



**A LITANY FOR SURVIVAL: A PROPOSAL TO AMEND KENYA'S  
PENAL CODE TO DECRIMINALISE THEFT OF FOOD FOR SURVIVAL**

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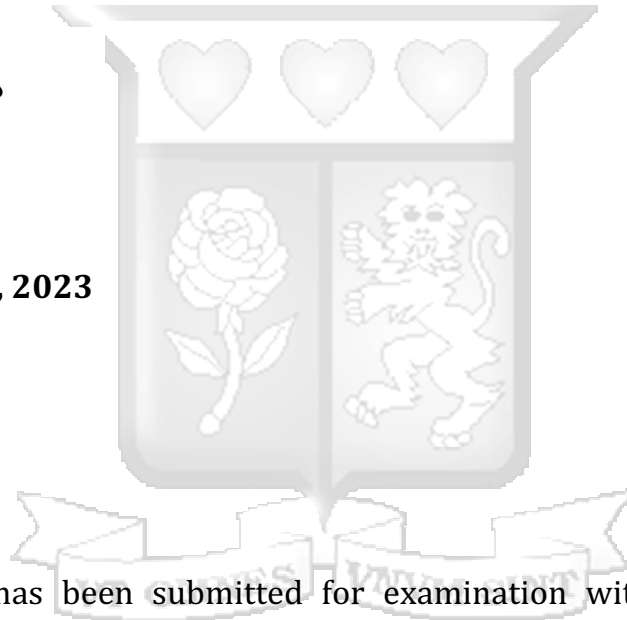
## **DECLARATION**

I, **NAWAAL WARIS**, 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.



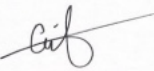
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Supervisor Name: **Cecil Abungu**

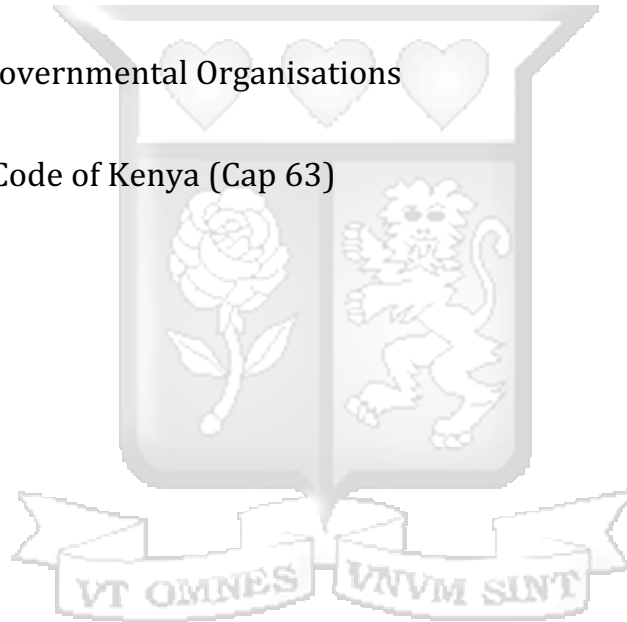
## **ABSTRACT**

*In the tapestry of human civilisation, the urgency of survival has woven itself as a fundamental thread, shaping the contours of law, morality, and societal norms. This imperative gains particular urgency in the realm of criminal law, where the stakes involve actions that endanger life and well-being. Within this context emerges the predicament of food theft for survival – a poignant reflection of the intersection between legal frameworks, moral imperatives, and human desperation.*

*In light of the pervasive food insecurity and poverty in Kenya, this study aims to examine whether Section 269 of the Penal Code of Kenya (Cap 63) should be amended to decriminalise theft of food in instances where survival prevails. This will be accomplished firstly against the backdrop of contrasting moralities between African and Western societies. Here, the study seeks to unravel the communal ethos prevalent in traditional African reasoning, where certain communities historically exhibited leniency towards theft driven by hunger, contrasting this perspective with the individualistic criminalisation of theft inherent in the Western legal framework. This study posits that dissenters of this premise can find further justification for the decriminalisation of food theft within the underlying principles of criminal law defences, such as self-defence and necessity. It contends that these principles, commonly invoked to justify criminal defences rooted in the imperative of survival, can extend to the decriminalisation of food theft, highlighting the feasibility of integrating this amendment within the framework of criminal law.*

## **LIST OF ABBREVIATIONS**

KLRC	Kenya Law Reform Commission
KNCHR	Kenya National Commission on Human Rights
KSH	Kenya Shilling
NCAJ	National Council on Administration of Justice
NGOs	Non-Governmental Organisations
PC	Penal Code of Kenya (Cap 63)



# **LIST OF LEGAL INSTRUMENTS**

## Domestic

### *1. Penal Code of Kenya (Cap 63)*



## **1.0 INTRODUCTION TO THE STUDY**

### **1.1. Background**

The pursuit of survival affords a rationale for why law and morals should include a specific content that essentially places the survival of every person above all else.<sup>1</sup> A society must face the problem of deciding when the life of somebody should yield to the claims or interests of others.<sup>2</sup> Within this understanding we encounter the realm of criminal law, insofar as it deals with actions that result or tend to result in loss of life.<sup>3</sup> For in its provisions, we possess a map of our sentiments with respect to life to serve as a basis for securing on where we have come to stand.<sup>4</sup>

Criminal law recognizes that there are limited occasions where an actor's otherwise criminal conduct should go unpunished.<sup>5</sup> In response to these situations, the law has developed a variety of defences available to criminal defendants, including those of excuse and justification, in which exist necessity, duress, and self-defence.<sup>6</sup> In the context of self-defence, for instance, this situation arises when the choice is between the life of the victim and the life of his assailant. The answer to this is unambiguous in every legal system: the victim may kill for his survival.<sup>7</sup> When the victim must take the life of one

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<sup>1</sup> Kadish S, 'Respect for Life and Regard for Rights in the Criminal Law', 64 *California Law Review* 4, 1976, 871.

<sup>2</sup> Austin JL, 'A Plea for Excuses', 57 *Proceedings of the Aristotelian Society* 1-2, 1956, 57.

<sup>3</sup> Kadish S, 'Respect for Life and Regard for Rights in the Criminal Law', 872.

<sup>4</sup> Kadish S, 'Respect for Life and Regard for Rights in the Criminal Law', 872.

<sup>5</sup> Hamrick S, 'Is Looting Ever Justified: An Analysis of Looting Laws and the Applicability of the Necessity Defense during Natural Disasters and States of Emergency', 7 *Nevada Law Journal* 1, 2006, 184.

<sup>6</sup> Pearson J, 'Choice of Evils: Necessity, Duress, or Similar Defense to State or Local Criminal Charges Based on Acts of Public Protest', 3 *American Law Reports* 5, 2004, 521.

<sup>7</sup> Kadish S, 'Respect for Life and Regard for Rights in the Criminal Law', 881.

threatening his own in order to survive, his action is justifiable.<sup>8</sup> This act is hence ‘justified as a means of preserving life’<sup>9</sup> and is relieved of criminal liability.<sup>10</sup>

The crime of theft holds a prominent place in laws and cultures across nations.<sup>11</sup> In the wake of criminal justice activism, the concept of “survival crime” transpired. The theory holds that the homeless and the poor commit property crimes and low-level infractions in order to secure their basic survival.<sup>12</sup> Thus emerges the potential moral argument that stealing food for oneself or one’s family (the homeless and the poor) is a justified “survival crime”.<sup>13</sup>

Though not implemented by name, the underpinnings of the survival crime ideology can be found within the principles of African Morality. Theft as a result of hunger in certain traditional African communities was tolerated.<sup>14</sup> This was intrinsically tied to the African concept of personhood, where what happens to the individual happens to the whole group,<sup>15</sup> and the individual can only say ‘I am because we are; and since we are, therefore I am’.<sup>16</sup> In light of this oneness of community, those caught stealing food crops were assessed to depict whether hunger was the reason behind the theft, and if established, they were either released or given a lenient punishment.<sup>17</sup> Some still practise this custom today, despite its likelihood to bring them into conflict with the law.<sup>18</sup>

This likelihood of conflict is brought about due to the criminalisation of theft of food in today’s laws, contrary to the leniency provided in traditional African societies. This position arises from not only the jurisprudence but the procedure of criminal law being

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<sup>8</sup> Kadish S, ‘Respect for Life and Regard for Rights in the Criminal Law’, 897.

<sup>9</sup> Wechsler and Michael, ‘A Rationale of the Law of Homicide’, 37 *Columbia Law Review*, 1937, 739.

<sup>10</sup> Kadish S, ‘Respect for Life and Regard for Rights in the Criminal Law’, 873.

<sup>11</sup> Green S, ‘Thirteen Ways to Steal a Bicycle’, Rutgers School of Law- Newark *Research Paper* Number 116, 2012.

<sup>12</sup> Rufo C, ‘Crimes of Survival’ *City Journal*, 2 January 2019 <https://www.city-journal.org/survival-crimes> on 2 January 2023.

<sup>13</sup> Rufo C, ‘Crimes of Survival’.

<sup>14</sup> Bunei E, ‘Factors influencing agricultural crimes in Kenya: Opinions and experiences of farmers’, in Donnermeyer, *The Routledge International Handbook of Rural Criminology*, Routledge, London and New York, 2013,86.

<sup>15</sup> Mbiti, J, ‘African Religions and Philosophy’, *Heinemann Publishers*, London,1969, 106.

<sup>16</sup> Mbiti, J, ‘African Religions and Philosophy’,1969, 106.

<sup>17</sup> Bunei E, ‘Factors influencing agricultural crimes in Kenya’, 83.

<sup>18</sup> Bunei E, ‘Factors influencing agricultural crimes in Kenya’ ,86.

largely Western in origin and individualistic in nature.<sup>19</sup> The Western legal system has crystallised types of crime from which elicit the basic structure of theft, such as larceny, embezzlement, and false pretences, with each of them having to do with the nature of the victim's participation and consequently result in criminal punishment.<sup>20</sup> Punishment is considered a necessary retribution for the crime of theft, and to put criminals out of action.<sup>21</sup>

The general punishment for theft in Kenya is imprisonment for three years.<sup>22</sup> Courts have altered this time period in certain instances according to their discretion, but the notion of decriminalising the punishment of theft of food as a whole was never questioned. It was then of utmost surprise that Principal Magistrate Vincent Adet, in adjudicating a case of theft, not only pardoned a couple for stealing a bale of wheat flour but initiated a funds drive for them to be financially assisted.<sup>23</sup> He "sympathised" with them on "humanitarian grounds", and took into consideration that the couple had three children and no source of income.<sup>24</sup> The case generated positive interactions, with former governor Mike Sonko lauding the magistrate for his humanitarian efforts and invited him to receive an award for his "great" gesture.<sup>25</sup>

A similar case involving theft of food was heard in Nairobi where Alvin Chivondo tried to steal food worth Kenya Shilling (Ksh) 3,100 from a Naivas Supermarket and was thereafter sentenced to one year in prison or to pay a fine of Ksh 100,000.<sup>26</sup> This sentence

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<sup>19</sup> Kelsall T, 'International Criminal Justice and Non-Western Cultures', Oxford Transitional Justice Research Working Paper Series, 12 April 2010 -

[https://www.law.ox.ac.uk/sites/default/files/migrated/kelsall\\_internationalcriminaljustice\\_final1.pdf](https://www.law.ox.ac.uk/sites/default/files/migrated/kelsall_internationalcriminaljustice_final1.pdf).

<sup>20</sup> Khamala C, 'Introduction to the Law of Theft: Criminal Law II Lecture', 2018.

<sup>21</sup> Borg R, 'Historical Locks: Theft and Punishment', 26 October 2016 -

<https://www.historicallocks.com/en/site/h/articles/theft-and-punishment/> on 9 January 2023.

<sup>22</sup> Section 275, *Penal Code* (Cap 63).

<sup>23</sup> Ocharo B, 'Mercy and donation for a couple who stole flour to feed their starving children' 13 May 2022 - <https://nation.africa/kenya/news/mercy-and-donation-for-couple-who-stole-flour-to-feed-their-starving-children-3813626> on 10 January 2023.

<sup>24</sup> Wangechi F, 'Mombasa court halts proceedings to conduct harambee for couple charged with theft', 11 May 2022 - <https://www.now.co.ke/news/mombasa-court-halts-proceedings-to-conduct-harambee-for-couple-%20charged-with-theft-1595> on 10 January 2023.

<sup>25</sup> Wangechi F, 'Mombasa court halts proceedings to conduct harambee for couple charged with theft'.

<sup>26</sup> Chepchirchir C, 'Man who stole cooking oil, sugar from Naivas jailed one year', 13 April 2022 - <https://www.the-star.co.ke/news/2022-04-13-man-who-stole-cooking-oil-sugar-from-naivas-jailed-one-year/> on 11 January 2023.

resulted in an uproar from Kenyan citizens who condemned it as “harsh”,<sup>27</sup> with the preeminent political leader Raila Odinga calling for Chivondo to be released unconditionally, saying, “Let the courts get their priorities right, for once, you can’t jail a man for trying to feed his family”.<sup>28</sup>

Poverty and hunger in Kenya remain deep and persistent, with 40% -around 16 million people- lacking sufficient food.<sup>29</sup> This resulted in the former President Uhuru Kenyatta setting out the Big Four Agenda in 2017, which comprised of Food Security, Affordable Housing, Manufacturing, and Affordable Healthcare.<sup>30</sup> Despite these objectives, food security has not been achieved in Kenya. As of November 2021, 7.9 million Kenyans (15.4% of the population) lack sufficient food for consumption.<sup>31</sup> By 2022, there was a 16.7% increase in crime, with stealing being the most reported crime by 35.1%, and theft of stock and by servants making up 26.2% of this figure.<sup>32</sup>

Section 269 of the Penal Code (PC) (Cap 63) of Kenya provides for special cases where theft is not deemed to be theft.<sup>33</sup> Subsection (2) involves taking food by a servant from his master for purposes of feeding the master’s animals. Incidentally, no provision exists allowing the taking of food for a human to feed himself.

## 1.2. Statement of Problem

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<sup>27</sup> Muia J, ‘Alvin Chivondo: Shoplifter bailed out by Sonko arrested for stealing’, 21 May 2022 - <https://www.citizen.digital/news/alvin-chivondo-shoplifter-bailed-out-by-sonko-arrested-for-stealing-again-n298609> on 11 January 2023.

<sup>28</sup> Kamau R, ‘Raila joins Kenyans in sympathizing with Naivas Shoplifter’, 14 April 2022 - <https://nairobewire.com/2022/04/kenyans-sympathise-with-naivas-shoplifter-fined-sh100k-for-stealing-sh3100-foodstuff.html> on 12 January 2023.

<sup>29</sup> Stiftung H, ‘16 Million Kenyans Face Hunger – Who will uphold their right to food?’, 20 March 2015 - <https://ke.boell.org/en/2015/03/20/16-million-kenyans-face-hunger-who-will-uphold-their-right-food> on 15 January 2023.

<sup>30</sup> Huduma Namba, 20 November 2020 - <https://www.hudumanamba.go.ke/the-big-4/> on 15 January 2023.

<sup>31</sup> Kamer L, ‘Extreme poverty rate in Kenya 2016-2025’, 22 September 2023 - <https://www.statista.com/statistics/1229710/number-of-people-living-in-extreme-poverty-in-kenya/> on 15 January 2023.

<sup>32</sup> Oruta B, ‘Stealing most reported crime in Kenya – Economic survey’, 5 May 2022 - <https://www.the-star.co.ke/news/2022-05-05-stealing-most-reported-crime-in-kenya-economic-survey/> on 16 January 2023.

<sup>33</sup> Section 269, Penal Code (Cap 63).

In Kenya, two-thirds of the population live in poverty, and the need to prevent and treat hunger is as pressing as ever, as the severe drought in the country is driving alarming levels of food insecurity.<sup>34</sup> Despite attempts to eradicate hunger in the country such as by the establishment of the Big Four Agenda, 25% of the inhabitants are still experiencing chronic food insecurity, and crime rates of theft have substantially increased.<sup>35</sup> This study thus assesses whether, in light of the pervasive food insecurity and poverty in Kenya, Section 269 of the Penal Code (Cap 63) of Kenya should be amended to include an exemption for theft of a small amount of food, without violence or dishonest intent, if one is faced by the immediate and essential need for nourishment in order to survive.

### **1.3. Research Objectives**

1. To examine the wrongfulness of theft by investigating the circumstances in which theft is considered morally wrong and when it is not, and to explore the underlying ethical justifications within the contexts of African and Western philosophies.
2. To investigate how criminal law responds to actions undertaken for survival, analysing the underlying factors that influence legal considerations and potential pardons for these survival-driven actions.
3. To propose whether, and if so, how the Penal Code (Cap 63) should be amended to decriminalise theft of food in instances where survival prevails.

### **1.4. Research Questions**

1. How does the wrongfulness of theft, as assessed within the ethical frameworks of African and Western philosophies, determine when theft is considered morally wrong?

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<sup>34</sup> Action Against Hunger, 'The State of Hunger in Kenya', 15 November 2019 - <https://www.actionagainsthunger.org/location/africa/kenya/> on 19 January 2023.

<sup>35</sup> Liebetrau L, 'Realizing the Right to Food: Kenya's Approach to Food Security in the Context of the Climate Crisis', 16 December 2019 - <https://za.boell.org/en/2019/12/16/realising-right-food-kenyas-approach-food-security-context-climate-crisis> on 19 January 2023.

2. How does criminal law respond to actions undertaken for survival and what are the underlying factors influencing legal considerations and potential pardons for these survival-driven actions?
3. Should the Penal Code (Cap 63) be amended to decriminalise theft of food in instances where survival prevails, and if so, how?

## **1.5. Hypothesis**

In light of the pervasive food insecurity and poverty in Kenya, Section 296 of Kenya's Penal Code (Cap 63) should be amended to include an exemption for theft of a small amount of food without violence or dishonest intent, if one is faced by the immediate and essential need for nourishment in order to survive. The rationale for this amendment stems from two main considerations. Firstly, African tradition, deeply rooted in principles of communal unity, has historically exhibited leniency towards food theft driven by hunger. This is in contrast with the perspective of the criminalisation of theft as emerging from the individualistic conception of a person, tied to Western philosophy. Secondly, the underlying principles in criminal law which are invoked to justify other criminal defences concerned with survival, such as self-defence and necessity, can logically extend to the decriminalisation of theft of food for survival. This underscores the feasibility of integrating this amendment within the framework of criminal law.

## **1.6. Justification**

Kenya is experiencing one of the most alarming food crises in decades, where millions of people are facing hunger and thirst.<sup>36</sup> One of the greatest challenges facing a majority of the citizens is food insecurity.<sup>37</sup> Food insecure families are typically poor and live in rural

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<sup>36</sup> IFRC, 'Kenya hunger crisis: Voices from the drought', 17 October 2022 -

<https://www.ifrc.org/article/kenya-hunger-crisis-voices-drought> on 19 January 2023.

<sup>37</sup> Heinruch Stiftung, '1.6 Million Kenyans face hunger – who will uphold the right to food?', 20 March 2015 - <https://ke.boell.org/en/2015/03/20/16-million-kenyans-face-hunger-who-will-uphold-their-right-food> on 20 January 2023.

areas.<sup>38</sup> This rife problem of hunger may drive food-insecure people to resort to extreme measures, such as stealing, in order to obtain the necessities they need.<sup>39</sup>

This study is pivotal as it will add to the possible solutions on the approach to take when a person in need steals food in order to survive. Previous studies have contributed towards food insecurity, African and Western concepts of personhood as well as theories of crime and punishment of theft, but none from the angle of exempting theft of food for purposes of survival, thus rendering this paper unique.

This work will be important to criminal law and useful to researchers working in the field as it will contribute to the studies on criminal liability of theft of food. Legislators will benefit as they amend statutes, and this paper proposes an amendment to the Penal Code. Scholars and students interested in and studying the fields of human rights, African and Western philosophy, and criminal law will benefit from this paper as it will be a contribution to these respective fields. This study will also assist adjudicators in making decisions on issues of theft of food by providing them with a distinct law, in that they will not have to legally and morally assess whether one has stolen food unlawfully on a case-by-case basis. This will in turn allow uniformity in judicial decisions across Kenya.

## **1.7 Conceptual Framework: Survival is more important than preservation of property**

This concept characterises the precedence of the need of survival over the right to property. From this perspective, theft of one's property of food may be seen as a morally justifiable action if it is necessary for another's survival.

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<sup>38</sup> The Conversation, 'Millions of Kenyans go hungry every day', 23 March 2020 - <https://theconversation.com/millions-of-kenyans-go-hungry-every-day-why-and-what-can-be-done-131782> on 20 January 2023.

<sup>39</sup> Gallo M, 'Hidden Hunger: The alarming connection between food insecurity, stealing, and survival', 1 August 2023 - <https://medium.com/@morgan.gallo/hidden-hunger-the-alarming-connection-between-food-insecurity-stealing-and-survival-7cc73cfcca83#:~:text=It%20refers%20to%20the%20lack,obtain%20the%20necessities%20they%20need> on 20 January 2023.

The right to life has been described as “the most important of all human rights”,<sup>40</sup> “the most basic or fundamental right”<sup>41</sup> or the “supreme right”.<sup>42</sup> The ultimate breaches of this right, leading to deaths, belong to the most serious violations of human rights.<sup>43</sup> There is primacy conferred to the right to life by one being free from hunger.<sup>44</sup> For Alston, the right to be free from hunger should be understood, consequently, as the minimum content of the right to food.<sup>45</sup> Therefore, the right to be free from hunger is defined as ‘the right to have access to the minimum essential food which is sufficient and adequate to ensure everyone is free from hunger and physical deterioration that would lead to death’.<sup>46</sup> This leads us to the right to food and the right to be free from hunger being in tandem with the supreme right to life.

The economic theory of survival crime provides that in the absence of a social safety net, people falling into poverty during an economic crisis might be pushed to commit a crime to survive.<sup>47</sup> Rufo defines survival crime as the holding that the homeless and the poor commit property crimes and low-level infractions to secure their basic survival.<sup>48</sup> These are crimes where officials running criminal justice systems consider not the nature of the crime, but the social circumstances of the offender.<sup>49</sup> Professor Rankin’s take would represent the most significant extension of the survival crime theory. She argues that the intersectionality of poverty and homelessness forces marginalised individuals to commit crimes to ensure their basic survival, and that States and local governments should

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<sup>40</sup> Dinstein Y, ‘The right to life, physical integrity and liberty’ in Henken (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights*, 1981, 114.

<sup>41</sup> Herndl K, ‘The Right to Life in International Law’ in Ramcharan (ed) *International Studies in Human Rights*, 1985, 52.

<sup>42</sup> International Covenant on Civil and Political Rights (CCPR), General Comment no 6, 1982, para 1.

<sup>43</sup> Kratochvil J, ‘The Right to Life in the perspective of the Human Rights Committee and the European Court of Human Rights’, *Social Science Research Network Electronic Journal*, 2006, 1.

<sup>44</sup> Dennis M and Stewart D, ‘Justiciability of Economic, Social, and Cultural Rights’, 98 *The American Journal of International Law* 3, 473.

<sup>45</sup> Adhikari B, ‘Nepalese Supreme Court Decisions on the Right to Food’ in Alston P and K Tomasevski (eds), *International Development Organisation*, New York, 1984, 167.

<sup>46</sup> Golay C, ‘The Right to food and Access to justice: Examples at the national, regional and international level’, Food and Agriculture Organisation Right to Food Publications.

<sup>47</sup> Mishra S, ‘Survival crime in the time of Coronavirus’ Criminal Law Blog, 31 May 2020 - <https://criminallawstudiesnluj.wordpress.com/2020/05/31/covid-19-xvi-survival-crime-in-the-time-of-coronavirus/> on 2 February 2023.

<sup>48</sup> Pomper S, ‘The decriminalization of survival crimes by progressive prosecutors makes everyone less safe; National Police Association, 10 September 2019, <https://nationalpolice.org/main/the-decriminalization-of-survival-crimes-by-progressive-prosecutors-makes-everyone-less-safe/> on 2 February 2023.

<sup>49</sup> Pomper S, ‘The decriminalization of survival crimes’, 1.

abolish prohibitions against low-level property crime,<sup>50</sup> thus prioritising survival over property crimes.

The social conditions of poverty coupled with dire necessity lead to the inevitability of petty crimes by the poor in order to ensure their survival.<sup>51</sup> In such cases, it is of utmost importance that the basic human rights of the deprived are respected and food and assistance are offered rather than prosecuting them for such crimes.<sup>52</sup> The rationale behind this demand is the higher status which is accorded to the right to life of a person in comparison to a personal right to property of another.<sup>53</sup>

The strain theory advanced by Merton offers an explanation as to why individuals may commit property crimes. The theory proposes that pressure derived from social factors, such as lack of income or lack of quality education, drives individuals to commit crimes.<sup>54</sup> For instance, individuals whose income places them below the poverty threshold are unable to realise socially accepted ambitions through legal means and are thus forced down a path of criminal behaviour to achieve their goals of survival.<sup>55</sup> Merton asserts that crimes such as theft are disproportionately concentrated in the lower class because they are the most vulnerable to this pressure or strain.<sup>56</sup>

Lawrence Kohlberg formulated a six-stage theory of moral development. He conducted an experiment whereby he presented a moral dilemma of a husband stealing a drug in order to save his wife's life and classified the various responses he obtained into six stages.<sup>57</sup> At stage 5 of 'Social Contract and Individual Rights', people recognize that different social groups within a society will have different values, but they believe that all

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<sup>50</sup> Rankin S, 'Criminalizing visual property, the effects of making homelessness a crime', 21 November 2016 - 2016 - <https://www.jurist.org/commentary/2016/11/criminalization-of-visual-poverty/> on 3 February 2023.

<sup>51</sup> Mishra S, 'Survival crime in the time of Coronavirus', 2.

<sup>52</sup> Mishra S, 'Survival crime in the time of Coronavirus' 2.

<sup>53</sup> Mishra S, 'Survival crime in the time of Coronavirus' 2.

<sup>54</sup> Merton K, 'Social structure and anomie; American sociological review', 3 *American Sociological Review* 5, 1938, 675.

<sup>55</sup> McKee J, 'Strain theory', 27 December 2023 - <https://www.britannica.com/topic/strain-theory-sociology> on 5 February 2023.

<sup>56</sup> Merton K, 'Social structure and anomie', 680.

<sup>57</sup> Cherry K, 'Kohlberg's Theory of Moral Development', 7 November 2022 - <https://www.verywellmind.com/kohlbergs-theory-of-moral-development-2795071> on 5 February 2023.

rational people would agree on two points.<sup>58</sup> First, they would all want certain basic rights, such as liberty and life to be protected and second, they would want some democratic procedures for changing unfair laws and for improving society.<sup>59</sup> Stage 5 respondents made it clear that the wife's right to live is a moral right that must be protected, and thus defended the theft with the statement that "life is more important than property".<sup>60</sup> They therefore claim that there are rights and morality that take some priority over particular laws.<sup>61</sup>

St. Thomas Aquinas expressed his view on survival taking precedence over property when he stated that "It is not theft, properly speaking, to take secretly and use another's property in a case of extreme need: because that which he takes for the support of his life becomes his own property by reason of that need".<sup>62</sup> Similarly, The Hedaya (a 12<sup>th</sup> Century legal manual by Burhan al-Din al-Marghinani) proclaims that "The property of another is made lawful to us in all cases of necessity, such as in a situation of famine for instance".<sup>63</sup>

This concept that survival is more important than preservation of property will be used to convey that in realising the right to food, theft of a small amount of food for purposes of an individual's survival will be accorded a higher status than that of a breach of another person's right to property. In addition to this, the concept will be depicted to exist within the principles of African Morality, based on the traditional approach to theft of food within society. This notion will additionally be utilised to oppose the individualistic conception behind Western philosophy by investigating its focus on property rights. Furthermore, foundations of this concept will be identified in criminal law's defences which are concerned with survival.

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<sup>58</sup> Crain C, 'Kohlberg's stages of Moral Development' in *Theories of Development*, 6 *Open Access Library Journal* 9,1985, 123.

<sup>59</sup> Crain C, 'Kohlberg's stages of Moral Development', 123.

<sup>60</sup> Crain C, 'Kohlberg's stages of Moral Development', 123.

<sup>61</sup> Crain C, 'Kohlberg's stages of Moral Development', 124.

<sup>62</sup> *Summa Theologica*, Question 66, 1481 Pt II – II.

<sup>63</sup> Hedaya 1870 ed 42, 522.

## 1.8 Literature Review

### 1.8.1 On the African Moral position on Personhood

Indigenous Africans have a unique, strong sense of community.<sup>64</sup> Dogbe expounds on this in that there are five factors that influence internalisation of this community-concept, namely; the ontological structure of African religion, the special method of authority distribution, the unique concept of culture, the significant theory of harmony and cooperation, and the all-embracing philosophy of being.<sup>65</sup> Onebunne further notes that African communalism is not an abstract theory but is a form of communal life and inherent in the structure of African economic, religious and socio-cultural life.<sup>66</sup> To the theonomous African, it is: "I am, because we are, and since we are, therefore I am"<sup>67</sup> as coined by John Mbiti.

A member of the African community comprehends their responsibilities to self and others, as well as what the society expects of him/her through other members of the community.<sup>68</sup> In a similar manner, Olasunkanmi claims that African communalism promotes personal accountability as a way to cultivate optimal communal ownership and relationships.<sup>69</sup> This is further endorsed by Etta who denotes that communal life is at the heart of the sustenance of African societies.<sup>70</sup> The various forms of African communalism were identified by Lateska as being: *Harambeeism* (pooling together), *Ubuntu* (humanity to others) and *Ujamaa* (familyhood).<sup>71</sup>

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<sup>64</sup> Dogbe K, 'Concept of community and Community Support Systems in Africa', 75 *Anthropos* 5, 1980, 796.

<sup>65</sup> Dogbe K, 'Concept of community and Community Support Systems in Africa', 796.

<sup>66</sup> Onebunne J, 'Epistemic appreciation of belongingness as a definitive principle in African communalism, 11 *Nnamdi Azikiwe Journal of Philosophy* 1, 2018, 35.

<sup>67</sup> Mbiti J, 'African Religions and Philosophies, 1970, 141.

<sup>68</sup> Senghor L, 'On African socialism', Praeger, 1964, 51.

<sup>69</sup> Olasunkanmi A, Economic globalization and its effects on community in Africa, 2 *Journal of Sociology and Social Anthropology* 1, 2011, 62.

<sup>70</sup> Esowe D, Etta E and Asukho O, 'African communalism globalization', 10 *African Research Review* 3, 2016, 311.

<sup>71</sup> Lateska M, 'Open Distance Learning (ODL) in South Africa through Ubuntu philosophy', *Africa Education Review*, 2016, 213.

Menkiti, in articulating the African traditional thought of a person, postulates that man is defined by reference to the surrounding community and thus in the African view, it is the community that defines a person as a person.<sup>72</sup> He contrasts this definition with the general Western view of a person which abstracts certain features of the lone individual as being the defining characteristic of man.<sup>73</sup> Gyekye, in his view of personhood, criticizes Menkiti's perspective as prioritising the community over the individual,<sup>74</sup> and instead asserts that personhood is a function of social facets as well as the individual.<sup>75</sup>

Ikuenobe's outlook seems to be coinciding with Menkiti's when he avers that African morality puts the wellbeing of a group at the foremost aspect, rather than the individual's, as entrenched in communal cultural practices and views.<sup>76</sup> He further attests that in the majority of traditional African culture, moral thoughts are against individualism.<sup>77</sup> Through this ideology, social correlative rights emerge, one of them being social responsibilities that we owe each other by virtue of being part of a community.<sup>78</sup> In unison with this view, Etta *et al* opine that African morality in respect of communalism, advocates for mutual help in the society.<sup>79</sup>

To put this into perspective, scholars have examined theft of food within the setting of Africa. Gichamo found that crop theft was used as a coping strategy for hunger and poverty.<sup>80</sup> Fafchamps and Minten have correspondingly asserted that the rural poor used theft to cope with economic difficulties for a temporary period.<sup>81</sup> Additionally, Lecoutere *et al.* observed that households turned to theft of crops to overcome food shortages.<sup>82</sup>

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<sup>72</sup> Menkiti I, 'Person and community in African traditional thought' in Richard Wright, *African philosophy: An Introduction*, University Press of America, New York, 1984, 171.

<sup>73</sup> Menkiti I, 'Person and community in African traditional thought', 171.

<sup>74</sup> Gyekye K, 'Person and Community in African Thought', in Gyekye (ed) *Ghanaian Philosophical Studies*, 1992,104.

<sup>75</sup> Gyekye K, *Tradition and Modernity: Philosophical Reflections on the African Experience*, 1997, 41.

<sup>76</sup> Ikuenobe P, 'Philosophical perspectives on communalism and morality, African traditions', 41 *African American Review* 4, 2006.

<sup>77</sup> Ikuenobe P, 'The communal basis for moral dignity: an African perspective', 45 *Philosophical Papers* 3,2016, 439.

<sup>78</sup> Ikuenobe P, 'Philosophical perspectives on communalism and morality, African traditions',2006.

<sup>79</sup> Esowe D, Etta E and Asukho O, 'African communalism globalization', 10 *African Research Review* 3, 307.

<sup>80</sup> Gichamo T, 'Dispute or residing together in harmony?', 4 *International Journal of Rural Criminology* 2 ,2019, 228.

<sup>81</sup> Fafchamps M and Minten B, 'Theft and rural poverty: Result of a natural experiment', International Association of Agricultural Economists, Annual Conference, Durban, South Africa, 2003,,6.

<sup>82</sup> Lecoutere E, Vlassenroot K and Raeymaekers T, 'Conflict, Food Insecurity and Fragility in Eastern DR Congo', 22 *Afrika Focus* 2, 2008, 46.

### 1.8.2 On the underlying notions of criminalization

Although criminal law strives to borrow from and legitimise itself via a plurality of legal systems, the fact remains that its basic doctrines are Western in origin.<sup>83</sup> Three major aspects form the cornerstone of Western criminal justice systems, notably the concept of crime, the concept of justice and the approach to justice.<sup>84</sup> Each of these possess an “individualistic” fundamental nature as they are embedded in Western philosophy’s traditions of individualism.<sup>85</sup>

Within the element of concept of crime, the Western paradigm defines crime as acts done by individuals in violation of criminal laws instituted by the state.<sup>86</sup> The focal point within the concept of justice is also individualism, as the rights of the offender become the central concern and punishing the guilty is the primary objective.<sup>87</sup> Finally, the nature of the third element ( approach to justice ) is established as conflict-based, where the truth can only be found through an adversarial system and due process.<sup>88</sup>

In addition to this, the three concepts of crime; state centred concept of crime, an offender centred concept of justice, and a conflict-based approach to justice, are all fundamental to Western criminal justice.<sup>89</sup> According to Liu, they are deeply rooted in Western philosophical traditions in which a discourse of individualism is dominant,<sup>90</sup> as the logical starting point of the respective theories are largely around the analysis of the nature of individuals.<sup>91</sup>

This transmutes into a problem when the jurisprudence has a poor sociological fit with the non-Western societies to which it is applied.<sup>92</sup> An instance of this is the Western legal

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<sup>83</sup> Kelsall T, ‘International Criminal Justice and Non-Western Cultures’,2.

<sup>84</sup> Liu J, ‘Asian Paradigm Theory and Access to Justice’, 32 (3) *Journal of Contemporary Criminal Justice*, 2016, 211.

<sup>85</sup> Liu J, ‘Asian Pradigm Theory and Access to Justice’, 212.

<sup>86</sup> Liu J, ‘Asian Pradigm Theory and Access to Justice’, 212.

<sup>87</sup> Liu J, ‘Asian Pradigm Theory and Access to Justice’, 212.

<sup>88</sup> Liu J, ‘Asian Pradigm Theory and Access to Justice’, 212.

<sup>89</sup> Liu J, ‘Asian Pradigm Theory and Access to Justice’, 213.

<sup>90</sup> Liu J, ‘Asian Pradigm Theory and Access to Justice’, 213.

<sup>91</sup> Liu J, ‘Asian Pradigm Theory and Access to Justice’, 213.

<sup>92</sup> Kelsall T, ‘International Criminal Justice and Non-Western Cultures’,2.

procedures applied in Africa, that are a stark contrast to the more informal style of African customary courts. Cryer contends that is of no wonder that getting clear testimony in such circumstances has often proved difficult, where it is not uncommon in Africa that secrecy is prized as a high social ordeal.<sup>93</sup>

Cottino advances two assumptions that should be made in the debate between Western beliefs and traditional legal practices. Firstly, any discussion should take into account the socio-cultural setting in which it is meant to operate.<sup>94</sup> The second factor is that no matter what the definition of crime may be, an adequate understanding of unlawful behaviour requires paying attention not only to the offender, but also to the victim and the bystander.<sup>95</sup>

### 1.8.3 Contribution

This study will be an addition to the discourse on the criminal liability of theft of food for purposes of survival in Kenya. Prior research has addressed the right to food, food insecurity, African and Western views of personhood, theories of crime, and punishment of theft, but none from the perspective of exempting food theft for survival, thus making this work unique.

This paper will contribute to the studies on criminal liability by proposing a potential solution for circumstances where individuals are driven to steal food in order to ensure their survival. This will add to the research of scholars such as Sanford Kadish, Boaz Sangero, and Andrew Ashworth in their examination of moral judgement within criminal law.<sup>96</sup> The works of James Nyoro and Graham Riches will also benefit in their evaluation of food security measures in Kenya.

This study will complement the existing literature on African morality, and specifically those that touch on communalism. This includes intellectuals such as Kwame Gyekye, John Mbiti, Ifeanyi Menkiti and Polycarp Ikuenobe in their positions of African

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<sup>93</sup> Cryer R, 'A long way from home: witnesses before international criminal tribunals', *International Commentary on Evidence*, 2007,3.

<sup>94</sup> Cottino A, 'Crime prevention and control: Western beliefs vs traditional legal practices', 90 *International Review of the Red Cross* 870, 2008, 289.

<sup>95</sup> Cottino A, 'Crime prevention and control', 290.

<sup>96</sup> Kadish S, 'Excusing Crime', 1987, 257.

personhood and tradition. This work may also posit a different view on the individualistic conception underlying criminalization in terms of theft of food. It will offer an addition to Western philosophy as enhanced by philosophers such as Hobbes, Locke, Rousseau, and Rawls.

Moreover, this study will contribute to the discussions on the ethics of theft of food by complementing or even contravening Kantian, Utilitarian, Virtue, and Deontological ethical theories.

## **1.9 Methodology**

The nature of this research will consist primarily of qualitative data through the analysis of theories, ideas, and facts as well as the linkages between them. For instance, the analysis of African and Western philosophies, the exploration of ideas and facts underlying theft and survival and the formation of links between all these aspects.

The study will utilise certain primary sources, such as the Penal Code (Cap 63) of Kenya. Secondary sources of journal articles, books, chapters in books, conference papers, and reports will also be used. These secondary sources will mostly consist of information pertaining to survival, theft of food, African morality and traditions, Western philosophy, criminal law defences, and the notions underlying criminalisation.

A doctrinal analysis will be used in this paper to evaluate the theft of food and its punishment. This will be done using the primary source of the Penal Code (Cap 63). This study will then conduct a historical analysis through the investigation of the African tradition regarding theft of food. This section will also make use of a critical analysis to demonstrate that there is a certain understanding of personhood held by African morality which leaves out the Western understanding of the same, and vice versa. Secondary sources on African and Western philosophy will be applied here. Secondary sources expounding on the notions of survival underlying certain laws of criminalization will also be utilised, and this section will make use of scholarly work. The fourth chapter of this study shall utilise a deductive method to assert its claim. Finally, a philosophical analysis will be conducted throughout this study in its discussion on the morality of theft of food.

## 1.10 Chapter Breakdown

This study will consist of five chapters. The first of these is introductory and will address the background, research objectives and conceptual framework of the paper, amongst others.

The second chapter will examine the wrongfulness of theft from the African and Western perspectives. This includes the African cultural position on the theft of food. The African conception of personhood will also be explored in detail and employed to justify how theft of food was treated more leniently traditionally. In addition, the individualistic conception underlying the criminalization of theft will be investigated. Theories of crime as well as Western philosophy will be scrutinised in order to prove this.

Chapter three will assess the intersection of criminal law and survival, particularly when individuals resort to actions to ensure their survival. This chapter will explore how criminal law responds to these situations, specifically through the examination of defences like justification and excuse, which encompass concepts of necessity, duress, and self-defence.

The fourth chapter will propose how the Penal Code (Cap 63) can be amended to decriminalise theft of food in instances where survival prevails, drawing from the concepts discussed in the preceding chapters.

The fifth and final chapter of this dissertation shall provide a conclusion to the study's findings as well as offer recommendations to relevant bodies.

## **2.0 MORAL PERSPECTIVES ON THEFT IN AFRICAN AND WESTERN PHILOSOPHIES**

### **2.1 Introduction**

This chapter commences by exploring African and Western moralities in order to discern their influence on decision-making within their respective domains. In pursuit of a comprehensive understanding of this dynamic, the chapter examines the divergences between African and Western modes of thought. Subsequently, the chapter presents the Western-centric individualisation inherent in the current framework of the criminal law. Finally, the chapter will demonstrate how the African rationale can offer an alternative perspective on the matter of food theft.

### **2.2 Communalism in African Thought**

In traditional Africa, a shared morality was the cement of society.<sup>97</sup> Morality is the sense and view of what is right and wrong and that which constitutes an absolute reference for character and behaviour.<sup>98</sup> Within Africa, morality is that which evolves from the process of living and is grounded in the context of communal life.<sup>99</sup> It is in respect to this view that the African people draw their ethical behaviour from the community which encapsulates the physical and spiritual world.<sup>100</sup> As Kollman aptly articulated, “African morality and ethics cannot be conceived outside of the community.”<sup>101</sup>

The concepts of good, bad, right, and wrong feature prominently in African moral thought, as they do in the moral systems of other peoples and cultures.<sup>102</sup> Generally, the norm of

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<sup>97</sup> Van der Walt, 'Morality in Africa: Yesterday and today, The reasons for the contemporary crisis', *Potchefstroom*, 2003, 52.

<sup>98</sup> Nel PJ, 'Morality and religion in African thought', *Acta Theologica* 28 (2), 2009, 35.

<sup>99</sup> Michel C and Verhoef H, 'Studying morality within the African context', 26 *Journal of Moral Education* 4, 1997, 394.

<sup>100</sup> Ossai A, 'Using the ethics of African traditional religion for the development of a just Nigerian state', 3 *Sapientia Global Journal of Arts, Humanities and Development Studies* 2695, 2020, 244.

<sup>101</sup> Van der Walt, 'Morality in Africa', 55.

<sup>102</sup> Gyekye K, 'African Ethics', *The Stanford Encyclopedia of Philosophy*, 9 September 2010 - <https://plato.stanford.edu/entries/african-ethics/#toc> on 6 January 2024.

right or wrong is said to be of social custom.<sup>103</sup> The views of the traditional thinkers indicate that what is good is constituted by the deeds, habits, and behaviour patterns considered by the society as worthwhile because of their consequences for human welfare.<sup>104</sup> In the African moral system, the determination of good or moral value is based on its consequences for humankind and human society, thereby establishing the conventional African standard of judgement.<sup>105</sup> It is therefore evident that African ethics is a humanistic ethics, a moral system that is preoccupied with human welfare.<sup>106</sup>

Individualistic ethics that focuses on the welfare and interests of the individual is hardly regarded in customary African moral thought.<sup>107</sup> Instead, a person is constituted and defined by community,<sup>108</sup> wherein each member bears the responsibility for upholding good moral conduct, so that the whole society may become morally committed.<sup>109</sup> Within the variations between traditional African people is an understanding that co-operation and social harmony are valued over competition and individualism, that the community comes before the individual.<sup>110</sup> Mbiti, for instance, asserts that all Africans, regardless of ethnic group, place a high value on harmonious human relations which link people together in a collective existence through an interconnected web.<sup>111</sup> For these reasons, it is opined that moral thoughts in the majority of traditional African culture are against individualism.<sup>112</sup> It is, however, important to note that some African communities recognise claims of individuality and others attempt to balance communalism and individualism so that they can co-exist.<sup>113</sup>

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<sup>103</sup> Meko I, 'The living-dead/ancestors as Guardians of Morality in African traditional religious thought', 10 (5) *Global Journal of Archaeology and Anthropology*, 2019, 2.

<sup>104</sup> Gyekye K, 'African Ethics', 6.

<sup>105</sup> Gyekye K, 'African Ethics', 6.

<sup>106</sup> Gyekye K, 'African Ethics', 8.

<sup>107</sup> Gyekye K, 'African Ethics', 10.

<sup>108</sup> Husein A and Kebede O, 'The conception of morality in indigenous African culture', 5 (3) *International Journal of English Literature and Culture*, 2017, 60.

<sup>109</sup> Meko I, 'The living-dead/ancestors as Guardians of Morality in African traditional religious thought', 12.

<sup>110</sup> Michel C and Verhoef H, 'Studying morality within the African context', 395.

<sup>111</sup> Michel C and Verhoef H, 'Studying morality within the African context', 395.

<sup>112</sup> Shani O, 'Analysis of African communalism as a determinant of ethical values: The case of primary education in Kenya, Philosophy of Education Thesis, University of Nairobi, Nairobi, 2022, 70.

<sup>113</sup> Awoniyi S, 'African Cultural Values: The Past, Present and Future', 17 *Journal of Sustainable Development* 1, 2015, 8.

In traditional African morality, duties trump rights, not the other way around, as it is in the moral systems of Western societies.<sup>114</sup> It is held that whatever happens to the individuals is believed to happen to the whole group and whatever happens to the whole group happens to the individual.<sup>115</sup> Therefore, most Africans do not think of themselves as a discrete individual, but rather as part of the community.<sup>116</sup> Your neighbour's situation is your situation and mutual aid becomes a moral obligation.<sup>117</sup> It is then customary that crimes were resolved in ways that promoted the well-being of the society.<sup>118</sup> The main aim of the social response is first and foremost not to punish the offender but to help him.<sup>119</sup> This is made possible because sight is never lost of the victim or of the surrounding social context.<sup>120</sup> It is not infrequent for crime to be perceived as a wound that must be healed, rather than an offence in the Western penal sense of the word.<sup>121</sup> Consequently, this perspective affects the judicial role in sentencing. The ultimate goal is to reach a resolution acceptable to all concerned, with constant attention paid to both restoration (a process that renews damaged personal relations and community ties) and reparation (the process of making things right for the victim).<sup>122</sup>

Although some contemporary Africans find it difficult to adjust between their primitive beliefs in certain aspects of their culture and the modern mode of accepted behaviour,<sup>123</sup> the communal values of traditional Africa are accommodated in the scheme of African modernity.<sup>124</sup> There are existing traditional practices among African communities that are synonymous with contemporary expositions on democratic governance both in principles and in practice.<sup>125</sup> Although indigenous wisdom does not feature much in modern development models, it is observed that among the local people this wisdom still

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<sup>114</sup> Gyekye K, 'African Ethics', 15.

<sup>115</sup> Husein A and Kebede O, 'The conception of morality in indigenous African culture.', 60.

<sup>116</sup> Husein A and Kebede O, 'The conception of morality in indigenous African culture', 61.

<sup>117</sup> Gyekye K, 'African Ethics', 13.

<sup>118</sup> Agoste C, 'Juvenile Justice in Africa: An assessment of adherence to International Law on preserving the rights of child offenders', MA Thesis, University of Manitoba, Manitoba, 2018, 19.

<sup>119</sup> Cottino A, 'Crime prevention and control', 297.

<sup>120</sup> Cottino A, 'Crime prevention and control', 297.

<sup>121</sup> Cottino A, 'Crime prevention and control', 297.

<sup>122</sup> Cottino A, 'Crime prevention and control', 297.

<sup>123</sup> Idang E, 'African culture and values', 16 *University of South Africa Press* 2, 2015, 107.

<sup>124</sup> Awoniyi S, 'African Cultural Values', 8.

<sup>125</sup> Awoniyi S, 'African Cultural Values', 12.

features strongly, especially on social issues.<sup>126</sup> It appears that African cultures always try to maintain values that are necessary for the survival of their people.<sup>127</sup>

### 2.3 Individualism in Western Thought

According to the Macmillan Contemporary Dictionary (1979), the term 'moral' is defined as "the distinction between right and wrong as defined by one's conscience".<sup>128</sup> This is indicative of the Western tradition, where morality is fundamentally individualistic in nature; it is dictated by one's conscience and is relatively independent of external influences.<sup>129</sup>

Individualism is defined by Triandis and Gelfand as an orientation towards independence and self-reliance, pursuing personal goals, maintaining relationships when the costs do not outweigh the benefits, and having the freedom to express oneself.<sup>130</sup> This is in contrast with the dynamics surrounding communalism, whereby societies are oriented around shared groups, identities and goals.<sup>131</sup> Oyserman *et al* provide a further distinction to these definitions, stating that attaining personal goals, happiness and personal control are assumed central to wellbeing within individualism, whereas carrying out obligations and duties are assumed central to wellbeing within communalism.<sup>132</sup> The fundamental assumption is the conception of the individual as an isolated entity separated from its own environment, living as a self-sufficient being.<sup>133</sup> Ultimately, the individual is the cause and the only constituent of the society.<sup>134</sup>

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<sup>126</sup> Malunga C, 'Identifying and understanding African norms and values that support endogenous development in Africa', 24 *Development in Practice, Taylor and Francis Journals* 5, 2014, 634.

<sup>127</sup> Idang E, 'African culture and values', 108.

<sup>128</sup> Michel C and Verhoef H, 'Studying morality within the African context, 394.

<sup>129</sup> Michel C and Verhoef H, 'Studying morality within the African context, 394.

<sup>130</sup> Triandis H and Gelfand M, 'Converging measurement of horizontal and vertical individualism and collectivism', 74 *Journal of Personality and Social Psychology*, 1998, 118.

<sup>131</sup> Humphrey A and Bliuc AM, 'Western individualism and the psychological wellbeing of young people: A systematic review of their associations', 22 December 2021 <https://www.mdpi.com/2673-995X/2/1/1> on 8 January 2024.

<sup>132</sup> Oyserman D, Coon HM and Kimmelmeier M, 'Rethinking individualism and collectivism: Evaluation of theoretical assumptions and meta-analyses', 128 (1) *Psychological Bulletin*, 11.

<sup>133</sup> Soares C, 'The philosophy of individualism: A critical perspective', 1 *International Journal of Philosophy and Social Values*, 2018, 1.

<sup>134</sup> Soares C, 'The philosophy of individualism', 1.

In the broader scope of European intellectual history, numerous endeavours have been made to define and promote individuality.<sup>135</sup> The notion that the person has an independent existence and should be treated as an individual is considered to be a traditional European or Western view, as expressed by proponents of the African conceptions of personhood such as Tempels, Menkiti, and Wilkinson.<sup>136</sup> This view of traditional Western philosophy as inherently individualistic in its approach to personhood and human relations has resulted in the conceptualisation of individual rights; where the rights and welfare of the individual are placed above those of the community.<sup>137</sup> The connection between Western culture and individualism, however, is not absolute, and some Western countries are deemed more collectivistic than others.<sup>138</sup>

Individualism holds that the individual is the primary unit of reality and the ultimate standard of value.<sup>139</sup> The individual is therefore the primary possessor of rights.<sup>140</sup> The West's high regard for private property represents this aspect of individualism,<sup>141</sup> where the right to private property is one of the fundamental rights of the individual.<sup>142</sup> The assumed superiority of private property rights, in part, springs from the notion that individual incentives to enforce such rights are greater.<sup>143</sup> These private property rights are capable of safeguarding individualism, as they provide independence and a sense of self-reliance.<sup>144</sup> In line with this, Nozick takes the value of private property rights to be self-evident because of their link with individual freedom.<sup>145</sup> This commitment to private

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<sup>135</sup> Soares C, 'The philosophy of individualism', 4.

<sup>136</sup> Kahaka M and Maundeni W, 'Comparing some traditional Western and African conceptions of personhood', 2 *European Journal of Humanities and Social Sciences* 5, 2022, 58.

<sup>137</sup> Kahaka M and Maundeni W, 'Comparing some traditional Western and African conceptions of personhood', 58.

<sup>138</sup> Krassner A, 'East-West, Collectivist-Individualist: A Cross-cultural Examination of Temperament in Toddlers from Chile, Poland, South Korea, and the US', 14 *European Journal of Developmental Psychology* 4, 450.

<sup>139</sup> Soares C, 'The philosophy of individualism', 7.

<sup>140</sup> Soares C, 'The philosophy of individualism', 7.

<sup>141</sup> <https://www.studysmarter.co.uk/explanations/politics/political-ideology/individualism/> on 10 January 2024.

<sup>142</sup> Rupp T, 'Common of the Commune: Private Property and Individualism in Remigio Dei Girolami's *De Bono Pacis*', 14 *History of Political Thought* 1, 1993, 41.

<sup>143</sup> Sjaastad E and Bromley D, 'The prejudices of Property Rights: On individualism, specificity, and security in property regimes', *Development Policy Review*, 2000, 375.

<sup>144</sup> Turner R, 'Individualism and Ownership', in *Neo-Liberal Ideology*, Edinburgh University Press, Edinburgh, 2008, 192

<sup>145</sup> Cheyney R, 'Yours, Mine, and Ours: Property Rights and Individual Liberty', 87 *Ethics* 2, 126.

property rights is based on the belief that such rights are demanded by the values of personal liberty, or autonomy.<sup>146</sup>

## 2.4 Contrasts in African and Western Thought

Moral reality within the West is fundamentally different from that in Africa.<sup>147</sup> Unlike the Western view where the individual object, person, or concept is seen as occurring in itself, no entities exist within the African ethos without relationship.<sup>148</sup> African rationality is much more inclusive and deals with an embedded and even embodied sense of responsibility towards the community.<sup>149</sup> This notion, in terms of the Western idea of logic, may be regarded as pre-logical.<sup>150</sup>

The Western society is primarily differentiated from the African one in that they are at best a collectivist society; that is the bringing together into a collectivity, a number of individuals who remain individual persons in a community or society.<sup>151</sup> The Western man distinguishes himself from the other and claims his autonomy in total individualism, affirming himself in his basic originality as against the reality and fact of 'being-with'.<sup>152</sup> Whereas Descartes, capturing Western personhood, would say "I think, therefore I am",<sup>153</sup> in the words of Mbiti, Africans would say "I am because we are and since we are, therefore I am".<sup>154</sup> This claim is believed to be a demonstration of the sharp contrast of ideas that exist between the African and Western understanding of a person.<sup>155</sup>

Unlike the Western belief in absolute individual equality, the African perspective does not necessarily grant human beings' equality.<sup>156</sup> From the customary African perspective,

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<sup>146</sup> Cheyney R, 'Yours, Mine, and Ours: Property Rights and Individual Liberty', 137.

<sup>147</sup> Michel C and Verhoef H, 'Studying morality within the African context, 394.

<sup>148</sup> Michel C and Verhoef H, 'Studying morality within the African context, 396.

<sup>149</sup> Nel PJ, 'Morality and religion in African thought', 41.

<sup>150</sup> Nel PJ, 'Morality and religion in African thought', 41.

<sup>151</sup> Obinyan V, 'The controversy with the concept of man in Western and African Philosophy: A Comparative Analysis', *Science Journal Publication*, 2012, 7.

<sup>152</sup> Obinyan V, 'The controversy with the concept of man in Western and African Philosophy', 7.

<sup>153</sup> Kahaka M and Maundeni W, 'Comparing some traditional Western and African conceptions of personhood', 58.

<sup>154</sup> Mbiti J, 'African Religions and Philosophy', 1969, 108.

<sup>155</sup> Kahaka M and Maundeni W, 'Comparing some traditional Western and African conceptions of personhood', 59.

<sup>156</sup> Michel C and Verhoef H, 'Studying morality within the African context, 400.

morality is not primarily a justice morality as it is in the West.<sup>157</sup> What is moral from a Western perspective tends to be defined by standards which apply to all individuals in all situations, regardless of social position.<sup>158</sup> Each autonomous individual is inherently worthy of respect, regardless of past behaviour or experience.<sup>159</sup> Moral rules are given in abstract Kantian categorical imperatives; there are generally strict absolutes of right and wrong.<sup>160</sup> From the African viewpoint, moral processes are primarily concerned with the maintenance of good relationships with others, as opposed to the maintenance of justice and individual rights.<sup>161</sup> What is right is what connects people together; what separates people is wrong.<sup>162</sup> For instance, whereas in Western societies stealing is wrong on the same level irrespective of whether one steals from rich to poor, the gravity of moral transgressions in African culture is relative to certain factors, such as wealth.<sup>163</sup>

## 2.5 The Western Foundation of Contemporary Criminal Law

Western concepts of crime, justice, and approaches to justice are influenced fundamentally by the Western key values.<sup>164</sup> The fundamental nature of these concepts is that they are individualistic.<sup>165</sup> Modern constitutions usually reflect classic liberal assumptions concerning the importance of individual autonomy and an individual's liberty rights rather than, for instance, obligations towards collectives.<sup>166</sup>

Western law is based on secular logic and the promotion of individual rights.<sup>167</sup> Western society has a number of rules such as '*Violence is wrong; stealing is wrong; lying is wrong*' as starting points when determining moral transgressions, though circumstances are

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<sup>157</sup> Michel C and Verhoef H, 'Studying morality within the African context, 397.

<sup>158</sup> Michel C and Verhoef H, 'Studying morality within the African context, 397.

<sup>159</sup> Shweder R, 'Beyond self-constructed knowledge: the study of culture and morality', 28 *Merrill-Palmer Quarterly*, 1982, 47.

<sup>160</sup> Michel C and Verhoef H, 'Studying morality within the African context, 397.

<sup>161</sup> Michel C and Verhoef H, 'Studying morality within the African context, 397.

<sup>162</sup> Mbiti J, 'Introduction to African religion', *Heinemann Publishers*, London, 1975,9.

<sup>163</sup> Michel C and Verhoef H, 'Studying morality within the African context, 403.

<sup>164</sup> Liu J, 'Asian Paradigm Theory and Access to Justice', 211.

<sup>165</sup> Liu J, 'Asian Paradigm Theory and Access to Justice', 212.

<sup>166</sup> Hornle T, 'Theories of criminalization', *Oxford University Press*, Oxford, 2014, 6.

<sup>167</sup> Ali S, 'Comparative Study of Islamic and Western Law in Criminal Law and Justice Systems', 114.

taken into account, especially when punishment is being inflicted or in the sentencing of a criminal.<sup>168</sup>

The prioritisation of rationality and the protection of individual rights have played a significant role in establishing legal systems in the Western world.<sup>169</sup> The criminal law as it covers behaviour which violates individuals' rights.<sup>170</sup> It is justified in a secular and functional mode, and individuals' needs and rights take centre stage.<sup>171</sup> Westerners tend to conceive the concept of crime and justice as individualistic concepts,<sup>172</sup> and people who violate the law must be punished because punishment is what they deserve.<sup>173</sup>

In his treatise on the Asian Paradigm Theory, Jianhong Liu analyses how the three cardinal facets of criminal justice systems (crime, justice, and the approach to justice) are rooted in the individualistic traditions of Western philosophy.

#### i) Concept of crime

In the Western paradigm, crime is defined as acts by individuals in violation of criminal laws instituted by states.<sup>174</sup> Once we are in the realm of behaviours that the state may criminalise, we face the task of defining criminal prohibitions.<sup>175</sup> Here the focus is primarily on the individual.<sup>176</sup> The concept of crime is state centred and crime is viewed as a conflict between the state and the offender.<sup>177</sup> The state identifies and punishes the offender, thus representing the public interest.<sup>178</sup> However, in actuality, the state does not necessarily represent the public interest as the victims' interests are often in conflict with state actions and interests.<sup>179</sup>

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<sup>168</sup> Michel C and Verhoef H, 'Studying morality within the African context, 398.

<sup>169</sup> Ali S, 'Comparative Study of Islamic and Western Law in Criminal Law and Justice Systems', 9 *Al-Qantara* 3, 2023, 114.

<sup>170</sup> Hornle T, 'Theories of criminalization', 23.

<sup>171</sup> Hornle T, 'Theories of criminalization', 15.

<sup>172</sup> Liu J, 'Asian Paradigm Theory and Access to Justice', 205.

<sup>173</sup> Cottino A, 'Crime prevention and control', 290.

<sup>174</sup> Ali S, 'Comparative Study of Islamic and Western Law in Criminal Law and Justice Systems', 114.

<sup>175</sup> Lee Y, 'What is Philosophy of Criminal Law', Review of Deigh J and Dolinko D 'The Oxford Handbook of Philosophy of Criminal Law', *The Fordham Law Archive of Scholarship and History*, 2013, 6.

<sup>176</sup> Lee Y, 'What is Philosophy of Criminal Law', 6.

<sup>177</sup> Liu J, 'Asian Paradigm Theory and Access to Justice', 212.

<sup>178</sup> Liu J, 'Asian Paradigm Theory and Access to Justice', 212.

<sup>179</sup> Liu J, 'Asian Paradigm Theory and Access to Justice', 212.

ii) Concept of justice

The state centred concept of crime logically leads to an offender centred concept of justice – because the state is powerful in comparison with the offender in a conflicting process, the suspects are entitled to added rights and protections to ensure fairness and justice.<sup>180</sup> The rights of the offender in the offender justice system becomes the central concern, and the role of victims becomes marginalised.<sup>181</sup> In offender centred justice, punishing the guilty offender becomes a primary objective.<sup>182</sup> The purpose of punishment in the West is considered to be serving justice, as opposed to communal concepts, where the objective of justice is to repair harm, provide restitution for victims, and resume peace and social relations.<sup>183</sup> This notion of justice in Western jurisprudence places significant emphasis on the equitable treatment of individuals within the confines of a legal structure.<sup>184</sup>

iii) Approaches to justice

The Western system is characterised as a conflict-based approach.<sup>185</sup> The truth can be found only through an adversarial system and process based on due process.<sup>186</sup> This notion is not widely accepted in communal culture because an adversarial approach may lead to the concealment of truth, as the adversarial process is not isolated from social stratification in power and influence.<sup>187</sup> Western law situates itself within a conceptual structure that endeavours to reconcile the self-governance of individuals with the requirements of a fair and well-regulated community.<sup>188</sup>

Liu's exploration of Western criminal justice systems reveals the dominance of individualistic philosophies, shaping a state-centric view of crime and an offender-centred concept of justice. Further, the conflict-based approach to justice inherent in criminal justice systems may not always align with communal cultures.

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<sup>180</sup> Liu J, 'Asian Paradigm Theory and Access to Justice', 212.

<sup>181</sup> Liu J, 'Asian Paradigm Theory and Access to Justice', 212.

<sup>182</sup> Lee Y, 'What is Philosophy of Criminal Law', 2.

<sup>183</sup> Ali S, 'Comparative Study of Islamic and Western Law in Criminal Law and Justice Systems', 116.

<sup>184</sup> Ali S, 'Comparative Study of Islamic and Western Law in Criminal Law and Justice Systems', 116.

<sup>185</sup> Liu J, 'Asian Paradigm Theory and Access to Justice', 212.

<sup>186</sup> Liu J, 'Asian Paradigm Theory and Access to Justice', 212.

<sup>187</sup> Liu J, 'Asian Paradigm Theory and Access to Justice', 212.

<sup>188</sup> Ali S, 'Comparative Study of Islamic and Western Law in Criminal Law and Justice Systems', 114.

## 2.6 The Alternative Perspective of African Tradition

In contrast to the Western approach to criminalisation discussed in the preceding section, this segment unveils an alternative lens through which to view a scenario of food theft, portraying the traditional African ethos in addressing such circumstances.

### 2.6.1 *The African Response to Theft*

For a long time in Africa, rural communities were not concerned about theft as a crime.<sup>189</sup> The Eurocentric view of economy, government, and life had a profound impact on the people of Africa.<sup>190</sup> In fact, it shattered the cultural norms around an acceptable level of theft.<sup>191</sup>

Historically, theft as the result of hunger in traditional African society was somewhat tolerated, a tradition that persists, albeit in defiance of formal law.<sup>192</sup> Traditionally, individuals caught stealing or having stolen food crops were examined to determine if hunger was the cause, and if established, they were freed or given a lenient punishment.<sup>193</sup> For most African communities, taking a small amount of crop from someone's farm due to hunger and the need to feed their families was not regarded as theft.<sup>194</sup> Rather, it was considered sharing with those who were not able to grow or raise their own food.<sup>195</sup> Similarly, the Kalenjin ethnic communities of Kenya were lenient to individuals captured for stealing farm produce, especially if it was established that the motive was related to hunger.<sup>196</sup> It was a sign of community solidarity, and what would be considered a crime was to steal *excess* food from the community.<sup>197</sup>

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<sup>189</sup> Bunei K, Auya S and Rono J, 'Agricultural crime in Africa', 118.

<sup>190</sup> Bunei K, Auya S and Rono J, 'Agricultural crime in Africa', 120.

<sup>191</sup> Osamba O, 'The sociology of insecurity: cattle-rustling and banditry in north-western Kenya', 1 *African Journal on Conflict Resolution*, 2000, 22.

<sup>192</sup> Bunei K, Auya S and Rono J, 'Agricultural crime in Africa', 120.

<sup>193</sup> Bunei K, Auya S and Rono J, 'Agricultural crime in Africa', 120.

<sup>194</sup> Bunei K, Auya S and Rono J, 'Agricultural crime in Africa', 121.

<sup>195</sup> Bunei K, Auya S and Rono J, 'Agricultural crime in Africa', 121.

<sup>196</sup> Bunei K, Auya S and Rono J, 'Agricultural crime in Africa', 121.

<sup>197</sup> Gichamo T, 'Dispute or residing together in harmony? Bean cultivation and theft in rural Ethiopia', Unpublished Thesis, Swedish University of Agricultural Sciences, Sweden, 2011.

From the conventional African perspective, moral situations do not exist in a vacuum. Instead, when an individual wrongs another, the circumstances surrounding the wrong are necessary in determining how best to deal with the situation.<sup>198</sup> Variables such as the consequences of the offence for those involved, the intention underlying the offence, and the status of the involved parties determine the degree to which the community is in disequilibrium.<sup>199</sup>

In customary African society, moral transgression is marked by extreme relativity, and it is necessary to understand the intention behind an action in order to determine the seriousness of the offence.<sup>200</sup> Sub conditions, which consist of amount, degree and nature, are imperative when ascertaining the seriousness of an offence.<sup>201</sup> In a scenario of theft of food, the following sub conditions would apply in traditional African culture, within communities such as the Kalenjin<sup>202</sup> and the Igbo<sup>203</sup>, with the aim of unveiling the intention of the offender:

- i) Whether the offence was well thought out or an accident, and in line with this, whether the offender was considered a thief throughout the community.<sup>204</sup>
- ii) The motive behind the theft - whether the offender acted out of jealousy, hunger, or revenge.<sup>205</sup> Stealing yams from a neighbour out of envy of the person's large barn of yams would be perceived differently from stealing yams to feed one's hungry children.<sup>206</sup>
- iii) How hungry the children were, as well as how many children were hungry would also be considered.<sup>207</sup>
- iv) The cause of the hunger would also be taken into consideration - whether it was due to a drought or an individual's irresponsibility.<sup>208</sup>

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<sup>198</sup> Mbiti J, 'Introduction to African religion', 176.

<sup>199</sup> Mbiti J, 'Introduction to African religion', 176.

<sup>200</sup> Mbiti J, 'Introduction to African religion', 178.

<sup>201</sup> Michel C and Verhoef H, 'Studying morality within the African context, 400.

<sup>202</sup> Bunei K, Auya S and Rono J, 'Agricultural crime in Africa ,121.

<sup>203</sup> Michel C and Verhoef H, 'Studying morality within the African context, 399.

<sup>204</sup> Michel C and Verhoef H, 'Studying morality within the African context, 400.

<sup>205</sup> Michel C and Verhoef H, 'Studying morality within the African context, 400.

<sup>206</sup> Michel C and Verhoef H, 'Studying morality within the African context, 400.

<sup>207</sup> Michel C and Verhoef H, 'Studying morality within the African context, 400.

<sup>208</sup> Michel C and Verhoef H, 'Studying morality within the African context, 400.

- v) The nature of the object stolen – for instance, stealing a sheep vs stealing a yam.<sup>209</sup>
- vi) The degree of damage done to the recipient – stealing a sheep would have a greater degree of material consequences than stealing a few yams.<sup>210</sup>

The community members then discuss the dynamics of the moral situation and arrive through consensus at a settlement that will restore the relationship between the offender and the offended.<sup>211</sup> What is moral is determined by the situation and relative to the suffering involved.<sup>212</sup>

The foundation of this approach stems from the deep-rooted community solidarity intrinsic to ancestral African culture and people. Their morality demands mutual reciprocity as a mandate in a world in which human beings can easily be overcome by the contingencies of the human condition and existence.<sup>213</sup> People ought to fulfil duties to others not because of the rights of these others, but because of their needs and welfare.<sup>214</sup> Insensitivity to the needs and hardships or suffering situations of others is repudiated in most African societies.<sup>215</sup>

### 2.6.2 Motivations underlying the adoption of this approach

Unlike modern Western law, customary laws often have quite different views as to who is the offender, what should be done about his transgression and how to restore social relations which have been threatened or broken.<sup>216</sup> For instance, African countries before the advent of colonialism had a rich variety of social control, social pressure, custom, customary law and judicial procedures that were used to maintain law and order.<sup>217</sup>

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<sup>209</sup> Michel C and Verhoef H, 'Studying morality within the African context, 400.

<sup>210</sup> Michel C and Verhoef H, 'Studying morality within the African context, 400.

<sup>211</sup> Okendo E, 'Decision-making Practices in Africa' in Uzo U, *Indigenous management practices in Africa*, Emerald Publishing Limited, Leeds, 2018, 232.

<sup>212</sup> Okendo E, 'Decision-making Practices in Africa', 241.

<sup>213</sup> Gyekye K, 'African Ethics', 8.

<sup>214</sup> Gyekye K, 'African Ethics', 10.

<sup>215</sup> Gyekye K, 'African Ethics', 8.

<sup>216</sup> Cottino A, 'Crime prevention and control', 290.

<sup>217</sup> Merry S, 'Legal Pluralism', 22 *Law & Society Review*, 1988, 876.

However, due to the marginalising effect of colonialism in Africa, and the indirect rule of Africans by the Europeans through pre-existing sources of political authority and the creation of native courts, most African countries today are found to be practising legal pluralism.<sup>218</sup> Thus, the system allowed indigenous societies to integrate their indigenous legal systems with those they inherited from their colonial masters.<sup>219</sup> As a result, in many African countries today, both the African traditional legal systems and European laws coexist and operate side by side with various points of overlap, conflict and mutual influence.<sup>220</sup> This is evident in Kenya, where the country's traditional criminal procedures have been modified by the colonial administration.<sup>221</sup> These existing laws are not based on the public morality of the people governed, and they generally played no part in their making.<sup>222</sup>

The African community and its ancestral values should be considered in cases of ethical justification of actions and customs.<sup>223</sup> The post-colonial reality provides a space to engage with the complexity of these phenomena in ways which allow the indigenous people to speak for themselves, but also to allow for the multi-valence and multi-layered dimensions of these concepts in African thought.<sup>224</sup> As is the case with other disciplines, Western psychology has evolved to interpret people's psychological experience in non-Western cultures and among so-called minorities in industrialised nations.<sup>225</sup> This application of Western psychological frameworks to other cultures has led to cultural devaluation of non-Western societies as well as to prejudices and misinformation about non-Westerners.<sup>226</sup>

In traditional African societies, morality permeated every aspect of life, and this had to be reflected in the laws. Laws, as we know them today were unknown and a society's code of behaviour, albeit unwritten, was deeply ingrained in every member of that society, and

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<sup>218</sup> Tamanaha B, 'Understanding Legal Pluralism: Past to present, Local to global', *7 Legal Studies Research Paper Series*, 2008, 43.

<sup>219</sup> Agoste C, 'Juvenile Justice in Africa', 26.

<sup>220</sup> Tamanaha B, 'Understanding Legal Pluralism', 60.

<sup>221</sup> Ebbe O, 'World Factbook of Criminal Justice Systems', Bureau of Justice Statistics, 2003, 2.

<sup>222</sup> Waliggo J, 'Law and public morality in Africa: Legal, Philosophical and Cultural Issues', ALRAESA Annual Conference, 2005, 4.

<sup>223</sup> Nel PJ, 'Morality and religion in African thought', 42.

<sup>224</sup> Nel PJ, 'Morality and religion in African thought', 44.

<sup>225</sup> Michel C and Verhoef H, 'Studying morality within the African context', 390.

<sup>226</sup> Michel C and Verhoef H, 'Studying morality within the African context', 390.

this is what curbed vices and other improper behaviour.<sup>227</sup> It is quite evident that the formal laws of today reduce the concept of morality to just one small aspect.<sup>228</sup> This narrow interpretation of morality could be a result of importing these foreign laws wholesale without the full involvement and participation of the people who are to be affected by them.<sup>229</sup> Morality as understood in the traditional African sense has been prevailed over by the written laws which do not adequately define what public morality is and neither do they regulate upon morality in its entirety.<sup>230</sup> There is hence a need to revisit our cultural or traditional norms and values in which morality was treated in a holistic approach and each person was compelled to live in accordance with the moral standards of that person's community.<sup>231</sup>

## 2.7 Conclusion

This chapter endeavoured to provide an alternative perspective on the crime of food theft through the lens of traditional African reasoning. It sought to reveal the communal ethos and concept of personhood prevalent in conventional African societies, contrasting it with the individualistic ethos of the West and its influence on criminal law.

This dissertation posits that for dissenters of this premise, the elements, and underlying principles of criminal law defences such as self-defence and necessity offer another compelling rationale for the decriminalisation of food theft for survival. The ensuing chapter will explore this topic.

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<sup>227</sup> Waliggo J, 'Law and public morality in Africa', 4.

<sup>228</sup> Waliggo J, 'Law and public morality in Africa', 4.

<sup>229</sup> Waliggo J, 'Law and public morality in Africa', 4.

<sup>230</sup> Waliggo J, 'Law and public morality in Africa', 4.

<sup>231</sup> Waliggo J, 'Law and public morality in Africa', 4.

## **3.0 CRIMINAL LAW'S RESPONSE TO SURVIVAL-DRIVEN ACTIONS**

### **3.1 Introduction**

Presenting an alternative argument, this chapter seeks to explore the defences within criminal law. It begins by illustrating that there are instances in which criminal law absolves criminal conduct based on actions of survival. To set a foundation, the chapter briefly examines the two categories under which criminal defences fall, namely excuse and justification. It proceeds to investigate the concept of self-defence, elucidating its elements and underlying principles. Similarly, the chapter analyses the defence of necessity, seeking to discern the elements and rationale that criminal law applies when pardoning criminal acts.

### **3.2 Deciphering Criminal Defences Concerned with Survival**

The intersection between morality and law is nowhere more evident than in the criminal defences.<sup>232</sup> Defences, it might be argued, are the embodiment of such complex human notions of fairness and morality, tempered by the demands of utility and efficacy, that they are too complex and perhaps too illogical to be reduced to an integrated, comprehensive, and internally consistent system of exculpation.<sup>233</sup>

The general notion underlying the criminal defences is captured by the claim, "Yes, I have committed harm but there are decisive reasons why I should not be held to blame or punished for my action."<sup>234</sup> The harm involved is the kind of harm anticipated by the criminal law – taking life, inflicting injury, depriving one of property- and the defensive reasons are ones recognised by law.<sup>235</sup>

The traditional view holds that the criminal law focuses uniquely on acts but allows instances in which character or motive can affect a defendant's ultimate fate.<sup>236</sup> The criminal law is primarily concerned with punishing defendants who manifest a defect of

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<sup>232</sup> Morawetz T, 'Reconstructing the criminal defenses: The significance of justification', 77 *The journal of criminal law and criminology* 2, 1986, 277.

<sup>233</sup> Robinson P, 'Criminal Law Defenses: A systematic analysis', 82 *Columbia Law Review* 2, 1982, 202.

<sup>234</sup> Robinson P, 'Criminal Law Defenses', 203.

<sup>235</sup> Morawetz T, 'Reconstructing the criminal defenses', 278.

<sup>236</sup> Finkelstein C, 'Excuses and Dispositions in Criminal Law', 6 *Buffalo Criminal Law Review* 1, 2002, 318.

motivation, and we should excuse those who violate the law in cases where no defect of motivation exists.<sup>237</sup> When an act is of such a description that it would be better that it should not be done, it is quite proper to look at the motives and intentions of the doer, for the purpose of deciding whether he shall be punished or not.<sup>238</sup> The emphasis on motive is that we cannot draw any negative conclusions about the motives of a person whose reason for violating the law is that he fears for his life.<sup>239</sup>

Over the course of several centuries, intention slowly became more important in defining crime, and harm alone became less important.<sup>240</sup> Each category of criminal defence mirrors and amplifies what is arguably a criterion for moral blamelessness and every species of moral exculpation seems to demand legal recognition.<sup>241</sup> The situations and sources of human action are varied and complex and there is no priori reason to think that the bases of moral exculpation sort themselves into simple categories.<sup>242</sup> At the same time, not just the law, but also human understanding, demands categorisation, however Procrustean the result. The criminal defences, with relatively little deformation, seem to sort themselves out into two groups: excuses and justifications.<sup>243</sup>

The subsequent sections discussing excuse, justification, self-defence, and necessity draw upon scholarly work, which considers these defences in their general form rather than focusing on their specific manifestations within separate jurisdictions. This approach was selected due to the discovery that scholarly literature provided a comprehensive understanding of these defences that is not confined to the specific legal provisions of individual jurisdictions. Scholarly analyses will be seen to uncover common themes across various legal contexts regarding these defences. Additionally, since these areas intersect with other disciplines such as philosophy, scholarly works provide interdisciplinary perspectives that shed light on the underlying principles and moral foundations of these legal doctrines, going beyond purely legal considerations. Furthermore, scholars offer established interpretations of these defences, rooted in

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<sup>237</sup> Finkelstein C, 'Excuses and Dispositions in Criminal Law',319.

<sup>238</sup> Robinson P, 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability', 23 *UCLA Law Review* 2, 1975, 268.

<sup>239</sup> Finkelstein C, 'Excuses and Dispositions in Criminal Law',319.

<sup>240</sup> Horowitz D, 'Justification and Excuse in the program of the Criminal Law', 49 *Duke University School of Law* 3, 1986, 114.

<sup>241</sup> Morawetz T, 'Reconstructing the criminal defenses',278.

<sup>242</sup> Morawetz T, 'Reconstructing the criminal defenses',278.

<sup>243</sup> Morawetz T, 'Reconstructing the criminal defenses',278.

thorough research and analysis. This ensures the accuracy and reliability of the information provided, surpassing what can be deduced from the legal provisions of these defences in their different jurisdictions.

### **3.3 Excuses and Justifications**

#### *3.3.1 The Relevance of Excuse and Justification*

The distinction between excuse and justification offers the best (if not the only) basis for the systematic analysis of exculpatory defences.<sup>244</sup> Excuse and justification provide an exculpatory rationale for finding an actor not guilty, even if he has engaged in all the conduct, possessed the state of mind, and caused the harm otherwise necessary to constitute a crime.<sup>245</sup> These defensive theories, as traditionally understood, exonerate based on principles that are broader than the facts of a particular case, because of the manner in which they appropriately apply to the facts of a case.<sup>246</sup> Excuse and justification defences thus involve applying the general to the specific, in order to make a principled judgement as to whether a given defendant ought to be stigmatised as a criminal and punished accordingly.<sup>247</sup>

#### *3.3.2 Excuses*

Excuse defences focus on the actor and not the act – they exculpate even though an actor’s conduct may have harmed society because the actor, for whatever reason, is not judged to be blameworthy.<sup>248</sup> All excuse defences are predicated upon the presence of some disability or disabling condition affecting the actor claiming the defence.<sup>249</sup> However, where the nexus between the disability and excusing condition is too remote, an actor will not be excused, regardless of the severity or magnitude of his disability.<sup>250</sup>

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<sup>244</sup> Eden P, ‘What role could the distinction between justification and excuse play in the creation of a Criminal Code for Jersey’, Institute of Law Jersey Conference, 2015, 3.

<sup>245</sup> Milhizer E, ‘Justification and Excuse: Excuse: What they were, what they are, and what they ought to be’, 78 *St. John’s Law Review* 3, 2004, 726.

<sup>246</sup> Milhizer E, ‘Justification and Excuse’, 726.

<sup>247</sup> Milhizer E, ‘Justification and Excuse’, 726.

<sup>248</sup> Milhizer E, ‘Justification and Excuse’, 726.

<sup>249</sup> Milhizer E, ‘Justification and Excuse’, 817.

<sup>250</sup> Milhizer E, ‘Justification and Excuse’, 817.

In relying on an excuse defence, one argues that some disability in their freedom to choose the right makes it inappropriate for them to be punished.<sup>251</sup> A successful defence of excuse represents a legal conclusion that although the act was wrong, liability is inappropriate because some characteristic of the actor vitiates society's desire to punish him.<sup>252</sup> The usual excuses – insanity, duress, involuntary action, disease, and occasionally intoxication – all relate to incapacity, disability, or infirmity, or an absence of conscious will to do evil.<sup>253</sup> They go, in short, to the mental element in criminal liability; to the *mens rea* factors that render otherwise criminal conduct non-criminal.

When an act is excused, we say that it was not really committed by the defendant, in the sense that it was not freely performed by him.<sup>254</sup> The underlying principle behind excuses is, therefore, voluntarism.<sup>255</sup> It may be said in these cases that the person had no *effective* choice or that no reasonable and upright person *could* have done otherwise.<sup>256</sup> The moral message of excusatory defences is that it would be wrong for society to punish persons for conduct that cannot properly be attributed to them.<sup>257</sup>

### 3.3.3 Justifications

A justification creates an exception to a legal norm in certain extraordinary circumstances.<sup>258</sup> It tries to carve out a sphere of human conduct where the otherwise wrongful conduct is not considered wrongful but is in fact, justified by the surrounding circumstances.<sup>259</sup> A justification entitles one to act in a certain way because it shows that an act that is morally wrongful in most instances is not wrongful in particular (justifying) circumstances.<sup>260</sup> The moral message of justification defences is that conduct that is otherwise considered wrongful becomes right or justified by the existence of certain extraordinary circumstances.<sup>261</sup> A justification entitles others to do a like action, because they too will be justified.<sup>262</sup>

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<sup>251</sup> Kadish S, 'Excusing crime', 1987, 258.

<sup>252</sup> Robinson P, 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability', 275.

<sup>253</sup> Horowitz D, 'Justification and Excuse in the program of the Criminal Law', 111.

<sup>254</sup> Horowitz D, 'Justification and Excuse in the program of the Criminal Law', 118.

<sup>255</sup> Kadish S, 'Excusing crime', 266.

<sup>256</sup> Kadish S, 'Excusing crime', 266.

<sup>257</sup> Kilara A, 'Justification and Excuse in the Criminal Law: Defences under the Indian Penal Code', 19 *Student Advocate Committee* 1, 2007, 18.

<sup>258</sup> Kilara A, 'Justification and Excuse in the Criminal Law', 14.

<sup>259</sup> Kilara A, 'Justification and Excuse in the Criminal Law', 14.

<sup>260</sup> Moore M, 'Causation and the Excuses', 73 *California Law Review* 4, 1985, 1096.

<sup>261</sup> Kilara A, 'Justification and Excuse in the Criminal Law', 18.

<sup>262</sup> Moore M, 'Causation and the Excuses', 1095.

However, these defences are not alterations of the statutory definition of the harm sought to be prevented or punished by an offence.<sup>263</sup> The harm caused by the justified behaviour remains a legally recognized harm which is to be avoided whenever possible.<sup>264</sup> Under the special justifying circumstances, however, that harm is outweighed by the need to avoid an even greater harm or to further a greater societal interest.<sup>265</sup> The rationale behind the justification defence is that one should not be punished where his act of breaking the law prevents more evil than it causes.<sup>266</sup>

All of the different kinds of justification defences share the same basic internal structure and have the same integral components.<sup>267</sup> In all situations allowing a justification defence, there is some adequate triggering condition that prompts the actor to violate the letter of the law.<sup>268</sup> Traditional examples of justification include self-defence (private defence), necessity, defence of others, and actions in an official capacity.<sup>269</sup> The defences of self-defence and necessity constitute the exceptions to criminal responsibility in circumstances of compulsion.<sup>270</sup> It is accepted that the common situation activating all the exceptions of compulsion is one of immediate danger to a certain legitimate interest that forces the actor to harm another interest in order to save the first.<sup>271</sup> The basic situation that is common to all compulsion exceptions involves the survival instinct.<sup>272</sup> The rationale for self-defence in particular and for necessity in general is the existence of a moral right of the person to prefer that which is most important for him – i.e., his own survival.<sup>273</sup> It is because of this underlying basis of survival that the focus of this chapter shall be on self-defence and necessity.

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<sup>263</sup> Robinson P, 'Criminal Law Defenses', 213.

<sup>264</sup> Robinson P, 'Criminal Law Defenses', 213.

<sup>265</sup> Robinson P, 'Criminal Law Defenses', 213.

<sup>266</sup> Arnolds E and Garland N, 'The defence of necessity in criminal law: The right to choose the lesser evil', 65 *Journal of Criminal Law and Criminology* 3, 1975, 290.

<sup>267</sup> Milhizer E, 'Justification and Excuse', 813.

<sup>268</sup> Eden P, 'What role could the distinction between justification and excuse play in the creation of a Criminal Code for Jersey', 2.

<sup>269</sup> Robinson P, 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability', 275.

<sup>270</sup> Sangero B, 'Self-Defence in Criminal Law', *Hart Publishing*, North America (US and Canada), 2006, 2.

<sup>271</sup> Sangero B, 'Self-Defence in Criminal Law', 2.

<sup>272</sup> Sangero B, 'Self-Defence in Criminal Law', 2.

<sup>273</sup> Levine S, 'The Moral Permissibility of Killing a Material Aggressor in Self-Defense', 45 *Philosophical Studies*, 1984, 69.

## 3.4 Self-defence

### 3.4.1 *An Introduction to Self-Defence*

Self-defence implies the use of essential and reasonable defensive force against the aggressor who perpetrates the illegitimate attack, in order to repel this attack and to save a legitimate interest from the risk of injury anticipated from the attack.<sup>274</sup> If the act in question had been committed under normal conditions, however, it would have constituted a criminal act.<sup>275</sup> Both in the past and in the present, the right to self-defence is undisputed.<sup>276</sup> This doctrine is a common law principle developed through judge-made law and further enhanced by statute.<sup>277</sup>

### 3.4.2 *The Rationale Behind Self-defence*

The ensuing section will delve into the underlying principles of self-defence, employing various approaches that encompass the general tenets of criminal law.

#### *i) Preservation of life*

Self-defence and the criminal law share a common aim: to prevent harm and preserve life for peaceable coexistence.<sup>278</sup> This common aim, which is more particularly expressed through political theory rather than moral philosophy, forms the substantive justification for self-defence in the criminal law.<sup>279</sup> Therefore, an actor's conduct based on a reasonable fear of death or serious injury does not merit punishment and, when life is at stake, criminal sanctions will not deter deadly force.<sup>280</sup> It is also unlikely that such an actor represents a future danger to the public.<sup>281</sup> A violent response towards another is consequently not wrongful when it is based on a reasonable fear that the other is perpetrating a deadly attack on the actor or a third party.<sup>282</sup>

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<sup>274</sup> Sangero B, 'Self-Defence in Criminal Law', 2.

<sup>275</sup> Sangero B, 'Self-Defence in Criminal Law', 2.

<sup>276</sup> Kopel D, 'The Natural Right of Self-Defense: Heller's Lesson for the World', 59 *Syracuse Law Review*, 2009, 1004.

<sup>277</sup> Meso O, 'The Doctrine of Self Defense in Criminal Law: An analysis', 2014, 2.

<sup>278</sup> Ashworth A, 'Principles of Criminal Law', *Oxford University Press*, 1991, 111.

<sup>279</sup> Ashworth A, 'Principles of Criminal Law', 111.

<sup>280</sup> Sangero B, 'Hellers Self-Defense', 13 *The New Criminal Law Review* 449, 2010, 1433.

<sup>281</sup> Meso O, 'The Doctrine of Self Defense in Criminal Law: An Analysis', 15.

<sup>282</sup> Sangero B, 'Hellers Self-Defense', 1433.

ii) *The autonomy of the individual*

This principle postulates that the rationale that underlies self-defence is the autonomy of the attacked person. The essence of this theory is that self-defence is based on the absolute right of the victim of the attack to defend his personal legitimate interest – his autonomy – against the attack.<sup>283</sup> There are those who base this defence on the right of a person – a natural right, according to one school, and an agreed right, according to a second school – to life and autonomy.<sup>284</sup> This is the minimum requirement to maintain life that has value.<sup>285</sup> Therefore, a person is permitted to give priority to his own life when his life is in conflict with the life of another.<sup>286</sup>

The issues raised by such decisions are fundamental, since they concern the basic right to life and physical safety.<sup>287</sup> An individual who is attacked or threatened with serious physical attack must be accorded the legal liberty to repel that attack thus preserving a basic right.<sup>288</sup> The criminal law cannot respect the autonomy of the individual if it does not provide for this dire situation.<sup>289</sup> The focus is not on the guilt of the aggressor, but on the autonomy of the innocent victim, where the assumption is that the latter has the right to prevent invasion of and penetration into the sphere of his autonomy.<sup>290</sup> The adage that is frequently applied to this set of circumstances is 'Right should never give way to Wrong'.<sup>291</sup>

iii) *The standard of consequences*

This underlying principle is based on the notion that the consequences of killing or injuring an aggressor in self-defence are preferable to the consequences of allowing the attacked person to be killed or injured.<sup>292</sup> That is, when faced with a choice between the aggressor's death or injury and the attacked person's death or injury, the aggressor's death or injury is the preferable consequence.<sup>293</sup> The means by which the aggressor's

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<sup>283</sup> Sangero B, 'Self-Defence in Criminal Law', 60.

<sup>284</sup> Aiyar K and Anad R, 'Law of Private Defence', *CU Menon*, 1964, 36.

<sup>285</sup> Sangero B, 'Self-Defence in Criminal Law', 60.

<sup>286</sup> Enker A, 'Duress and Necessity in the Criminal Law', *Universitat Bar-Ilan*, 1977, 56.

<sup>287</sup> Meso O, 'The Doctrine of Self Defense in Criminal Law: An Analysis', 5.

<sup>288</sup> Ashworth A, 'Principles of Criminal Law', 111.

<sup>289</sup> Ashworth A, 'Principles of Criminal Law', 111.

<sup>290</sup> Fletcher G, 'Rethinking Criminal Law', 365.

<sup>291</sup> Fletcher G, 'Rethinking Criminal Law', 365.

<sup>292</sup> Leverick F, 'Defending Self-Defence', 27 *Oxford Journal of Legal Studies* 3, 2007, 565.

<sup>293</sup> Leverick F, 'Defending Self-Defence', 565.

death or injury is the preferable consequence is that by virtue of her moral blameworthiness, the aggressor renders her own life less valuable than that of the attacked person.<sup>294</sup> The aggressor's guilt is used as the basis for a certain devaluation of her interest.<sup>295</sup>

Some scholars justify self-defence on modified consequentialist grounds as a choice of lesser harmful results.<sup>296</sup> Self-defence, they argue, should be recognized as an exception to the general prohibition on the use of force because it brings about less harm than following the general prohibition.<sup>297</sup> This evaluation is based on a comparison of the interests of the defender and the aggressor, modified by taking into account the aggressor's responsibility for the situation.<sup>298</sup> Therefore, allowing a defender to kill his aggressor is, on balance, the lesser harmful outcome, because the aggressor alone is responsible for the situation and hence the weight of his interests ought to be diminished.<sup>299</sup>

iv) *Protection of the social legal order*

Another foundational principle underlying self-defence is rooted in the social interest of protection of the public order in general and the legal system in particular. It is important to strengthen the sense of security and trust in the legal system and the rule of law and order for the law-abiding citizen.<sup>300</sup> According to this theory, the attacked person acts as the representative and protector of society, public order, and the legal system, since his actions are directed at neutralising a violation of the law.<sup>301</sup>

The act of the attacked person serves the public interest by deterring offenders and preventing offences.<sup>302</sup> Moreover, the knowledge that the protection of the social-legal order is given to all citizens strengthens the sense of security of the law-abiding public.<sup>303</sup> There is a compelling motivation behind why individuals may be more inclined to take

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<sup>294</sup> Montague P, 'Self-Defense and choosing between lives', 40 *Philosophical Studies*, 1981, 207.

<sup>295</sup> Sangero B, 'Self-Defence in Criminal Law', 103.

<sup>296</sup> Wallerstein S, 'Justifying the right to Self-Defense: A Theory of Forced Consequences', 91 *Virginia Law Review* 4, 2005, 1005.

<sup>297</sup> Wallerstein S, 'Justifying the right to Self-Defense', 1003.

<sup>298</sup> Wallerstein S, 'Justifying the right to Self-Defense', 1003.

<sup>299</sup> Wallerstein S, 'Justifying the right to Self-Defense', 999.

<sup>300</sup> Leverick F, 'Defending Self-Defence', 566.

<sup>301</sup> Sangero B, 'Self-Defence in Criminal Law', 67.

<sup>302</sup> Sangero B, 'Self-Defence in Criminal Law', 68.

<sup>303</sup> Sangero B, 'Self-Defence in Criminal Law', 68.

deterrence and retribution into their own hands: the sense that the state is failing to do it.<sup>304</sup> If the criminal law is the consequence of a social contract to provide a defence against private aggression, then only the assailant's actions constitute a transgression of the law.<sup>305</sup> The law is intended precisely to protect all would-be defenders from all assailants but not vice versa.<sup>306</sup> Hence, there exists a strong institutional justification for self-defence within criminal law.<sup>307</sup>

### 3.4.3 *The Elements of Self-Defence*

The following elements of self-defence outline both its scope and limitations.

#### *i) Use of necessary and reasonable force*

The requirement that the action of the actor against the aggressor within the framework of self-defence must be necessary in order to repel the aggressor, is perhaps the most accepted condition of self-defence in all the legal systems and from ancient history.<sup>308</sup> The two principal requirements of self-defence are that the force should have been necessary for self-defence and reasonable in the circumstances.<sup>309</sup>

The requirement of necessity supports two separate limitations. The first is that it should have been necessary to use force rather than employing non-violent means of self-protection.<sup>310</sup> A second limitation is that the amount of force should have been no more than necessary for the purpose of self-defence.<sup>311</sup> Thus, this necessity criterion imposes a prima facie duty that a person threatened with attack ought to avoid conflict if reasonably possible, and that a person under attack ought to withdraw if reasonably possible.<sup>312</sup>

#### *ii) Use of proportional force*

The principle of proportionality plays a restrictive role in the law of self-defence. It requires a rough approximation between the apparent gravity of the attack or threatened

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<sup>304</sup> Meso O, 'The Doctrine of Self Defense in Criminal Law: An Analysis', 17.

<sup>305</sup> Meso O, 'The Doctrine of Self Defense in Criminal Law: An Analysis', 17.

<sup>306</sup> Meso O, 'The Doctrine of Self Defense in Criminal Law: An Analysis', 17.

<sup>307</sup> Meso O, 'The Doctrine of Self Defense in Criminal Law: An Analysis', 17.

<sup>308</sup> Sangero B, 'Self-Defence in Criminal Law', 143.

<sup>309</sup> Ashworth A, 'Self-defence and the Right to Life', 34 *The Cambridge Law Journal* 2, 1975, 284.

<sup>310</sup> Ashworth A, 'Self-defence and the Right to Life', 284.

<sup>311</sup> Ashworth A, 'Self-defence and the Right to Life', 285.

<sup>312</sup> Ashworth A, 'Self-defence and the Right to Life', 293.

attack and the style and severity of the defensive actions.<sup>313</sup> This restriction is important because, if necessity were the sole requirement, the infliction of death or serious injury might in theory be justifiable if it were the only way of preventing a relatively trivial assault.<sup>314</sup> This principle flows from the human rights approach, inasmuch as the liberty of a person attacked to use such force as is necessary is curtailed out of respect for the attacker's right to life and physical security.<sup>315</sup> A criminal defendant may therefore not use deadly force to respond to a threat that was not in itself deadly.<sup>316</sup>

iii) *The immediacy requirement*

The requirement of immediacy can be seen as an additional aspect of the danger, that is, the danger that threatens a legitimate interest must be immediate.<sup>317</sup> Immediacy is probably the most dominant characteristic of a state of emergency.<sup>318</sup>

The requirement for immediacy has two facets. Justified private defence must be performed at its earliest when the danger is already close, and not earlier ('imminent danger'), and at its latest when the danger or part of it still exists, and no later ('present danger').<sup>319</sup> These two features of the requirement for immediacy can be posed against two negative possibilities that should be avoided. The first—preemptive violence—for then the 'defensive' action is too early (and in effect, from a substantive point of view, is not defensive at all), and the other—disguised revenge—when the 'defensive' action is too late (and again, from a substantive point of view, is not defensive at all).<sup>320</sup>

## 3.5 The Defence of Necessity

### 3.5.1 *An Introduction to the Defence of Necessity*

The concept of necessity has been anciently woven into the fabric of our culture.<sup>321</sup> Criminal defendants who intentionally and knowingly violate a criminal statute may

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<sup>313</sup> Ashworth A, 'Self-defence and the Right to Life', 296.

<sup>314</sup> Ashworth A, 'Self-defence and the Right to Life', 296.

<sup>315</sup> Ashworth A, 'Self-defence and the Right to Life', 297.

<sup>316</sup> Criminal Law Center, 'Self-Defense in Criminal Law Cases', 2023, 2.

<sup>317</sup> Sangero B, 'Self-Defence in Criminal Law', 150.

<sup>318</sup> Sangero B, 'Self-Defence in Criminal Law', 152.

<sup>319</sup> Sangero B, 'Self-Defence in Criminal Law', 154.

<sup>320</sup> Sangero B, 'Self-Defence in Criminal Law', 154.

<sup>321</sup> Hall J, 'General Principles of the Criminal Law', 2 ed, 1960, 416.

nevertheless claim that they have committed no crime.<sup>322</sup> These defendants make this assertion even though they admit committing the act and possessing the mental element proscribed by the law. The essence of the necessity situation is that the defendant had he chosen to, could have complied with the letter of the law, but decided not to do so because he thought that such compliance would in all probably result in a harm or evil as great or greater than that which would ensue from doing (or omitting to do) what prima facie is prohibited (or commanded).<sup>323</sup>

### *3.5.2 The Rationale behind the Defence of Necessity*

The following section will explore the underlying principles of the necessity defence, utilising various approaches that encompass fundamental principles of criminal law.

#### *i) Legal flexibility and moral integrity*

The necessity defence recognises that laws cannot possibly speak justly to every conceivable situation.<sup>324</sup> The law is a set of rules which must be applied to different cases taking into account of all the circumstances surrounding the conduct in question.<sup>325</sup> This suggests not only an analysis of whether the conduct should be justified or excused, but also whether punishing the conduct would be morally unjust.<sup>326</sup> The rationale behind this defence is paramount as it ensures that punishment is distributed fairly and according to culpability as well as recognising the factual differences faced by defendants.<sup>327</sup> The necessity defence respects and preserves important principles and functions of the law including the purpose of criminal punishment, preservation of life, and ensuring justice is applied fairly.<sup>328</sup> Moreover, it fills gaps left by other defences, such as self-defence and duress, to prevent the strict application of the law creating an injustice on the defendant.<sup>329</sup>

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<sup>322</sup> Arnolds E and Garland N, 'The defence of necessity in criminal law', 289.

<sup>323</sup> Glazebrook P, 'The Necessity Plea in English Criminal Law', 30 *The Cambridge Law Journal* 1, 1972, 88.

<sup>324</sup> Hawkins T, 'Necessity as a Statutory Defense in Texas', 3 *American Journal of Criminal Law* 3, 1975, 253.

<sup>325</sup> Lindsey J, 'A New Defence of Necessity in the Criminal Law', 17 *UCL Jurisprudence Review*, 2011,125.

<sup>326</sup> Lindsey J, 'A New Defence of Necessity in the Criminal Law', 125.

<sup>327</sup> Lindsey J, 'A New Defence of Necessity in the Criminal Law', 129.

<sup>328</sup> Lindsey J, 'A New Defence of Necessity in the Criminal Law', 145.

<sup>329</sup> Lindsey J, 'A New Defence of Necessity in the Criminal Law', 129.

Dworkin's theory of law allows judges to weigh up the principles at stake in the case before them and balance them against each other. Unlike rules, Dworkin says that principles have a dimension of weight and can therefore be considered in all the circumstances of the facts of the case; conflicting rules cannot be weighed against each other in the same way so there is something different between principles and rules.<sup>330</sup> As Dworkin explains, most courts are able to depart from previous decisions; this further suggests that rules alone are not at work in the legal system.<sup>331</sup> It is evident that judges have observed that justice in certain cases has required the existence of a defence to fill gaps in the law and as such they have developed a limited defence of necessity.<sup>332</sup> This defence, properly conceived, is a powerful tool in the criminal law for addressing some cases that pose difficult moral questions.<sup>333</sup> Without this tool and the flexibility that it provides, the criminal law compels strict adherence to the letter of the law<sup>334</sup> and, thereby, risks exactly the danger of the severance of law and morality.<sup>335</sup>

*ii) Moral involuntariness*

Blackstone contends that necessity amounts to a claim that the accused was acting in a state of moral involuntariness.<sup>336</sup> Factors outside of the accused's control leave him little practical choice but to act in a particular way, perhaps a way in which he would not normally have chosen to act if these factors were not present.<sup>337</sup> Such a defect in the will would render punishment for the act unjust.<sup>338</sup> A similar explanation is provided by David Jones, who argues that one who acts or fails to act out of necessity does not do so through his own free choice even though he may consciously decide to do what he does.<sup>339</sup> Therefore, where necessity exculpates, that is not because we approve of the conduct it permits, but because we have come increasingly to believe that dire necessity may affect free choice.<sup>340</sup>

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<sup>330</sup> Lindsey J, 'A New Defence of Necessity in the Criminal Law', 127.

<sup>331</sup> Lindsey J, 'A New Defence of Necessity in the Criminal Law', 127.

<sup>332</sup> Lindsey J, 'A New Defence of Necessity in the Criminal Law', 128.

<sup>333</sup> Berger B, 'A Choice Among Values: Theoretical and Historical Perspectives on the Defence of Necessity', 39 *Alberta Law Review* 4, 2002, 860.

<sup>334</sup> Berger B, 'A Choice Among Values', 860.

<sup>335</sup> Berger B, 'A Choice Among Values', 860.

<sup>336</sup> Blackstone W, '*Commentaries on the Laws of England: Book the Fourth*', 4 Clarendon Press, Oxford, 1765, 27.

<sup>337</sup> Blackstone W, '*Commentaries on the Laws of England*', 27.

<sup>338</sup> Blackstone W, '*Commentaries on the Laws of England*', 27.

<sup>339</sup> Jones D, '*Crime and Criminal Responsibility*', *Nelson-Hall* Chicago, 1978, 63.

<sup>340</sup> Horowitz D, '*Justification and Excuse in the program of the Criminal Law*', 125.

*iii) Balancing values*

Objective theories justify the deed committed in a state of necessity by the general interest of the rule of law to save social values (rights) threatened in accidental, dangerous social situations.<sup>341</sup> Because all values are subject to the same danger, there being a risk that they all disappear, theories have resorted to the criterion of assessing their importance. The act by which some values are saved and others sacrificed is not a crime, and does not attract criminal liability or sanction, because it is not contrary to the rule of law, thus being justified.<sup>342</sup> The social interest of the rule of law is then satisfied if at least one of the values is saved.<sup>343</sup>

Subjective theories are based on the constraint of the will of the perpetrator of the act of salvation, from a grave danger, which prevents him from acting according to his conviction, forcing him to commit an act provided by criminal law.<sup>344</sup> Thus the saviour does violate the criminal law, but lacks guilt, because he does not act freely, and the deed loses its criminal character by the permission of the law.<sup>345</sup> Therefore, according to the objective and subjective theories, the state of necessity is either a justifiable cause, based on the interest of the rule of law, or a cause of innocence, based on coercion.<sup>346</sup>

*iv) Equitable justice*

Equality of respect is an important principle for justice, but that principle does not just involve treating everybody in the same way; it is well established in human rights law that equality is also about recognising the differences in each case and treating cases differently where they should be.<sup>347</sup> This is relevant to the necessity defence because the facts of cases where necessity has been invoked circumstances which are unusual. The vast majority of people who break this law will be faced with unusually difficult circumstances and, therefore, this individual is entitled, out of equality of respect, to have his case treated differently to those others.<sup>348</sup> It is important that the law recognises the

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<sup>341</sup> Burdusel R, 'Theft of Food for Subsistence', International Conference Law, European Studies and International Relations, 2020, 177.

<sup>342</sup> Burdusel R, 'Theft of Food for Subsistence', 177.

<sup>343</sup> Burdusel R, 'Theft of Food for Subsistence', 179.

<sup>344</sup> Burdusel R, 'Theft of Food for Subsistence', 178.

<sup>345</sup> Burdusel R, 'Theft of Food for Subsistence', 178.

<sup>346</sup> Burdusel R, 'Theft of Food for Subsistence', 178.

<sup>347</sup> Lindsey J, 'A New Defence of Necessity in the Criminal Law', 126.

<sup>348</sup> Lindsey J, 'A New Defence of Necessity in the Criminal Law', 126.

differences that people are faced with; to treat an individual faced with very different and unusual circumstances as if they were any other criminal is problematic and does not serve the needs of justice.<sup>349</sup>

### 3.5.3 *The Elements of the Necessity Defence*

Necessity is an affirmative defence that requires the defendant to first admit to committing the elements of the offence and then present evidence regarding why the necessity defence should apply.<sup>350</sup> If the judge determines that the defendant cannot prove the elements of the necessity defence as a matter of the law, the defendant is not allowed to present the defence to the trier of the fact.<sup>351</sup> Thus, without substantial evidence in support of each of the following elements, the trier of fact will be barred from considering the defence at trial.

#### *i) The harm avoided*

The illegal act must have been committed to avoid significant harm. The harm avoided can be either physical harm or harm to property, and it can be potential harm to the defendant or to another person the defendant sought to protect.<sup>352</sup> Moreover, the criminal act must have been committed specifically to avoid the threatened harm; mere accidental, unforeseeable avoidance of harm through a criminal act will not qualify.<sup>353</sup>

#### *ii) No reasonable alternative*

If there was a reasonable, legal alternative to violating the law, the defence will fail.<sup>354</sup> Many attempts to invoke the necessity defence fail on this element, since courts can usually identify a number of judicially appropriate alternatives that would have enabled the defendant to avoid the potential harm without committing the criminal behaviour.<sup>355</sup>

#### *iii) Imminent harm*

The imminence requirement is closely connected to the requirement that no legal alternatives were available to the actor in order to avoid the potential harm.<sup>356</sup> Generally,

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<sup>349</sup> Lindsey J, 'A New Defence of Necessity in the Criminal Law', 127.

<sup>350</sup> Martin S, 'The Radical Necessity Defense', 73 *University of Cincinnati Law Review* 4, 2005, 1527.

<sup>351</sup> Martin S, 'The Radical Necessity Defense', 1527.

<sup>352</sup> LaFave W and Scott A, 'Criminal Law', 481.

<sup>353</sup> LaFave W and Scott A, 'Criminal Law', 482.

<sup>354</sup> Martin S, 'The Radical Necessity Defense', 1528.

<sup>355</sup> LaFave W and Scott A, 'Criminal Law', 483.

<sup>356</sup> Martin S, 'The Radical Necessity Defense', 1568.

if the threatened harm is not imminent, it is said that the actor had sufficient time to consider legal alternatives to the criminal act.<sup>357</sup> Consequently, failure of this element will usually negate a finding of the "lack of legal alternatives" requirement as well.<sup>358</sup>

iv) *The source of risk*

This final element is sometimes added to the necessity defence to prevent one from claiming the defence if the defendant was at fault for creating the situation.<sup>359</sup> Some jurisdictions bar the defence if the defendant's intentional, reckless, or negligent state of mind establishes culpability for the crime.<sup>360</sup> Other jurisdictions bar the defence if the actor was responsible for creating the situation requiring a choice of evils decision, regardless of whether the fault was intentional, negligent, or reckless.<sup>361</sup> This requirement ensures that the defence is reserved only for those who are considered blameless in the eyes of the law and were simply in the wrong place at the wrong time.<sup>362</sup>

### 3.6 Conclusion

This chapter has examined the elements and underlying principles of the defences of self-defence and necessity in order to comprehend the rationale behind pardoning criminal behaviour when actions are based on survival. The following chapter will leverage these insights to a scenario involving the theft of food for survival, while also presenting the African perspective as an alternative lens for contemplating the decriminalisation of this theft.

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<sup>357</sup> LaFave W and Scott A, 'Criminal Law', 485.

<sup>358</sup> Martin S, 'The Radical Necessity Defense', 1572.

<sup>359</sup> LaFave W and Scott A, 'Criminal Law', 486.

<sup>360</sup> LaFave W and Scott A, 'Criminal Law', 486.

<sup>361</sup> LaFave W and Scott A, 'Criminal Law', 486.

<sup>362</sup> Fletcher G, 'The Individualization of Excusing Conditions', 1274.

## **4.0 THE CASE FOR AN AMENDMENT TO KENYA'S PENAL CODE (CAP 63) TO DECRIMINALISE FOOD THEFT FOR SURVIVAL**

### **4.1 Introduction**

This dissertation has examined two approaches advocating for the decriminalisation of food theft for survival purposes. The first approach, rooted in the traditional African rationale, presents an alternative perspective to the Western criminalisation of such acts. The second approach unveiled the underlying principles of the necessity defence and self-defence. Building upon these insights, this chapter aims to advocate for the decriminalisation of food theft in cases of survival. It will further propose an amendment to the Penal Code of Kenya (Cap 63) to reflect this stance. Finally, this chapter will assess the potential implications and risks of such decriminalisation, offering solutions where applicable.

### **4.2 African Tradition Can Offer a Different Perspective**

It has been established that traditional African morality is deeply rooted in communal life, where the welfare of the community takes precedence over individual interests. Morality, shaped by communal values, emphasises mutual aid, cooperation, and social harmony. In the face of hunger, some African communities historically tolerated food theft, viewing it not as a crime but as a form of communal sharing to alleviate suffering. This ethos of solidarity underscores a compassionate approach to justice that prioritises the preservation of human life over punitive measures.

Contrastingly, Western morality is entrenched in individualism, where personal autonomy and rights reign supreme. The criminal justice system, shaped by Western philosophies, prioritises the enforcement of individual rights and state-centred justice.

African morality, with its emphasis on interconnectedness and collective responsibility, offers a more holistic approach to justice. In contrast to Western absolutes, traditional African ethics consider the context and intentions behind actions, prioritising the restoration of social relations over punishment.

The dominance of Western ideologies in criminal law has marginalised alternative perspectives, including African communal values. Concepts of crime, justice, and approaches to justice are inherently biased towards individualistic norms, neglecting the moral imperatives of solidarity and compassion. It is imperative to challenge this hegemony and advocate for a perspective that encompasses the African cultural approach rooted in communal ethos.

This indigenous African viewpoint introduces a distinct way of thinking and offers an alternative approach to reconsidering the criminalization of food theft (for survival) in Kenya, diverging from the Western focus on individualism. By drawing upon this African standpoint, the following pivotal insights concerning food theft for survival can provide an alternative framework for deliberation in Kenya.

Firstly, the traditional African view that food theft driven by hunger is a form of sharing rather than theft, and is therefore tolerated, thus reflecting a deeply ingrained cultural norm of communal solidarity. This approach prevailed in Africa before Western views on crime disrupted these norms, and it still holds relevance today.

Secondly, the approach to a moral transgression of theft of food should be with extreme relativity, considering various contextual factors such as intention, motive, and consequences. The severity of an offence in African tradition was not assessed solely based on the action itself but also on the circumstances surrounding it. This contrasts with the more absolute moral frameworks prevalent in the West, where actions like stealing are universally condemned without considering underlying circumstances. This is the current approach in Kenya, where the general punishment of theft is imprisonment for 3 years.<sup>363</sup>

There should also be emphasis on understanding the intention behind actions of food theft and assessing the severity of offences based on sub-conditions. Factors such as the motive behind theft, the degree of hunger, and the nature of the stolen object are

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<sup>363</sup> Section 275, *Penal Code* (Cap 63).

considered in determining the seriousness of the offence in African tradition, in contrast to the current criminal framework influenced by individualism where people who violate the law must be punished because punishment is what they deserve.

Additionally, rather than relying solely on punitive measures, African societies traditionally embraced a restorative approach to justice, where community members engage in discussions to reach consensus and restore relationships between the offender and the offended. This process reflects a deep-rooted commitment to mutual reciprocity and communal well-being, emphasising healing over punishment, which should be prioritised in Kenya. This is in contrast to the current criminal law framework where the purpose of punishment is considered to be serving justice.

Finally, some African societies critique the reductionist interpretation of morality prevalent in formal legal systems, which often fail to consider contextual factors and community values. Revisiting cultural norms, such as the tolerance for food theft when in need, call for a more holistic understanding of morality, rooted in community well-being rather than individual rights alone, which could be the perspective advocated for in Kenya.

### **4.3 Applying the Underlying Principles of Criminal Law Defences to Food Theft**

The rationale for self-defence, in particular, and for necessity, in general, lies in the moral prerogative of individuals to prioritise their own survival above all other considerations.<sup>364</sup> This underlying basis of survival provides the ground for comparing these two defences with the act of someone stealing food to survive, which also arises from the necessity of survival. Each of these actions, whether in self-defence, necessity, or that of food theft for survival, occur under extreme circumstances where individuals feel compelled to act in order to preserve their well-being.

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<sup>364</sup> Levine S, 'The Moral Permissibility of Killing a Material Aggressor in Self-Defense', 69.

The distinction between self-defence and necessity versus food theft for survival is of minimal significance, as the focus lies on the rationale behind preserving life rather than the specific means used to achieve it—for instance, the emphasis is on why killing another person is decriminalised in an act of self-defence, rather than the act of killing itself. Furthermore, it will later be explored that the same principles and elements applied in self-defence and necessity can be applied to situations where someone steals out of survival, thus decreasing the technical differences between them for the purpose of addressing this dissertation's question.

Drawing from the core principles and elements inherent in criminal law, notably reflected in necessity and self-defence, the subsequent sections will advocate for their integration into the discourse surrounding the decriminalisation of food theft in instances of survival.

#### 4.3.1 *Theft of Food Can Occasionally Align with the Underlying Principles of Self-defence*

One of the fundamental principles underlying self-defence is the preservation of life. In criminal law, actions taken to prevent harm and preserve life are often deemed justifiable, particularly when an individual faces a reasonable fear of death or serious injury. This principle emphasises that criminal sanctions should not deter individuals from using deadly force to protect themselves or others in life-threatening situations. Similarly, in cases of food theft for survival, individuals are driven by the imperative to preserve their own lives and those of their loved ones. When faced with starvation or extreme hunger, the instinctual drive to secure sustenance overrides conventional notions of property rights, reflecting a basic human impulse to survive.

Another crucial aspect of the self-defence principles is the autonomy of the individual. Individuals have the inherent right to defend their personal legitimate interests, including their autonomy, against aggression. This principle recognizes that individuals facing imminent threats should be accorded the legal liberty to repel such threats by all necessary means. In the case of food theft for survival, individuals are exercising their autonomy in the face of existential threats posed by hunger and deprivation. By

prioritising their own survival, they assert their right to life and bodily integrity, thus justifying their actions within the framework of self-defence.

Additionally, a consequentialist perspective on self-defence considers the outcomes of actions in relation to their consequences. When weighing the harm caused by food theft against the harm of starvation, a consequentialist analysis suggests that allowing individuals to steal food for survival produces preferable consequences. By prioritising the preservation of life over property rights, society acknowledges that the harm caused by theft is outweighed by the harm of allowing individuals to starve. This utilitarian calculus underscores the ethical imperative to prioritise human welfare and well-being in cases of extreme need.

Self-defence principles also serve the broader societal interest of protecting public order and the legal system. Allowing individuals to defend themselves against threats contributes to a sense of security and trust in the rule of law. In the context of food theft, decriminalising such actions not only addresses immediate needs but also promotes social cohesion and stability. By recognizing the legitimacy of self-preservation instincts, society reaffirms its commitment to the welfare of all its members, even in times of crisis.

#### 4.3.2 *Theft of Food Can Occasionally Align with the Underlying Principles of Necessity*

The necessity defence embodies a principle of legal flexibility and moral integrity, recognizing that laws cannot feasibly address every conceivable scenario. By allowing courts to consider the unique circumstances surrounding an individual's actions, the necessity defence ensures that justice is not only served but also perceived as fair and equitable. Advocating for the decriminalisation of food theft in cases of acute necessity underscores a commitment to upholding broader principles of justice and morality within the legal system. It acknowledges the inherent limitations of rigid legal frameworks and emphasises the importance of maintaining moral integrity in the face of challenging ethical dilemmas.

Moreover, the principle of moral involuntariness emphasises that individuals may be compelled to act against their normal inclinations due to external exigencies. When faced with the stark choice between starvation and theft, individuals grapple with a moral dilemma that transcends conventional notions of right and wrong. Punishing individuals for actions undertaken under dire necessity disregards the absence of genuine free choice, perpetuating an unjust system that penalises individuals for circumstances beyond their control. Decriminalising food theft acknowledges the moral complexities inherent in such situations and reflects a commitment to upholding principles of fairness and compassion within the legal system.

The necessity defence further entails balancing conflicting values and prioritising those of utmost importance in a given situation. It acknowledges that individuals may be forced to make difficult choices in emergencies, where preserving certain values necessitates sacrificing others. Decriminalising food theft in cases of acute necessity reflects a recognition of the inherent value of human life and dignity, prioritising these over property rights or legal norms. By striking a balance between competing values, society demonstrates a commitment to upholding principles of justice, compassion, and human rights in its legal framework.

Furthermore, equality of respect is a fundamental principle for justice, necessitating the recognition of differences in each case and the treatment of cases accordingly. The necessity defence acknowledges that individuals faced with dire circumstances require differentiated treatment within the legal system. Punishing individuals for food theft in situations of acute necessity disregards the unique challenges and vulnerabilities they face, perpetuating systemic inequalities and injustices. Decriminalising food theft in such cases aligns with principles of equitable justice by ensuring that individuals are treated fairly and compassionately, regardless of their socioeconomic status or circumstances.

#### **4.4 Amendment to the Penal Code (Cap 63) Laws of Kenya**

Special cases of actions deemed not to be theft are held under Section 296 of the Penal Code Cap 63 Laws of Kenya.<sup>365</sup> The provision states that when a factor or agent pledges goods or documents of title entrusted to them, as long as the sum involved does not exceed what is owed to them by their principal, it is not deemed to be theft. Additionally, if a servant takes food from their master's possession to give to an animal against the master's orders, it is also not deemed to be theft.

It is the proposal of this study, in light of the outcomes drawn from the preceding chapters, that an amendment be made to Section 269 of the Penal Code (Cap 63) Laws of Kenya to include a subsection (3) which decriminalises the theft of a small amount of food, without violence or dishonest intent, if one is faced by the immediate and essential need for nourishment in order to survive.

#### *4.4.1 Justifications for this codification*

Without a statutory definition of this decriminalisation, criminal defendants in cases of theft must continue to seek instructions from judges in the face of unreceptive courts. Codifying this concept would afford it the recognition traditionally received under African rationale and would align it with the underlying principles behind other defences similarly concerned with survival, such as necessity and self-defence. The establishment of a statutory basis would also promote uniformity, aiding judges in consistently determining the applicability of this exemption. Moreover, codifying this provision offers clear guidance on the general circumstances under which food theft for survival is permissible and judges can exercise discretion in applying this law to diverse factual scenarios, considering the unique circumstances of each case.

#### *4.4.2 Conditions to this provision*

In applying this statute, judges should take into consideration the following elements, some of which are informed by the principles governing self-defence and necessity, along with the sub-conditions observed in African tradition.

Firstly, the nature of the stolen item. In this regard, judges should assess whether the food item stolen was vital given the circumstances. The item should be intended to alleviate

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<sup>365</sup> Section 269, *Penal Code* (Cap 63).

hunger, rather than being a luxury item. For instance, comparing the necessity of a banana versus an ice cream. Additionally, the item should not have significant material consequences for the person from whom it was taken, meaning it should not be particularly expensive or in excessive quantities beyond what is necessary to temporarily alleviate hunger.

Secondly, in considering the motive behind the theft, judges should centre their attention on the underlying reason for the theft. The action should have been driven by the necessity to survive, rather than motives such as revenge, jealousy, or laziness.

Thirdly, judges should evaluate the cause of the hunger. This component serves to uphold accountability and prevent exploitation of the statute. The rationale behind the theft should not stem from an individual's reluctance to work, leading them to exploit this provision for sustenance. In this context, judges should inquire about factors such as:

- i) Does the person live in poverty? <sup>366</sup>
- ii) Is the person homeless?
- iii) Is the person employed, and if not, are they capable of working?
- iv) Is the person suffering from an illness that prevents them from working?
- v) Does the person have any funds accessible through their phone, such as an M-Pesa account (assuming they cannot afford a bank account)?

Moreover, the act of taking should not have involved any form of violence, nor should it have been conducted in an organised or premeditated manner.

Furthermore, the judges should assess the immediacy criterion. In this context, judges must assess whether there was an urgent and pressing need to alleviate hunger at the time of the theft. This reflects the essence of survival, where the act of stealing food was crucial for preserving life or maintaining bodily functions. The theft must have been an immediate necessity to prevent severe harm or loss of life due to hunger. This condition applies to situations where hunger poses an imminent and life-threatening risk, with the

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<sup>366</sup> The 2020 Comprehensive Poverty Report by the Kenya National Bureau of Statistics (KNBS) describes poverty as an adult earning less than Sh3,252 in rural areas and Sh5,995 monthly in urban areas. — Wafula P, 'Kenya: Sad Reality of 23.4 Million Kenyans Living Below Poverty Line', 12 August 2020 - <https://allafrica.com/stories/202008120697.html> on February 2 2024.

state of hunger creating an urgent danger of serious harm based on the circumstances at the time of the incident.

Under the element of viable alternatives, judges should examine whether there was a feasible and lawful alternative to obtaining food without resorting to theft. The act of theft must have been the only available option for securing nourishment. This aligns with the principle of being a last resort, where theft becomes necessary only when all other avenues for obtaining food have been exhausted.

Finally, judges should consider whether the individual has a history of repeated offences, indicating a pattern, or if they lack a significant criminal record altogether.

#### **4.5 Implications of this amendment**

The proposed amendment signifies a nuanced approach to addressing theft offences, particularly concerning the theft of food under specific circumstances. This introduces a paradigm shift towards a more rehabilitative and socially conscious approach to criminal justice, potentially reducing the criminalization of poverty and promoting social justice. By advocating for this legal change, the amendment contributes to the advancement of legal scholarship while also offering a concrete policy solution to address food insecurity and poverty.

Furthermore, the proposed amendment has broader social implications, acknowledging the basic human right to access food and providing a legal framework that accommodates situations of extreme necessity. This could have a direct social impact by addressing the needs of marginalised populations who may resort to theft out of necessity, thereby promoting fairness and equity within the legal system.

Additionally, this may stimulate debate and dialogue within the legal community and society at large, fostering greater awareness and understanding of complex issues surrounding poverty, inequality, and social justice.

#### *4.5.1 Risks to this proposition*

The first risk involves potential abuse of the proposed amendment through fraudulent claims of immediate necessity to justify theft. This could have unfair repercussions and compromise the integrity of the law. Strict verification processes should be put in place to guarantee the validity of claims in order to reduce this risk. Individuals seeking protection under the amendment could be required to submit evidence from community organisations or social service agencies attesting to their circumstances. Sanctions for anyone found to be abusing the system should also be implemented in order to stop fraudulent conduct and maintain the integrity of the law.

Secondly, marginalised communities and small enterprises may be disproportionately affected by the decriminalisation of food theft, which could result in a rise in civil unrest and financial losses. This might heighten social inequality and harm the local economies. Implementing targeted support initiatives for small enterprises and marginalised populations might help lower this risk. This can entail giving grants or subsidies to companies so they can improve their security protocols and counteract any losses resulting from theft. Furthermore, funding should be allocated to community-based initiatives that tackle the root causes of food insecurity and poverty, such as access to affordable housing, social welfare services, and job training programmes.

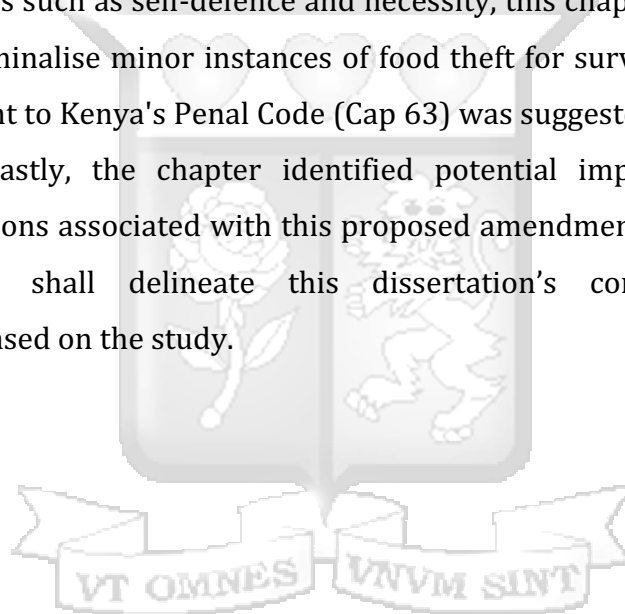
There is an additional risk that the proposed amendment may be implemented inconsistently and with legal ambiguity, leading to confusion among the judiciary and law enforcement agencies. This might reduce public confidence in the legal system and compromise the efficacy of the law. To manage this risk, clear guidelines and protocols should be developed for law enforcement officers and judicial personnel to follow when evaluating cases of theft under immediate necessity. Furthermore, supervision procedures must be put in place to monitor enforcement procedures and address any discrepancies or potential abuses.

Moreover, decriminalising theft, even under specific circumstances, could cause negative public reaction and the perception of laxity towards criminal activity. This might reduce support from the general public and reduce the amendment's efficacy. Public education

campaigns should be launched to enlighten the public about the rationale behind the proposed amendment and its potential benefits in order to mitigate this risk. Building support for the amendment and addressing concerns about its effects can be achieved by interacting with civil society organisations, religious institutions, and community leaders. It can also be beneficial to draw sympathy and understanding from the public by emphasising the amendment's humanitarian and social justice components.

## 4.6 Conclusion

Drawing from the findings of the African approach and the underlying principles of criminal law defences such as self-defence and necessity, this chapter has constructed a framework to decriminalise minor instances of food theft for survival. Consequently, a proposed amendment to Kenya's Penal Code (Cap 63) was suggested to incorporate this decriminalisation. Lastly, the chapter identified potential implications, risks, and corresponding solutions associated with this proposed amendment of this dissertation. The next chapter shall delineate this dissertation's conclusion and offer recommendations based on the study.



## **5.0 CONCLUSION AND RECOMMENDATIONS**

### **5.1 Introduction**

This dissertation has explored whether Kenya's Penal Code (Cap 63) should be amended to include the decriminalisation of theft of a small amount of food without violence or dishonest intent, if one is faced by the immediate and essential need for nourishment in order to survive. The aim was to justify this proposal using the following research objectives. The first was to examine the morality of theft within the ethical frameworks of African and Western philosophies. The second research objective aimed to discern the underlying rationale of criminal laws which exempt survival-related actions, with a focus on self-defence and the defence of necessity. Lastly, drawing upon insights gained from the preceding research objectives, the third one attempted to answer the question of whether, and how, the Penal Code (Cap 63) should be amended to decriminalise theft of food in instances where survival prevails. This concluding chapter shall therefore present the findings from the aforementioned objectives and offer recommendations based on this study.

### **5.2 Conclusion**

In assessing the morality of theft within African and Western ethical frameworks, this dissertation's first research objective found that the contrasting moralities of African and Western traditions illuminated the communal ethos inherent in traditional African reasoning juxtaposed against the individualistic framework prevalent in Western criminal law. By highlighting these disparities, the study aimed to challenge the prevailing Western-centric perspective on criminality and offer an alternative lens through which to examine food theft. This lens was anchored in the traditional African perspective of communal solidarity, with moral transgressions being assessed relative to contextual factors such as intention, motive, and consequences. This approach can be seen in the traditional tolerance of food theft by some African communities, particularly when motivated by hunger. This perception urges a more holistic understanding that embraces the interconnectedness of individuals within their communities – a principle highly esteemed in African societal norms.

The second research objective examined the defences of self-defence and necessity within criminal law, aiming to uncover the underlying principles that facilitate the pardoning of criminal conduct in certain instances of survival. This research investigated how these defences operate, their underpinnings, and the criteria for their application. The discussion on self-defence revealed its intrinsic role in preserving life and the autonomy of individuals by serving as a mechanism for a proportional response to imminent threats. Likewise, the exploration of necessity as a defence unveiled its function in addressing circumstances where adherence to the law would result in greater harm. By allowing deviations from legal norms under dire circumstances, the necessity defence offers a framework for evaluating the moral complexities inherent in such situations, thereby contributing to a nuanced understanding of justice within the legal system.

In pursuit of its third research objective, this dissertation applied the traditional African tolerance of food theft within certain communities, alongside the underlying principles behind self-defence and the necessity defence to propose an amendment to the Penal Code of Kenya. These posited as two alternate arguments to the decriminalisation of theft of food in instances of survival.

### **5.3 Recommendations**

In considering the future landscape of criminal law and human rights research, **aspiring researchers** should undertake comprehensive analyses to determine the effectiveness of alternative legal mechanisms such as diversion programs or restorative justice. Research on the socioeconomic variables that contribute to food insecurity and poverty in the nation should also be conducted meticulously. This could involve investigating social welfare programs, employment opportunities, land access, and other systemic issues that marginalised communities encounter. Furthermore, comparative studies between other jurisdictions and how they handled similar criminal behavioural issues related to poverty would result in invaluable perspectives of effective solutions in the Kenyan context.

The **Kenya Law Reform Commission (KLRC)** plays a central role in reviewing and proposing revisions to current laws, such as the Penal Code. As such, it should conduct an extensive assessment of statutes that lead to the criminalisation of actions stemming

from poverty. This procedure should include discussions with stakeholders from various sectors, such as legal professionals, human rights groups, and advocates for marginalised populations. Furthermore, the Commission should develop research reports and policy briefs that illustrate the socioeconomic impacts of existing legal structures and advocate for evidence-based changes that uphold human rights and promotes social justice.

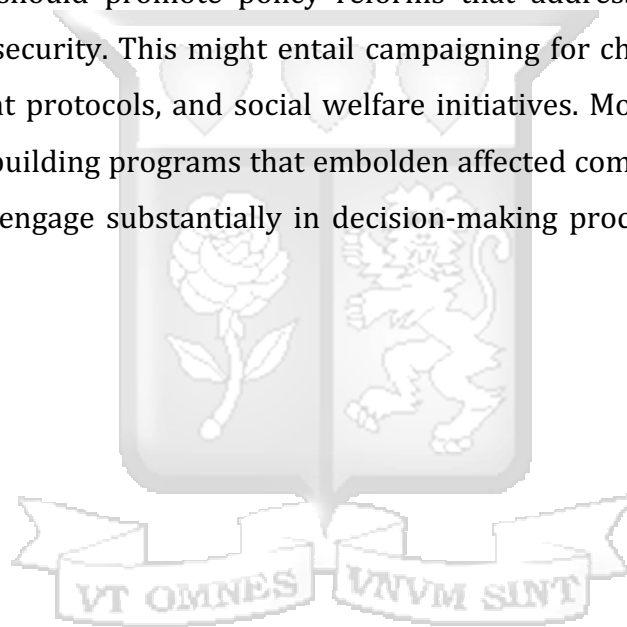
The **National Assembly** should prioritise inclusive public consultations and stakeholder engagements to gather diverse perspectives on proposed legislative reforms aimed at addressing poverty-related offences. Participatory methods should be employed in this process, including soliciting input from affected communities, civil society organisations, legal professionals, and relevant government institutions. The Assembly should further allocate funding for the implementation of programs that alleviate poverty and establish social safety nets. Supporting programs that enhance access to sustainable livelihoods, healthcare, and education may also be part of efforts to ultimately reduce the underlying socioeconomic disparities fuelling survival-related crimes.

The **National Council on Administration of Justice (NCAJ)** should advocate for the implementation of specialised training programs for judicial officers and law enforcement agencies. These programs should aim at sensitising functionaries to the distinctive challenges experienced by impoverished individuals experiencing food insecurity. Moreover, the Council should actively monitor and assess the impact of current laws and policies on marginalised communities, particularly regarding the criminalization of actions driven by poverty. Suggestions for change should be grounded in evidence and aimed at fostering fairness, equality, and access to justice for every Kenyan.

Given the paramount importance of protecting human rights, the **Kenya National Commission on Human Rights (KNCHR)** should give priority to monitoring and recording instances of human rights violations that arise from the criminalisation of actions attributable to poverty. This includes instances of arbitrary arrests, unfair trials, and inhumane treatment of individuals accused of committing offences aimed at sustaining life. The Commission should also actively engage in implementing the advocacy agenda that is designed to protect the fundamental rights of the citizens of

Kenya, particularly the right to access food and other basic necessities. Collaboration with governmental bodies, non-governmental organisations, and international partners will be equally important for the formulation of strategic plans and recommendations to bring on board systemic changes that address systemic poverty while upholding human dignity.

**Non-Governmental Organisations** (NGOs) have an essential role in providing legal aid and advocacy support to individuals confronting prosecution for survival-related transgressions. This includes educating people about their legal rights and options within the criminal justice system and providing tangible aid to those who require it. Additionally, NGOs should promote policy reforms that address the root causes of poverty and food insecurity. This might entail campaigning for changes to land tenure systems, employment protocols, and social welfare initiatives. Moreover, NGOs should partake in capacity-building programs that embolden affected communities to advocate for their rights and engage substantially in decision-making procedures at all tiers of governance.



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