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Dr. Omboto John Onyango, PHD

Kenyatta University

ABSTRACT

Even though there are other forms of punishment such as fines, community service order, and probation service among others for convicted offenders, imprisonment is the most commonly applied world over, particularly for felonies. Sending convicts to prison is driven by the belief that incarceration is the best measure of ensuring protection of the society. Nevertheless, imprisonment is also common because it is awarded as an alternative to fines and other financial penalties for petty offenders who cannot afford the financial conditions due to poverty. However, in Kenya like in other jurisdictions, this form of punishment is characterized by weaknesses which have over the years made it a failure in its key mandates of reformation, rehabilitation, retribution, incapacitation and deterrence.

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Even though there are other forms of punishment such as fines, community service order, and probation service among others for convicted offenders, imprisonment is the most commonly applied world over, particularly for felonies. Sending convicts to prison is driven by the belief that incarceration is the best measure of ensuring protection of the society. Nevertheless, imprisonment is also common because it is awarded as an alternative to fines and other financial penalties for petty offenders who cannot afford the financial conditions due to poverty. However, in Kenya like in other jurisdictions, this form of punishment is characterized by weaknesses which have over the years made it a failure in its key mandates of reformation, rehabilitation, retribution, incapacitation and deterrence. This paper which is an outcome of a library research presents a brief origin of this form of punishment globally and in Kenya as well, discusses techniques employed in reformation, the demerits and weaknesses of imprisonment, and analyses its application in Kenya as a developing country. The paper concludes with recommendations on how effectiveness of imprisonment can be enhanced in the country.

Keywords: imprisonment, demerits and weaknesses of imprisonment, kenya.

Author: Crime and Offender Rehabilitation Expert Lecturer Kenyatta University Kenya.

I. INTRODUCTION

Despite the fact that historical records show that custodial confinement of offenders existed in Athens as far back as 353 BC when it was employed in the Athenian Polis (Allen, 1997), imprisonment of offenders as it is known today commenced in Europe between 1600 and 1700 years as a paradigm shift from the harsh and severe punishments which typically involved public torment and humiliation of convicts. It originated in the desire to reform and rehabilitate the offenders in private places which brought in the Criminal Justice System (Mushanga, 1976). In the United States of America, it became common in 1800s while in Kenya, and other parts of Africa, this form of punishment was imported by the colonialists (Bohm & Halley, 1997; KNCHR, 2005).

The fact that imprisonment developed as an improvement from the harsh and degrading public torture of real and perceived offenders does not mean that torture does not take place within prison walls. It was, for example, established that both physical and verbal abuse is common in correctional institutions worldwide. For instance, according to Silverman and Vega (1996), authorized brutal practices such as whipping inmates were still common in the United States of America, particularly in Arkansas and Mississippi in the 1960s. In Kenya, before the onset of prisons reforms in the year 2003, torture and degrading treatment of inmates was a common means of enforcing discipline and compliance in prison institutions (KNCHR, 2005).

To reform and rehabilitate offenders, there are various measures within the prison walls, these include prisoner's vocational training programmes and on-job training such as training

in farming activities meant to equip the convicts with skills by which they should earn a living through lawful means after imprisonment. The trainings are offered based on the assumption that most convicts commit crimes because of poverty occasioned by lack of vocational skills that could enable them to earn a living by honest and lawful means. Imprisonment also employs recreational and therapeutic techniques such as guidance and counselling. There is also provision of basic formal education, and behaviour modification programmes as the offenders are viewed as sick individuals in need of treatment (Tewkbury, 1997).

II. THE DEMERITS OF IMPRISONMENT AS A PUNISHMENT

Though widely employed, imprisonment is marked by several demerits for the prisoners which negate on their reformation and rehabilitation. For example, there is little freedom characterized by routine activities with no opportunity of self-direction given that prisoners' movement is highly restricted (Haralombos & Holborn, 2007). For instance, the prisoners cannot move around as they may wish, they also have limited choice on the food they eat, the work they engage in among other limitations as these are dictated by the prison authorities. Prisoners do not also make decisions on matters that affect them. At times even simple decisions such as when to take a bath is made for them. Prisoners may also be expected to perform intolerable roles that they would not willingly accept in a free society.

It has also been observed that many times the inmates face unbearable confinement conditions under brutal prison authorities. There is also restricted outside social contacts, marked by limited visits that are supervised. Other negative characteristics of prison life are deterioration of convicts' vocational and professional skills, and interruption of family life (Bohm & Halley, 1997). On the offenders' professional regression, for instance, Polisky and Shavell (1999) observed that for the white-collar offenders, the negative impact of imprisonment, stigma and loss of earning does

not to a greater extent depend on the length of the prison term.

As a disruption of family life, Murray and Farrington (2008) observed that parental imprisonment may lead to antisocial behaviour in children such as delinquency, mental problems, drug abuse, and truancy among others. This is more pronounced if the imprisoned parent is a mother or if the parent is imprisoned for a long period of time. This observation underlines the importance of a mother in upbringing of children, and the importance of the presence of parents to the children's socialization. Imprisonment also impacts negatively on child support. For instance, according to Chung (2012), in Wisconsin, USA, the imprisonment of fathers increased dependency on government provided stamp food by the affected families. The study established that the US government provided food work as a safety net when families face deprivation due to fathers' imprisonment. This, however, imposes a substantial economic burden on the tax payers.

Imprisonment also leads to poverty among the inmates. For instance, Crimshaw (2014) established that prisoners re-enter their communities poorer than they left. In America, for example, it was observed that prisons and jails have produced outcasts whose main characteristics include poverty. The poverty of ex-prisoners can be attributed to the fact while in prison institutions, inmates are not engaged in economically viable activities, which are well paying. Thus, the prisoners leave prisons to their communities worse than they left.

III. FACTORS ADVERSATIVE TO THE ATTAINMENT OF IMPRISONMENT GOALS GLOBALLY

There are various challenges that impedes the achievement of prison functions world over. For instance, according to Paranjape, (2005), life in prison was meant to deter people from committing crime by isolating them from the public, ensuring strict discipline and provision of bare necessities. There is also strict security arrangements and monotonous routine life. These restrictions are imposed on the inmates' liberty

against their will, which often makes them to be unwilling to comply with the prison rules and regulations. This in the end leads to various acts of indiscipline such as fights and fracas between the inmates themselves, and the inmates and prison officers. Breaking of prison rules, prison riots, among others are also common in prison institutions. In these kinds of situations, prisons cannot achieve their mandate. On riots which rocked the English prisons in 1990 for instance, Wolf (1990) recommended the need for ensuring the correct balance between security, control and justice to achieve an effective prison management.

In underdeveloped countries, other causes of indiscipline among the inmates are poor and insufficient diet, poor sanitations and prisoners' health provisions. Aware that it is the obligation of the government to provide for them; these situations provoke disquiet among prisoners. Another factor that makes inmates to disobey prison rules and regulations include, but are not limited to, mistrust and lack of faith in prison authorities whom they consider to be forceful and harsh on them. The senior prison management do also resort to corrupt practices, and often extend preferential treatment to some inmates in exchange for inducement which causes antipathy among the other prisoners thus leading to cold wars between the inmates and prisons staff (GOK, 2008; Paranjape, 2005). To alleviate this situation, Coyle (2002) recommends that the prison management must create an environment where all members of the prison community are treated with fairness and justice. In addition to this, all prisoners should have the prospect to participate in productive activities. The scholar suggests that, above all, prisons should prepare the prisoners for life outside the prison walls well in advance.

Compliance to prison rules and regulations by the inmates which adversely affects reformation and rehabilitation of the convicts is also interfered with by the inmates' unmet sexual urge. In countries where conjugal visit is outlawed, prisoners extended absence from the normal society and the detachment from spouses and lovers deny them sexual gratification which is a vital biological urge of all normal adults. Because

they fail to control their sexual desire, the inmates resort to lesbianism, homosexuality and sodomy inside the prison walls; these can be by force or consented (UNODC/GOK, 2012). Due to lack of protections such as condoms, the prisoners who get involved in such sexual deviations get infected with and spread diseases such as HIV and AIDS, other sexually transmitted diseases, and infections such as hepatitis B and C, which, in the end, compel the prison authorities to spend a lot of resources on the inmates' health rather than on meeting their core functions of reformation and rehabilitation.

Fights and coercion among the inmates are other factors that negates on the achievement of prisons' core functions (Paranjape, 2005; Colvin, 2000). Fights are brought about by the desire of some individual inmates to control other felons. For instance, prisoners who committed capital offences normally look down on petty offenders. The conflicts are made worse by the introduction of prisoners' self-governance. For example, in India, an observation was made that due to lack of general moral discipline among criminals, majority of whom are illiterate and from the lower class of the society, when allowed to govern themselves in prisons, conflict normally arises between them (Paranjape, 2005).

Coercion in prison takes the form beatings and or being denied material needs for instance by having inmates' materials or items stolen. There is also indirect coercion where prisoners witness others being beaten up thus creating a threatening environment in which fear and intimidation become common aspects of life. This results into psychological distress under which the achievement of prisons mandates is impossible. Steiner (2008) summarizes the traditional explanations of prison indiscipline as deprivations suffered by inmates as a result of incarceration, such as lose of autonomy, freedom of movement, and access to goods and services, heterosexual relationships among others. He concurs with Paranjape (2005) that other than deprivations, another source of disorder among inmates is differences that arise between them.

It has also been argued that the physical and social prison conditions have made them unsuitable for convicts' reformation. Thus, prisons have been described as 'schools of crime' where the inmates only learn to engage in more serious crimes than the ones they were convicted of (Kagendo 2003; Gendreau, Goggin & Cullen, 1999). It has also been observed that prisoners always become institutionalized, for example, Goodstein (1993) observed that prisons instil acquiescent and compliant behaviour which causes institutional dependence.

Prison institutions in several jurisdictions are also congested and overcrowded. This global problem has made it impossible for prisons to achieve their mandate. For instance, in US enormous prison overcrowding contributed significantly to the increase in prisoners' rights litigation. By 1992 the populations of institutions in 29 states exceeded the institutions' capacity. The National prison project of American Civil Liberties Union reported that as at January 1, 1992, forty states, including the District of Columbia, Puerto Rico, and the Virgin Island were under court orders to reduce prison populations (National Prison Project, Corrections Digest, 1992).

IV. AN ANALYSIS OF IMPRISONMENT IN KENYA

Prisons as a criminal justice institution in Kenya was established by the British colonialists through a Prisons Board circular number 1 of 18th March 1911. By 1912, there were 30 prison institutions with 1,466 prisoners and 300 members of staff. Although it operated as an autonomous entity, prisons continued to be administered by the Inspector General of Police (Government of Kenya -GOK, 2011).

The first Inspector General of Prisons was only appointed in 1914 and he doubled up as the secretary of the prisons board. In 1917 the posts of Commissioner and Assistant Commissioner were created and subsequently held by R. Donald and T.A. Gray respectively. The first prison institution in Kenya was Fort Jesus which served as a prison from 1900 to 1958. In December, 1925, the Detention Camps Ordinance No. 25 was passed to

establish detention camps which were meant for petty offenders thus segregating them from hard core criminals who had committed felonies and were kept in prisons (GOK, 2011). Several changes have taken place in the development of prisons in Kenya since independence in 1963. Legislations that guide prisons have been enacted; these are CAP 90 -Prisons Act, CAP 91 -Detention Camps Act and CAP 92 -Borstal Act (GOK, 2011).

Just like in other countries, imprisonment is the main form of punishment in Kenya. It is normally awarded to the offenders that are considered to be a threat to the society based on the crimes they have committed. According to Subramanian & Shames, (2013), the common application of imprisonment globally is influenced by the belief that putting offenders behind bars ensures protection of the society as compared to community-based punishments such as probation. Imprisonment is also most common due to the fact that it is often awarded to poor petty offenders in place of fines and other financial penalties.

As per Kenya National Bureau of Statistics, according to the Business Daily Newspaper of Monday, January 18th 2021, as at December, 2019 the prison institutions in Kenya were overcrowded with a daily average population of 53,348 prisoners despite the fact that their official holding capacity is 26, 687. The number of individuals who were in jail stood at 219, 295 out which 141,948 were un-convicted offenders on trial as at the year 2019.

Confirming that imprisonment is the most preferred form of punishment in Kenya, a study conducted on the linkages between punishment and recidivism established that greater part of the respondents who were recidivists had been imprisoned for their first and subsequent convictions. For first convictions, majority of the respondents, (64% and 72% males and females respectively) had been awarded imprisonment for their very first conviction compared to 17% of the males and 7% of females who had been awarded fines, 8% and 14% respectively were punished by committal on probation service, 3.6% and 3.4% were placed on community service orders while

only 5% males were punished by compensation and restitution (Omboto, 2019).

According to Kenya National Commission for Human Rights, the key function of Kenya prisons is first and foremost, reformation and rehabilitation of prisoners. Therefore, there are various reformation and Rehabilitation strategies within prison institutions that aim to reform and rehabilitate convicts. For instance, inmates in need of education are offered the same under formal and non-formal education structure. Guidance and counselling, and spiritual programmes are also in place to cater for emotional and spiritual needs of Kenyan inmates. The programmes are offered by trained spiritual leaders employed by the prison department. Counselling targets the inmate's minds. It appeals to them on the need to discard criminality on release through creation of awareness on the dangers of crime to the society and the individual convicts among others. Trainings that aim to equip the inmates with skills they would use to earn a living by lawful means after release from custody are also offered under prisoners' vocational training programme (KNCHR,2005).

According to prison standing orders, a Government of Kenya (GOK) publication, the inmates are also engaged in sports, hobbies, handcrafts and other recreational activities for leisure and relaxation. To inculcate good work ethics, the prisoners offer free labour under Prisoners' Labour Distribution scheme supervised by the prison officers. And, to encourage good behaviour, well behaved non-capital crimes convicts serving more than one month prison term are entitled to a remission, which accounts for a third of their sentence. In addition, all well behaved prisoners who have stayed longer in prison also receive privileges under the prisoners' stage system. This involves promoting them from the lower stages to the special stage. The higher the prisoners' stage the better the privileges. These privileges are in form of unrestricted movement within prison institutions, better clothing and beddings, additional food ratio, and increment in the number of visits to the prisoner per month. It is also a requirement that prisoners should be classified and segregated so that petty

offenders do not learn serious crimes from the hard-core criminals (GOK, 1979).

Prisons in Kenya just like all over the world also ensure that inmates are in safe custody. This is all about ensuring that the inmates do not escape from lawful custody. This concerns both the remand inmates who are awaiting the conclusion of their cases in various courts, and the convicted prisoners undertaking reformation and rehabilitation. The containment and safe custody functions help in protection of the society when the dangerous criminals are locked up. They also ensure that the institutional rehabilitation mandate of prisons is accomplished as the inmates would be present for reformation and rehabilitation programmes.

However, despite the afore-discussed strategies, several factors have negated on reformation and rehabilitation of prisoners in Kenya. First, congestion and overcrowding in prison institutions occasioned by high crime rate in the country and insufficient funding by the government has made segregation of petty offenders and hard-core convicts impossible. Another impediment to the effectiveness of imprisonment in Kenya is availability of drugs and substances, and other contrabands in prison institutions (Omboto, 2010). This has been made possible due to corruption among prisons staff (GoK, 2008). Drugs such as cannabis, heroin and cocaine are at times readily available in Kenya prisons.

The presence and abuse of such drugs, and other contrabands in prison institutions have resulted into serious cases of inmates' indiscipline – a situation in which no meaningful reformation and rehabilitation can take place (Omboto, 2013). For instance, according to the *Standard Newspaper* (November 4, 2015), a Naivasha Maximum Security Prison Chief Inspector of Prisons (CIP) was nabbed with 1772 rolls of cannabis sativa hidden in car tyres as he was just about to supply to the 3000 inmates in that facility. This senior prison officer who was also found with several mobile phones was remanded at Nakuru Police station. The presence of these illegal mobile phones has also enabled the inmates to continue

committing crimes such as extortion while in prison. This has rendered the incapacitation function which is supposed to be the most important benefit of imprisonment in any society a nullity (Omboto, 2013).

Thus, another challenge facing imprisonment in Kenya rests on the integrity of prison officers and their capacity to reform convicts. While it has been observed that some prison officers lack integrity, over 60% of the prisons staff are high school leavers who cannot achieve much in the delicate responsibility of reformation and rehabilitation, a duty which requires professionals such as psychiatrists, psychologists, pastors, professional counsellors, social workers, sociologists, criminologists and other social scientists (Omboto, 2013).

Other challenges include poor diet, degrading clothing and beddings, lack of clean water, poor sanitation, infectious diseases, and homosexuality among others (Omboto 2013). In Kenya, homosexuality is fuelled by failure of the inmates to control their sexual desire, which due to lack of conjugal visits compel them to resort to sodomy and lesbianism inside the prison walls. The acts can be by force or consent (UNODC/GOK, 2012). Due to lack of protections such as condoms, the prisoners who get involved in such sexual deviations get infected with and spread diseases such as HIV and AIDS, other sexually transmitted diseases, and other infections such as hepatitis B and C, which, in the end, force the prison authorities to spend a lot of resources on the inmates' health rather than on meeting their core functions of reformation and rehabilitation.

Hence, because of the above challenges, Kenyan Prison institutions have been described to be 'criminogenic' (Odegi-Awuondo, 2003). That is, they encourage criminal tendencies rather than reformation and rehabilitation of offenders. Earlier on, Odera-Oruka (1985) argued that the hostile prison conditions make ex-convicts vengeful against the general society which results into recidivism.

V. CONCLUSIONS AND RECOMMENDATIONS: HOW TO MAKE IMPRISONMENT EFFECTIVE IN KENYA

This paper makes two conclusions. First and foremost, it is concluded that given the identified weakness and challenges inherent in this type of punishment, imprisonment in Kenya is ineffective. Therefore, the judiciary in Kenya should relook into sentencing policy for petty convicts who cannot afford fines. For as much as possible, this paper recommends that the courts should always sentence the poor -petty crimes convicts to community service and probation or suspended sentences, instead of subjection to fines which they cannot afford thus they end up in prisons.

Imprisonment as a punishment should also not be an option for these offenders because they turn into recidivists due to contamination by capital offenders because of lack of segregation capacity. These offenders can also easily become institutionalized and turn into recidivists. Not sending petty offenders to prisons is in line with the requirement of Community Service Order Act No. 10 of 1998 which outlines that those offenders whose crimes on conviction would earn them an imprisonment term of not more than three (3) years deserves community-based punishments. Furthermore, when it comes to social stigma associated with imprisonment, Schnittker & John (2007) warn that any contact with prisons has effect not just the length of contact.

Secondly, and as a matter of priority, it is concluded that given that some convicts will always deserve imprisonment, the Kenya government should ensure that the prison institutions have the capacity to truly reform and rehabilitate offenders. This can only be achieved by controlling the challenges discussed earlier and should begin with a pragmatic assessment of the current state of the institutions in county. The government of Kenya should begin by weeding out prison officers lacking in integrity; those who supply prisoners with drugs and other contrabands, and perpetuate other forms of corruption. Prison officers should be individuals worth emulating by the prisoners as role models.

Further to this, the fact that prison institutions lack the capacity in terms of personnel and programmes to reform some convicts such as drug, alcohol and sex offenders should be addressed.

The government should make sure that prison officers are suitably trained for the delicate work of reformation and rehabilitation by employing the professionals required for all types of offenders instead of some typologies like drug and sex offenders being subjected to artisan courses such as carpentry, tailoring, dress making, and farming as Omboto, (2019) established. According to Kington, Yates & Firestone (2012) and Lipsay, Chapman & Ladenberger (2001), for sex offenders to be reformed, they require pharmacological treatment and Cognitive Behavioural Therapy, while Tiger (2011) posits that drug abuse convicts require pharmaco-therapies; a combination of medicine treatment and counselling.

Other categories of convicts such as psychopathic offenders may also require medical treatment and counselling for them to be fully reformed and rehabilitated; thus, it is defeatist to subject all convicts to vocational training. Counselling approach in rehabilitation which Omboto, (2019) established that is rarely applied in Kenya prisons currently should be introduced. However, this requires that trained professional counsellors who are versed in various kinds of counselling as different convicts may need are employed. The types of counselling that the convicts may need include cognitive counselling, transactional counselling, problem management counselling, and reality counselling. Imhabekhai (2002) recommends that where the required experts are not available within the prisons, engagement of part time experts is necessary.

Prisoners must also be scientifically classified and segregated based on crime aetiology and offender's criminal history. The classifications currently employed by Kenya Prisons Service seem to enhance prison administration but may not facilitate reformation and rehabilitation of the convicts. The classifications are majorly based on the duration a convict has spent in prisons (Omboto, 2019). Further, petty first-time

offenders who for one reason or another land in prisons as remanded or convicted prisoners must not be contaminated by hardcore capital offenders. This requires that the government creates prison institutions for these two diverse classes of offenders or have different sections created for them in existing institutions.

Finally, all these recommendations require that the government should urgently enhance funding to Kenya Prisons Service. There is also need for proper planning and utilization of funds by the prison authorities. These will make segregation of prisoners possible, control congestion and improve on general prisoners' welfare. The prisoners should not live in squalid conditions, and the cases of physical torture and beatings of prisoners by the prison staff in which at times lead to death (*Standard Newspaper*, October 27, 2015), should be eradicated. As Tewkbury (1997) opines, it is the responsibility of prison authorities to provide treatment for the inmates, and contain them in conducive environments. For the same purpose, Briggs (1975) posits that prison institutions must put up measures to preserve and enhance a person's dignity and self-respect, while Playfair & Sington (1965) emphasized that correctional institutions must strive to train the inmates so as to counter any possible contamination by fellow felons.

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