P R O S T I T U T I O N A N D T H E L A W I N K E N Y A : A Socio-Legal Inquiry.

A dissertation submitted in partial fulfilment of the requirements for the Bachelor of Laws Degree, University of Nairobi.

B Y

M U M O M A T E M U

NAIROBI JULY, 1980.

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D E D I C A T I O N

To my MOTHERS : (i) GRACE MWELU MATEMU and
(ii) PRISCILLAH MUEKE MATEMU

who, for no fault of their own, have had their analysis of everything narrowed down to what the Bible says.

A C K N O W L E D G E M E N T S

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GENERAL INTRODUCTION

This study focusses on the analysis of the law as it is applied to the socio-legal phenomenon of prostitution. There is particular emphasis on the relationship between the legislative and the subsidiary legislative provisions against prostitution, and the rights and freedoms of the individual in Kenya. These rights and freedom are now enshrined in Chapters 5 of the Constitution of Kenya, which Chapter is now popularly known as the Bill of Rights.

The discussion is approached at two levels. The first is a theoretical analysis of the problem. This part focusses on the socio-legal history of prostitution in Kenya and also identifies the current law against prostitution. Included here is also an attempt to explain why the law against prostitution in Kenya takes its present form, and a brief analysis of bourgeouis theories on the relationship between the law and morality, with a particular emphasis on the concern of the law in the practice of prostitution.

The second level examines the actual mobilization of the law against prostitution. The aim here is to see both how justice is administered on those flouting the law against prostitution, and the "prostitutes" understanding of the function of the courts with regard to the practice of prostitution. Further, the examination of the mobilization of the law against prostitution is in effect a test of the practical credibility of bourgeois reasuring as to the role of law in the enforcement of morality. It is, thirdly, a test of the honesty in the propoundment of these theories.

The research of the mobilization of this law was mainly conducted in Mombasa. The first reason behind the choice of Mombasa is that prostitution seems to be at its highest there, due to high tourists population. The second reason is the writer's acquaintance with the nature of this problem in Mombasa, due to his having officiated in Mombasa's Tononoka District Magistrate's Court (where all "prostitutes" in Mombasa District are prosecuted) for about two months.

The general observations resulting from this study are that:-

(i) prostitution as practiced in Kenya now is as much a child of colonialism as the neo-colonial economy we continue to cherish.

(ii) that the present law "against" prostitution in Kenya aims at regulating its practice in the country and not abolishing it, and this is in keeping with capitalists' aim of allowing their workers to continue using prostitution as a means of discharging the emotions and fatigue they accumulate in the factories and offices.

(iii) that prostitution in Kenya now is a result of socio-economic circumstances and it would be a mistkae to blame it on individual moral inclination, a factor responsible only for isolated cases and not the mass prostitution we have in Kenya today.

The conclusions and suggestions for Reform are supposed to be inferences from the main body. The suggestions are made for the whole country, though the research was mainly conducted in Mombasa. This is because though prostitution is higher in Mombasa, than in inland towns, the difference is not very great.

CHAPTER I

THE ORIGIN, CAUSES AND DEVELOPMENT OF PROSTITUTION IN KENYA.

In this Chapter, an attempt is made to answer the following questions:-

(i) When was prostitution "born" in Kenya and why at that particular time?

(ii) Was there, in pre-colonial Kenya, any practice identical in nature to that now commonly known as prostitution? and finally

(iii) How, since this "birth" of prostitution, has the "Native" come to be involved in it?

Discussion in this paper will be limited to prostitution as practiced by women. Of course male prostitution (homosexuality) is rising in numbers in Kenya, but the submission here is that it has not clearly gone beyond being a matter of individual moral pervasion. On the other hand, attributing such a reason for the practice of prostitution in Kenya, especially in the country's urban centres, would be evidence of a Misconception of the real nature of this problem.

DEFINITION, EARLY TRACES AND LEGAL HISTORY

The Encyclopaedia Britnaica[1] defines prostitution as a term that refers to ".....the promiscious batering of sexual favours for monetary considerations (either cash or gifts) without any emotional attachement between the partners". Collier's Encyclopaedia[2] says that prostitution is "the practice of submitting to sexual relations, usually sexual intercourse, for pay".
These definitions do not depart from the popular understanding of the term prostitution and therefore we need not waste more space and time on the meaning of the term.

No authority has been found suggesting that there was any form of bartering of sexual favours for payments in the purely traditional African communities, before the impact of colonization. The reasons for absence of such practice could be said to be obvious. Life in traditional African Societies was mainly at subsistence level, exchange economy being limited to the barter system. There was no Monetary factor in this economy. Instead of being tought how to become a successful business agents, or accountants, therefore, the African female was, from her infancy, subjected to progressive coaching on the principles of good womanhood. The young men spent their youth learning to do the "manly" jobs under the guidance of their fathers and grandfathers. And different tribes in Africa did not differ substantially in their ideas of a good woman or a real man.

It is of course not possible to single out a particular year as the time of birth of prostitution in Kenya. But as early as 1913, there was local legal evidence that prostitution had come to Kenya[3]. In this year, a local amendment to the Indian Penal Code[4] (which had been the local code of Criminal Law since 1897), was enacted. This amendment contained provisions against the practice of prostitution[4A] and could be said to constitute the first recognition of the presence of prostitution in Kenya, in numbers large enough to warrant legislative attention.

The crime of prostitution was not merely a creature of law. It was a product of the changing socio-economic conditions and the law merely responded to this change. Infact the whole idea behind applying English law, first through receiving English law as codified in India[5] and later by local ordinances, was to institute socio-economic change which was a necessary consequence of colonialism.

Law was merely playing its part in this change. The Indian Penal Code was received in Kenya in 1902[6]. It was amended in 1914[6A] to contain provisions against prostitution. The Indian Penal Code as amended in 1913 continued to form the bulk of Criminal Law in Kenya upto 1930[7] when a comprehensive local code of criminal law replaced it. This 1930 Code, with only minor amendments, is the same we have today in the name of Penal Code having only acquired a different Chapter number in the laws of Kenya [8]. The provisions against prostitution have not undergone the slightest amendment since 1930.

We find from the foregoing from a historical reflection, prostitution appears to have come with colonialism and taken root together with the British Settlements. We will later find out that it was passed on to and adopted by, the indigenous people just like other colonial notions; like Christianity, bourgeois individualism resulting into narrowing of the family institution, exploitative tendencies and bourgeoisie property holding systems.

PROSTITUTION AND COLONIALISM : The Wider-Plan-Legal Relationship

Why did prostitution begin to appear in Kenya only after the coming of Europeans? Wherever a substantial number of Europeans settled, they sought to take with them their law . The aim was to live as European a way of life as possible even in places abroad. This was the tendency whether the settled place was a protectorate, a colony or only a protected territory. The 1889 Africa Order in Council, for example, received into British colonies the substance of English law. Again the High Court of Eastern Africa created by the 1902 East Africa Order in Council was to exercise jurisdiction in

accord with the Indian Penal Code and the India Civil and Criminal Procedure Codes[9], which codes were mere codifications of English law.

The Scramble for Africa was at its highest at the close of 19th Century. Our part of Africa was seized by the British. In accordance with the reasoning in the foregoing paragraph, we will therefore examine what the British way of life was at the time of colonization. In doing this we will be trying to identify the way of life that the colonizers brought here.

By the 1890's capitalism had overthrown ~~fundalisms~~ feudalisms. The industrial revolution had gone quite far in changing capitalism from its primitive and competitive level towards wider monopolistic levels. It was at this time that prostitution grew in numbers to problematic heights. The reason for this growth was the following: at this time dispossed and dispossessed people of Britain moved into towns in great numbers, to sell their labour to the industrialists. They were crowded together "under wretched conditions, their leisure occupations restricted and their everyday work emotionally unsatisfying" [10].

This state of affairs placed in such a situation that they had no choice but to seek alternative means of getting their sexual and other satisfactions since they did not have the time to acquire these through the usual way of socializing. They found in the money medium a fitting substitute. No wonder then that prostitutes, with varying degrees of involvement in the practice, began to emerge. These grouped themselves according to the piecemeal divisions created among the workers (in reality a single class of people) by their employers[11].

The prostitutes catering for the foremen and various branch managers were not the same as the ones offering themselves to the unskilled, manual labourers and the most effective criterion of classification was the beauty and sophistication of woman. We therefore see that rather than prostitution being a product of mere creativity of minds, it was forced on the people by socio-economic trends, that is, socio-economic and material conditions.

The rush by European powers for control of Africa has always been for exploitative purposes. The ways of perpetuating exploitation have, though, changed from time to time. The first mode was by the extraction of raw materials for industries back home. The second was the obtainance of labour for use in plantations in the Americas. The shortcomings of these two devices were soon to be seen. Lack of efficient, advanced means of transport rendered such early agents of imperialism like the Imperial British East Africa Company unable even to balance up losses with gains. Secondly, it soon proved expensive, harzadous and unpaying to transport labour (read slaves) to the places intented. The reason was that the inland-to-coast movement was threatened by wild animals and lack of food and fresh water, just as much as the transport by sea was faced by rough seas and poor marine technology.

It was much cheaper and convenient to exploit Africa from within, on its own soil. Manouvres like the dual mandate theory of Lugard[12] were used to justify the British Settlements in Africa. There was, anyway, less stigma in using African labourers on African soil. Through the administrative or legislative machinery of appropriating labour, enslavement would become less direct.[13]

Paschal Mihyo correctly observes that bourgeois philosophy and economics ".....thrives on innovation" [14] adding the fact that "stagnation would kill them and expose them as anticipated fallacies" [15]. This is why colonialists, though they never compromised their thought that their way of life was superior to that of the natives, let the latter continue applying to themselves their own law so long as this did not interrupt the exploitation process, or, as the colonial law put it "not repugnant to justice and morality".[16]

The colonialists knew how to tactifully condone habits which though morally very questionable were necessary in the exploitation process. In Britain, as we have seen, prostitution was one such habit. Later, in the colonies, prostitution served the same purpose as it served in the mother country that is,providing to the workers a means of filling the gap left in their emotional lives by the monotony and fatigue of the factories and construction sites. The concern of legislatures in prostitution (as will be emphasized later) was only to make those involved observe regulatory rules. These rules aimed at upholding some minimum moral standards and therefore preventing prostitution from constituting obvious public nuisance. Analysis of any capitalist legislation against prostitution will show that bourgeois legislatures concentrate on prohibiting soliciting and the keeping of brothels.[17] The only prostitute legislated against directly is the "common prostitute" and this is in the identified spirit of bourgeois law against prostitution.[18] This law is therefore always regulatory, never eliminatory.

THE INVOLVEMENT OF THE NATIVE

This has been touched on in the foregoing discussion and will now be taken up further. In Kenya the introduction of Urbanisation and Industrialization had the same socio-economic consequences as in England, for it was a stretch of the English way of life across the seas. Prostitution among African women is therefore analysed to the general impact of industrialization on the dispossessed Africans. Disposession among the Africans resulted from the dislocation of African social and economic institutions by the insubordination and illegalization of tribal ways of maintaining law and order as well as such labour manipulating devices as the reserve and kipande system. In fact rise in the numbers of African prostitutes was only kept down at this time by the movement restriction laws and regulations. [19]

At Independence, some of the movement restriction laws [20] were scruped off while those that remained were, except in the North Eastern areas of Kenya, no longer seriously applied. This means that unlike colonial times, people could now travel into and out of towns with lesser risk of arrest. The relaxation of the Vagrancy Act's mobilization is seemingly a recognition of the fact that vagrancy is another of the logical follow-ups of Industrialization.

The relaxation of movement restriction laws combiness with another factor in producting a high influx into towns. This second factor is the education system inherited from our colonizers and retained even upto now.[21] This educational system was not at all geared towards the needs of our country, especially in post-Independence days. It is therefore no wonder that every year a large number of people leave high school without

any particular skills or training. A.F. Muslim found the general movement into towns to be over 50,000 persons per year[22]. These people move into towns because there is no gainful employment for them in the rural areas. In the towns there is nothing for them to do either, the "No Vacancy" signs are not rare in any town.

Very soon, the school leavers discover as a fact that survival in the country is a matter of relentless, hard struggle. They find that their relatives in the towns are neither too willing nor too able to support them for the whole moment of job-seeking. The young women become criminals. For the young girls the going is easier. The petty bourgeoisie in towns give them offers that are too hard to brush aside, either in terms of job prospects or in other material expectations. By the time most of these offers prove fruitless, these girls, having been invited to parties and known what is expected of them thereafter, are no longer young, naive girls. They are prepared to respond without hesitation, to the inevitable demands of town life.

It is hard for these school leaver girls to be caught by the law against Vagrancy, idle and disorderly persons, or rogues and Vagabonds. Being young, suspicion on them of being thieves or decease carriers will be much less than is usually the case on hardened-looking open-market prostitutes. Demand for them will therefore be so high that it will rarely be necessary for them to solicit in the streets. They will have a ready market in the middle and older middle age workers and businessmen, as well as from the young men.

So long as these women are not soliciting in the streets, they will not get any bother from the law. And even when in the streets, so long as they do not solicit openly, the law will remain unconcerned. The Mombasa Municipality By-law against "loitering for the purpose of prostitution" [23] for example nets only third rates. The merits and demerits of such laws will be examined in the second Chapter.

CHAPTER II

CONSTITUTIONAL, LEGISLATIVE AND GENERAL LEGAL PROVISIONS RELEVANT TO PROSTITUTION.

INTRODUCTION

This Chapter is in three major sections. The first section will constitute an analysis of the provisions of the constitution of Kenya and their being on the practice of prostitution in the country. In section two, we will analyse the legislative enactiments and by-laws which have a bearing on prostitution. In the final section an attempt will be made to integrate and explain the results of the discussions in Sections ONE and TWO.

The discussion in the first section will centre on the fundamental rights and freedoms of the individual as stipulated in Chapter 5 of the Constitution of Kenya [24]. The reason is that those who practice prostitution are as much parts of the community to whom the constitution guarantees these rights and freedoms as successful thieves in the clergy or smugglers. Again, we will in Section I and II confine ourselves to analysing the legal documents mentioned. The reason is because we are in these Sections set to identify the present law against prostitution both in the Government's law books and in form of the authoritative interpretations by courts. This is an endavour to look at both sides of the legal coin.

THE KENYA CONSTITUTION AND THE PROSTITUTE

Discussions on the constitution of Kenya often have to begin with a mention of the Constitution's Section 3. This section deals with the hierachical position of the constitution in relation to the other laws of the country[25]. It is an amending section on all legislative enactments so that subject to a few exceptions[26], any other law not in line with the constitution is, to the extent of the inconsistency, void. Section three is strengthened by the provisions of section 46 (i) of the constitution which says that legislative power in Kenya shall be exercised "subject to this constitution".

Having established the superior position of the constitution as against any other legislations in Kenya, we can now analyse the constitutional provisions relevant to the practice of prostitution. These will be the provisions generally refered to collectively as The Bill Of Rights[27].

Section 70 guarantees to every Kenyan, regardless of extraction and such other personal aspects, equal rights and freedom of the individual. These rights are listed in paragraphs (a) to (e) as, inter-alia, the right to life, liberty, security and protection of the law, freedom of conscience and the right to privacy and property. This section however provides extensive qualifications to these rights. Since all qualifications to the rights and freedoms given in the bill of rights are identical, these qualifications will be discussed in later sections.

Though we do not wish to reproduce the provisions of the Bill of rights, those most relevant to our discussion will first be laid out briefly pending analysis . Section 72 prohibits deprivation of personal liberty except in a manner authorised by law. The qualifications to this right can be summarised as follows : One is not deprived of his liberty if he is held in execution of a lawful sentence or other order of court, or upon reasonable suspicion of having committed or about to commit an offence under the laws of Kenya, in case of suspected lunacy or vagrancy to prevent harm to oneself or to others, or in order to prevent entry into Kenya of an unwanted person or the escape from the country of some restricted person.

Although section 76 prohibits arbitrary search on ones person or property, such is not wrong if done for, among other reasons, protection of public morality or for pormoting rights and freedoms of others. Section 78 which deals with freedom of conscience has identical qualifications. Section 81 provides that "No citizen shall be deprived of his freedom of movement, that is to say, freedom to move freely throughout Kenya, the right to reside in any part of Kenya.....", but its sub-section (3) (b) of this section subjects this freedom to the usual qualifications. The other sections of the Bill of Rights are of remote relevance to our discussion here.

The first thing to note here is that there are, on most of the sections of the Bill of Rights, no local court decisions at all. The reasons for this state of affairs will be exaplained later in this Chapter. In Shah V. The Transport Licensing Board[27A], Chanan Singh, J (now late)

gave a judgement on the weight of section 70 of the Bill of Rights. Noting that the section begins with the word "whereas..." the judge held that though given a separate section number, This section ".....is quite clearly in the nature of a preamble....." [28] which gives a list of rights and freedoms protected in the ensuring sections. Chanan Singh made this clear by holding that "section 70 may help in interpreting any ambiguous expression in later sections of Chapter 5, but it itself gives a right or freedoms".
In analysing the ensuing sections we will take it as a settled rule of law that interpretation of the constitution is governed primarily by the same canons of interpretation as statutes and deeds.[29]

According to section 72, though no person should be deprived of his liberty, there is no legal or constitutional deprivation where the act in question is done, inter-alia, " (e) upon reasonable suspicion of (the deprived person's) having committed or being about to commit a criminal offence under the laws of Kenya". But obviously, even the law passed with the greatest breaches of legislative procedure is presumed to be constitutional until otherwise proved. This means that upto such time, this obviously defective law will form part of Kenya's laws. Even a subsidiary legislation remains valid until a declaration that the power delegated by the legislators to the body making this subsidiary legislation has been exceeded.
We now see that so long as a law exists in some written form, an act done under it will be constitutional, even if the law itself is later declared unconstitutional. Even after one succeeds in getting a law declared unconstitutional, he may find himself without a remedy against the author of the act in question. The reason is because section 72 (1) (e) guarantees the depriving person from liability so long as his act was based on reasonable suspicion of the commission of an offence.[30]

Under section 76, no person should be subjected to arbitrary search of his person or property. But where the search is being done for, inter-alia, "(a) the interests of.....public morality, public health,.....or (b) (If) reasonably required for..... promoting the rights and freedoms of other persons", this right is not contravened. Here too the word reasonable appears, thus limiting this right as said of section 72.

References has already been briefly made of the freedom of movement in section 81. We only need to add that if one is in lawful detention or is restricted in movement for, inter-alia, appearance in court at a later date for trial or other legal proceedings, this freedom is not violated.

From the qualifications we see that it is a very remote circumstance that a law will be declared unconstitutional by reason of its contravening provisions of the Bill of Rights. It will be validated either by the interests of public morality, public security or the court will find that the applicant has not shown on balance of probabilities that the law in question contravenes the interests of democracy. The qualifications in the Bill of Rights are so wide and vague that they tend to be ways of taking away all the rights through a different door.

The remedies available to citizens for breach of their rights seem very much in the air. Firstly, only the High Court has jurisdiction on matters of constitutional interpretation. Subordinate courts are required to refer a matter, after finding that it raises constitutional issues, to the High Court.[31] In Kenya, High Court judges are less than twenty in total. Delays will obviously be too long. Again, procedures in High Court matters are so costly and complex that the victims of the law against prostitution will find it impossible to pursue them. In fact if graduates in disciplines other than

law keep asking (and in good faith) the difference between "Lawyer", "Magistrate" and "Advocate" it would be most unrealistic to expect a prostitute to know what a "Chamber Summons"[32] or a "Notice Of Motion"[33] is. No wonder then that research has not unearthed any such application.

We have already noted that even if some adventurer succeeds in getting a certain law declared unconstitutional, he may find that as against the author of the act in question he has no personal remedy so long as the act was done on reasonable grounds. We need only add here that for the determination of the "reasonable grounds" issue one may find themselves having to file a separate suite in tort.[34] This is because while the constitutionality aspect is determined through a mere application which can be heard by a judge in chambers, an action for a tortious wrong (and an action based on the deprivation of freedom of movement constitutes the tort of false imprisonment), must be through a plaint and must be proved through calling evidence. This, anyway, seems to be the inference from the provision of section 84 (i) that a right of application is a right on top of the other legal rights so that it is available ".....<u>without prejudice to any other action</u> with respect to the same matter <u>which is lawfully available</u>.....".
The most, this provision does is to make an exception to the rule of res judicata;[34] still leaving the "reasonable and probable cause"[36] defence to the tort of false imprisonment available to the depriving person. And no circumstance will be more reasonable than the fact that the arrest was affected pursuant to some written law which only turned unconstitutional later.

We now end up with two propositions:-

(1) That in Kenya it is almost impossible to prove that a certain law is unconstitutional by reason of its contravening the Bill of Rights, except for those few by-laws that have been so declared. The fact that the Vagrancy Act has in fact been declared constitititutional[37]

makes the probability of the law against prostitution being delcared unconstitutional very low.

(2) That even if an unconstitutionality application succeeds the applicant has no personal remedy except through a fresh suit in tort whose success is not forthcoming. This is so despite the obvious expense and inconvenience of such a process. Prostitutes anyway, are more interested in their freedom than in such legal niceties. They would readily choose to pay any fine they can afford and go back to the market, than sanction such a process.

For these two reasons, therefore, the constitutionality of the legislative enactments and by-laws against prostitution will, in the following section, not be doubted. But while these laws will be assumed to be constitutional, we will attempt in the third section of this Chapter to explain why the Bill of Rights is worded so evasively on such important matters as the rights and freedoms of the individual.

THE LAW AGAINST PROSTITUTION: A POSITIVISTIC ANALYSIS

It is noted on the outset that authoritative discussions on these laws are very scanty. The reasons are obvious. These cases are normally decided by the Third Class (Lay) District Magistrates. Appeals from there go to Resident Magistrate (but no such appeal has been found in Mombasa Resident Magistrate's Courts Criminal Registry since January, 1976.) This means that the matters rarely reach the High Court. Again, the people are rarely represented by Counsel, so there rarely are any occasions of deep legal analysis. Research on mobilization of this low (to be analysed in Chapter 3) will show that in fact pleas of "not guilty" on these charges are very rare. To the women the Government is as interested in the fines as they are interested in going back to work, especially during the "high season"[30]. They only trust that between one arrest and the next they will have earned enough to pay another fine and remain with a surplus. Court fines therefore soon become an item in the women's budget.

All sections refered to in this part of Chapter II will, unless otherwise stated, be of the penal code.[39] Section 153 makes it an offence for any male person to knowingly live, wholly or partially, on the earnings of prostitution, or to persistently solicit or importune for immoral purposes. By Sub-section (2) of this section, the fact that a man is living with, or is habitually in the company of a prostitute or is found "to have exercised control, direction or influence over the movements of a prostitute (in a manner suggesting his) aiding, abetting or compelling her prostitution with another person....." will be enough proof that he is living on the earnings of prostitution. The elements of this offence are that if one is charged with soliciting, the soliciting must be persistent and it must be for immoral purposes. If charged with living on the earnings of prostitution, there will be no need of proving that one lived on these

wholly, but it must be shown that he controls a prostitute's movements or aids and abets her prostitution with another person. He must have done all these acts knowingly.

Section 154 is exactly identical to 153, only that it concerns cases where the offence is committed by a woman. In both sections as in all other sections on prostitution, the offence is a misdemeaner. Section 155 empowers magistrates to issue warrants of search on any place being used for prostitution by any woman or girl, for purpose of arresting those involved. But this must only be done on some information given on oath and the magistrate must find the suspicion reasonable.

According to section 156, any person who "(a) keeps or manages or assists in the management of a brothel, or being a tenant, lessee or occupier, or any person in charge of any premises, knowingly permits any such premises or any part thereof to be used as a brothel.....is guilty of a misdeameanor" (emphasis mine). Paragraph (c) stretches this offence to any lessor or landlord knowingly letting his premises for the purposes of prostitution, being a party to or condoning the use of his premises for such purposes.

In the case of R.V. Stephano Wanyee[40] it was held that for the offence of keeping a brothel to have been committed, it must be shown that the accused"...took part in the care, government or management of the premises in question". The court followed the English decision in R.V. Barrett[41] where it had been held that a landlord cannot be convicted of keeping a brothel merely because, having notice of the nature of the occupation, he does not give the tenants

notice to quit. In Sudanese V.R.,[42], it was further held that "keep" implies use for more than one occassion. In Wanyee's case, it was observed that the Criminal Law Amendement Act of 1885[43] whose section 13 (3) made it an offence for a lessor or landlord to let his premises for the purpose of prostitution, knowing that they will be so used, was occassioned by the wanting state of the previous law. In this respect Kenyan law is remedied in paragraph (c) which reads the same as section 13(3) of the above refered Act.

According to section 182, "the following persons :-

(a) Every common prostitute behaving in a disorderly or indecent manner in any public place, (b).....
.....shall be idle and disorderly persons and are guilty of a misdemeanor...."

No local case has considered this term. But it could be said that if a magistrate will have in mind the standard of proof required in criminal cases, this offence will catch only that prostitute who is such a nuisance to the whole business that even if she were in the legal profession she would be struck off the roll of practictioners for grossly unethical conduct. It will otherwise be impossible to prove that a woman is not merely a "prostitute" but actually a "common prostitute", and this beyond any reasonable doubt.

The Municipal Council of Mombasa, in section 29 of its 1969 General Nuisance by-laws,[45] provides that it is an offence for any person to, in any public place or street "(a) loiter or importune for the purposes of prostitution, (b) procure or attempt to procure a female or a male for the purposes of prostitution or homosexuality.....".

For this offence one may be liable to a six months imprisonment or one thousand shillings fine or both. We have already pointed out that the actual mobilization of this by-law will be considered in Chapter 3 of this paper. We will only proceed here to identify the origin of the Municipality's power to pass this by-law.

Section 201 (1) of the Local Government Act[46] authorises local authorities to make by-laws for the maintenance of safety, health and well being or good government of the people of its area, and for preventing nuisance. It is seemingly in concequence of this section that these Mombasa by-laws are called "General Nuisance" by-laws. The exercise of the power given in section 201 of this Act is though subject to section 202 of the Act. Subsection (3) of section 202 provides that a local authority legislation may not override the provisions of any other written law in force in Kenya at present. Now, does the Mombasa by-law conflict with the provisions of the Penal Code?

As outlined, the relevant sections of the Mombasa by-law provide that soliciting or importuning for the purposes of prostitution or homosexuality, or procuring or attempting to proceure a female or a male person for prostitution or homosexuality purposes is an offence. The penal code provides that it is an offence for a male or a female person to knowingly live wholly or partially on the earnings of prostitution, keep a brothel or be a common prostitute behaving in a disorderly or indecent manner in any public place or street. In the penal code therefore there are no direct provisions on the person who herself decides to practice prostitution.

While the mischeif rule[47] of interprating statutes may be applied to the penal code to cover the prostitute herself, any good counsel or magistrate would warn on stretching the rule that far. The Municipality of Mombasa therefore sought in this by-law to make the law much clearer[48]. The legislature, since 1930, has never made this move. The submission here therefore, is that the Mombasa Municipality (General Nuisance) By-laws of 1969 are not incosistent with the provisions of the penal code or with sections 201 and 202 of the Local Government Act under which these by-laws were enacted.

GENERAL OBSERVATIONS

The following summary can be drawn from the two foregoing sections:-

(a) That it is a remote probability in Kenya that a law, especially a legislative enactment, will be found unconstitutional by reason of its being inconsistent with the constitutional provisions of the Bill of Rights.

(b) That even after, a law is declared unconstitutional, the applicant has no personal remedy (read compensation) except through a fresh suit, despite the obvious hardship and expense since the day of the act giving rise to the application.

(c) That even this fresh action is almost certain to fail (and costs to be awarded against him) since the defence of "reasonable and probably causes" in tort is impliedly guaranteed in the constitution.

It must be added here, that having in mind the low level of literacy in Kenya, too few would be expected to know even of the existence of these legal dynamics. This in fact is ture of most laws. It is therefore unrealistic to expect the average Kenya to sanction them. The question of how many prostitutes have ever even seen a copy of the Kenya Constitution is therefore, hard to answer without the possibility of over-estimation (most undergraduates come across it only at the University and some finalists in the Engineering Faculty say they still have never seen it). The practical significance of Kenya's Bill of Rights therefore leaves alot to be desired in a country supposed to adhere to democracy and the rule of law.

THE REASONS FOR THE IDENTIFIED LEGAL POSITION

We noted in the first Chapter that the horizons of capitalism are hard to define, having, with the advent of imperialism, grown from its primitive level before the industrial revolution to the present stage of international capitalism. It was further pointed out that capitalism thrives on creativity and therefore tries as much as possible to keep abreast of socio-economic changes. The aim is always to perpectuate and enhance the system. For an explanation of this with regard to Kenya we will reflect on our country's constitutional history.

By the late 50's and early sixties, the British in Kenya, as in other colonies, had noted the hard fact that their conventional mode of exploiting colonies through controlling their industrial and commercial as well as administrative sectors had become an outdated device. At this time, from the look of nationalist movements, they had no option but

to hand over the administrative sector. They sought to evolve a way of assuring themselves that change of flag would not at all affect their commercial and industrial domination. This proposition finds credibility both in the outcomes of constitutional bargains[49] and in the length of time taken to finalize the burgains.[50]

The colonialists aimed at, and succeeded in, pushing into independence constitutions as many characteristics of the Westminister Constitutional Model as they could. The Secretary of State, during the 1960 Kenya Constitutional Conference, actually expressly admitted this This was one way of the colonialists of making sure that the economic status quo would remain in post-independent days. A second way of so doing will be given later in this section. Pursuant to this first method of continuance of economic control, some clauses could not be compromised. The sanctity of property had to be entrenched in no lesser legal document than the constitution[52]. This was a direct reception clause on the "Laisez-faire" economy, after which both Britain and the New Kenta group[53] must have sighed with relief. We will shortly show how they assured themselves that this clause would be retained even in post-independent days.

But what is the relationship between both the objectives of capitalism and the modes of achieving these, and the present state of the Bill of Rights? We have expressed the view that without creativity and resourcefulness, capitalism cannot stand against revolutionary ideas. This has been true whether in the colonies or in the motherland. Back in Britain, for example, when by middle of 19th Century, it had been seen that bourgeois excess were getting intolerable, they evolved the doctrines of equity, natural justice and good conscience.[54]

These were ways of clothing these excesses (especially regarding land tenure) without actually effecting any substantial corrections of the system.

In the same manner in the colonies, by inserting a Bill of Rights in the supreme legal document of the land, they would satisfy the majority of Kenyans that people would henceforth be seen as equal individuals irrespective of colour (or lack it) creed or tribe). The local people would then settle down with the feeling that oppression was not forthcoming. This would of course be in inadvertence to the fact that a few people (and fewer of them local):-

(i) owned and controlled all vital means of production,

(ii) though not actually owning labour, had managed to firmly control labour through the act of separating it from the other means of production. We will go into further detail about how control of labour was achieved.

Most of the settlers in Kenya were self-styled farmers. When they had settled in Kenya in numbers great enough to constitute a settler population they sought means of manipulating and maintaining labour for their farms. The first of these devices was the wage system which failed within a very short time. The reason was that since most of these farmers were totally unskilled in farm technology, yield had to be low and therefore the wages, unless the farms were to be run at a loss. Ostensible, cover-up reasons were, though, invented, like:-

> The native's use of money is in most cases so limited that an increase in wages does not increase in wages does not increase his welfare, but only his idleness and indulgence in bad habits.[55]

OR

> The native mind is immune to the operation of supply and demand.[56]

When the wage system failed, taxation was substituted for it. This, though failed also due to high collection costs as well as evasion. Other devices, either legal and quasi-legal or merely administrative, were sought. Among these, the reserve system[57] proved most successful and has been a paramount factor in the divorce of labour from other means of production.

The boundaries between reserves, as well as those of each reserve, were fixed. This means that the total amount of reserve land was fixed. Inter-reserve movements by natives were much controlled also.[58] Hannah Obeto asserts[59] that the fixity resulting from the reserve system had great "devasting effect on African social structures".[60] At this same time landholding systems in the Africans started narrowing up towards the individual. Lack of balance between this narrowing and advancement in agricultural technology resulted into big drops in yields from land just as the change of land tenure brought landlessnes, fragmentation and sub-economic parcelation.

From this time onwards, most natives had either no land at all or not enough land. Both these groups had to work for wages (therefore to find employment somewhere) or starve. At independence, the landlessness was enlarged by legislations like the Land Adjudication Act[61], and the Registered Land Act[62]. These laws also worsened the fragmentation and parcelation problems. The Land Consolidation Act[63] enacted as a check to the parcelation and fragmentation problems has had minimal effect.

Government-run loan agencies like the Agricultural Finance Corporation[64] have only succeeded in raising the number of the landless. These agencies are supposed to give loans to farmers for use in developing their parcels. But little effort has been made to educate these so-called farmers on elementary farming skills. As a result of planting the wrong crops and using inappropriate fertilizers and tools, great losses are made and these farmers cannot repay the loans as they fall due. Their parcels are therefore auctioned and the "farmers" join their other landless colleagues in the City where they can try their hands at various temporary casual undertakings.

We are now in a position to make the following summary:-

(1) That there is a very large number of landless people (and the recruitment to landlessness goes on) who must find employment if they will survive;

(11) That even those with land, majority of them have parcels that are too small to support them and they must therefore find work to supplement the incomes from those parcels.

These two points show that through operation of some artificially created legal and economic situations, the owners of means of production have placed even labour squarely at their control.

The above analysis mainly refers to mannual labour. This does not mean that mental labour (also called skilled labour) has not been controlled also. Control of this has been through the sublte means of establishing a large number of filters. The aim here is to make sure that only the best local brains form the ranks of skilled labour. At professional level, the checks are even tighter. The aim all through is to keep efficiency at the same level and they would rather use expatriates than slacken the filters. The use of expatriates anyway means nothing more than effecting international transfers of skilled staff from the parent companies to overseas branches.

Given the total control of all means of production (including labour) by others, freedom of movement to the dispossessed, even if it were absolute, would mean very little. It amounts to no more than the freedom to wonder about until, due to lack of energy, occassioned by lack of food and the effect of poor sanitation, they would be unable to wonder any more.

Yet, it would take some time for these dispossessed people to realise this. During this time, the colonialists started effecting what Hannah Obeto terms as counter-revolutionary measures[65]. This was achieved through recruiting a group of local men to the petty bourgeois sub-class, with identical interests as those of their foreign counter-parts. To quote Jean-Paul Satre.[66]

"The European elite undertook to manufacture a native elite. They picked promising adolescents; they branded them with red hot iron, with principles of western culture....."

The above explains why, in the Kenya Constitutional Conference, a high property factor as determinant of who could vote, was insisted on[67]. Again, those in the non-local petty-bourgeois class who had not bothered to become citizens saw how important it would be in post-independent days to control their industrial and commercial interests from within. They therefore pressed for, and succeeded in getting, an "automatic citizenship" clause in the constitution.[68]

The reasons for so extensively qualifying the fundamental rights and freedoms as to make the bill of rights a bill of exceptions, was because there was need for a device of withdrawing from society through constitutional means any person who tried to enlighten the people on the whole bluff. He would be detained either for public security, public morality, etc. While at their enactiment, the laws against vagrants and those against idle and disorderly persons were labour manipulating devices[69], their retention in post independence days were for different reasons. Their scrupping would allow too many dispossessed people in towns. This would naturally make it rather unsafe for those few with enough to eat and to spare (and most of these live in towns). This the question by Ghai and McAuslan:[70]
"How realistic was it to expect that the system of administration would change overnight in the direction of greater liberalism?" goes quite deep into the heart of the matter.

THE UNIQUE (WORSE) CONDITION OF WOMEN

While the conditions analysed above with regard to control of labour obtain on both men and women, there are several features peculiar to women only. Before and shortly after independence, many African fathers did not believe in educating their daughters. Again, colonial mission schools seem to have encouraged male dominance in education. For these reasons, illiteracy in Kenya, even upto now, is higher in women than in men. Yet with landlessness, conflict of cultures and the introduction of monetary economies, parents have less firm grips on their daughters. For the women then over and above, the financial motivation to leave home (it is now rather hard to get from parents enough money for several dresses and good looking shoes) is higher. There is also encouragement that it is now much easier to do so.

Owing to the said illiteracy, there is a large group of women in towns who cannot get jobs. When they get them, the jobs are rather insecure because from her jobless colleagues, a replacement is always readily available to the employer. The wages are low, yet the cost of living is too high in towns, and is rising rather fast. The women therefore have two alternatives:-

(1) To continue working and suppliment their earnings with quasi-prostitutional occupations after work or;

(11) To leave work altogether and concentrate full-time on prostitution.

In both cases, it is a struggle to keep the body and soul together; a very noble objective; and while the paramount determinant in this choice of evils is the economic one

just given above, the second determinant is obviously the looks of the decision maker. Fluency in English language may take the third position. But in this matter of pure survival struggle, morality will clearly play a rather remote role, especially after the initial, amateur stages.

This survival struggle is no longer peculiar in any type of low-income group. Our lecturers in the Faculty of Law are fully engaged in it in the following sense : Apart from lecturing in the University where they have their full-time jobs, they lecture part-time in commercial colleges or engage in such programmes as "Radio Lawyer" where their services may be needed. Those with practicing certificates do part-time practice while others have resigned altogether to concentrate on private practice. Those without practicing certificates are putting maximum effort to get them (and sitting the same tests with their former students at the Kenya School of Law does not bother them in the least). Now, are not these diversified struggles pursuing the same objective, that is, survival?

One thing gets clear from the foregoing lengthy narative. This is the fact that whether one is an office messenger or a University lecturer, it is no longer possible to live comfortably on ones salary alone, and the supplementation struggle is hotting up. Those without any professional (stricto sensu) services are forced to look arround themselves for any possible alternatives. For our limitedly educated women, prostitution is one of them. If they could lecture part-time anywhere they would most probably prefer this to going to bed with different partners every night, some of whose intentions they cannot even be sure.

The draftsman of the law against prostitution therefore had a most challenging assignment. He had to draft a law that strikes a balance between maintaining this necessary practice (being one of the very few of the worker's emotional outlets as well as the prostitute's source of income) and streamlining it so that it does not expose the rottenness of capitalism in the Jurry box" [71] The seemingly evasive manner in which the law against prostitution is drafted is not therefore any evidence of negligence. Far from that, it is wholly deliberate. It intents to allow prostitution to continue as well as punishing those going beyond the recognised limits.[72]

Bourgeois scholars have categorised prostitution as a topic of study only in abstruct jurisprudential studies of the relationship between law and morality. They have, though not yet considered the immorality involved in spending one million shillings on the Safari Rally while their house "boys"[73] cannot pay school fees for their children, owing to the fact that the fees are twice the amount of the salaris of the boys. These bourgeois opinions of law and morality will be considered further in the Third Chapter. They will also be compared with the results of research with a view to identifying their practical credibility.

CHAPTER III

LAW AND MORALITY: THE PROSTITUTION EXAMPLE AND KENYA SCENE.

Introduction:

In this penultimate chapter, we will: (1) attempt a brief focus on bourgeois views as to the role of law in the enforcement of morality generally, and in the eradication of prostitution in particular, (2) Apply these views as identified, to Kenya's socio-economic and other particular local circumstances, and (3) finally, look at the actual mobilisation of the law against prostitution in Kenya with a view to explaining why the mobilization takes the form it will be shown to take.

It is not intended to dwell undully on analysing all bourgeois literature on law and morality. There is too much of this now anyway. We will only restrict ourselves to what is necessary in framing a theoretical prelude for integrating our research data with the theoretical arguments. The aim will be to test the practical credibility of the theories.

Bourgeois theories on the legal enforcement of morals:

In 195', a Committee was appointed in England to study the proper extent of involvement of law in various aspects of morality[74]. Its report, finally released in 1957, had as its crux paragraph 13 which though mainly concerning homesexuality, could be taken as a general expression of the Committee's view on the proper concern of law in Morality. This paragraph says:

> Our own formulation of the functions of criminal law so far as it concerns (this) inquiry ..... is to preserve public order and decency, to protect the citizen from what is offensive or infurious and to provide sufficient safeguards against the exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced or in a state of special physical, official or economic dependence.

Further, this report expressed the view that it was not the functions of Criminal Law "to intervene in the private lives of citizens or to seek to enforce any particular pattern of behaviour",[75] any further than is necessary and unavoidable in achieving the goals spelt in the above-quoted paragraph. While indicating that they did not wish to condone private immorality, they recommended that homosexuality between two consenting adult males in private should no longer be criminal. Regarding prostitution, the committee was of the view that law should only be concerned with taking it out of the streets.[76]

This report seems to have sparked off a series of views on the subject of law and morality. Lord Devlin, in his public lecture on "The Enforcement of morals"[77] was the first to offer a major reaction to Committee's views. Devlin agreed that there are some areas of

private life in which the law has no business. He expressed the view that the state must justify in some way, "the punishments it imposes on wrongdoers" and advocated for a definition of the function of Criminal Law in simple terms" as the preservation of order and decency and the preservation of life and property of citizens ....."[78] This general theory would then be elaborated in each particular situation in the way it was done in the Wolfenden Report. According to Lord Devlin, the criminal law that carries out these objects will undoubtedly overlap moral law.

Lord Devlin continued that society is the outcome of a community of ideas, not only political, but also regarding the governance of life and behaviour. The latter he called the society's morals and added that if men were to create a society in which there is no fundamental agreement about good and evil, "they will fail; if having based (the society's formation) on common agreement, the agreement goes, the society will disintegrate".[79]

While recognising the impossibility of drawing a general limitation line in every circumstance, Lord Devlin was nevertheless opposed to the idea of "private" morality. According to him, it was no more possible to talk of private morality than we could talk of private treason, which would be an absurdity.[80] His test of whether or not we should punish an immoral act is whether it so offends "the man in the clapham omnibus" or the man "in the Jurry box"[81] as to make him regard it "with intolerance, indignation and disgust". Immorality then, for the purpose of criminal law is simply "what every right minded person is presumed to consider to be immoral"[82]

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Beyond such levels, the law will have to put up with "toleration of maximum individual freedom" so long as it will be consistent "with the integrity of society"[83]

Many bourgeois jurisprudents have written on law and morality, but the major debate has been between Devlin himself, Hart[84], Mill[85], and Fuller[86]. Professor Hart says that what the law, in enforcing morality, guards against is not necessarily disintegration of society. It could be radical change, and the reason is that once a group of men have developed a common form of life rich enough to include a common morality, this ought to be preserved. In support of an earlier stand by Durkheim, Hart defines crimes as a serious offence against this collective conscience of society, at the point where its bonds are strong and precise.[87]

Though Hart purports to oppose Devlin, it seems that his "strong and precise" test does not differ from Devlin's own test of "intolerance, futignation and disgust". This is because both tests permit a degree of toleration as well as devising a general test for discovering excesses to this toleration.

Hart further defines punishment as being a passionate reaction against the offending of the society's collective conscience; a symbolic expression of the outraged common morality the maintenance of which is the condition of cohesion resulting from men's likenesses. He ends up identifying two morality divisions (1) that common law morality which is essential to any society, containing those prohibitions that are essential to any society of human beings whatever (2) those moral convictions in each society which are essential to it.[88]

John Stuart Mills "On liberty"[89] is added into this discussion due to its emphatic consideration on the rights of an individual in society. Mill says that the only reason for which power can be rightfully exercised so as to deprive him of his freedom and liberty is to prevent harm to others. His own good, whether moral or physical, is not a sufficient excuse.[89A] Restraint of personal liberty is justified only if necessary for the community's self protection, otherwise no society is free unless human liberties, in their absolute and unqualified form, exist in it. To Mill, therefore, the probability that repeal of a law against some aspects of immorality would lead to increase in commission of the act, is immaterial. If the act is not harmful to other members of the society, then it matters not whether its commission rises.

Fuller chose to approach the discussion through categorising morality into (a) the morality of aspiration (b) the morality of duty[90]. This latter one, Fuller says, lays down the basic rules without which an ordered society would be impossible; those basics without which a society geared towards certain specific goals would fail off its mark. The rules regulating these basic expectations are, in most cases, in a forbidding rather than authorising form and condemn individuals not for failing to utilise the fullest opportunities for the fullest realisation of their capabilities, but rather for failing to respect the basic requirements of social living.[91]

For living upto these basics we do not as often reward men as we leave them unmolested and unpunished and concentrate on those whose conduct falls below these minimums. At levels above these, however,prizes and honours begin to operate, and we are already in the realm of the morality of aspiration. It would be both

hypocritical and senseless to bring such matters of subjective capabilities and personal choice into the governance of the law. Fuller ends up listing eight principles of legality[92] which legislators directing themselves properly should follow, not towards the utopia of total perfection, but so far as realistic circumstances permit. He suggests that these principles could be collectively termed as the internal morality of law and will be present in every legislation properly passed as suggested above.

A NOTE ON BOURGEOIS "CONFLICTS" OF VIEWS:

All bourgeois scholars' conflicts of views on the role of law in the enforcement of morality are in the abstruct[92]. Their views are actually unanimous on the substantive point that the law should enforce only a certain degree of morality; leaving behaviour above such degree to depend on private and personal inclinations and views. Whether the approach is through Mills "harm to others" test, or the Wolfenden Report's "purely personal actions", Lord Devlin's test of disgust to the Jurry box or Hart's "strong and precise" test the ultimate conclusion is the same.

Those who have specifically considered the problem of prostitution report in one voice: Take it off the streets, but do not pursue it any further.[93] The ostensible reason is that once off the streets, it becomes a matter of private choice. We have of course, in the second chapter explained our submissions as to the true reason. We will later in this chapter, show how research results support our opinions that in Kenya the way the law against prostitution is mobilised suggests Kenya's endorsement of bourgeois theories on the concern of law in this aspect of morality.

A Focus of bourgeois theories to the Kenya Scene

A generalised view of morality would be hard to arrive at. For example, in a bus, a man feels bound by a moral duty to give up his seat to a pregnant woman who cannot get another. The moral feeling in the mind of a prostitute's son that he was born out of an illegal agreement between his mother and a man whose name not even the mother knows, is also an aspect of morality, but one of a totally different nature. We could, therefore, instead advert to realistic experiences[94] like the following excerpt from a local magazine[95].

> One man we interviewed ..... had picked up the young girl in the bar and headed for the room in one of the dilapidated flop-houses along river-road somewhere. As she opened the door - locked on the side - the hall light fell on a little girl lying on a small bed. She stirred and woke up. She could have been hardly six .... but she knew the score.
>
> She put on her flip-flops, whispered something to her mother and left the room. The man was taken a back by the sight of a little girl no older than his own ..... being subjected to the incredible trauma of seeing her mother return with a different man overnight.[96]

This story was narrated by a participant in prostitution, as a personal encounter. He continues that halfway through the affair, he noticed some other movements on the same bed and;

> His consternation suddenly turned into horror as he realised that the person sharing a bed with their "armour" was a tiny tot who could hardly have been a year old.[97]

In the assumption that there is a high degree of truth in the story we could proceed to examine the effect of this practice on various other people.

It was indicated earlier in chapter 2 that colonial and even some post-indepedence artificial circumstances created a majority of low-income Urban persons (not necessarily all workers, employment itself being hard to come by). To save for food and school fees, these people can only live in very low income estates. The prostitutes, for these same reasons (plus the special reasons including the fact that the perfumes which can make them look less old are not cheap), live in the same areas. In Mombasa, in addition to Msufi Mkavu, places like Matopeni, Guraya and Bondeni are good examples. The residents range from watchmen and office messangers to prostitutes and vegetable hawkers. There is, therefore, no way the low income people in towns can escape these experiences.

Only prostitutes without children can live in rooms in "Day and Night Club" establishments. This is due to two reasons: ONE: The rents there range between 20 and 30 shillings every day. These quite high amounts imply that hard days may have to be subsidised by days of boom. Only the very attractive ones, therefore, can afford such rooms. TWO: These places being "short" or quick service places,no children can be allowed around since their curious eyes on customers would highly affect the trade.

The conclusion from the above is that even if we were to accept the recommendations of the Wolfenden Report or Lord Devlin's views wholesome, we would still identify a need to legislate against prostitution in Kenya. Even if we adopt Mill's "harm to others" test, we find that ---

the children of the prostitutes' neighbours would, especially due to the general money problem at their homes, be very easily lured into selling their bodies for subsidization. The society would obviously view this corruption of children's morals with intolerance, indigination and disgust. Hart would obviously find such exposure of inhumanity to young people so offending to the society's convictions at their strong and precise points as to warrant hostile reaction from it. The special harm to the children here is that they may find themselves practising prostitution long before they acquire the capacity to make "rational" decisions as to whether they should actually do so. Seen in the light of their practical effect in Kenya, therefore, bourgeois theories on law and morals would still call for legislation against prostitution.

Bourgeois jurisprudence has always been aimed at obscuring the class-nature of legal and socio-economic issues. This is why they analyse problems like prostitution only in the light of that occasional loose-moraled or otherwise eccentric woman or man (including some judges and legislators themselves) whose decision to resort to prostitution could properly be called a private and personal action.[98] The judges and legislators live in spacious areas in city and town outskirts. Their experiences in prostitution when living in Muthaiga in Nairobi or in Kizungo and Nyali in Mombasa[99] is quite limited. And their children are to a very great extent spared these horrors. If Lord Devlin had, for only one year, lived in one of the low-income areas cited here, he would have hastely written a substantive amendment to his views to concur with those of the participan we quoted, on "how degrading and dehumanizing such a life is for women forced into selling themselves."[100]

Talking to a local Magazine, a man who had first undergone the experience of prostitution seemed to have rebutted the argument that prostitution in Kenya could be termed a purely personal action. He wonders how the poor woman in his experience could have been so brutalized "that she could expose her children to so degrading and terrifying sights". He himself had chosen to discharge his sexual pressure through a prostitute that night. Yet after the actual participation, he forcefully felt that prostitution ".... should be outlawed". To him, now it had become "the second most heinous crime to murder". He even adds that no human society could call itself civilised "as long as some of its women are forced to earn their livelihood in such disgusting ways".[101] This is clear evidence of how mere visualization and abstract theories are disproved by a look at the actual problem.

Reasoning From the Viewpoint of the Mobilization of the Law.

Lord Devlin was of the opinion that if several men in a society believed in locking themselves in their houses and drinking excessively, the law may have to abstain from interfering with them despite general public repugnance to such conduct.[102] He says though that if this number rose to 1/4 of the total population the law cannot remain alocf anymore. Since this numbers test is taken as correct here, we will pursue it to see whether the number of prostitutes in Kenya is large enough to warrant the intervention of the law.

It is quite difficult to show through research the exact number of prostitutes in Kenya. This is due to the various modes of practising it. We have even noted that quasi-prostitution is not unknown. But we

could start from Tononoka District Court in Mombasa since this is where all "prostitutes" in Mombasa are prosecuted. The distribution of arrests for various months between January 1977 and December, 1977 was as follows:[103]

1977

	Jan.	March.	June	Sept.	December
Guilty	229	79	73	17	87
Not.Guilty	23	7	17	2	8
Total	252	86	90	19	95

1978

		March	June	Sept.	December
Guilty		65	13	31	87
Not Guilty		3	3	8	1
Total		68	16	39	88

1978

Jan

	Jan	March	June	Sept.	December
Guilty	135	158	53	26	16
Not Guilty	3	3	2	29	4
Total	138	161	55	55	20

These tables show that "Not guilty" pleas for charges of prostitution are very few. Again they show a great fluctuation in the number of monthly arrests and this is the same on daily arrests. The register shows, for example, that the total number of arrests for prostitution on 11th January, 1977 was one hundred and fifty two women. The court clerk and the court prosecutor (a police corporal) attribute this ridiculously high number to a "raid" by the police on the night of 10th January at several known "prostitution areas". But doesn't this imply that earlier ommissions to arrest were deliberate since these places were known? The conclusion is that neither the court register nor the police arrests show a correct figure on the number of prostitutes in the town. They ,though confirm one fact that the number is not by any standards low.

The tables confirm another assertion made earlier; that very few prostitutes wish to waste their time any more than is necessary. Very few, therefore plead "not guilty". In fact most of the not guilty pleas could be from women who only fall victim of arrests but are actually not prostitutes. There seems to be a general mutual understanding between the prostitutes that when one of their number is arrested, they should go to Tononoka Court the following morning with between 300/- and 500/- for fine, repayable after release of their friend. This shows that they have come to programme their lives on the basis of their occupation and even evolved their own principles of self-determination.

The monthly average of arrests for prostitution for the year 1977 was 85. In 1978, it was around 53 and for 1979, 86. For each year, therefore, we could safely assume a monthly average of about 75 arrests in Mombasa town alone, about 95% of these pleading guilty. The yearly average is about 900. Yet we showed in the first and second chapters that only those breaking the rules of the "profession" are arrested. These practising prostitution discreetly and never reaching the courts are, therefore a much higher number

Quasi-prostitutes make the number even higher.

Prostitutes seem to have quite distinctive habits. They sit at hotels sipping soft drinks or taking their time with such other low priced items like salads, "samosas" or "mishikaki".[104] One notices their purpose there when tourist-looking foreigners come to the hotel. Sitting in the late afternoon at the La Foutanella or the New Castle[105], or walking along Moi Avenue (formerlly Kilindini Road) is quite helpful in the estimation of the number of prostitutes in Mombasa. For the clearly "tourist class" prostitutes, one needs to visit the out-of-town hotels in the North or South Coasts.

Imbalances in Mobilization of the Law - A confirmation of the Spirit of the Law Against Prostitution.

Following the letter of law against prostitution, it is as much an offence to solicit for the purposes of prositution as it is to keep a brothel, live on the earnings of prostitution or precure a female or a male for purposes of prostitution or homosexuality. These are all misdemeanors. Yet while we have shown how high the number of arrests for soliciting for the purposes of prostitution is, research in Mombasa Courts' Criminal Registry revealed that since January, 1976, there has not been a single prosecution for keeping a brothel or living on the earnings of prostitution. The provisions against prostitution in the Penal Code, have therefore, for all this time, never been mobilised. In Nairobi, even after the most recent raid into a well-known brothel by the Provincial Commissioner,[106] no such charge was leveled against the proprietor of the place.

Technically it is of course in order for the women to be charged with soliciting. While at the hotels they wink at the tourists, those in the estates sit on stools at their doors, wearing short skirts and inviting customers either by directly saying "karibu Ndani"[107] or more tactfully by "Habari Kijana"[108]. But failure to prosecute the landlords or proprietors of these places shows clearly that the aim of the law against prostitution is to regulate and not to prohibit prostitution. There is all the evidence for arresting the proprietors and applying the decision in R.V. Wanyee[109] against them. They obviously realize the use into which their premises are put when they collect rents from the tenants, yet continue accepting the rents. In Nairobi, the place popularly known by University students as "Hall Fourteen"[110] has been operating continuously for more than ten years now.

Apart from the case of R.V. Wanyee[111], there is no other reported case on the offence of keeping a brothel. Yet in Mombasa, the New Coastal Hotel has been leasing rooms to prostitutes who even seek for customers in the bar itself telling them "twende juu".[112] The owner has been running it personally all through, but there is no evidence that he has ever been prosecuted. Other operating spots include the Kiss Nightclub (formerlly Central Night Club) and Sunshine Night Clubs. Only "the Cassablanca" was closed in 1976, and this was because a murder had been committed there in aggravating circumstances. The high class tourist Hotels, of course, do not offer prostitution facilities so directly. The prostitutes who frequent these places prefer taking their customers to their own houses.

We will combine conclusion and suggestions for reform with a note on the present Government Policy (if any), regarding the rehabilitation of these women. It is of course, already clear that the policy is not likely to raise high optimism on eradication of prostitution in Kenya.

CONCLUSIONS

Before laying down our conclusions, we will briefly try to identify the present Government Policy on dealing with prostitution. This takes the following two facets:

The first aspect is in form of the establishment of a women's section in the Probation Department[113] of the Ministry of Culture and Social Services. This section though is never called into action against hardened professional prostitutes since, as we have shown justice against such prostitutes takes the following form: the arrest is followed by a plea of guilty, then follows the imposition of a fine and the prostitute moves back to the market. Probation, therefore, only affects amateurs and women of tender age.

Secondly, there is what is called the Women's Bureau in this same Ministry. Its work is to try to get the women alternative legal and gainful occupations. While this bureau seems to have correctly diagnosed the problem of prostitution[114], it has admitted its limited ability to solve this problem. The reason is that the Government itself does not provide the Bureau with such alternatives. When it occasionally gets one or two prostitutes something else to do, these still are isolated, naive and, therefore clearly cosmetic solutions to a mass problem, hence no solutions at all.

Apart from these two bodies, there is no other Government policy on prostitution. Our conclusions and reform suggestions will, therefore, be made having this limited concern in mind.

We could say that our conclusions are already clear in the main body of this paper and we only need to summarise them as follows:

(1) That prostitution as practised in Kenya is a child of colonialism and has now grown, as has imperialism, to disturbing levels.

(11) That prostitution in Kenya being therefore more of a matter of socio-economic circumstances, the causes identified by Mr. Gachui,[115] of individual moral convictions and backgrounds, are too abstract to give a correct picture of this problem.

(111) That in Kenya, there is great need to eradicate prostitution; but legislative enactments on this are both unexpected and inadvisable.

SUGGESTIONS FOR REFORM.

This is the most difficult part of this paper. The reason is that asking the Government like Chris. Mulei did in his article on Prostitution,[116] to institute a National Consciousness of frawning at, instead of worshipping, those holding material possessions and money in very high esteem, would be unrealistic. The fact in Kenya now is that money is sacred, and will never cease to be so without a revolution of ideas. Such revolution would not be done in isolation from a revolution of the socio-political and economic principles and structures of the whole country.

While the present system persists, therefore, the Government could only be urged to be less hypocritical and legalise prostutition, subject to the following qualifications:

(I) That one shall operate a brothel only when licensed and no brothel shall be licensed in a residential area under any circumstances.

(II) Enhance the penalties for soliciting for purposes of prostitution or for any form of advertisement of any brothel.

These suggestions may look anomolous. The reasons for them though have already been adduced in the main body of this paper.

LIST OF AUTHORITIES

CHAPTER I

1. The Encyclopaedia Britanica Volume 18, pg.643

2. Collier's Encyclopaedia, Volume 19,pg.425

3. Criminal Law Amendment Ordinance, Cap.78 Laws of Kenya, 1926.

4. (A) Criminal Law Amendment Ordinance (supra) Sections 12(2), 14 and 15.

5. By the 1897 East Africa Order in Council - SRO 1575/1897, p.134

6. By the 1902 East Africa Order in Council - SRO 661.

6 (A) Footnote 1.

7. The Laws of Kenya, 1948, Cap.24 - Commenced on the 1st of August, 1930.

8. Cap. 63, Laws of Kenya, (1962) revised.

9. See the 1902 East Africa Order in Council on the Creation of the High Court and its Jurisdiction.

10. The Encyclopaedia Britanica (Supra) pg.646.

11 This Makes Workers feel that they are not at the same levels. The Urge in each worker ro strive for promotion is a very good assurance of greater production.

12. Lord Lugard: The Dual Mandate in British tropical Africa (Archon Ed. 1965). He expresses this Mandate as being to (1) civilise the natives, (11) stop slave trade.

13. See for example: Resident Natives Ordinances Nos. 33/1918 and 19/1924, Employment of Natives Ordinance, 191 and Thathi wa Mbate V. R. R, 9 E A L R I.

14. The Development of Legal Philosophy (Kenya Literature Bureau 1977) p. 126

15. Footnote 14.

16. See for example, East Africa Order in Council, 1897, article 52 and the East African Native Courts Amendment Ordinance, 1902.

17. See Chapter II Sections (i) and (ii) on Analysis of the Law against prostitution.

18. Sect 182 of the Penal Code, Cap 63 Laws of Kenya.

19. E.g. the Master and servants Ordinance, 1906 and the Employment of Natives Ordinances Nos.4/1912 etc.

20. See for example, Native passes Rules, 1900.

21. Except the Introduction of Technical Institutes, whic are not providing very technical either.

22. See A.F. Muslim. "The Administration of Justice in Urban Kenya"
An article in Urban Legal Problems in East Africa edited by G.W. Kanyeihamba and J.P.W.B. McAuslan Uppsalla, Scandinavian Institute of African Studies, 1978).

23. Municipality of Mombasa (General Nuisance) By-Laws 1969, LN 117/1969.

CHAPTER TWO

24. Act Number 5 of 1969 (in 1969 Kenya Acts).

25. Section 3 Provides that "..... subject to section 47 of this Constitution, if any other law is inconsistent with this Constitution, this Constitutio shall prevail and the other law shall, to the extent of the inconsistency, be void".

26. Foot note 25

27. In the Constitution though Chapter 5 is simply called "Protection of Fundamental Rights and freedoms of the individual".

27A 1971 E.A. 289.

28. P. 298 of Shah's Case (Supra).

29. see for example W. B. Harvey: An Introduction to the Legal Systems in East Africa, (EALB 1975).

30. See Section 72 (e) of the Kenya Constitution (supra).

31. See Section 67 of the Constitution (supra) especially sub-sections (1), (2) and (3).

-2. See generally Order L (50) rules 1, 1(A), 2 and 3 of the Civil Procedure rules (in cap 21, Laws of Kenya).

33. Foot note 32.

34. For the tort of false imprisonment or malicious prosecution.

35. That no fresh litigation may be raised on the same facts and subject matter except on appeal or an order of retrial.

36. See, eg. Humphrey's V. Conners 17 Ir. C.L.R.I

37. Kioko V.R. H/C Criminal Appeal No. 633/1967

38. "High season" is usually the period during Euro-American writers when many tourists came to Kenya fleeing the bitter cold.

39. Cap -3, Laws of Kenya (1962 rev.)

40. 22 K L R 45

41. 9 Cox 255.

42 8 Z L R 106 (Cr.A)

43. The Laws Reports, Statues 1884-5 (48 - 49 Vict.) Chapter 69.

44. 45 L N 117/1969.

46. Cap. 265, Laws of Kenya (commenced 30th August 1963).

47. Or the rule in Heydon's case (1584) 3 Rep. f7, p.18

48. Though most of its provisions Constitute repetitions of the provisions of the Penal Code.

49. Esp. Chapter 5 of Kenya Constitution. Compare its section 75 with the other sections of the chapter, especially the exceptions to each section.

50. The most recent one, on Zimbabwe, took about three months of relentless burgain from both sides.

51. Report of Kenya Constitutional Conference, 1960, para. 11

52. Section 75 of the Constitution of Kenya (Act No.5/1969).

53. Headed by Sir Michael Blundell, now a successful businessman in Kenya.

54. See excerpt from 6. American Journal of Legal History quoted in Harvey (supra) p.527.

55. Roger Van Zwanenberg: Colonial Capitalism and Labour in Kenya, 1919 - 1939 (EALB 1975). p.40.

56. Zwanenberg (ibid) pp.40 - 41, quoting from the 22nd April, 1922 Copy of the Newspaper "The Leader"

57. Okoth-Ogendo: The Legal Organization of Colonial Agriculture, 1900 - 1960: (Department of History Staff Seminar Series, April, 1977.)

58. See for example, the Native Passes rules, 1900

59. Hannah Obeto; The Operation of the Vagrancy Act 1968, in Mombasa District; A dissertation (Africana, 1977).

60. Obeto, (supra), p.4

61. Cap. 264 Laws of Kenya

62. Cap. 300, Laws of Kenya

63. Cap. 283, Laws of Kenya

64. Incorporated Under the Agricultural Finance Corporation Act, Cap 323, Laws of Kenya

65. Obeto, (supra) p.4

66. See Preface to Franz Fanon: Wretched of the Earth.

67. Para. 15: Report of Kenya Constitutional Conference, 1960.

68. Sections 87 and 88 of the Constitution of Kenya.

69. E.g. The Native Passes Rules, 1900, the Hut Tax.

70. Ghai and McAuslan: Public Law and Political Change in Kenya (Oxford, 1970) p. 412.

71. Sir Patrick Devlin: The Enforcement of Morals: (Oxford University Press, 1959, reprint 1965).

72. These limits have been pointed out in Chapter I of this Paper and will be expounded on further in Chapter III.

73. See Zwanenberg (supra) p.54 for the terminology "adult boys" contained in a quotation from a letter by the Secretary, Trans Nzoia Farmers' Association, written to the President of the Unofficial Members Railway Council.

CHAPTER THREE

74. The Committee on Homosexual Offences and and Prostitution C.M.D.247.

Also called the Wolfenden Report (and hereinafter so referred to).

75. The Wolfenden Report; (ibid) continuing p. 13.

76. The Wolfenden Report; paras. 224, 285 and 318.

77. Published first by Oxford University Press in 1959 and Reprinted in 1965 under the same title (hereinafter referred to simply as DEVLIN).

78. Devlin (ibid) p.5

79. Devlin, p. 10

80. Devlin, pp. 13 - 14

81. Devlin, p. 15

82. Footnote 81.

84. Professor of Jurisprudence, Oxford University and Fellow of University College, Oxford.

85. Lon L. Fuller (now late) Carter Professor of General Jurisprudence, Harvard Law School.

86. Only John Stuart Mill's Essay "On liberty"is of direct relevance here, so only this will be discussed. This essay though written as early as 1859 (exactly 100 years before Lord Devlin's lecture) is an important work on liberty and, therefore, has a bearing on Kenya's Bill of Rights - see footnote 89 for citation.

87. See H. L. A. Hart "Social Solidarity and the Enforcement of Morality" 35 University of Chicago L.R. p. 1 - 13

88. Hart (supra) pp. 9 - 10

89. Mill's "On liberty" is now Published in a book called Utilitarianism, On liberty and Considerations on Representative Government (Everyman's University Library No.1482).

89A Mill (supra) p. 72. Also see Generally, Chapter IV of "On liberty", at p.131 of the book (foot note 89).

90. See: The Morality of Law(Yale) University Press) pp. 5 - 6

91. Fuller (supra) pp. 33 - 94 Generally.

92. Esp. comparison of Devlin's argument on disintegration and Hart's opposition that what is guarded against is actually radical change. Also Devlin's theory of numbers opposed by Mill's test of harm to others.

93. See paragraph 224 and 285 of the Wolfenden Report (supra) and page 15 of Devlin (supra).

94. This is the only approach which has no risk of mystifying the problem at all.

95. See: Isabel Mbugua; Night lives. Viva, Vol. 6 No. 1, of January 1980 p.4

96. Viva (supra) p. 5

97. Viva (supra) p. 5

98. Neither the participant interviewed in the Viva article quoted (foot note 95) nor the interviewer fail to realise that prostitution is actually forced on the women. We showed in Chapter I that it is to a great degree also forced on the men.

99. These are mainly high-cost areas. The compounds in each home are large and surrounded with high fences. Often, there is a gate watchman.

100. Viva (supra) p. 5

101. foot note 100.

102. Devlin (supra) p. 113

103. Source: Tononoka District Court Registry, Mombasa Municipality(M.M.) By Laws Registers for 1977 - 1979.

104. These are types of Arab-oriented Snacks. They are now selling in Tourist Hotels and are becoming Tourist favourites.

105. Both these restaurants are along Moi Avenue (formerlly Kilindini Road).

106. Raid reported in Daily Nation, June 8th 1980. Discussed by Chris Mulei in article: "Law and Society; Prostitution" Sunday Nation, June 22nd, 1980.

107. Meaning "Welcome Inside" with an overtone as to the Inside referred to.

108. A greeting which is delivered very invitingly.

109. 22 K L R 45

110. Imani Day and Night Club; beyond Tusker house Bus Stop, at junction of Ronald Ngala Street.

111. Foot note 109.

112. Meaning "Lets go up". There is usually all circumstancial evidence to suggest what they should go to do; in form of extremely short skirts, gestures and other like behaviour.

CONCLUSION AND SUGGESTIONS FOR REFORT

113. This is established under the Probation of Offenders Act, Cap. 64, Laws of Kenya.

114. See Viva, Vol. 6 No. 1 of January 1980, p. 5

115. (Mr. Gachui) Title: Marriage and Prostitution, A theoretical consideration. I.D.S Working paper No. 6

116. Sunday Nation, 22nd June, 1980, p. 30.