



Jacinta Maweu

Ethics of Punishment:

The Paradox of Imprisonment for Reform

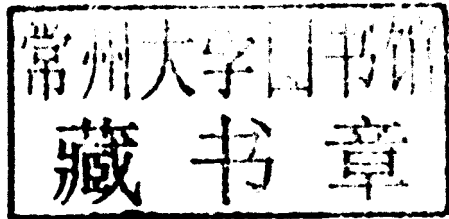


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**ETHICS OF PUNISHMENT: THE PARADOX OF IMPRISONMENT
FOR REFORM**

TABLE OF CONTENTS

Dedication

Abstract

CHAPTER ONE

1.0 Introduction 4

1.1 Background information 4

1.2 Statement of the problem 11

1.3 Research objectives 13

1.4 Hypotheses 14

1.5 Justification/ significance 14

1.6 Scope of the study 16

1.7 Ethical debates on Punishment 17

1.8 Theories of punishment 26

2.0 CHAPTER TWO 42

2.1 A Philosophical analysis of imprisonment for reform

2.2 A critique of imprisonment for reform

2.3 Concluding remarks

3.0 CHAPTER THREE 54

3.1 The paradox of imprisonment for reform

3.2 Concluding remarks

4.0 CHAPTER FOUR 63

4.1 A moral justification of imprisonment

4.2 Concluding remarks

5.0 CHAPTER FIVE 83

5.1 Conclusion

5.2 Recommendations

6.0 BIBLIOGRAPHY 91

6.1 Books

6.2 Reports

DEDICATION

I gladly dedicate this work to my amazing daughter Maureen Wangari, who is my chief source of inspiration. To my Mum for instilling in me the value of disciplined hard work.

To all ethicists, criminologists, sociologists, lawyers *inter alia* in their strive to come up with new ideas to ensure justice in our corrections systems.

ABSTRACT

This work provides an insight into the philosophy of imprisonment for reform. For centuries now, the reform of the criminal has been one of the main objectives of imprisonment. This study questions the veracity of the power of imprisonment to reform criminals. There seem to be some inherent contradiction between the more we take criminals to prison, the rate of recidivism and the apparent threatening crime rate that we witness every day. This seems to negate if not dilute the assertion that imprisonment does reform criminals hence help in the fight against one of man's worst enemies-crime.

It seems evident that no matter how hard we try to fight crime by building more prisons, by improving the existing ones, by providing the criminals with sufficient skills to help them earn a decent living free of crime after release, as well as inculcating moral values into the criminals, the complexity of the problem of crime is far from being resolved. This work, therefore focuses on investigating whether the prison as we know it no matter how decent, civilized, big or small, new or old is capable of reforming criminals into responsible citizens. The study examines the reasons why despite taking more and more people to prison, preaching to the prisoners moral values, building more spacious prisons and providing prisoners with their minimum basic needs, new crime patterns are still on the rise and the rate of recidivism is still high.

The study aims at establishing if it is possible to punish a criminal and try to reform him at one and the same time in the same institution- the prison. The main argument that the study advances is that the underlying philosophy behind the reform and the imprisonment of the offender are not geared towards the same purpose. Any attempt therefore to carry out the two in one and the same institution, as is the case in imprisonment definitely lands us in a contradiction. The study gives the philosophical analysis of imprisonment for reform in order to establish why imprisonment *per se* is not capable of reforming the offender its other aims like deterrence and retribution notwithstanding. This is because imprisonment *per se* does not have any significant rehabilitative impact on the criminal. This study seeks to explain why despite imprisonment being the most popular form of punishment; crime will be with us for a long time if we are not going to review our objectives of imprisonment, as we know it.

CHAPTER ONE

1.0 INTRODUCTION

BACKGROUND INFORMATION

The problem of the complexity of crime is far from being resolved. Crime is a scourge that has always seriously afflicted mankind just as poverty and disease. However, whereas civilization and progress in science has somehow saved man from the evils of disease and poverty, man is yet to find a remedy for crime. It has been observed that advance in science and modern inventions in technology paradoxically lead to an increase in crime or rather the rise of new crime patterns. The response to criminal behavior operates at the institutional and sub-institutional levels. As ordinary citizens, we react to the criminals rather sporadically both at the institutional and sub-institutional level- we personalize our reaction to the perpetrators of crime as well as the victims. Criminal justice reaction on the other hand, which is on the institutional level, is justified on the grounds that it contributes to the social order of the community. As much as there is no universal way in which different individuals both at the institutional and sub-institutional level react to criminality, most of the reaction is mainly out of revenge and repulsion at the criminal. All societies in the world maintain social harmony by use of objective laws that regulate human behaviour and the criminal justice system falls under this system of objective laws.

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

This means that

punishment is normally personalized, in that
it is applied to particular individuals on the
basis of their perceived wrongdoing
(Encyclopedia Britanica, Vol, 15, 1977:281).

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

Every society needs a system of rewards and punishments in order to

maintain the status quo as far as society's value system is concerned. Before the introduction of modern criminal law, punishment took the form of revenge or retaliation where the victim was allowed to inflict pain on the offender till he/she felt that justice had been done. The wrong doer was maimed, flogged, banished, killed, had some parts of their bodies chopped, branded etc. In essence, punishment was purely retributive. Then imprisonment was introduced to replace these rather barbaric forms of punishment, which was indeed a step forward at that stage of the development of civilization.

One would be forgiven for thinking that prisons have always existed as a form of punishment, but given man's long history of crime, the prison is a rather relatively modern idea. Historically, imprisonment was not used as a form of punishment, but as a way to confine criminals until capital punishment or corporal punishment was administered. For instance in the old testament, there were prisons used for detention in Jerusalem, there were also debtors' prisons where debtors were thrown until they paid their debts and also dungeons which held prisoners before they were killed. So the prison as we know it today was constructed in the late eighteenth and early nineteenth centuries and it was not used as a place of punishment. Up to 200 years ago, the prison was used only for temporary detention of prisoners awaiting trial, or for political prisoners (Alper, 1974). The modern prison system was born in London following Jeremy Bentham's views of utilitarianism. The first prisons of the early 19th century were also known as "Penitentiary" and their main goal as the name suggests was to ensure penance by the prisoners meditation, reflection and strict forced discipline.

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

Imprisonment is one of the most widely accepted forms of punishment within the criminal law. Other forms of punishment within the criminal law are as Reid (1994) outlines,

.....punishment may take the form of fines
to the state, restitution
paid to the victim or others, probation
with or without supervision and community
service among others. Punishment within these
provisions of criminal law therefore refers to
the penalties that are inflicted by power of the state;
that is the authority of law after a court found the
defendant guilty of a crime”(Reid, J.A, 1994:97).

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

Reform and rehabilitation of the offender is one of the key objectives of imprisonment, its other aims such as retribution and deterrence notwithstanding. According to one of the reports of the Administration of prison in Kenya (1970) it is stated that, “Kenya prisons’ service is devoted to transforming self-willed outcasts into useful citizens, to protecting society and to deterring the strong and the weak from the world of crime, with fairness and firmness aimed at rehabilitation and deterrence.” In a Tanzanian

annual report (1965), it is likewise stated that, "...make the prison administration service not only a punitive but essentially a reformatory one, capable of converting prisoners into good citizens after release from custody."

It is evident from these two reports that imprisonment is intended to have the reformation of the criminal as one of its key objectives its other objectives notwithstanding. Plato who is considered as the father of reformatory Theory of punishment argued that the wrongdoer is morally sick and in punishing him, the magistrate acts as a physician of souls. Plato argues in *The Laws* that Punishment is an instrument at the disposal of Law to induce wrongdoers to hate unrighteousness and to love righteousness or at least to cease to hate it. But how is imprisonment capable of "curing" the prisoner of his disease of mind and character? How close is Plato's analogy between the working medicine on the body and the working of punishment (read imprisonment) on the mind and character of the offender?

Any form of punishment including imprisonment entails some infliction of harm on the offender. When we punish, we intend the offender to suffer some pain, mental if not physical. The question then arises of how any forcible infliction of mental or physical pain can transform the mental disposition, which led the wrongdoer to commit the crime. Most studies on effects of prison life on the criminal show that the immediate effect of imprisonment is to lessen self- respect, to stifle moral inspiration and in general to coarsen (Moberly, 1968). As Bernard Shaw, a prominent anti-prison reform crusader once observed,

To propose to punish and to reform people by the same operation is exactly as if you were to take a man suffering from pneumonia, and attempt to combine punitive and curative treatment. Arguing that a person with pneumonia is a danger to the community, and that he need not catch it if he takes care of his health, you resolve that he shall have a severe lesson, both to punish him for his negligence and pulmonary weakness and to deter others from following his example. You therefore strip him naked, and in that condition stand him all night in the cold. But as you admit the duty of restoring his health, you engage a doctor to administer cough lozenges, made as unpleasant to the taste as possible so as not to pamper the culprit. A Board of commissioners ordering such a treatment would prove to be in earnest about punishing the patient and not in treatment of the patient (Moberly, 1968: 123).

Bernard Shaw thinks that when people clamor for imprisonment for reform, they can only mean that prisoners should be punished as well as reformed. The problem is that imprisonment and reform cannot take place at the same time in the same institution. An attempt to try to reform the prisoners in the prison will be derailed by the universal belief that prisons must remain unpleasant if they are to be dreaded in order to fulfill their traditional roles-deterrence and retribution. To reinforce his point, Shaw observes that if you are to punish a man retributively, you must injure him. And if you are to reform him, you have to improve him. And men are not improved by injuries!

1.2 THE STATEMENT OF THE PROBLEM

Prisons are found in every country in the world today despite research especially in the developed world (Martison 1974, McGuire 1995,) and evidence pointing to the fact that imprisonment has been counterproductive in the rehabilitation and reform of offenders. Rehabilitative strategies came to the fore in many Western penal systems in the 1960s and they still remain prominent in sentencing policies of these countries and in developing countries most of which inherited the criminal justice system of their colonizers. But according to the World Prison population list 2005, there are more than nine million prisoners worldwide and the numbers are steadily rising (Walmsley, 2005).

The philosophy of imprisonment for reform/rehabilitation is utilitarian; that we take criminals to prison because this will have good consequences of reforming the criminal hence protecting the society. This is seen as producing a greater balance of good over evil both to the individual and society than any other alternative. Rehabilitation/reform is the idea of 'curing' an offender of his or her criminal tendencies, of changing their habits, their outlook and possibly even personality, so as to make them less inclined to commit crimes in the future. It seeks to prevent a person from reoffending by taking away the desire to offend. This is very different from the idea of 'deterrence' (which is the idea of making him afraid to offend, though he may still desire to), and the idea of 'incapacitation' (which is the idea of taking away his physical power to offend, though he may still desire to and be unafraid to). These three consequentialist, or utilitarian ideas are in turn very different from the penological idea of 'retribution' – which is not primarily about reducing reoffending, but giving just deserts to the offender.

But the question still remains if it is possible to determine prior to taking criminals to prison that this will be the case- that imprisonment will have good consequences. Although we do have isolated cases where criminals do not go back to their criminal ways after imprisonment,

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

The problem of crime and hardcore criminals becomes worse everyday despite imprisonment being the most popular form of punishment and new measures of improving prison institutions being put in place. We have seen new sanctions been devised, prisons been improved and more prisons being built but this does not seem to transform criminals into responsible citizens as it should, reduce the rate of crime or the rate of recidivism.

Globally, there is widespread increasing crime as well as new crime patterns despite the effort to pack more and more people in prison for even longer terms than before. Is it then possible that as much as imprisonment may deter and incapacitate the criminals while in custody, it cannot in essence reform them and that is why we are incapable of curbing crime? Is it possible that the prison as we know it and as it has been cannot in itself have any rehabilitative effect on the criminals?

It seems that as much as the introduction of imprisonment marked a remarkable development in the penal system by abolishing the barbaric forms of punishment then, the ever threatening high rates of crime and recidivism clearly indicate that imprisonment being the most popular form of punishment to curb crime has some shortcomings that are worth investigating or that we need to revise the objectives of imprisonment altogether. For instance, why are criminals going back to crime even after being equipped with skills like carpentry, masonry, and dressmaking among others, which are supposed to help in the reformation process? Why isn't the improvement in prison conditions leading to the "improvement" of criminals? Are the prison systems conducive to transform the criminals morally? Or do we need to change our 'rehabilitative' strategies because it seems the ones in place are not working? Whatever the case, something seems to be seriously amiss in our conviction that indeed the prison can reform criminals. Is it possible that the prison is being over used or is it mis-used for objectives it cannot in essence achieve like rehabilitation?

1.3 RESEARCH OBJECTIVES

1.3.1 General objective

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