

# **PUNISHMENT AND TORTURE - A MEANS OF PREVENTING CRIME IN THE EYE OF JEREMY BENTHAM: ISSUES IN KENYA**

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## **ABSTRACT**

Today Kenyans spend more and more time in courts because our moral and social foundations are crumbling and we cannot count on them to provide adequate guidelines for our behavior. We are a society so raven such that no court action can save a society which evades its responsibility by thrusting upon its courts and its own laws. Prevention of crime depends on whether through punishment; criminals are made aware of their wrong doing. This happens when they are exposed to public anonymity or to the horrors of solitary confinement in prison. Besides, Kenya politically is splattered into single issue factions; religiously it is a vast kaleidoscope with hardly a shred of internal cohesion. Bentham's Thoughts on punishment and torture are interwoven with his views of law reform, Penal reform and Parliamentary reform. Governments have several theories to support the use of punishment to maintain order in society Theories of punishment can be divided into two general philosophies: utilitarian and retributive. Torture involves more physical, moral and psychological pain

more than any other ordinary punishment. It is administered in situations where a person is made to suffer any violent pain of the body in order to compel him to do something or to desist from doing something which is done or desisted form the penal application is immediately made to cease. Bentham argues against capital punishment because he condemns its use by tyrants and its application as a consequence of judicial corruption. But he admits that if capital punishment proves to be efficacious and becomes popular, the public approval of it would be proportionate to its efficacy. Conclusively, Bentham's contribution on torture and punishment offers us a new and more compassionate perspective on the problem of punishment and torture than suggestions of contemporary writers. For this reason, re-reading Bentham's work is not only required as far even applicable to African culture, specifically on the Kenyan judicial culture, but as well as a necessary matter.

**Key Words:** *punishment and torture, prevention of crime and capital punishment*

## **INTRODUCTION**

Today Kenyans spend more and more time in courts because our moral and social foundations are crumbling and we cannot count on them to provide adequate guidelines for our behavior. We are a society so raven such that no court action can save a society which evades its responsibility by thrusting upon its courts and its own laws. Prevention of crime depends on whether through punishment; criminals are made aware of their wrong doing. This happens when they are exposed to public anonymity or to the horrors of solitary confinement in prison. Besides, Kenya politically is splattered into single issue factions; religiously it is a vast kaleidoscope with hardly a shred of internal cohesion.

Crime increase in Kenya is uniquely characterized by imprisonments which are often repeated and extruded. As such increasing number of prisoners are returning home, having spent longer days in prisons, less prepared for life on the outside, with less assistance in their reintegration and at best, stained connections to their families and communities. They in turn strain their families and the community and appears like extending torture to them from prison to the family and community. This work examines roles of torture and punishment in preventing crime through physical, religious and moral means, preventing crime depends on whether through punishment, criminals are made aware of their wrong doing. This can happen when they are exposed to public horrors of solitary confinement in prison. The work, takes its position from Jeremy Bentham's concepts on torture and punishment. Bentham (1748-1832), formed the English legal system. His argument is that the strength of the penalty should outweigh the pleasure gained by committing the crime. He proposed a "hedonic calculus", a method of measuring the total pain and pleasure produced by an act which could then be used to determine the minimum determent needed to prevent a crime. He went further to design the pentopticon, a circular cell block machine by which the prison inmate was constantly and permanently visible to enable the warden monitor the behavior of the prisoner.

Bentham's own belief is that consciousness of wrong doing is the ultimate factor that prevents crime, since it is rooted in the moral and religious awareness of human culture. When relating torture and punishment, Bentham believes that the purpose of law is to coerce obedience especially from trespassers. If one is found guilty after being fairly tried, it is justifiable to coerce him physically or otherwise obey the law (W.L. and P.E.; Twining 1973:305-330).

Furthermore, this work does not dwell on criticism but attempts to explain, analyze synthesize and describe historically the problem of the purpose of torture and punishment in relation to Bentham's thoughts. It does not belabor on identifying types of torture and punishment by the fact that modern types of torture are morally distinct and different from those in Bentham's case (Bentham 1973:337). More so in Kenya, forms of violence which recently are being identified as to be types of torture includes terrorism, rape, land tenure systems, violent robberies and even interrogational practices instituted by various government arms.

## **MENTOR'S OF BENTHAM'S JUDICIAL THOUGHTS**

Bentham's Thoughts on punishment and torture are interwoven with his views of law reform, Penal reform and Parliamentary reform. His works were as a result of him being mentored by the British Law critics of his days.

### **1. Rev. John Forster and Bentham's Letter**

Bentham's letter to Rev. John Forster reveals that he was ultimately preoccupied with composing his theory of punishment in which he states that, the works of Cesare Beccaria on: "Crimes and Punishment," have given him further light and fresh incentives on the subject of "punishment" (Benthamin Principles of penal law voll :445-5).

Beccaria, as a great mentor of Bentham aimed at correcting the Western judicial system by abolishing capital punishment, long sentences and procedural injustices. His work has a strong impact on Western Penal Procedure and great influence on Bentham's contributions to the subject. (Beccaria, Crimes and Punishment 1963. H. Pauluccitrans.)

Beccaria's position on punishment especially in the area of purpose of punishment and application of torture strongly transformed Bentham's thoughts on punishment and torture.

## **2. Parley's work on Moral and Political Philosophy**

Parley defines virtue as the doing good to mankind, in obedience to the will of God and the sake of everlasting happiness which as well constitutes a moral obligation. (Parley W. Principles of Moral and Political Philosophy, vol II; 357). Bentham became so interested in Parley's works to an extent that he had to greatly value the virtue of good.

## **3. Eden's and Howard's Works on Principles of Law.**

Eden's contributions on, "The Principles of Penal Law," his hard labour bill and Howard's work influenced Bentham to venture into introducing the Prison system known as the Panopticon in England.

Bentham maintains that conformity to Law is empirically influenced by pain and pleasure. He rejected natural laws because they cannot be interpreted in any judicial system.

## **THEORIES OF PUNISHMENT**

Governments have several theories to support the use of punishment to maintain order in society. Theories of punishment can be divided into two general philosophies: utilitarian and retributive.

### **Utilitarian Theory of Punishment**

The theory of utilitarianism was devised by Jeremy Bentham, who worked on legal reform in (1789). The utilitarian theory of punishment seeks to punish offenders to discourage, or "deter," future wrongdoing. The retributive theory seeks to punish offenders because they deserve to be punished. Under the utilitarian philosophy, laws should be used to maximize the happiness of society. Because crime and punishment are inconsistent with happiness, they should be kept to a minimum. Utilitarian's understand that a crime-free society does not exist, but they endeavor to inflict only as much punishment as is required to prevent future crimes (Luna, 2003).

The utilitarian theory is "consequentialist" in nature. It recognizes that punishment has consequences for both the offender and society and holds that the total good produced by the punishment should exceed the total evil. In other words, punishment should not be unlimited. One illustration of consequentialism in punishment is the release of a prison inmate suffering from a debilitating illness. If the prisoner's death is imminent, society is not served by his continued confinement because he is no longer capable of committing crimes (Barnes, 1998).

Under the utilitarian philosophy, laws that specify punishment for criminal conduct should be designed to deter future criminal conduct. Deterrence operates on a specific and a general level. General deterrence means that the punishment should prevent other people from committing criminal acts. The punishment serves as an example to the rest of society, and it puts others on notice that criminal behavior will be punished. Specific deterrence means that the punishment should prevent the same person from committing crimes. Specific deterrence works in two ways. First, an offender may be put in jail or prison to physically prevent her from committing another crime for a specified period. Second, this incapacitation is designed to be so unpleasant that it will discourage the offender from repeating her criminal behavior (Markel & Flanders, 2010).

Rehabilitation is another utilitarian rationale for punishment. The application of rehabilitation is to prevent future crime by giving offenders the ability to succeed within the confines of the law. Rehabilitative measures for criminal offenders usually include treatment for afflictions such as mental illness, chemical dependency and chronic violent behavior. Rehabilitation also includes the use of educational programs that give offenders the knowledge and skills needed to compete in the job market.

### **Retributive Theory**

This theory is based on the idea of vindictive justice, or a tooth for a tooth and an eye for an eye. The principle is that if a man has caused the loss of a man's eye, his one eye shall cause to be lost; if he has shattered a man's limb, one shall shatter his limb; if a man has made the tooth of another man that is his equal fall out, one shall make his tooth fall out. This is to pay back the wrong-doer for his wrong-doing. It means that the wrong-doer has to be made to suffer by way of retaliation, even if no benefit results thereby to him or to others. Under this theory, offenders are punished for criminal behavior because they deserve punishment. Criminal behavior upsets the peaceful balance of society, and punishment helps to restore the balance. The retributive theory focuses on the crime itself as the reason for imposing punishment. Where the utilitarian theory looks forward by basing punishment on social benefits, the retributive theory looks backward at the transgression as the basis for punishment (Steiker, 1997).

According to the retributivist, human beings have free will and are capable of making rational decisions. An offender who is insane or otherwise incompetent should not be punished. However, a person who makes a conscious choice to upset the balance of society should be punished. There are different moral bases for retribution. To many retributivists, punishment is justified as a form of vengeance: wrongdoers should be forced to suffer because they have forced others to suffer (Tonry, 2018). This ancient principle was expressed succinctly in the Old Testament of the Judeo-Christian Bible: "When a man causes a disfigurement in his neighbour ... it shall be done to him, fracture for fracture, eye for eye, tooth for tooth...." (Exodus 21:24-26; the Bible, 2000).

To other theorists, retribution against a wrongdoer is justified to protect the legitimate rights of both society and the offender. Society shows its respect for the free will of the wrongdoer through punishment. Punishment shows respect for the wrong doer because it allows an offender to pay the debt to society and then return to society, theoretically free of guilt and stigma.

A third major rationale for punishment is denunciation. Under the denunciation theory, punishment should be an expression of societal condemnation. The denunciation theory is a hybrid of Utilitarianism and retribution. It is utilitarian because the prospect of being publicly denounced serves as a deterrent. Denunciation is likewise retributive because it promotes the idea that offenders deserve to be punished. The U.S. conception of punishment is a combination of the utilitarian, retributive and denunciation theories. The most widely accepted rationale for punishment in the United States is retribution. If convicted, the sentence a defendant receives is always, at least in part, a form of retribution. A sentence may, however, combine utilitarian ideals with retribution. For example, a defendant sentenced to prison for several years is sent there to quench the public's thirst for vengeance. At the same time, educational programs inside the prison reflect the utilitarian goal of rehabilitation (Luna, 2003).

The Kenyan legal system shows its adherence to utilitarian ideals in the creation of systems such as pretrial diversion programs, Probation and Parole. These systems seek to limit punishment to the extent necessary to protect society. The utilitarian philosophy is also reflected in the assignment of different punishments for different crimes and in the notion that the amount of punishment a convicted criminal receives should be in proportion to the harm caused by the crime. For example, murder calls for imprisonment or even the death penalty. A simple Assault and Battery with no serious injuries is usually punished with a short jail sentence or probation and a fine. Judges generally have the discretion to fashion punishment according to the needs of both society and the defendant (Barnes, 1998). This is an expression of utilitarian tenets. However, judicial discretion in sentencing is limited. In some cases statutes require judges to impose mandatory minimum prison sentences as punishment, and these laws stand as a monument to the retributive theory.

## **TORTURE: IT'S MORAL AND PHYSICAL IMPLICATIONS**

Torture involves more physical, moral and psychological pain more than any other ordinary punishment. It is administered in situations where a person is made to suffer any violent pain of the body in order to compel him to do something or to desist from doing something which is done or desisted from the penal application is immediately made to cease (Twining: 309). This in essence means that torture of whatever magnitude will always combat the entire human body. Torture should only be employed where the safety of a whole state may be endangered for want of that intelligence which is the object of it's procure.

1. Torture should be in the hands of qualified personnel to judge responsibly when it is necessary to use it. It ought to be consistent with the purpose for which it is administered.

Culprits have been made to confess through torture when other methods were available, had they not answered satisfactorily, would make them suspect. For example Bentham thinks that in England it is worse to torture a man to bring him to trial because if he refuses to cooperate by not answering, his silence would be taken as a confession. Since in England and other European countries, imprisonment to compel debtors to fulfill this obligation without is worrying as to whether they are capable of doing so or not; Bentham interprets this to be a kind of slow torture although it is not strictly speaking torture because it is not certainly productive of any particular intense kind bodily pain; it is however owing to its duration, very frequently more than equivalent to torture but something worse (W.L. and P.E. Twining Vol. 24:1973:319). Torture according to Bentham, is to be employed solely for the purpose of forcing a recalcitrant culprit to confess. For this reason he lays down the following rules for its application, as he believes that, if applied unnecessarily, torture can jeopardize the aims of punishment. The consequences of torture should not be prolonged pain as such, once the purpose has been achieved, any additional misery would be immoral and in waste.

2. Torture ought to be applied only when a person has failed to do what he is supposed to do.... That is the same strength of evidence ought to be required as is requisite to convict a man of a crime for which punishment of that kind and degree would be inflicted for the ordinary purpose of prevention (W.L. and P.E. Twining Vol. 24:322).

One of Bentham's objections torture lies in the abuse of it, when at its results, a false confession is made, thus leaving the door open to a dreadful consequence; the punishment of the innocent who pleads guilty only to avoid further pain. In Kenya religious rituals sealed by blood covenants among hardcore criminals such as the Taliban or Mungiki boys, hardens group members and torture will not suffice to bring out the confession. Unfortunately should a false confession be made because of abuse of torture, then dreadful consequences should be anticipated. Bentham maintained that bad laws have caused the introduction of torture because of fear of torture. People are unwilling to give information or evidence and thus in the application of torture a man is compelled to give evidence against himself.

Bentham quotes five cases in which he condemns use of torture:

1. When it is applicable to the criminal in order to extract from him the full confession for the crime he is believed to be guilty of.
2. When it is applied to force him to account for the contradictions he has fallen into in the course of his examination.
3. When it is applied to force him to denounce his accomplices.
4. When it is applied to force him to confess to crimes he is believed to be guilty of.
5. When it is applied under the notion of purging him to infirmly.



Bentham postulates that the first point offers a conclusive reason against compulsive punishment. He also agrees that there is no need to force the culprit to become his own accuser. "This practice in criminal matter is reprobated by the English Law" (W.L. and P.E. Twining: 321). Bentham further argues no moral justification or condemnation of torture can be advanced independently of the type of torture in question. But he cautions against treating torture as though it were a single phenomenon, susceptible to moral justification or condemnation independently of the purpose for which it is used.

But the goals of torture vary from society to society. For example, the Biblical dilemma reveals that the Jewish Law serves three purposes:

1. They are retributive – punishing the criminal for his act.
2. They are deterrent- make others learn from criminals
3. They are expiatory- tries to obtain God's forgiveness.(The Bible, Ex. 21:23, Lev. 18-)

Further, Jesus in the New Testament was tortured for crimes he never committed, but chose to remain silent. By them the concept of torture was compatible with the society's concept of justice during the era of Jesus when the Romans had the hanging, the Jews; stoning and the Egyptians desert sun death. But Samson was tortured by his enemies at the expense of making love to a foreign woman, he chose to remain silent as he served his punishment (The Bible, Lk. 22:63-71; Judges 16:21).

Bentham thinks that when there is sufficient proof to believe that the party accused of guilt, torture can be applied to extract a general confession and that it is believed that the accused had an accomplice, torture can force him to reveal the name. He justifies the use of torture in the latter case because the offence is punished for his contumacy in not giving the information which has been required of him; which is for the interest and the community he should give, which is in his power to give and which (not withstanding), he persists in refusing to give (W.L. &P.E. Twining: 330).

The 2000's has witnessed Kenya become a more and more litigious society and a careful examination of that phenomenon reveals a great deal about what has happened to us as a people of this nation. We are a legal entity on one hand and on the other hand, there exists a far reaching structure of law that defines who we are as a people of this Nation and as well what is required of us. Yet a nation is more than a legal entity, it is an entity of shared convictions of what it means to be human, to be a man or a woman, a citizen or neighbor. We accept unquestioningly, notions of how we are related to the natural world and to our people. We tend to take for granted the common rules binding us together, such that whether the Pokot, Turkana and the internally displaced people go without basic requirements or not, it is their own torture.

Nevertheless, the spelling out of the purposes of law is to safeguard our freedom, our safe working conditions and strive for a common good life. But we are a generation where hardly any



area of life seems safe from litigation. Hence we become hesitant to aid even accident victims, reveal drug and human traffickers lest we end up in court as a result of the actions or decisions we make. Every society reflects a sense of “moral order, without which no other order be it economic, political, social or religious, what you will; can possibly exist” (Malcolm Muggeridge, *Time Magazine* Dec. 3, 1979).

In each age of human history, new patterns of norms violation emerge, in response to which societies evolve social control mechanisms to regulate human conduct. According to the commission on English Prisons 2009, as cited in Scott and Codd 2010, the punishment crisis confronting us help us in a way, by presenting us with an opportunity to challenge the very basis of the manner we do react to crime. This commission’s assertion indicates that societies are in perpetual struggle to adopt the most suitable, appropriate and effective punishment for multitude of deviants and crimes committed by wrong doers.

Sentencing of criminal offenders is an important part of the judicial system as it indicates that the law is not dead and can be enforced against those who contravene it. This is the stage of a criminal trial where those that are said to be guilty are given sanctions as a completer court finds. Suitable for the offender (Lumumba, 2006). Sentences aim at punishing offenders and make them pay for their offences or deter them and make them an example to the public. Since crime has been thought to be mostly influenced by the attitude and behavior of a person, if any offender is helped to combat these, they are then inclined to abstain from crime or acquire skills that enable them overcome these influences (Campbell- Holt, 2008).But one can always question the judicial system of any government when it comes to justifying punishment. If knowledge of the law is found among the people, then it only exists in the powers of democratic governments. Such governments enhance wisdom and goodness. One can ask, “is Kenya a democratic republic?” Can knowledge of law be traced among all citizens or only among the few professional lawyers? Any democratic government has a moral obligation to take initiative and make laws which assures that accrual of happiness to the largest number in its community. Bentham believes that close supervision with sufficient prison personnel would improve the conditions of the prisoners and the chance of reformation. Reforms are called for because of the appalling conditions existing in our prisons. Hardcore criminals should be in solitary confinement because they would otherwise use any association with others to plan further evils while, by preventing them from having any contact with other wrong doers, there might be a possibility of reforming them. By the name virtue, this kind of punishment can lead to unjustifiably enhance long prison terms and possibly result in failure as is the case with convicts in Kenya.

In Kenya the fundamental purpose of prison services is to keep, reform, re-orientate and rehabilitate inmates to avoid recidivism and also empower the inmates become law abiding and productive members of the society upon release from prison (Ahmad, 2014). Concurrently Kamoyo and Barchok (2015) observe that prisons in Kenya may be doing more harm than good

to inmates. This is relative to cases of economic crimes, increased family domestic violence feuds, child abuse-sodomy rape and incest are on increase. Being in prison could be the worst experience for any inmate since the inmate has to create his/ her own way of passing time because the hours appear endless as such newly admitted inmates are viable to suffer from stress or shock as one joins a new environment in contrast to the usual residential environment. In this case, the individual experiences negative psychological manifestation such as emotional withdrawal, depression or body deterioration. Imprisonment of any kind is the worst form of torture. In Kenya torture and punishment are relative as well as the results of crimes committed and its judicial system is in perpetual struggle to adopt the most suitable and effective punishment for escalating crimes being committed in Kenya today. Stephen Jones 2008 observed that crime could be egotistical and against the interests of the works clan, as with petty theft or it could be political but reactionary, such as smashing machinery or burning hay stacks; or it could be political but progressive such as taking part in a banned demonstration or march.

Bentham believes that torture should be tied to punishment when considered as an application of continual castigation until the delinquent ceases offending. He maintains that although torture might be applied for the purpose of punishment, its real aim is to extract evidence from a criminal “who has been subjected to those dolorific applications which are commonly made use of for that purpose” (Twining: 330). However many people are quick to dismiss torture without really thinking about it. For all that is wrong with torture, there may be justified uses with or without regrets. Although torture is prohibited under International and Domestic Laws of most 21st Century countries, it is important to remember that there is no world where torture of any kind never takes place. For example, Saudi Arabia ratified the International Convention against torture in October 1997. Today torture, as a culture, of brutality is the outstanding rhythm of life in Saudi Arabia and many other Arab countries. Kenya Army has gone on record for being accused of mass torture in Mt. Elgon (Reuters, Nairobi, April 2008); despite the fact that Kenya Government had declared torture as illegal in 2004.

Bentham contents that torture is necessary to back active punishment, since according to him; torture is related to it as the essence of torture in that punishment continues until the delinquency comes to an end and at that, torture ceases. Torture and other forms of active punishment, may be considered as a continual application of successive punishment against continual offending the main offence committing in not doing what one is supposed to do. Punishment ceases when the offence ceases. Torture, though might appear at times as a perverted aspect of punishment, when applied not to extract evidence, could serve a purpose of inflicting pain. Bentham looks at torture in a positive way. His concept of it is consistent with the view of punishment, but does not encompass the sordid details community attributed to it. Rather, he compares it to the way imprisonment was applied in some European countries to enforce payment of debts, although he does not recommend it for this purpose. Torture as punishment, Bentham says aims at preventing wrong doing by physical means. But he advocates its use only when the guilt of the accused has been proven beyond any reasonable doubt. Is the journey to the Hague torture in essence or in

itself? This stance was intended to counteract the legal procedure adopted since Roman times, of trying cases in private, with the prisoner having no right to counsel. In these instances, when the judge felt almost sure of the guilt of the accused, he would order to be applied to extricate a full confession to prove his belief. But Bentham does not think trials should be based on guess work; according to him, torture is part of law, and should be applied only to those proven guilty, to get a confession and to set an example of what might happen to potential transgressors. Conversely, Bentham warns that it is utterly unjustifiable to apply torture when no guilt has been proven.

The use of torture, then, is in accordance with the law it might be cruel, impolitic, unconstitutional but certainly not legal (Bentham, O.L.G 1-12). The subject and object of law are the people and things related to it (Bentham, O.L.G.). The object is the act towards which the law is directed; it originates from a person and its progress might be through things or people. A person may come under notice of the law either as an active agent or a passive subject (Bentham of law in General: 54). In accordance with this definition, when Bentham affirms that the law is directed towards the subject and the object, it justified torture, if the person apprehended is the actual offender. Bentham says that the law is the will of the sovereign whose purpose is to control the conduct of the subjects by condemning some acts as criminal and imposing punishment for any transgression (Bentham, of law in General : 67). Therefore torture plays the role of punishment when it is applied to prevent crime.

## **THE RESTRICTIONS OF IMPRISONMENT**

To examine how imprisonment through solitude darkness and isolation, deprives and alters a person's attitude towards wrong doing. Bentham has observed that imprisonment restrains the faculties of the individual, by hindering him from receiving agreeable impressions or from doing what he desires: they take from his liberty with respect to certain enjoyments and certain acts (Bentham; principles of Penal Law Vol. 1:420). The resulting restrictions have both moral significance and physical consequences: morally, the individual is prevented from choosing the acts he wishes to perform, physically, he is threatened with increasingly restrictive punishment which might confine him to a particular territory.

According to Bentham, imprisonment affects a person by:

- Depriving him of the pleasures derived from the faculty of seeing and enjoying the diversity of his environment.
- Depriving him the pleasure of pursuing pastime activities.
- Preventing him from attending to his Health needs and carrying on business for a living
- Deprives him of public diversions
- Ostracizing him from family and friends
- Preventing him from pursuing public offices of honor and trust; how far is it true to Kenyan politicians.

- Taking away his opportunity for advancement or association with people as for example in the case of marriage for himself or his descendants.

According to Bentham, solitude is an aspect of imprisonment which affects a person by making him feel remorseful. For example, as to confirm this belief, Howard observes that when criminals in New Gate Prison were sentenced and brought to the confinement cell, they could often break down into tears. He quotes Hanway as;

“I remember an instance, some years before the law for proceeding to sentence upon evidence of a notorious male factor who would not pleas. It was a question whether he should be brought to the process, but the jailor privately recommended to the magistrate to try solitary confinement in prison. This produced the effect, for less than 24 hours, the daring, artful felon chose to hold up his hand at the bar, and quietly submit to the laws, rather than remain in such a solitary state without hope”. (Bentham, Principles of Penal LAW, Vol. 1:426).

The horror of solitary confinement proves to be a strong deterrent for criminals, since the impression they receive from such experience affects their mind in such a manner as to give way to tricks of the imagination and infantile fears because of the lack of immediate contact with reality. In addition, solitude brings the criminal closer to God and the realization of the wrong doing. But Bentham is aware that “Darkness, too has in circumstances like this, a peculiar tendency to dispose man to conceive and in a manner to feel, the presence of invisible agents. Whatever the reason, the fact is notorious and undisputed. When the external senses are restrained from action, the imagination is more active and produces numerous races of ideal beings. In a state of solitude, infantile superstitions, ghosts and species recur to the imagination. This of itself, forms a sufficient reason for not prolonging this species of punishment, which may overthrow the powers of the mind and produce incurable melancholy. The first impression will however always be beneficial (Bentham, the Principles of Penal Law Vol. 1:426).

Through this experience the criminal is restrained from pursuing his wicked disposition by simply being denied the opportunity to interact with others. Hard diet affects the criminal in an almost similar way: the pangs and the pain take so much of his imagination that he practically thinks of nothing else but probably death. The most natural of all will be to retrace the events of his past life; the bad advice he received his first deviation from rectitude which has led to the commission of the offence for which is at the time undergoing punishment a crime, all the pleasures deprived from which have been already and of which that remains is the melancholy suffering that he endures. His penitent reflections will naturally be directed to errors of which he has been guilty; if he has a wife or children or near relations, the affection that he once entertained for them may be renewed by the recollection of the misery that he has occasioned them. (Bentham, P.P.L Vol 1:425-6). Human beings need to find relief from feelings of guilt. This is achieved through repentance, in religious people which is a recognition and acceptance of the guilt emphasized by a determination to do better. But there is no forgiveness without justice. Repentance is commonly expressed through confession; there are numerous descriptions of

spiritual or emotional relief of repentance the passing from the misery of a torturing conscience to a great sense of alleviation and profound and satisfying peace. Guilt may be conceptualized as a negative self evaluation which occurs when an individual acknowledges that his behavior is at variance with a given moral value to which he feels obligated to conform. In abstraction, it is the reaction of an injured conscience, the injury consisting in the perception of the violation of the moral values that conscience feels compelled to abide to. Hence, one might hypothesize that before feelings of guilt he can become operative; hence the following conditions must be present;

- The individual must accept certain standards of right and wrong or good and bad as his own.
- He must accept the responsibility of governing his behavior to conform to whatever standards he has thus adopted.
- He should be able to discern when a discrepancy between behavior and internalize values occur.

According to the Christian tradition when a person realizes that, what he has done is evil, he tries to restore himself through repentance. Bentham's writings are not sufficient to elaborate this stance adequately, but J.H. Seelye 1869 states that, a valid repentance must be the act of an offender, not because the sovereign requires it, but because the offender has been led to require it of himself (J.H. Seelye, 1869; "Punishment' Its meaning and Ground," Hours at Home, Vol. viii: 569). In Bentham's view, when an individual realizes and repents for his wrong doing, pledging never to repeat it again, he is reformed, the fear of wrong doing leading, in its turn to conformity to law. Case of Akinyi/ Judith who spent 8 years in Langata women prison; came out a repented Christian soloist, a few months later was rearrested trafficking heroine (Standard Newspaper, July 13, 2010). Akinyi became, "a headmistress" of 239 inmates at Langata Women Prison, Kenya, who specialized in various skills under her supervisions.

In evaluating the effects of imprisonment, its observed that, with regard to efficacy to disable, this kind of punishment deprives the offender of the opportunity and power of doing mischief; it is not fungal, however, since the inmates do not work to pay for their sentences. During Bentham's time, imprisonment was not exemplary because the public had no direct experience of its efficacy. For this reason he believes that the panopticon prison system would be much more useful in making the public aware of the efficacy of imprisonment. He also documents some inequalities in the treatment of some inmates, in health standards for example and how well- to-do inmates were allowed to enjoy the company of relatives and friends, while the poor were neglected and made to endure miserable conditions.

The three purposes of imprisonment are punishment, compulsion and safe custody. Bentham cautions that when imprisonment is employed as punishment one ought to take into consideration of the criminal's age, sex, rank, physical conditions and the nature of the offence before sentencing. In some cases, he advocates harsher measures because of the comparatively

low degree of intensity and magnitude of the imprisonment when he believes that the same effect can be obtained through intensity and duration, at a lower cost. When Bentham wrote about the effects of imprisonment, he was fully aware of the appalling conditions existing in England and other countries, and that is why he called for a reform. Although he was convinced that solitary confinement, for example was necessary to bring the accused to admit his wrongdoing, his concern was mainly to establish how this mode of punishment could be applied to prevent crime. Hardcore criminals should be in solitary confinement, he believes, because they would otherwise use any association with others to plan further evils; while by preventing them from having any contact with other wrong doers, there might be a possibility of reforming them. By the same token Bentham points out this kind of punishment might lead to unjustifiably long prison terms, and possibly result in failure, as was the case with convicts in New South Wales. Bentham believes that close supervision with enough prison personnel would improve the condition of the prisoners and the chance of reformation. Bentham's concern is to expose the need for penal reform. For example, "A view of the Hard Labour Bill in the British Government revealed that he is pre-occupied with the reform of Penal Law; the bill, he observes does not adequately deal with the problem of reform (Bentham, 1962:3-35). Bentham rejects prevention, reformation, incapacitation and compensation objectives because none of them can be achieved through transportation punishment, on the ground that they don't attempt to reform nor prevent crime. He introduced his own objective, the economy of punishment. The nature of punishment and torture of any kind depends on the three forms of existing government. (Bentham, a Fragment on Government; 449-460); i.e. the monarch, in which the power to make laws is in the hands of one person; Aristocracy, in which the power is in the hands of a few chosen ones and Democracy; in which power to make laws resides in the hands of all. Bentham doubted whether any of these is the best government, because all allow some form of tyranny. He refutes the idea that monarchy is perfect and aristocracy wise and good. He sees democracy as an acceptable form of government as he asserts that wisdom and goodness are qualities of a democratic government.

In reference to Kenya, if the 2007/2008 perpetrators of political violence have to be committed to the international criminal court of justice in The Hague; they will be serving "compensation". By compensation or satisfaction, Bentham means the clause by which the criminal pays back the injured party for the loss of or any other suffering his offence has caused him. Bentham interprets compensation as past or future satisfaction. In the former case, separation is less than the evil committed, in the latter, it is equivalent to the offense because its function is to prevent more crime in future. It is observed in Kenya that there is more concern with correcting abuses anomalies of law and reforming, reinstating the offender by direct action of the legislator. But Bentham's own belief is that consciousness of wrong doing s the ultimate factor that prevents crime, since it is rooted in the moral and religious awareness of culture.

In the case of Judith Akinyi, Bentham would have preferred punishment by transportation (banishing of criminals from one country to another when serving criminal sentences). Akinyi is a Kenyan woman convicted to serve an eight year sentence for drug trafficking after being



arrested in Rome, Italy, July 12, 2010. She was a prominent lady who lectured at the Kenya Polytechnic till 2001 when she was introduced to the quick money project in drug trafficking. She eventually was transported from Italy to Kenya to complete her sentence from Langata Women's Prison. This kind of a process does not reform criminals otherwise she could have reformed when she was transported from Rome to Kenya. The problem in this situation is that of lack of religious reforms and availability of hard drugs. It is the immoral habit that makes the convict not to reform. When Akinyi completed her sentence from Langata Women's Prison in Kenya, she was neither reformed nor rehabilitated nor incapacitated, thus showing that the whole project is a dismal failure. If Kenyan prisons can put in the practice of moral habits, then religiously most of the convicts can reform. Likewise convicts in Kenya are suffering from lack of moral and religious consciousness despite the presence of prison chaplains or could it be because modernity has eroded the sense of a moral order to which one is called to be faithful.

He continues to examine four modes of punishment; Vicarious, transitive, corrective and random, in order to demonstrate the abuse and misuse of the Law by the British Justice System of his time; which allowed punishment of innocent people on the basis of their natural or accidental relationship with the author of a crime (Bentham 1962:5).

Vicarious Punishment is inflicted on a substitute when it is not possible to punish the actual culprit as in the case of Kenya, victims of political violence, the internally displaced people being punished for evils committed by convicts who can't be arrested nor their whereabouts traced. They are confined in camps inhumanely. They are deprived of their rights.

Transitive Punishment: punishment that falls to children or other relatives of the person guilty of a crime known as transitive punishment, Bentham objected to this kind of punishment, that innocent people should not be used as scapegoats. This kind of punishment is unnecessary to restrain criminals. He affirms that, the crown should not be given power to punish the family of the criminal because their suffering is without reason and waste. In any case punishment should be well defined so that it does not affect a person related to the guilty party in the "virtue of their connection" (Bentham, the Principles of Penal Law Vol. 1:477). It is important that people who have no share in the crime should not be punished. Bentham refutes the idea that collected punishment is unjustified because laws are fixed after the offense has been committed.

## **PUNISHMENTS-IRREMISSIBLE AND OPPRESSIVE**

Bentham argues against capital punishment because he condemns its use by tyrants and its application as a consequence of judicial corruption. But he admits that if capital punishment proves to be efficacious and becomes popular, the public approval of it would be proportionate to its efficacy. According to Bentham, popularity is not what makes an act justifiable, rather, he looks for something which lessens greater evils. Bentham's concern with the problem of death penalty was that, when one commits a crime punishable by death, he should be sentenced only



after a fair trial; he justified the death penalty on the grounds that it operates as self defense, both for the victims' rights and the safeguard of the community and not as a deterrent.

Bentham thinks that capital punishment is irremissible on the grounds that once a criminal is killed, there could be compensation but no remedy; but capital punishment involves crucial moral issues and it is to reach a general consensus on whether it should be abolished or not. But according to Bentham, capital punishment does not serve any purpose that is useful; he argues that a legalized death penalty is equivalent to the justification of injustice, because tyrants would interpret this legalization as a means of defending their oppressive methods under disguise of law or it gives them the advantage of imposing the death penalty for crimes they do not warrant. Bentham and Beccaria believed that any human and moral society must fully be committed to the sanctity of human life and its members must be deeply convinced that life of every human being is inviolable.

Furthermore, there are certain criminals whose nature is so morally corrupt that they cannot be reformed and experience shows that they are always determined to follow the road of crime. This has been man's moral problem since time immemorial. A Biblical case is cited in 2 Samuel 13:23-39 where Absalom organizes for the murder of his brother Amnon is wanting. The King who happened to be their father should have executed Absalom as the chief judge of his days and imprisoned Amnon for his heinous acts. But Absalom further conspires to rid the King by engaging him in a Gorilla War (II Sam. 15). It prompts us to criticize the legal system of Israel as a Theocratic Government for contravening the rights of human beings. In the light of Bentham's arguments, King David could have been opposite to capital punishment on the grounds that it hardly ever prevents crime and because of its irreversible nature. Besides in the days of King David, the Laws dealing with capital punishment existed in blueprint but were never practiced because the judges by then feared God and they were God's appointees who respected human dignity.

## **CONCLUSIONS**

According to Bentham, torture is related to punishment in that it too prevents crime. Although he acknowledges that capital punishment prevents criminals from repeating their offense, he doubted whether it would have the same effect on others, as this kind of punishment does not leave lasting impression on the popular imagination. He needed up rejecting death penalty on the grounds that it did not prevent crime and entailed horrors and irrevocable injustice. Bentham was aware that the judicial system of his time was corrupt and that judicial errors often caused punishment of the innocent. Consequently, serve no purpose; rather it made perjury appear meritorious by founding it on humanity, by causing contempt for unexecuted laws and rendering convictions arbitrary and pardons necessary.

Bentham's contribution to matters of punishment has grossly been overlooked. More so, in 1868 and 1956, the British House of Commons and of the Lords inconclusively debated the abolition

of capital punishment. Bentham's arguments would have provided a quick solution if Britain adhered to Bentham's thoughts on punishment. Conclusively, Bentham's contribution on torture and punishment offers us a new and more compassionate perspective on the problem of punishment and torture than suggestions of contemporary writers. For this reason, re-reading Bentham's work is not only required as far even applicable to African culture, specifically on the Kenyan judicial culture, but as well as a necessary matter.

## **REFERENCES**

- Barnes Jr, W. L. (1998). Revenge on Utilitarianism: Renouncing a Comprehensive Economic Theory of Crime and Punishment. *Ind. LJ*, 74, 627.
- Berger P. (1970). Obsolescence of the Concept of Honor.
- Burns J.A and Hart H.L.A (1970). An Introduction to the Principles of Moral and Legislation, London. Athlone Press.
- Burns T.H and Hart H.L.A (1977) a Comment on the Commentaries and Fragment on Government, London Athlone Press.
- Everett, C.W. (1966). Jeremy Bentham. London and New York.Dell.
- Hart H.L.A (1970). Of Laws in General, London Athlone Press.
- John R.B and Milton G. (1789). Utilitarianism from an Introduction to the Principles of Morals and Legislation Philosophy and Contemporary Issues. Upper Saddle River. NJ: Pearson, 182-192.
- Luna, E. (2003). Punishment theory, holism, and the procedural conception of restorative justice. *Utah L. Rev.*, 205.
- Markel, D., & Flanders, C. (2010). Bentham on stilts: The bare relevance of subjectivity to retributive justice. *California Law Review*, 98(3), 907-988.
- Parley W. (1964).Principles of Moral and Political Philosophy, Selby-Bigge, British Moralists, 2 vols. New York: Bobbs- Merrill. Standard News paper Jul 13, 2010.
- Steiker, C. S. (1997). Punishment and procedure: punishment theory and the criminal-civil procedural divide. *Ann. Rev. Crim. Proc.*, 26, 775.
- The Bible: The King James 2000 Version; Zondervan Bible Publishing.
- Tonry, M. (2018). Punishment and Human Dignity: Sentencing Principles for Twenty-First-Century America. *Crime and Justice*, 47(1), 119-157.
- Twining, W.L. and P.E (1973). "Bentham on Torture," *Northern Iceland Legal Quarterly*, Vol 24. 305-356.