitive} ~~punitive~~ penal system. Secondly, the rehabilitative approach (for the treatment-minded people) is invitational of personal tyranny and denial of human rights. This is derived from the fact that once a prisoner is placed in the hands of the doctor to be cured, before he is released, there is no one who can predict how long the cure will take, nor control of the doctor's judgment. Thus treatment is done in the name of a benevolent, but uncontrolled humanitarianism. That therefore justification for punishment must be sought for elsewhere and a clear limit be placed on what criminals

can be forced to undergo for their own benefit. As

Professor Silving said:

"Even bad people are not by the same token
experimental rabbits." 12

This led Professor Merris to say:

"Power over a criminal's life should not be
taken in excess of that which would be taken
were his reform not considered as one of our
purposes." 13

Lastly it is said that all the science in the world cannot
really rehabilitate a person whose attitudes are evidently
and manifestedly anti-social.

The only way to change a man is from the inside-out,
beginning with the heart, so says the clergyman. A question
is asked: Do criminals need psychotherapy, job training,
education, or do they have a more basic need for
"repentance" and forgiveness, that is, what possible
motivations can a social scientist give a prisoner when he
is not interested in the prisoner as a person? He can at
best employ his motivations with staunch commitment to the
motives he insists on.

It has been suggested that reformation can be achieved by:

- (a) Ministering to the inmates by prison church chaplains;
he should enlighten them about God and the concept of
Sin and Hell,

- (b) To seclude the prisoner, that is "cellular" incarceration so that the prisoner would not mix with hard core criminals. The basis of this is to 'empty' his head as do transcendental meditators so that he is able to gain higher receptability and comprehensive beneficial ideas of life,
- (c) Teaching the prisoner some kind of trade, so that when he is released he would employ his know-how for his benefit and the society at large. → But as has been pointed out earlier, these suggestions are sound and can only be achieved by those countries which have such programmes but not hindered by financial restraint.

The real problem is that when it comes to sentencing the courts often do not expressly avert to the principles of sentencing in such a way as to show precisely the manner in which they are attempting to apply ~~to~~ them to the circumstances of the particular case. They do not indicate the aim they have in mind for a sentence they mete out. Such an occasion is to be found in the case of R. V. Sergeant¹⁴ where the appellant was a "bouncer" in a discotheque. He attacked a young man who had been causing trouble and the result was that appalling violence then occurred. The result for the appellant was that he was convicted for affray and was sentenced to two years imprisonment. In reducing the sentence to such a period as would allow him to be released at once, Lawton L. J. *considered each of the four "classical principles" in turn,*

which any judge who comes to sentence ought always to have in mind. He said that although retribution in the form of "an eye for an eye" no longer is part of the criminal law, the courts must have regard, which expects the court to deal with the appalling problem of violence. He added further that a custodial sentence must be expected [*italics mine*], although it need not be a long one, especially for a man of otherwise good character, for whom the mere fact of imprisonment is retribution. Deterrence, for the accused, is of little value, and for others, it is of little value in the case of offences committed on the spur of the moment.

Prevention is a ground for imprisonment only when other means fail. Rehabilitation requiring long sentences in order to be effective, is a view "no longer held as firmly as it was." The application of the four principles, retribution, deterrence, reformation and prevention in the modern understanding was held not to require long sentence which a sentencing justice should always bear in mind. These aims are embodied in various theories of punishment as advanced by their proponents.

There have been juristic and socio-scientific debates as to which is the best of the theories in the twentieth century, and while considering these theories we have to take into account the African traditional punishment with the stress on the underlying aims and policies.

The preceding pages have been an effort to draw together the current writings on punishment. We began with a series of philosophers, not because they have definite answers, but because of their interesting views and importance to those more practically engaged in solving the punishment problem. The major issues talked were: the problem of definition of punishment and the difficulties of determining a single or multiple purpose for punishment.

Close analysis of the preceding discussion brings out two opposing approaches: the philosophical and the legal. The former is engaged in asking why we punish while the latter, the lawyers and the penologists ask whether punishment is working, or is efficient, or whether it deters or rehabilitates. I submit that the question of efficacy can only be answered in terms of goals. We must not withdraw from the empirical level to try and solve the problem of punishment nor to set up principles of punishment in a vacuum of pure reason.

The proposals enunciated in this legal-penological debate by the various philosophical schools should be a starting point for lawyers and penologists in instituting empirical research programmes and formulating drafts of penal codes. In this respect I shall examine the justification for capital punishment introduced in Kenya by the Hanging Act, 1973.

specific procedures whereby the victim is given part or whole of the fine in a criminal suit. This means that one does not usually have to file a civil suit to get damages but can get 'damages' directly in a criminal suit by being given fine proceeds. In Kenya, under sections 170-176 of the criminal procedure code there is compensation for a victim in a criminal suit and restitution of property to the victim. Compensation can be got from fines. But compensation from fines^{is} generally hardly invoked. Mostly the victims are expected to file a civil case in order to be compensated. It is the discretion of the magistrate or judge to award compensation from the fine. In the view point of the African this is a fallacious way of regaining status quo. The criminal might be imprisoned and the stolen goods not recovered, or he may be fined in certain instances. In Kenya under such circumstances the offended party usually gets very little if not nothing out of the fines, yet he is expected to walk out of the court with smiles that justice has been done. Such an African would readily accept a scheme which goes into compensating him towards his suffering and not sheer punitive measures being meted out to his assailant

In traditional Africa, prisons as known in the Western legal systems did not exist, although a murderer^{er} was incarcerated in a hut with the corpse until there was adequate compensation paid by his relatives.²

Fines and prisons are colonial legacies in Africa. To the

African the institutions of prisons and fines as conceived in the Western jurisprudence are alien institutions. Some critics of traditional African treatment of offenders level accusing fingers asserting that the African penal measures were extremely punitive to the extent of being inhuman if not barbaric and hence the colonial regime through legislation did away with the traditional African penal methods.³ At various times in the history of customary laws, hanging, beheading, stoning, drowning, burying alive, and killing by the identical means used by the murder^{er} had been allowed.

Although the named forms of punishment were in themselves severe and entailed elements of pure retribution, this is no excuse for Africa to engage in retributive punishments as an end to punishment. One must submit here that although this retributive element was present, the vital factor was compensation. John Roscoe writes:

"Though death was usually, the punishment for adultery, an offenders life would be spared, and he be fined two women if he were able to pay them; the culprit was however maimed; he lost a limb, or an eye gouged out, and showed by his maimed condition that he had been guilty of a crime. A slave taken in adultery with one of his masters' wives was invariably put to death."⁴ But we must note here that if all the parties were "peasants" then death was seldom the punishment for adultery, unless the offenders were caught, in flagrante delicto. This emphasises

the principles of reciprocity and compensation.

In emphasising the vitality of restitution Clinard and Abott write:

"Restitution to the victim or compensation to the victim has particular merit as a substitute for both fine and imprisonment in less developed countries. This was the traditional method of settling offence in most countries, and still remains so in rural areas particularly in African societies." ⁵

One writer ⁶, writing about the Tonga states the famous Tonga proverb:

"Musasi wa nandju i ku riha."

This is equivalent to "the repair of the damage is restitution." This emphasised the theme that pervaded the entire African communities that true corrective of crime has little value if the aggravated party is not compensated.

Let us assess the argument thus far. We now have several dimensions, that is, the Western theories of punishment upon which to compare African attitudes to crime. In the African society there were retributive sanctions, but the most significant were rules of compensation and restitution. Secondly, the process of restitution can be strongly influenced by the allocation of responsibility and liability, either to the individuals or to corporate groups, such as families, lineages, clans, village groups, or even age sets.

cancel
He is subject to wholesale reprobation, but he is not imprisoned or ^{declared an} outcast. Crime is not eliminated by locking him up. There was in these communities a distinct feature "reciprocity" of rights and duties of individuals and groups or clans. The major social intent in dealing with anti-social men was not so much the sanction or penalty imposed, as the repair of the damage done by way of reciprocal understanding. This is a desirable positive idea of law. An illustration of how the African resents the Western judicial administration of justice in a South African case:

"An African had been badly robbed by one of his own country men, who was arrested and duly brought to court for trial and sentence when the case started, it was found that the injured party could not be traced and therefore could not appear. He answered simply, why should I have appeared? I would have had to leave my job, with the probable consequence that I would have been sacked. Why risk that when the guilty man would be arrested, judged and imprisoned, and that if he had to pay a fine, it would go to the state. What would I get from this?" 7^b

Thus to this aggrieved party, the Western penal measures were meaningless. The attitude of this African contains a lot of logic and common sense, challenging the Western penal systems. The man was stressing on compensation from and not vengeance on his assailant. He was only adhering strongly to the African system of reciprocities which would have aided him to regain the status quo. One does not recreate an eye by gouging out another eye.

In relation to the subject matter of this treatise we have already hinted on areas where the death penalty was applied. We still probe further into this grave subject of the taking of human life in the name of the law.

capital punishment is now being employed by a number of African countries such as Kenya, Uganda, Ghana, Sierra Leone, Nigeria and Zambia. These countries have the death penalty for armed robbery or "robbery with violence". The phrase "robbery with violence" is quite confusing since no one robs without the use of violence. In Nigeria, Uganda and Sierra Leone, the penalty has to be inflicted in public and by a firing squad. The purpose, it is said, is to scare potential criminals. One eminent judge was asked whether he had witnessed an execution. He said that he had not as a duty to go down into the sewers. Nonetheless his interlocutor said that nevertheless engineers have a duty to test the building and normal functioning of sewers.

In 1973 the Sierra Leone Parliament passed a bill extending the death penalty to robbery with violence.⁹ During their debate the Attorney-General Mr. L. Brewah supporting the bill said that he "felt" the firing squad more humane than hanging and was even a better way of showing the "illiterates" that the sentence is carried out. This view nurses the notion that crimes can be prevented by very severe punitive measures, that the greater and more severe the punishment, the greater will be its deterrent: One would ask: What is more humane in firing squad than in hanging? This is sheer irony.

*As have been indicated in the previous chapter the deterrent effect of punishment is hardly being realised presently.

In Ethiopia the Penal Code provides that:

"Capital punishment shall be executed by hanging and

(1) This may be carried out in public to set examples to others." 10

In 1972, Jean-Bedel Bokassa's¹¹ tragic drama of public mutilation of thieves. This was an application by a fanatic of the theory of deterrence and extreme retribution. To beat thieves to death and parade their bodies cannot be justified only by a belief in deterrence. How does one justify the South African law of hanging a black man for raping a white woman and a white man is not subject to death penalty for raping a black woman? This is an explicit projection of racism embodied in Darwinism, being used under the pretext of justice.

To conclude this chapter, I submit that restitution and compensation in the traditional African sense was important and should be a major factor in criminal suits here in the Kenya. The African objective in punishment measures is worth preserving. We ought not to stick to these theories and practices conceived in the African viewpoint of punishment because they are traditional to Africa, but because they are reasonable, positive and suited to her present and future needs. The robbery, the wounds or beats, stripes, or use of any other personal violence to any person, be it Africa and Kenya in particular must restate her principle that a damage done must be repaired and preserve her conviction that the anti-social man can only be brought back to humanity by genuine re-socialization. Africa says:

"One straightens a tree (which is getting crooked) while it is still young." 12

The scripture says that what is desirable is not the death of the wicked, but his conversion and his life.

Mr Gatuguta asked the Vice-President and Minister for

CHAPTER III

¶III (1)

Home Affairs, Mr Daniel arap Moi, as he then was, how many robberies with violence were committed during 1977 Kenya Parliamentary debates on the crime of robbery with violence, secondly, the statements of the opposition and these robberies and how many criminals were involved in the proposers of the amendment of the law to introduce these and how many of these were arrested. In reply the Vice-President said that there were 1,344 cases of robbery with violence, and, too, the total value and cash stolen was K.Shs.4,085,455.90, and thirdly, the

number of criminals involved was 2,703, of these 1,030 The Legislators, that is the Members of Parliament (herein were arrested. Mr Karuki asked how much money was referred to as M.Ps) of Kenya were getting concerned about stolen between January 1970 and July 1971 from the various the increase in crimes of robbery with violence. This led banks. The reply was K.Shs.1,037,584. them to question the efficacy of the existing sentence

which was being given to the robbers as provided by

From these figures Mr Gatuguta concluded that those S. 296 (2) and S. 297 of the Kenya Penal Code. Before the robberies were a serious matter and he wondered what the amendment, S. 296 (2) read:

Government was doing about the problem. The reply was "If the offender is armed with any dangerous or that the police were doing their best to curb the number offensive weapon or instrument, or is in company of crimes. The Vice-President pointed out that so long with or more other person or persons or if, at or as the society was progressing there were bound to be immediately before or immediately after the time of groups of people learning new and using sophisticated the robbery he wounds or beats, strikes, or uses methods about robbery. "Therefore", he said, "I support any other personal violence to any person, he is that whether it is those who commit robberies, or those liable to imprisonment with hard labour for a term who steal cattle, it all depends on how we teach them to be good citizens." Here the Vice-President was " years together with corporal punishment."

advocating for reintegration which is the extension of There was a feeling that the above sentence was not severe rehabilitation from the institutional incarceration to enough to curb the crime of robbery with violence and this the community setting. The future of effective correction led to the debate on capital punishment. policy lies in the direction of community-based treatment.

Mr Gatuguta asked the Vice-President and Minister for Home Affairs, Mr Daniel Arap Moi, as he then was, how many robberies with violence were committed during 1970 in the Republic of Kenya, two, how much money was stolen in these robberies and how many criminals were involved in these and how many of these were arrested. In reply the Vice-President said that there were 1,344 cases of robbery with violence, and, two, the total value and cash stolen was K.Shs.4,015,455.90, and thirdly, the number of criminals involved was 2,703, of these 1,039 were arrested. Mr Kariuki asked how much money was stolen between January 1970 and July 1971 from the various banks. The reply was K.Shs.1,037,584.

From these figures Mr Gatuguta concluded that these robberies were a serious matter and he wondered what the Government was doing about the problem. The reply was that the police were doing their best to curb the number of crimes. The Vice-President pointed out that so long as the society was progressing there were bound to be groups of people learning new and using sophisticated methods about robbery. "Therefore", he said, "I suggest that whether it is those who commit robberies, or those who steal cattle, it all depends on how we teach them to be good citizens." Here the Vice-President was advocating for reintegration which is the extension of rehabilitation from the institutional incarceration to the community setting. The future of effective correction policy lies in the direction of community-based treatment.

The community offers a much healthier environment than the institutional (prison) setting. Therefore correctional institutions should adopt rigorous pre-release programmes to prepare the offender for community reintegration. This is what the Vice-President meant by teaching the offenders to be good citizens. How this can be achieved was discussed in chapter one on the rehabilitation and reformation theories of punishment.

The M.P.s felt that the law as it was at the time was unfair. Mr Munyasia said that anybody charged with the offence of robbery with violence was liable to be imprisoned for fourteen years regardless of the heinous nature of the crime. He added that the law was unfair where the violence alleged amounted to only a scratch on the victim. He therefore suggested an introduction of legislation making varying sentences depending on the degree of violence used. The Attorney-General Mr Njonjo in reply said that the then law was fair and the sentence awarded by the courts were just. He said that it was not the right moment to speak about altering the law because of the prevalence of robbery with violence.

He further went on to say that he had no intention of amending the existing law. He added that the police were not going to charge a person who had merely committed a technical offence of robbery with violence.

Mr Mulwa (M.P. for Makueni) who was very much concerned with the sentence imposed on these robbers said:

capital. "The Attorney-General will agree with me that the present law is unfair to a first offender, for example, who has been charged with the offence of robbery with violence, in that the judge or magistrate dealing with the case has no alternative but to sentence him to 14 years detention because he cannot go below 14 years, whereas a criminal who has a long record will also get the same sentence." He said that saying and

The Attorney-General in reply said:

Handwritten notes:
 Mr. Njonjo
 25/1/61
 C. 10/1/61
 K. 10/1/61

He added that heavy punishment is imposed on the so called first offenders must at least have started from somewhere at one stage. The question of robbery with violence is a matter of fact, and therefore the magistrate will assess it when sentencing such a person. The police will not charge someone else with the offence of robbery with violence if it is just a technical offence of snatching a bag of money from someone's pocket. What we are concerned with is when a robber is armed with pangas and pistols, which is frightening. This is why I ask the House to agree with me that at the moment it is wrong to be talking about amending the law. What we should be suggesting is tightening of the law against that offence. In fact, Mr Speaker, the President - at the last Madaraka Day Speech - did suggest that the law should be amended so that these people can face capital punishment: to be hanged on the trees so that others can fear. Instead of bringing an amendment that my learned friend wishes me to bring I'm going to bring an amendment to provide for capital punishment." 1

An analysis of Mr Njonjo's answer brings out four points.

One, that the question of robbery with violence is a question of fact and not opinion; secondly, that presently Kenya does not need an amendment to the law to provide for varying degrees of punishment for robbery with violence, but rather that a tightening of the legislation is necessary and thirdly, that as the President said,

capital punishment is necessary so that it acts as a deterrent and lastly, that the Attorney-General was going to bring an amendment to the legislation so as to provide for capital punishment.

Mr Migure suggested that the robbers be confined in detention camps. Mr Matano in reply to that suggestion said that they should not be detained as they are being imprisoned and caned. He said that caning and imprisonment were more severe than detention and satisfactory. He added that heavy punishment is imposed and acts as a deterrent.

Mr Matano's answer is more enlightening as concerns treatment of offenders, especially robbers. Detention will achieve nothing. It may only lead to physical and mental deterioration of the robbers, and how does this help the society and the individual robber? Perhaps, the punitive and deterrent aspect of Mr Matano's answer is desirable for it leaves room for rehabilitation of the robbers.

The late G. Morara said that the Government had a duty to conduct research into crime and find ways and means of reforming criminals. He added that it was an adequate solution for the problem as exhibited by a rehabilitative and reformist mind of Mr Morara. To buttress what Mr Morara said, the late J. M. Kariuki gave a sound and comprehensive view of the duty of the State in solving

this particular specie of crime; possible solutions in rehabilitative and reformative terms and the flaws in capital punishment in respect of its deterrent aspect.

His speech is hereby reproduced in verbatim:

"Have we gone into detail to try to find out the root cause of these serious problems? The Attorney-General and the staff in his department have done nothing to my understanding to try and analyse the reasons behind the increasing violent crimes in the Republic. I feel what the Attorney-General should have done is to consult a few other lawyers of his equal distinction, a few sociologists, a few people who can understand prison rehabilitation in order that he can find ways and means, and at the same time establish the reasons why and how these criminals are increasing today. Before this House can accept this Bill or the death penalty it must be assured that this is the only action we can take to deal with the crime.

However, are we as legislators of this country not entitled to have the facts which will make us to pass such legislation? In fact it has never worked anywhere in this world where robbers have been hanged. There is no reason to believe that it will work, in fact, here in Kenya. The life of a human being is very precious, criminal or not, and should not be taken away very lightly.

This House would only be justified to pass such a legislation if it cannot be given a significant reduction in the number of crimes, or unless it is actually convinced that by doing this particular thing it will help to reduce the number of crimes as a result there will be no more crimes in the country involving armed robbery. We can learn from history that in countries as near as Uganda, death is prescribed for armed robbery. We also know that this factor has not had a significant effect on the rate of armed robberies. In fact it was only the other day we heard that a prominent person from Uganda was killed by armed robbers. This particular country has a legislation for hanging armed robbers. In countries like Nigeria where public execution is the penalty for armed robbery, the crime rate has not been on the decrease, to the contrary it is on the increase. Many of us have witnessed people being shot and before they are given the last sacrament instead of showing any signs of sorrow, someone smiled to a priest.

We can quote that countries like Tanzania armed robbery is almost unknown. This suggests that the root cause of armed robbery lie not in want of

Before passing this Bill and before executing its supreme job of protecting the innocent members of the public from violent crimes, the House should undertake a heart-searching examination to see what effects this Bill is likely to achieve; what effects it is likely to have on our innocent people, and what achievement there is for us as the legislators. This House must be satisfied beyond any doubt, from all the facts available and from serious examination of all aspects of the Bill that this is the only solution left. The Bill amends S. 296 (2) and S. 297 of the P.C. to read:

"if during the course of or immediately

"I have taken all consideration of the implications after the commission of an offence under of these accused, but I'm bound to pass this section (that is robbery with violence) any grievous harm inflicted upon any person

other than a participant in such offence,

every person affected by the offence who

is shown to have inflicted such harm shall

sentenced to death."

The stress is on 'shall be sentenced to death.' This section seeks to add another capital offence of murder. Mandatory sentences are a nuisance, they should be avoided whenever possible. 'Shall' instead of 'may' means the justices will have no alternative but to send the culprit to the guillotine.

majority of our people, including ourselves, are Under S. 296 and S. 297 of the P.C. by 18th August, 1971, and 18th September, 1971, these were mandatory sentences.

The justices found it necessary to give these people maximum sentences, since the sentences were mandatory. It was reported in the Daily Nation that two people were accused of street robbery and were sentenced to a total

of 32 years for attacking and robbing a person of £20 and some documents. If we had passed the Bill these people would have had to hang. On 26-8-1971 the

east african Standard reported that a magistrate sentenced two people to a mandatory sentence of 14 years each for robbing a person of £1 such a person would have hanged.

On 31-8-1971 the Daily Nation reported that two youths, both aged 19 years were sentenced for 14 years each for robbing Shs.5/60 from a woman. The judge said:

'I have taken all consideration of the mitigations of these accused, but I'm bound to pass the minimum sentence imposed by the law of this

They too would have hanged. On 13-9-1971 Onyango Amos of Kakamega was sentenced to 14 years with 24 strokes for robbing someone of £5.

In this amendment if 'shall' is not removed then the sentence shall be mandatory. 'May' gives the justices a discretion whether the offender has caused enough grievous harm to warrant him to die..... If the criminal suspects the possibility of arrest, he will try to eliminate anyone who might live to tell the story.. Although he will be hanged, he will have taken the lives of so many people. Capital punishment is no solution to armed robbery.

As long as our economic set up is such that the majority of our people, including ourselves, are continuing to amass property and live side by side whereby the poor members of our society, even if this Bill is passed armed robbery will never miss in this country. So long as manifest social injustices are permitted to exist in our society ...

As long as the country is divided into have and have-nots, and so long as the have-nots see no future or hope of ever having anything, armed robbery will continue with or without the death penalty. A man desires living only when life is

worth living for. I would like to say here that life is not worth living if it is a life of misery. Death is therefore not feared by desperate people. Should the power to mete out death penalty lie with the sometimes inexperienced magistrates?

Rehabilitation of criminals rather than punishing him by sending him to the guillotine is most desirable. The criminal is never concerned with the probable result of his actions. So what is his immediate concern: to carry out his objectives, accomplish what he was out to do. This determination obliterates the deterrent effect of capital punishment. Passing this Bill amounts to an abdication of the Government's duty to try and eradicate violent crimes and also a betrayal of the fundamental rights entrusted to us, as members representing the constituents. Prevent rather than cure. There is no need to come and eliminate crime when they have taken place. Find out the root cause of armed robbery. Why mainly banks, and only certain banks? Who are behind them?" 2

This rather long quotation from the speech of the late J. M. Kariuki is a comprehensive speech covering each and every aspect of the problem in issue. At most, it is a

self-explanatory speech. He pinpoints clearly what the

Government should do as a starting point: find out the

root cause of the problem of robbery with violence with

the help of substantial data, and verify the effect of

death penalty on the potential criminals and the

general society. Then he goes on to explode the myth

about capital punishment in its having deterrent effect.

A thorough analysis reveals that the legislators especially

those who supported the Bill approached the issue with

a closed mind; that is, they had decided once and for all

that capital punishment was desirable. They were very

much bent on seeing the amendment go through. As such

they became emotional and upset and got carried away by

the numerous newspaper reports of cases of armed robbery,

forgetting that the newspapers use exaggeration in their narration. Such sentiments and attitudes should not be

Month of Armed Robbery	Number of Months	Number of Involves	
January	1	1	24-C.V.
February	2	4	24-10Y each
March	1	1	24-C.V.
January	1	1	13-D
February	1	1	13-D
March	1	1	13-D
January	1	1	24-C.V.
February	1	1	24-C.V.
March	1	1	24-C.V.
April	1	1	24-C.V.
July	1	1	24-C.V.
November	1	1	24-C.V.
January	1	1	24-C.V.
February	2	3	24-10Y; 13-8Y and 12S
March	1	1	13-8Y and 12S
April	3	3	24-C.V.; 13-8Y; 13-8Y
May	1	1	13-8Y; 13-8Y
June	4	5	13-8Y; 13-8Y
July	3	10	13-8Y; 13-8Y; 13-8Y
August	1	1	13-8Y
September	1	1	13-8Y and 12S
October	1	1	13-8Y
November	1	1	13-8Y
December	2	3	13-10Y; 13-10Y; 13-10Y and 12S

by the law and had no discretion to award a sentence lesser

than 14 years which was mandatory. As for the present Act,

the text provides for a mandatory sentence as

J. M. Kariuki pointed out, for the word "shall" leaves no

discretion on the justices for it connotes a mandatory

sentence. But even after the passing of the Hanging Act

in 1973 the justices still award lesser sentence against

the one stipulated by the Act. The table below shows the

sentences meted out to robbers using violence as recorded

in Kisumu Resident Magistrates' Court after the passing of

the Act.

Abbreviations:

1

C.V.

S

D

10

M.P.

DI

A

M

Number of Years

Charge Withdrawn

Strikes

Death Sentence

Notified

Not to Prosecute

Discharged

Accused

Minor

Year	Month of armed Robbery	Number of Cases per Month	Number of accused involved	Sentence
1974	January	6	8	3A-10Y each; 3A-AC; 2A-C.W.
	February	3	4	4A-12Y each; and 10S
	March	2	5	1A-10Y; 4A-C.W.
1975	January	2	4	4A-AC
	February	1	1	1A-D
	March	2	3	2A-10Y each; 1A-10Y
1976	January	5	10	2A-10Y each; 3A-AC; 5A-C.W.
	February	1	2	2A-8Y each
	March	3	6	2A-10Y " ; 1A-AC; 3A-C.W.
1977	April	2	2	1A- 8Y; 1A-9Y and 10S
	July	1	1	2A- 8Y each
	November	4	3	2A-10Y " ; 1A-AC; 3A-C.W.
1978	January	1	1	1A-10Y and 10S
	February	2	3	2A-AC; 1A-8Y and 12S
	March	3	4	1A-D ; 2A-C.W.; 1A-8Y and 15S
	April	3	8	5A-D ; 1A-M; 1A-C.W.; 1A-7Y
	May	2	2	1A-C.W.; 1A-AC
	June	4	5	1A-2Y; 3A-C.W.
	July	3	10	4A-Di ; 4A-AC; 1A-C.W.
	August	6	22	22A-C.W.
	September	3	5	2A-Di; 2A-C.W.; 1A-5Y and 5S
	October	1	1	1A-N.P.
	November	5	8	4A-C.W.; 4A-Di
	December	2	3	1A-10Y; 1A-12Y; 1A-13Y and 10S

Abbreviations used:

- Y - Number of Years
- C.W. - Charge Withdrawn
- S - Strokes
- D - Death Sentence
- AC - Acquitted
- N.P. - Nolle Prosequi
- Di - Discharged
- A - Accused
- M - Minor

The deduction from this table is that the judges and magistrates, the justices of the peace, are hesitant to mete out the death penalty to even the guilty armed robbers, though as we have seen from the wording of the section introduced in the Hanging Act, the sentence is mandatory. The question that one is inevitably led to ask is: Why are the justices not complying with the stipulations of the legislation? From the table, out of 67 cases involving 121 robbers only 6 were sentenced to death. This can be explained by Gardiner's statement that:

"I never can help asking myself why, when one is called upon to superintend an execution, one should have been affected with such an acute sense of shame. There must be something fundamentally wrong with a law which has the effect of lessening the self-respect of those whose duty it is to carry it out." 3

The same goes for the magistrates and judges. One judge was asked whether he went to witness an execution. He said that it was not his duty to go down to the sewers. But his interlocutor reminded him that even builders went down to the sewers to check its strength. The justices are ever haunted by the fact that human life must be respected, as expressed by one writer:

"In our country the lesson has been learnt that the respect for human life is best inculcated by the State itself refraining from taking life in the name of the law." 4

In England in the 18th century Elizabethian times juries daringly refused to convict where the death penalty seems too harsh. This seems to be the exact case in Kenya. Justices tend to provide incarceration rather than capital sentences.

III (2) The death penalty in the independent African States:
a brief survey

A cross-section survey of African ^{States} using capital penalty indicates unwillingness by the various legal systems to execute their capital sanctions even though provided for in their laws.

In Angola and Mozambique death penalty was abolished as part of Portuguese law. The Portuguese Political Constitution abolished the death penalty in 1867 and extended this to its African territories in 1870. In Liberia by S. 232 of its Penal Code, the offenders are hanged for murder, but for a long time no sentences of death were carried out because the Chief Executive, as a matter of conscience, would not sign the necessary documents. In the Cameroons in 1966 - 1967 in the "Affaire de Tembel" it was indicated that 17 persons were sentenced to death, but all had the sentences commuted to life imprisonment by the Head of the State. According to the U.N. Report, 1972, Togo had death penalty but there had been no executions since independence, and so was the case of Chad. Tanzania said that the Government was considering capital punishment

with a view to "its possible further restriction or total abolition." In Ethiopia, the death penalty was retained and till 1957 in its Penal Code there was a provision that hangings could be public. Yet there is evidence that more death sentences were passed than were usually executed.

In most independent African States Customary death penalties were abolished on attainment of independence. Presently we find that even though the penalty is provided for in those states, yet on the same token by which the customary death penalties were abolished, that is, as being uncivilised, unprogressive, and on humanitarian grounds based on good conscience i.e. sanctity of life, mandatory death sentences are subject to commutation by the executive clemency.

Kenya in its U.N. report on the use of capital punishment, referred to the death penalty awarded only for murder and treason and outlined its legal safeguards. It said that the question of total abolition of capital punishment was under constant review. But we now know that Kenya's submission to the U.N. was false. Instead of focusing on the total abolition of capital punishment, on the contrary, it has sought to increase its scope of application. Kenya should stick to its determination of total abolition of the death penalty, especially for armed robbery taking into account our ideologies, such as sanctity of life, social systems and our culture as

portrayed in the customary punishment. There should be rehabilitation of the offender rather than destroying him or making him feel an outcast. We should strive to instil into him a sense of belonging to the community.

how much money had been stolen in a given period, how much was recovered and how many guns had been recovered. These types of questions do not give an insight into the causes of this particular crime, its trends, what particular sanctions should be legislated to meet it and what underlying penal policy is attached to the particular policy, and lastly, what benefit that sanction will confer on the individual criminal and the society at large.

I submit here that the Kenya legislators were far too shortsighted and dealt with the matter superficially, their minds being plagued with vindictiveness and spirit of revenge. As a result they plunged into putting into action a machinery bent on total destruction of life rather than saving it.

IV: 2. Capital punishment: an argument for abolition

The subject of capital punishment is very debatable and much has been said on both sides.

The death penalty is remarkably effective in causing the offender to disappear from the scene. But it is uncivilized and inhuman. The questions posed are: What social benefit is derived from such a total elimination? How far does the death penalty affect the potential offenders apart from its effect on the person executed, there is no possibility of recidivism, no need for therapy, or reform or long periods of incarceration. The death penalty is said to be economically cheap and getting rid of an immediate problem,

danger or nuisance. That many criminals are hopeless cases and had better be put out of the way instead of incurring expense to the State. It is usually a sufficient reply that the injury to humanitarian sentiments involve in wholesale killing of social ineffectiveness would far more than offset the saving in money.¹ Capital punishment is not an effective deterrent.² Not all potential murders or armed robbers or any other type of offender calculate the difference between execution and protracted imprisonment. Does the death penalty make any difference to the crime rates? There is no unequivocal answer.

As the late J. M. Kariuki rightly pointed out: "A criminal is never concerned with the probable results of his actions. So what is his immediate concern? To carry out his objectives and accomplish what he was bent on doing, come what may. If the criminal suspects the possibility of capital arrest, he will try to eliminate anyone who might be ready to tell the story."³

Thus the offender might have to kill more people to erase all possible traces of his action so as to evade arrest and his own execution.

Deterrence implies using the one to be executed as a means to the end of regulating the behaviour of others. Such coercion through example is unacceptable in a civilized and rational society. The greatest deterrent is fear of arrest.

Article 5 of Universal Declaration of Human Rights
Stipulates:

It is "Nobody should be subjected to torture or to cruel,
inhuman or degrading treatment or punishment." 4

The Constitution of Kenya S. 74(1) Provides:

"No person shall be subject to torture or to inhuman
or degrading punishment or other treatment."

Therefore capital punishment as penalty for armed robbery
must be abolished. The police are known to use force and
even torture to obtain confession from those apprehended.
Witnesses do perjure, and perjury by a witness can lead to
condemnation of an accused. If perchance due to such
technicalities of procedure and substantive law in detention,
apprehension, and conviction, a person is put to death, it is
absurd in the eyes of the law when it is found out later a
case of mistaken identity that the offender should not have
hanged. Kenya Government would indicate the

life by the Government and its subjects, as a

Capital punishment clearly denies the well known concept
~~of~~ and sanctity of life. This concept is an essential value
for the state to support, and disregard for that tends to
lower respect for life in the public mind. How does one
reconcile the concept of sanctity of life with a bizarre
attitude as held out by Lord Lugard that beheading and
drowning are humane.⁵

insufficient and the stigma attached to trial and conviction

Article 6 of International Covenant on Civil and Political
Rights Stipulates:

"..... every human being has the inherent right to life. This shall be protected by the law."

It is therefore absurd that the state should take life for economic reasons such as that it is too expensive to support offenders such as armed robbers in protracted periods. In the Memorandum of Objects and Reasons of the Kenya Penal Code (Amendment) Bill, 1972, it was stated that:

"No additional expenditure of public money will be incurred by reason of the enactment of the Bill."

A seemingly correct interpretation of that is that there would be no economic loss when the Bill is enacted. Thus to the Kenya Government the death penalty is economically cheap. This runs counter to almost universally accepted moral and social principles. Therefore it is only desirable to abolish the death penalty as provided for by the Hanging Act, 1973. The abolition of capital punishment by the Kenya Government would indicate the reverence for life by the Government and the subjects. As a result, in the long run, incidences of crimes involving threat or actual taking of life and related crimes would decrease.

According to U.N. report⁶ there was no significant difference to be found in the crime rates of countries before and after the abolition of capital punishment. Following this report one can assert that, the long imprisonment and the stigma attached to trial and conviction are equally deterrents as the death sentence, particularly in the third world to which Kenya belongs. It is now

accepted that protracted imprisonment has been no less effective in countries that have ceased to use capital punishment.

According to the Memorandum of Objects and Reasons of the Bill, the object was to "render persons participating in violent robbery subject to the death penalty." The mode of execution is "hang by the neck until dead." This entails strangulation. Before the last hour of the offender comes, this period before execution constitutes cruel, inhuman and degrading treatment or punishment for the condemned person. Finally, it is a ghastly scene to see the condemned person hanging on the gallows.

Reason and experience tell us that killing is a

The justices have not always found it easy to be left as society's final arbiter of life and death and some of the correctional workers charged with the distasteful task of carrying out the penalty have been troubled by their macabre duties. There is a common sense and factual evidence to support the argument that the magistrates are less willing to convict when the penalty is death.

Dublin's Report ⁷ is a survey of 611 cases he investigated in the U.S.A. of these, 86 were killed resisting arrest, 54 committed suicide, 13 died before arraignment, and of the 458 remaining only 43% were declared guilty. Eight were sentenced to death, 170 to prison and 9 were released.

As an illustration of the guilty conscience on the justices for failure to uphold sanctity of life, one eminent judge was asked whether he had witnessed an

execution, in reply he said that he had not as a duty to go into the sewers. His interviewer said, "Nevertheless, engineers have a duty to test the building and normal function of sewers."

Since punishment consists in the infliction of pain it is good and just if and to the degree that it serves the common good by advancing the welfare of the person punished or of the rest of the society.⁸ The societal utility of punishment is achieved only if punishment is geared to resocialise the offender by reintegration into the society.

Reason and experience tell us that killing the criminal will not undo the crimes, or prevent other crimes or bring justice to the criminal or benefit the society.

Edwin Mordard⁹ in his book "Convicting the innocent" says that punishment is irreparable. This he said when he presented 65 cases of "justice gone astray", of which 29 were erroneous conviction for murder.

3. The question of the alternative

Most of the countries ^{using} capital punishment do so because as yet they have not devised a suitable alternative. These countries have not found a penal measure equally drastic and yet more humanitarian. Life imprisonment which is itself a "living death in prison", for it involves giving up of hope of regaining a normal life-style. It also involves physical and mental deterioration. Thus it is not a suitable or sufficient

Government has set up

alternative to the death penalty. In some cases, life imprisonment demands more resources and is generally reduced to a term of years. These prisoners are sometimes released on grounds of mercy and compassion. In Kenya this is under Presidential Prerogative of mercy, i.e. Presidential Amnesty. What then is the best alternative?

The theory of punishment which hinges on rehabilitation and reformation gives us a clue. The Kenya P.C. S. 296 (2) provided:

"Anyone who uses violence in a robbery would be subjected to imprisonment term of not less than fourteen years and not more than twenty years together with corporal punishment and hard labour."

This term of imprisonment first, ensured that the period of incarceration was definite, secondly, it provided for hard labour, thirdly, there was corporal punishment which was purely for chastisement purposes, fourthly, the period of confinement gave an allowance for a reformatory programme as indicated in chapter one. The State should take it as a responsibility to ensure that it engages in a programme which will be of benefit to the criminal by offering him basic knowledge in skills like masonry, plumbing, tailoring, shoe-making, arts and crafts etc. If a professional man, say a teacher is a criminal he should be made to appreciate the value of his knowledge and how best he should put it into better use instead of wasting it on criminal activities. This sounds an ambitious and pretty expensive programme, but it can be attained by going in stages. The Government can set up some institutions or reformatories

IV. which are specially designed to meet this end. Of course the flaw in this is that the unemployed would rush to commit crimes to get admissions into these institutions where the inmates have a decent life.

The Government of Kenya has got prison farms. These should be used as a groundwork for introducing and imparting agricultural knowledge to the inmates. The prison industries should be enlarged and strengthened in their educational roles to the prisoners, and some more prison industries be set up. In this way the society will benefit because when these people are released, hopefully, they will no longer be a menace to the society and to the individual criminal he would be accepted back into the society. If the Government is able to provide them with job opportunities the better. If an armed robber is executed, his total execution would only mean his elimination from the society and how does this serve the individual? The answer is difficult to find. The criminals should be sent to hospitals and the sick persons to jail.

In Saudi Arabia if a thief steals, his hands are chopped off. Since this law amputation of arms was introduced, no thefts so far have been reported. The fact of being seen without hands, which is indicative of one being a thief acts as a deterrent. Perhaps the Kenya Government may consider this type of sanction although it too is severe.

? what?? better die man!
↑
the more shift!

IV. 4. Conclusion

Within the scope of this dissertation it is time to conclude.

First, we began by examining what punishment is. After an examination of various attempts by writers to define punishment, we came to the conclusion that since each attempt had flaws, we could not possibly have a conclusive but only a generalized definition of punishment. This in effect means that one's definition of punishment will be dependent on one's approach to the goals justifying punishment.

There are several theories of punishment. One theory, the theory of defence which is geared to the protection of society by elimination of the potentially dangerous man by confining him. But this means that such a person would be denied his fundamental right of expression, where he is fond of giving verbal threats, and movement when he has actually done no wrong save his dangerous character. This would amount to detention.

The second theory is that of deterrence. That deterrence is fundamental to any legal system. By severe infliction of pain to the offender, potential criminals would be deterred. Critics have offered criticisms amongst which are that there is no rationale for inflicting pain on one person to benefit the society. That if deterrence by pain-infliction is desirable then punishing the innocent would achieve the same end too.

The third theory is retribution. This theory sees the

criminal as a dirty and evil fellow and he must therefore suffer. This theory has been criticized as being inhuman. The critics say that the criminal is a sick man and should be treated with an aim of healing him rather than intensifying his illness.

The fourth theory is that of Rehabilitation. The prisoners should be made to realise their value in society as a good citizen^s. The prison punishment should not only be punitive but also reformatory. This will help in reintegration of the offender into the society. The criticism levelled against this theory is that very few countries are willing to carry out such an expensive programme. We noted that instead of engaging in theoretical gymnastics we should face empirical problems and solve them.

We saw that the traditional African penal sanction was based on the concept of restitution and compensation, as opposed to the Western penal measures which are generally punitive. The offender was made to retribute on lines which awaken in him a new concept of his relations with his fellow men. Thus the popular tune was reparation of the damage, the restitution of the equilibrium. There was recognition of the fact that punishment for vengeance purposes or sheer punitive measures does not reform a person nor benefit the society.

It is unbecoming to the integrity of any legislature to enact a legislation which would have demanded of the legislators to take into account our ideologies, social systems and culture. In the legislative debates, one M.P. Mr. Nthenge rightly pointed out that no body was instituted to investigate the cause of that robbery with violence issue and its solution. Such a body would have had to start with conventional theories of punishment, both traditional and modern; use criminal data before the Act was passed and come out with the causes, trends and solution to the

problem of armed robbery. Yet we see from the debates that with superficial arguments coupled by emotions the legislators passed the Act. Mr. P. N. Muryasia, instead of showing concern for human life and social values, advocated capital punishment for economic reasons saying that high incidences of armed robberies and thefts discouraged prospective investors. *A myopic attitude towards sanctity of life.*

A survey of the cross-section of Africa indicates that although some countries have the death penalty as a sanction, this is hardly put into operation. The reason being that the deterrent value of this penal measure is ostensible. Most constitutions of the African States and U.N. Declaration of human Rights harp on that inhuman treatment as undignified and undesirable and that the state is entrusted with the task of safeguarding its citizens' lives.

Kenya is a developing country. She is thus pressed from all sides by different ideologies from the East and West. It is imperative therefore that she should not ignore all those elements which might help her, and which would contribute to her development. Where she has a valuable human experience, as in her traditional theme of criminal resocialization and the Western abandonment of the death penalty like Britain where the State itself compensates the victim of armed robbery and the concentration on prison education programmes, she should be in a position to judge for her betterment. She should be ready to get much beneficial inspiration from the East and West but at the same time be on guard against some ready made answers which may not suit her.

Kenya will not be able to accomplish her goals of having a welfare state free from crime by importing sterile stereotypes from the East and West which do not respond to our cultural reality.

To conclude I reiterate and defend the contention that the execution of a criminal is an abdication by the State of its duty of humane governance of society and therefore *I advocate that capital punishment in Kenya be abolished.*

governance of society and therefore I advocate that capital punishment in Kenya be abolished. REFERENCES

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