

**A CHANCE OF REDEMPTION: AN ANALYSIS OF RESTORATIVE JUSTICE IN  
KENYA**

**BY**

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## **DECLARATION**

I, NDUNG’U CYNTHIA MWIHAKI declare that ‘A CHANCE OF REDEMPTION: AN ANALYSIS OF RESTORATIVE JUSTICE IN KENYA’ is my own work, that it has not been submitted for any degree or examination in any other university or institution, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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

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**Dr. VICTOR LANDO**

## **ACKNOWLEDGEMENTS**

I am greatly indebted to my supervisor Dr. Victor Lando for his dedication, encouragement, insight and guidance. I would also like to thank my parents, sisters, and colleagues for their support all through my research and writing process.

## **DEDICATION**

I would like to dedicate this dissertation to my parents, Simon Gacheru and Lydia Njeri, and my siblings, Maryann Wathimu and Faith Wahu, for their unceasing love and support.

## **ABSTRACT**

In the 1970s, Restorative Justice was first ushered to the literature on criminal justice. However, there is potent evidence proving that this notion dates back to most traditional societies' customs and religions. Some argue that the values identified in Restorative Justice are rooted in just as old traditions and practices as ancient Greek and Roman history. These include: Victim-Offender Mediation, Family Group Conferences, Healing and Sentencing Circles and Community Restorative Boards. Globally, restorative justice was developed to guarantee that the offender-victim relationship is repaired and that victim, offender, and community needs are balanced. Restorative justice offers a participatory process that acknowledges and addresses the victim's unmet requirements and encourages the rehabilitation of victims as well as offenders in sexual offenses cases.

The developments of restorative justice are gaining momentum around the world as approved by the increasing number of organizations, number of countries introducing new legislation and publications that are dealing with it. Clearly restorative justice corresponds to a basic human and societal need that cannot be stopped by borders or politics. The fact that it is flexible and adaptable makes it work best when adapted to local customs and practices. Restorative justice proposes that we should address criminal conduct by promoting those accountable to remedy the damage caused to other individuals and relationships by their actions. It suggests that those individuals who are negatively affected by criminal conduct and those who cause this harm should play a central role in deliberating and determining what harm has been caused and what the offenders should do to fulfill their obligations to attempt to repair this damage.

**TABLE OF CASES**

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## **TABLE OF LEGAL INSTRUMENTS**

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Community Service Orders Act (No. 10 of 1998)

Counter-Trafficking in Persons Act (No.8 of 2010)

Criminal Procedure Code (Cap. 75 of the Laws of Kenya)

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Marriage Act (No.4 of 2014)

Narcotic Drugs and Psychotropic Substances (Control) Act (No.4 of 1994)

Penal Code (Cap. 63 of the Laws of Kenya)

Victim Protection Act (No. 17 of 2014)

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Victim's Rights Act (No. 39 of 2002)

Sentencing Act (No. 9 of 2002)

### **Norway**

Special Act on mediation, 1991

### **Rwanda**

Organic Law on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990 (No. 8 of 1996)

### **South Africa**

Promotion of National Unity and Reconciliation Act (No. 34 of 1995)

### **Historical Instruments**

Roman Law of the Twelve Tables

The Code of Hammurabi

The Germanic Tribal Laws

## **International Instruments**

African Charter on the Rights and Welfare of the Child

ECOSOC Resolution 2002/12 Basic principles on the use of restorative justice programmes in criminal matters

The United Nations Draft Declaration on Basic Principles on the use of Restorative Justice Programmes in Criminal Matters

The United Nations Principles

United Nations Convention on the Rights of the Child

United Nations Office on Drugs and Crime

United Nations Office on Drugs and Crime



## **TABLE OF ABBREVIATIONS**

ECOSOC: United Nations Economic and Social Council

FGC: Family Group Conferencing

ICTR: International Criminal Tribunal for Rwanda

TDRMS: Traditional dispute resolution mechanisms

TRC: Truth and Reconciliation Commission

UNCRC: United Nations Convention on the Rights of the Child

UNODC: United Nations Office on Drugs and Crime

UNAFEI: The United Nations Asia and Far East Institute of the Prevention of Crime and Treatment of Offenders

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## CHAPTER ONE: INTRODUCTION

### 1.1. Background

Ness, an advocate of restorative justice, noted that restorative justice was in fact a return to old-fashioned justice that existed before the Norman Conquest in 1066. Local villages in England guaranteed justice for centuries to ensure that the offender repaid the victim. This was based on Ethelbert's laws; it continued conditions that were in existence by earlier cultures like that of the Twelve Tables Roman Law, the Germanic Tribal Laws, and even the first written laws, the Hammurabi Code 2000 years before Christ. Cultural groups including Muslim, South American, American Indian and other societies included community restitution of the victim as an essential part of the system of justice. Crimes became a disturbance to the King's peace, William the Conqueror, and offenders were punished by his judiciary. In return for gaining authority and wealth, he ordered that people come to his judiciary for justice and he would bring sanctions that would be awarded to victims. Sadly his influence is also seen in our courtrooms; we are so busy punishing the offender forgetting the directly wronged victim and doing little to address the community that is wronged<sup>1</sup>

Zehr pointed out that the origin of many of the words used in retributive discourse had actually more of a restorative origin concerning civil wrongs: The Greek used words such as *'puneto'* which refer to an exchange of money for harm done. Similarly, the word guilt may be derived from the Anglo-Saxon *'geldan'*, which, like the German word *'geld'*, refers to payment Beyond European nations. Restorative traditions festered in modern times, for example in South Africa, a youth justice bill recognized in its preamble the indigenous restorative concept of *'ubuntu'*— the idea that our humanity is relatively tied to the humanity of those we live with.<sup>2</sup>

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<sup>1</sup>Quinn, T. (1996). *Restorative Community Justice: Background, Program Examples, and Research Findings*. Washington, DC: National Institute of Justice, pp.4-5.

<sup>2</sup>Braithwaite, J. (2002). *Restorative Justice & Responsive Regulation*. 1st ed. New York: Oxford University Press, pp.3-5.

Post-colonial practices in Africa have suggested that restorative justice values were not foreign to traditional African communities. For instance, in Kenya, ‘utu’ means humanity in Swahili, the national anthem uses the words “*natukae na undugu amani na uhuru,*” expresses the spirit of togetherness, cohesiveness and humanity.<sup>3</sup> As illustrated, this process promoted practices that were restorative in nature, one that aimed at bringing people together. Although restorative justice was a common concept among the communities, some practices were retributive in nature and this means that not all sanctions are restorative. This research looks at some of the practices that were used in the Kamba, Meru and Kikuyu communities.

The Kamba justice system was characterized by cultural ties that made the individual part of the society; therefore, the community dictated his behaviors. One existed as member of the community, not the individual, in that, anything that anyone did would affect the entire community. The offender method was based on a hierarchical framework with procedural rules. The family would settle the conflict within itself for crimes committed within the family, and if it were within a clan, the elders' committee would resolve disputes of the matter. Both the offender and the victim would also have a spokesman selected to represent them, who would then make it easier for both sides to hear evidence. The notion of guilt was irrelevant and the offender's intentions were not taken into account. Once the perpetrator was found guilty, according to the directions of the elders, he would compensate the victim. The victim would also have a chance to reconcile with the offender. Then members of the community aided the offender in compensating the victim as an offense against a person had ramifications on the entire clan.<sup>4</sup>

The structure of the criminal justice system of the Kikuyu was in accordance with the social framework. Litigants appeared before the elders who were their blood relatives. An individual had strong ties and therefore had to live according to the community's expectations. Where the offender and victim did not belong to the same extended family otherwise known as ‘*mbari*’,

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<sup>3</sup> Kinyanjui, S. (2009). Restorative Justice in Traditional Pre-Colonial “Criminal Justice Systems” in Kenya. *Tribal Law Journal*, 10, pp.3.

<sup>4</sup> *ibid*

there were elders' courts adjudicated the matter. There was a council of representatives depicting the extended families belonging to the litigants. The justice system could be viewed as an expansion of the regulation of individual behavior by society. The judiciary placed the erring individuals in a position that reiterated their community dependence because they threatened the community's peace and balance. Consequently, restorative responses to crime were invoked in order to sustain the cohesion of the whole community.<sup>5</sup>

The council of elders, referred to as the '*NjuriNceke*', carried out a large proportion of the actual administration of the Meru community. Their central role was maintaining peace and harmony in the community. They adjudicated cases brought forward by the victim against the offender. The aim of settling disputes and cases was reconciliation which was seen as a prerequisite for the community. The council of elders and litigants would gather on the day set for hearing to listen to both the victim and the accused's tale. The offender was offered a chance to correct his wrong by compensating the victim. This gave him the chance to be reinstated to the society because this culture idealized community bonds.<sup>6</sup>

## **1.2.Literature Review**

Gavrielides indicates that in the 1970s the word ' Restorative Justice' was first introduced to the literature on criminal justice. However, there is powerful proof that this notion dates back to many other traditional societies ' customs and religions. Some argue that the values observed in Restorative Justice are rooted in just as old traditions and procedures as ancient Greek and Roman civilization. He describes that programs are used to promote restorative justice, including: Victim-Offender Mediation, Family Group Conferences, Circles of Healing and Sentencing, Community Restorative Boards. Victim-Offender Mediation uses a qualified mediator to organize the session to bring the main victim and offender together. When both sides of the tale have been heard by the mediator, he helps to consider methods to create things right.

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<sup>5</sup> ibid

<sup>6</sup> ibid

Mediation enables the parties attain a fresh and common understanding of their relationship, one that will redirect their attitudes towards each other.

Conferences of the Family Group is another program that has traditional origins. This program includes not only main victims and offenders, but also secondary victims, party relatives, their good friends, representatives of the community, and the police. All these individuals are engaged because in one manner or another they are linked to the main respondents.<sup>7</sup>They are brought together by a third party, a facilitator, and everyone is involved in a debate that leads to amendments and sanctions. The narratives make the offender aware of the impact of his actions, allowing him to regret, apologize, accept responsibility and be forgiven by the victim and community. This then forms both the victim and the offender's future behavior to allow them to reconnect with important community support structures.

Dhami describes that restorative justice did not have an effect on prison policy and practice, mostly because it is nascent and scarcely used in the context of prisons. The fear of crime by the public and the attempts of politicians to get rid of crime make it difficult to replace imprisonment with restorative justice as the dominant response to crime. He claims that restorative justice should be used in prisons to enhance prisoners ' experience, which can contribute to the general usefulness of prisons in their attempts to decrease crime. If both have the goal of rehabilitation, restorative justice and imprisonment are both compatible. He then mentions the advantages of restorative justice for inmates, victims, communities, prisons and their employees ; restorative justice can enhance prisoners ' knowledge of the effect of their offences, allows prisoners to comprehend the cause of their potentially offensive behaviour, helps to rectify interactions between inmates and their families, helps prisoners to create amends for the victims through reparations such as apologies Finally, it can enhance the attitudes of the inmates towards and involvement of the society.<sup>8</sup>

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<sup>7</sup>Gavrielides, T. (2007). Restorative justice theory and practice. Helsinki [Finland].

<sup>8</sup>Dhami, M., Mantle, G. and Fox, D. (2009). Restorative justice in prisons. Contemporary Justice Review, 12(4), pp.433-448.

Gabagambi claims that restorative justice was used in Africa before the colonialists came, and that African nations should review it as it encourages healing, and repair ties between perpetrators, victims, and society far better than the Western system of adversaries. She also claims that restorative justice in the 21st century would work better than the court system. She suggests this paradigm would be better for Africa as it would decrease its reliance on external assistance, encourage active involvement by local groups, and contribute to the growth of Africa's own conflict resolution scheme. She notes that the Western criminal justice system was practiced in a Western way in Africa and thus obviously eroded and suppressed African law and legal systems used by Africans to restore complete healing for the offender, the victim, and the community. He proposes that African academics, particularly lawyers and criminologists, should lead the resurgence of restorative justice in Africa, which could be accomplished through cooperative research involving different groups and their rulers to know critically what restorative justice involves.<sup>9</sup>

Richards explains that restorative justice emerged because of the need to address the rights of the victims, their needs and their interests. He points out that victim advocacy tends to focus mainly on offences such as homicides, sexual assault, murder, child abduction and child sexual abuse. He says that often than not, it is victims of these crimes who are victimized as they are neglected and mistreated by the criminal justice system. They lack the opportunity to take part in criminal proceedings that voice their concerns and their chance to be heard by the community at large. He points out that it is not prevalent for perpetrators of minor offenses, such as theft of cars, to be more fully engaged in the criminal justice process. In addition, these victims don't want to be engaged in the criminal justice system, in fact most of them didn't want to be involved and wanted to be kept up-to-date. He also argues that the advent of restorative justice was more concerned with the needs of the victims of severe crimes, felonies, than with the victims of petty crimes that are mostly targeted at restorative justice.<sup>10</sup>

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<sup>9</sup>Gabagambi, J. (2018). *A Comparative Analysis of Restorative Justice Practices in Africa*. 1st ed. New York.

<sup>10</sup>Richards, K. (2009). Taking Victims Seriously? The Role of Victims' Rights Movements in the Emergence of Restorative Justice. *Current Issues in Criminal Justice*, 21(2), pp.302-320.



Keenan, like Gavrielides, says conferencing, victim-offender mediation, or dialog and circles are the most common models of restorative justice. She also states that restorative justice has been developed globally to ensure that the offender-victim relationship is repaired and that the needs of the victim, the offender and the community are balanced. Restorative justice, as proponents argue, can provide a participatory process that acknowledges and addresses the victim's unmet requirements and fosters the rehabilitation of victims and offenders in sexual offenses instances. Its application has however been met with opposition and concerns. Some of the concerns of restorative justice are that concerns by victims' advocates that it may place victims of sexual violence at a risk of re-traumatisation and re-victimization. It was asserted that restorative justice could move sexual violence back into the private sphere away from the long-awaited public arena and thus minimize the condemnation of sexual violence.<sup>11</sup>

Blad evaluates the developments of restorative justice which are gaining momentum around the world as approved by the increasing number of organisations, number of countries introducing new legislation and publications that are dealing with it. Clearly restorative justice corresponds to a basic human and societal need that cannot be stopped by borders or politics. The fact that it is flexible and adaptable makes it work best when adapted to local customs and practices. He states that there are international conferences on the topic blooming all over the world in places such as Albania, Ireland, Iran, Canada, France, Nepal and so many other countries. He explains that the more restorative justice is endowed globally, the more there is a risk of its standardization. Some claim that it has become a victim of its own success, and has, many a time, failed to be true to its own principles. At times it is not actually or even actively restorative. The author suggests that to avoid such malpractices a number of policies that are guided by high-quality research on socio-ethical, judicial and empirical issues should be put in place.<sup>12</sup>

Johnstone starts by explaining that we tend to argue about the extremes to which penalty should be directed, the suitability of the penalties, how heavily or leniently the offenders should be

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<sup>11</sup>O'Nolan, C., Zinsstag, E. and Keenan, M. (2018). Researching 'Under the Radar' practices: Exploring restorative practices in sexual violence cases. *Temida*, 21(1), pp.107-129.

<sup>12</sup>Blad, J. (2015). The politics of restorative justice. *Restorative Justice*, 3(1), pp.1-5.

punished, and the principles which should guide the penal procedures. However, instead of revolving around the above debates, restorative justice aims to challenge the fundamental assumptions. He describes that we should address criminal conduct by promoting those accountable for it to remedy the damage caused to other individuals and relationships by their actions. It suggests that those individuals who are directly harmed by criminal behaviour, and those who cause this harm, should play a central role in deliberating and deciding what harm has been caused and what the offenders should do to fulfill their obligations to try to repair this harm.<sup>13</sup>

All the authors have helped advance restorative justice. The key gap is that sentencing policy does not provide opportunities for dialogue and problem-solving among victims, community, offenders and their families. It is difficult for an offender to be accepted back to the community, after he or she is convicted of a crime as a normal law-abiding citizen due to stigmatization. The victim and the community are not educated on the importance of re-integration and restorative justice making it difficult to promote a peaceful atmosphere for both the offender and the community.

### **1.3. Problem Statement**

Restorative justice is a notion based on principles that emphasize the significance of offering possibilities for more active participation in the process of: offering support and assistance to victims of crime, holding perpetrators answerable to the victims ' individuals and groups, restoring victims ' mental and material losses, providing a variety of possibilities for dialog and problem-solving among victims of crime, offering offenders possibilities for skills growth and reintegration into productive life in the society, and enhancing public safety through building the community.

In Kenya, the sentencing policy and the types of sentences offered do not take into account the victim as a factor to be considered. In addition, the sentencing policy does not provide an

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<sup>13</sup>Johnstone, G. (2017). Restorative justice for victims: inherent limits?. *Restorative Justice*, 5(3), pp.382-395.

opportunity for dialogue and problem solving among both offenders and their families. After being convicted of a crime as an ordinary law-abiding citizen owing to stigma, it is hard for an offender to be accepted back to the society. The victim and the community are not educated on the importance of reintegration and restorative justice that makes it difficult for either the offender as well as the community to promote a peaceful atmosphere.<sup>14</sup>

Restorative justice should therefore not be taken lightly as it very crucial for a peaceful coexistent society. Firstly, the court needs to be informed, especially on matters regarding criminal justice that its role is not only to punish the wrongdoers but also to offer reparations to the victims. Second, prisons must train the prisoners for the reason they were incarcerated and realize the damage they caused. Finally, it is necessary to educate the community about its role in restorative justice. In fact, in Kenya, we have all the parts needed to maintain restorative justice; we have simply not processed them enough to create sense.

## **1.4. Theoretical Framework**

### **1.4.1. Reintegrative Shaming Theory**

Braithwaite's propounded Reintegrative Shaming Theory indicates that the key to crime control is cultural shaming in forms he calls reintegrative. He describes that low crime rates societies are the ones that judgmentally shame people committing offences. However, he says that shame can be unjustly and counterproductively applied, and the theory seeks to define the kinds of concepts that trigger crime rather than discourage it. He takes the opinion that most crime is a quality of practice; that the distinction between conduct and action is that conduct is physical and action is a significance provided only by society. He says that knowing that an action is deviant essentially changes the decisions taken about the nature of the decision. Social structures, like the

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<sup>14</sup>Kenyalaw.org, Restorative justice and Victims of Crime in Kenya, Concept of Justice in the African Customary Law.

criminal justice system, he says are therefore a resource for actors to make sense for their action and a product for that action.<sup>15</sup>

Reintegrative shaming, condemnation of the act in a spectrum of respect for the offender, discontent ended by forgiveness rituals, deterring crime. Restorative justice ensures that the offender, the victim and the community operate in harmony to encourage reconciliation. Reintegrative shaming theory operates by inviting victims and victim to meet the offender, as well as the individuals who care so much about the victim where they speak about guilt and get support from those they love and honor. This isn't disgraceful before the police, or the judges, or the media, it's disgraceful in the eyes of the ones we love, trust, and respect. This is where the distinction lies and this makes it easier for the victim to return to the community without feeling guilty or being stigmatized and disrespected by society.<sup>16</sup>

#### **1.4.2. Unacknowledged Shame Theory**

According to Nathanson, the Theory of Unacknowledged Shame indicates that shame can be a damaging emotion because it can lead to attacking others, attacking one's self, avoiding or withdrawing from others, all these reactions and behaviors can encourage crime. Therefore, a process is required that allows offenders to cope with the shame of committing a crime. Shame is not a bad thing, or an unusual behavior as it is experienced by all beings, and it is truly vital to one's development, it motivates us to maintain the social bonds that are essential to our survival. Shame has been pointed out by Scheff and Retzinger as the culprit that characterizes our worst domestic and international violence.

Tangney further explains that guilt over particular behaviors is healthy; the issue is chronic self-blame and obsessive contemplation over some distasteful behaviour, uncomplicated by emotions

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<sup>15</sup>Braithwaite, J. (1982). *Crime, shame and reintegration*. Cambridge: Cambridge University Press.

<sup>16</sup>Braithwaite, J. (2004). *Restorative Justice: Theories and Worries*. *Restorative Justice*, pp. 47-56.

of self-shame. Shame is much more likely to be straightforward when faced with shameful effects and when emotional reparations are made for those impacted, when not faced; shame is more likely to become chronic and more likely to fall into anger. In Ahmed's research, bullies cope with shame by transforming it into rage, for example, because they internalize it and thus experience continuous shame. Children who resist bullying and being victimized by bullies are capable of acknowledging and discharging shame so that it would not threaten them. Restorative procedures can decrease crime by creating a process where there is time and tolerance to be recognized for shame, which is not usually facilitated in court.

Shame will be recognized in restorative justice by apologizing and reciprocating through forgiveness. Maxwell discovered that the offenders who failed to apologize were three times more probable to reoffend in family group meetings than those who apologized. When hurt is transmitted, shame recognized by the person(s) that caused it, respect shown for the reasons given by the victim to communicate the hurt and respect reciprocated by the victim, constructive conflict between the victim and the offender has taken place. Instead of accentuating the positive and eliminating the adverse, restorative justice should emphasize the positive and address the negative. Therefore, this indicates that offenders can embrace and remove shame more at meetings than as they go through court instances, enabling restorative justice to play a greater role than the court process in decreasing crime.

### **1.4.3. Procedural Justice Theory**

The theory of procedural justice demonstrates that meetings on restorative justice do not have all of the court's procedural safeguards, yet perpetrators and victims will find them fairer. This is due to those who are attending and controlling the meetings. On the one hand, criminal justice inflicts harm, while conferences provide assistance both to the victim and the offender. It is anticipated that those who are present will be frank and thus also tend to be honest. Citizens have in their hands the power and control and are not placed under their lawyers' control. According to Tyler, when they saw themselves handled fairly by the criminal justice system,

people were more likely to comply with the law. Offenders are more likely to comprehend what is happening in meetings than in courts and feel more empowered to convey their opinions, have more opportunity to do so, are more inclined to feel that their rights have been respected, feel that they can correct factual mistakes, feel that they have been treated with regard and are less likely to feel excluded because of their age, income, sex or race at meetings.

### **1.5. Research Questions**

The study seeks to answer the following questions:

1. How does restorative justice repair relationships through a method of healing intended to satisfy the victim's requirements and seek to fully integrate the offender?
2. Why is a comparatively small amount of prisons restricted to restorative justice?
3. Why do victims' advocates fail to embrace restorative justice?
4. How can forgiveness be measured in restorative justice?
5. How far are victim expectations of justice met by restorative justice?

### **1.6. Research Objectives**

1. To determine how the restoration method seeks to remedy the injuries created; repair relationships and meet the requirements of both the victim and the offender.
2. To explain how distinct justice convictions will generate dramatically distinct ways to achieve restorative justice.
3. To establish recommendations for a victim-oriented approach to restorative justice.

### **1.7. Justification of the Problem**

The paradigm of restorative justice moves the traditional perspective of crime from the violated norm to the damage done to the most impacted people by the crime. In a quest to bring all three together through repair, reconciliation, and reassurance, justice includes the crime, victim, offender, and community. Restorative justice emphasizes interpersonal relationships over norms. It holds perpetrators to account for the offenses they committed. It moves the goal from punishing the criminal justice system to repairing the damage by inflicting pain on the offender. Restorative justice is extremely relevant at improving the effectiveness and efficiency of the criminal justice system, its relevance includes; the elements it has that enhance its ability to achieve improved results that help reduce crime, its ability to be implemented at any stage during the criminal process and its effectiveness to help achieve lower recidivism rates in reducing crime than the courts system.

Restorative justice is capable of reducing expenses in court proceedings such as the costs met during judicial and prosecutorial time, although restorative processes require certain expenses, they are often substantially lower. Restorative justice offers an alternative for the main mechanism used to punish offenders' imprisonment. Although the offender should be punished for negligence, this is not only expressed through incarceration. By enabling the parties concerned to decide a suitable result through a decision making process, society can expand its processes to express state condemnation in more advanced yet equally efficient ways. Restorative procedures are also time-efficient, because instances can be handled within several hours, and perpetrators do not necessitate legal representation.

Studies indicate, as shown above, that procedures of restoration are more efficient and effective than the process of trial. There is a gap between how it is expected to be interpreted by the justice system and how it is genuinely viewed. When the public believes in the judicial system's fairness and justice, it will start questioning its legitimacy and may deviate from applying the system's final choices.<sup>17</sup> Legal scientists should advocate restorative justice, but they also need to involve the public in their execution. Therefore, this study aims to assert the imperative of the criminal

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<sup>17</sup>Gabbay, Z. (2005). Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices. *Journal of Dispute Resolution*, 2005(2).

justice system to provide a process that they perceive as reasonable and just to people and groups impacted by crime; one that benefits the victim, the offender and the community.

## **1.8. Hypotheses**

This study relies on the following hypotheses:

1. Restorative justice has not affected prison policy and practice, mostly because it is underdeveloped and scarcely used in the context of prison.
2. Restorative justice arose due to the need to combat the victims' rights and concerns.
3. Restorative justice is a criminal justice system that focuses on the rehabilitation of offenders through reconciliation with victims and the wider community, sometimes through restitution of offenders

## **1.9. Research Methodology**

This study will employ the use of library resources, online resources, journal articles, handbooks, national and international legislation; through a qualitative desk based research. This will ensure that the research is not subject to judgement through giving a holistic view of the subject matter of this research. Additionally, it will critically analyse the Criminal Justice System and look at the loopholes that exist within it. It will therefore rely on Comparative Analysis and Doctrinal Analysis.

### **1.9.1. Comparative Analysis**

This method developed by Kantor and Savitch is based on the concepts which are operationalized using quantitative and qualitative data sets, which aims at achieving precision while remaining sensitive to local contexts. This methodology will rely on some African countries to compare the use of restorative justice and its application.



Culturally, the people of Ghana are usually not willing to bring matters before the tribunal. This describes in part why most Ghanaians reacted favorably to the National Reconciliation Commission, set up to assist reconcile the individuals of Ghana by sorting out the truth about previous human rights abuses', because their trials were not the same as those in a court room. Ghana's prisons currently lack appropriate infrastructure to equip offenders with the needed expertise and abilities to make a beneficial contribution to their nation on leaving prison. The people of Ghana think priority should be given to community amenities over imprisonment, particularly for minor offenders, females and the elderly.<sup>18</sup> Most South Africans believed in Ubuntu, the idea of a common humanity and community where everybody is the keeper of his or her brother or sister. Therefore, this philosophy endorsed and still encourages restorative justice by ensuring that an offender is reinstated to a position that allows him or her to withdraw from harming others. Despite years of denigration and erosion by the colonial powers and legacy under the westernized African elite, the African restorative justice system appears to be robust and is making a return as evidenced in the countries mentioned above.<sup>19</sup>

### **1.9.2. Doctrinal Analysis**

In its Draft Protocol for Community-based Restorative Justice Schemes, the Northern Ireland Office adopted The United Nations Draft Declaration on Basic Principles on the use of Restorative Justice Programmes in Criminal Matters. It used the following key principles on using Restorative Justice Programmes in Criminal Matters: that restorative processes must only be used with the free and voluntary approval of the party that can be withdrawn at any time; any agreements entered into should be voluntary, reasonable and proportionate; the victim and the offender should not be forced to engage in or acknowledge the result of the proceedings ; before agreeing with the participating parties, they should be notified of their rights, the nature of the proceedings and the possible results of their implications ; the parties should have the right to

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<sup>18</sup> ibid

<sup>19</sup> ibid

legal advice on the proceedings ; during the restorative proceedings, the security of the parties should be taken into account.<sup>20</sup>

### **1.10. Limitations**

The following limitations may arise while carrying out the research:

1. Since the term restorative justice has been coined, there has been a huge debate about what it should be or what it is, and there is no definitive measure up as to what should be included in its grasp.
2. One of the major disagreements include whether restorative justice should be approached as a process or an outcome.
3. What authentic forms of restorative justice are and what kinds of practices are not.
4. Whether restorative justice should be regarded as a set of principles of justice rather than a set of procedures. This means that there are many identities of restorative justice that can generate theoretical, empirical, and political confusion.
5. The purpose of restorative justice is to help victims, but this may be more feasible for some than for others depending on the crime committed. In the future, some offenders may become law-abiding citizens, but this may not be the case for everyone.<sup>21</sup>

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<sup>20</sup>Sherman, L. (2007). *Restorative justice: the evidence*. London: Smith Institute.

<sup>21</sup>Daly, K. (2005). The Limits of Restorative Justice. *Handbook of Restorative Justice: A Global Perspective*, pp.1 - 2.

## **1.11. Chapter Breakdown**

### **Chapter 1: Introduction**

The introduction will include a definition of restorative justice. It will also address what restorative justice is; its needs and roles.

### **Chapter 2: Understanding Restorative Justice**

This Chapter will look at the concept of restorative justice; the stakeholders of restorative justice; the victim, the offender and the community. The elements of restorative justice; this includes the process of achieving it and restitution. The role of restorative justice and Social Reintegration in Kenya; the value of reintegration for offenders and in particular the risk factors; in order to give a clear understanding of why reintegration of offenders is significant post- incarceration. The inadequacy of Retributive Justice; why the rates of recidivism are still high.

### **Chapter 3: The place of Restorative Justice in Kenyan Legal System**

This Chapter will shed light on whether there is space for it in the Kenyan legal system, Constitution and policy documents by the government. This Chapter will also dissect the Report of the Task Force on Alternative Justice Mechanisms. It will shed a light on Traditional Dispute Resolution Mechanisms, Legislation promoting restorative justice, juvenile offenders, The Probation and Aftercare Services and The Kenya Prison's Service.

### **Chapter 4: Comparative Perspectives**

This chapter will delve on the success of restorative justice in other jurisdictions in comparison with the practice in Kenya. This chapter will focus on; South Africa, Rwanda, Norway, Australia, and New Zealand.

### **Chapter 5: How Kenya can implement the Lessons Learnt from Comparative Studies.**

This chapter will conclude on restorative justice and the findings that it will have seen in other countries, which include government involvement and public awareness on the importance of reintegration of previous offenders back to society. It will then make recommendations on the areas that need improvement and maximisation of the standard of restorative justice in Kenya.

## CHAPTER TWO: UNDERSTANDING RESTORATIVE JUSTICE

### 2.1 Introduction

Crime is a betrayal of people and their bonds. It induces a sense of responsibility to make things right. The victim, the offender, and the community are all involved in the quest for solutions that foster healing, resolution, and reassurance.<sup>22</sup> Restorative justice's main function and objective stems from the fact that, due to a different view of crime and reaction to crime, it focuses on supporting the primary stakeholders of crime and emphasizing their interests and responsibilities after a crime has been committed.<sup>23</sup> From his point of view, Zehr involves the offender, the victim and the community for the benefit of all the stakeholders. Restorative justice relies on the principle of mediation where it includes all three stakeholders.<sup>24</sup>

Zehr goes on to say that in every criminal justice system, the interests of the victim of the crime should be prioritized.<sup>25</sup> This can be seen in some of the most common restorative justice mechanisms used in criminal justice systems, such as victim-offender mediation,<sup>26</sup> which includes face-to-face negotiations between the victim and the offender with the intention of facilitating healing and reconciliation; family group conferencing,<sup>27</sup> where the victim's and offender's support groups, such as family or social workers, are allowed to participate and assist in the negotiating process; and sentencing/peace-making circles,<sup>28</sup> which concentrate on collective rather than individual healing and are directed by peacemakers skilled in traditional norms.

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<sup>22</sup> Zehr H, *Changing Lenses: A New Focus for Crime and Justice*, 1990, Page 181

<sup>23</sup> Zehr H and Gohar A, *The Little Book of Restorative Justice*, Good Books, 11

<sup>24</sup> Love C, 'Family group conferencing: Cultural origins , sharing and appropriation: A Maori reflection' in G Burford & J Hudson (eds) *Family group conferencing: Nell' directions in community-centered child and family practice*, 2000, 15.

<sup>25</sup> *ibid*

<sup>26</sup> Bazemore G & Umbreit M 'A comparison of four restorative conferencing models ' (2001) *Juvenile Justice Bulletin*, 2001, 2.

<sup>27</sup> *ibid*

<sup>28</sup> K Pranis ' Peace-making circles: Restorative justice in practice allows victims and offenders to begin repairing the harm '59 *Corrections Today*, 1997, 73.

There are three key components of restorative justice; process, restitution, and reintegration.<sup>29</sup> For the process to take place, mechanisms employed in mediation are adopted. Restitution entails the offender's acknowledgment of the offense, which is normally accompanied by either an apology or an act of reparation for the damage caused by the offence.<sup>30</sup> Reintegration mainly involves providing both moral and material assistance to both the victim and the offender in order for them to be able to rejoin the community and fully function.<sup>31</sup>

This chapter will increase the overall objectives of the research by comparing restorative justice to retributive justice and elaborating on its attempts to determine its efficiency and its impact on the criminal justice system in order to ensure that justice is served to all affected parties. Furthermore, the chapter will discuss the importance of reintegration for prisoners, as well as risk and reintegration factors, so as to provide a better explanation of why reintegration is critical after incarceration. This chapter will also decode the stakeholders and elements of restorative justice and their role in the push and prevalence for justice.

## **2.2 Restorative Justice**

Restorative justice is a method of dealing with crime that focuses on repairing the damage done to victims, ensuring criminals are accountable, and, in many cases, including the community in the resolution of the dispute.<sup>32</sup> More precisely, restorative justice practitioners appear to accept that what actually distinguishes a “restorative” approach to crime is adherence to a collection of general objectives that provide a shared ground for parties' involvement in responding to a criminal case and its effects, rather than a specific practice or mechanism.<sup>33</sup> The following are a number of objectives of restorative justice programmes; giving victims a voice, empowering

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<sup>29</sup> Gomez S, Restorative Justice following Mass Atrocity: The Case of Rwanda, 2006, p9.

<sup>30</sup> ibid

<sup>31</sup> ibid

<sup>32</sup> United Nations Office on Drugs and Crime, ‘*Restorative Justice Programmes*’, Page 6.

<sup>33</sup> ibid

them to communicate their needs, allowing them to engage in the resolution process, and assisting them.<sup>34</sup>

The United Nations General Assembly adopted a Declaration of Basic Principles on Justice for Victims of Crime and Abuse of Power in 1985, which declared that “informal processes for conflict settlement, such as mediation, arbitration, and customary justice or indigenous traditions, should be used where applicable to promote conciliation and restitution for victims.”<sup>35</sup> Victims have a voice in deciding what will be an appropriate result for the process and may take steps toward resolution through engaging in decision-making. Repairing the relationships harmed by the crime, in part by reaching an agreement on how best to respond to it is also part of settling the dispute.<sup>36</sup> The key strategies for seeking justice and helping the victim, the perpetrator, and the community's interests are peacemaking, conflict resolution, and rebuilding relationships. It may also aid in the identification of the root causes of crime and the development of strategies to reduce crime.<sup>37</sup>

The main concern with the criminal justice system, according to restorative justice experts, is that it is only involved in punishing offenders.<sup>38</sup> The denial of retribution, on the other hand, is misguided. Punitive features are clearly present in the restorative justice response. Furthermore, punishment plays an important role in deterrence, not just for criminals but also for the community as a whole, and therefore in the upkeep of social order.<sup>39</sup> Punishment should therefore not be completely scraped out as an effective response to crime for the benefits that it has. Restorative justice's main function and value stems from the fact that, due to a different view of crime and reaction to crime, it focuses on empowering the primary stakeholders of crime and highlighting their interests and responsibilities after a crime has been committed.<sup>40</sup> These

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<sup>34</sup> United Nations Office on Drugs and Crime, ‘*Restorative Justice Programmes*’, Page 9.

<sup>35</sup> General Assembly resolution 40/34 of 29 November 1985, para. 7.

<sup>36</sup> *ibid*

<sup>37</sup> *ibid*

<sup>38</sup> Barton C, 'Empowerment and Retribution in Criminal and Restorative Justice' 2

<sup>39</sup> Scott D and Flynn N, *Prisons and Punishment: The Essentials*, 21.

<sup>40</sup> *ibid*

aspects of restorative justice have been described as the criminal justice system's greatest vulnerability and the restorative justice movement's greatest strength.<sup>41</sup>

As a result, crime is a disruption of the victim-offender-community relationship, it can then be treated as violations that must be compensated to their rightful owners in order for them to repair the damage and restore the victim and the community as much as possible.<sup>42</sup> Justice cannot be accomplished solely by punishing criminals, but rather by attempting to repair the damage that crime causes. In addition, those who have been impacted by crime should participate fully in the rehabilitation and restoration process.<sup>43</sup> The primary responsibility is to make good on the damage that has been done. As a consequence, obligations are concerned with the interests of those who are most affected by the crime; the offender, victim, and community.<sup>44</sup>

In the restorative justice process, the offender's ability to understand why they are being punished is fundamental.<sup>45</sup> The offender's responsibility is important because it allows criminals to think about the repercussions of their acts in order to comprehend the effect of their actions and the damage they bring to the victim and the community.<sup>46</sup> As a result, when the offender is given opportunities to improve personal competencies, accountability leads to healing for the offender, the victim, and the community. It also leads to reintegration of the offender into the community and the avoidance of recidivist behavior.<sup>47</sup> The offender is also boosted and assisted in his or her efforts to reintegrate into society.<sup>48</sup> This is realized when the criminal accepts responsibility for his conduct, resulting in him repairing the damage he has caused and thereby

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<sup>41</sup> *ibid*

<sup>42</sup> Wenzel M, Okimoto TG, Feather NT, Platow MJ, 'Retributive and Restorative Justice' 376.

<sup>43</sup> *ibid*

<sup>44</sup> *ibid*

<sup>45</sup> Nesser JJ, 'Restorative Justice as a Reaction to Crime: Development and Conceptualization' 6.

<sup>46</sup> *ibid*

<sup>47</sup> Umbreit MS, Vos B, Coates RB and Lightfoot E, 'Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls' 561.

<sup>48</sup> *ibid*



re-entering society successfully. He or she often requires help and care for issues related to his or her ability to counter crime, as well as the opportunity to learn and improve skills.<sup>49</sup>

Due to the understanding of violence, the interests of victims are legitimized in the restorative justice framework. First and foremost, victims need facts about the crime, why it occurred, and what has took place since the crime was committed.<sup>50</sup> This can necessitate direct or indirect contact with criminals. Victims will better understand why the perpetrator did what they did and come to terms with what happened as a result of this. Secondly, victims must be given the opportunity to share their story and express their pain and feelings toward the offender. They need a system that can understand the victim in order to communicate the severity of the damage caused to him or her.<sup>51</sup> Thirdly, the victims should be given more leverage in the justice system. Since the victims stand to benefit or lose the most from the success or failure of the justice system, they should be involved so that they can satisfy their needs, find resolution, and ensure that the case has been handled fairly and that justice has been served.<sup>52</sup> Finally, victims need restitution from offenders, in which the perpetrator attempts, though ineptly, to make amends for the harm caused.<sup>53</sup> This helps the victims get closure for the harm caused.

Community empowerment is significant because it encourages people to say what they think is right or wrong, fair or unjust, and express discontent and frustration in socially appropriate ways.<sup>54</sup> It should also be part of the resolution or agreement-making process.<sup>55</sup> This makes it easier for the party to reach a satisfactory consensus because they will see themselves as stewards of the settlement and will be more likely to stick to it. Communities will want guarantees that the offender will not commit the offense again and that the society as a whole, working with the offenders, will take preventive measures to ensure that the damage caused is

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<sup>49</sup> Bazemore G, 'Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration', 772.

<sup>50</sup> *ibid*

<sup>51</sup> *ibid*

<sup>52</sup> *ibid*

<sup>53</sup> *ibid*

<sup>54</sup> *ibid*

<sup>55</sup> *ibid*

not repeated.<sup>56</sup> Restorative justice is a method of involving, to the greatest extent possible, those who have a stake in a specific offense in identifying and addressing harms, obligations, and needs in order to heal and make things right.<sup>57</sup>

### 2.3 The Inadequacy of Retributive Justice in Kenya

In Kenya, crime is defined as a violation of the law or deviant behavior that amounts to a violation against the state, which is then prosecuted by the state.<sup>58</sup> Prosecution seeks to determine who bears criminal responsibility. As a result, the offender is blamed for the crime, and a comprehensive solution is deemed as a win-loss outcome.<sup>59</sup> Kenya's criminal justice system responds to crime through a punitive model.<sup>60</sup> Retributive justice is the operating principle of this system. Retributive justice states that punishment of the offender is the primary means of dealing with crime, and that once the punishment is imposed, justice is considered to be completed.<sup>61</sup> As a result, punishment is seen as a means of establishing justice. It is a requirement that is proportional to the magnitude of the wrongdoing, adequate and necessary for justice, and implemented by the courts through sentencing.<sup>62</sup>

The retributive justice system uses strict sentencing, long prison terms, and mandatory minimum sentences to deter crime. As a result, prison is seen as the only appropriate punishment for all types of crimes, the length of one's prison sentence is then determined by the gravity of the crime committed.<sup>63</sup> The principle of proportionality is also at the heart of retributive justice; a life for a life. This is the basis for sentences such as the capital punishments for murderers<sup>64</sup>. The system adheres to the concept that the most important part of the justice act is establishing the offender's

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<sup>56</sup> Bazemore G, 'Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration', 771.

<sup>57</sup> *ibid*

<sup>58</sup> *ibid*

<sup>59</sup> Kiage P, *Essentials of Criminal Procedure in Kenya*, 52. LawAfrica Publishing Limited, 2010.

<sup>60</sup> *ibid*

<sup>61</sup> Wenzel M, Okimoto TG, Feather NT, Platow MJ, 'Retributive and Restorative Justice' *Law and Human Behaviour*, 32 (5) 375 <<https://doi.org/10.1007/s10979-007-9116-6>> accessed 22 March 2021

<sup>62</sup> *ibid*

<sup>63</sup> Gabbay Z, 'Justifying Restorative Justice: A theoretical Justification for the Use of Restorative ' *Vol 2 Justice Practices Journal of Dispute Resolution* 2005,355.

<sup>64</sup> 1<sup>st</sup> Schedule Sec 203, *Criminal Procedure Code*.

guilt and punishing him in accordance with the gravity of his crime and the harm done to the victim and community. The illegal act violates a legal and social standard, and is thus directed against the state.<sup>65</sup> This idea paints a picture of the Kenyan penal system. It is made up of the Judiciary, the Police, and the Correctional Facilities.<sup>66</sup>

The retributive justice system is set up in such a manner that victims have no place in it, and when they do, it's usually in the form of reinforcing anger and a sense of victimhood rather than getting the justice they deserve.<sup>67</sup> The state and professionals working on behalf of the state are the primary participants in the justice system because they are disconnected from the crime.<sup>68</sup> The victim of the crime is often overlooked or neglected, and he or she is rarely given the opportunity to express their losses or injuries, as well as their needs.<sup>69</sup> The victim's role is limited to testifying in court and submitting victim impact statements, which detail the primary victim's personal injuries.<sup>70</sup> Furthermore, the involvement of the community is limited to presenting evidence in court. When a community is not directly involved in a crime, it is not perceived to be interested in the crime.

#### **2.4 Restorative Justice and Social Reintegration in Kenya**

The core objectives of the criminal justice system include rehabilitation and reintegration of offenders into the community. Recidivism, in any part of society, should be addressed by crime prevention strategies and the presented measures should be effective, so that there would be a

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<sup>65</sup> Pocora M, 'The Restorative Justice System - An Alternative to the Official Criminal System' *EIRP Proceedings*, Vol 9 2014

<sup>66</sup> Owino B, Egesa O , Akong'a J, 'Looking in the mirror: Reflections on implementation of principles of penal system in Kenya's prisons ' 3 *Journal for Academic Research for Multidisciplinary* (2015),202

<sup>67</sup> Minow M , *Between Vengeance and Forgiveness: Feminists approach to Violent Justice*, January 1998, p2

<sup>68</sup> *ibid*

<sup>69</sup> Barton C, 'Empowerment and Retribution in Criminal and Restorative Justice', 17. In Heather Strang and John Braithwaite (Eds.). 2000. *Restorative Justice: From Philosophy to Practice*. Aldershot: Dartmouth. (Ch. 4, pp. 55 – 76.)

<sup>70</sup> The Judiciary, *Sentencing Policy Guidelines*, 2016, 47

decrease in criminal activity.<sup>71</sup> The imprisonment period must be used constructively to ensure that the incarcerated offender should be willing and able to lead a law-abiding life, upon reintegration back to the community.<sup>72</sup> One of the aims of Rehabilitation programmes is to bring positive change to the offender through his willingness to reform.<sup>73</sup> Rehabilitation efforts include providing education and promoting vocational skills, psychological and social support by involving professionals, medical treatment, individual and group counseling and spiritual development.<sup>74</sup> In Kenya, reform and rehabilitation is executed by the Kenya Prisons Service, which offer punishment and rehabilitation as stipulated by the courts.<sup>75</sup>

While in prison, the offenders are offered rehabilitation and vocational programmes, however the legal framework post penal supervision is frail.<sup>76</sup> The government administrates sentences based on communities through Probation and Aftercare Services. The department has the following programmes: Aftercare, Community Service and Probation Orders. The Department caters for both juvenile and adult offenders.<sup>77</sup> The most productive way of policing that has emerged in the recent years is community policing which has emerged to be very productive and effective. It helps the community to identify, solve and respond to the problems that crimes cause.<sup>78</sup> Reintegration not only prevents recidivism, it also ensures that there is public safety.<sup>79</sup> Offenders have a hard time adapting to society, and they may face ostracism and stigma. Their ability to return to formal education, find jobs or housing is extremely underwhelming.<sup>80</sup>

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<sup>71</sup> United Nations Office on Drugs and Crime, *‘Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders’*, 1

<sup>72</sup> United Nations Office on Drugs and Crime, *‘Custodial and Non-Custodial Measures: Social Reintegration’*, Page 1.

<sup>73</sup> Dissel A, ‘Rehabilitation and Reintegration in African Prisons’, available at [www.hsrapress.ac.za](http://www.hsrapress.ac.za) accessed on 20<sup>th</sup> April 2021.

<sup>74</sup> Lipton D and Martinson R, *The Effectiveness of Correctional Treatment: A Survey of Correctional Treatment Evaluations*, Praeger, New York, 1975.

<sup>75</sup> Obondi, CAO, ‘Effective Resettlement of Offenders by Strengthening ‘Community Reintegration Factors’: Kenya’s Experience’, 60.

<sup>76</sup> *ibid*

<sup>77</sup> *ibid*

<sup>78</sup> United Nations Office on Drugs and Crime (UNODC), *‘Custodial and Non-Custodial Measures: Social Reintegration’* (Criminal Justice Assessment Toolkit, 2006), 1.

<sup>79</sup> *ibid*

<sup>80</sup> *ibid*

Reintegration further seeks to reduce the cost of solving crime in the society. When the reintegration of offenders becomes successful, this means that the number of offenders who appear before courts will significantly reduce and consequently fewer of them will go back to prison leading to a decrease in overcrowding.<sup>81</sup> The cost of imprisonment and law enforcement is dealt with by the law; unfortunately, the process only involves the offender. The other parties (the victim and the community) are therefore, not included in solving the dispute.<sup>82</sup> The community and the victim are not reconciled with the offender because they are not involved in the process.<sup>83</sup> The programmes that help reintegrate the offenders to the community involve; programmes that offer support to the offender with regard to preparing them for re-entry into the community and programmes that are community-based commonly referred to as “after-care” programmes which involve the assistance and supervision of the community.<sup>84</sup>

Protecting the rights of offenders and public safety are the key concerns of social reintegration. The safety of the community and the needs of the offenders must be considered.<sup>85</sup> In order for reintegration to be successful, the offender’s relationship with the family should be stable as he adapts to the new lifestyle. This is because the family offers strength, motivation and support when the offender pursues his goals.<sup>86</sup> Restorative Justice helps reintegrate offenders into the community by providing a forum for genuine discussion of remorse and guilt.<sup>87</sup> Social reintegration should aim at empowering offenders and subsequently administering justice through settling disputes. Their role initiates an understanding with the offender that includes emotional support, assistance in adjusting to changes that have occurred throughout the incarceration process, constructive reinforcement and inspiration for law-abiding behavior, and a means of reconciliation to the larger community.<sup>88</sup>

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<sup>81</sup> UNODC, *‘Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders’*, 8.

<sup>82</sup> *ibid*

<sup>83</sup> Wenzel et al, 'Retributive and Restorative Justice, 376.

<sup>84</sup> Hai NY, Dandurand Y, 'The Social Re-integration of Offenders', 29 *VNU Journal of Legal Studies* 2013, 26.

<sup>85</sup> *ibid*

<sup>86</sup> Quaker Council for European Affairs (QCEA), *The Social Reintegration of Ex-Prisoners in Council of Europe Member States* 2011, 107-116.

<sup>87</sup> *ibid*

<sup>88</sup> *ibid*

Through restorative justice offenders become responsible for the injury they caused to the victims and the community in turn, the offender is reintegrated into the community.<sup>89</sup> Punishment is often part of restorative justice though it is not as important the healing process.<sup>90</sup> The notion that retributive justice is necessary or even paramount for justice to prevail has been crashed by the wake of restorative justice.<sup>91</sup> The process of healing helps restore the offender and the victim back to the community.<sup>92</sup> Successful social reintegration would necessitate an appreciation of the offender's risk and resilience factors, as well as the offender's needs and reintegration program responsiveness.<sup>93</sup> As a result, social reintegration is designed to ensure that the offender lives a law-abiding life in the long run, rather than simply accepting the offender back into the community.

Offenders are unable to function normally in society due to risk factors.<sup>94</sup> They can be either internal or external in nature. Resiliency factors, on the other hand, protect the offender and give them the strength as well as spirit to live a law-abiding life.<sup>95</sup> They can be both internal and external in nature. Both risk and resiliency factors must be established in order for reintegration to concentrate on fostering resiliency while holding risk factors in mind. It's also necessary to recognize the offender's post-incarceration needs, such as employment and basic necessities like food, clothes, and shelter. This will ensure that the offender pursues avenues for meeting these needs across a network of support. The offender's commitment to the program is also important, since effective reintegration requires a committed participant.<sup>96</sup>

## 2.5 Conclusion

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<sup>89</sup> Bazemore G, 'Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration', 768.

<sup>90</sup> Brathwaite J, 'Setting Standards for Restorative Justice', 42 *British Journal of Criminology*, 2002, 564

<sup>91</sup> Wenzel et al, 'Retributive and Restorative Justice Michael Wenzel', 376.

<sup>92</sup> See above note (90)

<sup>93</sup> *ibid*

<sup>94</sup> *ibid*

<sup>95</sup> *ibid*

<sup>96</sup> Workman K, 'How Should We Reintegrate Prisoners?' *Rethinking Crime and Punishment*, 4.

Restorative justice is clearly founded on responsibility, self-involvement, community perspective, damage repair, avoiding discrimination, restitution, and early prevention, as evidenced by the discussion.<sup>97</sup> Any aspects of effective psychological reintegration, such as the offender's resilience mechanisms, can only be realized in a restorative justice framework. Restorative justice calls for reparation, which requires perpetrator responsibility for the damage done and provides a forum for the victim to express what is needed to right the wrong and repair the harm. Restorative justice campaigns also work to support offenders, victims, and the environment, allowing for meaningful reintegration. Stakeholders should work through the dispute, settle it, reintegrate the perpetrator, and restore community equilibrium. Restorative Justice encourages interaction with the perpetrator, survivor, and society, which is critical for social reintegration unlike the retributive justice system which only focuses on punishing the offender. It provides the most effective tool for stable reintegration, crime mitigation, and recidivism reduction that will salvage our Kenyan penal system.

## **CHAPTER 3: RESTORATIVE JUSTICE IN THE KENYAN CRIMINAL JUSTICE SYSTEM**

### **3.1 Introduction**

In many cases, modern restorative justice is a solution to the shortcomings of the retributive model.<sup>98</sup> It has also been recognized in international policy frameworks such as the Development and Implementation of Mediation and Restorative Justice Measures of Criminal Justice, which

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<sup>97</sup> Pecora M, 'The Restorative Justice System - An Alternative to the Official Criminal System,' *EIRP Proceedings*, 9, 2014

<sup>98</sup> Gomez S, Restorative Justice following Mass Atrocity, 4.

encourages the use of mediation and restorative justice in minor disputes.<sup>99</sup> Restorative justice is rarely used and is seen as an alternative to retributive justice. It is only used where both the accused and the victim agree. As a result, it is part of the larger retributive justice process.<sup>100</sup> This however, does not restrict the characteristics of restorative justice that make it a safer option. The following sections describe some of these characteristics.

The acknowledgment of the rights of the victims is the first feature that distinguishes restorative justice from retributive justice.<sup>101</sup> Restorative justice not only recognizes these privileges, it also guarantees that they are upheld in the transition and that they are returned where they have been violated. It caters to the mental, financial, material, and social needs of the victims. Another characteristic of restorative justice is that various restorative justice frameworks are suitable for different cultures and kinds of crimes.<sup>102</sup> This means that cases are handled on an individual basis, taking into account the situation, rather than providing a general rigid rule of law that dictates what can be done in specific cases, as is the case in retributive justice.

The Kenyan penal system is primarily based on retributive justice; however the principle of restorative justice is not alien. The use by the courts and tribunals of alternative methods of dispute resolution in the exercise of judicial jurisdiction, including negotiation, mediation, arbitration and traditional dispute resolution mechanisms is provided in the Kenyan Constitution.<sup>103</sup> This leaves room for the implementation of restorative justice for civil as well as criminal disputes.

This chapter will decode Traditional Dispute Resolution Mechanisms and its incorporation to modern legal systems in Kenya, despite its existence before colonialism. It will also expound on

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<sup>99</sup> Principles 2 & 5 Development and Implementation of Mediation and Restorative Justice Measures in Criminal Justice 1999/26, adopted by the Economic and Social Council on 28 July 1999.

<sup>100</sup> See note (98) above

<sup>101</sup> Among H, 'The application of traditional justice mechanisms to the atrocities committed by child soldiers in Uganda: A practical restorative justice approach,' *African Human Rights Journal*, p 444.

<sup>102</sup> Braithwaite J, *Restorative Justice and Responsive Regulations*, 5, 2002, 7.

<sup>103</sup> Article 159 (2) (c), Constitution of Kenya (2010).



legislation promoting restorative justice and how it has enhanced the delivery of justice to the common *mwananchi*. Subsequently, this chapter highlights the work and effort employed by the Taskforce on Alternative Justice Systems concerning the implementation of alternative dispute resolution mechanisms and develops a policy to mainstream Alternative Justice System.

### **3.2 Traditional Dispute Resolution Mechanisms**

Prior to colonialism, which influenced modern criminal law, Kenya's various communities used their own dispute resolution mechanisms. The emphasis on social harmony and togetherness over individual interests or the allocation of rights between disputants was a common theme in every community.<sup>104</sup> In restorative justice, as opposed to retributive justice, these principles are important. These mechanisms are embedded in African customary laws. As a result, they are rooted in African traditional norms and beliefs, and therefore form an integral part of the social structure.<sup>105</sup> Skelton and Batley state that "both methods strive for unity and the preservation of peace and harmony; they foster a normative structure that emphasizes both rights and duties; and they highly value integrity and respect" as features that connect African traditional justice systems and contemporary restorative justice.<sup>106</sup> They claim that "neither process provides a sharp difference between civil and criminal justice; both are typified by ease and informality of procedure; both promote cooperation and ownership; and both value redress and reward, even ceremonial motions or acts" from a procedural standpoint.<sup>107</sup>

All of these features blend together like puzzle pieces in a strong restorative justice system, and Traditional Dispute Resolution Mechanisms remain robust in the face of formal Western criminal laws. The new legislative system in Kenya allows for the use of TDRMs in case resolution. It is provided for in the Constitution as an alternate mode of dispute resolution that

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<sup>104</sup> 'Kariuki Muigua: Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010'

<sup>105</sup> Kariuki F, 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR', 2

<sup>106</sup> Skelton A and Batley M, *Charting Progress, Mapping the Future: Restorative Justice in South Africa*, Restorative Justice Center, 2006, 8.

<sup>107</sup> *ibid*

courts and tribunals can use in the exercise of judicial authority.<sup>108</sup> The Magistrates' Court Act only applies to a certain number of civil matters, such as land held under customary tenancy, seduction or pregnancy of an unmarried woman or girl, and intestate succession and administration of intestate estates.<sup>109</sup> Before a court can decide on a petition for the dissolution of a customary marriage, the parties may go through a course of conciliation or a customary dispute settlement procedure, according to the Marriage Act.<sup>110</sup>

The case of *Republic v Mohamed Abdow Mohamed*<sup>111</sup> exemplifies the utility of TDRMs in the settlement of criminal cases. In this case, the defendant was charged with murder and pleaded not guilty when arraigned in custody. On the day of the hearing, however, the State counsel told the court that counsel defending the deceased's family had written to the DPP asking that the charge be dropped due to a settlement reached between the accused's and deceased's families. The Local prosecutor made an oral application in court, quoting Article 159 of the Constitution, on the DPP's orders, to have the case marked as settled. The court granted the appeal and released the defendant, deciding that accepting the application rather than rejecting it would best serve the interests of justice.<sup>112</sup> Though not a perfect case, since the court's ruling was influenced by a lack of witnesses, this precedent shows that contemporary law and TDRMs can be used in tandem to achieve criminal justice in Kenya. TDRMs are versatile, cost-effective, expedient, cultivate relationships, are non-coercive, and result in mutually satisfying results as a form of restorative justice. They are also more suitable for improving access to justice closer to the public, assisting in the reduction of court backlogs, and reducing the congestion of our jails while easing the tax burden on taxpayers.<sup>113</sup>

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<sup>108</sup> Article 159 (2) (c), *Constitution of Kenya* (2010).

<sup>109</sup> Section 2, *Magistrates' Court's Act* (No. 26 of 2015).

<sup>110</sup> Section 68, *Marriage Act* (No.4 of 2014).

<sup>111</sup> [2013] eKLR.

<sup>112</sup> *ibid*

<sup>113</sup> 'Kariuki Muigua: Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010', 6

### 3.3 Legislation Promoting Restorative Justice

The Sentencing Policy Guidelines include the advancement of the principles and mechanisms of restorative justice during sentencing as one of its goals.<sup>114</sup> It furthermore states that, reformation, social integration, rehabilitation and restorative justice should be the primary objectives when dealing with children in conflict with the law.<sup>115</sup> This is also in line with the African Charter on the Rights and Welfare of the Child which states that; the primary goal of approaching any child during the trial and if he is found guilty of violating the penal law is to; reform, and reintegrate the child into his or her family and social rehabilitation.<sup>116</sup>

The Victim Protection Act states that a victim has a right to restorative justice. Where the victim decides to participate in restorative justice, the process shall proceed on the premise that; the participation of the offender shall not under any law be deemed as admission of proof or guilt, with reference to the offence complained of; the parties may withdraw their participation at any time; the criminal trial of the defender shall proceed to final determination in a case where a process for restorative justice fails, but the victim shall seek appropriate relief in civil proceedings if need be; the process towards restorative justice does not violate the provisions of Article 159(3) of the Constitution. The Act further states that the Court shall enforce an Order or Decree where there is an agreement for restoration or other redress agreed between the victim and the offender. The process of restorative justice shall proceed for a period not more than six months, after which it may only be extended by the will of the Court.<sup>117</sup>

The Narcotic Drugs and Psychotropic Substances (Control) Act establishes recovery centers to provide for, cure, and rehabilitate people who are addicted to narcotic drugs or psychotropic substances.<sup>118</sup> During the sentence of a person convicted under this Act, a court can require that

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<sup>114</sup> Section 2.4, Sentencing Policy Guidelines (2016).

<sup>115</sup> Section 20.10, Sentencing Policy Guidelines (2016).

<sup>116</sup> Article 17.3, African Charter on the Rights and Welfare of the Child

<sup>117</sup> Section 15, Victim Protection Act (No. 17 of 2014).

<sup>118</sup> Section 52, *Narcotic Drugs and Psychotropic Substances (Control) Act* (No.4 of 1994).

the prisoner spend part of his or her time in a rehabilitation facility.<sup>119</sup> Following the presentation of a report by the center's officer in charge, the same court can, if convinced that the sentenced offender has successfully completed the center's rehabilitation programme and is no longer an alcoholic, award release of the whole or part of the remaining sentence imposed.<sup>120</sup>

The Community Service Orders Act stipulates that when a person is convicted of a crime punishable by (or for which the court finds necessary to punish by) imprisonment for a period of not more than three years, with or without the possibility of a fine, the court may issue a community service order requiring the prisoner to do community service.<sup>121</sup> It also specifies that "community service shall comprise voluntary public work within a community, for the good of that community," and encompasses such things as road building or repair, environmental protection and improvement projects, and maintenance work in public schools, hospitals, and other public social service facilities.<sup>122</sup> The discharge may be unconditional or conditional on him not committing any crimes for a set period of time.<sup>123</sup> "The (Cabinet Secretary) shall... formulate arrangements for the provision of adequate facilities for victims of trafficking in persons and children accompanying the victims," according to the Counter-Trafficking in Persons Act. Resettlement, reintegration, and psychosocial counseling are examples of such programmes<sup>124</sup>

### **3.4 The Probation Aftercare Services**

The Probation and Aftercare Service is a government department under the Ministry of Interior and Coordination of National Government that is responsible for administering probation, community service, and aftercare directives. The department's mandate is derived from the Kenyan Constitution, the Probation of Offenders Act, the Community Service Orders Act, the

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<sup>119</sup> *ibid*

<sup>120</sup> *ibid*

<sup>121</sup> Section 3(1), *Community Service Orders Act* (No. 10 of 1998)

<sup>122</sup> *ibid*

<sup>123</sup> Section 35, *Penal Code* (Cap. 63 of the Laws of Kenya).

<sup>124</sup> Section 15, *Counter-Trafficking in Persons Act* (No.8 of 2010)

Prison Act, and other government policies concerning probation and national growth.<sup>125</sup> In the criminal justice system, the department provides information for the administration of justice, as well as oversight, rehabilitation, reintegration, and offender settlement.<sup>126</sup> The department also runs probation hostels, where offenders on probation can stay temporarily if their homes and conditions are not conducive to successful recovery, reintegration, and resettlement. Individual and collective counseling, formal schooling, and vocational training are also available at these hostels.<sup>127</sup> The primary goal of the Probation and Aftercare Service is to help prisoners who have been sentenced to probation with rehabilitation, reintegration, resettlement, and supervision.

A probation officer position is also offered by the Probation and Aftercare Service. In this situation, the government appoints a probation officer to carry out the prisoner's recovery, reintegration, and monitoring in probation stations. The probation officer is located in the same location as the offender and has more contact with him.<sup>128</sup> Since the effectiveness of their mandates and key duties of regulation, reintegration, and resettlement are only achievable when the community is empowered, the Probation and Aftercare Service understands and works to build a strong relationship with the community.<sup>129</sup> The lack of a coherent range of policy and procedures has hampered prisoners' reintegration into the Probation and Aftercare Service, which operates without a clear regulatory basis and draws its mandate from various legislative and policy instruments. As a result, inadequate delivery and offender control has become common.<sup>130</sup> Furthermore, the probation departments lack enough funding to successfully carry out their projects.<sup>131</sup> Furthermore, the effectiveness of reintegration measures is determined by the mindset and capability of workers. The method can become sluggish or unreliable if the workforce is unable to accept new approaches to reintegration.<sup>132</sup>

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<sup>125</sup> <http://www.probation.go.ke> on 14 April 2021

<sup>126</sup> See note (125) above

<sup>127</sup> Obondi CAO, 'Effective Resettlement of Offenders by Strengthening 'Community Reintegration Factors': Kenya's Experience', 61

<sup>128</sup> See note (127) above

<sup>129</sup> *ibid*

<sup>130</sup> See note (128) above

<sup>131</sup> Onyango I, 'Overview of the Kenyan Criminal Justice System', UNAFEI 153rd International Senior Seminar Participants' Papers, 151

<sup>132</sup> See note (130) above

### 3.5 Juvenile Offenders

Kenya became an advocate for the defense of children's rights after enacting the Children Act<sup>133</sup> in 2001. The Act is intended to carry out the provisions of the UNCRC<sup>134</sup> and the African Children's Charter.<sup>135</sup> It states, among other things, that the best interests of the child must be a primary factor in all acts involving children, whether made by public or private public services entities, courts of justice, regulatory authorities, or legislative bodies.<sup>136</sup> A child offender kept in custody is to be separated from adults in this respect.<sup>137</sup> Article 53 of the Kenyan Constitution (2010) reinforces this provision. The use of diversion programmes in the rehabilitation of juvenile offenders has proven to be very successful. Diversion may be used during the process of a trial or at the post-trial stage of judicial charges to ensure that they prevent direct legal action and custody if convicted.<sup>138</sup> Diversion is a method of settling criminal cases without having to go through the entire court process. In appropriate circumstances, diversion provides for a speedy resolution of criminal matters while also benefiting the victim and the community at large.<sup>139</sup>

Offenders who accept responsibility for their actions, are young or vulnerable, or have exceptional conditions are eligible for diversion. While somebody might make a mistake, diversion recognizes that if there are mitigating conditions, a criminal should not be sentenced to life in prison.<sup>140</sup> For many years, police and prosecutors have used diversion informally. At police stations, cases are often settled. Furthermore, the National Cohesion and Integration Commission is required by law to introduce diversion in the form of a conciliation agreement in hate speech prosecutions.<sup>141</sup> A diversion programme for children in conflict with law was

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<sup>133</sup> *Children Act* (Cap. 141 of 2001)

<sup>134</sup> *United Nations Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3

<sup>135</sup> *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49

<sup>136</sup> Section 4, *Children Act* (Cap. 141 of 2001)

<sup>137</sup> Section 18(3), *Children Act* (Cap. 141 of 2001).

<sup>138</sup> King'ori E, 'Strengthening Access to Justice for a Child in Conflict with the Law: A Case for Law Reform' Published LLM Thesis, University of Nairobi, August 2015, 51.

<sup>139</sup> Office of the Director of Public Prosecutions, 2019, *Diversion Policy*, 1

<sup>140</sup> *ibid*

<sup>141</sup> *ibid*

deployed in 2001. The complete implementation was hampered by a lack of resources and institutional obstacles. In Central Kenya, diversion programs for children are currently operating in Karatina and Othaya.<sup>142</sup>

### **3.6 Taskforce on Alternative Justice Systems**

The then Chief Justice, Hon. Dr. Willy Mutunga, urged members of the bar and judicial officers to think more deeply about the need for a placed jurisprudence and judicial procedures that will advance the search for access to justice for the majority of Kenyans in his address on June 19, 2012. On February 29, 2016, the then Hon. Chief Justice, Dr. Willy Mutunga, established the Taskforce on Alternative Justice Systems to examine the different traditional, informal, and other mechanisms used to access justice in Kenya (Alternative Justice Systems).<sup>143</sup> The Taskforce was later gazetted by Gazette Notice No. 1339 on March 4th, 2016.<sup>144</sup>

The taskforce looked at access to justice and the judicial imperative to participate in criminal and civil litigation from a range of backgrounds, including ordinary civilians and judicial officers, in the report. It also sought to abolish the fictitious hierarchies of ease of access to justice, allowing it to climb above some single constituency's capturing. This assures us that they accurately captured and expressed the aspirations and concerns that we all share in our fight for justice in Kenya. They agree that if our legal system follows equitable and accountable systems, as well as a sincere desire and action to preserve and promote individual integrity as the supreme paragon of justice and conflict settlement, these goals will be realized sooner rather than later. The Taskforce's solution goes above the existing banter and allows the judiciary to successfully carry out its constitutional and practical obligations.<sup>145</sup>

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<sup>142</sup> *ibid*

<sup>143</sup> Mutunga, Willy Dr. "Remarks by the Chief Justice at the formal launch of the Isiolo Law Courts' court-annexed alternative justice system and formal launch of the task force on alternative justice system". Sportsman Arms Hotel, Nanyuki". 2015.

<sup>144</sup> The Kenya Gazette Vol. CXVIII-No.21, 4<sup>TH</sup> March 2016, P. 838.

<sup>145</sup> <https://ajskenya.or.ke/themandate/> accessed on 23 April 2021

Their terms of reference included, bringing together Alternative Justice System experts and professionals to map out and appreciate the prevalence of Alternative Justice System, its intersection with the judicial system, and strides made in infusing it with national and constitutional principles and putting together best practices from a variety of traditional justice systems from a variety of cultures. They call for improved dialogue as well as effective transparency to all persons, starting with the need for local Alternative Justice Systems to be empowered in different communities. Their suggestions are demure; they believe the grand proposals were made in Kenya's 2010 Constitution. There is a sequence of small steps that, when done together, can trigger a collective mechanism capable of activating, strengthening, and consolidating a vital network and mass of individuals, thoughts, and organizations that can only lead to a successful Kenyan justice system.<sup>146</sup>

### **3.7 Conclusion**

Various legislative provisions (discussed in the chapter) have been implemented in Kenya's penal laws since independence to facilitate restorative justice practices. Through the Constitution, international legal statutes that have been used to enhance the welfare of the victim, offender and the community after the offence has been committed. The government should be responsible for integrating restorative justice programs in Kenya. It is ideally positioned to create a restorative justice framework that will enable criminals to successfully reintegrate into the community

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<sup>146</sup> *ibid*



## **CHAPTER FOUR: COMPARATIVE STUDIES OF RESTORATIVE JUSTICE IN PRACTICE**

### **4.1 Introduction**

Restorative justice practices can be traced back to indigenous justice practices, such as Maori in New Zealand, which included not only the victim and offender in negotiation, but also their family members. There were also circles based on First Nations' traditions in Canada, which welcomed any community member who was willing to join in seeking a solution. The members sat in a circle, and the conversation progressed clockwise from person to person before a consensus was reached.<sup>147</sup> Traditional dispute resolution frameworks such as a council of elders and *barazas* were also in force in many African countries, and some still are. Restorative justice, in its current definition, is any mechanism in which the victim and offender, as well as, if applicable, any other persons or community members impacted by the crime, collectively engage together in the settlement of matters resulting from the crime, usually with the assistance of a

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<sup>147</sup> Van Ness D, 'An overview of Restorative Justice around the world' United Nations 11<sup>th</sup> Congress on Crime Prevention and Criminal Justice, Bangkok, April 22 2005, on file with author

facilitator.<sup>148</sup> Arbitration, mediation, and conciliation are becoming more popular as trusted conflict resolution approaches.

To determine whether restorative justice practices can be used effectively locally, we must look at how other jurisdictions around the world have used them and had favorable results. This chapter examines how various nations have adopted and implemented restorative justice in their criminal laws, as well as the outcomes of its use in the pursuit of justice. The manner in which restorative justice has been conducted and judged satisfactory will be investigated and analyzed by several case studies, such as the *Gacaca* courts of Rwanda, Family Group Conferencing for youth offenders in New Zealand, police-run conferencing in Australia, Truth and Reconciliation Commission in South Africa and a review of the Norwegian penal system.

## 4.2 Rwanda

On April 6, 1994, the plane carrying Rwanda's then Hutu President Juvenal Habyarimana and Burundi's President was shot down as it prepared to land in Rwanda's capital. The plane's passengers were killed instantly, and targeted killings of Tutsis and those associated with them began within hours of the crash. Members of the government had previously instigated animosity between the two major Rwandan ethnic groups, Hutu and Tutsi. During Belgian colonialism, Tutsis became politicized and polarized. Between April and July 1994, roughly 800,000 and 1,000,000 Tutsis and moderate Hutus were killed in Rwanda over the course of 100 days.<sup>149</sup> The Rwandan government orchestrated the massacres, which were carried out by the military, armed militia groups, and regular men and women who often murdered their own family, neighbours and friends.<sup>150</sup> Rwanda was confronted with a new challenge after the genocide. Survivors had to figure out how to live with those who perpetrated and encouraged the violence.<sup>151</sup>

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<sup>148</sup> ECOSOC Resolution 2002/12 Basic principles on the use of restorative justice programmes in criminal matters.

<sup>149</sup> Brehm H, Uggen C, Gasanabo J, 'Genocide, Justice and Rwanda's Gacaca Courts' 30 *Journal of Contemporary Criminal Justice*, 3 (2014), 333-334

<sup>150</sup> Corey A and Joiremann S, *Retributive Justice: The Gacaca Courts in Rwanda*, African Affairs, 2004, 73

<sup>151</sup> Drumbl M, 'Punishment Post genocide: From Guilt to Shame to Civis in Rwanda' 75 *New York University Law Review* (2000), 1224

In an effort to get those who were involved in, or harmed by the mass violence to justice, three approaches were taken. Firstly, the International Criminal Tribunal for Rwanda (ICTR) was founded on November 8, 1994, in Arusha, Tanzania, by the United Nations Security Council.<sup>152</sup> The government of Rwanda used its domestic judiciary system, which started using *Gacaca* courts in 2001. To make the work of the different tribunals easier, the Rwandan government grouped the genocide perpetrators into four groups based on their level of responsibility<sup>153</sup>:

The first category included, Those whose illegal actions or criminal participation put them among the planners, participants, instigators, administrators, and leaders of a genocide or a crime against humanity; persons in positions of authority at the state, communal, business, or cell levels, or in a political party, that perpetrated or encouraged such crimes; individuals who committed acts of sexual torture and murderers who distinguished themselves in their areas of residence or passage by committing crimes with excessive malice.

The second category was for persons whose illegal actions positioned them among the suspects, conspirators, or accomplices of deliberate murder or serious attack on a person who caused death. The third category included persons who are liable of criminal acts against the victim as a result of their illegal actions or criminal participation. The fourth category was for persons who committed property offences. The International Criminal Tribunal for Rwanda (ICTR) was charged with investigating and prosecuting genocide perpetrators in the 1st Category. To maintain impartiality during the trials, it was based in Tanzania. The ICTR's official languages were both English and French until the year 2000. Kinyarwanda, Rwandans' local dialect, was not spoken. Because of the distance and language difference, many Rwandans were excluded from the legal process, and the Court was unable to contribute adequately to the process of reconciliation.<sup>154</sup>

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<sup>152</sup> UNSC S/RES/955 (1994) Establishing the International Tribunal for Rwanda and UNSC S/RES/977 Designation of Arusha as the seat of the International Tribunal for Rwanda (ICTR) (1995)

<sup>153</sup> Article 2, *Organic Law* (No. 8 of 1996) (Rwanda).

<sup>154</sup> Barria L, Roper S, 'How Effective Are International Criminal Tribunals? An Analysis of the ICTY and ICTR' *9 International Journal of Human Rights*, 3 (2006), 363.

The Rwandan national courts were to try over 130,000 suspects with just over 20 judges, a task that could take up to 150 years to complete due to the high number of cases.<sup>155</sup> A lack of funding, inefficiency, corruption, and executive power undermined the judiciary.<sup>156</sup> Both the victim and the aggressor lived in the local neighbourhoods where the murders took place.<sup>157</sup> The need for a justice system that included all stakeholders of the community emerged, and over 11,000 *Gacaca* courts were founded in the year 2001. Local community courts, *Gacaca*, which means "grassroots," is where victims and criminals explained their side of the story. These consisted of a strongly decentralized system of municipal courts influenced by Rwanda's pre-colonial traditional dispute resolution structure.<sup>158</sup> The Inyangamugaya (people of integrity) who were suggested and chosen by the local community presided over the courts.<sup>159</sup>

The following objectives were set out in the new *gacaca* process; determine the facts about what occurred; elucidate the evidence about the incident and abolish the practice of impunity.<sup>160</sup> Members of the community were not only observers, but also involved participants, whose accounts and testimony had a significant impact on the trial and, ultimately, the verdict.<sup>161</sup> *Gacaca* courts tried cases of Category 2 and 3 and imposed sentences ranging from community service to 30 years in jail, combining retributive and restorative justice.<sup>162</sup> As an opportunity for offenders to confess and potentially commute half of their sentence to community service, the *Gacaca* law offered significant sentence reductions.<sup>163</sup>

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<sup>155</sup> Graybill L, Lanegran K, 'Truth, Justice, and Reconciliation in Africa: Issues and Cases' 8 *African Studies Quarterly*, I (2004), 8

<sup>156</sup> Bolocan M, 'Rwandan Gacaca: An Experiment in Transitional Justice' 2004 *Journal of Dispute Resolution* , 2 (2004), 374

<sup>157</sup> *ibid*

<sup>158</sup> Bolocan M, 'Rwandan Gacaca: An Experiment in Transitional Justice', 375.

<sup>159</sup> Clark P, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers*, Cambridge University Press, 2010, 67.

<sup>160</sup> Westberg M, 'Rwanda's Use of Transitional Justice after Genocide: The Gacaca Courts and the ICTR' 59 *Kansas Law Review*' (2011), 337.

<sup>161</sup> Lipton D and Martinson R, *The Effectiveness of Correctional Treatment: A Survey of Correctional Treatment Evaluations*, Praeger, New York, 1975.

<sup>162</sup> Corey and Joiremann, *Retributive Justice: The Gacaca Courts in Rwanda*, 85 .

<sup>163</sup> *ibid*

Survivors were not given legal representation, and offenders were not required to testify in front of the courts. The trial expenses were significantly lowered as a result of this. Furthermore, as of April 2009, the *gacaca* courts had completed 1.1 million trials, compared to the civil justice system's 10,026 and the ICTR's 50 cases, respectively.<sup>164</sup> *Gacaca* provided people with participatory justice and community participation in the trials as part of the process of creating a unified Rwanda.<sup>165</sup>

There were, however, some flaws in the *gacaca* system. To begin with, because of the kind of evidence gathered and the informal setting, the *Gacaca* courts faced special destruction-of-evidence issues.<sup>166</sup> The professionalism of the judges was not guaranteed as cited by human rights activists.<sup>167</sup> Furthermore, paramount rights were disregarded, such as the defendants' right to legal representation and the right to call witnesses. This was a challenge as majority of the claimants had a poor educational profile and were unaware of their rights.<sup>168</sup>

On the flipside, this system increased clarity in the courts, allowing suppressed grievances and resentments to be exposed and addressed.<sup>169</sup> This was a crucial aspect because it allowed victims to recover from their traumas while also cultivating a stronger relationship between victims and offenders. Victim-offender mediation was also encouraged. The group was also motivated to take part by speaking out on what actually happened. As a result, the truth was revealed, propelling the society toward peace, which was also the main aim of the proceedings.<sup>170</sup>

### 4.3 South Africa

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<sup>164</sup> *ibid*

<sup>165</sup> *ibid*

<sup>166</sup> Westberg M, 'Rwanda's Use of Transitional Justice after Genocide: The Gacaca Courts and the ICTR', 353

<sup>167</sup> Burnet J, 'The Injustice of Local Justice: Truth, Reconciliation, and Revenge in Rwanda' 3 *Genocide Studies and Prevention Journal*, 2 (2008), 176

<sup>168</sup> Bolocan M, 'Rwandan Gacaca: An Experiment in Transitional Justice', 388.

<sup>169</sup> Haberstock L, 'An analysis of The Effectiveness of the Gacaca Courts,' 9

<sup>170</sup> *ibid*

South Africa has made significant progress in introducing restorative justice through penal law reforms since the end of Apartheid rule in the early 1990s. The process started in 1997, when the Minister of Justice and Constitutional Development asked the South African Law Reform Commission to include a study of the youth justice system in its framework. In 2000, they submitted their final report along with a draft of the Child Justice Bill (No. 49 of 2002), which was subsequently passed in 2008 by the National Assembly. The bill provided specific guidelines for establishing and operating FGCs as a diversion option prior to, and after conviction in order to assess a satisfactory course, which would then be transferred into a court order for sentencing purposes.<sup>171</sup>

The Restorative Justice Centre was established in Pretoria in 1998 with the aim of first formulating a restorative framework that was familiar to African principles, empowering citizens to engage in collaboration with the criminal justice system, relieving the court's workload, and thereby functioning as a diversionary method.<sup>172</sup> "Local peace committees" were formed in the early 1990s as part of restorative justice programmes. They were used in a number of townships to help local communities settle disputes, with reputable locals serving as facilitators. By 2004, 15 peace committees had been created, and 6,000 peace conferences had taken place.<sup>173</sup>

The goals of the Truth and Reconciliation Commission included, among other things, investigating and drawing a detailed image of the existence, causes, and scope of human rights abuses perpetrated during the apartheid era, providing victims with an opportunity to speak about their experiences, and taking steps to compensate victims and restore their honor.<sup>174</sup> The Commission sought to promote the spirit of *ubuntu*, which means 'humanness,' and which also connotes unity and humanity to all, much like restorative justice programs.<sup>175</sup> It established platforms for victims to share their experiences and made recommendations for victim reparation

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<sup>171</sup> *ibid*

<sup>172</sup> Zinsstag *et al*, *Conferencing: A Way Forwarding Restorative Justice in Europe*. 220-221

<sup>173</sup> Liebmann M, *Restorative Justice: How It Works*, Jessica Kingsley Publishers, 2007, 233

<sup>174</sup> Section 3, *Promotion of National Unity and Reconciliation Act* (No. 34 of 1995) (South Africa).

<sup>175</sup> Skelton A, 'Regional Views: Africa' in Johnstone G and Van Ness D (eds), *Handbook of Restorative Justice*, Willan Publishing, 2007, 471 .

(including restitution and rehabilitation), and the development of a community that would uphold human rights.<sup>176</sup>

#### **4.4 Australia**

Since the advent of police-run conferencing in Wagga Wagga in the early 1990s, restorative justice techniques have been used in the Australian criminal justice system. The severity of the offence, the injury incurred to the victim, the nature and extent of the person's wrongdoing, the number of warrants or cautions they have issued under the applicable Act, and other relevant factors must all be considered before deciding if the case is appropriate for a conference.<sup>177</sup>

#### **4.5 New Zealand**

New Zealand's criminal justice system has attracted international interest for the use of restorative justice mechanisms, especially Family Group Conferencing (or FGC) for youth offenders. The fact that these measures are based on legislation makes them even more remarkable. The Children, Young Persons, and Their Families Act of 1989 made FGC legislation. Maoris, who were underrepresented in New Zealand's registered crime statistics, believed the cause was that when crimes were committed, their children were taken from them and raised outside of (and unaware of) their customs. As a result, FGC was incorporated into a revised juvenile statute as a mechanism that mirrored Maori cultural tradition and included families in the decision-making process.<sup>178</sup> Three aspects of restorative justice are present in FGC, according to McElrea: a transition of authority from the state to the community, a

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<sup>176</sup> McLeod L: Reconciliation through Restorative Justice: Analyzing South Africa's Truth and Reconciliation Process' *George Mason University*, Spring 2015

<sup>177</sup> Larsen J, *Restorative Justice in the Australian Criminal Justice System*, Australian Institute of Criminology, 2014,6.

<sup>178</sup> Zinsstag E, Teunkens M Pali B, *Conferencing: A Way Forward for Restorative Justice in Europe*, European Forum for Restorative Justice, 2009, 168

negotiated community response, and mechanisms that serve to include healing for victims and acknowledgment of responsibility by offenders.<sup>179</sup>

The key stakeholders in the FGC are; the juvenile offender; his/her parents, guardian; members of the family (group) of the young offender; a representative of the cultural authority in whose care the child has been placed; a supporter of the victim; any barrister, solicitor, youth advocate or lay advocate representing the young offender and any other person whose attendance is in accordance with the wishes of the family.<sup>180</sup> Prayers and introductions from the attendees kick off the meeting. The coordinator goes through the procedure with the police officer present before reading a summary of the incident's details. The accused is then asked whether he or she denies or confirms the facts. If the offender admits to the details of the crime (or at least a substantial part of them), he or she is given the opportunity to testify on the authenticity of the police statement, and the victim (or representative) is given the opportunity to present his or her side of the story and discuss how the offense harmed him or her.

The offender was left alone with his relatives to formulate a suitable plan after an appropriate negotiation time. When the family had enough time to talk privately, the whole party reconvened to hear the family's and offender's planned family group conference plan. The parties involved the police and the victim. They also reviewed and negotiated the proposed plan. The coordinator recorded the proposal in writing when a collective resolution was reached. The family group conference plan is submitted to the court for consideration if criminal charges have been filed.<sup>181</sup> The Sentencing Act 2002 and the Victim's Rights Act 2002 in New Zealand established adult conferencing. The former expressly acknowledged restorative justice for adult offenders and stipulated that the court would consider any consequences of restorative justice processes in sentencing that took place.<sup>182</sup> The latter specifies that all judicial officials, lawyers, court

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<sup>179</sup> McElrea F, 'The New Zealand Model of Family Group Conferencing' *European Journal on Criminal Policy and Research* (19), 531

<sup>180</sup> Stewart T, *Family Group Conferences: Perspectives on Policy and Practice*, Annandale: The Federation Press, 1996,66.

<sup>181</sup> Schmid D, *Restorative Justice in New Zealand: A Model for U.S. Criminal Justice*, Ian Axford Fellowship, 2011, 13.

<sup>182</sup> Section 8, *Sentencing Act* (No. 9 of 2002) (New Zealand)



officials, and probation officers allow the victim and offender to meet "to address matters pertaining to the offence."<sup>183</sup>

#### **4.6 Norway**

The Special Act on Mediation, which was first enacted in 1991, shows that Norway has almost entirely adopted the Restorative Justice system.<sup>184</sup> After the proposed bill, which claimed that it was intended to "strengthen local communities' abilities to solve petty crimes themselves and "to give the disputes back to the people" without undermining legal rights," every municipality has developed independent and autonomous mediation programs.<sup>185</sup> Another point to consider is that in Norway, restorative justice is fully provided for by the government and is included in the country's National budget.<sup>186</sup>

#### **4.7 Conclusion**

Restorative justice practices have been incorporated into penal laws in a variety of countries around the world. This has been beneficial in improving social ties, helping victims and offenders to reconcile, and ensuring sufficient reparations for offences. The models embraced by the above countries, as well as their strengths and shortcomings, provide an excellent foundation on which Kenya can develop its own restorative justice legislation.

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<sup>183</sup> Section 9, *Victim's Rights Act* (No. 39 of 2002) (New Zealand)

<sup>184</sup> Norway, *Special Act on mediation*, 1991

<sup>185</sup> Kemeny S, *Mediation and Restorative Justice Sanctions in Norway*, 2014, 2

<sup>186</sup> Kemeny S, *Mediation and Restorative Justice Sanctions in Norway*, 2014, 2

## **CHAPTER 5: RECOMMENDATIONS AND CONCLUSIONS**

### **5.1 Introduction**

This paper has demonstrated that there are flaws in the retributive justice processes, both theoretically and practically, and that restorative justice has the potential to fill these gaps within the existing Kenyan penal system. The Sentencing Policy Guidelines and the Constitution offer a reference point for this. As a result, the government should develop guidelines and principles, as well as regulatory authorities to incorporate restorative justice into the penal system.

### **5.2 Recommendations**

The following are recommendations that could spearhead the process;

#### **5.2.1 Integration of a Restorative Justice Framework into the Kenyan Penal System**

Crime is a social threat and a major impediment to growth. This emphasizes the importance of the government to be interested in finding solutions to the negative problems that are causing a setback. The fact that the government still recognizes restorative justice activities like probation

as auxiliary to the primary framework suggests that there is more work to be done.<sup>187</sup> Victim-offender mediation, community involvement, accountability and transparency, trauma healing, and eventual reconciliation and reintegration, demonstrate that restorative justice is a beneficial form to the justice system.

The implementation of restorative justice programmes, the rules of ethics in the execution of restorative justice programmes, the credentials, preparation, and evaluation of the facilitators of these programmes, and the requirements for referring a case to this program should be at the pinnacle of this framework.<sup>188</sup> Procedural provisions should be enforced to ensure fairness in all processes.<sup>189</sup> Parties to the programme should be properly advised of their rights, the processes involved in the programme, and the intended result as well as the repercussions of the process.<sup>190</sup> No one should be forced to engage in the proceedings, and the procedure itself should be kept private and not infringe on the parties' interests.<sup>191</sup> The facilitators of the process should be objective and respectful of the dignity of the participants.<sup>192</sup>

### **5.2.2 Creating Awareness in the Community**

One of the key reasons that lead to recidivism is the stigmatization of prisoners after they are discharged back into society, as seen in the previous chapters. The societal mindset has been fixed on the belief that if an individual is imprisoned, they are no longer fit to be a member of society. The prisoners are considered "socially stigmatized," meaning they have no option but to stay in prison. As a result, members of society avoid associating with ex-offenders, and even if they do, it is just to mock and marginalize them. Members of society should be taught that the criminals were and are human beings, with the exception that their character before incarceration was lacking. Society should learn to welcome these offenders back because in most instances,

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<sup>187</sup> Oketch C, 'Community Rehabilitation of offenders in Kenya: Past, present and prospects. A communication ' (1) *African Journal of Crime and Criminal Justice*, 2009, 99.

<sup>188</sup> Article 12, *ECOSOC Basic Principles on the use of Restorative Justice in Criminal Matters*

<sup>189</sup> *ibid*

<sup>190</sup> *ibid*

<sup>191</sup> *ibid*

<sup>192</sup> *ibid*

they have been transformed and are no longer a liability to society as they were before their incarceration.

Wherever feasible, community participation should be mobilized. Communities should collaborate with the facilitators and be involved in the reintegration process.<sup>193</sup> The restorative justice framework should discuss community awareness and sensitization. When an inmate is discharged and he returns to the society, the public must be made aware of his or her needs. The community's willingness to participate is critical, and the programme must account for this to be effective. There should be public awareness of the value of reintegrating previous offenders back into society so that their recovery is smooth, and so that they don't feel compelled to commit crimes again in order to make ends meet. This is where the *Ubuntu* spirit comes into play, where brotherly love, compassion, and caring are evident.<sup>194</sup> Society should remember that ex-offenders are still people, and they need our assistance in order to resume to a regular lifestyle.

### **5.2.3 Engaging with Experienced Personnel**

The success of this initiative process depends on communication between the administrators of restorative justice services and the criminal justice authorities.<sup>195</sup> The process would be smooth if everyone has a shared understanding and is willing to share information. In order to carry out the task, administrators must have a strong working relationship with detention facilities in particular. Such duties cannot be delegated to prison wardens only, who are already responsible for ensuring that prisoners complete their sentences. Various personnel ought to be involved in the mediation process. This requires counsellors who will help the victim-offender and family members reconcile. The fact that certain prisoners, particularly those who have committed misdemeanors, leave prison institutions without receiving any sort of rehabilitation further demonstrates the need for additional personnel than is currently available. Personnel would ensure that these individuals are not forgotten and that they are attended to.

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<sup>193</sup> Article 61, *United Nations Standard Minimum Rules for the Treatment of Prisoners*.

<sup>194</sup> Khomba JK, *The African Ubuntu Philosophy*, published Phd Thesis, University of Pretoria, Pretoria, 20 II, 129

<sup>195</sup> Article 21, *ECOSOC Basic Principles on the use of Restorative Justice in Criminal Matters*.

### 5.3 Conclusion

It is clear from the facts presented in this paper on retributive justice that the system has failed to achieve its goals. In fact, it appears that the utilitarian goals of recidivism reduction and public safety are not being met.<sup>196</sup> Instead, the retributive justice system seems to be solely concerned on punishing criminals, with no care given to their rehabilitation, reconciliation with families, and reintegration back into society after serving their sentences; resulting in a high incidence of recidivism. The system has also neglected to provide a safe haven for victims, who will help in reconciling the offenders as well as victim healing.

Under the concepts of crime understanding and reaction, this research pits restorative justice against retributive justice. This is due to the fact that how an offense is perceived has an impact on how it is dealt with. Since it reflects on the interests and responsibilities of the key stakeholders of a crime, restorative justice is distinctive. Restorative justice presents a system of justice that is successful in responding to crime and meeting these needs. This research further explains social reintegration. Reintegration is influenced by the interaction between risk and resilience influences, as well as the offender's willingness to reintegration. Restorative justice, according to this report, is the most effective strategy for prisoners in Kenya to fully integrate back into society.

The objectives of this research have also been met. In terms of the understanding of crime and the response to crime under both justice systems, this paper compared restorative justice to retributive justice. The study examined the demands for social reintegration and concluded that restorative justice is the most effective approach for social reintegration of offenders. Restorative justice has been seen as having a role to play in social reintegration of offenders. Restorative justice can help people develop the resilience needed for effective reintegration. Furthermore, by

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<sup>196</sup> Gabbay Z, 'Justifying Restorative Justice: A theoretical Justification for the Use of Restorative' Vol 2 *Justice Practice s Journal of Dispute Resolution*, 2005, 355.

fostering interaction between the offender and the victim, restorative justice counteracts the isolating impact of imprisonment; therefore the reintegration process is sped up as a result.

This paper compared Kenya's use of restorative justice systems to those used by other countries around the world. As a result, it is reasonable to infer that Kenyan law only applies to restorative justice processes in a limited scope. Restorative justice approaches are clearly used secondarily to retributive justice practices in Kenya, while other countries, such as New Zealand, have used the former alongside or in place of the latter. The government of Norway not only has acts of parliament geared towards the development of restorative justice but it has also funded the programme<sup>197</sup>. Kenya should borrow a leaf from the Norwegian system.

The criminal justice system of Kenya does provide for the use of restorative justice practices. An analysis of numerous Kenyan laws that recognize restorative justice as a method of dispute resolution has confirmed this. The 2010 Constitution however, grants judges and magistrates the authority to use them in the exercise of judicial power and the pursuit of accessible access to justice for all people. Ultimately, a proper and workable structure for the use, maintenance, and promotion of restorative justice processes within Kenya's criminal justice system is required. This will ensure that criminal justice is delivered to those who are most impacted and concerned by the crime. Restorative justice has proved to be the proverbial light at the end of the tunnel, indicating that hope is not quite lost.

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<sup>197</sup> *ibid*

## BIBLIOGRAPHY

### 6.1 Books

Battle M, *Reconciliation: The Ubuntu Theology of Desmond Tutu*, (The Pilgrim Press, Cleveland, 2009)

Braithwaite, J, *Crime, shame and reintegration. Cambridge* (Cambridge University Press, 1982)

Braithwaite, J, *Restorative Justice & Responsive Regulation*. (1<sup>st</sup> ed. New York: Oxford University Press, pp.3-5, 2002)

Braithwaite, J. *Restorative Justice: Theories and Worries*. Restorative Justice, 2004

Burford & J Hudson (eds) *Family group conferencing: New directions in community-centred child and family practice*, (2000)

Clark P, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers* (Cambridge University Press, 2010)

Cohen S, *Visions of Social Control: Crime, Punishment and Classification* (Cambridge: Polity Press 2005)

Corey A and Joiremann S, *Retributive Justice: The Gacaca Courts in Rwanda* (African Affairs, 2004)

Daly K, The Limits of Restorative Justice. *Handbook of Restorative Justice: A Global Perspective* (2005)

Darley J, 'Just punishments: Research on Retributional Justice' In M Ross and DT Miller (eds) *The Justice Motive in Everyday Life* (Cambridge University Press 2002)

Dhami, M., Mantle, G. and Fox, D, *Restorative justice in prisons* (Contemporary Justice Review 2009)

Duff RA, *Punishment, Communication, and Community* (Oxford University Press 2001)

Dworkin R, *A Matter of Principle* Harvard University Press (Cambridge MA, 1985)

Foley T, *Developing Restorative justice Jurisprudence: Rethinking Responses to Criminal Wrongdoing* (Ashgate Publishing Ltd, 2014)

Gomez S, *Restorative Justice following Mass Atrocity: The Case of Rwanda* (2006)

Graybill L, Lanegran K, *Truth, Justice, and Reconciliation in Africa: Issues and African Studies* (Quarterly 2004)

Haberstock L, *An analysis of The Effectiveness of the Gacaca Courts in Post-genocide Rwanda* (Global Tides 2014)

K Pranis *Peace-making circles: Restorative justice in practice allows victims and offenders to begin repairing the harm* (Corrections Today, 1997)

Kemeny S, *Mediation and Restorative Justice Sanctions in Norway* (2014)

Kemeny S, *Mediation and Restorative Justice Sanctions in Norway* (2014)

Kiage P, *Essentials of Criminal Procedure in Kenya*, 3ed (Law Africa 2010)

Lipton D and Martinson R, *The Effectiveness of Correctional Treatment: A Survey of Correctional Treatment Evaluations*, (Praeger, New York 1975)

Odongo G, 'Kenya' in Decker Hand Marteache N (eds), *International Handbook of Juvenile Justice* (Springer International Publishing Switzerland, 2017)

Pavilich C, *Justice Fragmented: Mediating Community Disputes Under Postmodern Conditions* (Routledge 2002)

Rawls J, *A Theory of Justice*, (Harvard University Press, 1979)

Sandel M, *Justice: What's the Right Thing to Do?* Farrar, Straus and Giroux (New York, 2010)

Scott D et al, *Prisons and Punishment: The Essentials* (SAGE 2014)

Skelton A, 'Regional Views: Africa' in Johnstone G and Van Ness D (eds), *Handbook of Restorative Justice* (Willan Publishing, 2007)



Skelton A, 'Regional Views: Africa' in Johnstone G and Van Ness D (eds), *Handbook of Restorative Justice* (Willan Publishing, 2007)

Skelton A, 'The Child Justice Bill from a Restorative Justice Perspective' in Maepa T (ed), *Beyond Retribution: Prospect of Restorative Justice in South Africa* (Institute for Security Studies, 2005)

Stewart T, *Family Group Conferences: Perspectives on Policy and Practice* (Annandale: The Federation Press, 1996)

Ward, T. (etl) Repairing the rupture: Restorative justice and the rehabilitation of offenders. *Aggression and Violent Behavior*, (2009)

Westberg M, 'Rwanda's Use of Transitional Justice after Genocide: The Gacaca Courts and the ICTR' (Kansas Law Review 2011).

Zehr H, *Changing Lenses: A New Focus for Crime & Justice* (Herald Press, 1995)

Zehr H, Gohar A, *The Little Book of Restorative Justice*, (Good Books Intercourse USA, 2003)

Zinsstag E, Teunkens M Pali B, *Conferencing: A Way Forward for Restorative Justice in Europe*, (European Forum for Restorative Justice, 2009)

## **6.2 Journal Articles**

Among H, 'The application of traditional justice mechanisms to the atrocities committed by child soldiers in Uganda: A practical restorative justice approach,' *African Human Rights Journal*, p 444

Barria L, Roper S, 'How Effective Are International Criminal Tribunals? An Analysis of the ICTY and ICTR' 9 *International Journal of Human Rights* (2006) 3

Barton C, 'Empowerment and Retribution in Criminal and Restorative Justice' *Australian Journal of Professional Ethics* (1999) 2

Bazemore G, 'Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration', *American Behavioural Scientist* (1998) 41

Bentham J, *An Introduction to the Principles of Morals and Legislation*, Batoche Books, Kitchener (2000)

Bolocan M, 'Rwandan Gacaca: An Experiment in Transitional Justice' 2004 *Journal of Dispute Resolution* (2004) 2

Bolocan M, 'Rwandan Gacaca: An Experiment in Transitional Justice' 2004 *Journal of Dispute Resolution* (2004) 2

Braithwaite J, *Restorative Justice and Responsive Regulations*, 5(2002) 7

Brathwaite J, 'Setting Standards for Restorative Justice', *British Journal of Criminology*, (2002) 42

Brehm H, Uggen C, Gasanabo J, 'Genocide, Justice and Rwanda's Gacaca Courts' 30 *Journal of Contemporary Criminal Justice*, (2014) 3

Burnet J, 'The Injustice of Local Justice: Truth, Reconciliation, and Revenge in Rwanda' 3 *Genocide Studies and Prevention Journal*, 2

Drumbl M, 'Punishment Post genocide: From Guilt to Shame to Civis in Rwanda' 75 *New York University Law Review* (2000)

Gabbay Z, 'Justifying Restorative Justice: A theoretical Justification for the Use of Restorative ' 2 *Justice Practices Journal of Dispute Resolution*, (2005)

Gabbay, Z, Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices. *Journal of Dispute Resolution*, (2005) 2

Gavrielides, T, Restorative justice theory and practice. Helsinki [Finland] (2007)

Hai NY, Dandurand Y, 'The Social Re-integration of Offenders', *VNU Journal of Legal Studies* (2013) 29

Kinyanjui, S, Restorative Justice in Traditional Pre-colonial “Criminal Justice Systems” in Kenya. *Tribal Law Journal*, (2009) 10, pp.2-14.

Larsen J, *Restorative Justice in the Australian Criminal Justice System*, Australian Institute of Criminology, (2014)

Liebmann M, *Restorative Justice: How It Works*, Jessica Kingsley Publishers, (2007)

McElrea F, 'The New Zealand Model of Family Group Conferencing' *European Journal on Criminal Policy and Research* ( 1998)

'McLeod L: Reconciliation through Restorative Justice: Analyzing South Africa's Truth and Reconciliation Process' *George Mason University*, Spring (2015)

Nesser JJ, ‘Restorative justice as a Reaction to Crime: Development and Conceptualization’ *Crime*

Obondi, CAO, ‘Effective Resettlement of Offenders by Strengthening ‘Community Reintegration Factors’: Kenya’s Experience’, 61 Office of the Director of Public Prosecutions, Diversion Policy (2019)

Oketch C, 'Community Rehabilitation of offenders in Kenya: Past, present and prospects. A communication' 1 (1) *African Journal of Crime and Criminal Justice*, (2009)

Pocora M, 'The Restorative Justice System - An Alternative to the Official Criminal System'

*EIRP Practices Journal of Dispute Resolution 2005,355 Proceedings*, (2014) Vol 9

Schlag P, 'Normativity and the Politics of Form' 139 *University of Pennsylvania Law Review* (1991)

Scott D and Flynn N, *Prisons and Punishment: The Essentials*, 21

Umbreit MS, Vos B, Coates RB and Lightfoot E, ‘Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls’ *Cardozo Journal of Conflict Resolution* (2005) 8

Wenzel M, Okimoto TG, Feather NT, Platow MJ, 'Retributive and Restorative Justice ' *Law Human Behaviour*, (2008) 32

Workman K, 'How Should We Reintegrate Prisoners?' *Rethinking Crime and Punishment*, 4.

### **6.3 Reports**

Michigan Justice Statistics Center, *Understanding the Challenges Facing Offenders upon their Return to the Community: Final Report*, School of Criminal Justice, 2007

Quaker Council for European Affairs (QCEA), *The Social Reintegration of Ex-Prisoners in Council of Europe Member States 2011*

### **6.4 Thesis and Dissertations**

Johnstone, G. 'Restorative justice for victims: inherent limits?' *Restorative Justice*, 5(3) 2017

King'ori E, 'Strengthening Access to Justice for a Child in Conflict with the Law: A Case for Law Reform' (Published LLM Thesis, University of Nairobi, August 2015)

O'Nolan, C., Zinsstag, E. and Keenan, M. (2018). Researching 'Under the Radar' practices: Exploring restorative practices in sexual violence cases. (Temida, 2018)

Quinn, T. *Restorative Community Justice: Background, Program Examples, and Research Findings*. (Washington, DC: National Institute of Justice 1996)

Richards, K. 'Taking Victims Seriously? The Role of Victims' Rights Movements in the Emergence of Restorative Justice' (*Current Issues in Criminal Justice*, 2009)

Ruwange, M, 'The Pertinence of Restorative Justice in Kenya's Penal Laws' ( Bachelor of Law Degree, Strathmore Univeristy, January 2018)

Sherman, L. 'Restorative justice: the evidence' (London: Smith Institute 2007)

Waireri, S. 'The Role of Restorative Justice in the Social Reintegration of Offenders in Kenya' (Bachelor of Laws Degree, Strathmore University, February 2017)

Wanjiku, K, 'Inadequacy of the Kenyan Penal System: The Study of Retributive Justice, and Restorative Justice as an Alternative Justice System' (Bachelor of Laws Degree, Strathmore University, January 2018)

### **6.5 Conference Papers**

Kariuki F, 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR' CIArb: Broadening Access to Justice through ADR 30 Years On, Mombasa, 7-8 August 2014.

Van Ness D, 'An overview of Restorative Justice around the world' United Nations 11th Congress on Crime Prevention and Criminal Justice, Bangkok, April 22 2005, on file with author.

### **6.6 Internet Resources**

Dissel A, 'Rehabilitation and Reintegration in African Prisons', available at [www.hsrpress.ac.za](http://www.hsrpress.ac.za) accessed on 20<sup>th</sup> April 2021

<http://www.probation.go.ke> accessed on 15 April 2021

<https://ajskenya.or.ke/themandate/> accessed on 23 April 2021