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A Study on Community Service Orders in Kenya

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By

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Declaration

I, SIMATWO MERCY CHEMELI, 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:

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

Signed:.....

Date:.....

Desmond Tutu Owuoth

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Above all, God Almighty proved, yet again, that He always gives strength in times of weakness.

Dedication

For the Simatwo clan- your daughter made it!

Abstract

This dissertation is a study on the extents to which community service orders are utilized in Kenya as a sentencing option. The research for its writing proceeded on the hypothesis that community service orders meet the restorative justice goal, thus more should be done to ensure that more are meted, especially for petty offences. The dissertation explains the legal framework of these orders by drawing from national as well as international legislation. The statistics presented regarding the number of these sentences meted in the last year establish that they are generally few, and this has been attributed to the general lack of consistency in sentencing that existed before the sentencing policy guidelines were launched in 2016. However, the reforms made toward increasing the number of community service orders meted as opposed to incarceration are highlighted in the fourth chapter, are a testament that eventually the number of inmates in prison will decrease because criminal offenders will be serving CSOs for the petty offences they have committed.

List of Abbreviations

CoK	Constitution of Kenya
CSO	Community Service Order
NCAJ	National Council on the Administration of Justice
NCSOC	National Community Service Orders Committee
NCCJR	National Committee on Criminal Justice Reforms
PAS	Probation and Aftercare Services Department
SPG	Sentencing Policy Guidelines

National Legislation

Constitution of Kenya, (2010)

Prisons Act (Act No. 49 of 1962) Cap 90 Laws of Kenya.

Borstal Institutions Act (Act No. 23 of 1963) Cap 992 Laws of Kenya.

Penal Code, (Act No. 81 of 1948) Cap 63 Laws of Kenya.

Probation of Offenders Act Cap 64 Laws of Kenya.

Community Service Orders Act (Act No. 10 of 1998) Laws of Kenya.

Criminal Procedure Code Cap 75 Laws of Kenya.

Alcoholic Drinks Control Act (Act No. 4 of 2010) Laws of Kenya.

Forests Act Cap 385 Laws of Kenya.

Case Law

Jonathan Mutinda v. Republic [2004] eKLR.

Fatuma Hassan Salo v Republic [2006] eKLR.

Josephine Arissol v Republic [1957] EA 447

Republic v Paul Kitale Mwawasi [2018]eKLR

Douglas Monchonge Omogo v Republic [2018] eKLR.

Douglas Monchonge Omogo v Republic [2018] eKLR.

James Mwakisachi Mwadime v Republic [2018] eKLR.

Republic v Stanley Keino Kibet [2016] eKLR.

Republic v Joseph Mayaka Obier & 2 others [2016] eKLR.

Republic v Joseph Onsase Aura [2016] eKLR.

Republic v Ephantus Karanja Wangari [2016] eKLR.

Republic v Collet Thabitha Wafula [2016] eKLR.

Republic v Asher Otieno [2016] eKLR.

Stephen Kipruto Cheboi & 2 others v Republic (2014) eKLR

International Instruments

African Charter on Human and Peoples' Rights, 27 June 1981, 1520 UNTS 217.

UNGA, *United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules)* resolution 45/110, 14 December 1990.

Kadoma Declaration on Community Service, International Conference on Community Service Orders in Africa, November 1997, 4-6.-*Economic and Social Council resolution 1998/23, annexes I adopted on 28 July 1998.*

Basic principles on the use of restorative justice programmes in criminal matters *Economic and Social Council resolution 2002/12, annex, 24 July 2002.*

Chapter 1: Background and Introduction

1.1 Background

Restorative justice, what others may refer to as reparative justice,¹ covers the idea that when a crime has been committed, the action taken afterwards should aim to indemnify victims and encourage offenders to take responsibility for the harm caused.² In addition, the concept also seeks the reintegration of offenders into the community, all the while involving victims, offenders and community representatives in collaborative decision-making processes to meet these ends.³

Restorative Justice has been regarded as a theory underlying punishment.⁴ From the above definition of restorative justice, it is evident that it is an amalgamation of various theories of punishment, which are restitution of the victims; rehabilitation of the offenders; deterrence, where through punishment, other members of the society are discouraged not to commit crimes, and retribution- a considerably archaic form of punishment where criminal offenders get their just desserts based on the Code of Hammurabi, the 'eye for an eye' theory.⁵

The Kenyan society draws its restorative justice practices from African customary law.⁶ Traditional African societies were based on a spirit of collectivism, where the entire community was involved in social, economic and political activities, including the

¹ Ombija N, 'Restorative justice and victims of crime in Kenya' *Kenya Law*, 2007 <http://kenyalaw.org/kl/index.php?id=1895> accessed 17 January 2017.

² Doolin K, 'But what does it mean? Seeking definitional clarity in restorative justice' *Journal of Criminal Law* 2007, 71.

³ Doolin K, 'But What Does It Mean? Seeking Definitional Clarity In Restorative Justice', 428.

⁴ Bowker LH, *Correction, the science and the art*, 1ed, Macmillan Publishers Ltd, London, 1982, 38-40.

⁵ Musyoka W, *Criminal Law*, Law Africa Publishing (K) Ltd, Nairobi, 2011, 194, and Bowker LH, *Correction, the science and the art*, 38-40.

⁶ Ombija N, 'Restorative justice and victims of crime in Kenya' <http://kenyalaw.org/kl/index.php?id=1895> accessed 17 January 2017.

punishment of wrongdoers.⁷ The clan or community of both the victim and the offender were seen as one and interested in the amicable settlement of the dispute at hand.⁸

In Kenya, The Report of the Judicial Taskforce on Sentencing highlighted that through the 2016 Sentencing Policy Guidelines, the goal of punishment promoted is Restorative Justice.⁹ While there is a continued debate as to whether restorative justice dwells more on the outcome than the process, it is important to note that a desired outcome cannot be achieved without a well thought-out process.¹⁰ In addition, it has been argued that the process – procedural justice- is the underlying tone of restorative justice.¹¹ This is among the reasons the Sentencing Policy Guidelines (SPGs) were put in place; sentencing is the last tier of the process that is the criminal justice system, of which the outcome will be the achievement (or lack thereof) of restorative justice.¹²

Among the methods through which restorative justice can be achieved in Kenya, is through the utilization of traditional dispute resolution mechanisms, where African Customary Law is applicable,¹³ for so long as it is not repugnant to justice and morality.¹⁴ In addition, through custodial sentences that may offer the offenders the opportunity for competency development and reintegration, the Prisons Act is one of the avenues that seeks to achieve this goal.¹⁵ Sections 66 and 67 of the Prisons Act provides for the establishment of Youth Corrective Training Centres, where the youth may be offered special training in various crafts in order to rehabilitate them. In addition, the Borstal Institutions Act¹⁶ seeks to retrain and reintegrate young offenders to society. Section 4 of

⁷ Ombija N, 'Restorative justice and victims of crime in Kenya'<http://kenyalaw.org/kl/index.php?id=1895> accessed 17 January 2017.

⁸ Ombija N, 'Restorative justice and victims of crime in Kenya'<http://kenyalaw.org/kl/index.php?id=1895> accessed 17 January 2017.

⁹ The Judiciary of the Republic of Kenya, *Report of the judicial taskforce on sentencing*, 2016, 2.

¹⁰ Doolin K, 'But What does it mean?' 71.

¹¹ Gabbey Z, 'Justifying restorative justice: A theoretical justification for the use of restorative justice practices' 2 *Journal of Dispute Resolution*, 2005, 350-353.

¹² Kiage P, *Essentials of Criminal Procedure in Kenya*, Law Africa Publishing (K) Ltd, Nairobi, 2014.

¹³ Article 159, *Constitution of Kenya* (2010).

¹⁴ Article 159, *Constitution of Kenya* (2010).

¹⁵ *Prisons Act* (Act No. 49 of 1962) Cap 90 Laws of Kenya.

¹⁶ *Borstal Institutions Act* (Act No. 23 of 1963) Cap 992 Laws of Kenya.

the Act requires every borstal institution to give inmates educational, industrial or agricultural training.

Another avenue through which restorative justice in Kenya can be achieved, is the utilization of non-custodial sentences, which are provided for in the Penal Code.¹⁷ However, this paper will look into Community Service Orders (CSOs). Despite the fact that the Community Service Orders Act exists, according to the Kenya National Bureau of Statistics,¹⁸ those convicted to serve the orders are significantly fewer than those incarcerated. This has been attributed mainly to the fact that officers are unable to supervise the non-custodial orders. Nonetheless, a country with overcrowded prisons, where inmates suffer various human rights violations,¹⁹ (and ultimately, the goal of punishment may not be achieved) needs to utilize all options legally provided for in pursuit of restorative justice.²⁰

If the utilization of CSOs will lead to the achievement of restorative justice, this would mean that one of the goals of the Sentencing Policy Guidelines would be achieved. This would in turn, require that the guidelines are actually in practice and effective.

1.2 Statement of problem

It is as a result of the over-utilization of custodial sentences in Kenya, that fewer non-custodial sentences-particularly CSOs- are meted.²¹ The result of which, criminal offenders may never be truly rehabilitated nor would they ever be truly reconciled with the victims of their crimes.²² Thus, the goal of restorative justice as provided in the Sentencing Policy Guidelines 2016, may not be met. Given that the legislative framework for CSOs in Kenya is already in place, it is evident that there are challenges in the implementation of these laws by the judiciary and Probations and Aftercare Services

¹⁷ Section 24, *Penal Code*, (Act No. 81 of 1948) Cap 63 Laws of Kenya..

¹⁸ Kenya National Bureau of Statistics, *Statistical Abstract*, 2016, 266-274.

¹⁹ Muhoro P, Participant Papers,http://www.unafei.or.jp/english/pdf/PDF_rms/no57/57-23.pdf-, accessed 15 January 2017.

²⁰ Muhoro P, Participant Papers,http://www.unafei.or.jp/english/pdf/PDF_rms/no57/57-23.pdf-, accessed 15 January 2017.

²¹ Kenya National Bureau of Statistics, 'Statistical Abstract 2016', 266-274

²² Ombija N, 'Restorative justice and victims of crime in Kenya'.

department, which is why more CSOs are not meted. Thus, it is important to highlight the challenges the above mentioned bodies face with respect to the implementation of the CSOs Act and establish how to improve the situation.

1.3 Statement of Objectives

The general objective of this research paper was to test the impact of the Sentencing Policy Guidelines; by proving they are effective if the goal of restorative justice can be achieved through the increased utilization of CSOs.

The specific objectives of the paper are to:

- i. Examine the country's current penal practice in order to establish the extents to which restorative justice is applicable as a goal of punishment within the current legislative framework;
- ii. Appraise the implementation of the CSOs Act- highlighting the milestones achieved and the challenges faced in order to realize the goal of restorative justice, and;
- iii. Illustrate how meting CSOs are more likely to meet the restorative justice goal, as opposed to imprisonment (information from those in the communities).

1.4 Research Questions

- 1) To what extents is restorative justice applicable as a goal of punishment within the current legislative framework?;
- 2) What is the current position and trends in the implementation of the CSOs Act?
- 3) What overall effect would better implementation of the abovementioned statute have on the judiciary in pursuit of restorative justice, and what does it highlight with respect to the SPGs?

1.5 Hypothesis

Community service orders meet the restorative justice goal, thus more should be done to ensure that more are meted, especially for petty offences.

1.6 Justification of the study

This study is justified on the basis that although there are laws in place to facilitate the rehabilitation of criminal offenders through non-custodial sentences, judges have an

affinity toward custodial ones, even when CSOs are applicable.²³ Thus, by highlighting the reasons why and how this comes about, recommendations can be forwarded to remedy the situation, and more CSOs are meted out.

According to Clement Okech, CSOs epitomize the embodiment of supervised non-custodial sanctions in Kenya.²⁴ It is based on this premise that the paper dwells on CSOs as the best way in which the restorative justice goal in the Sentencing Policy Guidelines can be met through the use of their increased utilization. In addition Muhoro Perterson Kamunyu, observed that the courts should mete more non-custodial orders because the prisons, while capable of rehabilitating criminal offenders, have their resources overstretched and burdened by the many prisoners.²⁵ Furthermore, due to the numerous human rights violations that occur in the Prisons, this study is important in bringing out ways in which the number of criminal offenders convicted to the prisons can be decreased, so as to reduce the social evils that occur in the prisons.²⁶ Thus, in order to decongest prisons, it is important for more CSOs to be meted.

In addition, challenges in implementation of the CSOs Act may explain the aversion to the respective non-custodial order by judges, thus limiting the options that judges have when it comes to sentencing.²⁷ It may be inferred that their judicial discretion, a power accorded to them by that office, is greatly interfered with. Ergo, this study was important as it sheds light on to how to better implement the Act, widening the scope on which judges may exercise their discretion during sentencing, in order to promote restorative justice as targeted by the (SPGs) 2016.

²³ *Jonathan Mutinda v. Republic* [2004] eKLR, *Fatuma Hassan Salo v Republic* [2006] eKLR.

²⁴ Okech C, 'The evolution of sentencing in Kenya; Past present and future, probation service Kenya', <http://cep-probation.org/wp-content/uploads/2015/03/Parallel-IV-A-Alternatives-to-prison-in-Africa-Okech1.pdf> On 20 January 2017.

²⁵ Muhoro PK, 'Crime Prevention: Current issues in correctional treatment and effective countermeasures,' Participant Papers.

²⁶ Muhoro PK, 'Crime Prevention Crime Prevention: Current issues in correctional treatment and effective countermeasures,' Participant Papers.

²⁷ Okech C, 'The evolution of Sentencing In Kenya; Past Present and Future, Probation Service Kenya', <http://cep-probation.org/wp-content/uploads/2015/03/Parallel-IV-A-Alternatives-to-prison-in-Africa-Okech1.pdf> accessed 20 January 2017.

1.7 Scope & Limitations of the Study

This study is limited to:

- 1) Highlighting Kenya's current penal practice with respect to how CSOs meet the Restorative Justice Goal of Punishment
- 2) Establishing to what extent CSOs are in use;
- 3) Highlighting the challenges and opportunities in the implementation of the CSOs Act.

1.8 Research Design & Methodology

The methodology for the collection of data presented in the dissertation was triangulation.²⁸ Triangulation has been defined in social science as the mixing of data or methods so as to have diverse views and standpoints to cast light on a topic.²⁹ The specific methods applied were: (i) documentary research; (ii) interviews, and; (iii) observation.

The methodology is justified based on the fact that the author sought objective answers to the research questions. In addition, the methodology applied facilitates a crosschecking mechanism for the data presented to ensure its objectivity.³⁰

Documentary research was essential in establishing the link between restorative justice and CSOs. In addition, the documentary research aided the author in grasping the background of Kenya's sentencing regime, as well as the legal framework and extents to which CSOs have been implemented so far.

The interview referred to is a personal conversation with Dr. Sarah Kinyanjui, one of the most prolific writers on restorative justice in sentencing in Kenya. It was important to gain her perspective on the conceptual framework of the paper (Chapter 2) because of the general lack of consensus among scholars as to whether or not restorative justice is a theory.

²⁸ Olsen W, 'Triangulation in social research: Qualitative and quantitative methods can really be mixed', in Holborn M and Halarambos M, *Developments in sociology*, Causeway Press, Omskrik, 2004, 3.

²⁹ Shaw I, 'Cutting edge issues in social work research', 1 *The British Journal of Social Work*, 33, 2003, 103-116.

³⁰ Linos K and Carlson M, 'Qualitative methods for law review writing' 1 *The University of Chicago Law Review*, 84, (2017), 213-238.

1.9 Definition of Terms

i Restorative Justice

Restorative justice includes any process in which the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.³¹

ii Community

According to Paul McCold, when discussing the community it is important to look at it on two levels: The micro-community, and the macro-community.³² The former includes the victim and the offender of a crime, as well as those that have a personal relationship and emotional connection with them either as family or friends.³³ The latter refers to everyone else who is likely to have no such connection to the victim or the offender, but because of other factors such as geography or membership, they are affected by the crime committed.³⁴ Francis Kariuki summarizes this definition by stating that a community is a group of people with common and/or similar interests,³⁵ based on article 67 of the Constitution of Kenya.

The role of the micro-community is to collectively determine how to best repair the harm caused by the offending behaviour, for example, through participating in restorative mediation.³⁶ The harm in this instance refers to the specific financial and emotional trauma suffered by the victims and their families, and the harm to the relationship between the abovementioned and the offender and the offender's family.³⁷

³¹ United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programs*, Criminal Justice Handbook Series, United Nations, New York, 2006, 5.

³² McCold P, 'What is the role of community in restorative justice theory and practice?' in Zehr H and Toews B, *Critical issues in restorative justice*, Criminal Justice Press and Willan Publishing, New York, 2004, 157-162.

³³ McCold P, 'What is the role of community in restorative justice theory and practice?' 157-162.

³⁴ McCold P, 'What is the role of community in restorative justice theory and practice?' 157-162.

³⁵ Kariuki F, 'Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology,' *Strathmore University Press*, undated, 3-5.

³⁶ McCold P, 'What is the role of community in restorative justice theory and practice?' 157-162.

³⁷ McCold P, 'What is the role of community in restorative justice theory and practice?' 157-162.

In contrast, the role of the Macro-community is to measure the repair the aggregate effect of crime and limit the potential threat posed to society by the offender's future behaviour and take specific actions to repair the harm caused- for instance by determining the sanctions.³⁸

iii *Community Service Order*

The CSOs Act defines Community Orders as unpaid public work within a community, for the benefit of that community, for a period not exceeding the term of imprisonment for which the court would have sentenced the offender.³⁹ They are applicable only to crimes where the punishment would have been imprisonment for a term not exceeding three years, with or without the option of a fine; or imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less.⁴⁰

1.10 Outline of the Dissertation

Chapter 1 of the dissertation gives a background of the goal of punishment in Kenya being restorative justice. It outlines the problem, the research questions and the definition of key terms in the dissertation. Chapter 2 outlines the conceptual framework-linking CSOs and the goal of restorative justice. It also explains the methodology the researcher applied in the collection of the information presented. Chapter 3 answers the first research question, by reporting on the country's current penal practice and to what extents is restorative justice applicable as a goal of punishment within the current legislative framework. It also explains the role judicial discretion plays in the underutilization of CSOs. Chapter 4 highlights the current reforms that are taking place to ensure that more CSOs are meted. Chapter 5 is the final and concluding chapter and it highlights various recommendations based on Chapters 3 & 4.

³⁸ McCold P, 'What is the role of community in restorative justice theory and practice?' 157-162.

³⁹ Section 3, *Community Service Act* (Act No. 10 of 1998) Laws of Kenya.

⁴⁰ Section 3, *Community Service Act* (Act No. 10 of 1998) Laws of Kenya.

Chapter 2: Conceptual Framework & Methodology

'Absolutist' philosophies are wrong, or at the very least, untenable'

Mike Materni, Harvard Law

2.1 Introduction

This Chapter explains the connection between restorative justice and community service orders, thus developing the conceptual framework that informed the research. It explains restorative justice as a concept, rather than a theory, given the general lack of consensus as to whether it has achieved the rank of 'theory' as discussed by academics and professionals.⁴¹ Lastly, the methodology used in the collection of data is explained at the end of the chapter.

2.2 Restorative Justice Elements

To begin, Van Ness states that restorative justice strives to change and transform the way contemporary society views and responds to crime.⁴² This is a broad and general perception of restorative justice. The particular elements are explained in the paragraphs to follow.

According to Dr. Caroline Boyes-Watson, restorative justice is a growing social movement aiming to institutionalize peaceful approaches the harm caused by and experienced by criminal offenders and victims respectively.⁴³ In addition, restorative justice is essential in problem solving when it comes to violations of legal and human rights.⁴⁴ She asserts that all the above is possible through building partnerships with the various stakeholders involved in any particular crime.⁴⁵ These include the criminal offender, the victim, and the general community.

⁴¹ Walgrave L, 'Investigating the potentials of restorative justice practice' *Washington University Journal of Law & Policy*, (2011), 36

⁴² Van Ness D, 'Restorative justice as world view' *Prison Fellowship International* <http://www.educ.cam.ac.uk/research/projects/restorativeapproaches/seminartwo/DanielWVanNess.pdf> on 14 March 2018.

⁴³ 'What is restorative justice?' *Suffolk University* <http://www.suffolk.edu/college/centers/15970.php> on 14 February 2018.

⁴⁴ 'What is restorative justice?' *Suffolk University* <http://www.suffolk.edu/college/centers/15970.php> on 14 February 2018.

⁴⁵ 'What is restorative justice?' *Suffolk University* <http://www.suffolk.edu/college/centers/15970.php> on 14 February 2018.

In looking at the nexus between goals of punishment and restorative justice, Braithwaite and Daly agree that the depiction that restorative justice, retribution and rehabilitative justice cannot exist in the same sphere is false.⁴⁶ In fact, Daly encourages that distinguishing between the three is an effort in futility.⁴⁷ Evidently, restorative justice is a balance between the utilitarian approach and the retributive approach.⁴⁸ The utilitarian theory as forwarded by Jeremy Bentham has been taken to mean that the greatest good for the greatest number.⁴⁹ In the Criminal Justice System, the greatest good sought is minimum criminal infractions i.e the goal of deterrence- this means that members of society learn to refrain from criminal activity, and the offender's chances of recidivism are reduced.⁵⁰ To some scholars, the deterrence of criminal activity has been the greatest good sought.⁵¹ The cost of deterrence is more often than not, greatest on the criminal offender, given that he/she serves time in detention, or undergoes a punishment sanctioned by law. This is the point at which the utilitarian theory meets with the retributive theory of punishment. The criminal offender gets his/her 'just deserts' and therefore, the retributive Hammurabi Code that stipulates, 'an eye for an eye...' is directly applied.⁵²

⁴⁶ Braithwaite J, 'Accountability and responsibility through restorative justice', in Dowdle M (ed), *Rethinking Public Accountability*, Cambridge University Press, Cambridge, 2006, 37. See Also Daly K, 'The punishment debate in restorative justice', in Somin j and Sparks R (eds) *The SAGE handbook of punishment and society*, Sage Publications, 2013, 25.

⁴⁷ Daly K, 'The Punishment debate in restorative justice', 25.

⁴⁸ Marteni CM, 'Criminal punishment and the pursuit of justice' *2 British Journal of American Legal Studies* (2013), 266.

⁴⁹ Driver J, 'The history of utilitarianism' *Stanford Encyclopedia of Philosophy*, 22 September 2014 <https://plato.stanford.edu/entries/utilitarianism-history> on 28 January 2017.

⁵⁰ Driver J, 'The history of utilitarianism' <https://plato.stanford.edu/entries/utilitarianism-history> on 28 January 2017.

see also 'Punishment - Theories of punishment' *Net industries* <http://law.jrank.org/pages/9576/Punishment-THEORIES-PUNISHMENT.html> on 26 January 2017.

⁵¹ Haist M, 'Deterrence in a sea of just deserts: Are utilitarian goals achievable in a world of limiting retributivism,' *3 Article 8*, 99, (2009), 789-821.

⁵² Musyoka W, *Criminal Law*, Law Africa Publishing (K) Ltd, Nairobi, 2011, 66 , Bowker LH , *Correction, the science and the art*, 32.

In summary, there is no particular definition of restorative justice. However, the two main points that have been established from the above are: (i) the involvement of stakeholders, and; (ii) the balance restorative justice holds when it comes to the goals of punishment.

From the above proponents of restorative justice, it is notable that restorative justice focuses on the unique needs of the individuals affected by the specific incidents of a crime committed,⁵³ and invites them to participate in a personalized and private experience where they have the opportunity to consider what is necessary to help them heal.⁵⁴

2.3 The Link Between Restorative Justice and Community Service Orders

According to Dr. Sarah Kinyanjui, the link between CSOs and restorative justice is derived from the fact that stakeholders in a crime are involved in the sentencing of criminal offenders, and that offenders take responsibility for their actions by performing tasks that add value to the community.⁵⁵ Howard Zehr encourages scholars of restorative justice to look at three main questions when investigating restorative justice.⁵⁶ These are: (i) who has been hurt; (ii) what are their needs, and; (iii) how can things be put right. The important inference from this view is the investigation into; and involvement of all stakeholders affected by a crime. With respect to stakeholders, Sarah Kinyanjui points out that stakeholders are not limited to the victims of a crime alone.⁵⁷ For instance, burning forests is a crime with no isolated victim, but the offender must atone for his actions.⁵⁸ This broadened view that stakeholders may not be victims alone considers Zehr's assertion that identifying various stakeholders and their needs is possible through implementing CSOs as a sentencing option.

With reference to Zehr's questions above, Johnstone and Van Ness list some ingredients of restorative justice,⁵⁹ which can be found in the manner in which CSOs are administered

⁵³ Robinson G, 'Shapland J reducing recidivism: A task for restorative justice?' 3 *The British Journal of Criminology*, ' 48, (2008), 337-35.

⁵⁴ Marteni CM, 'Criminal punishment and the pursuit of justice', 266.

⁵⁵ Kinyanjui S, *Community service and probation for women: A study in Kenya*, Penal Reform International, 2016,

⁵⁶ Zehr H and Gohar A, *The Little Book Of Restorative Justice*, Good Books Intercourse New York, 2003

⁵⁷ Personal Communication with Sarah Kinyanjui

⁵⁸ Sections 52-57, *Forests Act*, (Act No. 7 of 2005).

⁵⁹ Van Ness D and Johnstone G, 'The meaning of restorative justice' in Van Ness D and Johnstone G (eds), *Handbook of restorative justice*, Willan Publishing, Cullompton, 2007, 5-24.

in Kenya. The first of these ingredients is the need for some relatively informal process, which aims to involve the victims and stakeholders, and others closely connected to the crime in discussions of what happened, what should be done to repair the harm and perhaps prevent further wrongdoing or conflict.⁶⁰ The second of these ingredients is an emphasis on empowering ordinary people whose lives are affected by a crime or other wrongful act.⁶¹ For these two, the role of the Probation and After Care Department in preparing pre-sentence reports for the courts before a CSO is meted, which involves investigations into the lives, community and socio-economic environment of a criminal offender, in order to determine what may have caused him/her to commit the crime, and the extents to which the victim and larger community were affected by the offender's crime.⁶²

The next ingredient is less stigmatization of an offender by punishment and more towards making amends for the harm that they have caused in a manner, which directly benefits those harmed, as a first step toward their re-integration into the community.⁶³ CSOs in Kenya are acts of service sanctioned by courts for offenders to perform within their local communities.⁶⁴ Given that CSOs are non-custodial orders an offender hardly faces the stigmatization that custodial orders impose.⁶⁵ Through his/her labours, a criminal offender receives what is due to him, while working in the very community he/she offended.⁶⁶ This means that a society may be more receptive to the offender when he/she completes serving his sentence, as they witnessed the attempt at penance through the tasks performed by the offender.⁶⁷

⁶⁰ Van Ness D and Johnstone G, The meaning of restorative justice' 5-24.

⁶¹ Van Ness D and Johnstone G, The meaning of restorative justice' 5-24.

⁶² Ministry of interior & coordination of national government, 'Probation and aftercare services', *Probation and aftercare services* <http://www.probation.go.ke/2015-11-07-10-14-45/2015-12-01-12-56-00.html> on 10 January 2017.

⁶³ Van Ness D, Johnstone G, 'The meaning of restorative justice', 5-24.

⁶⁴ Section 3, *Community Service Act*, (Act No. 10 of 1998).

⁶⁵ Kinyanjui S, 'A genealogical analysis of the criminal justice system in Kenya: Rebirth of restorative justice for juveniles' PHD Thesis, Leicester University, 2008, chapter 2.

⁶⁶ Kinyanjui S, 'A genealogical analysis of the criminal justice system in Kenya' chapter 2.

⁶⁷ Kinyanjui S, 'A genealogical analysis of the criminal justice system in Kenya' chapter 2.

The final ingredient is that decision makers should be concerned with ensuring that the decision making process and its outcome is governed by principles and values that are regarded by contemporary society as desirable because they are based on respect, non-violence, and inclusion rather than exclusion.⁶⁸ In their nature, CSOs prove to be directly compatible with this ingredient, given that they do not involve physical altercations with supervisors in the form of corporal punishment and that the offender is not excluded from the community he/she belongs to.

2.4 Conclusion

This chapter explained the various concepts of restorative justice that informed the paper's writing. In addition, the link between CSOs and Restorative Justice by looking at the various ingredients of Restorative Justice and comparing them to how CSOs are administered was established. Based on the conceptual framework discussed, a justification for the Judicial Taskforce on Sentencing recommending the utilization of CSOs and other non-custodial orders in pursuit of Restorative Justice is found.

⁶⁸ Van Ness D and Johnstone G, *The meaning of restorative justice* 5-24.

Chapter 3: Community Service Orders In Kenya

3.1 Introduction

This chapter outlines and discusses the legal and institutional framework of CSOs in Kenya. Moreover, court sanctioned responses to crime are into account by presenting the statistics and general practice in case law regarding CSOs. Lastly, the chapter discusses imprisonment as a product of the ‘dilution’ of Kenyans’ restorative values by criminal procedure introduced to the country as a result of colonization.

3.2 National Legal Framework for Community Service Orders in Kenya

The promulgation of the Constitution of Kenya, 2010 (CoK) introduced reforms that significantly transformed the country’s governance.⁶⁹ Chapter 4 of the CoK is the Bill of Rights which provides for the protection of the right to dignity; freedom from cruel, inhuman, or degrading treatment or punishment; freedom and security of the person; right to equality and freedom from discrimination; right to privacy; freedom of association; freedom of movement; right to fair trial and administrative action; rights of accused persons; right to nondiscrimination in access to justice and the right to health.⁷⁰ These rights are particularly important in the treatment of criminal offenders,⁷¹ because they are either taken away or have the potential to be undermined upon one’s incarceration,⁷² given the current state of overpopulated prisons which have strained resources to cater to prisoners’ needs.⁷³

⁶⁹ Akech M, ‘Institutional reform in the new constitution of Kenya’ *International Centre for Transitional Justice*, 2010, 7.

⁷⁰ Articles 27(4),28,29,31,36,47-50, emphasis on 50(2)(p), *Constitution of Kenya* (2010).

⁷¹ International Commission of Jurists: Kenya Section, *Decriminalize Petty Offences Attracting Criminal Sanctions*,2017, 3-5.

⁷² Muhoro P, Participant Papers, http://www.unafei.or.jp/english/pdf/PDF_rms/no57/57-23.pdf- on 15 January 2017.

⁷³ Kimega AM, ‘Stress among staff as experienced in the Kenya Prisons Service’ undated, 91-94. See also, Sarkin J, ‘Prisons in Africa: an evaluation from a human rights perspective’ 5(9)*Sur, Rev. int. direitos human.* São Paulo Dec. 2008 http://www.scielo.br/scielo.php?pid=S1806-64452008000200003&script=sci_arttext&tlng=en on 15 May 2017.

In addition, under the right to a fair trial, article 50(2)(p) of the CoK provides that criminal offenders should be given the least severe punishment provided for in law. It is based on these constitutional provisions that a basis for CSOs is found because they are a less severe punishment as compared to incarceration, and because they are not in prison, there are reduced chances of other rights being undermined.

Pursuant to the constitutional rights of criminal offenders outlined above, there are various statutes in place that wholly or partly provide for how they are to be punished. The first of these is the Penal Code, which lists the possible sentences available in Kenyan law, and that judges should always consider the circumstances of the offence and the character of the offender when choosing the appropriate sentence.⁷⁴ To this extent, the legal basis for judicial discretion in sentencing is touched on. Considering that this dissertation focuses on CSOs, it is important to enumerate the statutes that touch on CSOs and the Probation and Aftercare Services Department, which is charged with supervising and coordinating CSOs in Kenya. The first of these statutes are the Probation of Offenders Act,⁷⁵ and the Community Services Orders Act.⁷⁶ These Acts provide for how CSOs are to be carried out, stating the purpose of pre-sentencing reports that are collected by the PAS. In addition, the section 4 of the Probation of Offenders Act outlines the factors that a judge should consider when choosing between custodial and non-custodial sentences and these include: youth, character, antecedents, mental health and nature of the offence.⁷⁷ Furthermore, with respect to juvenile offenders the Children Act applies to the extent that the sentence chosen should always be in the best interest of the child,⁷⁸ and thus the need for the Borstal Institutions Act to facilitate the education and training of these offenders in preparation for life after the sentence is seen.⁷⁹

Among the sentencing options provided for in section 24 of the Penal Code are CSOs.⁸⁰ The CSO programme derives its mandate from the CSO Act and it is mainly geared

⁷⁴ Sections 24 & 35, *Penal Code*(Act No. 81 of 1948) Cap 63 Laws of Kenya.

⁷⁵ *Probation of Offenders Act*. Cap 64 Laws of Kenya.

⁷⁶ *Community Service Orders Act* (No. 10 of 1998) Laws of Kenya.

⁷⁷ Section 4, *Probation of Offenders Act*. Cap 64 Laws of Kenya.

⁷⁸ Section 18, *Children's Act* (2001)Laws of Kenya.

⁷⁹ Section 6, *Borstal Institutions Act* (Act No. 23 of 1963) Cap 92 Laws of Kenya.

⁸⁰ Section 24, *Penal Code* (Act No. 81 of 1948) Cap 63 Laws of Kenya.

towards offenders whose imprisonment sentences attract three years and below.⁸¹ It targets mainly non-serious offenders who do not pose a threat to themselves, the victim, or to the community.⁸² CSOs entail criminal offenders engaging in un-paid public works for a specified period within the community they offended with their crime.

The CSOs Act lists a number of committees with different functions that complement each other to ensure that the policy-making and supervision of CSOs is up to par. At the very helm is the National Community Service Orders Committee (NCSOC).⁸³ The functions of this committee include advising the Minister and the Chief Justice generally on the proper implementation of the provisions of the CSO Act, co-ordinating, directing and supervising the work of community service officers, and collecting and collating data on the operation of the CSO Act for the purpose of improving the national policy on community service orders. In addition, the NCSOC establishes CSO committees at district, divisional and locational levels comprising members to perform functions similar to the NCSOC at these levels.⁸⁴

Some members of NCSOC make up the Executive Committee.⁸⁵ The Executive Committee is responsible for the supervision of the day to day running of the secretariat. It also collects, stores and disseminates data relating to the implementation of CSOs.⁸⁶ Furthermore, this committee transmits to and advises the CSO committees at different administrative levels on the policies formulated by the NCSOC.⁸⁷ Furthermore, it facilitates educational activities aimed at sensitising members of the public and criminal justice agencies on the role and purpose of CSOs, co-ordinating with other agencies on matters relating to and beneficial to community service.⁸⁸

⁸¹ Section 3, *Community Service Orders Act* (No. 10 of 1998) Laws of Kenya.

⁸² Section 3, *Community Service Orders Act* (No. 10 of 1998) Laws of Kenya.

⁸³ The Composition of this Committee is in Appendix 1. Section 7, *Community Service Orders Act* (No. 10 of 1998) Laws of Kenya.

⁸⁴ Sections 8 and 11, *Community Service Orders Act* (No. 10 of 1998) Laws of Kenya.

⁸⁵ Section 9(2), *Community Service Orders Act* (No. 10 of 1998) Laws of Kenya.

⁸⁶ Section 9(2), *Community Service Orders Act* (No. 10 of 1998) Laws of Kenya.

⁸⁷ Section 9(2), *Community Service Orders Act* (No. 10 of 1998) Laws of Kenya.

⁸⁸ Section 9(2), *Community Service Orders Act* (No. 10 of 1998) Laws of Kenya.

The Probation and After-Care Services Department oversees the implementation of CSOs.⁸⁹ The Department's end goal is to offer appropriate services to community-based offenders in order to make them socially stable and law abiding.⁹⁰ Probation Officers carry out this function in accordance with sections 4 and 5 of Probation of Offenders Act.⁹¹ In addition, the CSOs Act enumerates their duties.

The duties of the supervising officers include identifying suitable work placements, oversight of offenders' the work and progress and ensuring that CSOs are complied with and that the scheme works smoothly.⁹² In addition, they are to apply to the court for review of orders that regarding the offenders.⁹³ Furthermore, they are to facilitate and promote the reconciliation of offenders and the community; this function is evident of the wholesome approach CSOs offer to facilitate restorative justice goals.⁹⁴ Moreover, they counsel offenders for rehabilitation purposes and liaise with any other persons or organisations of persons dealing with similar problems.⁹⁵ The supervision entails either home visits, or sessions with criminal offenders in the probation officers' offices, or both. Given the aforementioned, the resettlement, reintegration, and reconciliation of offenders with their communities is the most probable outcome of the Department's mandate and CSOs as a sentencing option.⁹⁶ These duties are proof of the restorative justice goal that is achieved through CSOs, as they highlight that offenders are meant to be rehabilitated, and that their penance is served within the community they offended.

The officers also ensure satisfactory safety conditions for both the community and the offenders serving CSOs. They are also tasked with guarding against discriminatory practices in dealing with offenders.⁹⁷ In addition, they are to maintain confidentiality of information on or relating to offenders-this is evidence of the respect of the right to

⁸⁹ 'Mandate' (*Probation.go.ke*) <http://www.probation.go.ke/about-us/mandate.html#> on 5 April 2017.

⁹⁰ 'Mandate' (*Probation.go.ke*) <http://www.probation.go.ke/about-us/mandate.html#> on 5 April 2017.

⁹¹ Sections 4 and 5, *Probation of Offenders Act*. Cap 64 Laws of Kenya.

⁹² Section 12(3), *Community Service Orders Act* (No. 10 of 1998) Laws of Kenya.

⁹³ Section 12(3), *Community Service Orders Act* (No. 10 of 1998) Laws of Kenya.

⁹⁴ Section 12(3), *Community Service Orders Act* (No. 10 of 1998) Laws of Kenya.

⁹⁵ Section 12(3), *Community Service Orders Act* (No. 10 of 1998) Laws of Kenya.

⁹⁶ Section 12(3), *Community Service Orders Act* (No. 10 of 1998) Laws of Kenya.

⁹⁷ Reference is made to the constitutionally protected freedom from discrimination (article 27 CoK) even when it comes to the treatment of criminal offenders.

privacy accorded to criminal offenders. They also keep updated records of offenders' performance and appraisal of the same, submitting periodic reports to appropriate or relevant CSO Committees and the Co-ordinator in respect of offenders.⁹⁸ Lastly, they are the ones who provide pre-sentence reports to the court, and co-ordinate the activities of the Committees and the courts in relation to CSOs.

Based on the legal provisions above, it is evident that there are departments and mechanisms in place to facilitate CSOs in Kenya. However, there is a large number of people incarcerated and establishing the gap between what in on paper and what happens in practice is important as it establishes two things.⁹⁹ The first is that it is that imprisonment is a fatal cancer as it undermines not only the law that establishes CSOs, but also, the restorative values of Kenyan society. The second, is that there are factors that affect judicial discretion that make judges favor imprisonment over CSOs.

3.3 International Legal Framework

Kenyan law governing CSOs were based on various international legal provisions. The CSOs Act, in particular, sought to reflect the provisions of the Tokyo Rules and the Kadoma Declaration on Community Service.

3.3.1 United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)

The Tokyo Rules provide a set of basic principles to promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment.¹⁰⁰ They are intended to promote greater community involvement in the management of criminal justice, specifically in the treatment of offenders, as well as to promote among offenders a sense of responsibility towards society.¹⁰¹

⁹⁸ Section 12(3), *Community Service Orders Act* (No. 10 of 1998) Laws of Kenya.

⁹⁹ 'Our Work' (*African Prisons Project*) <https://africanprisons.org/our-work/> accessed 5 April 2017.

¹⁰⁰ UNGA, *United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules) resolution 45/110*, 14 December 1990, part I.

¹⁰¹ UNGA, *Tokyo Rules*, part I.

The Rules continue to be implemented while taking into account the political, economic, social and cultural conditions of each country and the aims and objectives of its criminal justice system.¹⁰² More importantly, member states endeavour to ensure a proper balance between the rights of individual offenders, the rights of victims, and the concern of society for public safety and crime prevention.¹⁰³ This explains why Kenya's CSOs Act has intricate provisions on the functions of probation officers especially in analyzing and reporting on the criminal offender's circumstances before sentencing.

Moreover the rules require member states to actively ensure the development of non-custodial measures within their legal systems to provide alternatives to incarceration and consequently reduce its proliferation, and rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.¹⁰⁴ Thus the need for the implementation of the SPGs is justified in Kenya, in order to ensure the respect and alignment with these international provisions.

3.3.2 Kadoma Declaration on Community Service

The declaration states that CSOs are in conformity with African traditions of dealing with offenders and with healing the damage caused by crime within the community.¹⁰⁵ Moreover, the declaration provides that CSOs are a positive and cost-effective measure to be preferred, whenever possible, to incarceration.¹⁰⁶ Further, it stipulates that CSOs should be effectively implemented and supervised and should involve a programme of work in which the offender is required to carry out a number of hours of voluntary work for the benefit of the community in his or her own time.¹⁰⁷ The declaration derives the basis of these provisions from the African Charter on Human and Peoples Rights, which asserted

¹⁰² UNGA, Tokyo Rules, parts II-V.

¹⁰³ United Nations, Office of the High Commissioner for Human Rights, International Bar Association, 'Chapter 9 :The Use of Non-Custodial Measures in the Administration of Justice' *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* 2003, 396.

¹⁰⁴ United Nations, 'Chapter 9: The Use of Non-Custodial Measures in the Administration of Justice', 376.

¹⁰⁵ Kadoma Declaration on Community Service, International Conference on Community Service Orders in Africa, November 1997, 4-6.-*Economic and Social Council resolution 1998/23, annexes I adopted on 28 July 1998.*

¹⁰⁶ Economic and Social Council resolution 1998/23, annex 1.

¹⁰⁷ Economic and Social Council resolution 1998/23, annex 1.

that the inherent dignity of human beings rationalizes the prohibition of degrading punishment and treatment.¹⁰⁸

The Declaration, noting that the majority of prisoners who are found in prisons pose no actual threat to society, affirmed that the use of prison should be strictly limited as a measure of last resort.¹⁰⁹ It noted that community service is in conformity with African traditions of dealing with offenders and with healing the damage caused by crime within the community. Thus it can be inferred that custodial orders where CSOs and other non-custodial orders are applicable are an insult to human dignity.

3.3.3 Basic Principles On The Use Of Restorative Justice Programmes In Criminal Matters

In addition to what the Tokyo Rules and Kadoma Declaration above provide, these basic principles stipulate that member states should consider the formulation of national strategies and policies aimed at the development of restorative justice and at the promotion of a culture favourable to the use of restorative justice among law enforcement, judicial and social authorities, as well as local communities.¹¹⁰

There should be regular consultation between criminal justice authorities and administrators of restorative justice programmes to develop a common understanding and enhance the effectiveness of restorative processes and outcomes, to increase the extent to which restorative programmes are used, and to explore ways in which restorative approaches might be incorporated into criminal justice practices.¹¹¹ These principles continue to be upheld in the Kenya's acts of parliament that sanction CSOs and probation orders.¹¹²

¹⁰⁸ African Charter on Human and Peoples' Rights, 27 June 1981, 1520 UNTS 217, preamble.

¹⁰⁹ Dandurand Y, *A Second Chance - Alternatives to Imprisonment and the Social Reintegration of Offenders In Kenya*, United Nations Office on Drugs and Crime, 2012, 17.

¹¹⁰ Basic principles on the use of restorative justice programmes in criminal matters *Economic and Social Council resolution 2002/12, annex*, 24 July 2002.

¹¹¹ *Economic and Social Council resolution 2002/12, annex*, 24 July 2002.

¹¹² Dandurand Y, *A Second Chance - Alternatives to Imprisonment and the Social Reintegration of Offenders In Kenya*, United Nations Office on Drugs and Crime, 2012, 17.

3.4 Imprisonment, As A Product Of The ‘Dilution’ Of Kenyans’ Restorative Values

3.4.1 Statistics Reporting on the Number of Incarcerated Petty Offenders

Given the apparently sound legal and institutional framework in Kenya discussed in 3.2 and 3.3 above, the congestion of prison facilities in Kenya raises concern regarding the over-utilization of imprisonment, especially in instances where the court may mete non-custodial CSOs.¹¹³ Prison facilities are stretched to the limit, giving rise to various basic human rights violations.¹¹⁴ The congestion experienced in prison facilities has been attributed to the preference of incarceration as opposed to non-custodial sentences by judges.¹¹⁵ Extensive research, statistics and reports by the Kenya National Bureau of Statistics, The National Crime Research Centre and the National Council on the Administration of Justice, indicate the overreliance on imprisonment, even when an offender is meant to serve a term of less than 3 years.¹¹⁶

The Kenya National Bureau of Statistics annual report displays general fluctuations with respect to numbers of convicted persons serving CSOs.¹¹⁷ What is important to note, however, is that annually between 3000-4000 people are convicted to serve CSOs, despite the fact that approximately 50,000 people are sentenced to less than two years in prison annually. In addition, of the few reported police entries, 70% of them are petty offences and these petty offenders are likely to be jailed, unlike capital offenses where suspects are either acquitted, matters resolved outside the court or they successfully appeal against the sentences.¹¹⁸

¹¹³ The Judiciary of the Republic of Kenya, *Report of the Judicial Taskforce on Sentencing*, 2016, 21-22.

¹¹⁴ Muhoro P, Participant Papers, http://www.unafei.or.jp/english/pdf/PDF_rms/no57/57-23.pdf- on 15 January 2017.

¹¹⁵ Chachale V, *Sentencing Sentences*, <http://nairobiilawmonthly.com/index.php/2016/03/10/sentencing-sentences/> on 3 December 2017.

¹¹⁶ Kenya National Bureau of Statistics, *Statistical Abstract*, 2016, 266-274, see also: National Council on the Administration of Justice, *Criminal justice system in Kenya: An audit*, 2017, 68, 120-126 see also: *State of the Judiciary and the Administration of Justice Annual Report*, 2016 – 2017, 214-220.

¹¹⁷ Kenya National Bureau of Statistics, *Statistical Abstract*, 2016, 266-274.

¹¹⁸ Ogemba P, Prisons are full of young and poor, petty offenders, 24 January 2017 <https://www.standardmedia.co.ke/article/2000231096/prisons-are-full-of-young-and-poor-petty-offenders-report-indicates> on 25 May 2017.

In addition, over the last two years, there is a marked decline in placement of offenders on CSO. This has been attributed to budgetary cuts have affected operations in the CSO administrative stations and they have been unable to visit work places to monitor offenders as often as they should.¹¹⁹

The statistical evidence proves that CSOs are being underutilized despite a call for their proliferation in late 2016. In addition, the overutilization of imprisonment for petty offences goes against the SPGs and arguably denies petty offenders the opportunity to alternatives to imprisonment that avail them the chance to still be close to their families and places of employment.¹²⁰

Furthermore, the prisons are faced with challenges that in the long run may be detrimental to the offender, thus the rehabilitative goal present in restorative justice may be overlooked.¹²¹ Among these include the overcrowding in prison, which put a strain on the resources that are supposed to improve the functions of correctional facilities as well as ensure the staff are well trained on their role on the corrections process.¹²²

3.4.2 The Relationship between Judicial Discretion & Incarceration

Sections 210 and 215 of the Criminal Procedure Code mandate the courts to adjudicate on the guilt of accused persons.¹²³ Upon passing a guilty verdict, the court proceeds to make orders on how the criminal offenders atone for their crimes, based on the statutory sanctions in place.¹²⁴ The Penal Code usually provides for either minimum or maximum imprisonment sentences, and for non-custodial orders such as CSOs where the judge deems it fit.¹²⁵

¹¹⁹ The Judiciary, *State of the Judiciary and the Administration of Justice Annual Report, 2016 – 2017*, 219.

¹²⁰ Migai A and Kinyanjui S, 'Towards structured sentencing in Kenya: A case for reform', 9 *African Journal of Criminology and Justice Studies* 2016, 266.

¹²¹ United Nations Human Rights-Office of the High Commissioner, Human rights implications of over-incarceration and overcrowding <http://www.ohchr.org/EN/Issues/RuleOfLaw/Pages/OverIncarceration.aspx> on 5 December 2017.

¹²² Omboto J, 'The Challenges Facing Rehabilitation Of Prisoners In Kenya And The Mitigation Strategies,' 2(2) *International Journal of Research In Social Sciences*, June 2013, 40-42.

¹²³ Sections 210 and 215 *Criminal Procedure Code*

¹²⁴ Musyoka W, *Criminal Law*, Law Africa Publishing (K) Ltd, Nairobi ,2011, 194.

¹²⁵ Section 210, *Criminal Procedure Code*, Section 35 *Penal Code*.

Discretionary provisions in law provide a basis for considering the most appropriate order for each unique situation a judge is faced with in criminal trials. In a system that asserts the values of restorative justice, the underutilization of a judge's discretionary powers regarding the choice between custodial and non-custodial orders challenges this view where there is a continuing practice of incarceration- including pre-trial detention.¹²⁶ Section 35 of the Penal Code, which deals with conditional discharges, merely suggests the sentencing principles, and advises judicial officers to consider the context of the offence and character of the offender. Where only the maximum penalties are available, the judicial officers have very wide discretionary powers on the proper sentences to give.¹²⁷

The judiciary tries to ensure it exercises its discretion accordingly, by meting CSOs where possible. This is because they understand their obligations under the Penal Code and Criminal Procedure Code.¹²⁸ For instance in *Republic v Paul Kitala Mwawasi*, the accused was sentenced to serve a CSO instead of the few years of imprisonment he was liable for.¹²⁹

Hoewever, there are a few cases that depict the situation among magistrates regarding their exercise of judicial discretion with respect to sentencing. For instance, in *Douglas Monchonge Omogo v Republic*, the trial court sentenced the accused, who had been charged with manufacturing drinks without a licence under the Alcoholic Drinks Control Act, to pay a fine of Kshs. 100,000 or 6 months imprisonment.¹³⁰ Upon appeal at the High Court, Judge Okwany held that sentence meted out on the applicant was excessive taking into account the fact that the manufacturing of alcoholic drinks was never proved, only the

¹²⁶ Kartman M, Beckett K, 'Violence, mass incarceration and restorative justice: promising possibilities', *University of Washington*, 2016,3-5.

¹²⁷ Mbote PK, and Akech Migai, *Kenya: Justice Sector and the Rule of Law*, Open Society Initiative for Eastern Africa, 2011, 13.

¹²⁸ Section 35, Penal Code; Section 329 Criminal Procedure Code and the rule set in *Josephine Arissol v R* [1957] EA 447 that, "The general rule is that a maximum sentence should not be imposed on a first offender".

¹²⁹ *Republic v Paul Kitala Mwawasi* [2018]eKLR

¹³⁰ *Douglas Monchonge Omogo v Republic* [2018] eKLR.

possession of these said drinks. The judge stressed that ‘the trial court ought to have called for the probation officer's report with a view to considering the appropriate alternative sentence in line with the sentencing policy geared towards decongesting prisons.’¹³¹ With that the court ordered the applicant to serve 3 months’ Community Service during which period he would be supervised by the probation officer of his area.

In addition, in *James Mwakisachi Mwadime v Republic*, the accused was a minor, who was sentenced to serve time in the same prison as adults. The appeal court saw error in this given the violation of the rights of an arrested minor to be detained and sentenced separately from adult offenders. The minor’s 27 year sentence was rejected during this appeal, and he was sentenced to serve a CSO.¹³²

From the above cases, the initial trial courts are faulted with sentencing offenders to imprisonment without taking all of their circumstances into account. This has been attributed the large number of cases that need to be dispensed with at the magistrates’ court level, where there is always a large number of pending cases and fresh arrests that need to be dealt with.¹³³ Thus it is because of limited time that the magistrates may not seriously consider all the facts and circumstances surrounding an offence.

In addition to time constraints, the rigidity and harshness of some penal provisions, the discretion of judges is limited to only the maximum-minimum imprisonment terms provided for in the law.¹³⁴ Strict provisions in Kenyan laws on alcohol, traffic, and wildlife conservation provide judges with very little options other than to incarcerate an offender, which has caused an unnecessary congestion of prisons.¹³⁵ For instance, the Alcoholic Drinks Control Act,¹³⁶ for instance, is responsible for 70% of the criminal

¹³¹ *Douglas Monchonge Omogo v Republic* [2018] eKLR para 7.

¹³² *James Mwakisachi Mwadime v Republic* [2018] eKLR, paragraphs 55-59.

¹³³ Personal experience while working at the Chief Magistrate’s Court in Eldoret in May 2016.

¹³⁴ Ngirachu J and Ochieng A, ‘Harsh ‘colonial inspired’ laws have led to congestion in prisons’ Daily Nation, 18 April 2016, <https://www.nation.co.ke/news/loopholes-in-the-law-have-led-to-congestion-in-prisons-/1056-3163830-cxte6cz/index.html>, on 30 May 2017.

¹³⁵ Ngirachu J and Ochieng A, ‘Harsh ‘colonial inspired’ laws have led to congestion in prisons’ Daily Nation, 18 April 2016, <https://www.nation.co.ke/news/loopholes-in-the-law-have-led-to-congestion-in-prisons-/1056-3163830-cxte6cz/index.html>, on 30 May 2017.

¹³⁶ *Alcoholic Drinks and Controls Act*, Laws of Kenya.

convictions of women in the country.¹³⁷ This indicates that if this one law was amended or repealed, most women inmates in Kenya would not be incarcerated. It suggests that Kenya might be over-policed with respect to entrepreneurial activity, yet under-policed when it comes to serious crimes. This criminalisation and prosecution of such petty offences also paints law enforcement in Kenya as a sort of war against the poor.¹³⁸

The practice of incarceration in light of the statistics presented does not reflect the ideals of the various cultures represented in Kenya. In order to shed light to this statement, a brief history of how the prisons in Kenya started prove that community sentences should ideally be preferred.

3.4.3 History of Prison System in Kenya

Kenya, like many other nations in Africa, draws its administrative systems from its former colonial masters.¹³⁹ The administration of justice included.¹⁴⁰ Thus, most public institutions still bear the intended purposes of their establishment, which include the pursuit, protection and promotion of colonial interests.¹⁴¹ So much so that most prisons in Kenya were established and utilized during the struggle for independence between 1937 into the 1950s.¹⁴² And so many Africans were incarcerated because of actual/suspected participation in the violent confrontation of the British settlers for the sake of independence from the crown.

Ergo, the imprisonment system in Kenya (and other African countries) was structured to be not only punitive but also lacking any systematic and well developed programmes for

¹³⁷ Mungai C, 'The notorious law: This is what has landed many Kenyan women in jail. *SDE*, 2018' <https://www.sde.co.ke/article/2001249715/the-notorious-law-this-is-what-has-landed-many-kenyan-women-in-jail> on 24 March 2018.

¹³⁸ Mungai C, 'The notorious law: This is what has landed many Kenyan women in jail. *SDE*, 2018' <https://www.sde.co.ke/article/2001249715/the-notorious-law-this-is-what-has-landed-many-kenyan-women-in-jail> on 24 March 2018.

¹³⁹ Chukwuma U, 'Alternatives to imprisonment: community service orders in Africa' in Saleh-Hanna V, *Colonial Systems of Control: Criminal Justice in Nigeria* University of Ottawa Press 2008, 379-388.

¹⁴⁰ Chukwuma U, 'Alternatives to imprisonment: community service orders in Africa', 380.

¹⁴¹ Chukwuma U, 'Alternatives to imprisonment: community service orders in Africa', 380.

¹⁴² Ondieki E, <https://www.nation.co.ke/lifestyle/lifestyle/Inside-Kenya-tough-Prisons-/1214-3790978-i26ds8z/> on 30 January 2018.

rehabilitation and reintegration of ex-prisoners into the larger society upon discharge¹⁴³. Remarkably, though regrettably, this ugly trend had a spillover effect into the present post colonial era; hence prison officers who are not amenable to change are often described by prisoners as "colonial warders," associating their current behaviours with the colonial militarized mentality in their dealings with prisoners.¹⁴⁴

Moreover, the penal system is self-contained and looks inward. For instance, when people are put in prison they have left their world behind. This impact of imprisonment works to destabilize both the individual and the community, which has been dichotomized by these institutions of control.¹⁴⁵ Within the institution overcrowding, lack of nutritional diets, boredom, and the internal pains experienced with the loss of freedom are major issues that destabilize the humanity of this form of social control.¹⁴⁶ From an African perspective the real pains of imprisonment include separation from family and friends, the loss of jobs and homes, the fear of being forgotten, and the anxiety in thinking about whether one will fit into society upon eventual release.¹⁴⁷ Thus, imprisonment is recognized as a physiologically, psychologically, and emotionally destructive institution; in addition, it is socially damaging, culturally abhorrent, and penologically disastrous.¹⁴⁸ It is as a result of this strain caused by the overcrowding, that the SPGs recommend that more non-custodial orders be meted.

This aggressive stance to punishing criminal offenders proved to be contrary to some of the restorative values that were historically akin to the Kenyan people's traditional and cultural practices.¹⁴⁹ These practices referred to are those of 'ubuntu', which entails that

¹⁴³ Chukwuma U, 'Alternatives to imprisonment: community service orders in Africa' 380.

¹⁴⁴ Chukwuma U, 'Alternatives to imprisonment: community service orders in Africa' 380.

¹⁴⁵ Clear T, 'The Effects of High Imprisonment Rates on Communities' *Crime and Justice*, 37(1) *University of Chicago Press*, 2008, 97.

¹⁴⁶ Schonteich M, 'Hidden cruelties: prison conditions in sub-saharan Africa, *World Politics Review*, 24 Marcg 2015 <https://www.worldpoliticsreview.com/articles/15366/hidden-cruelties-prison-conditions-in-sub-saharan-africa> on 20 January 2018 and Chukwuma U, 'Alternatives to imprisonment: community service orders in Africa' 386.

¹⁴⁷ Chukwuma U, 'Alternatives to imprisonment: community service orders in Africa' 386.

¹⁴⁸ Chukwuma U, 'Alternatives to imprisonment: community service orders in Africa' 380.

¹⁴⁹ Sarah Kinyanjui, Chapter 4

‘consensus through dialogue’ is the approach taken for the restoration of community.¹⁵⁰ In addition, Archbishop Desmond Tutu asserted that such justice is characteristic of traditional African jurisprudence in so far as its ‘central concern is not retribution or punishment but, in the spirit of *ubuntu*, the healing of breaches, the redressing of imbalances, and the restoration of broken relationships.’¹⁵¹

3.5 Conclusion

This chapter explained the stable legal framework for CSOs in Kenya and that despite it, recent statistics prove that they are underutilized mainly because of the struggle between balancing time constraints and quick dispensation of cases. The author explained that the underutilization of CSOS and the proliferation of imprisonment is contrary to Kenyans’ restorative justice values based on their cultures because African culture promotes the spirit of ‘*Ubuntu*’. Thus, CSOs have a better chance of matching this culture, as opposed to incarceration.

¹⁵⁰The African concept of ubuntu and restorative justice, Source: (2006) In, Dennis Sullivan and Larry Tiftt editors, "Handbook of Restorative Justice" A Global Perspective. London and New York: Routledge. Taylor & Francis Group.161-171. <http://restorativejustice.org/rj-library/the-african-concept-of-ubuntu-and-restorative-justice/7185/#sthash.cOT5ISJj.dpbs>, on 12 Feb 2018.

¹⁵¹ The African concept of ubuntu and restorative justice, Source: (2006) In, Dennis Sullivan and Larry Tiftt editors, "Handbook of Restorative Justice" A Global Perspective. London and New York: Routledge. Taylor & Francis Group.161-171 <http://restorativejustice.org/rj-library/the-african-concept-of-ubuntu-and-restorative-justice/7185/#sthash.cOT5ISJj.dpbs>, on 12 Feb 2018.

Chapter 4: Works in Progress

4.1 Introduction

This chapter discusses the opportunities currently available in ensuring more CSOs are meted in accordance with the laws discussed in Chapter 3 by highlighting the reforms that have been happening post the 2016 SPGs. In particular, the prison decongestion programme that is underway through moves by the National Coordinator of CSOs, and the decriminalization of petty crimes through the revision of penal laws by the National Committee on Criminal Justice Reforms (NCCJR) is looked into. This chapter also highlights the role of traditional dispute resolution mechanisms and the role of chiefs in decreasing the number of cases that make their way to the formal court system. Furthermore, the restorative practices within the prisons are outlined in order to provide some silver lining on the incarceration culture and prove that it is not all together unbearable.

4.2 Reforms in Kenya's Sentencing Regime

The first of these reforms is the move by the National Community Service Orders Committee to decongest prisons by going to the various prisons across the country and reviewing the cases of inmates who qualify to serve CSOs and other non-custodial orders.¹⁵² Inmates serving less than three years in prison, as well as those that are deemed to have served adequate time and can be released to rejoin their communities are the targets of this programme. The main justification for the decongestion of prisons stems from the fact that prisons in Kenya are housing close to three times their capacity and so the respect for human dignity, equity, and human rights pursuant to article 10 of the CoK may be undermined. In addition, article 50(2)(p) provides that criminal offenders have the right to the least severe of the prescribed punishments for an offence.¹⁵³

¹⁵² The programme is currently spearheaded by the Chairman of the National Community Service Orders Committee-Justice Luka Kimaru. 'Kenya prisons decongestion on course' <https://www.capitalfm.co.ke/news/2017/12/kenya-prisons-decongestion-course-says-judge/> accessed 30 December 2017.

¹⁵³ *Constitution of Kenya* (2010).

Secondly, the National Committee on Criminal Justice Reforms (NCCJR) was launched in January 2018 in order to review laws and policies that criminalize petty offences and make recommendations on their declassification and reclassification.¹⁵⁴ The main function of the NCCJR is to spearhead the comprehensive review and reform of Kenya's criminal justice system and make legal, policy, institutional, operational, and administrative recommendations necessary for better functioning of the criminal justice sub-sector.¹⁵⁵

In addition, the mandate of the NCCJR includes identifying the legal, institutional, administrative and financial barriers that impede the efficient functioning of the criminal justice system.¹⁵⁶ Furthermore, the NCCJR will identify areas of inter-agency collaboration and cooperation that would make the criminal justice system effective in serving members of the public. Lastly, it is to conduct sensitization sessions among relevant stakeholders and the public on the contents of the audit report¹⁵⁷ and engage them on the criminal justice reform initiative and engage other relevant state and/or non-state agencies in realizing the desired results of the audit findings implementation. Thus, it is evident that this committee's active functioning may greatly improve Kenya's criminal justice system, in order to achieve its restorative justice goals.

Another reform taking place is the judiciary taking advantage of their statutorily provided discretion that is provided for in the Criminal Procedure Code, as well as the Penal Code.¹⁵⁸ In some recently decided cases, there is evidence of judges increasingly utilizing the PAS department for the purposes of obtaining pre-sentencing reports. The cases not only include those of petty offences, but also, grievous crimes that would have attracted long prison sentences had it not been for the judge considering the circumstances of the

¹⁵⁴ International Commission of Jurists-Kenya Section, 'Crime and punishment: The case for petty offences in Kenya,' <http://www.icj-kenya.org/news/latest-news/140-crime-and-punishment-the-case-of-petty-offences-in-kenya> on 1 February 2018.

¹⁵⁵ The Judiciary, 'National Commission on Criminal Justice Reforms,' <https://www.judiciary.go.ke/about-usour-programmesnational-committee-on-criminal-justice-reforms/> on 30 March 2018.

¹⁵⁶ The Judiciary, 'National Commission on Criminal Justice Reforms,' <https://www.judiciary.go.ke/about-usour-programmesnational-committee-on-criminal-justice-reforms/> on 30 March 2018.

¹⁵⁷ National Council on the Administration of Justice, *Criminal justice system in Kenya: An audit*, 2017, 68, 120-126.

¹⁵⁸ Section 210 *Criminal Procedure Code*, Section 35 *Penal Code*(Act No. 81 of 1948) Cap 63 Laws of Kenya.

accused. For instance, in *Republic v Stanley Keino Kibet*,¹⁵⁹ the accused was charged with manslaughter and was sentenced to three years in prison and three years on probation. In the judgement, the judge considered the presentencing report, which explained that the accused was a first-time offender, the family breadwinner, and that the crime was committed by accident. This case is evidence that despite various budgetary and personnel strains, the PAS endeavours to ensure that they fulfill their mandate.

Similar instances where the judges' decisions on sentencing evidenced due regard to their power of discretion are *Republic v Joseph Mayaka Obier & 2 others*,¹⁶⁰ *Republic v Joseph Onsase Aura*,¹⁶¹ *Republic v Ephantus Karanja Wangari*,¹⁶² *Republic v Collet Thabitha Wafula*,¹⁶³ and *Republic v Asher Otieno*.¹⁶⁴ In each of these cases, the judges exhibit due diligence in analyzing the pre-sentencing reports and actually apply their discretion to ensure minimal time is served in prison by the criminal offenders. This is a step forward in the right direction, and a challenge to the argument that judges in Kenya are pre-disposed to always incarcerate criminal offenders.

4.3 Reforms within prisons

Despite the fault behind the history of prisons and the challenges they continue to face, it is pertinent to note that the Kenya Prisons Services are always reforming and striving toward improving their facilities and incorporating restorative practices through rehabilitating criminals by engaging them in various labours.¹⁶⁵ The most notable of reforms and restructuring taking place courtesy of Moody Awori, the 9th Vice President of Kenya and the Minister of Home Affairs at that pointy in time.¹⁶⁶

¹⁵⁹ *Republic v Stanley Keino Kibet* [2016] eKLR.

¹⁶⁰ *Republic v Joseph Mayaka Obier & 2 others* [2016] eKLR.

¹⁶¹ *Republic v Joseph Onsase Aura* [2016] eKLR.

¹⁶² *Republic v Ephantus Karanja Wangari* [2016] eKLR.

¹⁶³ *Republic v Collet Thabitha Wafula* [2016] eKLR.

¹⁶⁴ *Republic v Asher Otieno* [2016] eKLR.

¹⁶⁵ Ndunda J, 'Breaking the cycle of crime: Prisoners and Rehabilitation' *The Star*, 11 October 2016 https://www.the-star.co.ke/news/2016/10/11/breaking-the-cycle-of-crime-prisoners-and-rehabilitation_c1432057 on 20 July 2017.

¹⁶⁶ 'Prison reforms spark hope for human rights' *The Inside Story on Emergencies*, 26 February 2003,

Once criminal offenders are convicted, they are usually engaged in labour activities. Prisons in Kenya generally keep their inmates occupied by engaging them in activities such as farming, carpentry, and in some instances like Kamiti Maximum Prisons, inmates produce all the plates used to display registration numbers on vehicles in Kenya. These labour activities strive to instil a sense of discipline in the inmates, and bring about a change in their behaviour.

These labours sometimes include a learning opportunity where inmates gain skills such as tailoring, masonry, carpentry, and similar handy-work skills, which the convicts are expected to use to earn their daily bread should they be released from prison. Prison institutions operate on the premise that disciplining offenders through routines and allocated labour results in the normalization of offenders into law-abiding citizens.¹⁶⁷

4.4 Applying Traditional Dispute Resolution Mechanisms

Among the progressive provisions of the CoK, is the recognition and encouragement of traditional dispute resolution mechanisms (TDRMs) in resolving disputes, provided the process and decision arrived at is not repugnant to justice and morality.¹⁶⁸ While they have always been present and applied, their inclusion in the constitution was meant to popularize them in order to reduce the number of cases that find their way to the formal criminal justice system are reduced.¹⁶⁹

The Criminal Procedure Code allows judges to refer criminal cases to be resolved through TDRMs, provided the offence does not amount to a felony, and which is not aggravated in degree.¹⁷⁰ In *Stephen Kipruto v R* the court affirmed this position regarding the

<http://www.irinnews.org/report/41796/kenya-feature-prison-reforms-spark-hope-human-rights> on 20 July 2017, see also, 'Reforms giving prison facilities a human face,' The Star, 25 April 2011

<https://www.standardmedia.co.ke/article/2000033910/reforms-giving-prison-facilities-a-human-face> on 20 July 2017.

¹⁶⁷ Sarah Kinyanjui, Chapter 4.

¹⁶⁸ Article 159(2), *Constitution of Kenya* (2010).

¹⁶⁹ Muigua K, 'Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems', 2017, 13-16.

¹⁷⁰ Section 76, *Criminal Procedure Code*, Laws of Kenya.

appropriateness of TDRMs for misdemeanours and not felonies.¹⁷¹ The sanctions present in TDRMs include non-custodial punishments such as the payment of fines and compensation. To this end, there is the avoidance of incarceration.¹⁷²

TDRMs are particularly encouraged because they ensure access to justice that is accessible, affordable and comprehensible to ordinary people.¹⁷³ In addition, because they apply the values of traditional African societies, which are mainly restorative in nature. The goal often is not just to punish the perpetrator, but to compensate the victim for their loss, to prevent the accused from committing the crime again, and to reintegrate both the victim and offender back into the community.¹⁷⁴

4.5 Conclusion

Since the turn of the millennium, Kenya has been trying to ensure that there are less people serving time in prisons by ensuring non-custodial orders such as CSOs are made available. The progress has been slow and faced with various challenges but improvements are always being made. By highlighting the reforms that have been going on through decongesting prisons, decriminalizing petty crimes, and applying traditional dispute resolution mechanisms, less people are going to be serving prisons sentences if these reforms are kept up with. Together with these points, the rehabilitation programs in the prisons are key in ensuring the goal of restorative justice is eventually met.

¹⁷¹ *Stephen Kipruto Cheboi & 2 others v Republic* (2014) eKLR

¹⁷² Section 76, *Criminal Procedure Code*.

¹⁷³ Muigua K, 'Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems,' 2017, 13-16 see also article 48, *Constitution of Kenya* (2010).

¹⁷⁴ Wjowska E, 'Doing Justice: How informal justice systems can contribute,' United Nations Development Programme Oslo Governance Centre -The Democratic Governance Fellowship Programme, December 2006, 17.

5. Conclusion & Recommendations

'One may write the notes at the beginning of a song, but someone else will sing it...'

Lin Manuel Miranda

This dissertation sought to investigate the utilization of community service orders in Kenya. It highlighted the robust legal framework in support of these orders, explaining how they are not only adequate, but also in line with the criminal justice system's restorative justice goal. The dissertation also studied the statistics of the current utilization of CSOs and found that not as many are meted as compared to the prolific use of imprisonment. Reasons such as budgetary cuts to the probation and aftercare services department were highlighted. It was also noted that a good number of petty offences carried the penalty of imprisonment, which is counter-productive to the restorative justice goal, because petty offenders are the ones most likely to benefit from restorative justice. In addition, the African values of collectivism are not congruent with shunning a good number of members who are beneficial to society by incarcerating them when they commit these petty offences.

Nonetheless, the current move by the National Committee on Criminal Justice Reforms to decriminalize petty offences so that offenders do not find themselves incarcerated is a step in the right direction that will see petty offenders only serve non-custodial orders, which are arguably the most restorative sentence. Additionally, the application of traditional dispute resolution mechanisms may keep more people likely to be incarcerated away from the formal criminal justice system in order to avoid their imprisonment *ab initio*.

The only recommendations from the study, therefore, are:

- i. There should be better inter-agency coordination and oversight of sentences imposed between the judiciary, probation and aftercare services department, the Kenya prison service and other relevant stakeholders in ensuring that those who qualify for community service orders are identified and accorded the opportunity to serve their sentences outside prison, in the communities they offended;
- ii. The continuing reforms highlighted in chapter 4 are maintained and even hastened so that there is a general improvement regarding Kenya's sentencing regime.

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Appendix 1

The National Community Service Orders Committee

According to the CSO Act, there is a committee known as the National Community Service Orders Committee (NCSOC) which should consist of:

- i. a chairman who shall be a judge of the High Court appointed by the Chief Justice;
- ii. a representative from the office of Director of Public Prosecutions;
- iii. a representative from the office of the Permanent Secretary in the Ministry for the time being responsible for matters relating to administration and internal security;
- iv. a representative the office of the Permanent Secretary in the Ministry for the time being responsible for matters relating to public works or his nominee;
- v. a representative from the office of the Inspector-General of Police;
- vi. a representative from the office of the Commissioner-General of Prisons
- vii. the Director of Probation;
- viii. the Director of Children Services;
- ix. a nominee of the Council of the Law Society of Kenya;
- x. two persons with training and experience in the criminal justice system:
- xi. one with experience in the teaching of law, and the other;
- xii. a magistrate of the first class, both appointed by the Chief Justice;
- xiii. the National Community Service Orders Co-ordinator; and;
- xiv. representatives of non-governmental organizations involved in social welfare work and registered under the Non-Governmental Organizations Co-ordination Act, 1990 (No. 19 of 1990) for such objectives.

