EVALUATING THE EQUITABLE MEASURES: KENYA'S STRATEGY IN PUNISHING ATTEMPTED ROBBERY WITH VIOLENCE AND ROBBERY WITH VIOLENCE

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DECLARATION

I, CYNTHIA NYABUNDI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: ....

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This dissertation has been submitted for examination with my approval as University Supervisor.

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ABSTRACT

Capital punishment, colloquially known as the death penalty, has historically been employed as a deterrent to crime. In the context of Kenya, the death penalty is prescribed for capital offenses including treason, murder, and robbery with violence. However, a critical gap arises in the penal code concerning the differentiation between robbery with violence and attempted robbery with violence, both attracting the same severe penalty. This discrepancy leads to ambiguity in legal interpretation and compromises defendants' ability to prepare adequate defences. This research aims to address the lacuna in Kenyan law regarding the punishment disparity between robbery with violence and attempted robbery with violence utilizing a qualitative methodology and engaging with philosophical perspectives on differential punishment. The significance of this research lies in its potential to inform policymakers and legal practitioners on the necessity of amending existing legislation to ensure fair and proportional sentencing. By filling the scholarly gap on the appropriateness of the death penalty for attempted robbery with violence, this study contributes to the discourse on criminal law and criminology, particularly within the Kenyan context. Ultimately, this research seeks to advocate for a more nuanced and equitable approach to sentencing, aligning with constitutional principles of fairness and proportionality while enhancing public understanding of legal rights and principles.

LIST OF CASES

Benard Kimani Gacheru Vs Republic (2002) eKLR

Caroline Auma Majabu v. Republic Criminal Appeal No. 65 of 2014 [2014] eKLR

David Mwangi Mugo vs. Republic [2011] eKLR

Fatuma Hassan Salo V Republic [2006] Eklr;

Francis Karioko Muruatetu & another v Republic [2017] eKLR

Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

Geoffrey Andare v Attorney General & 2 others (2016) eKLR.

Godfrey Ngotho Mutiso V Republic [2010] Eklr

Hoare v The Queen (1989) 167 CLR 348)

Johana Ndungu v R (1996) eKLR.

Kaberia Kahinga & 11 others vs. Attorney General (2016) eKLR.

Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment)

Mithu Vs. State of Punjab, 1983 (2) SCC 277, Constitution Bench

R v Dawson and James (1976), Court of Appeal of England and Wales.

R v. Scott, 2005 N.S.W.C.C.A. 152 (2005).

Supreme Court of India in Alister Anthony Pereira Vs State of Mahareshtra at paragraph 70-71

Thomas Mwambu Wenyi Vs Republic (2017) eKLR

William Okungu Kittiny v Republic [2018] Eklr

LIST OF LEGAL INSTRUMENTS

Constitution of Kenya, 2010.

Independence constitution of Kenya (repealed)

Kenya National Commission on Human Rights: Position Paper N0. 2 on the Abolition of the Death Penalty, 2007

Penal Code (2020)

Proposed New Constitution of Kenya (Wako Draft) that was rejected by Kenyans when it was subjected to a referendum on the 21st of November 2005.

Sentencing Policy Guidelines, 2017

The Murder (Abolition of Death Penalty) Act 1965

The National Constitutional Conference was held in Nairobi at the Bomas of Kenya in 2003-2004

UK Criminal Justice Act of 2003

Universal Declaration of Human Right

CHAPTER 1

1.1 BACKGROUND

Capital Punishment[1], also known as the death penalty, has been used as a deterrent to crime since the dawn of time.[2]

The death penalty is the taking of a person's life after a competent court convicts them of a capital offence[3]. The death penalty jurisprudence can be traced back to the millennia of Babylonian Hammurabi's codification of capital jurisprudence[4]. In pre-colonial Kenya, death was commonly imposed as a last resort in cases of offenders who had made themselves dangerous beyond the limits of endurance of their fellows by the persistence or gravity of their crimes[5]. The coming of the British into Kenya led to the legalization and extension of the death penalty[6] to capital offences such as murder and high treason[7] among others.

Today, under Kenyan law, capital offences include treason[8], murder[9], robbery with violence[10] as well as attempted robbery with violence[11] and administration of unlawful oaths to commit capital offences[12]. It is worth noting that both robbery with violence and attempted robbery with violence attract the same penalty in Kenya; the death penalty.

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[1] Potas, I., & Walker, J." Capital punishment," *Australian Institute of Criminology*, 1987, 105

[2] SHAH, R. "Norms on Capital Punishment," *Asian Journal of Humanities and Social Sciences*, *2*(4), 2014,116

[3] *KENYA NATIONAL COMMISSION ON HUMAN RIGHTS: Position Paper N0. 2 on the Abolition of the Death Penalty,* 2

[4] Shah, R. "Norms on Capital Punishment," *Asian Journal of Humanities and Social Sciences*, *2*(4), 2014, 116

[5] James S, "Kenya, Tanzania and Uganda in Alan Milner", *African Penal Systems London: Routledge and K. Paul* 1969, 104

[6] Karimunda, A. M, "The Death Penalty in Africa: The Path Towards Abolition," *Surrey, UK*, 2014

[7] Hynd, S. "Killing the Condemned: The Practice and Process of Capital Punishment In British Africa, 1900–1950s," *The Journal of African History, 49*(3), 2008, 405

[8] Section 2, *Penal Code* (Act No. 24 of 1967); Laws of Kenya any person who is guilty of the offence of treason shall be sentenced to death.

[9] Section 204, *Penal Code* (Act No 20 of 2020); any person convicted for murder shall be sentenced to death

[10] Section 296(2), Penal *Code* (Act No 20 of 2020); if the offender is armed with any dangerous or offensive weapon or instrument or is in company with one or more persons or if at or immediately before or after the time of robbery he wounds, beats, strikes or uses any other personal violence to any person he shall be sentenced to death

[11] Section 297(2), *Penal Code* (Act No 20 of 2020): if the offender is armed with any dangerous or offensive weapon or instrument or is in company with one or more persons or if at or immediately before or immediately after the time of robbery he wounds, beats, strikes or uses any other personal violence to any person he shall be sentenced to death

[12] Section 5, *Penal Code* (Act No. 52 of 1955); any person who administers an oath, or engagement in the nature of an oath, purporting to bind the person who takes it to commit any offence, punishable with death, is guilty of a felony and shall be sentenced to death.

The requirement of a union of actus reus[13] and mens rea[14] is a central ingredient to a crime[15]. This has been the prevailing position in Kenya with regard to criminal cases. To this effect, for a crime of robbery with violence to be established, both the actus reus and mens rea need to be satisfied. The actus reus involves fraudulent taking in conjunction with violence. Such violence must be used to take or retain the property that has been stolen[16]. The mens rea for the same is the fraudulent intention as well as either the intention to use violence or the threat of such violence[17].

The same elements were expressed in the case *Joseph Kaberia Kahinga & 11 others vs. Attorney General*[18] where the courts pointed out the following elements as being key in substantiating the offence of robbery with violence: The offender being armed with a dangerous or offensive weapon or instrument, or the offender is accompanied with one or more person(s) and the offender wounds, beats, strikes, or inflicts any other personal violence to any person immediately before or after the time of robbery.

On the other hand, an attempted offence is created where either the mens rea or actus reus element is absent. An attempted offence falls under inchoate offense alongside solicitation and conspiracy. An in choate offence is a type of crime that is committed by taking a punishable step towards the commission of another crime. An attempt is an inchoate offense that occurs when an individual takes a substantial step towards the commission of a target offense, but ultimately fails to complete the crime[19].

An attempted offence entails three elements that ought to be proven. To begin, the individual must have had the specific intent to commit the actual crime. Second, the person must take steps towards committing the crime and lastly, the crime should not have been completed[20]. Furthermore, the Kenyan penal code states that anyone who attempts to commit a felony or a misdemeanour is guilty of an offence thus liable for one-half of such punishment as may be provided for the offence attempted if no other

[13], Bryan A. Garner Editor in Chief, Black's Law Dictionary, 9th Edition,41; The wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability; a forbidden act.
[14] Section 206, *Penal Code,* (Act No. 20 of 2020); malice aforethought
[15] *Geoffrey Andare v Attorney General & 2 others* (2016) eKLR.
[16] *Johana Ndungu v R (*1996) eKLR.
[17] *R v Dawson and James* (1976), Court of Appeal of England and Wales.
[18] *Joseph Kaberia Kahinga & 11 others vs. Attorney General* (2016) eKLR.
[19]Inchoate Offences https://www.law.cornell.edu/wex/inchoate_offense
[20] Section 388, *Penal Code* (Act No. 20 of 2020).

punishment is provided[21]. However, in the cases of offence punishable by death or life imprisonment an offender is only liable for imprisonment for a term not exceeding seven years.[22]. In this light, an attempted robbery with violence ought to attract less penalty as opposed to a robbery with violence. However, this is clearly not the case seeing as the penalty for both robbery with violence[23] and attempted robbery with violence[24] is death.

Therefore, it is clear that the Penal Code has failed to set out in sufficient precision, distinctively clarifying and differentiating the degrees of aggravation of the offence of robbery with violence and attempted robbery with violence such particularity as to enable those accused to adequately answer to the charges and prepare their defence[25].

1.2 STATEMENT OF PROBLEM

The provision for both the offence of robbery with violence and the attempted offence under sections 296(2) and 297(2) of the Penal Code respectively suggest the same penalty for both offences, death. This is contradictory to the provision of section 389 of the Penal Code thus resulting in a lack of clarity by the Penal Code as it has fallen short of uniquely distinguishing the severity of the aforementioned crimes with adequate accuracy.

From the above, it is evident that there exists a lacuna surrounding the sentence attracted by robbery with violence and attempted robbery with violence where the severity of attempted robbery with violence is not uniquely distinguished from the completed offence. This lacuna creates confusion in the legal system as noted in the case *Joseph Kaberia Kahinga & 11 others vs. Attorney General*[26] above.

This research, therefore, seeks to study and assess the appropriateness of the penalty provided under Kenyan statute for attempted robbery with violence together with robbery with violence. I shall investigate this position in light of the principle of proportionality and justice.

[21] Section 389, *Penal Code* (Act No. 20 of 2020).
[22] Section 389, *Penal Code* (Act No. 20 of 2020).
[23] Section 296(2), Penal code (Act No. 20 of 2020).
[24] Section 297(2), *Penal Code* (Act No. 20 of 2020).
[25] *Joseph Kaberia Kahinga & 11 others v Attorney General* (2016) eKLR
[26] *Joseph Kaberia Kahinga & 11 others vs. Attorney General* (2016) eKLR.

1.3 RESEARCH OBJECTIVES

1. To assess the three approaches to the punishment of attempted offenders, that is, the approach that favours differential punishment and the approach that is against differential punishment and to identify which of the three approaches Kenya has adopted.

2. To assess the culpability of an attempted robbery with violence in comparison to an actual offence

3. To examine whether Kenya's approach to the punishment of attempted offences contravenes the principle of proportionality: the punishment of a certain crime should be in proportion to the severity of the crime itself and thus violates the constitutional right to a fair hearing.

4. To determine the best approach to punishment of attempted crimes.

1.4 RESEARCH QUESTIONS

1. a. What are the three current approaches to the punishment of inchoate offenders?

   b. Which of the three approaches has Kenya adopted in the Penal Code?

2. What is the culpability of attempted robbery with violence in contrast to the actual offence?

3. Does Kenya's approach to approach to the punishment of attempted offences contravene the principle of proportionality: the punishment of a certain crime should be in proportion to the severity of the crime itself and thus violate the constitutional right to a fair hearing?

4. What is the best approach for the punishment of attempted robbery with violence

1.5 HYPOTHESIS

The provision for both the offence of robbery with violence and the attempted offence under sections 296(2) and 297(2) of the Penal Code respectively suggest the same penalty for both offences, death. This is contradictory to the provision of section 389 of

the Penal Code. This brings about difficulties for the judicial officers when it comes to interpreting and applying these provisions.

As such, the hypothesis of this study is premised on the fact that the contradictory provisions in the Kenyan Penal Code regarding robbery with violence and attempted robbery with violence suggest a potential lack of legislative clarity and consistency in sentencing guidelines, leading to ambiguity in distinguishing between the severity of attempted and completed offenses, which may result in varied judicial interpretations and sentencing practices.

1.6 JUSTIFICATION OF STUDY

The contradiction presented in the penal code by sections 296(2), 297(2) and section 389 of the Penal Code on the penalty of inchoate robbery with violence and robbery with violence not only creates a strain for the judicial officers when it comes to interpreting these provisions but also the lack of clarity of distinction in the penal code makes it strenuous for the accused to satisfactorily answer to the charges as well as put together their defence.

Therefore, this study will serve to this study will serve to address a critical issue concerning the clarity and consistency of laws with regard to attempted robbery with violence and robbery with violence. By examining the contradictory provisions, the study seeks to identify gaps in legislative drafting that may lead to confusion and inconsistency in legal interpretation and application. Understanding the implications of contradictory provisions on sentencing guidelines is crucial for ensuring fairness in the criminal justice system.

Moreover, by examining how attempted robbery with violence is treated compared to completed robbery with violence, the study can identify potential disparities in sentencing practices. The study holds also academic significance by contributing to the scholarly understanding of legislative drafting, legal interpretation, and criminal justice practices. Findings from the study can inform policy discussions and legislative reforms aimed at addressing inconsistencies or gaps in the law.

This research, hence, will be a novel addition by contesting the current stance of the penalty attracted by both robbery with violence and attempted robbery with violence in Kenya from the perspective of proportionality and justice. Furthermore, this will be

useful to lawmakers by guiding them on how they can amend the law on the punishment of attempted robbery with violence to make it proportionate and to adjudicators when interpreting the aforementioned provisions of the penal code and subsequently whilst making decisions with reference to such cases to uphold the spirit of justice and principle of proportionality.

1.7 THEORETICAL AND CONCEPTUAL FRAMEWORK:

1.7.1 THEORETICAL FRAMEWORK: RETRIBUTIVE THEORY OF PUNISHMENT

At the core of the retributive principle is that the individual is treated justly. The principle maintains that all state punishment occurs for correction and example, but above all it must be just with respect to the crime only because it is a sin. The criminal must not be able to complain of injustice. Therefore, a punishment that is too severe as vindication would not only be a hindrance greater than the hindrance to freedom represented by the offence and thereby itself a hindrance to freedom, but its execution would be unjust to the individual actor thus unjust as a correction[27].

Immanuel Kant is considered to be the author of the retributive theory of punishment. According to Kant, punishment is warranted as a means to promote proportionality between well-being and virtue[28]. This idea is founded on the idea that political obligations are essentially obligations of reciprocity or fair play: "If the law is to remain just, it is important to guarantee that those who disobey it will not gain an unfair advantage over those who do obey voluntarily. Criminal punishment attempts to guarantee this, and in its retribution, it attempts to restore the proper balance between benefit and obedience[29]." Therefore, Kant's justification for an institution of punishment is that it is required to nullify the unfair advantage law breakers gain over law-abiding citizens[30].

However, Kant's theory has been criticised for lacking clarity as it fails to present an intelligible explanation of what is to be understood by proportionate punishment and

[27] Byrd, B. Sharon. "Kant's theory of punishment: Deterrence in its threat, retribution in its execution." *Law and Philosophy* 8, no. 2 (1989): 193-194

[28] O'Connell, E., 2014. Kantian moral retributivism: Punishment, suffering, and the highest good. *The Southern Journal of Philosophy*, *52*(4), pp.477-495.

[29] Jeffrie G. Murphy, Kant: The Philosophy of Right (New York: St. Martin's Press, 1970), p. 142

[30] S. I. Benn, "Punishment," in The Encyclopedia of Philosophy, ed. Paul Edwards, 8 vols. (London: Macmillan Publishers; New York: Free Press, 1967), vol. 7, p. 30.

why it should be imposed[31]. At this juncture H.L. A Hart is considered to have come in and provided the most significant clarification with his introduction of the three tenets of retributive punishment which answers: what sort of conduct may be punished, how severely, and what is the justification for the punishment. The tenets are: firstly, a person may be punished if and only if he has voluntarily done something wrong; secondly the punishment must match, or be equivalent to, the wickedness of the offence and finally the justification for punishing persons is that the return of suffering for moral evil voluntarily done is itself just or morally good. These tenets have also been referred to as the principle of responsibility[32], the principle of proportionality, and the principle of just requital respectively[33]. I shall rely on these three tenets for the purpose of this study.

The principle of responsibility leads to the question of what makes a person liable and eligible for punishment. This question has been answered by logical retributivism[34] which holds the view that a that a person deserves to be punished if and only if he brought the punishment on himself by knowingly and intentionally violating a positive law that justly protects the rights of others[35].

The principle of proportionality has been interpreted differently in three main ways. The first one is the Penalty Principle which states in part that punishment is retributively just only if it imposes on an offender a deprivation of rights to the extent of his evident culpable failure to abide by the law. The second mode of interpretation employed is the Full Measure Principle which avers that the hardship to which he is thus exposed does not exceed the worst that anyone could reasonably expect to suffer from the similar conduct of another if such conduct were to become general in the community[36]. Finally, is the principle of commensurate deserts asserting that the severity of punishment should be commensurate with the seriousness of the wrong which depends both on the harm done by the act, and on the degree of the actor's culpability[37]. The common denominator

[31] Von Hirsch, A., 1992. Proportionality in the Philosophy of Punishment. *Crime and Justice*, *16*, pp. 62
[32] Hart, H.L.A., 1959. Prolegomenon to the Principles of Punishment. In *Correctional Ethics* (pp. 3-28). Routledge.
[33] Hart, H.L.A., 2008. *Punishment and responsibility: Essays in the philosophy of law*. Oxford University Press, 231
[34] Quinton, A.M., 1954. On punishment. *Analysis*, *14*(6), pp.133-142.
[35] Kneale, W.C., 1967. *The responsibility of criminals* (Vol. 18). Clarendon Press.
[36] Card, C., 1973. Retributive Penal Liability. " American Philosophical Quarterly Monographs, No. 7, 22-23
[37] Von Hirsch, A., 1992. Proportionality in the Philosophy of Punishment. *Crime and Justice*, *16*, pp.55-98.

among the three is that the severity of the punishment should be equivalent to the severity of the crime.

The principle of just requital has been simply interpreted to mean that we should never treat offenders merely as a means of inflicting punishment but should consider their right to treatment as moral agents[38]

The theory of retribution will be used to analyse and critique the approach adopted by Kenya in penalising attempted robbery with violence as opposed to robbery with violence with respect to the afore-outlined tenets to retributivism. I shall mainly focus on the first two tenets. Firstly, I will begin by gauging whether the Kenyan approach is parallel to the principle of responsibility. I shall then proceed to assess the aforementioned approach against the principle of proportionality.

1.7.2 CONCEPTUAL FRAMEWORK: THE CONCEPT OF PROPORTIONALITY

Proportion in the field of punishment and crime is based on the principle that justice should be given to everyone for what belongs to them and deserves it, and in this sense, it means entitlement. When it comes to the proportionality of crime and punishment, it means that there must be a balance between the two; the severity of punishment and the crimes committed[39]. Moreover, the proportionality of the criminal is manifested in two ways, first, deterministic criminalism[40], which determines the punishment as accurately as possible according to the gravity of the crime. And criminals should be punished only to the extent deserved, no more and no less[41].

The concept of proportionality arose from the Latin phrase of Lex talionis which refers to the law of retaliation, whereby a punishment resembles the offence committed in kind and degree[42]. It dates back to the Code of Hammurabi, in which the Lex talionis was used as a governing principle for dealing with crimes[43]. It involved the restoration of some

[38] Quinton, A.M., 1954. On punishment. *Analysis14*(6), Oxford University Press, 136
[39] Dachak, H., 2021. The Principle of Proportionality of Crime and Punishment in International Documents. *International Journal of Multicultural and Multireligious Understanding*, *8*(4), pp.685-686
[40] Viney, W., Waldman, D.A. and Barchilon, J., 1982. Attitudes toward punishment in relation to beliefs in free will and determinism. *Human Relations*, *35*(11), pp.939-949.
[41] Bakaria, Cesar. (1989). Thesis of Crimes and Punishments, Shahid Beheshti University Press
[42] Hornby, A. S., & Turnbull, J. (2010). *Oxford Advanced Learner's Dictionary of current English* (8th edition.). Oxford: Oxford University Press.
[43] Francesco Parisi, 'The Genesis of Liability in Ancient Law' (2001) 3 Amer Law Econ Rev 82-124, 95; David Daube, Studies in Biblical Law (New York: Ktav Publishing House Inc, 1969) 105

form of rudimentary 'equilibrium'[44]. Moreover, the same concept was later adopted in Mosaic law in the old testament in the books of Exodus[45]; Leviticus[46]; and finally, in Deuteronomy[47] which requires mirror punishments, that is, punishments which are meant to reflect the crime precisely. The compensatory aspect of the Lex talionis under the Mosaic Code favours its characterization as a measured and proportionate response to punishable conduct by a member of the community[48]. Unlike the Code of Hammurabi, the Lex talionis of the Old Testament did not command the punishment of one innocent person for the culpable conduct of another[49]. Nonetheless, both adoptions of Lex talionis are seminal expressions of restraint and proportionality as moral principles of punishment[50].

Various scholars have weighed in on the aforementioned notion of Lex talionis and have gone ahead to add to this concept by construing clearer interpretations of Lex talionis. Hart for instance among others has observed, mirror punishments as imposed in Mosaic law are impossible, or at least inappropriate, in many instances giving the example of theft which cannot be punished by theft[51]. In addition to this and in relation to the proper measure of punishment, Kant has expressed that Lex talionis is based on the principle of equality, by which the pointer of the scale of justice is made to incline no more to one side than the other. Kant further argues that Lex talionis is the only principle that in regulating a public court can definitely assign both the quality and the quantity of a just penalty. Thus, in Kant's view, it is only through 'the equalization of punishment with crime' by judicial sentence, that a sentence can be pronounced over all criminals proportionate to their wickedness[52].

[44] Fish, M.J., 2008. An eye for an eye: Proportionality as a moral principle of punishment. *Oxford Journal of Legal Studies*, *28*(1), pp.59

[45] Exodus 21:24-27: 'eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise

[46] Leviticus 24: 17-22: 'fracture for fracture, eye for eye, tooth for tooth'

[47] Deuteronomy 19:21: 'life for life, eye for eye, too for tooth, hand for hand, foot for foot'

[48] Fish, M.J., 2008. An eye for an eye: Proportionality as a moral principle of punishment. *Oxford Journal of Legal Studies*, *28*(1), pp.61

[49] H. Hertz, The Pentateuch and Haftorahs (2nd edition, London: Soncino Press, 1993), 405

[50] Fish, M.J., 2008. An eye for an eye: Proportionality as a moral principle of punishment. *Oxford Journal of Legal Studies*, *28*(1), pp.57

[51] H.L.A. Hart, Punishment and Responsibility (Oxford: Oxford University Press, 1968) 161, quo

[52] Kant, I., 1887. *The philosophy of law: an exposition of the fundamental principles of jurisprudence as the science of right*. T. & T. Clark, 196-198

The concept of proportion has also been interpreted from a legislative point of view and a judicial perspective. From the legislative view, it is stated that in order to observe the proportionality, the legislator, when criminalizing an act or omission, must be aware of both the proportionality of the punishment with that crime and the proportionality of the punishment with the offender. The first element arises from the concepts of entitlement and punishment, which means that punishment requires that everyone be punished according to the severity of their crime. And in the second case, punishment must not only be proportionate to the crime but also proportional to the character of the offender.[53]

At the judicial stage, on the other hand, the judge observes proportionality in determining the amount of punishment by relying on the principle of individualization. This encompasses paying attention to the personality of the perpetrator while determining the punishment and distinguishing the severity of the crime and tailoring the punishment appropriate to the circumstances and the nature of the crime. For instance, distinguishing between someone who commits theft out of greed, and one who steals from hunger and compulsion, surely their punishment cannot be the same. However, in order to achieve proportionality in the judicial stage, the legislator must provide the judicial authority with various levers such as determining the minimum and maximum punishment and the qualities of mitigation[54].

This concept of proportionality will be utilised to evaluate Kenya's approach to punishment of inchoate crimes contrary to actual crimes with respect to robbery with violence and attempted robbery with violence. This will be done by assessing proportionality from both the legislative stage and the judicial stage.

1.8 EXTENDED LITERATURE REVIEW

1.8.1: On differential punishment of inchoate offence counter to an actual offence

Attempt is one area of the law where the tension between objective or differentiated and subjective or non-differentiated approaches is particularly acute. A subjectivist will focus

[53] Dachak, H., 2021. The Principle of Proportionality of Crime and Punishment in International Documents. *International Journal of Multicultural and Multireligious Understanding*, *8*(4), pp.687

[54] Dachak, H., 2021. The Principle of Proportionality of Crime and Punishment in International Documents. *International Journal of Multicultural and Multireligious Understanding*, *8*(4), pp.688

on the moral wrong of the accused, whose blameworthiness may be the same as someone who completes the crime. It may be no thanks to the accused that her attempt did not succeed. Indeed, a pure subjectivist would see no practical difference between an attempted crime and a complete one; in each, the defendant may have done all that she could and what happened as a result of her actions was to some extent a matter of chance[55].

Adam Smith, for instance, states that the only appropriate object of praise and censure is an individual's will[56]. HLA Hart expresses a similar view by asserting that there is no difference in wickedness between the successful and unsuccessful attempts in this regard, though there may be in skill[57]. Becker also views criminal conduct as a socially unstable character trait which, if acted upon by many persons, provides others a reason to also abandon socially stable behaviour in their own defence. Therefore, criminal law provides that assurance by punishing conduct that creates social instability or volatility[58].

In addition, the act - utilitarian theory claims that punishment is justified if and only if the punishment serves to reform the individual or to deter similar actions, thus further rationalizing similar penalties for both an attempted offender and an actual offender as they need the same amount of reform[59]. However, Ashworth, while adopting a subjectivist stance, supports separate liability for attempts by referring to the popular understanding among the general public that there is a difference between an attempted crime and a successful crime. Ashworth argues that the labelling function of criminal law should reflect this commonly perceived difference, even if morally there is no real distinction[60].

On the other end of the spectrum, a purely objective approach would see the difference between an attempted and successful crime as crucial. Objectivists have tended to focus on the harm to the victim or the Queen's peace that has been caused by the attempt, but such harm does not occur with every attempt, and so attempt liability under a purely

[55] Herring, J., Cremona, M., Herring, J. and Cremona, M., 1998, *Criminal Law*, 2nd edition, 332
[56] Smith. A, "The theory of moral sentiments," Vol. 1. J. Richardson, 1822,
[57] Hart HLA, "Punishment and responsibility: Essays in the philosophy of law", *Oxford University Press*, 2008, 129
[58] Becker L C, "Criminal Attempt and the Theory of the Law of Crimes," 3(3) *Philosophy & Public Affairs*, 1974, 273-274.
[59] Dworkin, Gerald, and Blumenfeld D, "Punishment for intentions." *Mind* 75, no. 299, 1966, 397-398.
[60] Ashworth, A. Taking the Consequences, in Shute, S., Gardner, J. and Horder, J., 1993. Action and value in criminal law, Oxford University Press

objective approach is limited. Beccaria, for example, championed for differentiated penalties as it encourages desisting from committing a crime. This is in opposition to the full penalty for a mere attempt that demotivates a person from refraining from committing the crime[61]. A perspective of luck and unfair advantage has also been employed by Michael D Bayles[62] and Michael Davis[63] respectively to demonstrate the rationality behind different penalties.

Some commentators try to take a middle approach. Duff has suggested that the law should consider attempts as attacks on interests protected by the law[64]. This has the benefits of capturing both the subjective and objective elements of an attempt. It focuses on the intent of the accused as well as the threat to the victim[65]. Hyman Gross also proposes "a middle way", distinguishing between various kinds of attempts based on their "dangerousness" such as manifest impossibility, overt impossibility and covert impossibility.[66].

1.9 CONTRIBUTION

There is hardly any academic work in Kenya on the appropriateness of the death penalty provided under Kenyan statute for attempted robbery with violence together with robbery with violence. Similarly, there is a dearth of literature with regard to this particular topic outside Kenya. Nonetheless, there exists international scholarly work on the topic of punishment of an attempted crime as opposed to the punishment of an accomplished crime[67], most of which have done so with respect to murder and attempted murder. This study is thus unique addition not only because it will discuss the fairly novel topic of penalising attempted robbery with violence and robbery with violence in the Kenyan context but also because it does so via a proportionality analysis of the aforementioned practice.

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[61] Marchese di Beccaria, Cesare, and Cesare Beccaria "Beccaria: On Crimes and Punishments' and Other Writings," *Cambridge University Press*, 1995,19.

[62] Bayles, M.D, "Punishment for attempts" *8*(1) *Social Theory and Practice*, 1982, 25,28.

[63] Michael D, "Why attempts deserve less punishment than complete crimes." *Law & Phil,* 1986, 29; an unfair advantage arises from the fact that they have successful or unsuccessfully caused harm contrary to the law

[64] Duff, R.A., 1997. *Criminal attempts*. Oxford University Press.

[65] Herring, J., Cremona, M., Herring, J. and Cremona, M., 1998, *Criminal Law*, 2nd edition, 332

[66]Hyman Gross, A Theory of Criminal Justice (New York: Oxford University Press, 1979), pp. 430-434.

[67] Burkhardt, Bjorn. "Is there a rational justification for punishing an accomplished crime more severely than an attempted crime." *BYU L. Rev.* (1986): 553.

Additionally, my study would contribute to criminal law and criminology literature by giving an analysis and insight into the punishment of robbery with violence and attempted robbery with violence in Kenya and further provide an understanding of the punishment of inchoate offences and complete offences.

My dissertation will further complement the literature of legal philosophers such as H.L. A Hart[68], Immanuel Kant [69]and Hyman Gross[70] among others in their conversation surrounding differential punishment of inchoate offences contrary to completed offences.

1.10 METHODOLOGY

This study will encompass two major parts: the first detailing Kenya's approach to the punishment of inchoate crimes as contrasted against actual crimes and the second part assessing this approach using the principle of proportionality. To accomplish this, the study will rely on qualitative evidence derived primarily from secondary sources such as books, articles and reports in addition to primary sources such as the Penal Code, the Constitution of Kenya and relevant case law. A deductive strategy will generally be employed in this study, with the chapters establishing a premise from which the main assertion will be deduced.

Consequently, the first chapter will illustrate the approach that Kenya has embraced in respect of the punishment of attempted robbery with violence in contrast with robbery with violence as the second chapter discusses the principle of proportionality and afterwards draws an analysis of Kenya's approach against the principle of proportionality. The study, in the first part, will begin by delving into the three approaches to the punishment of inchoate crimes; the approach that advocates for differential punishment of inchoate crimes and actual crimes and the perspective in opposition to the aforementioned penalizing. This will be done primarily by reviewing articles and books. A doctrinal analysis of the Penal Code and relevant case law will be utilised in asserting that Kenya has adopted the approach against differential punishment for inchoate crimes and actual crimes.

[68] Hart HLA, "Punishment and responsibility: Essays in the philosophy of law", *Oxford University Press*, 2008
[69] Fleischacker, Samuel. "Kant's theory of punishment." (1988): 440.
[70] Hyman Gross, A Theory of Criminal Justice (New York: Oxford University Press, 1979),

The study will proceed to discuss the degree of aggravation of inchoate offences in comparison to actual offences by illustrating the conversation put out by various scholars in their literary work. Finally, this study will shed light on the principle of proportionality which will primarily entail a doctrinal examination of court decisions based on the principle of proportionality, as well as a review of books and scholarly articles on the subject. Thereafter, assess Kenya's approach based on the established principle relying on relevant case law and make the prescriptive claim that the said approach is disproportionate to and thus the constitutional right to a fair trial.

1.11 CHAPTER BREAKDOWN

Chapter one is an introductory part of the study. It sets forth, among others, the research objectives, research questions, theoretical and conceptual framework and justification of the study and in doing so lays the groundwork for the subsequent chapters. The second chapter will examine the three approaches to the punishment of inchoate crimes; the view in favour of differential punishment of inchoate crimes and actual crimes and the outlook in opposition to the aforementioned punishment. It will further put forward the claim that Kenya adopts the latter of the two approaches.

The purpose of chapter three will be analytically study the degree of grievance caused by an inchoate offence as against actual crimes before chapter four goes ahead to provide evidence for the study's central premise. – that Kenya's approach to the punishment of inchoate offences contravenes the principle of proportionality and thus violates the constitutional right to a fair hearing. This will be accomplished by outlining the principle of proportionality and what it entails, after which Kenya's penalising practices will be evaluated in light of this notion.

To conclude the study, chapter five will offer recommendations as to how the two statutes can be amended to endorse a penalising practice that is proportionate and, in the process, seek to suggest a better approach to the same.

The challenges and limitations that I have faced during my study are time and resource constraints that have impacted the depth and scope of the study, considering the comprehensive nature of legal research and analysis required in the examination of this subject.

2 CHAPTER 2: EXPLORING THE TRIAD: CURRENT APPROACHES TO THE PUNISHMENT OF INCHOATE OFFENDERS

2.1 INTRODUCTION

In the intricate web of legal philosophies surrounding the punishment of inchoate offenses versus their fully realized counterparts, scholars find themselves entangled in debates and diverse perspectives in the examination of the delicate equilibrium between uniformity and differentiation in the adjudication of inchoate offenses in comparison to the actual offense.

On one end, the proponents of parity advocate for a paradigm wherein the volitional aspect, rather than the actual outcome, serves as the paramount criterion for commendation or condemnation[71]. Drawing upon the tenets expounded by Adam Smith and the act-utilitarian theory[72], proponents assert the imperative of a singular approach, wherein attempted and consummated offenses attract commensurate punitive measures[73]. On the antipodal front, critics scrutinize the retributive theory[74], challenging its insistence on proportionality by positing that the inherent peril lies not in the outcome but in the erratic character trait inherent in criminal conduct[75].

Conversely, Beccaria steps into the spotlight championing a hierarchical penal structure that encourages leniency and facilitates a transformative change of heart[76]. Michael Davis contributes a facet of levity, positing that attempted offenders, despite societal advantages, warrant clemency owing to their ostensibly disadvantaged position relative to their accomplished counterparts[77]. Michael D Bayles further introduces an element of

[71] Smith. A, "The theory of moral sentiments," Vol. 1. J. Richardson, 1822,

[72] Dworkin, Gerald, and Blumenfeld D, "Punishment for intentions." *Mind* 75, no. 299, 1966, 397-398.

[73] Burkhardt, Bjorn, "Is there a rational justification for punishing an accomplished crime more severely than an attempted crime" 3rd issue, *BYU L. Review.* ,1986,554

[74] Hart HLA, "Punishment and responsibility: Essays in the philosophy of law", *Oxford University Press*, 2008, 129

[75] Becker L C, "Criminal Attempt and the Theory of the Law of Crimes," 3(3) *Philosophy & Public Affairs*, 1974, 273-274

[76] Marchese di Beccaria, Cesare, and Cesare Beccaria "Beccaria: On Crimes and Punishments' and Other Writings," *Cambridge University Press*, 1995,19.

[77] Michael D, "Why attempts deserve less punishment than complete crimes." *Law & Phil,* 1986, 29; an unfair advantage arises from the fact that they have successful or unsuccessfully caused harm contrary to the law

fortuity, thereby prompting contemplation on whether, in the face of undeserved serendipity, attempted offenders should be accorded lenient punitive measures[78].

Hyman Gross unveils a third approach, delineating the gradations of dangerousness inherent in attempts through the classifications of manifest impossibility, overt impossibility, and covert impossibility[79].

In this kaleidoscopic tableau of scholarly perspectives, the pursuit of justice reveals itself as an intricate gem, with each scholar contributing a distinctive facet to the ongoing quest for a judicious and comprehensive approach to the penalization of attempted offenses. In this chapter, therefore, I will attempt to navigate the complexities of this scholarly tapestry.

2.2 UNIFORM PUNISHMENT: DISTINGUISHING BETWEEN INCHOATE OFFENSES WITH ACTUAL OFFENSES

A longstanding puzzle within criminal law revolves around the disparate punishment of two offenders who commit the same criminal act, particularly when one, due to circumstances beyond their control, causes more harm than the other. In this regard, legal theorists have predominantly addressed the issue of demarcation rather than proportion, suggesting that the rationale for criminalizing an act should also determine the extent of punishment. They have focused on the effects it has on general deterrence[80] and base their argument on the fact that most empirical studies have concluded that lengthening an offender's sentence generally has a neutral or even positive effect on his likelihood of recidivism[81].

In addition to this, champions of this view advance that purpose of criminal law is to prevent certain acts. Thus, if punishing criminals is how the criminal law achieves that purpose, then the only question is how early is too early to begin preventing[82]. This assumption has led to the conclusion that lenient treatment of attempts is either fundamentally misguided or, at best, justified by speculative considerations, such as the belief that the failure to complete a crime demonstrates a lack of resolve or that the

[78] Bayles, M.D, "Punishment for attempts" *8*(1) *Social Theory and Practice*, 1982, 25, 28.
[79] Hyman Gross, A Theory of Criminal Justice (New York: Oxford University Press, 1979), pp. 430-434
[80] Boeglin, J. and Shapiro, Z., 2017. A theory of differential punishment. *Vand. L. Rev.*, *70*, p.1507
[81] Sung, L. and Lieb, R., 1993. *Recidivism: The effect of incarceration and length of time served*. Olympia, WA: Washington State Institute for Public Policy, p 5-6
[82] Davis, M., 1986. Why attempts deserve less punishment than complete crimes. *Law & Phil.*, *5*, 4

reduced penalty for attempts acknowledges the difficulty of proving intent without a completed offense[83].

In furtherance of the above assertion, some of these theorists have contended that where the attempt is complete there is no relevant moral difference between the complete attempter and the substantive offender. They deserve the same punishment: the only difference between their cases lies in the result, and that is a matter of chance or luck[84]. Therefore, the starting point for sentencing the complete attempter should be the same as that for the substantive offender, on the principle that "an actor who acts culpably has his blameworthiness and punishability fixed by that culpable act alone, regardless of whether it produces a harmful result[85]."

The monistic- subjective concept of wrongdoing has additionally contributed to the argument for uniform punishment by viewing criminal wrongdoing as consisting of the wrongfulness of action or, more precisely, the wrongfulness of intention. The concept explains that criminal wrongdoing exhausts itself in the wrongful action. The success of the act does not increase the wrongdoing, and the absence of success does not diminish it[86]. Consequently, the wrongfulness of a completed attempt is no less than that of the accomplished offense. Thus, under this aspect of wrongdoing, there is no reason to mitigate punishment.

Retributivism is the leading theory in favour of uniform punishments. Retributivists, led by Immanuel Kant[87], traditionally understood the wrong in question as a moral wrong, an evil intention realized in an act. Retributivism relies on the basic premise that criminal offenders should be made to suffer, in the form of criminal punishment, in "payment" for their crimes[88]. What seemed important was the intention's having been realized in some act or other, not the particular way in which it was realized. Thus, one is morally just as blameworthy for attempting to rob a bank and failing as they would had they succeeded. The rationale behind this is that they meant to succeed, and only, say, the bank guard's

[83] Michael D, "Why attempts deserve less punishment than complete crimes." *Law & Phil,* 1986, 5
[84] P. Robinson and J. Darley, Justice, Liability and Blame: Community Views and the Criminal Law (Boulder, Colo.: Westview Press, 1995), 23.
[85] L. Alexander and K. K. Ferzan (with S. J. Morse), Crime and Culpability (Cambridge: Cambridge University Press, 2009), 192
[86] Horn, E., 1973. Konkrete Gefährdungsdelikte. *(No Title)*; Münzberg, W., 1966. Behavior and success as the basis of illegality and liability. *(No Title)* .
[87] Kant, I., 2017. *Kant: The metaphysics of morals*. Cambridge University Press.
[88] Cottingham, J., 2019. Varieties of retribution. In *Retribution*, Routledge, 3

alertness prevented them from "making a haul". Moreover, they assert that if punishment should be proportioned to moral blameworthiness, then what they deserve for their attempts is just what they would deserve had they succeeded. So, attempts should generally be punished as severely as complete crimes[89].

Retributivism further holds that criminal offenders should be made to suffer, in the form of criminal punishment, in "payment" for their crimes[90]. Through administering retributive punishment, the criminal justice system also expresses society's moral condemnation of the offender. In light of this, H.L.A. Hart questions whether the accidental fact that a harmful outcome has not occurred should be a ground for less punishment of a criminal who may be equally dangerous and equally wicked[91].

Deterrent theorists have presented a slightly different rationale, contending that the purpose of punishment is to deter socially dangerous acts by making them unattractive. They argue that almost no one plans a mere attempt, rather envision the crimes as complete and highly successful in prospect. On this basis, the distinction between attempt and complete crime is considered not only pointless but also inconsistent with the deterrent purpose of punishment[92].

In the same light, rehabilitationists have argued against leniency for attempts asserting that the purpose of punishment is to prevent socially dangerous acts by changing the dangerous person so that he is no longer a danger and by holding him in a safe place until he is changed. They hold that one who attempts a crime is in general as dangerous as one who succeeds unless the crime is broken off because of a change of heart. Thus, in general, punishment for an attempt should be the same as punishment for a complete crime[93].

In closing theories in favour of uniform punishment underscore moral culpability, deterrent efficacy, and rehabilitative potential of offenders. From the above it is evident that this is an unpopular view. This is partly due to the continuous shift in jurisprudence from uniform punishment for inchoate offences and completed offences to differential

[89] Davis, M., 1986. Why attempts deserve less punishment than complete crimes. *Law & Phil.*, *5*, 6
[90] Cottingham, J., 2019. Varieties of retribution. In *Retribution* Routledge,3.
[91] Hart, H.L.A., 2008. *Punishment and responsibility: Essays in the philosophy of law*. Oxford University Press,130
[92] Lawrence C. Becker, 'Criminal Attempts and the Theory of the Law of Crimes', Philosophy and Public Affairs 3 (Spring 1974): 262-294;
[93] Wootton, B. and Wootton, B., 1963. *Crime and the criminal law: Reflections of a magistrate and social scientist* (Vol. 1). London: Stevens, 32-57

punishment of the same. Moreover, the scarcity in such arguments is further attributed to by the loopholes in the above arguments which include solely focusing on the moral wrongfulness and intention rather than examining the same alongside the severity of the harm done and thus the proportional punishment due. In addition to this, it is my opinion that the above views fail to take into consideration both the victim and offender and are rather centred around appeasing the victim and society and reducing the offender to an object of revenge without due regard to proportionality. Additionally, the said theories fail to make any attempts to reintegrate the offender into society.

2.3 DIFFERENTIAL PUNISHMENT: CONTRASTING INCHOATE OFFENSES WITH ACTUAL OFFENSES

The distinction in penalty is championed in most legal systems to punish attempts differently due to the difference in the harm inflicted by the attempt as opposed to that which would have been inflicted upon the completion of a crime. The explanation that Adam Smith gives for this irregularity of sentiments is: As what gives pleasure or pain, either in one way or another, is the sole exciting cause of gratitude and resentment; though the intentions of any person should be ever so proper and beneficent on the one hand, or ever so improper and malevolent on the other; yet if he has failed in producing either the good or the evil which he intended, less gratitude seems to be due to him in the one, and less resentment in the other. And, as the consequences of actions are altogether under the empire of fortune, hence arises her influence upon the sentiments of mankind regarding merit and demerit[94].

Additionally, in his empirical argument, Adam Smith observed that "common sense" assesses good and evil human deeds according to their consequences. Sociopsychological investigations have proven that: "In general, the greater the harm, the greater the punishment reaction[95]." The "penal lottery[96]" view further posits that, given that people are generally risk averse[97], thus arbitrarily punishing certain offenders severely and

[94] Smith. A, "The theory of moral sentiments," Vol. 1. J. Richardson, 1822, 92-108

[95] Miller, D.T. and Vidmar, N., 1981. The social psychology of punishment reactions. In *The justice motive in social behavior: Adapting to times of scarcity and change* (pp. 145-172). Boston, MA: Springer US.

[96] Chiao, V., 2012. Ex ante fairness in criminal law and procedure. *New Criminal Law Review*, *15*(2), .289.

[97] Teichman, D., 2011. The optimism bias of the behavioral analysis of crime control. *U. Ill. L. Rev.*, 1697.

others leniently will deter crime more effectively and efficiently than would punishing all offenders equally.

In addition to this, nearly all authors who advocate less severe punishment for completed attempts refer, in one form or another, to the "common perception of justice," the "natural sense of justice," the "controlling values of social life," or, as it was earlier called, the "demand of the soul of the people[98]." Despite considerations of criminal law policy, the "natural sense of justice" suggests that the disturbance of the peace caused by an attempt is not on the same level of criminality as the accomplished offense[99]. Criminal law, which directly affects the general public, simply "cannot refuse to consider such instinctive and generally prevailing public views[100]." Therefore, the appropriateness of punishment is deemed to depend upon the impression the punishment will make on public sentiments. Suppose someone had intended, but did not actually inflict, an appalling amount of harm[101].

The most prominent formulation of this argument comes from philosopher Michael Moore. In his book Placing Blame, Moore builds an argument for differential punishment out of three claims about people's attitudes with regard to causing harm: firstly, most people believe that an offender "deserves more punishment for having killed a victim than he would if he had unsuccessfully tried to kill that victim"; secondly, most people experience a "feeling of greater guilt when they succeed in causing versus trying for or risking bad results[102]"; and finally, most people tend to focus on the possible results of a course of action, rather than saying to themselves, "it does not matter how my choice comes out, so long as I make a reasonable choice without any culpable intention[103]." Moore goes on to argue that "the principle whose truth best explains this mass of

[98] Burkhardt, B., 1986. Is there a rational justification for punishing an accomplished crime more severely than an attempted crime. *BYU L. Rev.*,562.
[99] Blumoff, T.Y., 2004. Some thoughts on the aesthetics of retribution. *Canadian Journal of Law & Jurisprudence*, *17*(2), 243
[100] H. Hart, Punishment And Responsibility 131 (1968); H. Hart & T. Honore, Causationin The Law 394-98 (1985); Brady, Punishing Attempts, 63 Monist 247, 255 (1980); Smith, The Element Of Chance In Criminal Liability, 1971 Crim. L. Rev. 63 (1971).
[101] Burkhardt, B., 1986. Is there a rational justification for punishing an accomplished crime more severely than an attempted crime. *BYU L. Rev.*,553.
[102] Moore, M.S., 2010. *Placing blame: A theory of the criminal law*. Oxford University Press, 225
[103] Moore, M.S., 2010. *Placing blame: A theory of the criminal law*. Oxford University Press, 229-232

judgments in particular cases is of course the principle that causing a harmful result independently determines the extent of our just deserts, along with culpability[104]."

In the same breath, the relationship of punishment to deed is that punishment must stand in strict proportional relationship not only to the actor's intention, but also to the resultant harm. To maintain proportionality, a mere attempt must be punished less severely than a consummated crime[105]. In light of this, Michael Davis puts forth the argument of unfair advantage in defence of differential punishment, asserting that someone who attempts a crime but fails to do the harm characteristic of success still risks doing that harm. He deserves punishment for risking that harm because even risking such harm is an advantage the law-abiding do not take. He deserves less punishment for the attempt than he would for the complete crime because being able to risk harming is not as great an advantage as being able to do it. To attempt murder is, for example, not worth as much as to succeed[106].

The successful offender has the advantage of having done what he set out to do. The would-be offender whose attempt failed has only had the chance to do what he set out to do. The difference is substantial. Because even the criminal guilty only of attempting a serious crime takes a substantial advantage the law-abiding do not, he deserves substantial punishment for what he did. But because merely attempting a serious crime is substantially less of an advantage than actually succeeding at it, such a criminal deserves substantially less in punishment for the attempt than he would for the complete crime[107]. Moreover, imposing the same penalty for attempts violates the principle of using the least severe measures available[108].

Differential punishment has also been argued to provide marginal incentives for offenders to abandon their criminal design before the criminal act is consummated, whereas equal punishment removes incentives for abandonment of criminal plans[109]. As Judge Richard Posner puts it: If the punishment for attempted murder were the same as for murder, one who shot and missed (and was not caught immediately) might as well try

[104] Moore, M.S., 2010. *Placing blame: A theory of the criminal law*. Oxford University Press, 226
[105] Berman, M.N., 2021. Proportionality, Constraint, and Culpability. *Criminal Law and Philosophy*, *15*(3),333-
[106] Davis, M., 1986. Why attempts deserve less punishment than complete crimes. *Law & Phil.*, *5*, 28
[107] ibid
[108] Steiker, C.S., 2005. No, capital punishment is not morally required: Deterrence, deontology and the death penalty. *Stan. L. Rev.*, *58*, 751.
[109] Posner, R.A., 1985. An economic theory of the criminal law. *Colum. L. Rev.*, *85*, p.1519.

again, for if he succeeds, he will be punished no more severely than for his unsuccessful attempt[110].

Jerome Michael and Herbert Wechsler further hold that differential punishment provides substantially the same deterrent value as would punishing all instances of the underlying conduct, and comes at a lower practical cost than punishing attempts equally as completed offenses[111]. The core assumption of this argument is that an individual contemplating a criminal act looks to the penalty for the completed, as opposed to the attempted, crime when deciding whether to act. At most, then, this theory suggests that the criminal justice system can substantially deter intentional crimes without punishing attempts as severely as it does complete offenses[112].

Victim-facing expressive justifications have also been explored in justifying differential punishment. These justifications focus on the victim and their dignity rather than solely on the perpetrator breaching the law[113]. Several proponents of such theories argue that punishment is intended to establish "equality" between victim and offender. George Fletcher, for example, argues that "a criminal act establishes a particular relationship" between an offender and victim, whereby the offender "gains a form of dominance that continues after the crime has supposedly occurred.[114], and that failure to punish secures continuing dominance of the offender over the victim. Some commentators have suggested that the expressive function of punishment takes the form of a duty owed to victims of crime by the state[115].

In light of the above, the amount of expressive punishment required increases with the amount of harm done to the victim, holding constant the offender's behaviour and mental state. In this regard, Jean Hampton's status-based expressive theory states that for offenses where no harm is inflicted on a victim, no victim has had their status degraded in a way that requires an additional measure of punishment to rebut the offender's false claim of superiority over the victim. In other words, "only when the victim is subjected to unredressed harm is he or she" subjected to "status degradation" requiring a strong

[110] Posner, R.A., 1985. An economic theory of the criminal law. *Colum. L. Rev.*, *85*, p.1218
[111] Michael, J. and Wechsler, H., 1937. A Rationale of the Law of Homicide II. *Colum. L. Rev.*, *37*, p.1261, 1295
[112] Boeglin, J. and Shapiro, Z., 2017. A theory of differential punishment. *Vand. L. Rev.*, *70*, p.1510
[113] Goti, J.M., 2001. Equality, Punishment, and Self-Respect. *Buff. Crim. L. Rev.*, *5*, 504
[114] Fletcher, G.P., 1999. The place of victims in the theory of retribution. *Buffalo Criminal Law Review*, *3*(1), pp.51, 57.
[115] Goti, J.M., 2001. Equality, Punishment, and Self-Respect. *Buff. Crim. L. Rev.*, *5*, p.497,504

expressive response[116]. In this way, victim-facing theories of expressive punishment advocate for practice of differential punishment to achieve their goals.

The second set of victim-facing justifications for differential criminal punishment posits that the state should channel victims' desire for revenge into extra measures of punishment[117]. As Justice Stewart argued in his concurrence in the landmark death penalty case Furman v. Georgia, "channelling the instinct for revenge in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law[118]." Additionally, Steven Eisenstat explains, "recompense, getting satisfaction, matching like with like, giving what's coming to the wrongdoer, equalizing crime and punishment, an eye for an eye; each of these synonyms for revenge implies the proportionality of the scales of justice[119]."

In summation the critical examination of the arguments presented reveals the intricate tapestry of considerations that shape the discourse on differential punishment. The philosophical underpinnings, empirical observations, and practical implications underscore the need for a nuanced and comprehensive approach that balances the demands of justice, societal expectations, and the psychology of human behaviour. However, these arguments similarly fall short of the aspect of severity by assuming that all attempts cause substantially less harm in comparison to its counterpart completed crime.

2.4 NAVIGATING THE MIDDLE GROUND: A BALANCED APPROACH TO PUNISHMENT OF INCHOATE OFFENSES VERSUS ACTUAL OFFENSES

More recently, retributivists have shifted their focus somewhat from intention to the act itself. Wrongdoing, as it is often stated now, encompasses both the action taken and the intended outcome. For instance, reckless driving is considered bad, but causing someone's death as a result is deemed morally worse. I believe there are at least two variations of this "loss-based" approach. One type would underscore the harm inflicted on individuals, while the other would highlight the loss of social discipline or security[120].

[116] Binder, G., 2007. Victims and the significance of causing harm. *Pace L. Rev.*, *28*, 736

[117] Henderson, L.N., 1992. The wrongs of victim's rights. In *Towards a critical victimology* (pp. 100-192). London: Palgrave Macmillan UK. ("Recent victim's rights proposals appear to be driven more by the retaliatory view of retribution than by the moral aspect of retribution.").

[118] *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

[119] Eisenstat, S., 2004. Revenge, justice and law: Recognizing the victim's desire for vengeance as a justification for punishment. *Wayne L. Rev.*, *50*, p.1136

[120] Fletcher, G.P., 2000. *Rethinking criminal law*. Oxford University Press, 472-483.

Both approaches could justify treating some attempts as deserving less punishment than certain completed crimes. However, neither approach is entirely satisfactory.

For instance, it seems unreasonable to conclude that I would cause significantly more harm to individuals or society by completing a bank robbery and getting arrested as I leave the bank than I would if arrested either before the teller handed me anything or once he handed me a bag of worthless paper. Yet, the loss-based approach seems to compel us to either equate the attempt with the completed crime or provide a rationale to believe that the completed crime would cause significantly more harm than the attempt.

Hyman Gross provides an especially interesting example of this sort of retributivism. Gross does not argue that every attempt should be punished as severely as the corresponding complete crime. Instead, he proposes "a middle way", distinguishing between various kinds of attempts based on their "dangerousness". Some crimes become mere attempts because of "manifest impossibility". Other crimes fail because of "overt impossibility." But most crimes that fail do so because of "covert impossibility." According to Gross, a crime that fails because of covert impossibility should be punished as severely as the complete crime because the act was "as dangerous as it could be" and so, "harmful conduct". Crimes that fail because of overt impossibility are, however, less culpable because they are less dangerous. Crimes that fail because of manifest impossibility are even less culpable because they are not dangerous at all[121].

Gross' guiding principle is that the same conduct should receive the same punishment. To those who might object that attempts and complete crimes cannot be the same conduct because one is merely dangerous while the other is actually harmful, Gross responds that the harmfulness of conduct is a matter not of the harm done but of the harm risked. He defends that response by claiming that an attempt defeated by covert impossibility is as blameworthy as the complete crime would be. The assassin who misses their shot is, "morally speaking" a murderer whether he succeeds in his attempt or not. Gross thus falls back on something like the traditional retributivist view that the criminal law punishes morally blameworthy acts because they deserve punishment[122].

[121] Hyman Gross, A Theory of Criminal Justice (New York: Oxford University Press, 1979), pp. 430-434.
[122] Hyman Gross, A Theory of Criminal Justice (New York: Oxford University Press, 1979), 431

Manifest impossibility occurs when there are no proper grounds for criminal liability because the actor has no reason to believe that harm would occur. In these cases, the impossibility is evident. On the opposite end of the spectrum are instances of covert impossibility. In these situations, even though the harm cannot occur in reality, there is a general belief that it will, and the actor also has reason to believe in its occurrence. In such cases, the culpability of the actor remains unchanged when the harm does not materialize, and consequently, there is no justification for reduced liability when harm is averted. Overt impossibility falls in between these extremes. While the actor may have reason to believe that harm can occur, there is no basis to believe that it will actually happen.

Hyman Gross illustrates different forms of impossibility through three cases of attempted assassination. In the first scenario, the assassin holds a toy gun, mistakenly believing it to be a lethal weapon. Despite careful aim and pulling the trigger, it is manifestly impossible for the intended victim to die. The actor believed in the possibility, but there was no reasonable basis for this belief, as normal attention to the essential aspects of ability would reveal the impossibility. Moreover, not only was there no reason to believe in the possibility, but the actor himself had no basis for such belief. It was either sheer indifference or perhaps some delusion that led him to attempt an assassination with a toy gun, rather than simply a failure to pay normal attention to factors affecting his ability to execute the task. When the actor neglects these crucial considerations and is entirely unequipped to achieve his goal, we naturally do not perceive his actions as a serious threat, and certainly not as an immediate danger. Someone aware of the would-be assassin's actions but choosing to ignore them could hardly be labelled as irresponsible[123].

In a second scenario, let's consider an assassination attempt involving a shot fired at the intended victim after careful aim had been taken. Unbeknownst to the actor, however, the weapon is notoriously inadequate, with a range of about a hundred yards, and the target is much farther away. The intended outcome by the actor is once again impossible, but this time it is an overt impossibility. Yet again, there was no reason to believe that the

[123] Hyman Gross, A Theory of Criminal Justice (New York: Oxford University Press, 1979), 431

victim's death was possible, as normal attention to matters of ability would clarify the impossibility, similar to the first case[124].

However, unlike the initial case, in this instance, the actor had reason to believe that his intention was possible. Although he failed to pay adequate attention to his ability to perform the task as one normally would, he was only careless and not indifferent or under the influence of some delusion. In contrast to the man with a toy gun, he armed himself with a deadly weapon, which is sufficient attention to ability to render his act genuinely dangerous. In this case, others would reasonably be concerned not just with the actor's intentions but with what he was doing. Ignoring such a situation would be a measure of irresponsibility on their part[125].

In the third case, we encounter a situation of covert impossibility. The weapon in use is appropriate for the task, but the assassin fires a round with a concealed defect, causing the bullet to fail in reaching its intended target. In this instance, not only did the actor have reason to believe that his intention was possible, but there was actual justification for that belief. Despite lacking the ability, he had not been deficient in enabling himself to perform the job. It is reasonable to assert that, in this case, the conduct was as dangerous as possible, constituting a case of harmful conduct. Although the actions could not result in the victim's death, the avoidance of such an outcome was purely coincidental In contrast, overt impossibility diminishes the danger of the conduct and, consequently, its culpability. Therefore, it justifies a lesser degree of liability. On the other hand, covert impossibility holds no exculpatory value, as it merely gives rise to the futile argument that the absence of harm was a matter of chance[126].

The principle that supports equal liability for attempts and completed crimes in cases of covert impossibility is straightforward and extends beyond such scenarios. When the absence of harm is solely a matter of chance, there is no justification for considering the action less dangerous. Numerous situations exist where harm was possible, and its avoidance was only due to some chance event or condition. In these instances, there is no grounds for deeming the conduct less dangerous than if harm had indeed occurred. Even if the victim's life is spared due to a cigarette case or a momentary nod, the actions of the

[124] Hyman Gross, A Theory of Criminal Justice (New York: Oxford University Press, 1979), 432
[125] Hyman Gross, A Theory of Criminal Justice (New York: Oxford University Press, 1979), 432
[126] Hyman Gross, A Theory of Criminal Justice (New York: Oxford University Press, 1979), 432

assailant still constitute harmful conduct. When conduct is deemed harmful, liability for it must be consistent, irrespective of whether the crime is completed or merely attempted[127].

This raises the question of whether liability should lean towards the lesser responsibility typically assigned to attempts or the greater responsibility typically assigned to completed crimes. There is no one-size-fits-all answer. Liability should always align with the culpability of the conduct, and considerations such as assuaging feelings or compensating for injury should not play a role in determining the extent of criminal liability. Adjusting penal provisions that currently differentiate between attempts and completed crimes may necessitate elevating the attempt's severity in some cases and lowering the completed crime's severity in others to achieve parity in punishment for the same conduct[128].

It is a matter of considering all elements that contribute to culpability and then adjusting the penalty to position the conduct correctly relative to the culpability of other crimes on the scale outlined in a penal code. Not only harmful conduct but also imminently dangerous conduct may sometimes receive disparate treatment in attempts and completed versions of a crime. Consider, for instance, not the calculated act of a distant assassin but rather violent homicidal assaults where the assailant uses deadly force against the victim. Some of these assaults may still be cases of harmful conduct[129].

Ultimately, the question of whether to assign lesser or greater liability for attempts compared to completed crimes becomes a matter of carefully weighing elements that contribute to culpability.

2.3 CONCLUSION

In conclusion, the debate over uniform punishment versus differential punishment for inchoate offenses versus completed offenses is a complex and multifaceted issue that delves into various philosophical, empirical, and practical considerations within the realm of criminal law. The proponents of uniform punishment emphasize moral culpability, deterrent efficacy, and rehabilitative potential as key factors justifying equal punishment for attempts and completed crimes. However, this perspective faces criticism

[127] Hyman Gross, A Theory of Criminal Justice (New York: Oxford University Press, 1979), 433
[128] Hyman Gross, A Theory of Criminal Justice (New York: Oxford University Press, 1979), 433
[129] Hyman Gross, A Theory of Criminal Justice (New York: Oxford University Press, 1979), 434

for neglecting the severity of harm done and failing to consider the reintegration of offenders into society.

On the other side, advocates for differential punishment argue that the distinction is crucial to align with societal perceptions of justice, the expressive function of punishment, and the practical deterrent effect. These arguments highlight the importance of acknowledging the varying degrees of danger and harm associated with attempts versus completed crimes. Additionally, victim-facing justifications assert that punishment should address the relationship between the offender and victim, emphasizing the need for differential punishment to restore a balance of equality. This view similarly falls short of addressing the severity of an attempt, basing its argument on the assumption that all attempts cause substantially less harm thus warranting less punishment.

The middle ground, as explored in the balanced approach, introduces the idea of a nuanced and comprehensive assessment that considers both the harm inflicted and the dangerousness of the conduct. This approach acknowledges that attempts and completed crimes may vary in their degree of culpability and advocates for a flexible response that aligns with the specific circumstances of each case. The discussion further introduces the concept of covert, overt, and manifest impossibility, providing a framework for distinguishing between attempts deserving of lesser punishment and those equivalent to completed crimes.

In navigating this middle ground, it becomes apparent that a one-size-fits-all approach to punishment may not be suitable. Instead, the severity of punishment should be carefully calibrated based on a thorough analysis of the elements contributing to culpability in each case. This includes assessing the harm done, the dangerousness of the conduct, and the level of intention. Striking this balance requires a nuanced understanding of the intricate factors involved, ensuring that the criminal justice system effectively addresses the complexities of inchoate offenses and completed crimes while upholding principles of justice and fairness.

CHAPTER 3: UNRAVELING THE CULPABILITY SPECTRUM BETWEEN INCHOATE OFFENSES AND THEIR ACTUAL COUNTERPARTS

In the intricate landscape of criminal law, understanding culpability is paramount to assessing the moral and legal responsibility of individuals for their actions. This chapter delves into the evolving concept of culpability, tracing its historical development and scrutinizing its multifaceted dimensions. From early common law traditions to contemporary perspectives, the chapter explores the spectrum between inchoate offenses and their actual counterparts, offering a nuanced analysis of culpability's various facets.

In criminal law, culpability is a measure of the degree to which an agent can be held morally or legally responsible for action and inaction. Therefore, a person is said to be culpable only if they are justly to blame for their conduct[130]. Moreover, culpability is said not to demand correspondence between culpability and punishment; rather, it requires only that the quantum of punishment not exceed the extent of the culpability[131].

Under common law traditions, the view of criminal culpability has developed and refined over the years with the first period initially imposing liability without regard for the actor's culpable state of mind. The second period saw the emergence of a distinction between "wilful" and "accidental" harms, reflecting an early concern for an actor's culpable state of mind. This aligns broadly with the modern knowing-reckless distinction. The third period recognized the three aforementioned categories of culpability. Moreover, accidental cases were further divided into careless and faultless accidents during this period. This marked the initial recognition of purely faultless conduct. Reckless and negligent instances of carelessness were distinguished, leading to the transition from three categories to four during the fourth period. Finally, the fifth period distinguished purposeful and knowing forms of intention[132].

The above history demonstrates that culpability is not a unitary concept within the criminal law. In addition to the aforementioned, culpability has been divided into two broad concepts. These are narrow and broad culpability. Narrow culpability is an

[130] Fletcher, G.P., 2000. *Rethinking criminal law*. Oxford University Press, 398

[131] Burkhardt, B., 1986. Is there a rational justification for punishing an accomplished crime more severely than an attempted crime. *BYU L. Rev.*, 567

[132] Robinson, P.H., 1979. A brief history of distinctions in criminal culpability. *Hastings LJ*, *31*, 821

ingredient in wrongdoing itself, describing the agent's elemental mens rea. It consists of different mental attitudes or relations that the agent might bear to the objective or material elements of the offense such as purpose, knowledge, recklessness, and negligence. These different forms of elemental mens rea represent different grades of culpability, from more to less, and help define different offenses[133].

On the other hand, broad culpability is the responsibility condition that makes wrongdoing blameworthy and without which wrongdoing is excused. Broad culpability is part of the retributivist idea that blame and punishment are fitting responses to culpable wrongdoing. This is wrongdoing for which the agent is responsible and, hence, blameworthy[134]. Moreover, it is the kind of culpability that requires both normative competence[135] and situational control and implies that the agent had a fair opportunity to avoid wrongdoing. In particular, predominant retributivism condemns blame and punishment of wrongdoing as unfair unless the agent was broadly culpable for her wrongdoing[136].

Borrowing from Chapter Two, we see that Gross demonstrates that attempting the "covertly impossible" deserves the same punishment as committing the complete crime while attempting the "overtly impossible" deserves less punishment. Gross' argument is focused on the degree of "culpability[137] ".

Let us begin with attempting the covertly impossible. Gross observes that a person whose attempt turns out to be covertly impossible is just as culpable as the person who succeeds. Such a criminal fails to do the characteristic harm not because he is incapable of doing it or because he failed to do everything in his power to do it. He fails only "by chance" and chance does not reduce culpability. In the same light, the approach of dangerous proximity focuses on a subset of *actus reus* formulations for attempts that emphasise an

[133] Brink, D.O., 2019. The nature and significance of culpability. *Criminal Law and Philosophy*, *13*,358
[134] Brink, D.O., 2019. The nature and significance of culpability. *Criminal Law and Philosophy*, *13*,354
[135] Brink, D.O., 2003. Immaturity, normative competence, and juvenile transfer: How (not) to punish minors for major crimes. *Tex. L. Rev.*, *82*, 1555: Normative competence in criminal law refers to the cognitive, affective, and conative abilities required to understand and distinguish right from wrong, regulate one's emotions and actions accordingly, and exercise responsible behaviour. It is recognized that normative competence can be compromised in various ways, such as through mental illness or immaturity. The reduced normative competence of juveniles, for example, justifies reduced punishment for them. However, it can be challenging to determine whether a failure to exercise normative competence is due to a lack of competence or a reduced capacity.
[136] Brink, D.O., 2019. The nature and significance of culpability. *Criminal Law and Philosophy*, *13*,354
[137] Davis, M., 1986. Why attempts deserve less punishment than complete crimes. *Law & Phil.*, *5*, 29

actor's proximity to completing a crime, where intervention becomes necessary and punishment is warranted[138].

This view holds that the actor currently harbors an intention to cause harm and has undertaken actions perceived as indicative of their dangerous nature. Thus, this approach utilizes dangerousness as a criterion for identifying individuals who not only possess the intent to impose an unjustifiable risk but have also taken concrete steps toward realizing that intention. The view, in close relation with covert impossibility, posits that it is only when the actor does something that they believe increases the risk of harm to the victim in a way that they no longer can control that they have engaged in a culpable act[139].

Moreover, according to Gross, the person attempting the overtly impossible deserves more punishment than the person guilty of attempting the manifestly impossible because what he did was more dangerous than attempting the manifestly impossible, but deserves less punishment than the person guilty of attempting the covertly impossible because what he did was less dangerous than that. Gross explains the lesser culpability of those who attempt the overtly impossible by appealing to the lesser danger such attempts pose[140].

Another approach to culpability is put forth by Michael Davis in his argument of "unfair advantage"[141]. This argument posits that punishment should be proportioned only to a certain sort of culpability, the culpability specifically connected with "cheating", that is, with the unfair advantage one takes by breaking the law in question. While our criminal may be just as bad a person, just as culpable generally, whether or not he succeeds or fails at this or that crime, he is not therefore equally well off. To cheat successfully is to take a greater advantage than one takes by cheating unsuccessfully. That is why a license to commit a complete crime is worth more than a mere license to attempt the same crime[142].

Borrowing from the retributivist idea of culpability, an additional theory of culpability holds that one is culpable when one knowingly risks harm to others. In doing this, the actor manifests their respect or lack thereof for others and their interests. That is, choice

[138] Dressler, J. 2001. Understanding criminal law, (4th ed., 2006), 425-427.
[139] Alexander, L. and Ferzan, K.K., 2009. *Crime and culpability: A theory of criminal law*. Cambridge University Press, 214.
[140] Davis, M., 1986. Why attempts deserve less punishment than complete crimes. *Law & Phil.*, *5*, 29-30
[141] Davis, M., 1986. Why attempts deserve less punishment than complete crimes. *Law & Phil.*, *5*, 29
[142] Davis, M., 1986. Why attempts deserve less punishment than complete crimes. *Law & Phil.*, *5*, 29-30

and acting on that choice are sufficient grounds for desert and punishment. Furthermore, it is only at the time the actor engages in the act that unleashes a risk of harm that he believes he can no longer control, through the exercise of reason and will alone, that he has performed a culpable action[143].

In support of the above "choice matters" theory of culpability, an argument is presented against the moral significance of results in determining culpability in criminal law. In a demonstration of this, a thought experiment is presented involving an actor who decides to harm a victim, emphasizing that the actor's choice and intention to cause harm are sufficient grounds for desert and punishment. This argument further asserts that choice, grounded in practical reasoning, provides a principled basis for holding individuals responsible. The criminal law's influence is seen at the point when the actor makes a choice, not necessarily when harm occurs[144].

Moreover, the argument holds that the subsequent causation of harm does not inherently increase the actor's moral culpability nor is it necessary for negative desert, since attempts and risks may be punished even without causing harm. Additionally, causation is viewed as being insufficient, as a strict liability regime would hold even careful actors criminally responsible for accidental harm. This is based on the view that the primary principle of morality that guides one's actions and choices is to "treat others with sufficient concern" rather than causation of harm[145].

In furtherance of this argument, the authors, Larry Alexander and Ferzan argue that focusing on results shifts the emphasis back to a mechanistic causal universe and diminishes the significance of human action as a matter of practical reasoning. Moreover, they express their scepticism about the phenomenological argument that suggests we feel guiltier and blame others more when harm occurs, asserting that emotions alone do not provide a compelling principle for enhancing desert based on results. Therefore, on this premise, the authors contend that culpability should be primarily based on choice

[143] Alexander, L. and Ferzan, K.K., 2009. *Crime and culpability: A theory of criminal law*. Cambridge University Press, 171
[144] Alexander, L. and Ferzan, K.K., 2009. *Crime and culpability: A theory of criminal law*. Cambridge University Press, 173
[145] Alexander, L. and Ferzan, K.K., 2009. *Crime and culpability: A theory of criminal law*. Cambridge University Press, 176

rather than results as choice is a more powerful and persuasive basis for understanding the purposes of criminal law, practical reasoning, and criminal responsibility[146].

The authors further present two hypothetical scenarios to challenge the assumption that results should enhance culpability. In the first hypothetical, a satanic cult initiation involves twenty members pulling a trigger with one live bullet among nineteen blanks, resulting in the death of the kidnapped victim. The authors argue that, if each member knew the risk and willingly participated, the one who fired the live round is not more blameworthy than the others. The emphasis is on shared culpability, as all members demonstrated the same disrespect for the victim's life[147]. This position is similar to Hyman Gross' covertly impossible attempts which would similarly hold that the nineteen would be as culpable as the twentieth actor as they had only missed to complete the crime chance since Gross asserts that harmfulness of conduct is a matter not of the harm done but of the harm risked[148].

The second hypothetical involves two children breaking a neighbour's window while tossing baseballs into the yard. Even if it is unknown which child caused the damage, the authors argue that parents would likely punish both children equally, emphasizing the enforcement of the rule against hitting balls into the neighbour's yard rather than determining individual culpability. In presenting the above hypothetical situations, the authors do not dismiss the importance of harm and acknowledge its significance in determining culpability. However, they emphasize that criminal law aims to prevent unjustified harm, and harm itself is what the criminal law ultimately cares about[149].

Moreover, this view states that it should be obvious that in maintaining the moral equivalence of culpable acts that cause harm or cause conduct that is a proxy for undue risks of harm. This is based on their assumption that the actor has taken the last step they believe necessary to unleash the risk and that the relevant level of risk is now beyond their control. A further assertion is that if an actor merely intends to unleash the risk, even as soon as the next moment, his culpability is not as high as that of one who has

[146] Alexander, L. and Ferzan, K.K., 2009. *Crime and culpability: A theory of criminal law*. Cambridge University Press, 175
[147] Alexander, L. and Ferzan, K.K., 2009. *Crime and culpability: A theory of criminal law*. Cambridge University Press, 176
[148] Hyman Gross, A Theory of Criminal Justice (New York: Oxford University Press, 1979), 431
[149] Alexander, L. and Ferzan, K.K., 2009. *Crime and culpability: A theory of criminal law*. Cambridge University Press, 176

unleashed the risk. Thus, even if inchoate forms of criminality are culpable, however, that culpability is less than the culpability of those who believe they have already unleashed the risk. Only the culpability of the latter is equivalent to that of actors who culpably cause harm.

Michael Moore introduces the concept of luck in moral philosophy in support of "result matters" theory of luck. He argues that in a deterministic world, variables beyond one's control exist at every stage, from character formation to execution of actions. Moore contends that "result luck" is indistinguishable from other types of luck such as : "constitutive luck" which involves the genetic and experiential fortuities that cause one to have the character that produces potentially harmful conduct; "circumstantial luck" for instance "planning luck" that involves fortuities that may intervene to prevent one from forming plans to engage in potentially harmful conduct; and "execution luck" that involves fortuities that prevent the execution of firmly formed intentions to perform potentially harmful conduct[150] suggesting that if external factors shape one's character and circumstances, moral responsibility becomes elusive as one should be able to benefit from their result luck.

Conversely, a critique is presented in "Choice matters" in culpability theorists' response to Michael Moore questioning whether positive results of a crime decrease blameworthiness since negative results increase blameworthiness. In the assessment of this quandary, a picture is painted of the Israeli bomb thief who stole a backpack from a crowded area, brought it to a secluded area, opened up the backpack, and found a bomb[151]. Although some theorists argue that the thief's action was unjustified because he did not know of the bomb, other theorists claim that the thief, whose action resulted in the lesser evil, was justified[152]. These latter theorists, such as Michael Davis, would grant the thief a defence to the completed crime of theft but punish him for attempted theft[153].

[150]Moore, M.S., 1998. Placing Blame: A Theory of Criminal Law. *CAMBRIDGE LAW JOURNAL*, *57*(3), 621.
[151] Robinson, P.H., 1997, February. The bomb thief and the theory of justification defenses. In *Criminal Law Forum*, Vol. 8, No. 1, 387.
[152] Robinson, P.H., 1975. A theory of justification: societal harm as a prerequisite for criminal liability. *UCLA L. Rev.*, *23*, p.266; Fletcher, G.P., 1975. The right deed for the wrong reason: a reply to Mr. Robinson. *UCLA L. Rev.*, *23*, p.293.
[153] Byrd, B.S., 1986. Wrongdoing and Attribution: Implications Beyond the Justification-Excuse Distinction. *Wayne L. Rev.*, *33*, 1289; Smith, J.C., 1989. Justification and excuse in the criminal law, 43

Therefore, it seems immaterial to the actor's culpability and the amount of punishment that he deserves that his action resulted in less harm. Moreover, the question of the reason why his punishment should decrease owing to the fortuity that his theft saved lives when, like other thieves, he intentionally stole someone else's property and whether fortuitous results of one's culpable action fully absolve the offender of any blameworthiness whatsoever arises[154]. Against this backdrop, the conclusion drawn is that if such fortuities can decrease punishment, then no one's moral ledger is complete until the end of time. For if results matter, including the results of bringing about lesser evils, then what looks to be a net harmful result might prove at some distant time to be net beneficial. Therefore, it is more reasonable, an actor who acts culpably has his blameworthiness and punishability fixed by that culpable act alone, regardless of whether it produces a harmful result[155].

Moreover, luck alone does not provide a principled basis for distinguishing moral responsibility for actions from responsibility for results[156]. On the same note, the compatibilist perspective, argues that moral responsibility is grounded in practical reasoning, not in a mechanistic-causal account of behaviour. The compatibilist position maintains that individuals can be morally responsible for their actions based on intentional, non-compulsory behaviour guided by a general capacity for rationality[157].

Additionally, control over choices is immune to luck and qualitatively different from control over heredity, environment, and causal consequences. Additionally, regardless of history, confronting options, or external influences, the choices individuals make are uniquely within their control, and this control is not just a matter of degree but of a different kind. The text contends that bad luck before or after a choice does not affect culpability, as culpability is tied to the distinct and immune control individuals have over their choices[158].

[154] Levy, K., 2005. The solution to the problem of outcome luck: Why harm is just as punishable as the wrongful action that causes it. *Law & Phil.*, *24*, 286

[155] Alexander, L. and Ferzan, K.K., 2009. *Crime and culpability: A theory of criminal law*. Cambridge University Press, 178

[156] Alexander, L. and Ferzan, K.K., 2009. *Crime and culpability: A theory of criminal law*. Cambridge University Press, 190

[157] Greco, J., 2006. Virtue, luck and the Pyrrhonian problematic. *Philosophical Studies*, *130*, 13.

[158] Nir Eisikovits, "Moral Luck and the Criminal Law," in Law and Social Justice, 117

Larry and Kimberly also emphasize the influence of law and morality on an actor's practical reasoning, asserting that the law should consider the actor's reasons for action when determining culpability. They acknowledge that an actor can change their mind until a point where they believe they have set in motion a risk beyond their control. Moreover, they assert that the law should not punish based on predictions of future criminal conduct and argue that culpability should be grounded in the action itself, focusing on what the actor has done rather than speculating about their future actions. They advocate for the last-act formulation as the only approach that appropriately punishes the actor for their actions, aligning with the principle of punishing individuals for what they have done rather than what they might do in the future.

Their advocacy for the last-act formulation of culpable action is based on three interconnected claims. Firstly, it asserts that criminal law and morality aim to influence an actor's reasons for action. Secondly, it contends that an actor can alter their decision about imposing a risk of harm until they believe they have unleashed that risk and can no longer control it through further practical reasoning. Thirdly, the text argues that an actor should be punished solely for what they have done, not for what they may do in the future. In the examination of culpability of inchoate crimes, the question that arises is whether criminal intentions can themselves constitute culpable and punishable acts. This examination is further broken down into two parts: the first part questions whether forming intentions qualifies as an action or if intentions are merely mental states accompanying other acts, and the second part examines why, even if intentions are considered acts, they should not be considered culpable acts[159].

Two different views are presented in response to this question. On one hand, the view that an intention might itself be a culpable act rests on two assumptions. First, this view assumes that forming an intention alters the world in some way that is material to the criminal law's concerns. That assumption is surely met, at least under many standard philosophical accounts of intentions. Under those accounts, intentions alter the balance of reasons for the actor. Before he forms the intention, he has reasons A, B, and C in support of doing the act and reasons X, Y, and Z against doing it. After he forms the

[159] Alexander, L. and Ferzan, K.K., 2009. *Crime and culpability: A theory of criminal law*. Cambridge University Press, 198

intention, he has a new reason for doing the act, namely, the intention itself, a reason that makes the act more eligible and hence, if the actor is rational, more likely[160].

Second, this view assumes that forming intentions not only changes the world in the way indicated but also is something we do intentionally. If this assumption is granted, then we can say that forming a culpable intention – an intention to commit a future culpable act – is itself a culpable act. However, this view answers the question of whether is the intention itself that is a culpable act and fails to answer whether the formation of the intention is culpable[161]. To illustrate, suppose a person has a certain belief-desire set. Ordinarily, this person will form an intention to act based on his evaluation of his beliefs and desires and a decision regarding what is the best course of action to take in light of them[162].In pursuance of this decision, the actor forms an intention, a plan to engage in that course of action. Hence, although intending, by itself, is not an act but rather a mental state, the mental act of deciding what to intend is potentially culpable[163].

On the other hand, is the view that intentions are not culpable. In support of this view, an argument on the concern of distinguishing intentions from desires is presented. Gerald Dworkin and David Blumenfeld make the point that the lines between intending, on the one hand, and fantasizing, wishing, desiring, and wanting, on the other, even if philosophically clear, are quite difficult to draw as a practical matter, even for the actor himself in identifying the nature of his emotional and mental set. They further state that asserting that intentions are culpable would require us to be constantly worried about the nature of our mental life constantly questioning whether we are only wishing or we have gone a step further and that we may be criminally culpable. The resultant guilt would tend to impoverish and stultify the emotional life.[164]

This view does not apply to completed crimes and completed attempts. However, it does apply forcefully, to incomplete attempts, where it is the actor's attitude toward his future

[160] Bratman, M., 1987. Intention, plans, and practical reason. 80; Raz, J., 1975. Reasons for action, decisions and norms. *Mind*, *84*(336), 489.
[161]Pink, T., 1996. The psychology of freedom. 137–165 (1996).
[162]Moore, M.S., 2010. *Act and crime: The philosophy of action and its implications for criminal law*. Oxford University Press. 140
[163] Ryle, G., 1984. The concept of mind (1949). *London: Hutchinson*, 67
[164] Dworkin, G. and Blumenfeld, D., 1966. Punishment for intentions. *Mind*, *75*(299), 396, 401

conduct that is at issue. The actor may have difficulty distinguishing a mere flight of fantasy from a settled intention[165].

The second argument in favour of the non-culpable nature of inchoate crimes is on the conditionality of intentions and the opacity of future circumstances. This argument highlights that actors often form intentions based on certain conditions which are partial. Thus, it becomes challenging to assess the culpability of intentions due to the uncertainty of future circumstances and the actor's evolving beliefs and attitudes[166]. The argument holds that the conditionality of intentions is not simply a matter of there being potential circumstances that might undermine an intention. Rather, intentions are open-ended plans designed to lead to further deliberation about the specifics. Intentions structure our later means-end reasoning, and their conditionality is thus a feature of them that cannot be ignored. Any plan may or may not lead to a future choice to risk harm to another person for insufficient reasons[167].

The third defense to this view is the argument of duration and renunciation of intentions. This argument considers the impact of the duration of intentions on culpability, questioning whether a longer duration makes an actor more culpable. To illustrate this, consider the hypothetical situation in which X forms the intent to kill Y on January 1. Later, on July 1, Z forms the intent to kill Y on the next January 1. On July 2, X has held the intention to kill Sally for over six months, whereas Z has done so for only a day. Is X more culpable than Z?

If intentions are to be considered culpable, regardless of their duration, then both X and Z would be equally culpable on July 2, despite the significant difference in the length of time each has held the intention to harm Y. Additionally, X's culpability remains constant from the time of forming the intention on January 1 to July 2, unless changes in beliefs about conditions and circumstances occur. Furthermore, if an individual chooses to renounce their intention, then does this act of renunciation alter their level of culpability? If forming the intention itself is considered a culpable act then it will be difficult to expunge culpability by revoking an intention. Therefore, if X was deemed culpable on

[165] Alexander, L. and Ferzan, K.K., 2009. *Crime and culpability: A theory of criminal law*. Cambridge University Press, 202

[166] Bratman, M., 1987. Intention, plans, and practical reason, 29

[167] Alexander, L. and Ferzan, K.K., 2009. *Crime and culpability: A theory of criminal law*. Cambridge University Press, 209

January 1 for intending to harm Y, that culpability persists even if the intention is later revoked since the past remains fixed and unalterable, containing the culpable act. The analogy further demonstrates that intentions cannot be held culpable given one's ability to renounce their intentions[168]. Moreover, whereas duration may affect the gravity of harm to certain matters, the same does not apply to intentions as the duration does not affect the gravity of the harm.

In summation, there are a myriad of approaches that have been taken to expound on the culpability. Nonetheless, all these approaches adopt a retributivist idea that blame and punishment are fitting responses to culpable wrongdoing. The theorists also agree that punishment of culpable acts is only fair where the punishment is proportionate to the gravity of the acts. It is worth noting that the completion of attempts is hindered by various facts including the acts of others for example where a person raises an alarm obstructing them from completing the crime.

With that in mind I am in concurrence with the idea that punishment should be proportionate the gravity of acts. Nonetheless, in determining the culpability of attempted robbery with violence, each case ought to be assessed and decided based on their unique circumstances and facts of the specific case taking into consideration both the mens rea and actus reus elements of the attempt.

[168] Duff, R.A., 2007. *Answering for crime: Responsibility and liability in the criminal law*. Bloomsbury Publishing, 104.

CHAPTER 4: DECODING KENYA'S STANCE: THE CHOSEN APPROACH TO PUNISHMENT OF INCHOATE OFFENSES IN THE PENAL CODE

Adam Smith in explaining the irregularity of sentiments states that what gives pleasure or pain, either in one way or another, is the sole exciting cause of gratitude and resentment; though the intentions of any person should be ever so proper and beneficent on the one hand, or ever so improper and malevolent on the other; yet if he has failed in producing either the good or the evil which he intended, less gratitude seems to be due to him in the one, and less resentment in the other[169].

I dare say that it is upon this rationale that most judicial systems punish inchoate crimes less than their completed counterparts such as in England where criminal attempts remain punishable as common-law misdemeanours, with life imprisonment as a theoretical maximum. In practice, however, courts normally award lighter sentences for attempts than they do for complete offenses, and in some cases, statutes require this[170]. Similarly, in the U.S., "the usual punishment grading system for attempt involves making attempts punishable by a reduced factor of the punishment for the completed crime. In California, for example, an attempt carries a maximum term of not more than one-half of the highest maximum term authorized for the completed crime[171]."

The Kenyan penal code has likewise reflected this view under section 389 of the act which calls for less punishment for inchoate offences. Nonetheless, the statute maintains a non-differential penalty route for robbery with violence and attempted robbery with violence. The courts in Kenya, however, have adopted various interpretations to the statute with some of them sticking to the letter of section 296 of the penal code and others opting to make their judgement following section 389 of the penal code[172]. With that, this chapter delves into Kenya's position towards the punishment of inchoate offences and their completed counterparts to attempted robbery with violence and robbery with violence as well as their mandatory sentence and the jurisprudential developments made in this regard.

[169] Smith. A, "The theory of moral sentiments," Vol. 1. J. Richardson, 1822, 92-108
[170] Fitzgerald, P.J., 1962. Criminal law and punishment. *(No Title), 98*
[171] Paulsen, M.G. and Kadish, S.H. eds., 1962. *Criminal Law and Its Processes: Cases and Materials*. Little, Brown, 368
[172] Section 296(2), section 389, *Penal Code* (Act No 20 of 2020)

The death penalty entails the taking away of a person's life after conviction on a capital offence by a competent court. This form of punishment has existed in almost all civilizations although the modes of its execution have varied from country to country.

An early example of enforcement of the death penalty dates as far back as the 5th Century B.C. in Roman law[173]. The first formal laws on the death penalty were, however, not established until the 18th Century. Britain through European settlers influenced the use of the death penalty in jurisdictions such as the United States[174] and colonial Africa.

However, in pre-colonial Africa, the notion of punishment was centred more on reconciliation and compensation than retribution. In a few instances, depending on the nature of the offence, punishments such as corporal punishment, expulsion, ostracization and banishment were meted out. Its application, however, varied in time and space and depended on what a particular community considered a serious offence punishable by death. There was no uniformity or prescribed method of determining which crimes were punishable through imposition of the death sentence[175]. The trend among diverse religions also demonstrated a restorative approach to punishment[176].

The notion of punishment in colonial Africa was associated with "good governance, justice, and civilization". Violence and excessive punishment meted by colonial regimes were tools often used to control the operation of the state[177]. The death penalty applied in the United Kingdom until 1965, when the Murder (Abolition of Death Penalty) Act[178] suspended the death penalty for murder for a period of 5 years. In 1969, the House of Commons voted by 343 to 185 to reaffirm its decision that capital punishment for murder should be permanently abolished. By the time of abolition of the death penalty in Britain,

[173] Reggio, M.H., 1997. History of the death penalty. *Society's Final Solution: A History and Discussion of the Death Penalty*.

[174] The first execution in USA was in Virginia in 1608. See in Death Penalty Information Centre: Introduction to the Death Penalty, at: http://www.deathpenaltyinfo.org/.

[175] Kenya National Commission on Human Rights: Position Paper N0. 2 on the Abolition of the Death Penalty ,2

[176] The notion of punishment differs from religion to religion. Religions such as Islam support the death penalty. Christianity is however divided on the issue, but the Catholic Church globally campaigns against capital punishment while some Protestant churches support its use as having the sanction of God. See: Andrew F (2004), "The Christian Perspective on Capital Punishment: An Evaluation of Rehabilitation", Quodlibet Journal: Volume 6 Number 3, July - September. Hindus firmly believe in the law of Karma, the thrust of which is that if one does good or evil, it must always come back hence humans cannot take it upon themselves to execute criminals.

[177] Hynd, S., 2023. *Imperial Gallows: Murder, Violence and the Death Penalty in British Colonial Africa, c. 1915-60*. Bloomsbury Publishing.

[178] The Murder (Abolition of Death Penalty) Act 1965, section 3(4)

most of her colonies, including Kenya, had attained independence. That meant that it was the choice of respective independent colonies to either follow the trend of Britain to abolish the death penalty or retain it. Kenya chose to retain the death penalty[179].

The application of the death penalty in colonial Kenya was heightened during the struggle for independence. Sir Evelyn Baring, Governor-General of Kenya in 1953 imposed the death penalty for persons who administered the Mau Mau oath[180].

The independence constitution of Kenya provided for the right to life of every person save in the execution of the sentence of a court in respect of a criminal offence under the laws of Kenya of which a person would have been convicted[181]. The death sentence in Kenya is limited to the offences of treason, murder and robbery with violence. However, the offences of robbery with violence and attempted robbery with violence did not carry the death sentence until 1973 when the Penal Code was amended to provide for it[182].

The debate preceding the adoption of the Bomas Draft Constitution in March 2004[183] grappled with the question of the death penalty and its abolition. Despite the initial inclusion of express language in the draft Constitution outlawing capital punishment, delegates at the National Constitutional Conference eventually voted in favour of retaining capital punishment, principally on the basis that people who committed heinous crimes should be punished as harshly as possible[184].

Consequently, the Bomas Draft Constitution recognized that every person has the right to life, but remained silent on the death penalty and neither mentioned situations under which the right to life may be deprived. Adopting a different approach from the Bomas draft, the Wako Draft[185] recognised the right to life but gave Parliament the power to legislate the extent to which a person may enjoy that right. By implication, the death

[179] Kenya National Commission on Human Rights: Position Paper N0. 2 on the Abolition of the Death Penalty,2
[180] McConnell, J.A., 2005. The British in Kenya (1952-1960): Analysis of a successful counterinsurgency campaign. *Unpublished Master of Science, Naval Postgraduate School, Monterey, CA*.
[181] Section 70(1), Independence constitution of Kenya
[182] Kenya National Commission on Human Rights: Position Paper N0. 2 on the Abolition of the Death Penalty. The Penal Code was amended to include robbery with violence under the category of offences for which the death sentence is applied due to popular pressure arising from the high rates of robbery with violence at that time. This illustrates the extent to which the public relates capital punishment with deterrence for crimes.
[183] The National Constitutional Conference was held in Nairobi at the Bomas of Kenya in 2003-2004
[184] Kenya National Commission on Human Rights: Position Paper N0. 2 on the Abolition of the Death Penalty, 2007
[185] Article 35 of Proposed New Constitution of Kenya (Wako Draft) that was rejected by Kenyans when it was subjected to a referendum on the 21st of November 2005.

penalty still had room in the then proposed Draft Constitution that was rejected during the November 2005 referendum[186].

During the 61st Session of the UN Commission on Human Rights in 2005, Kenya was one of the countries that abstained from voting for a UN Draft Resolution calling for the abolition of the death penalty[187].

On the other hand, nationally, Vice President, Moody Awori, in 2003 when releasing more than 20 prisoners convicted for capital offences, stated his intention to introduce a Bill in Parliament to abolish the death penalty. The then Commissioner of Prisons, Abraham Kamakil, termed this a "historic event", saying that the death penalty should be abolished because it claimed innocent lives. He observed, "We are longing for the day Parliament will remove the death penalty from our Constitution." The same views were echoed by the then Minister for Justice and Constitutional Affairs, Hon. Kiraitu Murungi, who reiterated that the death penalty, being a violation of human rights, would be abolished and death row convicts would soon have their sentences commuted to life[188].

In the same light, retributivists in their argument against the death penalty argue that to support the death penalty is to teach that violence and killing is an acceptable way of dealing with serious crimes[189]. Additionally, whenever a member of our community is executed, it reinforces the notion that taking a human life is justified to achieve the ends we seek[190]. Moreover, the primary objective of any criminal justice system should prioritize the reform and rehabilitation of offenders. The death penalty, however, contradicts this principle by hindering the possibility of rehabilitating convicts[191]. Thus, in abolishing the death penalty, society will resort to an in-depth reflection on what other

[186] Kenya National Commission on Human Rights: Position Paper N0. 2 on the Abolition of the Death Penalty, 2007

[187] This resolution, which was adopted by 26 votes to 17, noted "abolition of death penalty contributes to the enhancement of human dignity and to the progressive development of human rights". It called upon all states that still maintain the death penalty to abolish it completely, and in the meantime establish a moratorium on executions.

[188] This was said during a meeting with the KNCHR on June 6th 2005 and was widely reported in both print and electronic media; see, for example, a report in the Daily Nation on 7th June 2005, page 6.

[189] American Civil Liberties Union (2001), The Death Penalty, Briefing Paper No. 14, Spring: 24 September, at: http://www.nhclu.org/publications/deathpenalty.htm.

[190] Parikh, Sujar (2005), "A New Vision of Justice: Restorative Justice is more effective than the Death Penalty", Peace Power, Berkeley's Journal of Principled Non-Violence and Conflict Transformation, VOL. 1, Issue 1 Summer, at: http://calpeacepower.org/0101/death_penalty.htm

[191] Kenya National Commission on Human Rights: Position Paper N0. 2 on the Abolition of the Death Penalty, 2007

alternative penalties can be administered for serious crimes with the effect of both punishing and rehabilitating the offender[192].

Furthermore, the sentencing policy guidelines established by the Judiciary delineate the fundamental principles that should govern the sentencing procedure. Foremost among these is the principle of proportionality. This principle stipulates that the punishment meted out should precisely align with the gravity of the offense; neither excessive nor insufficient. It emphasizes that the proportionality of the sentence must be evaluated in consideration of the actual, foreseeable, and intended impact of the offense, as well as the culpability of the offender[193].

The sentencing guidelines encompass essential principles such as equality, uniformity, parity, consistency, and impartiality. These principles mandate the imposition of identical sentences for similar offenses committed by offenders in comparable circumstances[194]. In addition to this, the rationale and considerations leading to the sentence should be explicitly articulated, aligning with both the law and the sentencing principles outlined in these guidelines to ensure accountability and transparency[195].

The guidelines also provide for the principle of inclusiveness which advocates for the active participation of both the offender and the victim in the sentencing process[196]. The sentences imposed must not only uphold but also promote human rights and fundamental freedoms, emphasizing the dignity of both the offender and the victim[197].

[192] Kenya National Commission on Human Rights: Position Paper N0. 2 on the Abolition of the Death Penalty, 2007

[193] The principle of proportionality is grounded within the concept of just deserts and is embraced by common law. In Hoare v The Queen (1989) 167 CLR 348), it was stated that "a basic principle in sentencing law is that a sentence of imprisonment imposed by the court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances." The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) recognise the principle of proportionality but emphasise that in respect to juveniles, the response should not only consider the gravity of the offence but also the personal circumstance of the juvenile. Article 50 (1) of the Constitution of Kenya 2010 upholds the right to have a fair determination of a matter. Fairness demands that the sentence imposed should neither be excessive nor less than is merited. In Caroline Auma Majabu v. Republic Criminal Appeal No. 65 of 2014 [2014] eKLR where a sentence of life imprisonment and a fine of Kshs.1,000,000 for having been found in possession of heroin worth Kshs.700 was found to be excessive.

[194] Articles 27, 73(1)(a)(iii), 73(2)(b), Constitution of Kenya 2010

[195] Article 50(a),73 (2) (d), Constitution of Kenya 2010

[196] Article 10 (2) (b) of the Constitution of Kenya identifies inclusiveness as one of the national values and principles of governance

[197] Article 21 (1) of the Constitution imposes a duty on all State organs to observe, respect, protect, fulfil and promote the rights and fundamental freedoms in the Bill of Rights. Article 10 (2) (b) identifies human rights as one of the national values and principles of governance.

Additionally, the sentencing regime should contribute to the broader enhancement of human rights and fundamental freedoms in Kenya.

The guidelines also emphasize that courts should opt for sentences conducive to rehabilitation[198]. In the sentencing process, the guiding principles envision that the imposed sentence should comprehensively address the objectives of retribution[199], deterrence[200], rehabilitation[201], restorative justice[202], community protection[203], and denunciation[204].

Hence, while Kenya has not de jure abolished capital punishment, practice de facto testifies to the presence of an unofficial moratorium on enforcement of the death sentence[205].

This stance was reaffirmed and the mandatory death penalty was found to be unconstitutional by the Supreme Court in the Muruatetu case[206]. In this case, the appellants had been sentenced to death for the offence of murder contrary to Section 203[207] as read with Section 204[208] of the Penal Code. The Supreme Court held in this case that such a law can only be regarded as harsh, unjust and unfair in addition to section 204 of the Penal Code deprives the Court of the use of their legitimate jurisdiction to exercise discretion in a matter of life and death not to impose the death sentence in an appropriate case.

[198] Section 3(3.5), Sentencing Policy Guidelines, 2017

[199] Section 4(4.1) (1), Sentencing Policy Guidelines, 2017: Retribution: To punish the offender for his/her criminal conduct in a just manner

[200] Section 4(4.1) (2), Sentencing Policy Guidelines, 2017: Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

[201] Section 4(4.1) (3), Sentencing Policy Guidelines, 2017: Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.

[202] Section 4(4.1) (4), Sentencing Policy Guidelines, 2017: Restorative justice: To address the needs arising from the criminal conduct such as loss and damages and promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

[203] Section 4(4.1) (5), Sentencing Policy Guidelines, 2017: Community protection: To protect the community by incapacitating the offender.

[204] Section 4(4.1) (5), Sentencing Policy Guidelines, 2017: Denunciation: To communicate the community's condemnation of the criminal conduct

[205] Kenya National Commission on Human Rights: Position Paper N0. 2 on the Abolition of the Death Penalty, 2007

[206] Francis Karioko Muruatetu & another v Republic [2017] eKLR

[207] Section 203, Penal Code, Kenya: Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

[208] Section 204, Penal Code, Kenya: Any person convicted of murder shall be sentenced to death.

In support of this holding, the court stated that mandatory sentencing such as the death sentence infringed on the right to fair trial which is one of the inalienable rights enshrined in Article 10 of the *Universal Declaration of Human Rights*[209]. The said right is similarly recognised under Article 25(c) of the Constitution[210] thus elevating it to a non-derogable right. The court further asserted that for a sentence to be wholly proportionate to the accused's criminal culpability, a Judge ought to have the discretion to consider mitigating circumstances[211] submitted by the convicted person[212].

Moreover, imposing the death penalty on all individuals convicted of murder, although the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'over punishing' the convict. Given this analysis, the court concluded that the mandatory death penalty is unconstitutional.

Consequently, in 2018, a Task Force proposed guidelines for implementing the Court's decision in the Francis Muruatetu Case. Key recommendations included re-sentencing all death row inmates, capital offenders whose sentences were commuted, and those sentenced post-Muruatetu without following the Court's ruling and exhausting appeals. However, progress has been slow. The National Assembly hasn't repealed death penalty sections in the Penal Code, and the government hasn't issued a formal moratorium despite ratifying the Second Optional Protocol to the ICCPR. Sentencing consistency in capital offenses remains unresolved after the Court's guidelines issued on the 6th of July 2021that limited application to murder cases only[213].

Nonetheless, while the Muruatetu was limited to the death penalty in murder cases, the principles the decision pronounced have had far-reaching implications with ramifications for sentencing in all criminal cases. Indeed, the court of appeal and the high court have extended these principles to cases of robbery with violence and other criminal cases where legislation prescribes minimum and mandatory sentences, noted Chief

[209] Article 10 of the *Universal Declaration of Human Rights*
[210] Article 25, Constitution of Kenya 2010
[211] Section 23, sentencing policy guidelines, 2017
[212] Article 50(2)(k) Constitution of Kenya 2010
[213] **The Case of Francis Muruatetu Versus the Republic of Kenya,** OCTOBER 10, 2021, The Case of Francis Muruatetu Versus the Republic of Kenya - ICJ Kenya (icj-kenya.org)

Justice Martha Koome in her opening remarks at the inaugural sitting of Kenya's supreme court[214].

The above has been demonstrated in multiple cases such as the case of Maingi & 5 others v Director of Public Prosecutions & another that expressed similar sentiments as the Muruatetu case concerning proportionate sentencing. This case, however, was one of sexual offences whose main question was concerned with whether the mandatory minimum sentence under the sexual offences Act was unconstitutional. Nonetheless, the case, in their analysis, borrowed heavily from the Muruatetu case. In this case, it was suggested that Kenya borrow a leaf from the United Kingdom and condense the Sentencing Policy Guidelines into a statutory format to make it mandatory for judicial officers to take regard of all the necessary factors before meeting out the sentence[215].

The court cited section 142 of the UK Criminal Justice Act of 2003 which provides that one of the objectives that needs to be considered is the objectives of the sentence, the seriousness and the circumstances of the offender[216]. The court further asserted that the discretion of the trial court must be exercised judicially and guided by evidence and the sound legal principle. This principle necessitates the consideration of the circumstances of the offence, the age of the offender, whether the accused is a first offender or repeat offender, and finally the paramount objective of whether the offender is rehabilitated[217].

In further agreement with the Muruatetu case, the Court of Appeal in the case of Benard Kimani Gacheru Vs Republic (2002) eKLR observed that sentencing is a matter which rests in the discretion of the trial court and it depends on the facts of each case[218].

On a similar note, the Court of Appeal in Thomas Mwambu Wenyi Vs Republic (2017) eKLR[219] cited the decision of the Supreme Court of India in Alister Anthony Pereira Vs State of Mahareshtra[220] where the court held that sentencing is an important task in the matter of crime. The court further held that one of the prime objectives of criminal law is

[214] Death penalty case re-visited by Kenya supreme court, 9 July 2021 · Carmel Rickard, https://africanlii.org/articles/2021-07-09/carmel-rickard/death-penalty-case-re-visited-by-kenya-supreme-court
[215] Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment)
[216] Section 142 of the UK Criminal Justice Act of 2003
[217] Fatuma Hassan Salo V Republic [2006] Eklr; Mithu Vs. State of Punjab, 1983 (2) SCC 277, Constitution Bench
[218] Benard Kimani Gacheru Vs Republic (2002) eKLR
[219] Thomas Mwambu Wenyi Vs Republic (2017) eKLR
[220] Supreme Court of India in Alister Anthony Pereira Vs State of Mahareshtra at paragraph 70-71

the imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and how the crime is done, stating that there is no straight jacket formula for sentencing an accused person on proof of a crime.

Additionally, the court in this case observed that a sentence that would meet the ends of justice depends on the facts and circumstances of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. Moreover, as a matter of law, the proportion between crime and punishment bears the most relevant influence in the determination of sentencing the crime-doer. Thus, the court has to take into consideration all aspects including social interest and consciousness of the society for an award of an appropriate sentence.

In furtherance of this, in the case R v. Scott, 2005, Howle J. Grove & Baar JJ then stated that there is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and then must be a reasonable proportionately between the sentence passed in the circumstance of the crime committed. Moreover, one of the purposes of punishment is to ensure that the offender is adequately punished. A further purpose of punishment is to denounce the conduct of the offender[221].

Cases of attempted robbery with violence such as William Okungu v Republic case 2018[222] and the Mutiso case[223] have also affirmed that the arguments set out in the Muruatetu case in respect of Section 203 as read with Section 204 of the Penal Code might apply to other capital offences. Thus, applying *mutatis mutandis* to Section 296 (2) and 297 (2) of the Penal Code and are similarly inconsistent with the Constitution.

A subtle judicial hint, thus, emerges when Muruatetu decisional law is interposed to Article 50(2)(p) of the Constitution[224]. Arguably, the decisional law in Muruatetu changed the law on mandatory punishments and provided room for the discretion of the court to impose an appropriate sentence which may be less severe than the mandatory sentence depending on the facts of the case. By parity of reasoning, the imposition of mandatory

[221] *R v. Scott*, 2005 N.S.W.C.C.A. 152 (2005).
[222] William Okungu Kittiny v Republic [2018] eKLR
[223] Godfrey Ngotho Mutiso V Republic [2010] Eklr
[224] Article 50(2)(p) Constitution of Kenya 2010: fair trial includes the benefit of the least severe of the prescribed punishments for an offence

sentences was a deprivation of the right to appropriate sentences. Therefore, any person who suffered a mandatory sentence may invoke article 50(2)(p) of the Constitution and seek a less severe sentence under Muruatetu decisional law. Such would remedy the injustice and the violation of the right to fair trial caused by the imposition of mandatory sentences. Additionally, the indeterminate nature of mandatory sentences makes them discriminatory according to articles 27(1) and (2) Constitution of Kenya[225].

Moreover, In the spirit of the court's discretionary mandate on sentencing, the judiciary sentencing policy under section 22 dictates that the court upon convicting an offender should invite the offender to make their submissions before proceeding to consider the sentence as well as submitting their views on the appropriate sentence[226].

The question thus arises as to whether the Muruatetu decision, which dealt with a case with dissimilar facts and circumstances, should be universally applied. In my view, the principle established in Muruatetu regarding the unconstitutionality of mandatory sentencing should be applied *mutatis mutandis* in appropriate cases, particularly in capital offenses where mandatory sentences are at issue. This approach aligns with the promotion of justice through judicial discretion in sentencing, even though the Muruatetu ruling was specific to murder cases.

To prevent further confusion, I propose that the national government review the penal code with the aim of repealing death penalty sections in the Penal Code to promote consistency and clarity in sentencing.

In conjunction with mandatory sentencing, the issue of conflict of the proportionality of the punishment and culpability of robbery with violence and attempted robbery with violence was highlighted in the case of Joseph Kaberia Kahinga & 11 others v Attorney General [2016] eKLR[227].

The court in this case acknowledged the petitioners' argument that the ingredients supporting the charge of attempted robbery with violence under Section 297(2) of the Penal Code[228] did not set out the degree of aggravation to warrant a person convicted of

[225] Article 27, Constitution of Kenya 2010: Every person is equal before the law and has the right to equal protection and equal benefit of the law; (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
[226] Section 22, sentencing policy guidelines, 2017
[227] Joseph Kaberia Kahinga & 11 others v Attorney General [2016] eKLR
[228] Section 297(2) of the Penal Code

committing the offence to face the ultimate punishment of the death sentence. Therefore, those among them who were convicted of the offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code had their constitutional right to a fair trial as guaranteed by Articles 50(2)[229] and 25(c)[230] of the Constitution violated because the ingredients of the offence did not leave room for the court to consider attenuating circumstances of the particular case.

Moreover, the Petitioners argued that there was no distinction apparent in the ingredients that constitute the charge of attempted robbery with violence contrary to Section 297(2) and attempted robbery contrary to Section 297(1) of the Penal Code[231].

Additionally, based on the above argument presented by the petitioner, the court examined the ingredients that would secure a conviction for the offence of attempted robbery with violence contrary to Section 297(1) of the Penal Code by the prosecution. The court stated that the following ingredients must be established: (i) That the accused assaulted the victim with the intent to steal. (ii) That immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property; (iii) To obtain the thing intended to be stolen; (iv) Or to prevent or overcome the resistance of its being stolen.

The offence is aggravated under Section 297(2) if, in addition to the above ingredients: (v) The offender is armed with dangerous or offensive weapon or instrument, or (vi) Is in company with one or more person(s), or (vii) If at or immediately before or immediately after the time of the assault, he wounds, beats, strikes, or uses any other personal violence to any person. The above-cited ingredients to establish the offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code are considered disjunctively: the offence is established when one of the ingredients is proved.

Having analysed these arguments, the court held that the sub-sections of Section 297 of the Penal Code are indeed ambiguous and not distinct enough to enable a person charged with either offences to prepare and defend himself due to a lack of clarity on what constitutes the ingredients of the charge. Therefore, impeding the realisation of Article 50(2) of the Constitution proclaims what constitutes "a fair trial" when a person is

[229] Article 50(2), Constitution of Kenya
[230] Article 25(c), Constitution of Kenya
[231] Section 297(1) of the Penal Code

charged with a criminal offence. Article 50(2)(b) states that: "Every accused person has the right to a fair trial, which includes the right to be informed of the charge, with sufficient detail to answer it".

Additionally, in light of this, the court observed that a person may be charged under Section 297(1) and another under Section 297(2) of the Penal Code based on the same facts and circumstances. The court further stated that the difference, if convicted, will be regarding the sentence that is meted out to such convicted person. While the convict charged under Section 297(1) faces a maximum sentence of seven (7) years imprisonment, the convict charged under Section 297(2) faces a death sentence. Thus, concluding that it is apparent that a person charged under Section 297(2) of the Penal Code faces prejudice because he can, be convicted and sentenced to death where the same facts and circumstances may have constituted facts that supported the charge for the lesser offence of attempted robbery with violence contrary to Section 297(1) of the Penal Code.

Moreover, the court asserted that the definition of what constitutes the offence of attempted robbery with violence under Sections 297(1) and 297(2) of the Penal Code should be sufficiently set out in detail so that there is no ambiguity regarding the degree of the gravity of the offence. Furthermore, the present ambiguity and lack of clear distinction as to what constitutes an offence under Section 297(1) and Section 297(2) of the Penal Code violates an accused person's right to a fair trial in that he cannot be informed, as envisaged under Article 50(2)(b) of the Constitution[232], of the charge and with sufficient detail to be able to answer to it.

This issue of this conflict was similarly brought out in David Mwangi Mugo vs. Republic [2011] eKLR[233] where the Court of Appeal held that the submission on the legality section 297(2) of the Penal Code which prescribes the sentence of death, conflicts with section 389[234] of the same Code which requires that in offences of attempt to commit a felony, the sentence should not exceed seven years' imprisonment.

In conclusion, from the above examination, it is manifestly clear that Kenya's jurisprudence is gradually shifting from the strict penal code sentencing and is embracing

[232] Article 50(2)(b), Constitution of Kenya, 2010
[233] David Mwangi Mugo vs. Republic [2011] eKLR
[234] section 389, Penal Code

more proportionate sentencing taking into consideration the severity of the crime. Given the above trend, it would be unsustainable and counterproductive to place inchoate and actual offences in the same plane of punishment as maintaining the same would water down the jurisprudential efforts that have been made by the courts.

CHAPTER 5: PROPOSING AMENDMENTS: A COMPREHENSIVE REVIEW AND RECOMMENDATIONS FOR ENHANCING PROPORTIONATE PENAL PRACTICES WITHIN STATUTES

While the Kenyan Penal Code has provided for differential punishment for inchoate offences and actual offences under section 389[235], robbery with violence and attempted robbery with violence remain an exception to this rule with the penalty for both being death. In addition to this contravention, section 297(1)[236] and Section 297(2)[237] of the Penal Code present an ambiguity as the said sections fail to sufficiently create these offences with clarity and certainty as to detail the degrees of gravity in the case of attempted robbery with violence with the attendant aggravation in the punishment to be meted out. In the preceding chapters, I have argued that similar punishment for inchoate offences and their completed counterparts is untenable because it violates the principle of proportionality, the retributive theory of punishment and the rehabilitative function that a penalty is supposed to serve in addition to contracting the right to a fair trial under Article 50 of the constitution 2010[238].

Additionally, I have highlighted the unconstitutionality of the mandatory death sentence and the inhumane nature of the death penalty as they contravene the right to life and limit the discretion of the court. Inasmuch as Kenya has not enforced any death sentence since 1987, the retention of the death penalty in our statutes and the non-differential penalty stance taken for robbery with violence and attempted robbery with violence not only portrays Kenya as a society that does not respect the sanctity of life but also the ability of those who have committed crimes to learn and reform through restorative and rehabilitative justice as well as the proportionality of penalties based on circumstances. This negative stance affects Kenya's desire to become a human rights state built on and governed by the principles of human rights.

Moreover, I have demonstrated that a proportional penalty, which aligns the severity of the punishment with the seriousness of the offense, can be a more effective deterrent than a severe penalty[239] for several reasons: Firstly, when individuals perceive that the

[235] Section 389, *Penal Code*, (Act No. 20 of 2020).
[236] Section 297(1), *Penal Code*, (Act No. 20 of 2020).
[237] Section 297(2), *Penal Code*, (Act No. 20 of 2020).
[238] Article 50, *Constitution of Kenya*, 2010.
[239] Harel, A., 1994. Efficiency and fairness in criminal law: the case for a criminal law principle of comparative fault. *Cal L. Rev.*, *82*, p.1181.

punishment matches the crime, they are more likely to view the justice system as fair thus greater compliance with the law[240]. Secondly, a proportional penalty helps individuals understand the consequences of their actions more clearly.

Furthermore, harsh penalties can sometimes make individuals feel desperate or hopeless, especially if they believe the punishment is disproportionate to their actions. This desperation can potentially lead to further criminal behaviour or a disregard for the law. On the other hand, knowing that the punishment is proportional can motivate individuals to comply with the law. They understand that engaging in criminal behaviour will have consequences, but those consequences are reasonable and not excessively punitive[241].

Additionally, proportional penalties respect the dignity of individuals by treating them as rational beings capable of understanding the consequences of their actions. In contrast, harsh penalties may be viewed as dehumanizing or excessively punitive[242]. Finally, a proportional penalty allows for a greater focus on rehabilitation and reintegration into society. It acknowledges that individuals can change and improve their behaviour, rather than solely punishing them severely for past actions[243].

From the foregoing, it is apparent that there is a need for legislative amendments to the Penal Code and the Criminal Procedure Act. A strict application of some of the provisions of the said statutes may cause injustice. To the extent that the Penal Code has prescribed a mandatory death penalty, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of the Constitution[244].

Therefore, the following are the recommendations based on this study:

a. The Parliament of Kenya should take immediate and necessary steps to abolish the death penalty in Kenya through an amendment to Sections 204, 40(3), 296(2),

[240] Nilsen, E.S., 2007. Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse. *UC Davis L. Rev.*, *41*, p.111.
[241] Goldman, A.H., 1979. The paradox of punishment. *Philosophy & Public Affairs*, pp.42-58.
[242]Carlsmith, K.M., Darley, J.M. and Robinson, P.H., 2002. Why do we punish? Deterrence and just deserts as motives for punishment. *Journal of personality and social psychology*, *83*(2), p.284.
[243] McNeill, F., 2014. Punishment as rehabilitation; Yankah, E.N., 2020. The right to reintegration. *New Criminal Law Review*, *23*(1), pp.74-112.
[244] Article 28, *Constitution of Kenya*, 2010: Every person has inherent dignity and the right to have that dignity respected and protected.

and 297(2) of the Penal Code, CAP 63 Laws of Kenya; the Criminal Procedure Code, CAP 75 Laws of Kenya; other statutory provisions linked to the death penalty.

b. The penal code ought to be amended to clearly distinguish between robbery with violence and attempted robbery with violence so that the degrees of aggravation of each are succinctly outlined as well as the elements that would constitute each of the crimes.

c. The penal code ought to be revised to reflect the jurisprudential trajectory adopted by the courts with regard to sentencing; considering the circumstances of the crime as well as the outcome to issue a proportionate sentence.

d. The Government, through the Kenya Prisons Service, should facilitate programs and activities toward a restorative justice system. Alternatives to the death penalty with a focus on reform and rehabilitation of offenders, should be given priority.

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