

QUESTIONING THE PLACE OF RETRIBUTIVE JUSTICE IN MANDATORY  
MINIMUMS USING RAPE IN KENYA AS A CASE STUDY

MARJORY NJERI GATHONI

084407

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,  
Strathmore University Law School

February 2018.

## TABLE OF CONTENTS

Acknowledgments .....	i
Declaration .....	ii
Abstract .....	iii
List of Cases .....	iv
List of Legal Instruments .....	v
CHAPTER 1: INTRODUCTION.....	1
1.1. Background to the Study .....	1
1.2. Statement of the Problem .....	2
1.3. Justification of the study.....	3
1.4. Hypothesis .....	3
1.5. Research objective .....	3
1.6. Research questions.....	4
1.7. Literature review.....	4
The Kenyan Context.....	6
1.8. Research methodology .....	7
1.9. Limitations .....	7
1.10. Chapter Breakdown .....	7
CHAPTER 2: RETRIBUTION IN MANDATORY MINIMUMS.....	9
2.1. Introduction .....	9
2.2. The Retributive theory.....	9
2.3. Modern retribution realised in the Just desert theory .....	10
2.4. The Utilitarian theory as a justification of criminal punishment.....	12
2.5. Linking utilitarianism and retribution .....	13
2.6. Mandatory Minimum sentences.....	14
2.7. Conclusion.....	15

CHAPTER 3: RAPE IN KENYA .....	17
3.1. Introduction.....	17
3.2. The history of legislation of sexual offences in Kenya.....	17
a. The narrow definition of rape and the fact that it was categorised as an issue of morality;.....	18
b. The fact that sentencing of was left in totality to the discretion of judges;.....	19
c. New trends such as sexually transmitted diseases that were not taken into previous legislation of sexual offences;.....	19
d. The developments of new forensic methods such as DNA profiling to help in the identification of sex offenders.....	19
3.3. Changes brought about by the enactment of the 2006 Act .....	20
3.4. The Effect of the Sexual Offences Act on the rates of the Crime of rape.....	22
3.4.1. Discussion on Mandatory Sentences in Kenya.....	22
3.4.2. The Effect of the Mandatory Minimum Sentence for rape in Kenya.....	23
3.5. Conclusion.....	26
CHAPTER 4: FINDINGS AND RECOMMENDATIONS .....	27
4.1. Introduction.....	27
4.2. Findings.....	27
4.3. Recommendations.....	28
4.4. Conclusion.....	30
BIBLIOGRAPHY .....	31
Books	31
Journal Articles.....	31
Internet Resources .....	32
Statutes .....	34
Case law .....	34

## **Acknowledgments**


I would like to acknowledge all those who supported me through the writing and research process of this dissertation.

I would like to first extend my deepest gratitude to Mr Smith Ouma, my supervisor for his continued guidance and support throughout the process of carrying this research.

I would also like to thank my beautiful mother, Gladys, for her love and support throughout the research and writing process.

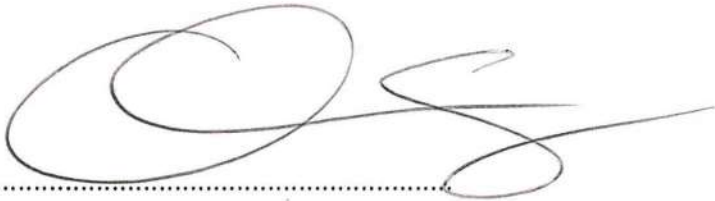
**Declaration**

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

Signed:  .....

Date: 28/05/2018 .....

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

Signed:  .....

Date: 29<sup>TH</sup> MAY 2018 .....

SMITH OUMA.

## **Abstract**

Retributive justice has been used as the justification for the punishment of crimes for a long time. However, it has had little effect in ensuring that offenders are discouraged from committing crimes and therefore, there has been an emphasis on the need to move away from retribution as the justification for punishment. This thesis seeks to find a link between two theories of punishment, retribution and utilitarianism as in essence they have different aims. In particular, the different aims are, pay back and deterrence.

Mandatory minimums are a realisation of both the retributive and the utilitarian theories of punishment. Mandatory minimums set out a default and determinate punishment for anyone who is found guilty of committing the crime they are attached to. In this way they are retributive. The deterrent effect comes about in the sense that, law makers assume if a crime has a pre-determined and default punishment attached to them, offenders and potential offenders will be deterred from committing the crime.

However, though the retributive effect of mandatory minimums is always realised when punishment is meted out, the deterrent effect has yet to be realised and this is reflected in the rising crime rates. For example, this thesis has looked at the punishment for rape meted out in Section 3 of the Sexual Offences Act of Kenya, which is in the form of a mandatory minimum. The Sexual Offences Act, was enacted, as a response to the ineffectiveness of the already prescribed punishments in the now repealed Penal Code. It introduced mandatory minimums for sexual offences in a bid to reduce the incidences of sexual assault in Kenya. However, the economic survey by the Kenya National Bureau of Statistics of 2017, shows evidence that the incidences of the crime of rape that have been reported, seem to have plateaued and they have not reduced.

The question then becomes whether a change in law would be more effective in ensuring that the rates of crime reduce. A change in law might have a positive effect but this dissertation paper concluded that the other means such as the need for public education on sexual offences and the aforementioned Act, should be implemented first before a change in law is considered.

## **List of Cases**

1. *Kennedy Konde Munga v Republic* (2011) eKLR.
2. *Joseph Njuguna Mwaura & 2 others v Republic* (2013) eKLR.
3. *Juma Faraji Serenge alias Juma Hamisi v Republic* (2007) eKLR.
4. *Republic v Abdulahi Noor Mohamed* (2016) eKLR.

## **List of Legal Instruments**

1. Penal Code of Kenya, CAP 63 of 2009 (revised 2014).
2. Sexual Offences Act of Kenya, No. 3 of 2006 (Revised 2014).
3. Penal Code of Kenya CAP 63 of 1985. (Repealed)

## CHAPTER 1: INTRODUCTION

### 1.1. Background to the Study

Punishment of crimes is imperative to ensure the effective functioning of society.<sup>1</sup> In the formal legal system, punishment is defined as the infliction of painful or uncomfortable consequences by the authorities, in the legal system, on an offender.<sup>2</sup> According to Cesare Beccaria, punishment, as described in this context, is important as it controls the will of those who aim to gain an unfair advantage in society; by using their liberty to hurt others.<sup>3</sup> This therefore means that if crimes are left unpunished, then there will be discord in society.<sup>4</sup>

As punishment is imperative to ensure a well-functioning society, there are many theories of punishment which prescribe the need for punishment and the end of punishment.

One of those theories is retribution. As a theory of punishment, it rationalises that for any punishment to befit the crime, it must be equal in measure to the crime.<sup>5</sup> This theory of punishment is envisioned in many instances of law.

For example, in the Mosaic law, which is the law of Moses and makes up of the first five books of the Old Testament, in the Bible, it is expressed in the idea of 'vengeance'.<sup>6</sup> Under the Mosaic Law, specifically in the book of Exodus, chapter 21, verse 23 and 24, the penalty prescribed for serious situations shall be a life for a life, an eye for an eye, a tooth for a tooth, a hand for a hand and a foot for a foot.<sup>7</sup>

Mandatory sentences seem to fulfil these requirements of vengeance for a wrong perpetrated against another as, they provide for a uniform punishment for all offenders who perpetrate the same crime.<sup>8</sup> The sentence is either a mandatory minimum or a mandatory maximum. For the purposes of this paper, the important category is that of the mandatory minimum sentences.

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<sup>1</sup> Cesare Beccaria: An Essay on Crime and Punishment', *The Federalist papers project*, <http://www.thefederalistpapers.org/wp-content/uploads/2013/01/Cesare-Beccaria-On-Crimes-and-Punishment.pdf>, on 7 February 2017.

<sup>2</sup> Gale M.E., 'Retribution, Punishment and Death' 18:973, *University of California* (1985), 980.

<sup>3</sup> Bradley G, 'Retribution: The Central Aim of Punishment', 27 *Harvard Journal of Law and Public Policy* (2013), 23.

<sup>4</sup> Cesare Beccaria : An Essay on Crime and Punishment', *The Federalist papers project*, <http://www.thefederalistpapers.org/wp-content/uploads/2013/01/Cesare-Beccaria-On-Crimes-and-Punishment.pdf>, on 7 February 2017

<sup>5</sup> <https://marisluste.files.wordpress.com/2010/11/soda-filozofijas-3.pdf>, on 26 January 2017.

<sup>6</sup> <https://marisluste.files.wordpress.com/2010/11/soda-filozofijas-3.pdf>, on 26 January 2017.

<sup>7</sup> Exodus 21:24, The Bible.

<sup>8</sup> <https://marisluste.files.wordpress.com/2010/11/soda-filozofijas-3.pdf>, on 26 January 2017.

Mandatory minimum sentences are the compulsory sentences, prescribed by law, meted out for certain crimes.<sup>9</sup> They set out a minimum 'jail-term' an offender has to serve in prison once they are found guilty of committing the crime the sentenced is prescribed for by law. This means that during sentencing, judges' discretion is limited by law and they are required to adhere to this minimum sentence which is prescribed in law.<sup>10</sup> In Kenya for example, Section 26 (2) of the Penal Code, provides in summary that a person may not be given a shorter sentence if the sentence is expressly provided for in the law.<sup>11</sup>

For the purposes of this research, Section 3 of the Sexual Offences Act of Kenya provides for a mandatory sentence, in the form of a mandatory minimum for the penalty for rape.<sup>12</sup> The punishment is a term of imprisonment of not less than 10 years and may be enhanced to life imprisonment.<sup>13</sup>

This provision is important as it forms the case study of this research, as it questions whether mandatory minimums actually help in deterring criminals from committing certain crimes.

## **1.2. Statement of the Problem**

The aim of punishment is to ensure that there is social order, by ensuring that offenders pay for their crimes and prospective offenders are deterred from committing crimes. Mandatory minimum sentences embody the aim of payback, which is the underlying principle of retribution. They punish crimes committed, by prescribing a uniform sentence for similar crimes. The question then becomes whether they ensure that offenders are deterred from committing similar crimes.

This question, is particularly relevant, with regards to the offence of rape in Kenya, where statistics paint a grim picture notwithstanding the fact that a mandatory minimum sentence of, no less than ten years and which may be enhanced to life imprisonment has been prescribed in the Sexual Offences Act of Kenya.<sup>14</sup>

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<sup>9</sup> Mayba Y, 'Justice Reform: Who's Got the Power', 3 *Research Journal of Justice Studies and Forensic Science* (2015),48.

<sup>10</sup> Christopher R, 'Time and Punishment', 66 *Ohio State Law Journal* (2005), 310.

<sup>11</sup> Section 26 of the Penal Code of Kenya, CAP 63 of 2009 (revised 2014).

<sup>12</sup> Section 3 of the Sexual Offences Act of Kenya, No. 3 of 2006 (Revised 2014).

<sup>13</sup> Section 3 of the Sexual Offences Act of Kenya.

<sup>14</sup> Section 3 of the Sexual Offences Act of Kenya.

### **1.3. Justification of the study**

The Kenya National Bureau of Statistics in its economic survey of 2017 report, recorded in table 16.5, that the reported cases of rape in Kenya in 2016 were 888.<sup>15</sup> This was a decrease in the number of rape cases, as in 2015 the number of reported cases was 893.<sup>16</sup> This means that even with the enactment of the Sexual Offence Act of Kenya which prescribes a retributive punishment, the incidences of rape are seemingly reducing though at a much slower rate than anticipated by aforementioned Act. The provision of the Sexual Offences Act quoted above mirrors a similar provision of the 2006 repealed Sexual Offences Act of Kenya. This shows a slow reduction in the rate of the crime of rape even though there is punishment levied for offenders. Relying on these statistics it is foreseeable that even if research is done now, the result will be the same or there will be a slight change in numbers.

### **1.4. Hypothesis**

At the end of this study, it is expected that the dissertation will reaffirm the continuing failure of the provision of the section 3 of the Sexual Offences Act Kenya, which provides for the penalty for rape and which will have been analysed and categorised as a retributive punishment. The penalty provided in the aforementioned section, has a minimal deterring effect as the incidences of rape seem to be increasing. As a conclusion, the dissertation will determine whether a change of law is required or whether there is an alternative to the change in law.

### **1.5. Research objective**

The main objective of the study is to analyse the effect of mandatory minimum sentences on deterrence of the crimes, using the sentence for rape in Kenya as a case study.

In particular:

- a. To analyse the retribution as a theory of criminal punishment and whether there are retributive principles envisioned in mandatory minimum sentences and whether mandatory minimums lead to deterrence.
- b. To analyse the effect of the mandatory minimum sentence in Section 3 of the Sexual Offences Act of Kenya, set out as the penalty of rape in Kenya.

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<sup>15</sup> Kenya National Bureau of Statistics, Economic Survey 2017, *Kenya National Bureau of Statistics* (2017), 260.

<sup>16</sup> Kenya National Bureau of Statistics, Economic Survey 2017, *Kenya National Bureau of Statistics* (2017), 260.

- c. To suggest an alternative form punishment or alternative method of enforcing mandatory minimums which would be more effective in ensuring that offenders are deterred from committing a certain crime.

#### **1.6. Research questions**

- a. Can mandatory minimum sentences be considered to have a retributive effect?
- b. Are retributive sentences efficient in ensuring that prospective offenders and reoffenders are deterred from committing a crime?
- c. Can the penalty provided for in the Sexual Offences Act of Kenya be considered a retributive sentence?
- d. Has this penalty been effective in ensuring that the incidences of rape in Kenya reduce? If not, is there need for revision of the penalty to ensure that it is effective in ensuring that the rates of rape reduce in Kenya? And in the same sense, what alternative punishments would be the best at ensuring that criminals are deterred from committing the crime of rape?

#### **1.7. Literature review**

The study aims at explaining how the retributive theory of punishment has influenced the implementation of mandatory minimum sentences, and whether those mandatory minimum sentences have served the purpose of ensuring that there is deterrence. It links two different ideas as it attempts to show that retributive justice can be used to ensure that offenders are deterred from committing crimes.

In her paper, ‘*Culpability and Sentencing under Mandatory minimum sentences and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal*’, Karen Lutjen, discusses the various philosophical backings of mandatory minimum sentences.<sup>17</sup> She differentiates between the retaliatory theory and the just deserts theory.<sup>18</sup> For her the retaliatory theory, has the same understanding of classical retribution.<sup>19</sup> She argues that, using the introduction of mandatory minimum sentences in America as an example, mandatory minimum

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<sup>17</sup> Lutjen K, ‘Culpability and Sentencing under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal’, 10 *Notre Dame Journal of Law, Ethics and Public Policy* (2014),393.

<sup>18</sup> Lutjen K, ‘Culpability and Sentencing Under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal’, 393.

<sup>19</sup> Lutjen K, ‘Culpability and Sentencing Under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal’, 393.

sentences are retaliatory. This is because, according to her, they were a response to the political climate in America which called for a 'tough on crime' approach for criminal punishment.<sup>20</sup>

She then goes on to talk about the just desert theory. She differentiates it from the retaliatory theory. She argues that, unlike the retaliatory theory, the just desert theory takes into account the gravity of the offense, the previous conduct of the offender and the intent of the crime while justifying the punishment of a certain crime.<sup>21</sup> She uses Immanuel Kant's rationalisations that, the justification of the punishment of crime is the fact that it takes place, to bring to light the essence of the just desert theory.<sup>22</sup>

In this sense, it seems that, retributive principles are incorporated in mandatory minimum sentences, as they focus on the crime itself as a justification for the uniformity of the sentencing process.<sup>23</sup> Using this analysis, it would seem that, the influences of retribution on mandatory minimum sentences are mostly the justification of punishment of crimes once they are committed and the fact that, punishment should be uniform for a certain crime.

Matthew Haist in his paper, '*Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"?*', argues that just deserts, which could be argued as a form of modern retributivism has made retribution resurface as a justification of punishment.<sup>24</sup> He argues that the reliance of punishment on the just desert individual who commits crime moves away from the traditional view of punishment which is essentially revenge.<sup>25</sup>

In his paper, he talks about Norval Morris, a pioneer of the limiting retributivism, who proposed that deserts and moral blameworthiness should be used as a limiting principle for punishment.<sup>26</sup> The principle would provide for the limits of leniency and severity when prescribing punishments. These limits would provide possible punishments which would be given for

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<sup>20</sup> Lutjen K, 'Culpability and Sentencing under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal', 393.

<sup>21</sup> Lutjen K, 'Culpability and Sentencing under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal', 393.

<sup>22</sup> Lutjen K, 'Culpability and Sentencing under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal', 393.

<sup>23</sup> Lutjen K, 'Culpability and Sentencing under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal', 393.

<sup>24</sup> Haist M, 'Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"?', 99 *The Journal of Criminal Law and Criminology* (2009),801.

<sup>25</sup> Haist M, 'Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"?',801.

<sup>26</sup> Haist M, 'Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"?', 802.

certain crimes.<sup>27</sup> The possible punishment would in turn create a uniformity in punishments.<sup>28</sup> In turn, the deterrent effect would come about from the certainty of punishments to be levied.

### **The Kenyan Context**

In an article in the Standard Digital, Pravin Bowry, argues that mandatory minimums sentences in general are unjust and unfair.<sup>29</sup> Moreover, he argues that these two aspects, unfairness and injustice, are seen because of the discretion if the Judges' is taken away.<sup>30</sup> He gives the example of sexual offences in Kenya, where mandatory minimums are provided for in the Sexual Offences Act in Kenya, for many of the crimes defined or which form part of the said Act.<sup>31</sup> He says this happens as judges are unable to use their discretion when providing sentences after taking to the facts of each case.<sup>32</sup>

To quote a message by the former Chief Justice of Kenya, Justice Willy Mutunga at the begging of the 2016 report of the Judicial Taskforce of Sentencing, he says,

*“Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders.”*<sup>33</sup>

This shows that the two writers are in agreement that, though mandatory minimums, in spirit, seem to reduce crime rate, they are intrinsically flawed as they lead to unfairness and injustice. To add on, in a memorandum by the Avon Global Center of Women and Justice at Cornell School, it was stated, while commenting on the effect of mandatory minimums sentences for sexual offences in Kenya,

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<sup>27</sup> Haist M, ‘Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"?’ , 803.

<sup>28</sup> Haist M, ‘Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"’, 803.

<sup>29</sup> ‘Pravin Bowry: What Penalty for Sex Offenders?’, *Standard Digital*, 14 September 2011, <https://www.standardmedia.co.ke/article/2000042766/what-penalty-for-sex-offenders>, on 5 September 2017.

<sup>30</sup> ‘ Pravin Bowry: What Penalty for Sex Offenders?’, *Standard Digital*, 14 September 2011, <https://www.standardmedia.co.ke/article/2000042766/what-penalty-for-sex-offenders>, on 5 September 2017.

<sup>31</sup> Pravin Bowry: What Penalty for Sex Offenders?’, *Standard Digital*, 14 September 2011, <https://www.standardmedia.co.ke/article/2000042766/what-penalty-for-sex-offenders>, on 5 September 2017.

<sup>32</sup> ‘ Pravin Bowry: What Penalty for Sex Offenders?’, *Standard Digital*, 14 September 2011, <https://www.standardmedia.co.ke/article/2000042766/what-penalty-for-sex-offenders>, on 5 September 2017.

<sup>33</sup> The Judiciary of the Republic of Kenya, Report of the Judicial Taskforce on Sentencing 2016, 2.

*“A 2010 study of achieving justice for sexual offences in Kenya found that, instead of providing an easily applicable punishment and deterrent, these mandatory minimum sentences can result in depriving a victim of justice.”<sup>34</sup>*

### **1.8. Research methodology**

The research involves the review of the retributive theory of punishment, as envisioned in mandatory minimum sentences and their efficiency in ensuring that the crime rate of the rape in Kenya has reduced.

Based on this understanding then, it will show that mandatory minimums are ineffective in ensuring that crime rate is reduced.

This in turn means that the research will be a desk research, as the research will be a review of different literal texts. The texts reviewed will outline the utilitarian and retributive theories of punishment and their effects. The texts reviewed will also outline the history of the punishment meted out for rape in the section 3 of the Sexual Offences Act of Kenya and the effect of the aforementioned section on incidences of rape in Kenya.

### **1.9. Limitations**

The paper aims at looking at the deterrent effect of retributive principles. This poses a problem as the retributive theory and the utilitarian theory, as theories of punishment, have different aims.

### **1.10. Chapter Breakdown**

The research will be broken down into five chapters. Chapter 1 will be the introduction. It will provide a background to the problem and the justification of the research.

Chapter 2 examines retributive punishments and linking the aim of those punishments to the aim of mandatory minimums.

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<sup>34</sup> Pradhan M and Shameem N: Memorandum: Assessing the Impact of Mandatory Minimum Sentences on Sexual Offences in Tanzania’, *Avon Global Centre For Women and Justice at Cornell School*, 12 September 2013, [http://ww3.lawschool.cornell.edu/AvonResources/Avon\\_Global\\_Center\\_Memo\\_Mandatory\\_Minimum\\_Sentences.pdf](http://ww3.lawschool.cornell.edu/AvonResources/Avon_Global_Center_Memo_Mandatory_Minimum_Sentences.pdf), on 5 September 2017.

Chapter analyses the rape sentence in Kenya as a case study in answering the question of whether mandatory minimums have a deterrent effect.

Lastly Chapter 4, gives conclusions on the findings of the research and give recommendations from the findings.

## CHAPTER 2: RETRIBUTION IN MANDATORY MINIMUMS

### 2.1. Introduction

There are multiple theoretical justifications for criminal punishment. This thesis discusses retribution as a theory of punishment and looks at both the aim and end of the criminal punishment envisioned in retribution. It concludes by showing how mandatory minimums are a realisation of the retribution.

### 2.2. The Retributive theory

For John Locke, in the state of nature everyone had the right to protect themselves from harm by others.<sup>35</sup> In his writings, he went on to say, that in this state of nature everyone has the right to punish those who hurt them.<sup>36</sup> For Locke, the right to punish wrong against themselves, as stated above was only in the state of nature.<sup>37</sup> This leaves a gap in the understanding, as it is unclear what happens where there is political order.

According to Cesare Beccaria, it is not enough to give the power to the sovereign to ensure that all individuals enjoy their liberty, where there is political order.<sup>38</sup> He rationalizes that there is need for punishment of those who go against the laws established by the sovereign.<sup>39</sup> This is to ensure that the passions of individuals who oppose the general good are controlled.<sup>40</sup>

From the brief discussion above, we see that punishment is imperative so that social order is maintained. As mentioned previously in this paper, there many theories of punishment.

The retributive theory of punishment, propounds that the punishment meted out for the crime committed has to proportionate to the crime, for the punishment to befit the crime.<sup>41</sup> The main

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<sup>35</sup> Locke J, *Two Treaties of Government*, Awnsam Churchill, England, 1689, Book II, Chapter 1.

<sup>36</sup> Locke, *Two Treaties of Government*, Book II, Chapter 1.

<sup>37</sup> Locke J, *Two Treaties of Government*, Book II, Chapter 1.

<sup>38</sup> 'Cesare Beccaria: An Essay on Crime and Punishment', *The Federalist papers project*, <http://www.thefederalistpapers.org/wp-content/uploads/2013/01/Cesare-Becarria-On-Crimes-and-Punishment.pdf>, on 7 February 2017.

<sup>39</sup> 'Cesare Beccaria: An Essay on Crime and Punishment', *The Federalist papers project*, <http://www.thefederalistpapers.org/wp-content/uploads/2013/01/Cesare-Becarria-On-Crimes-and-Punishment.pdf>, on 7 February 2017.

<sup>40</sup> 'Cesare Beccaria: An Essay on Crime and Punishment', *The Federalist papers project*, <http://www.thefederalistpapers.org/wp-content/uploads/2013/01/Cesare-Becarria-On-Crimes-and-Punishment.pdf>, on 7 February 2017.

<sup>41</sup> Bradley G, 'Retribution: The Central Aim of Punishment', 24.

aim of punishment is to punish the wrongdoer for the wrong committed.<sup>42</sup> An example of retributive punishment is seen in the Code of Hammurabi's, *lex talionis*, which is translated means an 'eye for an eye'.<sup>43</sup>

For retributive theorists the main aim of punishment is that wrongdoers pay for their crimes in and the punishment must be equal to the crime the wrongdoer perpetrates.<sup>44</sup> For the retributivists, one is punished as they commit a moral wrong and for that they must suffer the consequences.<sup>45</sup> Whether he or she will or will not commit the same crime in the future does not matter, one suffers punishment for committing the wrong.<sup>46</sup>

To differentiate retribution from revenge, retribution is in a sense 'payback' for committing a crime.<sup>47</sup> The Latin root of the word retribution is *re* and *tribuo*, which translates to "I pay back".<sup>48</sup> This means that the wrongdoer is being paid back for committing the crime. Retribution may be taken to mean revenge as some scholars argue, that the punishment of the crime appeals one's emotional responses to crime such as hatred and resentment.<sup>49</sup> However, whereas for retributivism one is punished for doing something that is morally wrong, revenge is payback for any wrong one commits.<sup>50</sup> Also, retributivists believe that punishment must be equal to the crime committed. As mentioned previously, an eye for an eye. On the other hand for revenge, there is no limit to the payback one gets once they do something wrong. It may be an eye for two eyes.<sup>51</sup>

### 2.3. Modern retribution realised in the Just desert theory

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<sup>42</sup> Bradley G, 'Retribution: The Central Aim of Punishment', 24.

<sup>43</sup> Mohanty A: 'Retributive Theory of Punishment: A Critical Analysis', *Lawoctopus*, 15 January 2015, <http://www.lawctopus.com/academike/retributive-theory-of-punishment-a-critical-analysis/>, on 8 February 2017.

<sup>44</sup> Bradley G, 'Retribution: The Central Aim of Punishment', 24.

<sup>45</sup> Alec Walen: 'Retributive Justice' *Stanford Encyclopedia of Philosophy*, 18 June 2014, <https://plato.stanford.edu/entries/justice-retributive/> - Ret, on 20 September 2017.

<sup>46</sup> Bradley G, 'Retribution: The Central Aim of Punishment', 24.

<sup>47</sup> Alec Walen: 'Retributive Justice' *Stanford Encyclopedia of Philosophy*, 18 June 2014, <https://plato.stanford.edu/entries/justice-retributive/> - Ret, on 20 September 2017.

<sup>48</sup> Alec Walen: 'Retributive Justice' *Stanford Encyclopedia of Philosophy*, 18 June 2014, <https://plato.stanford.edu/entries/justice-retributive/> - Ret, on 20 September 2017.

<sup>49</sup> Anthony Duff: 'Legal Punishment' *Stanford Encyclopedia of Philosophy*, 13 May 2013, <https://plato.stanford.edu/archives/sum2013/entries/legal-punishment/> - PosRetMeaDes, on 20 September 2017.

<sup>50</sup> Banks C, *Criminal Justice Ethics: Theory and Practice*, Sage Publications 2012, 123.

<sup>51</sup> Banks C, *Criminal Justice Ethics: Theory and Practice*, 123.

Modern retributivism is a redefinition of classical retribution and is seemingly an answer to the continual failure of other justifications of punishment such as rehabilitation and incapacitation.<sup>52</sup> Retribution had long been discarded, in the twentieth century, as the main justification of punishment as the understanding of retribution had been translated to simply mean vengeance.<sup>53</sup> However, as the law evolved, it continually seemed that other justifications of punishment failed to meet the objective of criminal punishment, which is to ensure order in society. Law makers seemed to move back towards retribution as the main of punishment.<sup>54</sup>

The underlying rationale for this theory is that, crime is a violation of the moral and natural order and therefore, one who commits crime deserves to be punished.<sup>55</sup> Unlike the traditional retributive theory, the main tenet of the theory is proportionality and not just punishing the wrongdoer for the crime they have committed.<sup>56</sup> It envisions that the punishment for the crime has to be proportional to the crime committed.<sup>57</sup> Severity of the punishment is proportionate to the severity of the crime. In the same sense as well, all those commit a certain crime, must be given the same punishment.<sup>58</sup> The circumstances of the crime do not pay a part in determining the punishment of a certain crime.<sup>59</sup> As long as one has committed a crime, then they shall be punished for that crime.<sup>60</sup> Going back Cesare Beccaria's writings, the just desert theory, removes the unfair advantage gained by the wrongdoer so that they do not benefit from their crime.<sup>61</sup>

For this research, this principle will be used to explain the retributive aspect in mandatory minimum sentences.

The theory proposes that, punishments meted out have to be justified first and secondly, they must be proportionate to the crime.<sup>62</sup> In first instance, justification for the punishment basically

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<sup>52</sup> Starkweather D, 'The Retributive Theory of 'Just Deserts' and Victim Participation in Plea Bargaining', 67 *Indiana Law Journal* (1992),855.

<sup>53</sup> Starkweather D, 'The Retributive Theory of 'Just Deserts' and Victim Participation in Plea Bargaining',855.

<sup>54</sup> Hudson B, *Understanding Justice*, 2ed, Open University Press, 2003, 39.

<sup>55</sup> Starkweather D, 'The Retributive Theory of 'Just Deserts' and Victim Participation in Plea Bargaining', 855.

<sup>56</sup> Starkweather D, 'The Retributive Theory of 'Just Deserts' and Victim Participation in Plea Bargaining',857.

<sup>57</sup> Starkweather D, 'The Retributive Theory of 'Just Deserts' and Victim Participation in Plea Bargaining',857.

<sup>58</sup> Starkweather D, 'The Retributive Theory of 'Just Deserts' and Victim Participation in Plea Bargaining',857.

<sup>59</sup> Starkweather D, 'The Retributive Theory of 'Just Deserts' and Victim Participation in Plea Bargaining',857.

<sup>60</sup> Anthony Duff: 'Legal Punishment' *Stanford Encyclopedia of Philosophy*, 13 May 2013, <https://plato.stanford.edu/archives/sum2013/entries/legal-punishment/> - PosRetMeaDes, on 20 September 2017.

<sup>61</sup> Anthony Duff: 'Legal Punishment' *Stanford Encyclopedia of Philosophy*, 13 May 2013, <https://plato.stanford.edu/archives/sum2013/entries/legal-punishment/> - PosRetMeaDes, on 20 September 2017.

<sup>62</sup> Manahan J and Skeem J; 'Risk Assessment in Criminal Sentencing', *Berkeley*, [https://gspp.berkeley.edu/assets/uploads/research/pdf/09-2015\\_Risk\\_Assessment\\_in\\_Criminal\\_Sentencing.pdf](https://gspp.berkeley.edu/assets/uploads/research/pdf/09-2015_Risk_Assessment_in_Criminal_Sentencing.pdf), on 9 February 2017.

means that, punishment is only given where a crime had been committed.<sup>63</sup> Immanuel Kant proposes this notion.<sup>64</sup> For him, the degree of punishment given to the offender must be equal to the crime the offender perpetrated to others.<sup>65</sup> If there is no crime committed, punishment is unjustified.<sup>66</sup> In the second instance, proportionality refers to the severity of the crime being equal to the crime committed.<sup>67</sup>

This rationale justifies severe punishments for murders and other crimes that may be considered severe such as robbery with violence and rape.<sup>68</sup> The punishment itself as per the just desert theory show the blameworthiness of the offender.<sup>69</sup> This means therefore, that every crime committed can be shown to have an 'attached' punishment to it which means that the punishment may be certain when one commits a certain crime.<sup>70</sup>

In this sense, just deserts are form of modern retributivism; as it provides for punishment to be guided by the principle of proportionality.

#### **2.4. The Utilitarian theory as a justification of criminal punishment**

This theory differs from the theory of just deserts as it moves from a more individualistic approach to a society-based approach.<sup>71</sup> As per the theory, relying on Jeremy Bentham's theories, punishment should only be levied if it results in the benefit of the whole of society.<sup>72</sup> In achieving this, punishment of crime can work in two ways.<sup>73</sup> First, general deterrence, as it can deter future perspective criminals from committing crimes and secondly, specific

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<sup>63</sup>Manahan J and Skeem J: Risk Assessment in Criminal Sentencing', *Berkeley*, [https://gspp.berkeley.edu/assets/uploads/research/pdf/09-2015\\_Risk\\_Assessment\\_in\\_Criminal\\_Sentencing.pdf](https://gspp.berkeley.edu/assets/uploads/research/pdf/09-2015_Risk_Assessment_in_Criminal_Sentencing.pdf), on 9 February 2017.

<sup>64</sup> Christopher R, 'Time and Punishment', 284.

<sup>65</sup> Christopher R, 'Time and Punishment', 284.

<sup>66</sup> Christopher R, 'Time and Punishment', 284.

<sup>67</sup> Starkweather D, The Retributive Theory of 'Just Deserts' and Victim Participation in Plea Bargaining, 858.

<sup>68</sup> Starkweather D, The Retributive Theory of 'Just Deserts' and Victim Participation in Plea Bargaining, 858.

<sup>69</sup> Starkweather D, The Retributive Theory of 'Just Deserts' and Victim Participation in Plea Bargaining, 858.

<sup>70</sup> Starkweather D, The Retributive Theory of 'Just Deserts' and Victim Participation in Plea Bargaining, 858.

<sup>71</sup> Haist M, 'Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"', 794.

<sup>72</sup> Haist M, 'Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"', 794.

<sup>73</sup> Haist M, 'Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"', 794.

deterrence, it can ensure that those who have already committed crimes are deterred from committing the same crimes in the future.<sup>74</sup>

Critiquing it with the just desert theory, punishment is only justified when the whole society benefit, unlike the just desert theory where punishment is justified by virtue of commission of a crime.

## 2.5. Linking utilitarianism and retribution

From the discussion of the theories above, there seems to be no link between them as the aims of the different theories do not link. However, there may be answer in the form of limiting retributivism mentioned in Chapter 1. To reiterate the theory propounds that, using retributive principles, an upper and a lower limit may be set for crimes.<sup>75</sup> The range will vary depending on the seriousness of the crime. The upper and lower limits, as per retributivism, are set by the moral blameworthiness and the fact that the wrongdoer actually committed the crime.<sup>76</sup> Matthew Haist argues that these limits are easily set as different societies would rank the crimes such as theft and rape in the same order across the board.<sup>77</sup> This theory appeals to supporters of the utilitarian theory as, the limits provide a space for judges for example, to decide the most appropriate punishment within the bounds to give so as to ensure that there is deterrence.<sup>78</sup> It also takes in to consideration the effect the crimes have on society as the limits set vary on the seriousness of the crime which may also be termed as the effect of the crime on the society.

Though the theory seems to be a perfect link between the two, Haist continues to argue that the link is indeed faulty. He rationalises that, since extrinsic factors play a role in the determination of punishment under the theory of limiting retributivism, it may lead to the desired effect of deterrence not being achieved.<sup>79</sup> He argues that criminals, both potential and those who are

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<sup>74</sup> Haist M, 'Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"', 794.

<sup>75</sup> Haist M, 'Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"?', 803.

<sup>76</sup> Haist M, 'Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"?', 807.

<sup>77</sup> Haist M, 'Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"?', 806.

<sup>78</sup> Haist M, 'Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"?', 806.

<sup>79</sup> Haist M, 'Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"?', 821.

already offenders, may anticipate the factors the judge will take in to consideration while prescribing the punishment and therefore use these circumstances to their advantage and go ahead to commit the crime believing that the judge will prescribed a lighter judgement.<sup>80</sup> The deterrent effect in this sense will only be up to the point where the wrongdoer believes that though they will suffer, they will not suffer too much for their crime.<sup>81</sup>

## 2.6. Mandatory Minimum sentences

Mandatory minimum sentences as explained in chapter 1, are the minimum sentences that can be prescribed for a certain crime and are prescribed by the law.<sup>82</sup> They limit the judges' discretion and make sure that there is a sense of uniformity for the sentencing of similar crimes.<sup>83</sup>

Using the United States of America as an example, the introduction of mandatory minimum sentences was a response to the indeterminate sentencing system which failed to meet the aim of punishment.<sup>84</sup> The Parole Board and the judges had unlimited discretion to decide what punishment was to be meted out for crimes committed.<sup>85</sup> In the case of the United States, the introduction or reintroduction of harsher mandatory minimum sentences was as a new 'tough on crime' approach in the twentieth century to help in the fight against drugs.<sup>86</sup>

Mandatory minimum sentences appeal to both theories of punishment that have previously been discussed in this chapter. Drawing from the discussion on the different theories, mandatory minimums may be termed as a form of just deserts.

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<sup>80</sup> Haist M, 'Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"?', 817.

<sup>81</sup> Haist M, 'Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"?', 817.

<sup>82</sup> Mayba Y, 'Justice Reform: Who's Got the Power', 48.

<sup>83</sup> 'Muhlhausen D: Theories of Punishment and Mandatory Minimums' *The Heritage Foundation*, 27 May 2010, <http://www.heritage.org/testimony/theories-punishment-and-mandatory-minimum-sentences>, 20 September 2017.

<sup>84</sup> 'Muhlhausen D: Theories of Punishment and Mandatory Minimums' *The Heritage Foundation*, 27 May 2010, <http://www.heritage.org/testimony/theories-punishment-and-mandatory-minimum-sentences>, 20 September 2017.

<sup>85</sup> 'Muhlhausen D: Theories of Punishment and Mandatory Minimums' *The Heritage Foundation*, 27 May 2010, <http://www.heritage.org/testimony/theories-punishment-and-mandatory-minimum-sentences>, 20 September 2017.

<sup>86</sup> 'Muhlhausen D: Theories of Punishment and Mandatory Minimums' *The Heritage Foundation*, 27 May 2010, <http://www.heritage.org/testimony/theories-punishment-and-mandatory-minimum-sentences>, 20 September 2017.

This is because once an offender commits the crime, they must do the time.<sup>87</sup> For example, in Kenya under the Sexual Offences, the punishment for rape, which is the main subject of this paper, is no less than ten years. They meet the criteria of being set and proportionate.<sup>88</sup> An offender is assured that one they commit a certain crime then they are liable to pay for that crime.

Mandatory minimums may also be seen to have a deterrent effect as they impose long prison sentences for all those who commit heinous crimes such as rape and murder.<sup>89</sup> The deterrent effect desired is both specific and general. Generally, those who would have committed the crime the long punishment is meted out for, fear that they will serve the long prison sentence so they opt not to commit the crime. Specifically, offenders are also discouraged from reoffending as they do not want to spend a lot of time in prison.

Having proven that mandatory minimums are actually, a form of retributive punishment, then the next step is to find out whether or not they actually help in deterring wrongdoers from committing crime. They provide a one size fits all sentencing approach. This is problematic as it fails to take extrinsic factors as they prescribe similar punishments for all those involved.<sup>90</sup> Those who commit crimes often use the cost-benefit approach and once they see that they benefit outweighs the cost, the fact that there is determinate sentence will not prevent them from committing a crime.<sup>91</sup>

## 2.7. Conclusion

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<sup>87</sup> 'Muhlhausen D: Theories of Punishment and Mandatory Minimums' *The Heritage Foundation*, 27 May 2010, <http://www.heritage.org/testimony/theories-punishment-and-mandatory-minimum-sentences>, 20 September 2017.

<sup>88</sup> 'Muhlhausen D: Theories of Punishment and Mandatory Minimums' *The Heritage Foundation*, 27 May 2010, <http://www.heritage.org/testimony/theories-punishment-and-mandatory-minimum-sentences>, 20 September 2017.

<sup>89</sup> 'Muhlhausen D: Theories of Punishment and Mandatory Minimums' *The Heritage Foundation*, 27 May 2010, <http://www.heritage.org/testimony/theories-punishment-and-mandatory-minimum-sentences>, 20 September 2017.

<sup>90</sup> <http://www.icje.org/articles/JustDesertsandJustice.pdf>, on 2 September 2017.

<sup>91</sup> 'Muhlhausen D: Theories of Punishment and Mandatory Minimums' *The Heritage Foundation*, 27 May 2010, <http://www.heritage.org/testimony/theories-punishment-and-mandatory-minimum-sentences>, 20 September 2017.

From the analysis of the different theories, it is clear that the link between the retributive theory of punishment and the utilitarian theory of punishment may only be realised when considering the limiting retributivism.<sup>92</sup>

Mandatory minimums envision this theory as they are both retributive and deterrent in nature as already discussed. Retributive as they punish the wrongdoer for the crime.<sup>93</sup> They are they provide for long prison sentences for serious crimes in a bid to ensure that offenders are discouraged from committing those crimes because they are put off by the long prison sentence.<sup>94</sup>

However even from a theoretical basis, they are ineffective as offenders may consider the cost of committing the crime to be negligible.

The next chapter will use a practical example to show the ineffectiveness of mandatory minimums in realising their desired deterrent effect on the rates of crime in particular for the crime of rape in Kenya.

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<sup>92</sup> Haist M, 'Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"?', 803.

<sup>93</sup> 'Muhlhausen D: Theories of Punishment and Mandatory Minimums' *The Heritage Foundation*, 27 May 2010, <http://www.heritage.org/testimony/theories-punishment-and-mandatory-minimum-sentences>, 20 September 2017.

<sup>94</sup> 'Muhlhausen D: Theories of Punishment and Mandatory Minimums' *The Heritage Foundation*, 27 May 2010, <http://www.heritage.org/testimony/theories-punishment-and-mandatory-minimum-sentences>, 20 September 2017.

## CHAPTER 3: RAPE IN KENYA

### 3.1. Introduction

As mentioned in chapter one, since the sentence for rape in Kenya is in the form of a mandatory minimum, this thesis will use the sentence as a case study to show the effect mandatory minimum sentences on deterrence. Also, it will aim to assert that mandatory minimums have not realised their desired deterrent effect and in that way the incidences of rape in Kenya are still high.

### 3.2. The history of legislation of sexual offences in Kenya

The Sexual Offences Act of Kenya, which was enacted in 2006 and was set out as, as indicated in its preamble, an act of parliament '*which is to make provision about sexual offences, their definition, prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes*'.<sup>95</sup>

The Act, repealed some sections between section 139 and 169 of the Penal Code of Kenya before the Code itself was revised.<sup>96</sup> The specific sections provided for crimes that were categorized as crimes against morality, in particular those of a sexual nature and included, the crime of rape under sections 139 and 140.<sup>97</sup> The provisions that were not repealed by the Sexual Offences Act, provide for other crimes that may be termed as offences that go against the moral values, which are basic norms that are accepted as the guide of the behaviour of society, and that is why they are provided for under the chapter of crimes against morality. Some of the crimes include, abortion and prostitution. However, even though the Sexual Offences Act was enacted in 2006, there are provisions of crimes of a sexual nature that have not been repealed and included in the Act such as the defilement of imbeciles under section 146 of the Penal Code.

Although, the Penal Code already had provisions for the punishment to be levied for all those who were found guilty of having committed crimes of sexual violence, the Sexual Offences

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<sup>95</sup> Preamble, Sexual Offences Act of Kenya.

<sup>96</sup> Penal Code of Kenya CAP 63 of 1985. (Repealed).

<sup>97</sup> Section 140, Penal Code of Kenya.(Repealed)

Act was enacted in 2006 as a response to the 'ineffectiveness' of the prescribed punishment for rape and other sexual offences.<sup>98</sup>

The main sponsor for this Act was Honourable Lady Justice Njoki Ndungu, when she was a nominated member of Parliament. She tabled the Bill in Parliament as a private member's Bill and it was a result of the collaboration of many agencies of the civil sector such as the Juvenile Justice Network, FIDA and the Child Welfare Society of Kenya.<sup>99</sup>

As already mentioned, the bill was a response to the lax attitude taken by the judiciary at the time in dealing with sexual offences in Kenya, as well as a response to the lack of stringent sentences for sexual offences.<sup>100</sup>

As Justice Ndungu was the sponsor of the Sexual Offences Bill in parliament, the brief description of the history of the Act, will refer, in addition to other sources, to her responses in an interview she had with Association for Women's Rights in Development (AWID) in 2006 and the Parliamentary Hansard of April 26<sup>th</sup> 2006, the day she was tabling the bill before Parliament. When she was asked why there was the need for a new legislation on sexual offences in Kenya, she gave the following reasons;

**a. The narrow definition of rape and the fact that it was categorised as an issue of morality;**

Under the Penal Code, the crime of rape was defined; *'as a person having the carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threat or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act or in the case of a married woman, by personating her husband, is guilty of the felony termed rape.'*<sup>101</sup>

From the definition, it is implied that a person of the male gender cannot be a victim of the crime of rape. This leaves a gap in the understanding of crime as a male person can also be a victim of rape. Moreover, as explained previously, crimes against morality are many and they cover different aspects, therefore there was a need to separate sexual crimes.

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<sup>98</sup> <http://kenyalaw.org/kl/index.php?id=1920>, accessed on 4<sup>th</sup> October 2017.

<sup>99</sup> Mbote P and Akech M, Kenya: The Justice Sector and the Rule of Law, *The Open Society Initiative for Eastern Africa* (2011), 51.

<sup>100</sup> <http://kenyalaw.org/kl/index.php?id=1920>, accessed on 4<sup>th</sup> October 2017.

<sup>101</sup> Section 139, Penal Code of Kenya. (Repealed)

**b. The fact that sentencing of was left in totality to the discretion of judges;<sup>102</sup>**

The repealed provision for the punishment of rape, in the Penal Code, was under section 140. It provided as follows;

*'Any person who commits the offence of rape is liable to be punished with imprisonment with hard labor for life, with or without corporal punishment.'*<sup>103</sup>

The provision, though it would seem was harsh, gave the judge a wide berth of discretion as the sentence was in the form of a mandatory sentence.<sup>104</sup> This meant that the limit of the punishment the judge could provide was life imprisonment and using their discretion they could provide for lenient sentences. This was ineffective as though the punishment for rape was punitive its purpose was beaten by the wide berth given for the discretion of judges.

**c. New trends such as sexually transmitted diseases that were not taken into previous legislation of sexual offences;**

In response to these trends, the Act in section 26 criminalizes the deliberate transmission of HIV or any other life-threatening diseases. Any person who knowingly transfers such diseases is liable to a prison sentence of no less than 15 years and the sentence may be enhanced to life imprisonment.<sup>105</sup>

**d. The developments of new forensic methods such as DNA profiling to help in the identification of sex offenders.<sup>106</sup>**

Section 36 of the Act provides for the collection of DNA samples which would be used in cases to be used in forensic and scientific testing to determine whether or not one has committed a crime.<sup>107</sup> In addition, the samples are to be kept in a designated place until finalization of the

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<sup>102</sup>Mbote P and Akech M, *Kenya: The Justice Sector and the Rule of Law*, 51.

<sup>103</sup> Section 140, Penal Code of Kenya. (Repealed)

<sup>104</sup> Shadle B, 'Sexual Offences in Kenyan Courts, 1960s -2008', II *Kenya Law Review* (2010), 1.

<sup>105</sup> Section 26, Sexual Offences Act.

<sup>106</sup> Association for Women's Rights in Development Legislating against Sexual Violence in Kenya: An Interview with the Hon. Njoki Ndungu,' *Reproductive Health Matters Journal*, 17 May 2007, <http://www.tandfonline.com/doi/full/10.1016/S0968-8080%2807%2929286-9>, on 4 October 2017.

<sup>107</sup> Section 36, Sexual Offences Act.

trial.<sup>108</sup> It also provides for the creation of databank for the information of dangerous sex offenders to be keyed in.<sup>109</sup> As of the year 2018, there is no database that has been created as provided for in the Act.

The bill received much resistance as it was seen as piece of legislation which would mainly agitate for the rights of women and they termed as piece of women's legislation.<sup>110</sup> This is because those mainly affected by sexual crimes are women.<sup>111</sup> However, both genders may be victims and this fact is recognised by the new act.<sup>112</sup> Additionally, many of the members of parliament felt that the enactment of the act would lead to false accusations of rape.<sup>113</sup> Moreover, religious leaders felt that the Act agitated for right of same- sex couples and talked abortion which they were not willing to discuss publicly as of yet.<sup>114</sup> Lady Justice Njoki Ndungu said that, in order to get the members of parliament on board with the bill, amendments had to be made to the bill and a lot of social sensitisation was done.<sup>115</sup> One major amendment made was the removal of the provision of marital rape as a sexual offence.<sup>116</sup>

### 3.3.Changes brought about by the enactment of the 2006 Act

The Sexual Offences Act introduced new sexual crimes such as gang rape and trafficking for sexual exploitation.<sup>117</sup>

The legislation also changed the crime of rape from one against morality to one of violence, in particular sexual violence. While tabling the Sexual Offences Bill in Parliament, Njoki

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<sup>108</sup> Section 36, Sexual Offences Act.

<sup>109</sup> Section 36, Sexual Offences Act.

<sup>110</sup> 'Association for Women's Rights in Development Legislating against Sexual Violence in Kenya: An Interview with the Hon. Njoki Ndungu,' *Reproductive Health Matters Journal*, 17 May 2007, <http://www.tandfonline.com/doi/full/10.1016/S0968-8080%2807%292928-9>, on 4 October 2017.

<sup>111</sup> 'Association for Women's Rights in Development Legislating against Sexual Violence in Kenya: An Interview with the Hon. Njoki Ndungu,' *Reproductive Health Matters Journal*, 17 May 2007, <http://www.tandfonline.com/doi/full/10.1016/S0968-8080%2807%2929286-9>, on 4 October 2017.

<sup>112</sup> Section 3(1), Sexual Offences Act.

<sup>113</sup> Association for Women's Rights in Development Legislating against Sexual Violence in Kenya: An Interview with the Hon. Njoki Ndungu,' *Reproductive Health Matters Journal*, 17 May 2007, <http://www.tandfonline.com/doi/full/10.1016/S0968-8080%2807%2929286-9>, on 4 October 2017.

<sup>114</sup> Mbote P and Akech M, *Kenya: The Justice Sector and the Rule of Law*, 51.

<sup>115</sup> Mbote P and Akech M, *Kenya: The Justice Sector and the Rule of Law*, 52.

<sup>116</sup> 'Association for Women's Rights in Development Legislating against Sexual Violence in Kenya: An Interview with the Hon. Njoki Ndungu,' *Reproductive Health Matters Journal*, 17 May 2007, <http://www.tandfonline.com/doi/full/10.1016/S0968-8080%2807%2929286-9>, on 4 October 2017.

<sup>117</sup> Section 10 and 17 Sexual Offences Act.

Ndungu, emphasised that defining the crime of rape as a crime against morality was limiting, as the act in itself was one of violence aimed to show dominance and power over the victim.<sup>118</sup> The change in classification, shows the severity of the crime and the need for stricter legislation on the crime. It also widened the scope of the crime of rape to include or more specifically provide that either gender, male or female may be guilty of perpetuating the crime of rape.<sup>119</sup> The provision under section 3 of the Act provides,

*'A person commits the offence termed rape if, he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs, the other person does not consent to the penetration, or the consent is obtained by force or by means of threats or intimidation of any kind.'*<sup>120</sup>

Section 33 includes a unique provision that states that evidence of surrounding circumstances and impact of the sexual crime may be heard so as to help ensure that the offender receives the most appropriate punishment for their crime.<sup>121</sup>

Most importantly for this paper, it introduced mandatory minimum sentences for sexual crimes which was deviation for the previous situation which provided for only maximum sentences for sexual offences.<sup>122</sup> This is important to note as prior to the enactment of this Act, other crimes had similarly had mandatory minimum sentences but the sexual offences did not. For example, for all those who are found armed with any dangerous or offensive weapons with the intent of committing a felony, are guilty of a felony and are liable to a term of imprisonment of no less than seven years and a maximum of fifteen years.<sup>123</sup> Though capital offences also have mandatory sentences, they can neither be classified as mandatory minimums nor maximums as the judge has no choice as to adhere to the law and prescribe the mandatory sentence provided in the law. For example, the crime of robbery with violence attracts a mandatory death sentence.<sup>124</sup> The difference between mandatory minimums or mandatory

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<sup>118</sup> Parliament Hansard, National Assembly Official Report, 26<sup>th</sup> April 2006, 1.

<sup>119</sup> Section 3(1), Sexual Offences Act.

<sup>120</sup> Section 3(1), Sexual Offences Act.

<sup>121</sup> Section 33, Sexual Offences Act.

<sup>122</sup> 'Association for Women's Rights in Development Legislating against Sexual Violence in Kenya: An Interview with the Hon. Njoki Ndungu,' *Reproductive Health Matters Journal*, 17 May 2007, <http://www.tandfonline.com/doi/full/10.1016/S0968-8080%2807%2929286-9>, on 4 October 2017.

<sup>123</sup> Section 308, Penal Code.

<sup>124</sup> Section 296 (2), Penal Code.

maximums and mandatory sentences is that, the judge in the first two instances may use their discretion to prescribe a judgment, though the scope is limited for mandatory minimums.

Some examples of the mandatory minimums introduced by the Act are;

1. The minimum sentence for rape which is 10 years, which was already stated in chapter one,
2. The minimum sentence for attempted rape which is 5 years,
3. The minimum sentence for sexual assault which is no less than 10 years.<sup>125</sup>

### **3.4.The Effect of the Sexual Offences Act on the rates of the Crime of rape**

#### **3.4.1. Discussion on Mandatory Sentences in Kenya**

Before analysing the current rates of sexual offences in Kenya at the moment, it is important to look in to the interpretation of mandatory minimums, provided by national law, by those who interpret and enforce the law.

Firstly, the judges' discretion is completely limited and they are not allowed to set any punishments which are below the prescribed mandatory minimum provided.<sup>126</sup> This was seen in the case of, *Kennedy Munga vs Republic*. In this case the judge prescribed an order of probation for the crime of defilement.<sup>127</sup> On appeal the sentence was revised to fifteen years as the prior order was rendered illegal, as the mandatory minimum sentence set out for defilement in the Sexual Offences Act in section 8(4), for a child aged between the age of sixteen and eighteen, shall not be one of less than fifteen years.<sup>128</sup> In this case the minor in question was seventeen years, therefore the accused was liable to serve a term of not less than fifteen years.<sup>129</sup>

This case follows the rationale of the Court of Appeal in the case of *Joseph Njuguna v Republic*.<sup>130</sup> In the case the judges argued that, although mandatory death sentence prescribed by the Penal Code of Kenya went against the spirit of 2010 Constitution of Kenya, the judiciary

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<sup>125</sup> Section 3, 4 and 5, Sexual Offences Act.

<sup>126</sup> *Kennedy Konde Munga v Republic* (2011) eKLR.

<sup>127</sup> *Kennedy Konde Munga v Republic* (2011) eKLR.

<sup>128</sup> *Kennedy Konde Munga v Republic* (2011) eKLR.

<sup>129</sup> *Kennedy Konde Munga v Republic* (2011) eKLR.

<sup>130</sup> *Joseph Njuguna Mwaura & 2 others v Republic* [2013] eKLR.

could not go against the wishes of the people as expressed in legislation by failing to prescribe the punishments provided in legislation for various crimes.<sup>131</sup>

This shows the fact that the courts' hands are tied when it comes to prescribing sentences where mandatory sentences have already been provided for. This rationale follows the provisions of Section 26 of the Penal Code. The section states that an offender may be liable to a term of imprisonment of life or shorter unless where the law provides otherwise.<sup>132</sup> This means that as long as there is a set term of punishment in the law, the judge may not prescribe a term which is less than the one that is in the law.

Additionally, according to the penal code, a fine cannot substitute the sentence where a mandatory minimum sentence is provided.<sup>133</sup>

Recently, the Supreme Court affirmed the judgement of the Court of Appeal in the case of *Francis Kariuki Muruatetu & Another v Republic*, death penalty was unconstitutional as it goes against the right to life provided for in the bill of rights.<sup>134</sup> The reason why the judgement is interesting, is that Supreme Court said that the discretion of judges should not be limited when handing out the death penalty.<sup>135</sup> The court however stressed that the punishment itself is not invalid, just that judges should use their discretion in cases that attract the death penalty when giving the jail term.<sup>136</sup> This shows the slow gravitation of law makers away from the need to implement mandatory sentences. Judges have realised the need for discretion so that the jail term is effective when it suits the situation as it determined in case to case basis.

### 3.4.2. The Effect of the Mandatory Minimum Sentence for rape in Kenya

The Kenya National Bureau of Statistics in the Economic Survey 2017, specifically in table 16.5, analysed and showed that the number of people who had been reported to have committed

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<sup>131</sup> *Joseph Njuguna Mwaura & 2 others vs Republic* (2013) eKLR.

<sup>132</sup> Section 26, Penal Code.

<sup>133</sup> Section 26 (3)(i), Penal Code of Kenya.

<sup>134</sup> 'Maureen Kakah : Mandatory death sentence is now unconstitutional in Kenya', *Nation Media Group*, 14 December 2017, <https://www.nation.co.ke/news/Supreme-Court-declares-mandatory-death-sentence-unconstitutional/1056-4228260-f1krmcz/>, 21 January 2018.

<sup>135</sup> 'Annette Wambulwa: Supreme Court make landmark ruling on death sentence', *The Star*, 14 December 2017, <https://www.the-star.co.ke/news/2017/12/14/supreme-court-make-landmark-ruling-on-death-sentence-c1684997>, 21 January 2018.

<sup>136</sup> 'Maureen Kakah : Mandatory death sentence is now unconstitutional in Kenya', *Nation Media Group*, 14 December 2017, <https://www.nation.co.ke/news/Supreme-Court-declares-mandatory-death-sentence-unconstitutional/1056-4228260-f1krmcz/>, 21 January 2018.

crimes of sexual nature had increased from the previous year from 70, 515 in 2015 to 73, 221 in 2016.<sup>137</sup>

From the number of reported cases, it seems that more people are willing to come forward and report crimes, the number of incidents seem to have increased. As was stated in Chapter 1 as well, the same survey however, shows that the number of people reported having committed the crime of rape seems to have reduced in 2016 from 2015. Which may be seen as reduction on the incidences of crime which is positive.

Using the same table, it shows that there was an increase in the number of reported rape case in 2015 from the 855 incidents reported in 2014 as there were 893 incidents reported on 2015.<sup>138</sup> In 2016 however, there was a slight and negligible decrease in the number of reported cases as there were 888 incidents reported.<sup>139</sup> The numbers in the survey may be taken as an estimate of the number of incidences of rape that occur in society as there are many people who are unwilling to report incidences. The numbers, show that the Sexual Offences Act is continually unsuccessful in fulfilling its mandate of ensuring that rates of sexual crimes reduce. Although there seems to be a willingness of the public to want to report the crime of rape, the effect of the Act on perpetrators of sexual crimes is minimal.

In an Article in *the Standard Digital*, Njoki Ndungu, who was the architect of the Sexual Offences Act of Kenya, said that the problem was not the law itself, which she praised for having introduced stricter sentences to bring an overall deterrent effect, but those involved in the implementation process.<sup>140</sup> In defence of the harsh sentences that are provided for she said that when authorities, in particular the police, try to reconcile those the perpetrators and victims and afterwards let the perpetrators go, repeat offenders are created.<sup>141</sup> This is because, the intended effect of criminal punishment is not realised.<sup>142</sup> In the interest of justice, the offender

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<sup>137</sup> Kenya National Bureau of Statistics, Economic Survey 2017, *Kenya National Bureau of Statistics* (2017), 260.

<sup>138</sup> Kenya National Bureau of Statistics, Economic Survey 2017, *Kenya National Bureau of Statistics* (2017), 260.

<sup>139</sup> Kenya National Bureau of Statistics, Economic Survey 2017, *Kenya National Bureau of Statistics* (2017), 260.

<sup>140</sup> 'Muthoni K: Why Judges want the Sexual Offences Law Amended', *Standard Digital*, 3 October 2016, <https://www.standardmedia.co.ke/article/2000218188/why-judges-want-kenya-s-sexual-offences-law-amended>, on 4 October 2017.

<sup>141</sup> 'Muthoni K: Why Judges want the Sexual Offences Law Amended', *Standard Digital*, 3 October 2016, <https://www.standardmedia.co.ke/article/2000218188/why-judges-want-kenya-s-sexual-offences-law-amended>, on 4 October 2017.

<sup>142</sup> 'Muthoni K: Why Judges want the Sexual Offences Law Amended', *Standard Digital*, 3 October 2016, <https://www.standardmedia.co.ke/article/2000218188/why-judges-want-kenya-s-sexual-offences-law-amended>, on 4 October 2017.

must suffer for the harm they have caused.<sup>143</sup> Also, she stressed that for sexual crimes, the victim is left traumatized unlike when one is the victim of petty crime.<sup>144</sup> Therefore, any form of reconciliation would not be serve the interests of justice.<sup>145</sup>

Reconciliation is a method of alternative dispute resolution that is provided for in Article 159 of the Constitution of Kenya.<sup>146</sup> The courts are encouraged to promote alternative dispute resolution mechanism in carrying out their mandate.<sup>147</sup> However, the stance of the Court has been that alternative dispute resolution mechanisms are, in criminal matters, is in line with the provisions of section 176 of the criminal procedure code of Kenya. The section provides that reconciliation shall be in matters of common assault and not those that amount to felonies or are of an aggravated nature.<sup>148</sup> In addition, the case of *Juma Faraji Serenge alias Juma Hamisi v Republic*, the judge ruled that since criminal matters are matters of public interest and the state is the complainant, a case cannot be withdrawn even if the victim and the accused come to an agreement as the rightful complainant is the state.<sup>149</sup> Similarly, in the case of *Republic v Abdulahi Noor Mohamed*, where the accused had committed the crime of murder, the court said that crime does not affect the victim alone but the whole of society.<sup>150</sup> Therefore, the means used in the settlement of a case should serve the public interest.<sup>151</sup> the accused was applying to the court to be allowed to settle the matter out of court by talking to the family of the and then the agreement they came to would be filed as the final decision of the case.<sup>152</sup> The court added that on top of it being a matter of public interest murder is a felony and therefore the matter could not be settled by reconciliation of the parties.<sup>153</sup>

Taking into account the provisions of the section 176 of the Criminal Procedure Code and the rulings of the court in the two aforementioned cases, it would seem that the court is law supports the position Justice Ndungu on matters of reconciliation and the crime of rape. This is because rape, under the repealed section 139 of the Penal Code, rape was termed as felony

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<sup>143</sup> 'Muthoni K: Why Judges want the Sexual Offences Law Amended', *Standard Digital*, 3 October 2016, <https://www.standardmedia.co.ke/article/2000218188/why-judges-want-kenya-s-sexual-offences-law-amended>, on 4 October 2017.

<sup>144</sup> 'Muthoni K: Why Judges want the Sexual Offences Law Amended', *Standard Digital*, 3 October 2016, <https://www.standardmedia.co.ke/article/2000218188/why-judges-want-kenya-s-sexual-offences-law-amended>, on 4 October 2017.

<sup>145</sup> Parliament Hansard, National Assembly Official Report, 26<sup>th</sup> April 2006, 1.

<sup>146</sup> Article 159, Constitution of Kenya, 2010.

<sup>147</sup> Article 159, Constitution of Kenya.

<sup>148</sup> Section 176, Criminal Procedure Code of Kenya, CAP 75 of 2003 (Revised 2015).

<sup>149</sup> *Juma Faraji Serenge alias Juma Hamisi v Republic* (2007) eKLR.

<sup>150</sup> *Republic v Abdulahi Noor Mohamed* (2016) eKLR.

<sup>151</sup> *Republic v Abdulahi Noor Mohamed* (2016) eKLR.

<sup>152</sup> *Republic v Abdulahi Noor Mohamed* (2016) eKLR.

<sup>153</sup> *Republic v Abdulahi Noor Mohamed* (2016) eKLR.

and therefore reconciliation cannot be used in rape cases.<sup>154</sup> Also, as it is a matter of public interest the prosecution must be involved as they represent the state as the complainant and in that way the interests of the society.<sup>155</sup>

Interestingly, she seemed to be of the retributivist school of thought, in a sense, as it said that the law is not concerned with deterring others of committing a crime; its only concern is ensuring that those who commit a crime suffer consequences for the crime they commit.<sup>156</sup>

This shows that even the main agitator of the law admits that there is a need to address the issue of the interaction of Section 3 of the Sexual Offences Act and its realisation today.

### **3.5. Conclusion**

From the brief discussion on the section 3 of the Sexual Offences Act and its effect on the rates of the crime of in Kenya is not as effective as was expected when the Act was enacted.

The punishment for rape under section 3 is harsh as the limits set out are, a minimum of ten years and a maximum of life imprisonment.<sup>157</sup> This shows that the punishment in itself is retributive as once one is found guilty of the crime of rape they are immediately liable to a term of imprisonment. It follows the retributive principle of liability for a term of imprisonment by virtue of committing a crime.

Even though the Act was a response to the failure of existing law, the Act has only managed to accomplish one of its aims which is the definition of sexual offences it has failed in ensuring the prevention of sexual offences and protection of potential victims from perpetrators of sexual offences.<sup>158</sup> The aim of prevention of the sexual offences shows the deterrent aim of the Act.

From the, discussion on section 3 of the Sexual Offences Act, it is clear the problem is not lack of legislation but the problem is enforcement of the provision to ensure that offenders are deterred from committing the crime of rape.

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<sup>154</sup> Section 176, Criminal Procedure Code of Kenya.

<sup>155</sup> *Republic v Abdulahi Noor Mohamed* (2016) eKLR.

<sup>156</sup> 'Muthoni K: Why Judges want the Sexual Offences Law Amended', *Standard Digital*, 3 October 2016, <https://www.standardmedia.co.ke/article/2000218188/why-judges-want-kenya-s-sexual-offences-law-amended>, on 4 October 2017.

<sup>157</sup> Section 3, Sexual Offences Act Kenya.

<sup>158</sup> Preamble, Sexual Offences Act of Kenya.

## CHAPTER 4: FINDINGS AND RECOMMENDATIONS

### 4.1. Introduction

This chapter summarises the findings from the discussion in chapters 2 and 3. It will also give recommendations on the way forward in terms of Mandatory minimum sentences in Kenya. It also looks at whether a change in law as suggested in chapter one would be the most effective way to ensure that incidences of the rate of the crime of rape reduce.

### 4.2. Findings

Retribution as theory of punishment focuses on the need to punish offenders for the wrongs they have committed and ensuring that the punishment that is issued is proportional to the crime itself.<sup>159</sup> This is realised in mandatory minimums as they are meted out to those who are found guilty of the crimes that have a mandatory minimum attached to them.<sup>160</sup> The strict imposition of these sentences however does not address the issue of ensuring that offenders are discouraged from committing crime or reoffending.<sup>161</sup>

The objective of the study was to first analyse the relationship between deterrence and retribution. The link established in this thesis is, limiting retributivism, which sets out that retributive principles should be used to set upper and lower limits that judges should use so as to ensure that they met out punishments which take into account the moral blameworthiness of the criminal. In the same way the limits provided so as to encourage deterrence of crimes. With this link, mandatory minimums are able to be shown as both utilitarian and retributive punishments as they set limits on the punishment of certain crimes and are geared to ensuring offenders are deterred from committing crimes.

The second objective was to show whether the punishment for rape that has been set out in the section 3 of the Sexual Offences Act of Kenya has been effective in ensuring that the incidences of rape in Kenya are reduced. The discussion in Chapter 3 showed that the rates of the crime of rape in Kenya have not reduced significantly in recent years. At the time of the introduction of the Sexual Offences Act, there was a lot of support for tougher sentences for sexual offences. However, the continued fail of mandatory minimums has led to the realisation of a need for change in mandatory minimums sentences for sexual offences and other mandatory sentences

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<sup>159</sup> Bradley G, 'Retribution: The Central Aim of Punishment', 24.

<sup>160</sup> 'Muhlhausen D: Theories of Punishment and Mandatory Minimums' *The Heritage Foundation*, 27 May 2010, <http://www.heritage.org/testimony/theories-punishment-and-mandatory-minimum-sentences>, 20 September 2017.

<sup>161</sup> <http://www.icje.org/articles/JustDesertsandJustice.pdf>, on 2 September 2017.

for offences in Kenya. The ineffectiveness of Section 3 of the Sexual Offences Act, begs the question whether there is need for a new form of punishment to ensure that the deterrent aim of punishments is realised.

The third objective was to suggest an alternative form of punishment or suggest an alternative method of enforcing the law on sexual offences so as to ensure that the incidences of the crime of rape reduce. It is clear that the use of harsh punishments in the form of mandatory minimums, as a realisation of retributive principles has been ineffective in ensuring that the rates of crime reduce. However, the problem is not necessarily the law but the enforcement of the law itself, as the arrest and sentencing of offenders is an effective process followed by law enforcement officers and the courts. Therefore, a change in law might not be as effective as one would believe.

#### **4.3. Recommendations**

Mandatory minimums seem to be the most preferred system for punishment for crimes of a sexual nature due to their harshness. However, as seen from the discussion on the sentence of rape in Kenya, they have not been as effective in ensuring that the rates of the crime of rape reduce.

From the study the following recommendations can be made:

- 4.3.1. There is a need for public education on the Sexual Offences Act, both on the crimes and the punishments available for those who are found guilty of the crimes in the Act. When the Act was being discussed as a bill, there was a lot of emphasis on the sensitisation of women, prosecutors and MPs, so that they would understand the Act and as a way to spread awareness of the rights of, for example, women, which were protected by the Act.<sup>162</sup> There was also the simplification of the Act for those who may have not understood the Act and the preparation of manuals for prosecutors and law enforcement officers so that they would be able to understand how the law was to be implemented.<sup>163</sup> Presently these sensitisation projects can be carried out through barazas or in different groups with a certain audience, such as faith-based groups as was done when the Act was still being discussed as a bill.
- 4.3.2. Introduction of methods of keeping up with offenders even after they are released from prison. For example, the databank that is provided for section 36 of the Sexual Offences

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<sup>162</sup> Mbote P and Akech M, Kenya: The Justice Sector and the Rule of Law, 51 -52.

<sup>163</sup> Mbote P and Akech M, Kenya: The Justice Sector and the Rule of Law, 51 -52.

Act, which would contain samples of dangerous sexual offender collected for the purposes of scientific testing during the offender's trial.<sup>164</sup> The Act goes in to provide that the Minister will provide the purpose for the samples in the databank.<sup>165</sup> One use of the samples would be to keep track with the offenders once they leave jail. This is to ensure that offenders are not reoffending.

In 2007, a task force that was appointed by the Attorney general to come up with regulations and guidelines to help with the enforcement of the Sexual Offences Act, came up with the information that should be provided for in the database of offenders.<sup>166</sup> To this day the database has still not been created and therefore tracking of offenders activities relies solely on the information the personal information of offenders, which is in the system and which may be false. This is a problem as there is no way to ensure that reoffenders do not reoffend. In countries such as New Zealand, once violent and sexual offenders are released from prison, measures to ensure they do not reoffend are taken. These measures include restrictions on the activities of the offender once they are released and extended supervision to ensure that they do not commit crimes.<sup>167</sup>

- 4.3.3. The rehabilitation of sexual offenders. The aforementioned task force was also given the responsibility of coming up with rehabilitation programmes for sex offenders.<sup>168</sup> The rehabilitation of offenders is just as important as rehabilitation of victims as it helps in actually finding out the underlying reason offenders commit certain crimes. Rehabilitation may be in the form of psychiatric treatment, like in Estonia where it is a condition for temporary release or parole.<sup>169</sup> In Estonia a similar provision was made in their penal code which states that sexual offenders may be released on parole if they

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<sup>164</sup> Section 36, Sexual Offences Act.

<sup>165</sup> Section 36, Sexual Offences Act.

<sup>166</sup> Mbote P and Akech M, Kenya: The Justice Sector and the Rule of Law, 51 -52.

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[http://www.corrections.govt.nz/working\\_with\\_offenders/community\\_sentences/employment\\_and\\_support\\_programmes/release-and-management-of-sexual-offenders.html](http://www.corrections.govt.nz/working_with_offenders/community_sentences/employment_and_support_programmes/release-and-management-of-sexual-offenders.html), on 14 January 2018.

<sup>168</sup> Mbote P and Akech M, Kenya: The Justice Sector and the Rule of Law, 51 -52.

<sup>169</sup> 'Republic of Estonia: Treatment and rehabilitation of Sexual Offenders', *Ministry of Justice*, [https://www.just.ee/sites/www.just.ee/files/sekskurjategijate\\_seminar\\_eng.pdf](https://www.just.ee/sites/www.just.ee/files/sekskurjategijate_seminar_eng.pdf), on 14 January 2018.

agree to complex treatment.<sup>170</sup> Complex treatment is a mix or may be a mix of pharmacological approach and a therapeutic approach.<sup>171</sup> Estonian law goes on to provide that it may be applied to persons for a period of eighteen months or up to a maximum of three years.<sup>172</sup> The offender however must be serving a prison term of a minimum six months and a maximum of two years and must serve up to thirty days of their imprisonment term.<sup>173</sup> The treatment is important as it helps offender realize their improper thoughts and the need for intervention to ensure that they do not commit the same crimes that put them in jail again.<sup>174</sup>

#### 4.4. Conclusion

Though the mandatory minimum sentence for rape seems to be ineffective, a change in law may not produce the desired effect of reducing the rates of crime therefore, other measures as suggested in the research may be more effective in helping the sentence become effective.

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<sup>170</sup> 'Republic of Estonia: Treatment and rehabilitation of Sexual Offenders', *Ministry of Justice*, [https://www.just.ee/sites/www.just.ee/files/sekskurjategijate\\_seminar\\_eng.pdf](https://www.just.ee/sites/www.just.ee/files/sekskurjategijate_seminar_eng.pdf), on 14 January 2018.

<sup>171</sup> 'Republic of Estonia: Treatment and rehabilitation of Sexual Offenders', *Ministry of Justice*, [https://www.just.ee/sites/www.just.ee/files/sekskurjategijate\\_seminar\\_eng.pdf](https://www.just.ee/sites/www.just.ee/files/sekskurjategijate_seminar_eng.pdf), on 14 January 2018.

<sup>172</sup> 'Republic of Estonia: Treatment and rehabilitation of Sexual Offenders', *Ministry of Justice*, [https://www.just.ee/sites/www.just.ee/files/sekskurjategijate\\_seminar\\_eng.pdf](https://www.just.ee/sites/www.just.ee/files/sekskurjategijate_seminar_eng.pdf), on 14 January 2018.

<sup>173</sup> 'Republic of Estonia: Treatment and rehabilitation of Sexual Offenders', *Ministry of Justice*, [https://www.just.ee/sites/www.just.ee/files/sekskurjategijate\\_seminar\\_eng.pdf](https://www.just.ee/sites/www.just.ee/files/sekskurjategijate_seminar_eng.pdf), on 14 January 2018.

<sup>174</sup> 'Republic of Estonia: Treatment and rehabilitation of Sexual Offenders', *Ministry of Justice*, [https://www.just.ee/sites/www.just.ee/files/sekskurjategijate\\_seminar\\_eng.pdf](https://www.just.ee/sites/www.just.ee/files/sekskurjategijate_seminar_eng.pdf), on 14 January 2018.

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