Alternatives to Imprisonment in Kenya*

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INTRODUCTION

Recently in many countries, the role and functions of penal institutions have been the subject of vigorous debate. It has been suggested that, within the broader concept of humanization of criminal justice, a wide range of sentencing alternatives may appropriately replace imprisonment in some cases; certain types of offenses should be decriminalized and depenalized; settlement or compromise techniques should be developed and promoted, particularly in relation to compensation of, and restitution to, victims; and a rational selection of discharge provisions should be put into place.[1] Advocates of noncustodial

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 This is a revised version of a paper presented at a sentencing workshop organized by the Society for the Reform of Criminal Law, the Legal Resources Foundation, and the Law Development Commission, Victoria Falls, Zimbabwe, September 1–5, 1993.

I am grateful to Professor Daniel Van Ness, Legal Advisor on Criminal Justice to the Government of Malta; and to Madeleine Sann, Director of Publication, *Criminal Law Forum,* for their suggestions.

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1 *See, e.g., Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders: Report Prepared by the Secretariat* 84–86, U.N. Doc.

measures have advanced a combination of reasons based on considerations of efficacy, humanitarian principles, and economics.[2]

The efficacy argument holds that prison terms do not appear to be more effective than noncustodial sentences in terms of preventing individuals from reoffending during the years following release. While prison terms are certainly more successful in keeping offenders away from society for a certain period of time, this assumes that the offender would have been committing offenses had he or she been outside. However, "there is no hard evidence that custodial sentences exert a greater preventive effect on individual offenders than other penal sanctions, if reconvictions are taken as a measure of effectiveness."[3] Indeed, a recent review of studies on the relationship of prison and recidivism concluded that prison not only fails to rehabilitate but "in fact *dehabilitates.*"[4]

The efficacy argument also holds that imprisonment has a number of undesirable effects. On the most obvious level, it damages the mental and physical health of prisoners. Equally clear, prisons also

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A/CONF.121/22/Rev.1 (1986); *Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders: Report Prepared by the Secretariat* 11–14, U.N. Doc. A/CONF.87/14/Rev.1 (1980); *Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders: Report Prepared by the Secretariat* 21–22, 32–33, U.N. Doc. A/CONF.56/10 (1976).

2 *See generally* Andrew Ashworth, *Sentencing and Penal Policy* ch. 10 (1983); Advisory Council on the Penal System, Great Brit., *The Length of Prison Sentences* (1977); Malcolm M. Feeley et al., *Between Two Extremes: An Examination of the Efficiency and Effectiveness of Community Service Orders and Their Implications for the U.S. Sentencing Guidelines,* 66 S. Cal. L. Rev. 155 (1992).

3 Ashworth, *supra* note 2, at 322.

4 Thomas Mathieson, *Prison on Trial* 47 (1990) (analyzing empirical studies of rehabilitation programs, social scientific studies of the organization of prisons, and sociological studies of prison life); *see also* Nigel Walker, *Sentencing: Theory, Law, and Practice* 145–46 (1985) (noting that a subsequent period of imprisonment for an offender who has already experienced custody entails a higher risk of recidivism than does probation); S.R. Frager, *The Prison System,* 7 Prison Serv. J. 11 (1973) (estimating that 75 percent of male inmates in British prisons have already served five sentences); James Robison & Gerald Smith, *The Effectiveness of Correctional Programs,* 17 Crime & Delinq. 67, 71–72 (1971) (noting that longer custodial sentences may result in a higher rate of reconviction than do shorter ones).

serve as schools for crime: prisoners typically acquire from each other ideas, techniques, and personal contacts that lead them into subsequent offenses. Moreover, the stigma of having been in prison may make it difficult for the offender to lead an honest and industrious life on release.[5]

Doubts have also been expressed about the reformative potential of imprisonment. Recent studies suggest that the rehabilitation model is not an appropriate basis for sentencing decisions. Many criminal justice experts now doubt that rehabilitation can be induced reliably in a prison setting, or that one can really detect whether or when a prisoner has been rehabilitated.[6]

The humanitarian argument posits that it is generally more humane to leave an individual with his or her family and employment than to remove the offender from society.[7] Even under the best conditions, imprisonment disrupts the fabric of human relationships that a person develops over a lifetime. Furthermore,

> [b]y any accepted standards . . . prison conditions, policies and practices usually fall below the level of decency. From torture in a police lockup to degrading conditions and abuse by guards or other inmates in a long-term prison, prisoners all over the world are abused in gross violation of their rights under international and domestic law, almost invariably without recourse or remedy.[8]

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[5] Sub-comm. on the Penitentiary System, House of Commons, Can., *Report to Parliament* (Mark MacGuigan chair, 1977), *quoted in* Canadian Sentencing Comm'n, *Sentencing Reform: A Canadian Approach* 40–44 (1987); Walker, *supra* note 4, at 159–69; Julie Leibrich, *Straight to the Point: Angles on Giving Up Crime* ch. 9 (1993) (discussing the situation in New Zealand); Jeff Potts, *American Penal Institutions and Two Alternative Proposals for Punishment,* 34 S. Tex. L. Rev. 443, 460–74 (1993).

[6] Francis A. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (1981); Canadian Sentencing Comm'n, *supra* note 5. *But see* Francis T. Cullen & Karen E. Gilbert, *Reaffirming Rehabilitation* (1982); Michael Vitiello, *Reconsidering Rehabilitation,* 65 Tul. L. Rev. 1011 (1991).

[7] Walker, *supra* note 4, at 76–77.

[8] Joanna Weschler, Human Rights Watch Prison Project, *The Human Rights Watch Global Report on Prisons* at xxi (Aryeh Neier ed., 1993).

In Kenya, for example, data supplied by Attorney-General Amos Wako for November 1992, at a workshop on the administration of justice held in Nairobi, indicated that the prisons had a total population of 28,914 inmates, which was 56.3 percent more than the recommended holding capacity of the system.[9] A general reduction in the prison population would certainly help achieve more humane conditions. Apart from severe overcrowding, prison conditions in Kenya are appalling in other respects. Food rations are inadequate, poorly cooked, and at times unfit for human consumption. Commonly, toilet facilities are in woefully short supply and cells are infested with lice and cockroaches. Inmates walk around half-naked because their uniforms are in tatters. Disease is rife, with prisoners suffering from AIDS, pneumonia, and malaria.[10] Beatings are part and parcel of prison life. Not infrequently, inmates have been physically and mentally maimed and some have died as a result of torture.[11]

The economic argument suggests that reducing the prison population would be less financially burdensome to the state. According to Attorney-General Wako, in 1992 each prisoner cost the Kenyan government 279.10 Kenyan shillings a day, while a probationer would cost only 13.10 shillings a day.[12]

The purpose of this article is to examine current alternatives to imprisonment in Kenya and to suggest likely directions for reform. The focus in the first several sections is on the types of sentence at the

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[9] *Reported in* Daily Nation (Nairobi), July 9, 1993, at 5; *see also* Weschler, *supra* note 8, at xxii (noting "severe overcrowding" in Kenyan prisons).

[10] On prison conditions, see Chege wa Gachamba, *Inside Kenya's Prisons,* Daily Nation (Nairobi), Oct. 21, 1992, Weds. Magazine, at 1; Africa Watch–Human Rights Watch, *Kenya: Taking Liberties* (1991).

[11] Njuguna Mutonya, *A Day in Shimo la Tewa Prison,* Daily Nation (Nairobi), Oct. 21, 1992, Weds. Magazine, at 1.

[12] Daily Nation, *supra* note 9; *see also* Weschler, *supra* note 8, at xvii ("many reforms require only will, not money . . . . Also, if a country cannot afford to deal with overcrowding by constructing adequate facilities, it can consider other means, including a change in sentencing policy, modification of its pre-trial detention, and different ways of dealing with minor offenders").

disposal of the courts in dealing with criminal offenders.[13] For the sake of explaining the nature of these sanctions, I have classified them into the following categories: (1) repressive, (2) custodial, and (3) noncustodial. Noncustodial sentences are further subdivided into punitive, rehabilitative, and restitutionary sanctions. I also briefly review early release provisions like pardon. The concluding sections make suggestions about directions for reform.

REPRESSIVE SENTENCES

Repressive sentences are relics of the past. They are the most stringent, awesome, and cruel punishments available for certain offenses. These punishments have increasingly come in for criticism and in many countries have been abolished. But in most African states, they are still widely in use.

Capital Punishment

The aims of the death penalty are retribution, general deterrence, and incapacitation. Death is the most severe punishment available in Kenya and remains the mandatory penalty for murder, treason, and armed robbery.[14] However, the death sentence cannot be passed on any offender who at the time of the offense was under eighteen years of age; such an offender is detained in prison at the President's discretion.[15] A pregnant woman convicted of a capital offense must be sentenced to life imprisonment instead.[16]

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13 On sentencing options in Kenya generally, see Florence M. Muli et al., *Kenya (Nairobi),* in *Urban Crime: Global Trends and Policies* 162 (Hernando Gomez Buendia ed., 1989); James S. Read, *Kenya, Tanzania, and Uganda,* in *African Penal Systems* 89 (Alan Milner ed., 1969); Brian Slattery, *A Handbook on Sentencing* chs. 7–9 (1972).

14 Penal Code §§ 40(3), 204, 296(2) (Kenya).

15 *Id.* § 25.

16 *Id.* § 211.

The debate over the death penalty is beyond the scope of this article.[17] While "there is no consistent and credible [empirical] evidence supporting the general deterren[ce] hypothesis . . . . [m]ethodological weaknesses pervade this area and may be sufficiently severe and intractable to undercut *all* research findings."[18]

Corporal Punishment

Corporal punishment is available for a number of offenses. The aims of this sanction are retribution, specific deterrence, and general deterrence. As with capital punishment, the acceptability of this form of punishment is deeply debated; many persons take the position that it is an inhuman, degrading, and/or ineffective method of dealing with offenders.[19]

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17 For a general discussion, see Roger Hood, *The Death Penalty, a World-wide Perspective: A Report to the United Nations Committee on Crime Prevention and Control* (1989). For anti–capital punishment perspectives, see Hugo Adam Bedau, *Death Is Different* (1987); William A. Schabas, *The Abolition of the Death Penalty in International Law* (1993); Christine Mpaka, *The Death Penalty: The Unending Debate,* Nairobi L. Monthly, July–Aug. 1989, at 21. For pro–capital punishment views, see Walter Berns, *For Capital Punishment* (1991); Ernest van den Haag, *The Ultimate Punishment: A Defense,* 99 Harv. L. Rev. 1662 (1986).

18 Neil Alan Weiner, *When Death Is the Sanction — United States and Worldwide Perspectives,* 2 Crim. L.F. 177, 183–84 (1990) (emphasis added) (reviewing Hood, *supra* note 17); *see also* Bedau, *supra* note 17, ch. 9 (analyzing a mandatory death sentencing law for rape–murder). *See generally* Hood, *supra,* ch. 6. For a review of studies concluding that executions *increase* the likelihood of new homicides, see William L. Bowers & Glenn L. Pierce, *Deterrence or Brutalization: What Is the Effect of Executions?,* 26 Crime & Delinq. 453 (1980). For a review of studies finding that executions *do deter* new homicides, see Stephen J. Markman & Paul J. Cassell, *Protecting the Innocent: A Response to the Bedau–Radelet Study,* 41 Stan. L. Rev. 121, 154–56 (1988). Articles pro and con are collected in *The Death Penalty in America* 305–82 (Hugo Adam Bedau ed., 3d ed. 1982).

19 Franklin E. Zimring & Gordon Hawkins, *Dangerousness and Criminal Justice,* 85 Mich. L. Rev. 481, 485–88 (1986). *But see* Graeme Newman, *Just and Painful: A Case for the Corporal Punishment of Criminals* (1983).

For a discussion of the flogging of a U.S. youth in Singapore in 1994, see Michael Elliot, *Crime and Punishment,* Newsweek, Apr. 18, 1994, at 6; Philip Shenon, *A Flogging Sentence Brings a Cry of Pain in U.S.,* N.Y. Times, Mar. 16, 1994, at A4, *available in* LEXIS, World Library, Allnws File.

For certain offenses, corporal punishment may be ordered either in place of, or in addition to, other sanctions; for other offenses, it may be awarded only in addition to a prison term. Corporal punishment is imposed mostly for offenses against morality enumerated in chapter XV of the Penal Code, such as rape (section 140) or defilement (section 145(1)); attempted rape (section 141) or attempted defilement (section 145(2)); procuration or attempt to procure any female under the age of twenty-one to have unlawful carnal connection (section 147); indecent assault on a female (section 144) or on a male under fourteen years of age (section 164); and indecent practices between males (section 165). Corporal punishment is also provided for serious prison offenses, such as aggravated or repeated assault by an inmate on a fellow prisoner, assault or attack on a prison officer, and mutiny or incitement to mutiny.[20]

The Penal Code limits the use of this sanction in several ways. No sentence of corporal punishment shall be passed upon any female, nor upon any male sentenced to death. Corporal punishment cannot be imposed in default of payment of a fine. This sanction shall not be inflicted upon a prisoner unless a medical officer certifies that the prisoner is physically fit to undergo such punishment.[21]

CUSTODIAL SENTENCES

Imprisonment

Imprisonment—by far the most popular method of dealing with criminal offenders—is argued to serve the purposes of retribution,

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A group of international human rights instruments prohibit corporal punishment, including Universal Declaration of Human Rights art. 5, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948); International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, art. 7, 999 U.N.T.S. 171; Standard Minimum Rules on the Treatment of Prisoners art. 31, E.S.C. Res. 663 (XXIV) C, U.N. ESCOR, 24th Sess., Supp. No. 1, at 11, U.N. Doc. E/3048 (1957), *amended by* E.S.C. 2076 (LXII), U.N. ESCOR, 62d Sess., Supp. No. 1, at 35, U.N. Doc. E/5988 (1977).

20 Prisons Act §§ 51(3)(a), 52(5)(a) (Kenya); Prison Rules R. 67 (Kenya).

21 Penal Code, *supra* note 14, § 27.

incapacitation, deterrence (both specific and general), and rehabilitation. During the 1980s, 73 percent of all convicted persons were sentenced to imprisonment by Nairobi courts.[22] While imprisonment is available for most offenses in Kenya, it is excluded for offenses for which the death penalty is mandatory or for which some other sentence is mandated. For certain offenses, a convicted person must be sentenced to imprisonment for life. For a wide intermediate range of offenses, imprisonment is possible but not mandatory. In such cases, the criminal law generally prescribes maximum sentences only, leaving the courts wide discretion as to the length of sentence and, indeed, as to whether to impose imprisonment at all. For many offenses, the prescribed punishment includes imprisonment or fine or both. The courts are empowered to impose a fine in addition to, or in substitution for, imprisonment except for offenses for which the minimum sentence is imprisonment or for which the sentence provided is imprisonment together with corporal punishment. A sentence of imprisonment can be with or without hard labor.[23]

In general, a sentence of imprisonment shall not be imposed on a first offender except where the offense is particularly grave, aggravated, or widespread in an area.[24] Similarly, no juvenile—that is, a person at least fourteen but less than sixteen years old—and no young person—that is, someone at least sixteen but less than eighteen years old—shall be ordered to be imprisoned unless for good reason and subject to confirmation of the sentence by the High Court.[25] No child—that is, a person under the age of fourteen—shall be ordered to be imprisoned or to be confined to a detention camp.[26] When an offense is part of a domestic dispute, imprisonment will not typically be imposed, on the theory that imprisoning the offender may work a

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22 Muli et al., *supra* note 13, at 184.

23 Penal Code, *supra* note 14, § 26.

24 Supreme Court of Kenya, *Circular to Magistrates,* 29 Kenya L. Rev. 205 (1956); *see also* Arell v. R., 1970 High Ct. Digest n.159 (Tanz.); Hattan v. R., 1969 High Ct. Digest n.234 (Tanz.).

25 Children and Young Persons Act § 16 (Kenya).

26 *Id.*

hardship on the complainant. In such cases, reconciliation between the parties is the goal, and imprisoning the accused is not likely to promote harmony in the family.[27]

Imprisonment in Default of Fine or Compensation

When a fine is imposed, or a compensation order is made under section 31 of the Penal Code, or an order for the payment of prosecution costs is made under section 32 of the Penal Code, the courts have power to order that in default of payment, the offender be imprisoned for a maximum period ranging from fourteen days to twelve months depending on the amount in default.[28] By virtue of section 336 of the Criminal Procedure Code, the execution of a sentence of imprisonment in default of payment of monetary sanctions can be suspended for up to thirty days. If the offender fails to pay within this period, the court may direct execution of the sentence of imprisonment.

Detention Camps

The Detention Camps Act provides that a person who is convicted of an offense that would be adequately punished by a fine or imprisonment for not more than six months, may instead be sentenced to a detention camp for any period up to six months.[29] Detention camps are also used to confine offenders who have been convicted of offenses for which the prescribed punishment is only a fine or a fine and imprisonment in default of payment of such a fine. In these cases, the act allows the court to order the offender to serve time in a detention camp in default

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27 *See* R. v. Kitila, 1968 High Ct. Digest n.65 (Tanz.) (holding that by imposing a long term of imprisonment on the defendant husband for a domestic offense, the magistrate had caused the wife to suffer more by depriving her of the breadwinner of the family).

28 Penal Code, *supra* note 14, § 28. Commitment in cases of default shall be no longer than six months, unless the statute under which the conviction was obtained allows a longer period of confinement in the event of default. Crim. Proc. Code § 342 (Kenya).

29 Detention Camps Act § 5(1) (Kenya).

of payment.[30]

Inmates of detention camps are required to labor without payment,[31] but every person under a sentence of detention for more than one month may earn remission of one-third of the sentence by satisfactory industry and good conduct (though at least one month must be served in detention). Further remission may be granted on special grounds such as exceptional merit or permanent ill health. Remission that has been earned shall be forfeited as punishment for lack of industry or for infractions of camp discipline.[32] While such facilities at one time were very popular in Kenya, providing an alternative to imprisonment for the large number of petty offenders for whom other penalties were unsuitable, the introduction of alternative sanctions like extramural penal employment has lessened the use of detention camps.

Remand in Custody

Whereas straightforward criminal cases may be heard in a matter of days or weeks, preparation of the state's case in a complex prosecution may take many months. In such cases, the accused may be remanded in custody for a long time before trial. This situation inflicts inconvenience and, not infrequently, considerable hardship on defendants who are eventually either acquitted or awarded a noncustodial sentence. It has been estimated that about 45 percent of those remanded in custody are acquitted.[33] Since only about 73 percent of convictions result in a sentence of imprisonment, only 40 percent or so of persons remanded into custody are likely to be sentenced to prison. In some instances, the offender may remain in prison prior to trial for longer than the term of imprisonment provided for the offense he or she is alleged to have committed. The press occasionally reports such cases. In many instances, the accused is remanded in custody due to inability to provide bail or surety. Apart from its adverse effect on prisoners, pretrial remand

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30 *Id.* § 5(3).

31 *Id.* § 10.

32 *Id.* § 9.

33 Muli et al., *supra* note 13, at 194.

in custody seriously stretches the resources of an already overburdened prison system by aggravating overcrowding; by diverting the attention of prison officers, who could more profitably be deployed otherwise; and by creating a category of inmates who are poorly integrated into the prison population.[34]

Borstal Training

Section 6 of the Borstal Institutions Act makes a sentence of borstal training available for young persons, aged fifteen up to eighteen, convicted of an offense punishable with imprisonment. Under this provision, the court has discretion, taking into account the circumstances of the offense and the offender's character and previous conduct, to detain him or her in a borstal institution for a period of three years. Section 25 empowers the Commissioner of Prisons to grant a leave of absence to any inmate of a borstal institution for such period and on such conditions as the commissioner may think fit. Leave may be revoked at any time upon breach of its conditions.

The emphasis in borstal training is on remedial and educational services tailored to the needs of the individual. The system seeks to promote the all-round development of character and capacities through classroom instruction, individual programs of study, and the encouragement of hobbies, handicrafts, and cultural interests.

Remand Homes

Under section 11 of the Children and Young Persons Act, an offender under the age of sixteen may be committed to the custody of a remand home. These are institutions other than prisons or detention camps where juvenile offenders are remanded in custody during the trial period. If there is no juvenile remand home within a reasonable distance of the court, the court is empowered to make alternate arrangements to insure proper custody (such as committing the juvenile offender to the care of a fit adult or an approved voluntary organization or demanding security

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34 *See* Alan Milner, *The Nigerian Penal System* 222–23 (1972).

from a parent or guardian for the offender's good behavior).[35] An offender aged at least fourteen who is of unruly character can be remanded to prison.[36]

Approved Schools

Under section 17(e) of the Children and Young Persons Act, where the court is satisfied of the guilt of an offender under sixteen years of age, the court has authority to order the youth to be sent to an "approved school" suitable to his or her needs. Approved schools are residential establishments, so designated by the Minister of Home Affairs under section 37 of this act, that provide maintenance and training.

NONCUSTODIAL SENTENCES

A wide variety of noncustodial options are available in Kenya. Some sanctions are punitive in nature, whereas others are predominantly rehabilitative or restitutionary.

Punitive Sanctions

FINES

Fines are a commonly used sanction intended to achieve retribution, specific deterrence, and general deterrence. The fine is levied either by itself or in conjunction with another sentence (most commonly, imprisonment). Courts have the power to fine upon conviction for any offense in lieu of imprisonment so long as the applicable legislation does

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35 Children and Young Persons Act, *supra* note 25, § 11(1)(a).

36 *Id.* § 11(2). *Id.* § 17 provides for a variety of other sanctions (repressive, custodial, and noncustodial) much like those available for adults and reviewed in this article, including discharge, probation, corporal punishment, payment of a fine or other monetary sanction, and imprisonment for offenders above fourteen but under eighteen years old.

not specify a different mandatory sentence.[37] In deciding whether an offense does or does not merit imprisonment, the court should not take into account the wealth of the offender.[38]

The Penal Code and other legislation impose ceilings on the amount of fine that may be ordered for various offenses. Moreover, the amount must bear a reasonable relation to the convicted person's ability to pay.[39] Before imposing a fine, the court should investigate the financial status of the offender, taking into account property, income, and other relevant factors.[40]

FORFEITURE

According to section 29 of the Penal Code, the courts have power to order the forfeiture of any property that was used in connection with the commission of certain offenses. If the property cannot be forfeited or cannot be found, the court shall assess its value and order the forfeiture of an equivalent sum. This remedy may be in addition to, or in lieu of, any penalty imposed for commission of the offense.

DISQUALIFICATION

Disqualification is based on the idea of preventive justice, although it has retributive and deterrent elements as well. Disqualification means temporarily or permanently suspending an offender's license or other formal privilege to engage in a particular activity or business where that person has committed a criminal offense related to such activity. This sanction attempts to ensure that the offender cannot get back into the position from which he or she previously caused the harm.[41] There are

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37 Penal Code, *supra* note 14, § 26(3).

38 Sethi v. R., 1962 E. Afr. L. Rep. 523 (Sup. Ct.) (Kenya) (holding that the court should not impose imprisonment on an accused just because she or her family was capable of paying a fine without great difficulty).

39 *See* Juma v. R., 1 Tanganyika L. Rep. (Revised) 257 (High Ct. 1942).

40 *See* R. v. Bishon, 2 Tanganyika L. Rep. (Revised) 31 (High Ct. 1954).

41 For a lucid account of disqualification, see Milner, *supra* note 34, at 156–69.

a number of statutes (some of them described below) under which a person may be disqualified from carrying out a particular activity or business.

Section 30 of the Penal Code provides that where a person is convicted of any offense relating to the handling of unlawfully obtained property, and like offenses, and the offense was committed in the course of business, the court may impose appropriate sanctions, as well as issue an order temporarily or permanently prohibiting the defendant from engaging in any such or similar trade or business.[42] Section 32 of the Pawnbrokers Act provides that a pawnbroker convicted of any fraud in the course of business or of knowingly receiving stolen goods may be disqualified from holding a pawnbroker's license. Under section 16 of the Liquor Licensing Act, license renewal may be denied where the applicant has been convicted of an offense relating to the sale of liquor, or of any offense resulting in a sentence of imprisonment for more than six months without option of a fine. Moreover, under section 14 of the Liquor Licensing Act, a person convicted of selling liquor without a license or of any offense relating to the manufacture or sale of liquor or of any offense resulting in a prison sentence of more than six months without option of a fine may be disqualified from obtaining a liquor license.

The court is empowered by section 189 of the Companies Act to disqualify a person who has been convicted of an offense in connection with the promotion, formation, or management of a company from managing the affairs of that company, for a period of up to five years, without leave of court. If, in the course of winding up the affairs of a company, it appears that a person has committed an offense of fraudulent trading within the meaning of section 323 of the Companies Act, that person may be similarly disqualified by the court, whether or not he or she has been convicted of the section 323 offense. A person who has otherwise been found guilty while an officer of a company may be similarly disqualified. Under section 188 of the Companies Act, an undischarged bankrupt is disqualified from acting as director of, or

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42 In granting a trade license as well, the licensing officer has to be satisfied that the applicant has not been convicted of certain economic offenses. Trade Licensing Act § 11 (Kenya).

taking part in the management of, any company without leave of court.[43]

Another form of disqualification is the temporary suspension or the permanent cancellation of a driver's license upon conviction of certain serious driving offenses. The court is also empowered to order that particulars of the conviction be entered on the driving license itself.[44]

DEPORTATION

Under section 26A of the Penal Code, the court may direct the removal from Kenya of a noncitizen upon conviction of an offense punishable with imprisonment for a term not exceeding twelve months, either immediately or upon completion of the sentence. But where the offense of which a noncitizen is convicted is punishable with imprisonment for a term exceeding twelve months, the court shall, if satisfied that the person should be removed from Kenya, recommend to the minister responsible for immigration that an order for removal be made instead of having the person serve the sentence in a Kenyan prison. The minister is empowered under section 8 of the Immigration Act to issue such an order in these circumstances.

Rehabilitative Sanctions

CONDITIONAL AND ABSOLUTE DISCHARGE

Discharges are rehabilitative in nature. A conditional discharge, as explained below, may also have a deterrent effect since the offender is under the threat that if he or she commits another offense during the period specified, he or she will be liable for the original offense. Section 35 of the Penal Code, which governs both conditional and absolute discharges, provides that if the court is of the opinion that it is inexpedient to inflict punishment and that a probation order is not appropriate,

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[43] *See* Yash Vyas, *Criminal Liability of Directors under the Companies Act in Kenya,* Advocate (Nairobi), Oct. 1993, at 19, 25.

[44] Traffic Act § 76 (Kenya). Similar provisions are to be found in Penal Code, *supra* note 14, § 39.

it may conditionally or absolutely discharge an offender upon conviction. In forming that opinion, the court must have regard to all the circumstances, including the nature of the offense and the character of the offender. If there is little risk of further criminal conduct, an absolute discharge may be ordered. If there is some risk of repetition, but no need for supervision, a conditional discharge may be appropriate.

When a discharge is conditional, the offender is enjoined not to commit any offenses during the period of discharge. This is the sole condition that is imposed. Before making an order for conditional discharge, the court is required to explain to the offender in ordinary language that if he or she commits another offense during this period, he or she will be liable to be sentenced for the original offense. The offender would, of course, be liable separately for the offense committed during the discharge period. The maximum period of conditional discharge is twelve months.

An absolute discharge terminates the proceedings in relation to the offense for which it has been granted. Absolute discharge is accorded when the mere fact of conviction is considered punishment enough. It can also be accorded in cases where pretrial incarceration results from inability to post bail and thus amounts to a real penalty—this is the typical "time-served" sentence, where the period spent in prison by the accused awaiting disposition turns out to be equal to, or greater than, the punishment considered proportionate to the offense.[45] Absolute discharge may also be accorded in cases where there is no moral blameworthiness,[46] or where the conviction has led to substantial financial loss.

PROBATION

Probation is a combination of treatment and punishment. A probation order is a legal disposition: the offender is sentenced to serve time on probation. While probation includes counseling and other rehabilitative and educational services in the community, in an attempt to improve the

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45 *See* Jack M. Kress, *Reforming Sentencing Laws: An American Perspective,* in *New Directions in Sentencing* 97, 99 (Brian A. Grosman ed., 1980).

46 *See* R. v. O'Toole, 55 Crim. App. 206, 209 (C.A. 1971) (Eng.).

offender's adjustment to society, this sanction is punitive inasmuch as a number of restrictions are placed on the probationer.[47]

In Kenya, probation is governed by the Probation of Offenders Act. Section 4 specifies that where a charge is proved but the court is of the opinion that it is expedient to release the offender on probation, it may either convict the offender and make a probation order or, without proceeding to conviction, make a probation order. Probation can be combined with an order to pay costs or damages for injury or compensation for loss.[48] The High Court is also empowered to make an order for probation in lieu of imposing any other sentence except for offenses that carry mandatory penalties.

In deciding whether to order probation, the courts must, under section 4, take account of the youth, character, antecedents, home surroundings, and health or mental condition of the offender, as well as the nature of the offense and any extenuating circumstances. The courts may also require the offender to enter into a recognizance, with or without sureties, for such amount as the court may deem fit, to deter breach of the probation order.

Under section 5 of the Probation of Offenders Act, a probation order places the offender, for a period of not less than six months and not more than three years, under the supervision of a probation officer. The probationer must reside at the place specified in the order. The probationer will be in breach of the probation order by failing to comply with this or any other of its requirements. In that situation, the courts have power under section 8 either to impose a fine without prejudice to the continuance in force of the probation order, or to convict and sentence the offender for the original offense, or to impose the sentence for the original offense if the individual already was convicted. Pursuant to section 7, an offender convicted of an offense committed while on probation is also liable to be convicted and sentenced, if not convicted earlier, on the original offense. If already convicted, the probationer may

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47 *See generally* Edwin H. Sutherland & Donald R. Cressey, *Criminology* 461–82 (8th ed. 1970); David K. Muigua, Treatment of Offenders with Special Regard to Probation and the Application of Extra-mural Penal Employment in Kenya (1988) (unpublished LL.B. dissertation, University of Nairobi).

48 Probation of Offenders Act § 6 (Kenya).

be sentenced for the original offense. Of course, if an offense is committed during the period of probation, the offender would be separately liable therefor.

SECURITY FOR GOOD BEHAVIOR

By virtue of section 33 of the Penal Code, a person convicted of an offense not punishable with death may be ordered to enter into his or her own recognizance, with or without sureties, to keep the peace and maintain good behavior for a period of time fixed by the court ("binding over"). Binding over may be ordered either in addition to, or instead of, any other punishment to which the offender may be liable. Moreover, the offender may be ordered to be imprisoned until such recognizance is entered into, although in this situation the imprisonment must not be longer than one year. If the offender fails to observe any of the conditions of the recognizance, he or she may be arrested and either remanded in custody or released on bail with additional security so as to compel his or her appearance at the hearing on the breach of the conditions of the recognizance. Security for good behavior may be a useful alternative to sanctions in the case of domestic disputes or public demonstrations. Such an order is not a penalty in itself but is designed to deter the defendant from committing another offense.

Similar provisions are contained in the Criminal Procedure Code. Sections 43–46 empower the courts to order the posting of a bond, with or without sureties, for keeping the peace and maintaining good behavior in the following circumstances: where a person is likely to disturb the peace or to do any other wrongful act; where a person is disseminating seditious matter; where a person is suspected of committing a crime; or where a person is a habitual offender. The bond applies to a period of three years in the case of habitual offenders, and to a period of one year in other cases. The courts are also empowered under section 46 to issue an order restricting the movement of habitual offenders for a period of three years. Note that an order for security for good behavior under section 33 of the Penal Code can be made only after conviction, whereas under sections 43–46 of the Criminal Procedure Code an order for binding over may be made when there is concern that the person is likely to commit an offense or is suspected of committing an offense or is a habitual offender.

POLICE SUPERVISION

In certain cases when a court orders imprisonment, it may also stipulate that the convicted person be subject to police supervision for a period not exceeding five years after release from prison. Supervision orders typically include requirements concerning residence, reporting to the police, and the like.[49]

Restitutionary Sanctions

Restitution is argued to be a sanction that accomplishes all the aims of punishment: deterrence, retribution, rehabilitation, and reintegration.[50] Although the terms "restitution," "reparation," and "compensation" have different meanings, for present purposes I am using "restitution" in a broad sense to refer to all restorative activity undertaken by the offender, including "the return of property by an offender to his or her victim; the payment of money by an offender to his or her victim; the provision of service by an offender to his or her victim; . . . or the provision of service by an offender to a third party."[51] Restitution is said to be justified because it redirects the system's attention to the true party in interest—the victim[52]—and in the process serves to ameliorate an excessively rigid dichotomy between the criminal and the civil law.[53] The following restitutionary sentences are available in Kenya.

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49 Crim. Proc. Code, *supra* note 28, §§ 343–354.

50 *See generally* Charles F. Abel & Frank H. Marsh, *Punishment and Restitution* (1984); *Offender Restitution in Theory and Action* (Burt Galaway & Joe Hudson eds., 1978); James William Casson III, *Restitution: An Economically and Socially Desirable Approach to Sentencing,* 9 N. Eng. J. on Crim. & Civ. Confinement 349 (1983).

51 Richard C. Boldt, *Restitution, Criminal Law, and the Ideology of Individuality,* 77 J. Crim. L. & Criminology 969, 970 n.2 (1986).

52 Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice,* in *Assessing the Criminal: Restitution, Retribution, and the Legal Process* 349, 367 (Randy E. Barnett & John Hagel eds., 1977).

53 Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution,* 52 Miss. L.J. 515, 536 (1982).

COMPENSATION

Under section 31 of the Penal Code, the courts are empowered to order a convicted person to make compensation to any person injured by his or her offense. The compensation may be either in addition to, or in place of, any other punishment. Section 175 of the Criminal Procedure Code authorizes the courts to order the whole or any part of a fine collected from the offender to be applied to compensating the victim for losses or injuries caused by the offense. However, it has been held that a heavy fine should not be imposed merely to create a compensation fund.[54]

RESTITUTION

Section 178 of the Criminal Procedure Code provides that if a person is convicted of an offense relating to extorting, converting, illegally obtaining or disposing of property, or knowingly receiving such property, the court may order restoration of the property to the owner or the owner's representative. Under section 177, property found on the accused may be restored to the rightful owner, as determined by the court, even if he or she is the person charged. Alternatively, property found on the accused may be applied to the payment of any fine, costs, or compensation directed to be paid by him or her.

COSTS

Under section 171 of the Criminal Procedure Code, a person convicted of any offense may be ordered to pay to the public or private prosecutor reasonable costs, in addition to any other penalty imposed. Costs must not exceed 2,000 shillings in the case of High Court proceedings or 500 shillings in the case of a subordinate court.

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[54] Mahamoud v. R., 1959 E. Afr. L. Rep. 1087 (Sup. Ct.) (Kenya); *accord* Singh v. R., [1951] 6 Uganda L. Rep. 265 (High Ct.); *see also* Douglas Brown, *The Award of Compensation in Criminal Cases in East Africa,* 10 J. Afr. L. 33, 36 (1966); Gatheru Gathemia, Compensation in Criminal Law (1985) (unpublished LL.B. dissertation, University of Nairobi).

EXTRAMURAL PENAL EMPLOYMENT

Section 68 of the Prisons Act provides for extramural penal employment.[55] This is a method for dealing with petty offenders and for reducing the cost of maintaining inmates serving short prison terms. Extramural penal employment is a hybrid sanction. It is retributive in the sense that the offender is made to pay for his or her wrongdoing by performing public work as defined by statute. This method also seeks to achieve both specific and general deterrence. At the same time, the offender is given a chance to reform and fit into society once again. Finally, the method is restitutionary insofar as the offender provides services to the very community he or she has wronged.

An order for extramural penal employment may be made in the case of a person sentenced to imprisonment for not more than six months; or imprisoned for nonpayment of a fine, compensation, or costs; or sentenced to detention. In such cases, the sentencing court orders that in lieu of imprisonment or detention the offender should perform some public work[56] outside the prison or detention facility for the duration of the term of imprisonment or detention. Offenders are required to engage in some kind of public work unconnected with prisons and to report to a designated local government department or a local authority such as a municipality or city council. The prisoner works in the daytime and is provided with food while at work but is not paid. Offenders can go back to their homes at night. During the period of extramural penal employment, the convicted person may by dint of industry and hard labor earn a remission of one-third of the sentence.

RECONCILIATION

Section 176 of the Criminal Procedure Code vests an important power in the courts to promote reconciliation and settlement, in an amicable way, in minor criminal cases by the payment of compensation or on

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55 On extramural penal employment generally, see Muigua, *supra* note 47.

56 Prisons Act, *supra* note 20, § 68(9), defines public work as "work performed in any department of the Government or any local authority."

other terms approved by the court. Once settlement is reached, the court may stay or terminate formal criminal proceedings.

EARLY RELEASE

Remission of Sentence

By virtue of section 46 of the Prisons Act, prisoners sentenced to terms exceeding one month may by industry and good conduct earn remission of one-third of their sentence. Remission cannot be granted to any prisoner until one calendar month has been served, or to any prisoner sentenced to imprisonment for life, or to any prisoner detained at the President's discretion. A prisoner may be denied remission in the interests of his or her reformation and rehabilitation or in the interests of public security or public order.

Remission cannot be earned for any period spent in hospital through the prisoner's own fault or for any period during which the prisoner is undergoing solitary confinement as a punishment. Remission may be lost if the prisoner commits an offense against prison discipline. The Minister of Home Affairs is empowered to restore forfeited remission in whole or in part on the recommendation of the Commissioner of Prisons. The minister may also grant a further remission on the grounds of exceptional merit, permanent ill health, or other special considerations.

Release on Parole

Section 49 of the Prisons Act provides that a person sentenced to a term of four years or more may be allowed by the Commissioner of Prisons to be absent from prison on parole, within three months of the date upon which he or she is due for release, for such period of time and upon such conditions as the commissioner may specify. Breach of parole conditions is an offense punishable in its own right by imprisonment up to six months. The commissioner has power to recall a prisoner released on parole. The act does not mention the grounds on which a prisoner may be recalled, although it would appear that breach of the conditions

of parole must be a ground. To prevent arbitrary use of the recall power, grounds should be specified.

Presidential Pardon

The prerogative of mercy is the exclusive domain of the President. Section 27 of the Constitution gives the President full discretion to grant pardons. The prerogative may be exercised in several forms. The President may pardon a convicted person either unconditionally or subject to lawful conditions; grant a respite from the execution of a punishment either indefinitely or for a specified period; substitute a less severe form of sentence; remit the whole or part of a punishment or penalty; or remove in whole or in part the nonqualification or disqualification of a person, on the basis of electoral misconduct, from registration as an elector or from nomination for election to the National Assembly.[57]

Section 28 of the Constitution provides for an Advisory Committee to the President on the Prerogative of Mercy. The President may refer death penalty cases to the committee for advice or may consult the committee in other cases, but the committee's recommendation is not binding on the President.

EXPANDING THE USE OF ALTERNATIVES TO IMPRISONMENT

Although a wide range of noncustodial sentence options are available to Kenyan courts, their use has been negligible. As noted earlier, in Nairobi

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[57] With regard to the last, see Mbondo v. Galgalo, Election Petition No. 16 of 1974 (High Ct. 1975) (Kenya) (disqualifying a senior Cabinet minister, on the ground of his having engaged in electoral misconduct, from contesting any election for 5 years); Constitution (Amendments) Act No. 1 of 1975 (Kenya) (introduced to nullify the preceding decision by providing for a presidential pardon in such cases); James R. Gathii, *Kenya's Legislative Culture and the Evolution of the Kenya Constitution,* in *Law and Development in the Third World* 84, 98 (Yash Vyas et al. eds., 1994) (noting the immediate pardon of this minister).

in the 1980s, 73 percent of all convicted persons were sentenced to imprisonment.[58] "Imprisonment is clearly the favoured method of dealing with convicts even where the nature of the offence would suggest the trying of other methods."[59] Despite clear directives from the Registrar of the High Court to all magistrates in Kenya to order extramural penal employment in lieu of imprisonment for petty offenders,[60] the number of such orders appears to have dropped considerably from the initial figure of ten thousand in 1963, when the scheme was inaugurated.[61] These statistics suggest that it may be necessary to amend the sentencing provisions of the criminal laws to remove obstacles to noncustodial sanctions; to provide new noncustodial alternatives; and to incorporate into sentencing laws the following general principles:

> The criminal must be viewed and used as a means of conferring an immediate benefit on the community at large.
>
> Imprisonment should be imposed only as a sanction of last resort, taking into account the nature and gravity of the offense.
>
> Imprisonment should not be imposed for minor offenses unless there are aggravating circumstances or the offense is widespread in a particular area.
>
> Imprisonment should not be imposed for first offenses or domestic offenses unless the offense is of a serious nature.
>
> Automatic imprisonment for nonpayment of fines should be replaced by alternative noncustodial sanctions.

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58 See *supra* note 13 and accompanying text.

59 Muli et al., *supra* note 13, at 185.

60 Registrar of the High Court of Kenya, Circular No. 47/20/V.II–808 (Mar. 30, 1983).

61 Muigua, *supra* note 47, at 29 & appendix.

The trial court should be required to state reasons when it orders a nonmandatory sentence of imprisonment.

Noncustodial measures must be real alternatives to imprisonment, not additions to it. Only in the case of serious crimes should noncustodial sentences be combined with imprisonment.

In cases where the offender has already remained in pretrial remand for a period equal to, or greater than, the term of imprisonment provided for the offense, the offender should be released immediately upon conviction. Where some period less than the specified term has been served in pretrial remand, this period must be taken into consideration in sentencing the offender. Moreover, the state should pay reasonable compensation to accused persons who are acquitted after spending time in pretrial remand. Compensation should also be available for time served on a custodial sentence that turns out to have been based on an unjustified conviction.

Courts must encourage reconciliation and settlement between the parties on appropriate terms.

In most African traditions, the common objective of dispute resolution is pacification of the disputing parties and healing the rift in the community caused by the crime.[62] Contemporary Kenyan statutory provisions relating to reconciliation and settlement fully embrace this objective, as do restitutionary sentences in their own way, but these provisions have some ambiguities, which need to be removed. The provisions may be further strengthened by incorporating indigenous community-based dispute resolution into the statutory framework.[63]

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[62] *See generally* Daniel W. Van Ness, *New Wine and Old Wineskins: Four Challenges of Restorative Justice,* 4 Crim. L.F. 251, 252–57 (1993). See *infra* note 73 and accompanying text.

[63] In this connection, see Mary Ann Yeats, *Cultural Conflict in Community-Based Corrections,* 2 Crim. L.F. 341 (1991) (discussing the situation of Aboriginal offenders in Australia).

Settlement

An important power is vested in the courts, under section 176 of the Criminal Procedure Code, to try to bring about a reconciliation between victims and offenders and to facilitate settlement in the case of common assault or offenses of a personal or private nature that do not amount to a felony or a misdemeanor of an aggravated nature. Unfortunately, section 176 has been invoked only sparingly and there is some confusion over which offenses it comprises. For instance, some courts take the position that the express mention of common assault in section 176 implicitly rules out more serious forms of assault.[64]

The provisions relating to settlements contained in section 320 of the 1973 Indian Code of Criminal Procedure appear to be substantially similar to those set out in section 176 of the Kenyan Code.[65] The provisions in the Indian Code, under the heading "compounding of offences," are quite comprehensive and unambiguous. The code contains a list of offenses that are compoundable either with or without the consent of the court. Compounding, according to Justice Prinsep in *Murray v. Queen-Empress,* "signifies that the person against whom the offence has been committed has received some gratification, not necessarily of a pecuniary character, to act as an inducement for his desiring to abstain from a prosecution."[66] According to Justice Trevelyan, compounding "supposes an arrangement by which the parties have settled their differences, and in the more usual acceptance of the term implies that the prosecutor has received some consideration or gratification for dropping prosecution."[67]

Under Indian law, compounding is of two gradations. Specified

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64 *See* Mbegu v. R., 1969 High Ct. Digest n.312 (Tanz.); R. v. Saidi, 1960 E. Afr. L. Rep. 1058 (High Ct.) (Tanganyika). *But see* Kingu v. R., 1968 High Ct. Digest n.105 (Tanz.).

65 On Indian law generally, see Prabhas Chandra Sarkar et al., *The Law of Criminal Procedure* (4th ed. 1974); C.H. Sohoni, *Code of Criminal Procedure* (R. Nagaratnam ed., 19th ed. 1992).

66 Indian L. Rep. 21 Cal. 103, 112 (Calcutta High Ct. 1893).

67 *Id.* at 114.

minor offenses may be compounded by the parties themselves; specified offenses of a more serious nature require the consent of the court as well.[68] An abetment or attempt to commit a compoundable offense may be compounded in a similar manner.[69] The compounding of an offense has the effect of an acquittal; however, if the offense is improperly compounded, the accused may be tried again.[70]

As noted earlier, the Indian provisions are substantially similar to those set out in section 176 of the Kenyan Criminal Procedure Code.[71] While Indian statutory and case law can help with the interpretation of cognate provisions in Kenyan law, it would be preferable to set out in the Kenyan Criminal Procedure Code a list of all compoundable offenses under the Penal Code and other statutes.

Administrative fines are a variant of compounding.[72] These commonly take the form of "voluntary settlement" with income tax offenders and monetary fines for minor traffic offenses. Such arrangements avoid costly and unnecessary litigation in these areas and could be mandated for appropriate criminal offenses.

Along these lines, I suggest that there should be a statutory direction to the courts that their primary concern be the settlement of criminal cases and the reconciliation of the parties by means of compensation, restitution, and similar arrangements. Once an acceptable settlement has been reached, the courts should then be required to discharge the offender either absolutely or conditionally.

Settlement provisions should be strengthened by incorporating the rich indigenous traditions of community adjudication found in many African societies. Community-based justice relies on restitutive, rather than repressive, sanctions and public participation, rather than formal

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68 Crim. Proc. Code, 1973, § 320 (1)–(2) (India) [hereinafter Indian Code].

69 State v. Trikamdas, 1954 A.I.R. (Bom.) 427 (Bombay High Ct.) (India).

70 Indian Code, *supra* note 68, § 320(8).

71 For another code similar to the Indian, see R. v. Saidi, 1960 E. Afr. L. Rep. 1058 (High Ct.) (Tanganyika) (Windham, C.J.) (suggesting that the offense of cheating, or obtaining money by false pretenses, was a compoundable offense under Indian law and should be similarly treated under Crim. Proc. Code § 134 (Tanganyika)).

72 *See* Walker, *supra* note 4, at 227.

process and specialized legal practitioners.[73] Deinstitutionalization of criminal justice should be an important objective of criminal law reform.

Restitution

When the focus of criminal justice shifted to punishment and rehabilitation under colonial rule, the offender became the key figure in the criminal law process, not the victim and the goal of remedying the wrong done to him or her. While the Kenyan Penal Code and Criminal Procedure Code have provisions relating to compensation,[74] these have been underutilized. In *Mukindia v. R.,* a case that is still good authority in Kenya, the Court of Appeal for Eastern Africa observed that the power to award compensation "should only be used in the clearest cases, as when a person has suffered a comparatively minor physical injury, or has been deprived of property, or whose property has suffered damage, and such deprivation or damage is of readily ascertainable and comparative small value."[75] In other cases, the Court stated, the aggrieved party should be left to pursue civil remedies. The Kenyan courts themselves have taken the view that fines should be calculated exclusively for the purpose of punishment and not then increased in size merely to make funds available for compensation purposes.[76] And this is despite the fact

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[73] On customary courts in Botswana, see Bessie Head, *Serowe, Village of the Rain Wind* 40 (1981); Bojosi Otlhogile, *Criminal Justice and the Problems of a Dual Legal System in Botswana,* 4 Crim. L.F. 521, 524 n.12, 529–30 (1993); Isaac Schapera, *A Handbook of Tswana Law and Custom* ch. 1 (2d ed. 1955). A trial in a traditional court "is not adversarial in the sense of a trial in a court of the common law tradition. Every man present—including the Chief—is entitled to speak for or against the accused, with assistance readily available [to the accused] on matters of procedure." Otlhogile, *supra,* at 530 (citation omitted).

[74] Penal Code, *supra* note 14, § 31; Crim. Proc. Code, *supra* note 28, § 175.

[75] 1966 E. Afr. L. Rep. 425, 428 (appeal taken from Kenya). This court was at one time the highest court of appeal for the states in east Africa, including Kenya. Its decisions are binding on Kenyan courts unless subsequently overruled by the present Court of Appeal of Kenya.

[76] Mahamoud v. R., 1959 E. Afr. L. Rep. 1087 (Sup. Ct.) (Kenya); *accord* Salim v. R., 1 Tanganyika L. Rep. (Revised) 169 (High Ct. 1930); Singh v. R., [1951] 6 Uganda L. Rep. 265 (High Ct.).

that "compensatory fines were created specifically to avoid the necessity of subsequent civil proceedings."[77]

It is submitted that under existing law the courts are empowered to order payment of compensation either in addition to, or instead of, any other remedy. To avoid narrow interpretations of the code provisions relating to compensation, they should be amended as follows:

> Offenders or third parties responsible for their behavior should, as far as possible, make fair compensation to victims, their families, or their dependents. Such compensation should include restitution of property, payment for injury or loss suffered, and reimbursement of expenses incurred.
>
> Where the community traditionally recognized the performance of personal services for the victim as adequate reparation, or compensation in kind rather than in cash, the courts should be authorized to make such orders.
>
> The offender's capacity to pay should be the only limit on the amount of compensation the court can order. This would leave scope for providing meaningful compensation in serious cases.
>
> Restitution to crime victims should be accomplished through a sentence of conditional discharge, with the condition being that the defendant provide adequate compensation to the victim.
>
> When the evidence is insufficient to support a criminal charge but nonetheless establishes a civil wrong, the court should be able to order compensation to the victim.

Constructive Community Work

One of the legitimate objectives of penal policy is using the offender to confer some immediate benefit on the community. The scheme of

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[77] Milner, *supra* note 34, at 114; *see also* Ignas v. Simeo, 1968 High Ct. Digest n.400 (Tanz.) (suggesting that the trial court should have awarded compensation in the criminal proceedings, obviating the need for a separate civil suit).

extramural penal employment provided under section 68 of the Prisons Act aims at this goal. To date, however, not much constructive use has been made of this sanction. Offenders are generally given petty jobs such as cleaning offices or maintaining gardens, which may do little for either the community or the offender. More innovative planning is needed to realize the full potential of community work programs.

CONCLUSION

In spite of the wide variety of sentencing options available in Kenya, the courts overwhelmingly choose to sanction by imprisonment. Even default on the payment of a fine can lead to a prison term where extramural penal employment would at the very least be more economical and more beneficial to the community. In my view, the main purpose of penal policy is to provide an opportunity for the offender to reintegrate himself or herself into society and to rectify the damage both to the victim and to society caused by the crime. Imprisonment frustrates these objectives and should be reserved for habitual serious offenders and for grave offenses that do not readily lend themselves to alternative sanctions. Even in such cases, however, compensation can be ordered in addition to a prison term.

Settlement, restitution, and similar approaches should become routine for all minor offenses. Putting primary reliance on alternative sanctions should produce considerable savings in costs and in manpower, alleviating some of the pressure now experienced by an overburdened criminal justice system. To derive the greatest benefit from alternative sanctions, we need also to review and integrate indigenous traditions of community-based dispute resolution into the statutory structure.