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Parole in Kenya; A case for a more Comprehensive Parole Framework in Kenya

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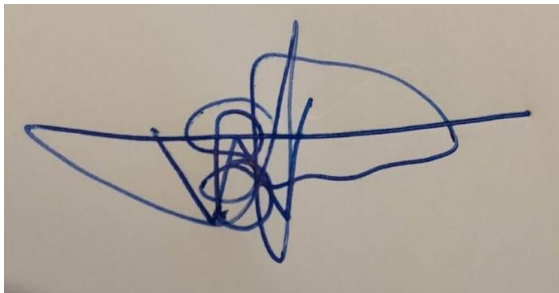
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DECLARATION

I, **BRADLEY SIMIYU WAFULA**, 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: 8 / 04 /2024

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

Signed:



Mr. Douglas Gichuki

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List of Statutes and Regulations

1. Power Of Mercy Act, Act No.21 of 2011.
2. Article 133, Constitution of Kenya 2010.
3. Kenya National Assembly Official Record (Hansard), Volume 90, 1962.
4. Penal Code of Kenya.
5. Criminal Procedure Code, Act No. 9 of 1951.
6. Probation of Offenders Act (Act No.56 of 1955).
7. Prisons Act, Act No. 49 of 1962.
8. Prison Rules, (Legal Notice No. 60 of 1963).
9. Correctional Services Act No.111 of 1998, South Africa.
10. African Charter on Human and People's Right.
11. Judiciary Sentencing Policy Guidelines.

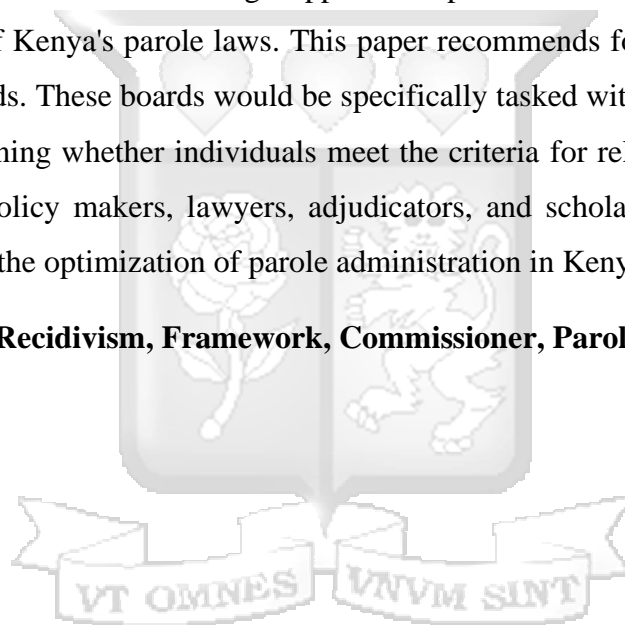
List of Cases

1. Janusz Jakub Walus v Minister of Justice and Correctional Services and Others (2022), Constitutional Court of South Africa.
2. Mohammad Giasuddin v. State of A.P(1977).
3. Satish v. State of U.P, Supreme Court of India.
4. Budhi vs State Of Rajasthan And Another, Indian High Court.

ABSTRACT

In response to the inherent challenges in fulfilling the rehabilitative aspect of sentencing within our current criminal justice system, particularly contributing to escalating recidivism rates, this research advocates for crucial reforms in the prison setup. Specifically, the study delves into a comprehensive examination and assessment of the legal, policy, and institutional framework governing parole in Kenya. The primary objective is to pinpoint potential deficiencies, inadequacies, and areas requiring improvement within the existing legal framework, in particular the Prisons Act which has mandate when it comes to matters parole. Furthermore, the research seeks to investigate the viability of conducting a comparative analysis between the parole laws of Kenya and South Africa. This comparative lens aims to discern whether leveraging insights from South Africa's legal approach to parole could contribute substantively to the enhancement of Kenya's parole laws. This paper recommends for the establishment of dedicated parole boards. These boards would be specifically tasked with hearing cases related to parole and determining whether individuals meet the criteria for release. The findings are expected to inform policy makers, lawyers, adjudicators, and scholars, contributing to the ongoing discourse on the optimization of parole administration in Kenya.

Key Words: Parole, Recidivism, Framework, Commissioner, Parole Board.



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CHAPTER 1: INTRODUCTION

1.0.BACKGROUND

Recidivism refers to the relapse of criminal behaviour that results in the re-arrest, reconviction, and/or reimprisonment of an individual.¹ The rate of reversion in Kenya is estimated to be at approximately two thirds which translates to about 67 percent of the released prisoners each year.² Kenya is ranked among the countries with a high recidivism rate which begs the question as to whether our prison system is really performing its function of rehabilitation and pre-release preparation of prisoners.³ Most ex-convicts tend to re-offend when they leave prison without the know-how of how to survive in the outside world. Research into factors behind recidivism in Chikurumbi Farm Prison in Zimbabwe led to the findings that prisoners who lack a source of livelihood often at times fail in the reintegration in the community and resort into crime as a mode of earning a living.⁴ Research conducted in the Meru Prison shows that participation in technical and vocational training has proven to be of critical importance in the preparations of the prisoners for life outside.⁵

Savannah Sims in her article shows that re-entry training and prison education can assist former criminals in effectively re-entering the community.⁶ They may entail special education, technical education, career education, adult education, and adult post-secondary education. She further posits that it is critical to prioritize pre-release programs in preparing criminals to be productive members of society.⁷

Drawing from this, there is a clear deduction that the rehabilitation programmes help the ex-offenders in reforming and therefore performs the rehabilitative function of sentencing. Data by the Ministry of Interior and coordination of National Government indicates that the current prisoners' population stands at 54,000 of whom 48% are pre-trial detainees whilst the

¹ < [Recidivism Rates by Country 2023 \(worldpopulationreview.com\)](https://www.worldpopulationreview.com)>, on 8th January 2023.

² Oruta E, 'The Role of Prison Experience on Recidivism in Kakamega County, Kenya' Public Policy and Administrative Research, 2017, 101.

³ Oruta E, 'The Role of Prison Experience on Recidivism in Kakamega County, Kenya' Public Policy and Administrative Research, 2017, 101.

⁴ Addonis A, 'Factors behind recidivism in Chikurumbi Farm Prison',103.

⁵ Wasike P, 'Research project report submitted in partial fulfilment for the requirements of award of master of arts degree in project planning and management 'published, University of Nairobi,2013, 40.

⁶ Sims S, ' [Main Factors for Effective Reintegration into Society](#)', Think Outside the sell, on 21st August 2020 < [My Blog – Think Outside The Cell](#)>, on 9th November 2023.

⁷ Sims S, ' [Main Factors for Effective Reintegration into Society](#)', Think Outside the sell, on 21st August 2020 < [My Blog – Think Outside The Cell](#)>, on 9th November 2023.

remaining ones are sentenced prisoners.⁸The official capacity of the Kenyan Prisons stands at 26,687.⁹ The current number of officers who are manning and assisting in the prisons is 22,000.¹⁰This shows then that the prisons are understaffed which leads to a problem in the supervision and administration of such a huge number of persons. In 2019 alone, the Kenyan National Treasury allocated close to 27 billion shillings of taxpayers' money to the department of correctional services.¹¹ These figures are mind-blowing considering that Kenya is already grappling with a huge foreign debt and other economic challenges.¹² That being the case the high population in our prisons have a counterproductive effect on the efficiency of the rehabilitative process as the number is quite high. The big number of prisoners leads to poor sanitary conditions in prisons and a fight for the few amenities available for the large crowd. This takes us back to the colonial era where prisons only existed to serve a punitive function and were instruments of destruction by the colonial master as opposed to the rehabilitative function that the current prison set up is to perform.¹³A study has shown that there is a strong correlation between prison experience and the increase in recidivism as inhumane conditions would hamper rehabilitation and thus leading to a surge in the number of re-incarceration of ex-offenders.¹⁴ This in turn costs the taxpayer additional expenses to the already bloated correctional services budget. Further to this the United Nations (UN) Standard Minimum Rules for Non-Custodial Sentences requests that member States ought to develop non-custodial measures withing legal systems which provide other options of punishment other than imprisonment.¹⁵

The introduction of the parole system of early release would be an appropriate solution to the high number of prisoners in facilities which has had a negative impact on capacity of the inmates to rehabilitate and change their characters before re-integration back into the community.

⁸ <[Kenya Prisons Service | State Department for Correctional Services](#)>, on 4th October 2023.

⁹ Mutai E, 'Inmates Numbers Keep Top Prison Brass Up' Business Daily, < '[Inmates numbers keep prisons top brass awake - Business Daily \(businessdailyafrica.com\)](#)'> on 10th January 2023.

¹⁰ Mutai E, 'Inmates Numbers Keep Top Prison Brass Up' Business Daily, < '[Inmates numbers keep prisons top brass awake - Business Daily \(businessdailyafrica.com\)](#)'> on 10th January 2023.

¹¹ Mutai E, 'Inmates Numbers Keep Top Prison Brass Up' Business Daily, < '[Inmates numbers keep prisons top brass awake - Business Daily \(businessdailyafrica.com\)](#)'> on 10th January 2023.

¹² < [Three claims about Kenya's billion dollar debt to China, checked- Africa Check](#)>, on 2nd January 2023.

¹³ Nyathira S, 'Assessing the effectiveness of custodial sentence in Kenya ' published , Strathmore University, Nairobi, 2018, 1.

¹⁴ Oruta E, 'The Role of Prison Experience on Recidivism in Kakamega County, Kenya' Public Policy and Administrative Research, 2017, 101.

¹⁵ A Report on Alternatives to Imprisonment and the Social Reintegration of Offenders in Kenya, November 2012, 21.

Apart from parole there are other forms of early release which are currently practised in Kenya. These are Probation, Remission and Power of Mercy. Remission is provided for under the Section 46 of the Prisons Act which provides those criminal prisoners sentenced to imprisonment for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences.¹⁶ The Power of Mercy Act governs power of mercy release which basically under section 2 means the exercise by the presidential powers in relation to the granting a free or conditional pardon to a person convicted of an offence, postponing the carrying out of a punishment, either for a specified or indefinite period and substituting a less severe form of punishment.¹⁷

Many people struggle to differentiate between parole and the probation system. Parole comes from the French word '*parol*' which means giving of one's word that they will stand true to their promise.¹⁸ This system has been credited to the man by the name Alexander Maconochie who was a superintendent in the U.S and introduced the mark system in which prisoners had to maintain good behaviour so as to earn their freedom.¹⁹ Parole helps persons to pursue rehabilitation as a goal of punishment leading to reformation as they will endeavour to do good so as to be able to get out of prison.²⁰ Iyana Kuzemeiko noted that the parole system leads to a reduction in the capacity of an ex-convict to re-offend and therefore the elimination of parole may have tragic consequences as it would increase the prison population by close to 10 percent and therefore stated that the most favourable release policy is one which the cost of incarceration equals the cost of recidivism of risks.²¹ Parole according to the Indian Court in the case of *Budhi state v. State of Rajasthan*, stated that parole has three major purposes. These are, the motivation for the offenders to mend their character and be released early, it also helps the convicts to restore the familial ties and lastly it is vital in the re-integration of the convict back into society.²²

The parole system of early release is currently not practiced in Kenya. This can be attributed to the fact that Kenya does not have a national parole board and parole regulations which

¹⁶ Section 46, *Prisons Act*, Act No. 49 of 1962.

¹⁷ Section 2, Power Of Mercy Act, Act No.21 of 2011. See Also Article 133, Constitution of Kenya 2010.

¹⁸ PeterSilia Joan, 'Parole and Prisoner Re-entry in the United States ' 26 *Crime and Justice Journal*,1999, 486-487.

¹⁹ PeterSilia Joan, 'Parole and Prisoner Re-entry in the United States ' 486-487.

²⁰ <[How Can Parole and Credit Policies Reduce Recidivism? \(prisonfellowship.org\)](http://prisonfellowship.org)>, on 10th November 2023.

²¹ Llyana K, 'How Should Prisoner be Released from Prison' 128(1) *Quarterly Journal of Economics*, 2013, 371.

²² *Budhi vs State Of Rajasthan And Another*, Indian High Court.

hinders the implementation of the parole.²³ However, there is provision for parole as per section 49 of Prisons Act limited to 3 month before the end of the sentence at the discretion of the Commissioner-General.²⁴

Probation on the other hand has its origin in the word *'probare'* which means to check or prove.²⁵ Probation differs from parole in that one is admitted into community supervision without having served jail term but in both the offender has to adhere to specific guidelines so that their conditional release is not revoked.²⁶ The Indian Supreme Court in the case of *Satish v. State of U.P* while dealing with the question of probation, observed that certainly, society deserves a peaceful life without criminals causing chaos. It noted that the reformatory theory emphasizes that achieving a civilized society requires more than punishment; it calls for fostering public harmony and mutual acceptance. Therefore, first-time offenders should be given a fair chance to reform and build a better future.²⁷

Probation has been practiced in Kenya since the year 1939 when the Patterson Commission of 1939 was established to investigate the issue of overcrowding in prisons.²⁸ It consequently recommended the use of non-custodial options. Probation sanction which is the epitome of all supervised sanctions was established in Kenya through an ordinance in 1943 although its implementation came in 1946. ²⁹The Commissioner of Prisons was given the mandate to oversee the programme, as the then the chief probation officer, given that the programme was domiciled in prison and because there were no trained probation officers in Kenya then. ³⁰ Fast-forward to 2023, there is a fully functional probation services department in the country comprising of 650 professional officers.³¹ Probation in Kenya is given the legal standing by section 4 of the Probation of Offenders Act, that gives the court power to either convict the offender and make a probation order; or without proceeding to conviction, make a probation

²³ Kenya Law Reports, < [Decisions for grant of parole to prisoners should be based on the minimum period of imprisonment that a convicted person or offender should serve before they could be considered for parole and not on the seriousness of the offense that they had committed. | Kenya Law](#)>, on 2nd January 2023.

²⁴ Section 49, *Prisons Act*, Act No.49 1962.

²⁵ Hamda A, 'Rebooting Criminals: Reformatory Theory vis-a-vis Restorative Justice' (2021) 4 International Journal of Law Management & Humanities 4(1) 1373.

²⁶ < [Parole vs Probation – What is the difference? \(thelawadvisory.com\)](#)>, on 20th January 2023.

²⁷ *Satish v. State of U.P.*, Supreme Court of India.

²⁸ < [Overview of Community Corrections Kenya E.pdf \(unafei.or.jp\)](#)>, 10th January 2023.

²⁹ < [Overview of Community Corrections Kenya E.pdf \(unafei.or.jp\)](#)>, 10th January 2023.

³⁰ < [Overview of Community Corrections Kenya E.pdf \(unafei.or.jp\)](#)>, 10th January 2023.

³¹ < [Probation services functions in Kenya help reduce congestion — Africa Criminal Justice Reform \(ACJR\)](#)>, on 23rd December 2022.

order.³² Based on the overcrowding situation in our prison facilities at the moment parole will be instrumental in reducing the prison population as the main target are convicted persons.

1.1.STATEMENT OF PROBLEM

The current prison set up fails to meet the rehabilitative aspect of sentencing and thus this study aims to examine whether the legislature should enact new laws which provide for the modern 'parole system'.

The prison system in Kenya faces a major challenge as it has surpassed its maximum holding capacity, resulting from a significant rise in inmate population. This overcapacity hinders the system's ability to effectively achieve the rehabilitative aspect that sentencing is supposed to serve. Addressing this issue requires a thoughtful approach to alleviate prison congestion while aligning with the objectives of the criminal justice system. There is a pressing demand for a comprehensive legal framework on parole which meet the evolving needs of society, as the existing parole provision, Section 49 of the Prisons Act, is deemed inadequate, and outdated considering the prevailing societal dynamics. This is given the fact that for modern systems of parole there is more that goes into the systems such as the time factor, risk evaluation mechanism and supervision which will be shown in the paper.

1.2.RESEARCH QUESTIONS

1. What are the existing legal, policy, and institutional framework of parole in Kenya?
2. Are the existing frameworks on parole in Kenya adequate (if any)?
3. Is conducting a comparative analysis on the applicable law on parole in South Africa for the enactment of laws in Kenya sufficient to come up with comprehensive laws on Parole?

1.3.RESEARCH OBJECTIVES

1. To examine the existing legal, policy, and institutional framework of parole in Kenya.
2. To examine whether the existing frameworks of parole in Kenya are adequate (if any).
3. To investigate whether conducting a comparative analysis on the applicable laws on parole in South Africa for the enactment of similar laws in Kenya would be sufficient to come up with comprehensive laws on parole.

³² Section 4, Probation of Offenders Act (Act No.56 of 1955).

1.4.HYPOTHESIS

The current criminal justice system is inefficient due to the aspect that it fails to fulfil the rehabilitative aspect of punishment. This is because prison facilities are currently beyond the maximum capacity that they can hold and thus the inmates do not have an enabling environment to help in reforming. The enactment of new laws relating to parole, would help in decreasing the population levels in prisons and thus providing for a conducive environment for the offenders to reform their characters. This would ultimately lead to safer communities, lower crime rates, and a more effective criminal justice system.

1.5.JUSTIFICATION

The study will carry out intensive research into the Kenyan laws relating to correctional facilities proposing the enactment of new laws encompassing the parole system of early release in the current legal framework. This, according to the study, would provide for a more nuanced approach to punishment of offenders leaning more towards rehabilitative aspect of sentencing. The study would mostly be impactful on the current prisoners as they are the target of the reform. It will also serve as a baseline for the parliamentarians when drafting the proposed new legislation. Adjudicators will also benefit from the study in so far as it would guide them when making sentences, to provide for minimum sentences a prisoner would serve before eligibility for parole. Lastly, the study is beneficial to the society at large as it would educate the masses on the why there is need for the parole system and how it would be impactful in reducing the prisoner congestion leading to a more efficient rehabilitative system.

1.6.THEORETICAL FRAMEWORK

1.7.1 Reformatory Theory of Punishment

The study is premised on the reformatory theory of punishment. According to this theory, the object of punishment is to reform the offender. The theory aims at rebuilding the character of the individual making him less susceptible to indulging in criminal activities.³³It focuses on reforming the criminals and bringing them back to society as good and law-abiding citizens. This is based on the Gandhian principle: ‘hate the sin, not the sinner.’³⁴It achieves this through the strategy of individualisation.³⁵Unlike other theories such as deterrent theory of punishment, this theory looks at the offender rather than the victim of the crime and is centred in ensuring

³³ Malik A, ‘Theories Of Punishment In The Ethics Of Philosophy’, Scholarly Research Journal For Humanity Science and Language 1(6),2014, 904.

³⁴ <[Reformatory theory of punishment - iPleaders](#)>, on 24th January 2023.

³⁵ Chinda S, ‘Reformatory Theory of Punishment: Analyzing the Status in India’, International Journal of Law Management & Humanities, 4, 2021, 1114-1115.

that the convict upon serving his custodial sentence, will be reintegrated back into the society. It places a lot of emphasis on the offender rather than the magnitude of the crime.³⁶ The theory looks at crime as a disease which should be treated with medicine rather than imposing punitive measures on the individual.³⁷ It thus proposes that criminals ought to be treated like patients suffering from a disease as it is not to their liking that they indulge in criminal behaviours.³⁸ The reformatory theory came as a result of failure of the deterrent, retributive and preventive theories.³⁹ The parole mode of punishment has been accepted as a modern technique of reforming prisoners.⁴⁰ The court in the Indian case, *Mohammad Giasuddin v. State of A.P(1977)* stated that cruel and vicious punishment is a relic of the past and a regressive practice. Modern humans recognise punishment as a procedure of restructuring an individual who has effectively turned to criminal activity, and the present society has a major stake in the rehabilitation of the offender as a means of social defence.⁴¹ This is the basis upon which the reformatory theory has been laid, the changing circumstances in the current society call for a reformatory approach to punishment rather than punitive which was used mostly by our colonial masters. Punishment in the modern days looks mostly at the offender rather than the victim of the crime.

Critiques of this theory have argued that if the theory is applied to criminals, the prison will no longer remain as a prison rather become a dwelling house.⁴² Secondly, the theory only works best for the non-habitual offenders and thus hardcore criminals that are perpetual offenders would render the theory useless in that instance.⁴³ Lastly is that when the punishment is a death sentence, the reformatory theory is rendered inapplicable. This is because only life, not death, can reform the offender. As a result, death sentences are opposed to the reformatory aspect of the penal system.⁴⁴

This theory helps the study in that it captures the rehabilitative aspect that punishment ought to serve, which is to reform an offender's character. It recognizes the fact that punitive measures alone are not always effective in reducing recidivism rates. The parole system, which allows

³⁶ Priya T, 'Reformatory Theory of Punishment' *Academike*, September 2nd 2014, < [Reformatory Theory of Punishment - Academike \(lawctopus.com\)](#)>, on 23rd January 2023.

³⁷ Shreya A, 'Innovative Forms of Punishment', *Jus Corpus Law Journal*, 1(3), March 2021, 390.

³⁸ Rai N, 'Theories of Punishment with Special Focus on Reformatory Theory', 4.

³⁹ Rai N, 'Theories of Punishment with Special Focus on Reformatory Theory', 4.

⁴⁰ Priya T, 'Reformatory Theory of Punishment' *Academike*, September 2nd 2014, < [Reformatory Theory of Punishment - Academike \(lawctopus.com\)](#)>, on 23rd January 2023.

⁴¹ *Mohammad Giasuddin v. State of A.P(1977)*.

⁴² <[Reformatory theory of punishment - iPleaders](#)>, on 24th January 2023.

⁴³ Chinda S, 'Reformatory Theory of Punishment: Analysing the Status in India', 1114.

⁴⁴ <[Reformatory theory of punishment - iPleaders](#)>, on 24th January 2023.

offenders to serve a portion of their sentence in the community under supervision, provides an opportunity for offenders to receive rehabilitation and support services while also holding them accountable for their wrongs. The community is also a crucial player when it come to parole system of early release as they are instrumental in the re-integration bit of the prisoner while serving their non-custodial sentence and under supervision. This is a wholesome approach as regards the criminal justice system as it will ensure that not only do the prisoner's change their ways to be eligible to parole but also ensures that after the custodial sentence there is supervision which keeps the prisoners away from engaging in crime.

1.7. LITERATURE REVIEW

Up until now, research concerning early forms of release has mainly centred around probation. This involves proposing for treatment and rehabilitation programmes to help substance abuse offenders under probation⁴⁵, gauging the effectiveness of probation orders in the criminal justice system⁴⁶, evaluating victim involvement in the probation process⁴⁷, and examining the concept and practice of probation.⁴⁸ Although parole is not currently practiced in Kenya, the commissioner of prisons can choose to release a prisoner who has served four or more years within three months of their due date as per section 49 of the Prisons Act.⁴⁹ However, this type of parole does not include any monitoring or supervision after the release date. Therefore, my study's unique contribution lies in its comprehensive scope and argument that new laws need to be established to incorporate a comprehensive parole system for a more efficient criminal justice system.

1.7.1. Examining the existing legal, policy, and institutional framework of parole in Kenya.

Not much has been written in relation to examining of the laws and frameworks that generally are in place to govern parole as an early system of release. There is however research that has touched on areas surrounding parole.

John Onyango for example, has done an analysis of Probation Service Order and Its Application in Kenya.⁵⁰In his article he explores the historical genesis of the probation service

⁴⁵ See for example: Njore S, 'Substance Use and Abuse among Offenders under Probation Supervision in Limuru Probation Station, Kenya' *Journal Of Humanities And Social Science*,20(2),2015,73.

⁴⁶ See for example: Chacha J, 'Effectiveness Of Probation And Community Service Order Sentencing On Offenders: A Case Study Of Nairobi County' published, University of Nairobi, Nairobi, 2019, 10-11.

⁴⁷See for example: < [Overview of Community Corrections Kenya E.pdf \(unafei.or.jp\)](#)>, on 23rd January 2023.

⁴⁸ See for example: Wanjiku M, 'The Interaction Of Crime Victims With Probation Services: The Case Of Three Selected Probation Stations In Nairobi, Kenya' published, University of Nairobi, Nairobi, 2015, 17.

⁴⁹ Section 49, *Prisons Act*, Act No. 49 of 1962.

⁵⁰ Omboto O, 'Analysis of Probation Service Order and Its Application in Kenya', *Open Journal of Social Sciences*, 10(4), 2022, 1.

as a punitive measure, outlining the prerequisites for convicts to qualify for probation and delving into the advantages associated with this mode of punishment.⁵¹ Additionally, he has addressed the various methodologies employed in the rehabilitation of offenders, tracing the historical evolution of the probation service within the context of Kenya.⁵² This being one of the latest research projects on early forms of release it has not dealt with the current societal trends which needs a nuanced approach to early release. This paper will be unique in that it identifies the current loopholes in the parole laws and proposes a framework practical enough to suit our Kenyan context.

Salome Kagendo in her thesis has also investigated the factors which perpetuate recidivism among the ex-convicts. She narrowed down to the stigma the face in the community, and economic and financial hurdles which they may face thus resorting to crime.⁵³ Her article came to the deduction that long-term sentences have an effect of lessening the rate of recidivism as data which she gathered by way of questionnaires.⁵⁴ These findings will be the basis of the discussion into the modern laws of parole that the paper proposes due to the fact that the system proposed will have a cocktail of custodial and non-custodial sentence which is supervised and thereby impacting most of the long-term sentences.

Matjaz Ambroz and Katja Sugman Stubbs have done an extensive analysis of the Slovenian legal framework relating to release on parole. They argue that the Slovenian parole system, which has remained practically unchanged since the 1950s, needs certain improvements, especially regarding procedural safeguards in the decision-making process.⁵⁵ Their article is of the proposition that the decision in relation to whether or not to grant parole remains an administrative procedure which should not be the case as it does not have possibility of appeal on the decision.⁵⁶ Just like Slovenia, Kenya also needs a reform in the parole laws which have become outdated and impractical in the current world and thus would need an ultimate reconstruction so as to fit our unique circumstances.

⁵¹ Omboto O, 'Analysis of Probation Service Order and Its Application in Kenya', 1.

⁵² Omboto O, 'Analysis of Probation Service Order and Its Application in Kenya', 1.

⁵³ Kagendo S, 'Factors Precipitating Recidivistic Behaviours Among The ^Kenyan Prisoners: A Sociological Interpretation', University of Nairobi, Nairobi Town, 2003, 10-11.

⁵⁴ Kagendo S, 'Factors Precipitating Recidivistic Behaviours Among The ^Kenyan Prisoners: A Sociological Interpretation', University of Nairobi, Nairobi Town, 2003, 89.

⁵⁵ Matjaz A, Katja S, 'Conditional Release (Parole) in Slovenia: Problems and Possible Solutions', Prison Journal 91(4), 2011, 467-468

⁵⁶ Matjaz A, Katja S, 'Conditional Release (Parole) in Slovenia: Problems and Possible Solutions', 467-468.

Through their article they have suggested the middle way- which is combining a discretionary system for long sentences and mandatory release system for shorter sentences.⁵⁷They further argued for a judicialization of decision making in parole matters. This could be implemented by introducing specialized judges for matters of execution of penal sentences.⁵⁸

Anika Ades has also examined parole as an early form of release in the international criminal Law perspective. She argues that victims' groups and experts in international criminal law have been vocal opponents of early release practices, especially when early release is granted without consulting survivors.⁵⁹

She further raised a fundamental question on the suitability of extending domestic criminal law to the international realm, particularly in the context of rehabilitation and early release.⁶⁰ Her concern stems from the perceived inadequacies of domestic procedures in effectively addressing the reconciliatory, educational, and symbolic objectives inherent in international criminal law.⁶¹

Further to this, Arie Freiberg has also done an analysis of the Australian Parole system and extensively reviewed the new laws that were put in place by the legislature due to increasing recidivism.⁶²It argues that legislatures, purportedly reflecting public opinion or community views, have become less willing to trust either the courts or parole boards and have gradually, but consistently, eroded the latter's authority, powers, and discretion. It also argues that victims' interests have been not only recognised - generally appropriately - but, in some circumstances, elevated to the extent that they conflict significantly and adversely with those of offenders.⁶³ This just shows the need to have a system of parole that is wholesome, which also considers the victim of the crime when considering early release of prisoners.

⁵⁷ Matjaz A, Katja S, 'Conditional Release (Parole) in Slovenia: Problems and Possible Solutions', 481-482.

⁵⁸ Matjaz A, Katja S, 'Conditional Release (Parole) in Slovenia: Problems and Possible Solutions', 481-482.

⁵⁹ Anika A, 'Unconditional Injustices: Victim Participation and Early Release in International Criminal Law', *New York University Journal of International Law and Politics*, 52(2), 2020, 596-597.

⁶⁰ Anika A, 'Unconditional Injustices: Victim Participation and Early Release in International Criminal Law', 640.

⁶¹ Anika A, 'Unconditional Injustices: Victim Participation and Early Release in International Criminal Law', 640.

⁶² Arie Freiberg; 'Parole, Politics and Penal Policy', *QUT Law Review*, 18(1), 2018, 192-193.

⁶³ Arie Freiberg; 'Parole, Politics and Penal Policy', 192-193.

1.7.2. Examine whether the existing legal, institutional and policy frameworks of parole in Kenya are adequate.

Edward Rhine and Joan Petersilia, in their article, 'The Future of Parole Release' have tried to come up with a nuanced approach to the institutional mechanism related to parole. They argue that systems of discretionary prison release need improvement, if not reinvention. This would entail addressing the institutional structure of parole boards, how much release discretion they are given, the substantive grounds for release decisions, the use of risk assessments in the decisional process, and the need for parole supervision in some but not all cases.⁶⁴ A key point to note in their critique is the institutional structure of the parole boards in U.S.A which have few formal credentials for persons required for appointment to the parole board, whether educational or experience-based.⁶⁵

Another Key Proposal they make is Selective Use of Supervision. They argue that a period of parole or post-release supervision should be required for many, but not all, individuals leaving prison.⁶⁶ Further to this is that supervision should be reserved mainly for those who present higher risks of reoffending and those incarcerated for serious, violent, or predatory sexual crimes, regardless of risk level.⁶⁷ This paper however tends to disagree with this proposition, although its commendable, it bits the very essence that parole is meant to serve as one can argue the element of discrimination. What criteria is used to arrive at the conclusion that violent and sexual offenders stand a high chance of re-offending?

Grier Thomas examined the need for due process protection to prisoners as they have legitimate expectation of conditional release. The author further rejected the aspect of right-privilege distinction when it comes to parole and proseed for judicial review on the arbitrary decisions made by parole boards.⁶⁸ To justify their argument the paper proceeds to examine the decision of the court in *Childs v. United States Board of Parole* which applied a similar rationale. The court stated that the nature of the interest of the parolee facing revocation and that of the parole applicant in the light of the ultimate effect of the Parole Board's determination, it appeared obvious that the difference is not enough to exclude the applicant from due process protections. This is so simply because the stakes are the same, incarceration or conditional freedom.⁶⁹ From

⁶⁴ Edward Rhine; Joan Petersilia, 'The Future of Parole Release', Crime and Justice: A Review of Research, 2017, 279.

⁶⁵ Edward Rhine et al, 'The Future of Parole Release', 286.

⁶⁶ Edward Rhine et al, 'The Future of Parole Release',319.

⁶⁷ Edward Rhine et al, 'The Future of Parole Release',319.

⁶⁸ Grier T, 'Judicial Review of Parole Release Decision-making', Iustia, 4(1), 1976, 6.

⁶⁹ Grier T, 'Judicial Review of Parole Release Decision-making', 7.

this therefore a parolee has a right to judicial review of a parole board's decision. This proposition just emphasizes on the need for a more comprehensive parole framework because currently the Commissioner-General of Prisons has the ultimate say on release of prisoners on parole and this is not subject to review.

Timothy Lydon in his paper critiques the two-part test established by the Supreme Court in the 1998 case *County of Sacramento v. Lewis*. This is in relation to the erroneous release of prisoners by a parole board.⁷⁰The first prong of the test requires a determination of whether the executive agency action 'shocks the conscience'. If a court holds that the action was conscience-shocking, it should then, under the second prong of the test, determine whether the right at issue is deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed.⁷¹

The author argues that the test does not consider the interests of erroneously released prisoners, which renders them vulnerable to government oppression and abuse.⁷² He proposes that courts must protect such individuals from an unreasonable and destructive usurpation of individual liberty.⁷³

1.8.CONTRIBUTION

My study will be unique in so far as it proposes the amendment of section 49 of the prisons Act so as to provide for a more detailed and comprehensive parole framework which takes into account the needs of the modern criminal justice system.⁷⁴ This would be a step towards a better punishment system which not only takes into account the custodial sentence of a convict while in prison but also serves the rehabilitative aspect of punishment as it prepares the prisoner for life after the custodial sentence and has a supervision mechanism of ensuring an offender does not fall back into the criminal past.

⁷⁰ Timothy P. Lydon, 'If the Parole Board Blunders, Does the Fourteenth Amendment Set the Prisoner Free - Balancing the Liberty Interests of Erroneously Released Prisoners', *Georgetown Law Journal* 88(3), 2000, 575-576.

⁷¹ Timothy P, 'If the Parole Board Blunders, Does the Fourteenth Amendment Set the Prisoner Free - Balancing the Liberty Interests of Erroneously Released Prisoners', 575-576

⁷² Timothy P, 'If the Parole Board Blunders, Does the Fourteenth Amendment Set the Prisoner Free - Balancing the Liberty Interests of Erroneously Released Prisoners', 603.

⁷³ Timothy P, 'If the Parole Board Blunders, Does the Fourteenth Amendment Set the Prisoner Free - Balancing the Liberty Interests of Erroneously Released Prisoners', 603.

⁷⁴ Section 49, Prisons Act.

1.9.METHODOLOGY

The proposed research methodology for this study involves two major parts. The first will entail a doctrinal analysis. It will focus on investigating the role and effectiveness of early forms of release within the Kenyan criminal justice system. This will be achieved through in-depth analysis of secondary sources such as books, articles, case law, and reports. In addition, primary sources such as Acts of Parliament will also be relied upon to provide a comprehensive understanding of the legal framework surrounding early forms of release.

To establish the potential risks associated with granting parole, the study will also analyse various court decisions and academic articles. It will do so by highlighting the potential threats to public safety that may arise from the early release of offenders and provide insights into the ways in which these risks can be mitigated.

The second part of the study will be a comparative analysis of the parole systems in Kenya and South Africa. Given that both jurisdictions have transformative constitutions and share similarities in their legal, social and cultural frameworks, this analysis will be particularly insightful in assessing the feasibility of adopting parole in Kenya. The analysis will also involve a doctrinal review of the laws governing parole in South Africa, as well as an examination of relevant case laws to provide a nuanced understanding of how the system operates in South Africa. This will enable Kenya to draw valuable insights from South Africa that can be adopted to help in the success of adoption of parole in our legal framework.

1.10. LIMITATIONS OF THE STUDY

Some of the limitations which were encountered during the process include:

- i. The amount of literature and laws relating to the topic in Kenya was scarce.
- ii. The access to some of the data in relation to research proved challenging.
- iii. This being research based solely on desk research, it may lack the physical aspect.

1.11. CHAPTER BREAKDOWN

Chapter 1 will serve as an introduction to the paper. This chapter will provide an in-depth overview of the background to the study, it will then identify the problem and provide a detailed justification for the research, it will also lay the theoretical framework in which to view the paper, additionally, the study will conduct a literature review of the topic and give the methodology which will be applied in the paper.

Chapter 2 will conduct a comprehensive investigation into the existing legal, policy, regulatory and institutional framework of parole in Kenya.

Chapter 3 will shift focus to examine whether the existing frameworks on parole in Kenya are adequate.

In Chapter 4, a comparative analysis with South Africa will be conducted, highlighting the successes and challenges in early release program in which Kenya can draw valuable insights into the best practices that can be adopted into our local legal framework.

Finally, Chapter 5 will offer a set of recommendations and conclusions based on the findings presented in the previous chapters. These recommendations will be grounded in empirical evidence and will provide practical solutions for policymakers, and adjudicators.



CHAPTER 2: AN ANALYSIS OF THE EXISTING LEGAL, POLICY, AND INSTITUTIONAL FRAMEWORK OF PAROLE IN KENYA

INTRODUCTION

In this chapter, this study embarks on a comprehensive exploration of the existing legal, policy, and institutional framework that shapes the parole system in Kenya. Through a detailed analysis, we aim to unravel the intricacies of the current landscape governing parole, delving into the established laws, policies, and institutional structures that collectively define the parameters of early release within the Kenyan criminal justice system. This examination seeks by the end to have provided a thorough understanding of the evolving framework, shedding light on the complexities and implications of the parole system in its present state.

Legislation and Statutory Provisions

Constitution of Kenya 2010

The Kenyan Constitution stands as a transformative legal document, distinguished by its extensive bill of rights outlined in Chapter 4.⁷⁵ According to a communique from the International Court of Justice (I.C.J.), the Constitution of Kenya 2010 emerged from a protracted and collaborative process, yielding a consensus document.⁷⁶ This document aimed to rectify historical injustices, tackle abuses of power, and address long-standing societal issues such as economic and political marginalization prevalent in Kenya's political history. The I.C.J. communique underscores that the constitutional philosophy of transformative constitutionalism encapsulates the essence of Kenya's Constitution, embodying the collective aspirations of the Kenyan people.⁷⁷

Many scholars have had challenges in defining this concept wholly but Karl Klare in his famous article, *Legal Culture and Transformative Constitutionalism*, defines it as a means of achieving social and political change through means that are grounded in the law and are not violent by nature.⁷⁸ This definition has also been adopted by other scholars in this field of transformative constitutionalism as the above article leads discussions on this aspect. In most of the countries which gained their independence after world war II developed new constitutions to cater for

⁷⁵ Cornelia G, 'Kenya's New Constitution: a Transforming Document or Less than Meets the Eye?', *Law and Politics in Africa, Asia, and Latin America*, 2011, 44(1), 2011, 60-62.

⁷⁶ Communique On Transformative Constitutionalism Under Kenya's Constitution: 'Have We Achieved The Transformation Sought By The Kenyan People?', July 2020, 1-3.

⁷⁷ Communique On Transformative Constitutionalism Under Kenya's Constitution: 'Have We Achieved The Transformation Sought By The Kenyan People?', July 2020, 1-3.

⁷⁸ Klare K, 'Legal culture and transformative constitutionalism' 14(1) *South African Journal on Human Rights*, 1998, 1

the needs of their countrymen and had to fit it the local circumstances. As opposed to the to the classical or liberal constitutions which are prevalent in most of the European countries, transformative, constitutions are unique to most of the African countries. But this proposition has arguably been challenged by various scholar including, Michaela Hailbronner, citing Germany as one of the countries that is not in the global south and has been able to establish a transformative constitution which has been very successful and should be used as an example in African states.⁷⁹ In African countries which have adopted this transformative constitution such as Kenya and South Africa, we have seen a lot of activism from the courts as a way by which to achieve this transformation.

Under the bill of rights, Article 51 of the Constitution of Kenya provides that a person who is detained, held in custody, or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody, or imprisoned.

Article 51 of the Kenyan Constitution ensures that individuals who are detained, held in custody, or imprisoned maintain all the rights and fundamental freedoms outlined in the Bill of Rights.⁸⁰ This guarantee emphasizes the commitment to upholding human rights even during periods of confinement. The provision, however, includes an exception, stating that certain rights may be limited if incompatible with the fact of detention, with the condition that such limitations are justified and clearly necessary. This balanced approach seeks to protect prisoner' rights while recognizing the practical constraints that may arise due to the circumstances of detention as envisioned by article 24.⁸¹

Therefore, the Article 51 framework becomes a crucial reference point for the justification of parole system of early release, emphasizing the protection of detainees' rights and necessitating a careful consideration of any restrictions imposed during the parole process.

This connection reinforces the constitutional commitment to maintaining a delicate balance between the rights of individuals seeking early release and the broader objectives of the criminal justice system.

⁷⁹ Hail Bronner M, 'Transformative Constitutionalism: Not Only in the Global South' 4(3) *America Journal of Comparative Law*, 2017, 528.

⁸⁰ Article 51, Constitution of Kenya 2010.

⁸¹ Article 24 Constitution of Kenya 2010.

Article 2(6) of the Constitution states that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.⁸² This just creates the emphasis on the fact that treaties such as African Charter on Human and People's rights is binding upon Kenya. It places emphasis under article 5 that every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.⁸³ From this one can deduce the aspect that prisoners also ought not be treated in a degrading manner as it will be a violation of the charter and thus this calls for the need to improve the conditions within prisons to facilitate the rehabilitative aspect of sentencing.

In the year 2021 we made a country statement at the fourteenth united nations congress on crime prevention and criminal justice, Kenya stated that it aligns itself with and is guided by the provisions of Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) this is as per article 2(6) of the Constitution. Being a signatory of the international instrument, they vowed to improve living conditions of prisons through a decongestion exercise that was to take place in 2021.⁸⁴

The Hansard-12th December 1962

The Hansard is a primary document that keeps the records of the proceedings that take place in parliament, and this is documented in a booklet. In Kenya it has official records of the proceedings of the Legislative Council of the Colony and Protectorate of Kenya, the House of Representatives of the Government of Kenya, and the National Assembly of the Republic of Kenya.⁸⁵ Of relevance is the Hansard dated 16th October 1962 to 20th December 1962. This contains the proceedings which are the cracks of the discussions which were the foundation of the prison's bill which later came to be known as the Prisons act CAP 90.

The bill was introduced to the house by Mr. Mate the then Minister for Social services.⁸⁶ He drew the attention of the house particularly to clause 49 of the Bill which according to him was a valuable innovation which was to give the prisoner a glimpse of the outside world.⁸⁷ It was limited to only 3 months before release of a long-term prisoner. The envisaged benefits were

⁸² Article 2(6), Constitution of Kenya 2010.

⁸³ Article 5, African Charter on Human and People's Right.

⁸⁴ Country Statement Of The Republic Of Kenya At The Fourteenth United Nations Congress On Crime Prevention And Criminal Justice, 6th To 12th March 2021, Kyoto, Japan.

⁸⁵ Kenya National Assembly Official Record (Hansard), Volume 90, 1962, 482.

⁸⁶ Kenya National Assembly Official Record (Hansard), Volume 90, 1962, 486.

⁸⁷ Kenya National Assembly Official Record (Hansard), Volume 90, 1962, 486.

two-fold: firstly, to facilitate the prisoner's preparedness for seeking employment, and secondly, to ease the process of reintegrating into the community upon actual release. It placed upon the commissioner the sole responsibility of releasing the said prisoner due to deal with the release due to experience learnt from other territories which were successful in the practice.⁸⁸

While acknowledging the commendable effort of the Minister during that period, it is evident that the mentioned clause has become outdated. Therefore, there is a pressing need for a contemporary and more inclusive parole law.

For example, the three-month timeframe before release may be seen as arbitrary and may not cater to the diverse needs of individual prisoners. A modern system of parole takes into factors such as the nature and gravity of the offense, and the progress of rehabilitation. Therefore, in way it is tailored to meet the specific needs of each prisoner.

The Prisons Act

This is an act of parliament which was enacted to consolidate and amend the law relating to prisons; to provide for youth corrective training centres, extra mural penal employment; to provide for the organisation, discipline, powers, and duties of prison officers; and for matters incidental thereto and connected therewith.⁸⁹

Section 49(1) of the Prisons Act that provides that within three months of the date upon which a prisoner serving a sentence of or exceeding four years is due for release, the Commissioner may allow such prisoner to be absent from prison on parole for such length of time and upon such conditions as the Commissioner may specify.⁹⁰

It serves as the primary legislation overseeing the parole administration in Kenya, conferring authority upon the Commissioner General of Prisons for its implementation. This law will be the central framework guiding our discussion on the practical aspects of parole in Kenya. The paper will assess the adequacy of this act in relation to parole aiming to bring out current gaps in the legislations that need improvement such as the victim participation, checks and balances, standardized risk evaluation and the time one is said to be eligible for parole as essential for a more comprehensive parole framework.

⁸⁸ Kenya National Assembly Official Record (Hansard), Volume 90, 1962, 486.

⁸⁹ Long Title, *Prisons Act*, Act No. 49 1962.

⁹⁰ Section 49, *Prisons Act*, Act No.49 1962.

Prison Rules, 1963

This is a subsidiary legislation that provides for the manner in which the prison service will conduct its business and outlines how to go about the day-to-day activities of the prison.

Rule 100 provides that where the Commissioner allows a prisoner to be absent from prison on parole, he shall issue to the prisoner on parole licence in Form 3 in the Second Schedule to these Rules.⁹¹ These rules carry significance as they lay the groundwork for the proposed comprehensive parole system, essentially serving as the foundational framework for its structure.

Criminal Procedure Code

This is an act of Parliament that was enacted to make provision for the procedure to be followed in criminal cases. Section 343 provides that if an individual, previously convicted of a crime punishable by a prison term of three years or more, is subsequently found guilty of an offense with a comparable imprisonment term or an offense under section 345, the court holds the authority, during the sentencing for imprisonment, to additionally direct that the person be placed under police supervision in accordance with section 344. This supervision may extend for a period not surpassing five years from the individual's release from prison.⁹²

Further, Section 344 lays out expectations for individuals under police oversight. These encompass the need to live within a specified area, secure written consent from officer in charge in case of any change in residence, obtain consent before leaving the designated area, stay in regular communication with the overseeing police officer regarding living arrangements, and promptly comply with requests made by the authorized police officer.⁹³ These requirements establish an important link with the very essence of parole, as it emphasizes on common life after support systems, community reintegration, and rehabilitation for individuals with past criminal involvement. Both parole and police supervision seek to find a delicate equilibrium between fostering rehabilitation and ensuring public safety, underscoring the importance of responsibility and adherence to defined conditions as individuals transition back into society. The only difference is that parole encompasses both custodial and non-custodial sentence as one is eligible for release after several years served.

⁹¹ Rule 100, Prison Rules, (Legal Notice No. 60 of 1963).

⁹² Section 343, Criminal Procedure Code, Act No. 9 of 1951.

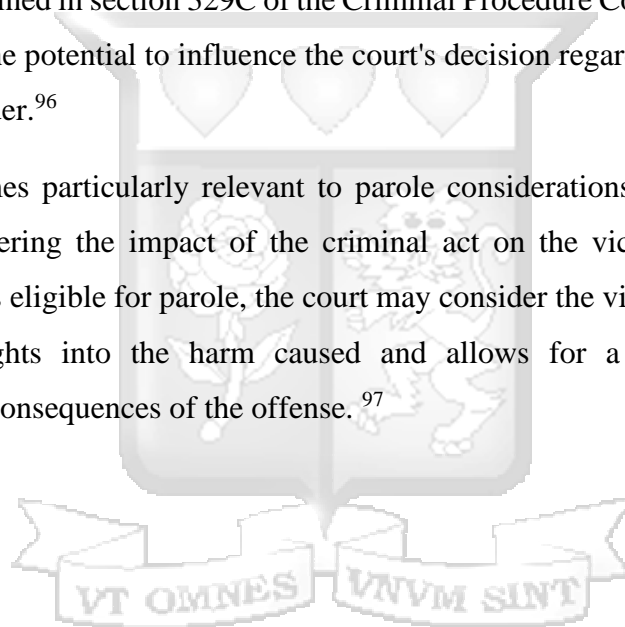
⁹³ Section 344, Criminal Procedure Code, Act No. 9 of 1951.

Victim Protection Act

This act was enacted to give effect to the principles articulated in Article 50 (9) of the Constitution.⁹⁴ Its core purpose is to safeguard individuals who have experienced crime and abuses of power, ensuring they receive improved information and support services. The act also aims to establish mechanisms for reparations and compensation for victims. Notably, it places a particular emphasis on offering special protection to those who are especially vulnerable in the aftermath of such incidents, demonstrating a commitment to holistic and humane justice.⁹⁵

Section 12 of the legislation additionally stipulates that an individual who has fallen victim to a criminal offense can present a victim impact statement during the sentencing proceedings, as per the guidelines outlined in section 329C of the Criminal Procedure Code (Cap. 75). Notably, this statement holds the potential to influence the court's decision regarding the sentence to be imposed on the offender.⁹⁶

This provision becomes particularly relevant to parole considerations as it underscores the importance of considering the impact of the criminal act on the victim. When evaluating whether an offender is eligible for parole, the court may consider the victim impact statement, which provides insights into the harm caused and allows for a more comprehensive understanding of the consequences of the offense.⁹⁷



⁹⁴ Article 50(9) Constitution of Kenya 2010.

⁹⁵ Long Title, Victim Protection Act, Act No.17 Of 2014.

⁹⁶ Section 12, Victim Protection Act, Act No.17 Of 2014.

⁹⁷ Section 12, Victim Protection Act, Act No.17 Of 2014.

2.2. Policy Landscape

2.2.1. Judiciary Sentencing Guidelines

This Policy Guideline was established through a gazette Notice dated 26th April 2016⁹⁸ These Sentencing Guidelines were established aiming at guiding judicial officers, in the application and interpretation of laws that govern sentencing.

They seek to establish a structured framework that enables courts to exercise their sentencing discretion with objectivity, impartiality, accountability, and transparency. The overarching goal is to foster consistency and uniformity in the sentences handed down by the courts. By adhering to these guidelines, the intention is to not only improve the administration of justice but also to bolster public confidence in the Judiciary.⁹⁹

Policy suggests that a custodial sentence should only be considered when non-custodial options fall short in achieving the objectives of sentencing¹⁰⁰. It underscores the need to be mindful of high recidivism rates associated with imprisonment and advocates for sentences that focus on steering offenders away from criminal behaviour.¹⁰¹ However, it may be argued that the emphasis on avoiding custodial sentences for petty offenders overlooks potential deterrent effects and fails to address cases where non-custodial measures may not be sufficient to protect society or rehabilitate the offender effectively.

Additionally, the policy outlines criteria for evaluating whether a custodial or non-custodial sentence is appropriate. It considers the seriousness of the offense, the offender's criminal history, circumstances involving juvenile offenders, the character of the offender, and the safeguarding of the community.¹⁰²

While the policy attempts to provide a structured approach to the custodial versus non-custodial sentencing decision, some aspects might warrant scrutiny. Firstly, the emphasis on the gravity of the offense and the criminal history of the offender could potentially lead to punitive measures, neglecting the potential for rehabilitation. Also, in relation to character, it has not outlined the standard which a character of a potential convict may be determined. The paper commends the policy guidelines but nevertheless notes that a with a comprehensive system of parole some of these challenging scenarios may be cured.

⁹⁸ Legal Notice No.2970.

⁹⁹ Para 2.1. Judiciary Sentencing Policy Guidelines.

¹⁰⁰ Para. 7.18 Judiciary Sentencing Policy Guidelines.

¹⁰¹ Para 7.19 Judiciary Sentencing Policy Guidelines.

¹⁰² Paragraph 7.19 Judiciary Sentencing Policy Guidelines.

2.3. Institutional Infrastructure

2.3.1. Office Of Commissioner General-Prisons

The establishment of this office is mandated by Section 5 of the Prisons Act, a provision that entrusts the Commissioner with the administration of the Kenya Prisons Service. According to the Act, the Commissioner holds the authority for the control and supervision of all prisoners, subject to the Minister's directives.¹⁰³

Adding to this, Section 49 of the Act grants the commissioner the authority concerning the release of prisoners on parole.¹⁰⁴ This setup presents a noteworthy challenge. The concentration of parole-release powers in a singular individual raises concerns about the potential for abuse. Unlike certain jurisdictions where parole decisions undergo review by a distinct parole board, here, the decision lies solely with the Commissioner.¹⁰⁵ This lack of an additional oversight body means that decisions on parole may not be subject to external scrutiny, potentially compromising the fairness of the process. In other jurisdictions, parole review boards play a vital role by providing a platform for prisoners to raise complaints or grievances about decisions made, ensuring a more transparent and accountable system.¹⁰⁶

2.4. Rehabilitation and Reintegration Programs

In this section we delve into an analysis of existing programs aimed at rehabilitating individuals and the evaluation of the effectiveness of reintegration initiatives in reducing recidivism. Kenya currently has the Probation and After care services Agency under the Ministry of Interior, State Department for Correctional Services headed by a National Director of Probation Service and Aftercare Service.¹⁰⁷ It has been mandated with the responsibility of implementing the Probation of Offenders Act Cap 64, the Community Service Orders Act No. 10 of 1998 Laws of Kenya and the Power of Mercy Act No. 21 of 2011 among others.¹⁰⁸ It is tasked with Supervision of offenders on probation orders, community service orders and other penal release

¹⁰³ Section 5, *Prisons Act*, Act No.49 1962.

¹⁰⁴ Section 49, *Prisons Act*, Act No.49 1962.

¹⁰⁵ < [A Brief Overview of Parole in South Africa - PJJ van Rensburg Attorneys \(pvanren.co.za\)](#)>, on 20th October 2023.

¹⁰⁶ Section 76, Correctional Services Act, South Africa. See also: Department of Correctional Service, on 4th May 2006, < [N Balfour: Launch of the Parole Review Board | South African Government \(www.gov.za\)](#)>, on 8th August 2023.

¹⁰⁷ State Department for Correctional Services, < [Probation & Aftercare Service | State Department for Correctional Services](#)>, on 28th October 2023.

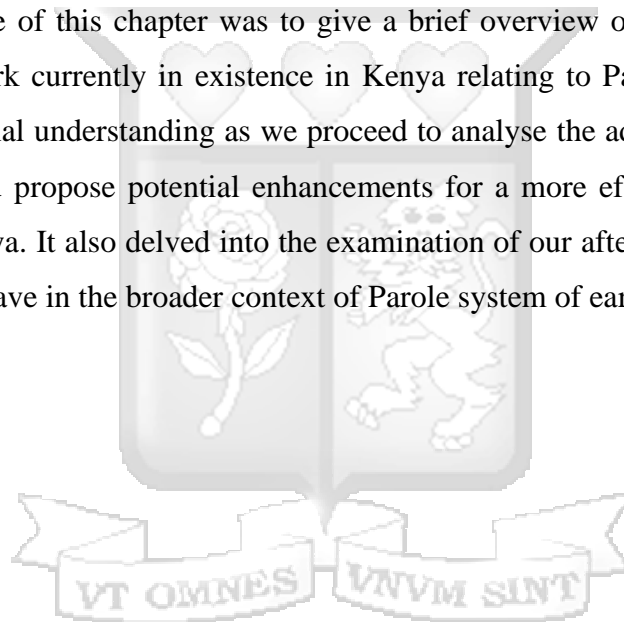
¹⁰⁸ State Department for Correctional Services, < [Probation & Aftercare Service | State Department for Correctional Services](#)>, on 28th October 2023.

licenses, re-integration and re-settlement of offenders in the community, and the provision of services for Victim protection and promotion of rights and welfare.¹⁰⁹

A point to note is that the after-care Service also deals with Preparation and submission of Power of Mercy Pre-release Advisory Reports for Special Category Offenders to Power of Mercy Advisory Committee.¹¹⁰ Further to this it is also tasked with supervision of offenders released by Presidential Release Warrant, Court Order, Board of Visitors License, Discharge Board Releases Warrant.¹¹¹ Given this context, the existing reintegration framework could serve as a viable mechanism, playing a pivotal and foundational role in the introduction of the comprehensive parole system.

2.5. Conclusion

The primary objective of this chapter was to give a brief overview of the legal, policy and institutional framework currently in existence in Kenya relating to Parole. This exploration serves as a foundational understanding as we proceed to analyse the adequacy of this laws in the current world and propose potential enhancements for a more effective and responsive parole system in Kenya. It also delved into the examination of our after-care services and the potential they could have in the broader context of Parole system of early release.



¹⁰⁹ State Department for Correctional Services, < [Probation & Aftercare Service | State Department for Correctional Services](#)>, on 28th October 2023.

¹¹⁰ < [AFTERCARE PROGRAMME PAMPHLET \(probation.go.ke\)](#)>, on 20th November 2023.

¹¹¹ < [AFTERCARE PROGRAMME PAMPHLET \(probation.go.ke\)](#)>, on 20th November 2023.

CHAPTER 3: AN ANALYSIS OF THE ADEQUACY OF EXISTING FRAMEWORKS OF PAROLE IN KENYA

Introduction

This chapter delves into the efficacy of Kenya's parole system, evaluating it against international best practices. Its major focus will be on three fundamental aspects namely victim centric approach thereby exploring mechanisms within the legal system to address victims' concerns in the parole process, it will also look at risk evaluation thereby assessing the enhancement of monitoring, supervision, and decision-making processes. Lastly, the paper will delve into the need for checks and balances in relation to office of commissioner of prisons. The chapter aims to bring out strengths and shortcomings which are evident from the existing frameworks. This exploration seeks to offer a concise yet comprehensive understanding of how Kenya's approach to parole aligns with global standards, emphasizing the need for a more robust framework on parole in pursuit of an effective criminal justice system.

3.1. Victim-Centric Approach

The inclusion of victims in the decision-making process regarding an offender's release is imperative. Consequently, a thorough impact assessment should precede any release. However, under our existing legal framework, such provisions are lacking. Victim Impact Assessment describes any physical, emotional, psychological, or financial impact of the crime in relation to the victim and his family. They are usually considered by the court when sentencing an offender.¹¹²In Kenya we have the victim protection Act which under section 12 prescribes for impact assessment of victims. This legislation is critical as it can be used in tandem with parole laws for a more effective system.

Joan Petersilia in her article recommended that victims should have the right to submit impact statements, but their input should be limited only to the future risk potential of the inmate and conditions of release.¹¹³This according to her would be a step towards a better criminal justice system.

A study which examined the effects of victim participation at parole hearings in Alabama revealed that both the involvement of victims and offenders significantly influenced parole decision-making. Remarkably, the impact of victim participation surpassed that of institutional

¹¹²Hill, Trey, 'Victim Impact Statements: A Modified Perspective,' Law and Psychology Review, 29, 2005,211.

¹¹³ Rhine E, Petersilia J, 'Improving Parole Release in America', Parole in America & the Status of Federal Sentencing Reform Legislation, 28(2), 2015, 100.

behaviour and engagement in rehabilitation initiatives when predicting determinations regarding the approval or denial of parole.¹¹⁴ This just goes further to show how important victim assessment tests are in parole. Some proponents of victim impact assessment argue that retribution is improved if victim impact statements elucidate the amount of harm that the victim suffered, because a judge being guided by this would then give a punishment equal to harm.¹¹⁵

Pennsylvania which is a state in the United States of America has in its laws a provision that gives victims of crime the right to provide victim impact information in a presentence report, and to be informed whenever the offender is to be released on parole.¹¹⁶ A parole board is therefore required by law to have this when having parole hearings. This in and of itself is a step forward as it helps parole boards have a wholesome view when determining whether one is to be released from prison or not.

That being the case however, there is the danger of reducing the Victim Impact States to mere tools for assessing an offender's potential danger rather than recognizing victims as individuals whose voices should be heard for a more comprehensive understanding of the impact of the crime. The laws should be construed in a manner that recognizes this challenges and endeavours to counteract such reductionism.

The foregoing discussion underscores the imperative need for adopting a Victim-Centric Approach to Parole within the Kenyan context. Consequently, any forthcoming legislation pertaining to parole must intricately incorporate and prioritize this dimension. Section 49 of the Prisons Act is therefore not sufficient as it has not placed a burden on the Commissioner to assess the Victim Impact Statements when determining whether to release a prisoner or not.

3.2.Risk Evaluation Factors

Behind a successful Parole System that can reduce recidivism levels among offenders is a well indoctrinated risk evaluation mechanism which a parole board or commission may use to assess possibility of a convict re-offending once released back into the public. There is the dire need for a well-established risk assessment in our current context in Kenya as there are no provisions which state what shall be followed in assessing the risk posed by individual who is to be

¹¹⁴ Kathryn M, Brent L, 'Victims, Punishment, and Parole: The Effect of Victim Participation on Parole Hearings' *Journal of Criminology & Public Policy* 4(2), 2005, 333-334.

¹¹⁵ Hill, Trey, 'Victim Impact Statements: A Modified Perspective,' 211.

¹¹⁶ Parsonage, William H., et al., 'Victim Impact Testimony and Pennsylvania's Parole Decision Making Process: A Pilot Study', *Criminal Justice Policy Review*, 6(3), 1992, 192-193.

released on parole. Release of a prisoner who poses a risk to the public is very detrimental to the parole system in general and proves challenging in its success.

Parole decisions usually involve assessments of both past conduct and future behaviour.¹¹⁷ It is usually a contrast between the evaluative dimension and the predictive aspect.¹¹⁸ With such there is usually a kind of trade off which is faced by parole boards in relation to assessing whether the benefits of releasing the prisoner on parole outweigh the potential risks that are posed to public safety.

Hornell Hart argues that a parole failure, exemplified by a parole violation, tarnishes the reputation of the parole method in the public's perception and weakens its widespread backing. Naturally, parole boards find such occurrences embarrassing and undesirable.¹¹⁹ Parole boards therefore must carefully assess an offender and be certain that the probability of violating his release is minimal to improve the public confidence. Currently under our Kenyan laws there is no provision in our prison's Act which lays down the procedure followed when a parolee violates his early release on parole.

A study carried out in relation to Australian Parole Board narrowed down to four essential factors which are crucial in predicting the occurrence of a risk. They included aggressive disciplinary incidents, the Violence Risk Scale (VRS) total score, the Community Corrections Officer's (CCO) recommendations for release, and confirmed accommodation.¹²⁰ These factors proved to be essential in determining parole decisions.

There has been a vital call for the need to change parole prediction, according to proponents of this argument most predictive endeavours emphasize a static depiction of statistical relationships between unchanging background factors and parole outcomes.¹²¹ That being the case there it is imperative to acknowledge that parole behaviour is a specific form of conduct and thus proposing for a comprehensive understanding of all contributing factors is essential. This just shows that risk evaluation should not be only numbers and previous statistics but also looking at behavioural aspects of each offender independently.

¹¹⁷ John S, Burke P, 'Evaluation and Prediction in Expert Parole Decisions', 17(3) *Criminal Justice and Behavior*, 1990, 315.

¹¹⁸ John S, et al, 'Evaluation and Prediction in Expert Parole Decisions', 315.

¹¹⁹ Richard S. Sterne, 'A Re-Evaluation of Parole Prediction', *Criminologica* 3(4), 1966, 3-4.

¹²⁰ Mooney J, Daffern M, 'Elucidating the factors that influence parole decision-making and violent offenders' performance on parole', *Psychiatry, Psychology and Law*, 21(3), 385.

¹²¹ Richard S. Sterne, 'A Re-Evaluation of Parole Prediction', 6.

Based on the above there is clearly a lacuna in our law that needs to be filled in relation to risk assessment. The Prisons Act needs to provide a clear and detailed method which is to be used by decision making bodies in relation to early release of prisoners on parole.

The Judiciary Sentencing guidelines also ought to incorporate provisions granting judges the discretion to impose minimum sentences, after which individuals may become eligible for parole. In this context, the Pennsylvania Board of Probation and Parole operates within a sentencing framework where judges establish both a minimum and maximum sentence.¹²² Subsequently, this structure enables the board to assess parole eligibility applications in accordance with the parameters established by the sentencing judges. A similar approach can be tailored to fit our local circumstances in Kenya.

3.3. Checks and Balances

Section 49 of the Prisons Act exclusively confers authority for granting parole to prisoners on the Commissioner of Prisons.¹²³ This proves to a problematic endeavour as the decision appears to be final and there is no provision which relates to appeal on grounds that an offender is dissatisfied with the outcome. This authority is susceptible to potential abuse, underscoring the need for the drastic implementation of oversight mechanisms to prevent such incidents.

According to Montesquieu constant experience has shown that every man invested with power is apt to abuse it, and to carry it as far as it will go [...]. To prevent this, he saw it being necessary that power should be check to a power.¹²⁴

Take for example in New York, USA, one can appeal a denial of parole through the Appeals Unit of the Parole Board.¹²⁵ The grounds through which one is allowed to appeal is limited to whether the proceeding and/or determination violated lawful procedure, was influenced by an error of law, or was arbitrary, capricious, or unlawful. Secondly, that the board must have relied on mistaken or irrelevant information in deciding and that the determination was excessive in nature.¹²⁶ One can also pursue Judicial Review based on article 78 but the conditions to be met are usually set very high.¹²⁷ This stringent measures put in place are quite essential as it ensures that parole boards exercise independence when making the determinations as they are

¹²² John S, et al, 'Evaluation and Prediction in Expert Parole Decisions', 315.

¹²³ Section 49, Prisons Act.

¹²⁴ Baron de Montesquieu, *The Spirit of the Laws* (1748) Book XI Chap IV, in *The Complete Works of M. De Montesquieu*.

¹²⁵ 'Parole', Jailhouse Lawyer's Manual 2011, 878.

¹²⁶ 'Parole', Jailhouse Lawyer's Manual 878.

¹²⁷ 'Parole', Jailhouse Lawyer's Manual 878.

accountable for erroneous decisions. This serves as a legal recourse for prisoners, offering them the opportunity to seek redress in cases where they are dissatisfied with a verdict rendered by the parole board.

That being the case however, there are some that oppose this view on interference with discretionary powers of parole boards asserting that courts have no power to interfere with the discretion of the statutorily created parole authority to grant or deny parole, which is held to be a matter of grace and not of right. So long as the statutory procedures were followed the denial of parole ought not be interfered with.¹²⁸ This paper alive this fact, argues that this overly restrictive approach to review of parole board decisions could potentially hinder the safeguarding of individual rights and ensuring fair and just decision-making.

There is therefore a need for the oversight mechanisms to be put in place in Kenya in relation to granting of parole decisions by the Commissioner of Prisons. This is essential so as mitigate the potential for the abuse of discretionary authority and ensure that parole determinations align with legal standards and principles.

3.4. Time Period for Parole Release

For parole to work, there needs to be the aspect of early release that should come into play. Typically, most parole system allow for the release of prisoners upon serving a certain number of years. For example, in South Africa, sentenced prisoners without a non-parole period (no prescribed period that the offender must spend in prison before parole is considered) are eligible for parole after serving half of their sentence.¹²⁹ This acts as an incentive for them to be on good behaviour to be released early. According to a 2013 study from Columbia university on the effectiveness of parole boards in reducing recidivism, it emerged that the hope of an early parole release incentivizes inmates to invest in their own rehabilitation and when such incentives are removed investment falls and recidivism rises.¹³⁰

This paper makes the argument that the 3-month period provided under section 49 of the Prisons Act is not adequate given the modern realities, and thus the period one should be eligible for release should be based on the time one has served rather than the months remaining pre-release for parole to be a success in Kenyan context.

¹²⁸ Rubin S, 'Law of Criminal Correction', West Publishing Company, 1963, 5-6.

¹²⁹ TSP Attorneys, < [When does a prisoner qualify for parole? \(tsplaw.co.za\)](https://www.tsplaw.co.za)>, on 15th May 2024.

¹³⁰ Seekan B, 'How should inmates be released from prison? Parole versus fixed-sentence regimes', on May 13, 2013, < [How should inmates be released from prison? Parole versus fixed-sentence regimes - The Journalist's Resource \(journalistsresource.org\)](https://www.journalistsresource.org)>, on 15th May 2024.

3.5. Downside of the Parole Program

While the parole program undeniably presents several advantages within the context of our current prison system, it is important to recognize and address its inherent drawbacks comprehensively. One significant challenge pertains to the employment opportunities available to parolees, as the stigma associated with their past convictions often limits their access to job opportunities. This obstacle not only hinders their reintegration into society but also increases the likelihood of recidivism as ex-convicts may feel compelled to resort to illicit means of survival.¹³¹

Moreover, the issue of housing poses another considerable hurdle for individuals on parole. Many struggle to secure stable accommodation due to barriers such as financial constraints and societal prejudices. This lack of accommodation not only undermines their ability to adhere to the conditions of their parole but also exposes them to environments with conducive criminal behaviour.¹³²

Furthermore, the effectiveness of the parole system is compromised by the risk of manipulation by certain parolees. There exists a subset of individuals who may exploit loopholes or deceive parole boards, resulting in the premature release of offenders who have not undergone genuine rehabilitation. This failure to accurately assess the readiness of individuals for reintegration into society poses a significant threat to public safety, as it increases the likelihood of recidivism and potential harm to communities.¹³³

A study done in the USA context by David Harding, and Bruce Western, **on** parolees indicated the aspect that despite the fact that over four million people being under community supervision, one ought to expect empirical evidence to show that probation and parole significantly reduces crime.¹³⁴ The opposite is however the case as their research finds little evidence that community supervision improves public safety. Moreover, from the study it emerged that at two years after release, the likelihood of arrest was slightly higher for parolees than for those without supervision.¹³⁵ This analysis just goes to show the fact that parole may

¹³¹ Michigan Justice Statistics Centre, Final Report on Understanding the Challenges Facing Offenders Upon Their Return to the Community, 2012.

¹³² Michigan Justice Statistics Centre, Final Report on Understanding the Challenges Facing Offenders Upon Their Return to the Community, 2012.

¹³³ Special Report, 2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014), US Department of Justice.

¹³⁴ Harding D, Western B, 'From Supervision to Opportunity: Reimagining Probation and Parole', American Academy of Political and Social Science, 701(1) 2022, 12-13.

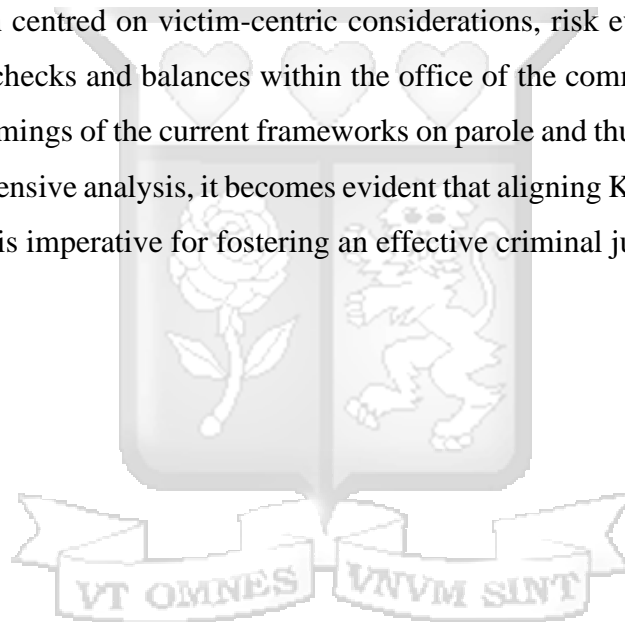
¹³⁵ Harding D, et al, 'From Supervision to Opportunity: Reimagining Probation and Parole', 12-13.

not work all times as it is evident that even persons that have undergone parole can still engage in criminal behavior.

In essence, while parole offers a pathway to rehabilitation and reintegration for offenders, its efficacy is contingent upon addressing these critical challenges. By tackling issues such as unemployment, lack of adequate housing, and the integrity of parole assessment processes, we can strive towards a parole framework that maximizes societal benefits while minimizing risks to public safety. This will be through the implementation of measure that the paper proposes which will be discussed in chapter 5.

Conclusion

This chapter has critically examined the effectiveness of Kenya's parole system, employing a multifaceted approach centred on victim-centric considerations, risk evaluation mechanisms, and the necessity for checks and balances within the office of the commissioner of prisons. It has shown the shortcomings of the current frameworks on parole and thus the need for reforms. Through this comprehensive analysis, it becomes evident that aligning Kenya's parole approach with global standards is imperative for fostering an effective criminal justice system.



CHAPTER 4: A COMPARATIVE ANALYSIS OF THE SOUTHAFRICAN APPROACH TO PAROLE

Introduction

This chapter undertakes an in-depth comparative analysis of parole systems in Kenya and South Africa, examining the legal frameworks, institutional frameworks, and assessing the oversight role played by the court in the parole decision making process. They are both similar due to the social, cultural, and legal context considering they are both common law jurisdictions, additionally, the fact that they are among the first African countries with transformative constitutions. The analysis aims to bring out the distinctive features and similarities within the parole frameworks of the two jurisdictions, thereby, providing informed insights into the potential adaptation of parole laws to address the evolving needs of the Kenyan Criminal Justice System.

4.1. Legal Framework on Parole

In South Africa there are two types of legislative frameworks which govern the penal system. They include the previous Correctional Services Act (the 1959 Act) which is applicable to offenders who were sentenced before the 1998 Act, and the current Correctional Services Act (the 1998 Act) which applies to offenders sentenced after its enactment. The objective of the 1998 act is evidently focused on implementing the constitutional provisions concerning detainees which are entrenched in the more transformative constitution of the South African people of 1996.¹³⁶

The administration of parole in south Africa entails three distinct stages namely, Case Management Committee recommendation; the Correctional Supervision and Parole Board approval, and lastly the community supervision.¹³⁷

The Correctional Services Act(1998) under Section 73(5) gives effect to the parole process stating that a sentenced offender may be placed under correctional supervision, on day parole, parole or medical parole on a date determined by the Correctional Supervision and Parole Board and in the case of an offender sentenced to life incarceration, on a date to be determined by the Minister.¹³⁸ In this case it is important to note the status that the parole board plays in

¹³⁶ Murdoch W, 'Assessment of the South African Parole System', *Journal of South African Law*, 2017(4), 2017, 13.

¹³⁷ Louw F, Luyt W, 'Parole and parole decisions in South Africa', *Research Gate*, 2009, 4.

¹³⁸ Section 73(5), Correctional Services Act No.111 of 1998, South Africa.

South Africa. This in contrast to Kenya, Section 49 of the Prisons Act provides for parole which is granted by commissioner of prisons.¹³⁹

Section 73(6)(a) states that these prisoners may only be considered for parole after having served at least half of the sentence was imposed by the court. Interestingly any prisoner who has served 25 years of imprisonment must be considered for parole, regardless of how long the sentence period is.¹⁴⁰ The latter provision just goes to show the fact that in south Africa there is no emphasis on certain distinct conditions which must be met by individuals who are to be released on parole and thus may be susceptible to fail in rehabilitation programme. Although the release on parole is not a right, the offender has a legitimate expectation that he will be considered for parole and will be placed on parole should he be eligible for release.¹⁴¹ In Kenya however, parole is only eligible to persons who have served their custodial sentence and have a remainder of 3 months before release and thus there are no provisions relating to minimum sentences before eligibility for parole.

It is evident from that as per South African laws even prisoners serving life sentence have a legitimate expectation that at some point in time they may be considered for Parole. The parole system in South Africa demonstrates a greater degree of advancement when compared to its Kenyan counterpart, where the parole legislation remains unchanged even after the enactment of the 2010 constitution.

Further to this there is the inclusion of victim participation in the release of an offender in the South African context under section 75(4) of the Correctional services Act(1998) which provides that where a complainant or relative is entitled in terms of the Criminal Procedure Act, to make representations the National Commissioner must inform the Board which in turn must inform the complainant or relative in writing when and to whom he or she may make representations. Kenya can borrow this and implement it to fit local circumstances as victim participation is a vital factor when coming up with a comprehensive parole system.

4.2. Institutional Frameworks and Parole Boards

Section 74 of the Correctional Services Act establishes the Parole Boards and Correctional Supervision setting out its composition and quorum.¹⁴² Currently there are 51 parole boards in South Africa as of today which are operational according to data from Correctional Services

¹³⁹ Section 49, Prisons Act (Act No.

¹⁴⁰ Section 73(6)(a) Correctional Services Act No.111 of 1998, South Africa.

¹⁴¹ Mujuzi D, 'Unpacking The Law And Practice Relating To Parole In South Africa', 2011, 209.

¹⁴² Section 74, Correctional Services Act No.111 of 1998, South Africa.

Department.¹⁴³ In Kenya currently there is no parole board present as this role is placed upon the commissioner of prisons.

Section 75 confers power upon the board members to perform various functions such as the placement of a sentenced offender under correctional supervision or day parole or grant parole or medical parole when they meet the eligibility criteria relied upon by the board.¹⁴⁴

Further to this Section 76 establishes the Parole Review Board which is mandated with the task of reviewing the decisions which are made by the Parole Board in relation to placing the offenders on parole.¹⁴⁵ An interesting thing to note is that the decision of the Board is final except in cases where the Minister, the National Commissioner or the Inspecting Judge refers the matter to the Correctional Supervision and Parole Review Board for reconsideration, in which case the decision of the Board is suspended pending the outcome of the decision of the Correctional Supervision and Parole Review Board. This structural construct is very important as it provides a check on the powers of the Parole Board making them accountable of the decisions which they make in relation to releasing offenders. This is a positive aspect which can be emulated in the Kenyan Jurisdiction as offenders have an appellate body for legal recourse when denied parole.

4.3. Court Decisions on Parole

In South Africa, the parole process extends beyond the executive domain, involving the judiciary as well. The upcoming analysis will delve deeply into the court decision of the *Jakub Walus v. Minister of Justice* case, revealing an inclination towards Judicial Review in parole decisions. This trend acts as a mechanism to scrutinize and balance the powers of the release authority, highlighting the judiciary's key role in overseeing release of offenders on parole.

¹⁴³ < [Supervision and Parole boards – Department of Correctional Services \(dcs.gov.za\)](https://dcs.gov.za)>, on 8th December 2023.

¹⁴⁴ Section 75, Correctional Services Act No.111 of 1998, South Africa.

¹⁴⁵ Section 76, Correctional Services Act No.111 of 1998, South Africa.

Janusz Jakub Walus v Minister of Justice and Correctional Services and Others Case No. CCT 221/21 in the Constitutional Court of South Africa

BRIEF FACTS

This case involves Janusz Jakub Walus, convicted for the 1993 murder of Mr. Chris Hani, a prominent anti-apartheid activist and leader of the South African Communist Party, along with an illegal firearm possession charge. Initially sentenced to death, later commuted to life imprisonment in 2000, Walus sought parole after serving 24 years. The Minister of Justice and Correctional Services denied parole, citing the gravity of the crime, court sentencing remarks, and the nature of the offense.¹⁴⁶ Despite positive aspects such as exemplary behaviour, participation in rehabilitation, and remorse, the Minister's decision disregarded these factors. Walus contested, emphasizing his 28-year prison term, good conduct, and compliance with parole requirements. The opposition from the Minister, the South African Communist Party, and Mrs. Hani placed emphasis on severity of the crime, its impact on democracy, and trial court sentencing remarks. This case prompts considerations on parole determinants, the balance between rehabilitation and the nature of the crime, and the impact of such decisions on the broader societal context, particularly in the context of South Africa's transition to democracy.¹⁴⁷

APPLICANTS CASE

The applicant submitted that he is entitled to parole in terms of the provisions of the Correctional Services Act of 1959 (1959 Act), as it was applicable at the date of commission of the crime. He argued that a prison sentence that is so long that a prisoner has no chance of being released at the expiry of the sentence or on parole amounts to cruel, inhuman, and degrading punishment. The applicant argued that life imprisonment without the option of parole makes it unconstitutional. He further submitted that it denies an offender the possibility of returning to society, it robs the prisoner of all hope and that takes away their dignity and desire for living. The applicant argued that if a prisoner has properly and fully completed the punitive period of his or her imprisonment, and becomes entitled to parole thereafter, and their further incarceration is not necessary for the protection of society, the administrative and executive organs of the state will act wrongfully and unreasonably, should they insist on the

¹⁴⁶ Janusz Jakub Walus v Minister of Justice and Correctional Services and Others (2022), Constitutional Court of South Africa.

¹⁴⁷ Janusz Jakub Walus v Minister of Justice and Correctional Services and Others (2022), Constitutional Court of South Africa.

perpetuation of such incarceration. He submitted that he cannot do anything to further and improve his chances of being placed on parole as the facts will not change in future.¹⁴⁸

1ST RESPONDENTS CASE

The Minister contended that it's acknowledged that the applicant is eligible for parole consideration under section 136(1) of the 1998 Correctional Services Act. He emphasized that when contemplating parole, the decision-maker must assess various factors, including the nature of the crime, criminal and background history, response to treatment, medical and psychological considerations, domestic situation, post-parole employment prospects, and selection for parole. Referring to section 63(1) of the 1959 Act, the Minister argued that the decision-maker must consider the crime's nature and court remarks during sentencing when deciding on parole. Citing *Derby-Lewis v Minister of Correctional Services and Others*, the respondent highlighted the court's emphasis on the trial court's judgment, stating it's crucial not just for the merits but also for sentence assessment in parole decisions.¹⁴⁹ The Minister justified the decision to deny parole, asserting it was rational and reasonable, based on the available information and reasons to him. He further contended that the decision achieved a balanced consideration of positive and negative factors affecting parole placement.

COURT'S ANALYSIS

The court held that 1st respondent misconceived the sentencing remarks contemplated in the department's document policy. The court's remarks he considered related to the seriousness of the offense that the applicant had committed and to the fact that the offense had been planned and committed in cold blood. The sentencing remarks referred to in the policy document could only be remarks about the minimum period of imprisonment that a convicted person or offender should serve before he or she could be considered for parole.¹⁵⁰

The decision by the 1st respondent not to release the applicant on parole was held to be irrational. The court reasoned that if more than 26 years after the applicant was sentenced for the crime of murder, it was appropriate for the 1st respondent not to release him on parole in 2020, because of the nature of the crime, the seriousness thereof and the court's sentencing

¹⁴⁸ *Janusz Jakub Walus v Minister of Justice and Correctional Services and Others* (2022), Constitutional Court of South Africa.

¹⁴⁹ *Janusz Jakub Walus v Minister of Justice and Correctional Services and Others* (2022), Constitutional Court of South Africa.

¹⁵⁰ *Janusz Jakub Walus v Minister of Justice and Correctional Services and Others* (2022), Constitutional Court of South Africa.

remarks, why would it be appropriate for the 1st respondent to release him one or two or three or five years thereafter? The factors relied by the 1st respondent in his decision to deny the applicant parole were thus seen to be immutable as they would not change one or two or three or five years later. The court's reasoning emphasizes on the importance of consistency and transparency in parole decisions. By questioning the appropriateness of a delayed release based on immutable factors, it ensures that the parole board and persons in charge of offender release to be guided by clear, principled guidelines for parole eligibility, thus promoting fairness and equality.

The court further reasoned that the 1st respondent's decision not to place the applicant on parole was not rationally connected to the power conferred upon him. Denying the applicant parole simply based on the nature of the crime, and the seriousness thereof and the trial courts and the Supreme Court of Appeal's sentencing remarks even though the applicant had complied with all other requirements for him to be placed on parole was inexplicable. The 1st respondent's decision was irrational and therefore reviewed and set aside.¹⁵¹ While judicial review is essential, the court's assertion that the 1st respondent's decision was "irrational" raises concerns about potential overreach into executive authority. Parole decisions involve a nuanced evaluation of various factors, and excessive judicial intervention may interfere with the discretionary powers entrusted to Parole Boards and correctional Supervision.

The decision of the Minister of Justice and Correctional Services made in March 2020, rejecting the applicant's application for parole was reviewed and set aside. The Minister of Justice and Correctional Services was ordered to place the applicant on parole on such terms and conditions as he deemed appropriate and to take all such steps as needed to be taken to ensure that the applicant was released on parole within ten (10) calendar days from the date of the order.

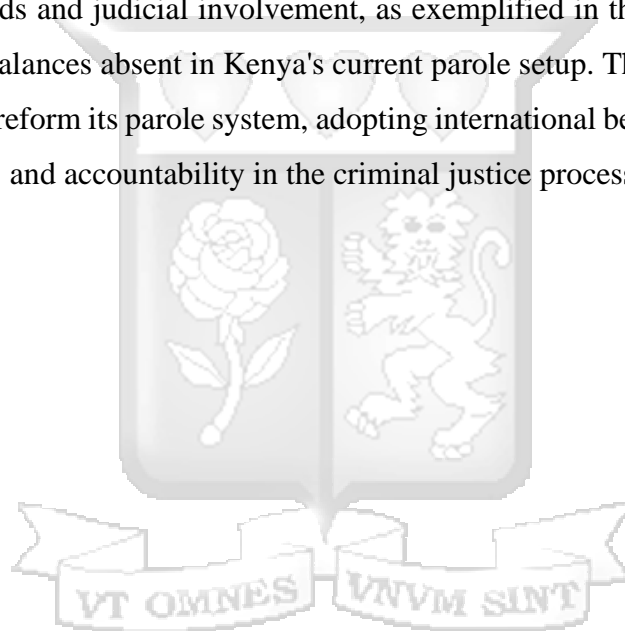
The above decision is a classic example of Judicial oversight mechanisms in play in relation to decisions made by state officials. There is the principle of fair administrative action which comes into play and therefore ensuring that those holding public office are accountable for their decision making. This acts as a safeguard to guarantee that parole boards exercise informed, rational, and independent judgment in their decisions regarding the release of offenders. By subjecting these decisions to judicial scrutiny, the legal system aims to uphold standards of

¹⁵¹ Janusz Jakub Walus v Minister of Justice and Correctional Services and Others (2022), Constitutional Court of South Africa.

fairness and integrity within the administrative processes governing the release of individuals in the criminal justice system.

Conclusion

This chapter extensively analyses the parole systems in South Africa and Kenya, revealing substantial disparities in their legal, institutional, and judicial frameworks. South Africa boasts a dual legislative approach, employing the 1998 Correctional Services Act to implement constitutional provisions for detainees and featuring a comprehensive three-stage parole process. The country's inclusive parole consideration, even for life sentence prisoners, and the incorporation of victim participation showcase a more advanced system than Kenya's, where parole powers rest solely with the Commissioner of Prisons. Furthermore, South Africa's well-structured parole boards and judicial involvement, as exemplified in the Walus case, provide essential checks and balances absent in Kenya's current parole setup. The analysis emphasizes the need for Kenya to reform its parole system, adopting international best practices to enhance fairness, transparency, and accountability in the criminal justice process.



CHAPTER 5: SUMMARY FINDINGS, RECCOMENDATIONS, AND CONCLUSION

Introduction

This chapter serves as the conclusion of the whole paper. Its discussion is based on three major components. First, it will begin by giving a summary of the findings showing whether the research' hypothesis has been confirmed or disproved, then give practical recommendations on the way forward regarding the adoption of a comprehensive framework of parole in Kenya. Lastly, it concludes by recapping the key arguments presented by the author throughout the paper.

5.1.Summary Findings

We began by examining the existing legal, policy, and institutional framework of parole in Kenya. In this we looked at the existing legal framework and the reasons exposed some of the lacunae prompting the need for a more comprehensive parole system. In our discussion we found that Article 51 of the Kenyan Constitution serves as a crucial backbone that advances the argument towards a more comprehensive parole system, emphasizing the protection of detainees' rights and striking a balance between individual rights and the broader objectives of the criminal justice system. We also looked at the Hansard of December 12, 1962, which espouses on the historical roots of the parole system in Kenya, specifically the Prisons Act, CAP 90 which has remained unchanged since.

The paper further examined whether the existing frameworks of parole in Kenya are adequate. Based on this, the paper made a revelation in that there exists a significant gap in our current legal framework regarding risk assessment for parole decisions. Existing laws, such as the Prisons Act, lack clear procedures for evaluating the risk posed by individuals to be released on parole which proves to be detrimental to fate of a prisoner set to be released. Further to this, the paper identifies a potential flaw in the exclusive authority granted to the Commissioner of Prisons under Section 49 of the Prisons Act, highlighting the absence of appeal mechanisms for dissatisfied offenders. The paper also noted the fact that the time period within which one is eligible for release needs to be relooked at given the modern realities of the current criminal justice system.

Lastly in the comparative analysis between Kenya and South Africa in relation to parole framework the paper made a finding in that South Africa has well-established Parole Boards under Section 74 of the Correctional Services Act, comprising 51 operational boards with

defined functions. In contrast, Kenya does not have a parole board, thereby, placing parole decisions solely under the Commissioner of Prisons. South Africa further introduces a Parole Review Board for oversight, enhancing accountability and providing an appellate body for parole decisions, in addition to judicial review by the courts. This structural construct is absent in Kenya, emphasizing a need for a more comprehensive institutional framework.

5.2.Recommendations

After a thorough examination of the gaps and deficiencies inherent in our existing parole framework, the paper proposes several recommendations to address these shortcomings. The identified lacunas in the current system underscore the need for urgent strategic reforms in our criminal justice system.

1. The need for possible amendment of the timeframe for release on parole.

This paper makes the argument that the 3-month period provided under section 49 of the Prisons Act is not sufficient. It therefore gives the recommendation that the period one should be eligible for release ought to be based on the time one has served rather than the months remaining pre-release for parole to be a success in Kenyan context. This can be borrowed from the South African perspective as it will go a long way in incentivizing prisoners to reform.

2. *The need for oversight mechanisms.*

There is a compelling need to institute oversight mechanisms in Kenya concerning the parole decisions made by the Commissioner of Prisons. This imperative measure aims to mitigate the potential for the discretionary abuse of authority. Establishing oversight mechanisms is crucial to ensuring that parole determinations align with legal standards and principles, promoting accountability and fairness in the parole process. These include institutions such as the parole review board and also providing for appellate procedure to the courts.

3. *The need to incorporate Victim participation in the parole process.*

Adopting a Victim-Centric Approach to Parole within the Kenyan context is imperative. This approach acknowledges the profound impact that criminal acts have on victims. Therefore, incorporating victim participation in the parole process becomes an essential element. Assessing and considering the perspective of the victim allows authorities to comprehensively understand the consequences of the offense when contemplating the release of an offender. This move aligns with international best practices and ensures a more inclusive approach to the parole decision-making process.

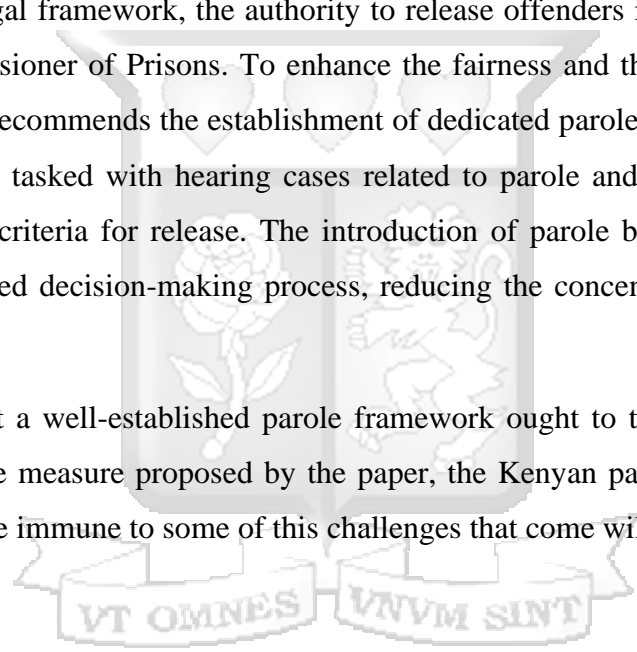
4. *The need to have well established risk-evaluation procedure.*

There is a critical need which calls for the establishment of a robust risk assessment criterion within the Kenyan context. This criterion would enable authorities to systematically evaluate the potential risks associated with releasing an offender on parole. Introducing a well-defined risk-evaluation procedure enhances transparency and consistency in parole decisions. This measure ensures that decisions are grounded in an objective assessment of the individual's readiness for reintegration into society, contributing to a more effective and reliable parole system.

5. *The need for the establishment of parole boards.*

Within the current legal framework, the authority to release offenders is concentrated on the office of the Commissioner of Prisons. To enhance the fairness and thoroughness of parole decisions, this paper recommends the establishment of dedicated parole boards. These boards would be specifically tasked with hearing cases related to parole and determining whether individuals meet the criteria for release. The introduction of parole boards ensures a more collective and informed decision-making process, reducing the concentration of power in a single individual.

This paper posits that a well-established parole framework ought to take these factors into account. Based on the measure proposed by the paper, the Kenyan parole framework when restructured will prove immune to some of this challenges that come will the parole program.



5.3. Conclusion

In conclusion, this research has undertaken a comprehensive examination of the parole system in Kenya, scrutinizing the existing legal, policy, and institutional framework while evaluating its adequacy. It has identified various inadequacies in the current framework on parole that call for the need for more comprehensive laws on parole and an amendment to the Prisons Act. The findings from the research will help to address identified shortcomings, ensuring a more effective and fair parole system. The exploration of a comparative analysis with South Africa's parole laws has provided valuable insights, emphasizing the potential benefits of incorporating certain elements into Kenya's legal framework. Throughout this study, the imperative need for localized framework to fit the Kenyan Circumstances has been emphasized.



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