

**THE PERTINENCE OF RESTORATIVE JUSTICE IN KENYA'S
PENAL LAWS**

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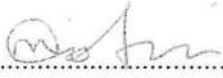
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DECLARATION

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

Signed: 

Date: 29/05/18

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

Signed: 

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ABSTRACT

Restorative justice processes are key in the achievement of criminal justice. Their aim is to involve victims and community members more intimately in repairing the harm done by criminal offenders while maintaining social ties. These processes may be viewed as an apt alternative to retributive justice systems which involve the punishment and seclusion of offenders by imprisonment. Various countries in the world have established statutory frameworks recognizing restorative justice practices. These are used either as diversionary measures by police and courts or as sentencing options by judges and magistrates. Most States utilize restorative justice practices when dealing with juvenile offenders but some cases involving adult offenders are also quite common.

Kenyan legislation provides opportunities for the application of restorative justice mechanisms. Though some statutes explicitly provide that they be used in specific civil disputes, others leave the door open for its application in criminal disputes, including the Constitution of Kenya (2010) under Article 159(2).

This paper begins with an analysis of Kenya's role in promoting restorative justice subsequent to the colonial administration. The paper argues that much remains to be done to embrace restorative justice in order to maintain social harmony in the realisation of criminal justice among the community-driven Kenyan people. It then delves into the use of restorative justice programmes by four States and its success in the achievement of criminal justice in each. A case study of its use by Rwanda following the 1994 genocide is also presented. Finally, recommendations on an optimal framework of restorative justice in Kenya's criminal justice system are provided.

Young Offenders Act (No. 57 of 1993)

Criminal Law Sentencing Act (No. 50 of 1988)

Crimes (Restorative Justice) Act (No. 65 of 2004)

South Africa

Child Justice Act (No. 49 of 2008)

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

Criminal Procedure (Second Amendment) Act (No. 62 of 2001)

Probation Services Act (No. 35 of 2002)

Child Justice (B-49 of 2002)

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)

International

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

UNSC S/RES/955 Establishing the International Tribunal for Rwanda

UNSC S/RES/977 Designation of Arusha as the seat of the International Tribunal for Rwanda (ICTR)

United Nations Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3

African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49

LIST OF LEGAL INSTRUMENTS

Kenya

Constitution of Kenya (2010)

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

Sexual Offences Act (No. 3 of 2006)

Companies Act (No. 17 of 2015)

Land Act (No. 6 of 2012)

Victim Protection Act (No. 17 of 2014)

Magistrates' Court's Act (No. 26 of 2015)

Marriage Act (No. 4 of 2014)

Children Act (Cap. 141 of the Laws of Kenya)

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

Community Service Orders Act (No. 10 of 1998)

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

New Zealand

Children, Young Persons and their Families Act (No. 24 of 1989)

Sentencing Act (No. 9 of 2002)

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

Australia

Young Offenders Act (No. 104 of 1994)

Youth Justice Act (No. 81 of 1997)

Dispute Resolution Centre Act (No. 35 of 1990)

Young Offenders Act (No. 54 of 1997)

Criminal Procedure Legislation (No. 474 of 2010)

Children, Youth and Families Act (No. 96 of 2005)

Youth Justice Act (No. 44 of 1992)

LIST OF CASES

1. *Kamanza Chiwaya v Tsuma* (Unreported High Court Civil Appeal No. 6 of 1970)
2. *Lubaru M'imanyara v Daniel Murungi* [2013] eKLR
3. *Mary Kinya Rukwaru v Office of the Director of Public Prosecutions & another* [2016] eKLR
4. *Republic v Mohamed Abdow Mohamed* [2013] eKLR

LIST OF ABBREVIATIONS

ACT:	Australian Capital Territory
DPP:	Director of Public Prosecutions
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

CHAPTER ONE: INTRODUCTION

1.1 Background of the Problem

With the arrival of colonialists in the late 19th century, Kenya's criminal justice system underwent significant change. The British colonial administration introduced the prison system following the enactment of the East Africa Prisons Regulations in April, 1902.¹ Incarceration has since been an effective tool in the achievement of retributive justice for offenders. This mode of justice enforces punishment as the primary means of dealing with an offence or transgression against the law.² It views punishment through means such as imprisonment as pivotal in "removing the undeserved benefit from the offender by imposing a penalty that in some sense balances the harm inflicted by the offence".³

Custodial sentences have been accorded undue preference by judges and magistrates in sentencing as well as a large number of statutory provisions.⁴ Consequently, a number of challenges face Kenya's justice system, including overcrowding in prisons. Typical Kenyan prisons were built to accommodate 16,000 prisoners, but as at June 2013, the Kenya prison population stood at 52,000.⁵ Data from the Prisons Department also shows that the total inmate population of Kamiti Maximum Security Prison stands at 54,154 (as at April 2015), which is more than double the prison's capacity.⁶ Cases of recidivism are also quite common.⁷ Human rights reports have also indicated that water shortages, poor medical care and insufficient food are common within Kenyan prisons.⁸ More importantly, however, is the failure of such

¹ Kiplangat B, Kiilu R, Shisia A, 'Assessing the Impact of Change Management Strategies on the Administration of Kenya Prisons Service' 3 *International Journal of Economics, Commerce and Management*, 8 (2015), 618.

² Wenzel M, Okimoto TG, Feather NT, Platow MJ, 'Retributive and Restorative Justice' 32 *Law & Human Behaviour*, 2 (2008), 375.

³ Cragg W, *The Practice of Punishment: Towards a Theory of Restorative Justice*, Taylor & Francis, 2002, 15.

⁴ See the *Penal Code* (Cap. 63 of the Laws of Kenya), *Sexual Offences Act* (No. 3 of 2006), *Companies Act* (No. 17 of 2015) and the *Land Act* (No. 6 of 2012).

⁵ Langat K, Kabaji E, Poipoi M, 'Efficacy of Rehabilitation Programmes on Psychosocial Adjustment of Elderly Male Offenders in Kakamega Main Prison, Kenya' 3 *The International Journal of Humanities & Social Studies*, 11 (2015), 71.

⁶ 'Joe Kiarie: Petty Offenders Jam Prisons as Congestion Hits Crisis Level' *Standard Digital*, 2 May 2015 <https://www.standardmedia.co.ke/article/2000160773/petty-offenders-jam-prisons-as-congestion-hits-crisis-level> on 20 January 2017.

⁷ 'Matt Githigira: Repeat Offenders Signal Jail System Needs Reform' *The Star*, 26 October 2016 http://www.the-star.co.ke/news/2016/10/26/repeat-offenders-signal-jail-system-needs-reform_c1444031 on 20 January 2017.

⁸ United States Department of State: Bureau of Democracy, Human Rights and Labour, *Country Reports on Human Rights Practices for 2014: Kenya*, October 2014, 8.

retributive justice systems in achieving the rehabilitation of offenders and their reintegration into society once released from custody.

To quell these challenges, an alternative approach to criminal justice is required. This study proposes the use of restorative justice practices as a better means of achieving criminal justice in Kenya. Restorative justice is an approach whereby the victim to a crime, the offender as well as other persons within their community who are affected by a crime, “participate actively together in the resolution of matters arising from the crime, generally with the help of a facilitator.”⁹ It aims at achieving accountability, making amends, and in some instances facilitating meetings between victims and offenders.¹⁰ Additionally, restorative justice works on the underlying principles that crime hurts individual victims as well as communities and that the community is responsible for the well-being of all its members, including both victim and offender.¹¹

Restorative processes bring those harmed by crime or conflict, and those responsible for the harm, into communication, enabling everyone affected by a particular incident to play a part in repairing the harm and finding a positive way forward.¹² Outcomes of the process include verbal apologies, participating in community service as well as the restitution and reparation of damaged property.¹³

Non-custodial sentences provided in Kenyan statute and assessed within this study avail an avenue for the use of restorative justice practices by the relevant persons and institutions in the achievement and enhancement of access to justice. In the case of *Mary Kinya Rukwaru v Office of the Director of Public Prosecutions & another*,¹⁴ it was held that “the 2010 Constitution of Kenya has entrenched and given constitutional underpinning to reconciliation and restorative justice as some of the methods of justice and alternative dispute resolution.”

⁹ https://www.unicef.org/tdad/index_56040.html on 7 February 2017.

¹⁰ <http://restorativejustice.org/> on 7 February 2017.

¹¹ <https://www.ojdp.gov/pubs/implementing/balanced.html> on 7 February 2017.

¹² Kariuki F, ‘Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR’ CI Arb: Broadening Access to Justice through ADR 30 Years On, Mombasa, 7-8 August 2014, available at <http://www.kmco.co.ke/index.php/publications/166-applicability-of-traditional-dispute-resolution-mechanisms-in-criminal-cases-in-kenya-case-study-of-republic-v-mohamed-abdow-mohamed-2013-eklr> on 7 February 2017.

¹³ https://www.unicef.org/tdad/index_56040.html on 7 February 2017.

¹⁴ [2016] eKLR.

This study seeks to locate the place of restorative justice processes within the criminal justice system of Kenya and shed light on how best to develop a framework for their use (if one does not already exist).

1.2 Statement of the Problem

The overarching problem to be addressed in this research is that in Kenya's written law, the concept of restorative justice does not have a firm foundation.¹⁵ Statutory provisions on the subject of restorative justice consider it as an option of last resort and not in *pari passu* with retributive justice mechanisms.

Furthermore, the Kenyan criminal justice system is worryingly dependant on achieving retributive justice leaving little room for the implementation of those restorative justice systems recognised under Kenyan law.

The Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.¹⁶ This provision is in the ambit of restorative justice, but still such a dispute resolution mechanism is shunned by the courts of Kenya.

The cases of overcrowded prisons are also on the rise given that incarceration is the most prevalent form of sentencing issued by judges and magistrates of Kenyan courts. This issue also initiates human rights concerns with regard to the treatment and well-being of prisoners with prominent cases of food shortages, insufficient medical care, and the inhuman and degrading treatment of prisoners by prison authorities arising in Kenyan prisons.¹⁷

1.3 Purpose of the Study

This study aims at identifying the place of restorative justice practices in the criminal justice system of Kenya.

1.4 Statement of Objectives

The objectives of this study are as follows:

¹⁵ 'Honourable Mr. Justice NRO Ombija: Restorative Justice and Victims of Crime in Kenya' <http://kenyalaw.org/kl/index.php?id=1895> on 7 February 2017.

¹⁶ Article 159(2), *Constitution of Kenya* (2010).

¹⁷ 'Renee Lewis: Human rights violations in Kenyan prisons' *Sunday Monitors Kampala*, 17 March 2009 <http://humanrightshouse.org/noop/page.php?p=Articles/5465.html&d=1> on 8 February 2017.

1. To examine restorative justice as an alternative to retributive justice.
2. To analyse the implementation of restorative justice in the laws of Kenya.
3. To discuss the use of restorative justice by various States in the world.
4. To recommend how best restorative justice mechanisms can be applied in the Kenyan justice system.

1.5 Research Questions

The study seeks to answer the following questions:

1. What is meant by the terms “restorative justice” and “retributive justice”?
2. How does restorative justice differ from retributive justice?
3. How does Kenya employ restorative justice practices in its justice systems?
4. How are restorative justice practices employed in various jurisdictions around the world?
5. What framework of restorative justice best suits the Kenyan criminal justice system?

1.6 Research Hypotheses

This study relies on the following hypotheses:

1. There are no restorative justice mechanisms being used in the criminal justice system of Kenya.
2. Restorative justice systems are more effective than retributive justice systems in achieving criminal justice.
3. There exist other means of achieving criminal justice apart from retributive justice systems.

1.7 Limitations of the Study

- i. The study relies heavily on secondary over primary sources of data and statistics. Data collection methods such as conducting interviews and providing questionnaires are thus not used.
- ii. Time limits of the study correspond to those dictated by the 2017 guidelines for LL. B dissertations of Strathmore Law School.

1.8 Literature Review

A variety of articles and case studies exist in reference to restorative justice as a dispute resolution mechanism which is the subject of this study.

John Tierney¹⁸ writes that restorative justice “represents an alternative approach to one based upon retribution and/or deterrence, which is seen as alienating the offender from the community and likely to increase anger, conflict and further harm. With restorative justice, the offender is expected to repair the harm done to the victim and the community by some sort of reparation, whilst at the same time acknowledging the wrongfulness of their behaviour”.

Daly¹⁹ writes that advocates’ claims about restorative justice contain four myths:

- a) restorative justice is the opposite of retributive justice;
- b) restorative justice uses indigenous justice practices and was the dominant form of pre-modern justice;
- c) restorative justice is a ‘care’ (or feminine) response to crime in comparison to a ‘justice’ (or masculine) response; and
- d) restorative justice can be expected to produce major changes in people.

John Braithwaite²⁰ asserts that “restorative justice has been the dominant model of criminal justice throughout most of human history for perhaps the entire world’s peoples”.

Strang and Sherman²¹ describe modern retributive justice processes as “the theft of crime from victims”. This is because victims are widely recognized to be the neglected party in the criminal justice process. Neither their needs nor their preferences are usually taken into account in the prosecution and sentencing of offenders. This supposedly natural justice abandons victims to fend for themselves rather than embracing them as the central focus of harm to be repaired.

Honourable Mr. Justice Ombija²² of the High Court of Kenya writes that “in customary law, the victim, the clan and the perpetrator of the offence were all considered in the penal sanction. The main penal mechanisms were restitution and compensation”. He also considers that the formal penal system in Kenya does not affirmatively promote restorative justice, but that African customary law does in content and form. However, a main hindrance to the application of the customary restorative justice system in Kenya is its unwritten and uncertain nature.

¹⁸ Tierney J, *Criminology Theory and Context*, Pearson Education Limited, 2006, 302.

¹⁹ Daly K, *Restorative Justice: The Real Story*, Punishment & Society, 2002, 1.

²⁰ Braithwaite J, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, University of Chicago Press, 1999, 127.

²¹ Strang H and Sherman L, ‘Repairing the Harm: Victims and Restorative Justice’ 15 *Utah Law Review* (2003), 16.

²² ‘Honourable Mr. Justice NRO Ombija: Restorative Justice and Victims of Crime in Kenya’ <http://kenyalaw.org/kl/index.php?id=1895> on 10 February 2017.

Charlotte Clapham,²³ writing on the use of restorative justice by the *gacaca* courts of Rwanda, states that “the restorative conception and intentions of the modern practice of *gacaca* were specifically designed as an alternative to Western models of retributive justice, in order to offer a more efficient, effective and long-term solution to the problems of national suffering and divisions”. She is of the opinion that *gacaca* “constitutes an experiment in restorative justice, yet without ever fully achieving its own aims”.

Honourable Justice Preston²⁴ posits that by applying restorative processes to environmental crimes, restorative justice can be transformative for the victim, offender, community, environment and justice system. Classes of victims differ depending on the nature and effects of the environmental crime. They may be specific persons whose life, health or property is directly impacted, but they can also be members of the community who are more indirectly affected or future generations or the environment and non-human biota.

²³ Clapham C, ‘Gacaca: A Successful Experiment in Restorative Justice?’ Published LLB Thesis, University of Sheffield, April 2012.

²⁴ Justice Preston B, ‘The Use of Restorative Justice for Environmental Crime’ EPA Victoria Seminar on Restorative Environmental Justice, Melbourne, 22 March 2011, available at <http://www.lec.justice.nsw.gov.au/> on 10 February 2017.

CHAPTER TWO: THEORETICAL FRAMEWORK AND RESEARCH METHODOLOGY

2.1 Introduction

Criminal justice is often viewed in two facets; crime and punishment.²⁵ The theoretical framework of this study thus considers why individuals commit crime (theories of criminology) and why the crime must be punished (theories of penology).

2.2 Theories of Criminology

These were developed as early as the eighteenth century. Several theories exist but all may be grouped into two broad categories; the classical school of thought and the positivist school of thought.

2.2.1 Classical School of Thought

This class of theorists dates back to the eighteenth century with the treatise of Cesare Bonesana-Beccaria. In his works, he posited that the objective of the penal system should be to devise penalties only severe enough to achieve the proper purposes of public security and order; anything in excess is tyranny. He considered the effectiveness of criminal justice as largely dependent on the certainty of punishment rather than on its severity.²⁶ “A punishment, to be just, should have only that degree of severity which is sufficient to deter others,” he writes.²⁷

In his opinion, to ensure a rational and fair penal structure, punishments for specific crimes must be decreed by written criminal codes, and the discretionary powers of judges severely curtailed.²⁸

Beccaria borrowed heavily from the works of previous scholars on the subject, including Montesquieu, and advocated strongly for the abolition of capital punishment writing that “it is not the intensity of the pain that has the greatest effect on the mind, but its continuance”.²⁹

2.2.2 Positivist School of Thought

This school of thought developed in the latter part of the nineteenth century and within it, several views co-exist. Among these is the utilitarian theory proposed chiefly by Jeremy

²⁵ Materni M, ‘Criminal Punishment and the Pursuit of Justice’ 2 *British Journal of American Legal Studies* (2013), 264-266.

²⁶ <https://www.britannica.com/biography/Cesare-Beccaria> on 28 August 2017.

²⁷ Beccaria C, *On Crimes and Punishment*, Hackett Classics, 1764, 52.

²⁸ Beccaria, *On Crimes and Punishment*, 37.

²⁹ Beccaria, *On Crimes and Punishment*, 51.

Bentham. He was of the opinion that laws should be structured with the objective of attaining the greatest good for the greatest number which is done by increasing pleasure and reducing pain. Following his logic, all forms of punishment are to be considered evil as they induce pain. He posited that punishment should only be resorted to “so far as it promises to exclude some greater evil.”³⁰

There are also biological theories of criminology fronted by the works of Italian psychiatrist Cesare Lombroso. He used scientific means to study criminals and with his findings suggested that criminals are distinguished from non-criminals by multiple physical anomalies. These include a sloping forehead, ears of unusual size, asymmetry of the face, prognathism (the condition of having a projecting jaw), excessive length of arms, asymmetry of the cranium, and other “physical stigmata”.³¹ He suggested that criminals were atavistic (essentially ‘evolutionary throwbacks’) and that some people were basically ‘born criminals’.³² Lombroso’s works are now largely discredited with the development of methods of scientific research.

2.3 Theories of Penology

Penology (from the Latin word ‘*poena*’ meaning punishment) is the study of the treatment and punishment of criminal offenders.³³ It is concerned with the processes and institutions (including courts, police and prisons) involved in the punishment of crime, prevention of crime and treatment of prisoners.

There are five main theories of penology, namely deterrence/preventive, expiatory, rehabilitative, retributive and restorative. This study shall focus on the retributive vis-à-vis the restorative theory of penology.

2.3.1 Retributive Theory

This theory posits that justice is done when the punishment served is proportional to the crime committed. It advocates for the principles of “let the punishment fit the crime” and “an eye for an eye, a tooth for a tooth”. In simpler terms, vengeance takes precedence over social welfare and personal growth.

³⁰ Bentham J, *An Introduction to the Principles of Morals and Legislation*, Clarendon Press, 1789, 346.

³¹ Lombroso C, *L'uomo Delinquente (The Criminal Man)*, Milan Publishers, 1876, 89.

³² <http://www.scejr.ac.uk/wp-content/uploads/2016/02/SCCJR-Causes-of-Crime.pdf> on 28 August 2017.

³³ <http://sociologyindex.com/penology.htm> on 28 August 2017.

Professor Antony Flew³⁴ contended that for an act to be defined as a punishment, it must:

- i. create human suffering;
- ii. arise as a direct result of the perpetration of an offence;
- iii. it must only be directed to the person who undertook the offence (the offender);
- iv. be the intentional creation of other humans in response to the offence;
- v. be inflicted by an authorised body representing the embodiment of rules or laws of the society in which the offence was committed.

One proponent of this theory, John Finnis, believes that criminal laws must be coercive in order to restore the distributive just balance of advantages between the criminal and the law-abiding.³⁵

Immanuel Kant then views retributive punishment as being imposed on the offender because they deserve it and as an end in itself.³⁶

2.3.2 Restorative Theory

This theory forms the subject of this research paper. It describes an approach to criminal justice wherein those harmed by crime or conflict and those responsible for the harm interact or communicate in order to find a solution that essentially enables everyone affected by a particular incident to play a part in repairing the harm and finding a positive way forward.³⁷

Howard Zehr,³⁸ considered by many as the “grandfather of restorative justice”, describes it as an alternative framework for thinking about wrongdoing. He opposes the modern West’s conception of justice which he summarizes into five core ideologies:³⁹

- i) Guilt must be fixed;
- ii) The guilty must get their “just deserts”;
- iii) Just deserts require the infliction of pain;
- iv) Justice is measured by the process;
- v) The breaking of the law defines the offense.

³⁴ Flew A, ‘The Justification of Punishment’ *Journal of the Royal Institute of Philosophy* (1954), 296.

³⁵ Finnis J, *Natural Law and Natural Rights*, Clarendon Law, 2011, 263.

³⁶ Kant I, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, Lawbook Exchange Limited, 1887.

³⁷ <https://restorativejustice.org.uk/what-restorative-justice> on 15 September 2017.

³⁸ Zehr H, *Changing Lenses: A New Focus for Crime & Justice*, Herald Press, 1990/95, 12.

³⁹ Zehr, *Changing Lenses: A New Focus for Crime & Justice*, 65-66.

Zehr further proposes that the needs of the victim of the crime ought to be the main concern in any criminal justice system.⁴⁰

RETRIBUTIVE JUSTICE	RESTORATIVE JUSTICE
Crime is an act against the State.	Crime is an act against another person, a family and/or the community.
Parties involved are the State and the offender.	Parties involved are the victim, offender and community members.
Crime results from individual choice and imputes individual responsibility.	Crime results from both individual choice and social conditions.
Offender accountability equated to suffering, revenge and punishment.	Offender accountability defined as assuming responsibility and making appropriate reparations.
The rights and needs of the victim are peripheral to achieving justice.	The rights and needs of the victim are central to achieving justice.
Aimed at imputing blame or guilt on the offender (is retrospective).	Aimed at finding resolutions and making repairing harm done (is prospective).
Extensively involves representatives for parties to the dispute.	Parties to the dispute are at the forefront and are directly involved in finding a resolution.

Table 1: A comparison of retributive justice and restorative justice

2.4 Research Methodology

This study employs the use of library resources, including Lexis Library, Wiley Online Library, Oxford Open and Hein Online. Books, articles and papers of authors writing on restorative justice in criminal law are considered in this paper.

Other primary sources of data that are included in this study are relevant case law and Acts of Parliament. Secondary sources employed include internet sources, reports and statistical data.

⁴⁰ Zehr, *Changing Lenses: A New Focus for Crime & Justice*, 30.

CHAPTER THREE: RESTORATIVE JUSTICE IN THE KENYAN CRIMINAL JUSTICE SYSTEM

3.1 Introduction

Although the Kenyan penal system is largely reliant on retributive justice, restorative justice is not a foreign concept. The Constitution of Kenya provides for the use of alternative forms of dispute resolution by courts and tribunals in the exercise of judicial authority, including reconciliation, mediation, arbitration and TDRMs.⁴¹ This opens the door to restorative justice practices for both civil and criminal disputes. Additionally, the Sentencing Policy Guidelines include as one of its objectives the promotion of restorative justice values and processes during sentencing.⁴² It also provides that reformation, social integration, rehabilitation and restorative justice are the paramount objective for juvenile offenders.⁴³ Further still, the Victim Protection Act⁴⁴ expressly grants every victim a right to voluntarily participate in any process towards restorative justice albeit for a period of six months extended only with the leave of the court.

This chapter provides an analysis of the restorative justice processes used in Kenya and begins with a discussion on how traditional Kenyan communities employed it in their justice systems. Subsequently, the chapter considers how restorative practices are used with juvenile offenders and makes reference to the relevant statutory rules.

3.2 Traditional Dispute Resolution Mechanisms

Prior to the advent of colonialism, which has largely influenced modern criminal law, the various communities living in Kenya employed their own dispute resolution mechanisms. A common feature in each was the emphasis of social harmony and togetherness over individual interests or the allocation of rights between disputants.⁴⁵ These values are essential in restorative as opposed to retributive justice. At the heart of these mechanisms is the fact that

⁴¹ Article 159 (2) (c), *Constitution of Kenya* (2010).

⁴² Section 2.4, *Sentencing Policy Guidelines* (2016).

⁴³ Section 20.10, *Sentencing Policy Guidelines* (2016).

⁴⁴ Section 15, *Victim Protection Act* (No. 17 of 2014).

⁴⁵ 'Kariuki Muigua: Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010'

<http://www.kmco.co.ke/index.php/publications/111-traditional-dispute-resolution-mechanisms-under-article-159-of-the-constitution-of-kenya-2010> on 15 January 2018.

they are embedded in African customary laws. They are thus anchored on African traditional norms and values, and hence part and parcel of the social fabric.⁴⁶

Skelton and Batley identify features that link African traditional justice processes and modern restorative justice by stating that ‘both practices aim for reconciliation and the restoration of peace and harmony; they promote a normative system that stresses both rights and duties; and they highly value dignity and respect’.⁴⁷ Procedurally, they state that ‘neither process makes a sharp distinction between civil and criminal justice; both are typified by simplicity and informality of procedure; both encourage participation and ownership; and both value restitution and compensation, including symbolic gestures or actions’.⁴⁸ All these characteristics fit like puzzle-pieces to the foundations of a good restorative justice system,

TDRMs continue to be resilient in the face of formal Western penal laws. A good example is the Council of Elders in the Ameru community, known as the *Njuri Ncheke*. It was composed of male subjects who were elders by virtue of their age and had undergone formal initiation before appointment. It dealt with social issues such as conducting wedding ceremonies as well as resolving criminal matters such as murder.⁴⁹ When an offence was committed, the council would inform all concerned parties (including community members) of a date set for hearing the matter. On that day, the parties would congregate at a designated open location. The victim set out the facts of his claim and the accused person was given an opportunity to present his side of the story. The aim of the “hearing” was to determine whether an accused person committed a wrong. If so, a pre-determined compensation would have to be paid by the offenders and their clan to the victim.⁵⁰ The *Njuri Ncheke* still exists and operates today, although their role has been curtailed by state-based justice institutions.^{51,52}

Kenya’s current legal framework provides an avenue for TDRMs to be applied in the determination of cases. The Constitution provides for it as an alternative form of dispute

⁴⁶ Kariuki F, ‘Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR’, 2.

⁴⁷ Skelton A and Batley M, *Charting Progress, Mapping the Future: Restorative Justice in South Africa*, Restorative Justice Center, 2006, 8.

⁴⁸ Skelton and Batley, *Charting Progress, Mapping the Future: Restorative Justice in South Africa*, 9.

⁴⁹ Kinyanjui S, ‘Restorative Justice in Traditional Pre-Colonial “Criminal Justice Systems” in Kenya’ 10 *Tribal Law Journal* (2010), 13.

⁵⁰ Kinyanjui S, ‘Restorative Justice in Traditional Pre-Colonial “Criminal Justice Systems” in Kenya’, 14.

⁵¹ Kinyanjui S, ‘Restorative Justice in Traditional Pre-Colonial “Criminal Justice Systems” in Kenya’, 12.

⁵² See also the case of *Lubaru M’imanyara v Daniel Murungi* [2013] eKLR where parties filed a consent seeking to have their dispute referred to the *Njuri Ncheke*. The court, citing Articles 60(1) (g) and 159(2) (c) of the Constitution (2010), allowed the application noting that it was consistent with the Constitution.

resolution to be used by courts and tribunals in the exercise of judicial authority.⁵³ The Magistrates' Court's Act restricts its application to certain listed civil matters, including matters of land held under customary tenure, seduction or pregnancy of an unmarried woman or girl and intestate succession and administration of intestate estates.⁵⁴ The Marriage Act provides that parties to a customary marriage may undergo a process of conciliation or customary dispute resolution mechanism before the court may determine a petition for the dissolution of the marriage.⁵⁶

The case of *Republic v Mohamed Abdow Mohamed*⁵⁷ demonstrates the applicability of TDRMs in the resolution of criminal disputes. Here, the accused was charged with murder and, when arraigned in court, pleaded not guilty to the charge. However, on the hearing day, the State counsel informed the court that counsel representing the deceased's family had written to the DPP requesting that the charge be withdrawn on account of a settlement reached between the families of the accused and the deceased respectively. On the instructions of the DPP, the State counsel made an oral application in court to have the matter marked as settled citing Article 159 of the Constitution. The court allowed the application and discharged the accused, determining that the ends of justice would be met by allowing the application rather than disallowing it.⁵⁸ Though not an ideal case, as lack of witnesses played a major role in the court's decision, this precedent demonstrates that contemporary law and TDRMs can be used concomitantly to achieve criminal justice in Kenya.

TDRMs as a mode of restorative justice are flexible, cost-effective, expeditious, foster relationships, non-coercive and result in mutually satisfying outcomes. They are thus most appropriate in enhancing access to justice closer to the people, help reduce backlog of cases in courts and can also reduce the congestion of our prisons while easing the tax payers' burden.⁵⁹

⁵³ Article 159 (2) (c), *Constitution of Kenya* (2010).

⁵⁴ Section 2, *Magistrates' Court's Act* (No. 26 of 2015).

⁵⁵ In *Kamanza Chiyaya v Tsuma* (Unreported High Court Civil Appeal No. 6 of 1970), the High Court held that the list under section 2 of the Magistrates' Court's Act of claims under customary law was exhaustive and excludes claims in tort or contract.

⁵⁶ Section 68, *Marriage Act* (No. 4 of 2014).

⁵⁷ [2013] eKLR.

⁵⁸ Kariuki F, 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR', 1-2.

⁵⁹ 'Kariuki Muigua: Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010', 6.

3.3 Juvenile Offenders

With the enactment of the Children Act⁶⁰ in 2001, Kenya established herself as an advocate for the protection of the rights of children. The Act serves to implement the requirements under the UNCRC⁶¹ and the African Children's Charter.⁶² It provides, inter alia, that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.⁶³ In this regard, a child offender held in custody is to be separated from adults.⁶⁴ The Constitution of Kenya (2010) echoes this provision under Article 53.

The use of diversion programmes is highly effective in rehabilitation of juvenile offenders. Diversion seeks to ensure that they avoid formal court action and custody if arrested and can be used in the course of trial or at the post-trial stage of criminal proceedings.⁶⁵ Though a critical component of juvenile justice, diversion is not provided for in Kenyan law. The Children Act is similarly silent on the conditions of and appropriate stage for diversion of a child.⁶⁶ A pilot programme was attempted in March 2001 in 14 target districts (including Nakuru, Siaya and Kisumu) but was marred with legal, financial and structural challenges.⁶⁷

The number of inmates below 18 years of age was recorded at 2,570 in 2013 and 3,455 in 2014 (1.1 % of the total prison population in 2013 and 1.4 % in 2014).⁶⁸ These figures are alarming and necessitate proper legislative and structural measures from the Government of Kenya to effect restorative justice mechanisms for juvenile offenders.

3.4 Legislation promoting Restorative Justice

In addition to those mentioned in this chapter, certain other Acts of Parliament contain provisions that support the use of restorative justice processes for the resolution of civil or criminal disputes.

⁶⁰ *Children Act* (Cap. 141 of 2001).

⁶¹ *United Nations Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3.

⁶² *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49.

⁶³ Section 4, *Children Act* (Cap. 141 of 2001).

⁶⁴ Section 18(3), *Children Act* (Cap. 141 of 2001).

⁶⁵ 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.

⁶⁶ King'ori E, 'Strengthening Access to Justice for a Child in Conflict with the Law: A Case for Law Reform', 79

⁶⁷ Rutere S and Kiura C, *The Diversion Program in Kenya*, Sida Review, 2009, 3.

⁶⁸ Odongo G, 'Kenya' in Decker SH and Marteache N (eds), *International Handbook of Juvenile Justice*, Springer International Publishing Switzerland, 2017, 34.

First, the Narcotic Drugs and Psychotropic Substances (Control) Act provides for the establishment of rehabilitation centres for the care, treatment and rehabilitation of persons addicted to narcotic drugs or psychotropic substances.⁶⁹ A court may, during sentencing of a person convicted under this Act, order that a part of the offender's imprisonment be spent in a rehabilitation centre.⁷⁰ On the submission of a report by the officer in charge of the centre, the same court may, if satisfied that the convicted person has successfully undergone the treatment and rehabilitation programme of the centre and that he is no longer an addict, grant remission of the whole or part of the remaining period of imprisonment imposed on him.⁷¹

Second, the Community Service Orders Act provides that where any person is convicted of an offence punishable by (or for which the court deems appropriate to punish by) imprisonment for a term not exceeding three years, with or without the option of a fine, the court may make a community service order requiring the offender to perform community service.⁷² It further states that "community service shall comprise unpaid public work within a community, for the benefit of that community" and includes construction or maintenance of public roads or roads of access; environmental conservation and enhancement works; and maintenance work in public schools, hospitals and other public social service amenities.⁷³

Additionally, the Penal Code provides for community service orders and payment of compensation as options for punishment of criminal offenders by a court.⁷⁴ It also stipulates that a convicted person may be discharged by a court having regard to the circumstances including the nature of the offence, the character of the offender and that it is inexpedient to inflict punishment. The discharge may be absolute or subject to the condition that he commits no offence during a prescribed period.⁷⁵

Finally, the Counter-Trafficking in Persons Act provides that "the (Cabinet Secretary) shall...formulate plans for the provision of appropriate services for victims of trafficking in persons and children accompanying the victims". Such services include resettlement, re-integration and psycho-social support.⁷⁶

⁶⁹ Section 52, *Narcotic Drugs and Psychotropic Substances (Control) Act* (No. 4 of 1994).

⁷⁰ Section 58(1), *Narcotic Drugs and Psychotropic Substances (Control) Act* (No. 4 of 1994).

⁷¹ Section 58(3), *Narcotic Drugs and Psychotropic Substances (Control) Act* (No. 4 of 1994).

⁷² Section 3(1), *Community Service Orders Act* (No. 10 of 1998).

⁷³ Section 3(2), *Community Service Orders Act* (No. 10 of 1998).

⁷⁴ Section 24, *Penal Code* (Cap. 63 of the Laws of Kenya).

⁷⁵ Section 35, *Penal Code* (Cap. 63 of the Laws of Kenya).

⁷⁶ Section 15, *Counter-Trafficking in Persons Act* (No. 8 of 2010).

3.5 Conclusion

Kenya has recognized restorative criminal justice practices since its pre-colonial era where harmonious co-existence within communities was paramount to each individual member. This was disrupted through the implementation of the foreign penal laws of the British colonists which gave prominence to retributive means of justice, chief among them being prison sentences. Since attaining independence, various legislative measures (as discussed in the chapter) have been realized to promote restorative justice practices in Kenya's penal laws. However, there are still opportunities that can and need to be explored before Kenya joins the ranks of New Zealand, South Africa and Rwanda in the achievement of a cohesive legal system employing restorative justice.

CHAPTER FOUR: RESTORATIVE CRIMINAL JUSTICE IN PRACTICE

4.1 Introduction

The use of restorative processes to resolve criminal matters is not an invention of the 21st century. Its roots can be traced to indigenous justice practices, including conferences among the Maori of New Zealand who involved not only the primary victim and offender in mediation but also their family members and friends. There also existed circles drawn from the First Nations' practices in Canada and which invited any interested member of the community to participate in finding a resolution. The participants sit in a circle, with discussion moving clockwise from person to person until the participants have arrived at a resolution.⁷⁷ Several African communities also had, and some still have, in place traditional dispute resolution mechanisms including a council of elders and *barazas*.

The modern conception of restorative justice has only improved on the above and consists of any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.⁷⁸ Processes such as arbitration, mediation and conciliation are now gaining track as trusted methods of dispute resolution.

To answer the question of whether restorative justice practices can be successfully used locally, we must examine how other jurisdictions from around the world have implemented them and derived positive outcomes. This chapter analyses the means by which different countries have embraced and employed restorative justice in their criminal laws and the outcome of its practice in the pursuit of justice. A case study of the use of *gacaca* courts subsequent to the 1994 Rwandan genocide is included to highlight the success of restorative justice in mending a nation.

4.2 New Zealand

New Zealand has gained international attention for its use of restorative justice processes, particularly Family Group Conferencing (or FGC) for youth offenders, in its criminal justice system. More unique is that these processes are rooted in statute. FGC was introduced into the

⁷⁷ 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.

⁷⁸ ECOSOC Resolution 2002/12 Basic principles on the use of restorative justice programmes in criminal matters.

law by the *Children, Young Persons and their Families Act* of 1989. Maoris, who were disproportionately represented in the registered crime figures in New Zealand, saw the reason being that when offences occurred, their children were removed from their care and grew up outside of (and ignorant of) the culture and communities to which they belonged. Therefore, FGC was introduced in a new law for juveniles as a process that reflected Maori cultural practice and that involved families in the deliberations.⁷⁹

McElrea lists three elements of restorative justice that occur in FGC; a transfer of power from the state to the community, a negotiated community response and processes which aim to provide healing for victims and acknowledgement of accountability by offenders.⁸⁰

During FGC, the key participants are:⁸¹

- i. the juvenile offender;
- ii. his/her parents, guardian or carer;
- iii. members of the family (group) of the young offender;
- iv. a representative of the cultural authority in whose care the child has been placed;
- v. the victim of the offence or alleged offence to which the conference relates
- vi. a supporter of the victim;
- vii. the youth justice coordinator;
- viii. a representative of the police;
- ix. any barrister, solicitor, youth advocate or lay advocate representing the young offender;
- x. a social worker in certain defined situations; and
- xi. any other person whose attendance is in accordance with the wishes of the family (group)

Typically, the conference begins with prayers and introductions by participants. The coordinator then explains the procedure before the police officer present reads out a summary of the facts of the offence. The offender is then asked if he/she denies or admits those facts. If the offender agrees to the facts of the offence (or at least the core portion of them), they get the opportunity to comment on the accuracy of the police statement and the victim (or representative) can present his/her view of the facts and can explain how the offence affected

⁷⁹ Zinsstag E, Teunkens M Pali B, *Conferencing: A Way Forward for Restorative Justice in Europe*, European Forum for Restorative Justice, 2009, 168.

⁸⁰ McElrea F, 'The New Zealand Model of Family Group Conferencing' *European Journal on Criminal Policy and Research* (1998), 531.

⁸¹ Stewart T, *Family Group Conferences: Perspectives on Policy and Practice*, Annandale: The Federation Press, 1996, 66.

him/her. Frequently, statements by the victim are followed by an apology or some expression of remorse by the offender. The conference participants then discuss collectively and sometimes with emotion what should be done to repair the harm to the victim (including the payment of restitution) and what the offender should do in order to be held accountable for the offence.⁸²

After a suitable discussion period, the offender is left alone with his family to discuss a suitable plan. Once the family has had sufficient time to caucus privately, then the entire group reconvenes to hear of the proposed family group conference plan from the family and the offender. The proposed plan is discussed and frequently negotiated by the parties including the police and the victim. If a collective agreement is reached, the plan is recorded in writing by the justice coordinator. If criminal charges had been presented in court, then the family group conference plan is presented to the court for approval.⁸³

Adult conferencing in New Zealand is established under the *Sentencing Act 2002* and *Victim's Rights Act 2002*. The former explicitly recognized restorative justice for adult offenders and provides that the court must take into account any outcomes of restorative justice processes that have occurred in sentencing.⁸⁴ The latter requires all judicial officers, lawyers, court staff and probation officers to encourage the holding of a meeting between the victim and the offender of a crime "to resolve issues relating to the offence".⁸⁵

4.3 Australia

Restorative justice practices have been used in the Australian criminal justice system since the early 1990s with the introduction of police-run conferencing in Wagga Wagga (a town in New South Wales). These practices have become mainstream in Australian juvenile justice and have been extended for use with adult offenders. In determining whether the matter is suitable for a conference, the seriousness of the offence, the level of violence involved, the harm caused to the victim, the nature and extent of offending by the young person, the number of times they have received warnings or cautions under the relevant Act and other matters deemed relevant

⁸² Zinsstag et al, *Conferencing: A Way Forward for Restorative Justice in Europe*, 174.

⁸³ Schmid D, *Restorative Justice in New Zealand: A Model for U.S. Criminal Justice*, Ian Axford Fellowship, 2011, 13.

⁸⁴ Section 8, *Sentencing Act* (No. 9 of 2002) (New Zealand).

⁸⁵ Section 9, *Victim's Rights Act* (No. 39 of 2002) (New Zealand).

must be taken into consideration.⁸⁶ Outcomes include making an apology or reparations to the victim, doing community service and attending counselling.

Australia is divided in eight jurisdictions (or territories): New South Wales, Victoria, South Australia, Queensland, Western Australia, Tasmania, the ACT and the Northern Territory. Table 2 below illustrates key features of restorative criminal justice within the eight Australian territories.⁸⁷

Jurisdiction	Program Offered	Legislation	Eligible Participants	Excluded Offences	Point of Referral
Northern Territory	Youth Conferencing	<i>Youth Justice Act, 1997</i>	Youth (10 to under 18 years)	Include murder, attempted murder, manslaughter, terrorism offences, sexual offences	Police and court (pre-sentence)
Western Australia	Family Group Conferencing	<i>Young Offenders Act, 1994</i>	Youth (10 to under 18 years)	Include homicide, sexual offences, some drug-related offences	Police and court (pre-sentence)
Tasmania	Community Conferencing	<i>Youth Justice Act, 1997</i>	Youth (10 to under 18 years)	Include murder, rape, aggravated armed robbery, manslaughter	Police and court (sentencing option)
Queensland	Justice Mediation Program	<i>Dispute Resolution Centre Act 1990</i>	Adults (17 years and over)	None stipulated in the legislation	Mostly diversionary but can come at all stages of the

⁸⁶ Larsen J, *Restorative Justice in the Australian Criminal Justice System*, Australian Institute of Criminology, 2014, 6.

⁸⁷ Larsen, *Restorative Justice in the Australian Criminal Justice System*, 8-9.

					criminal justice process
New South Wales	Youth Justice Conferences	<i>Young Offenders Act, 1997</i>	Youth (10 to under 18 years)	Include sexual assault, drug and traffic offences	Police and court (pre-sentence)
	Forum Sentencing	<i>Criminal Procedure Legislation 2010 NSW (Part 7)</i>	Adults (18 years and over)	Include murder, sexual offences, stalking and intimidation	Court (pre-sentence)
Victoria	Youth Justice Group Conferencing	<i>Children, Youth and Families Act 2005</i>	Youth (10 to under 18 years) and young adults (10 to 20 years)	None stipulated in the legislation	Court (pre-sentence)
	Youth Justice Conferencing	<i>Youth Justice Act 1992</i>	Youth (10 to under 17 years), although some adults may be referred by police	None stipulated in the legislation	Police and court (pre-sentence)
South Australia	Family Conferencing	<i>Young Offenders Act 1993</i>	Youth (10 to under 18 years)	Legislation only stipulates that youth who admit to committing a 'minor' offence may be referred by police	Police and court (pre-sentence)

	Port Lincoln Aboriginal Conferencing	<i>Criminal Law Sentencing Act 1988</i>	Adults (18 years and over)	None stipulated in the legislation	Court (pre-sentence)
Australian Capital Territory (ACT)	Restorative Justice Unit	<i>Crimes (Restorative Justice) Act 2004—operating in phase one</i>	Youth (10 to 17 years)	Serious property offences, sexual offences, domestic violence offences	From apprehension to post sentence

Table 2: Territorial application of restorative justice programs in Australia

4.4 South Africa

Since the end of Apartheid rule in the early 1990s, South Africa has taken outstanding steps towards implementing restorative justice through penal law reforms. This began in 1997 when the Minister of Justice and Constitutional Development requested the South African Law Reform Commission to include in its programme an investigation into the youth justice system. Their final report was presented in 2000 together with a draft of the Child Justice Bill (No. 49 of 2002) which was later passed by the National Assembly in 2008. The Bill included detailed procedures for setting up and running FGCs as a diversion option prior to or during trial or after conviction to determine a suitable plan, which the court could then transfer into a court order for the purpose of sentencing.⁸⁸

In 1998, the Restorative Justice Centre was established in Pretoria and aimed first to formulate a restorative model familiar to African values, to empower people to work in partnership with the criminal justice system and to relieve the court's workload and therefore function as a diversionary process.⁸⁹ Another example of restorative justice programmes in South Africa are the "local peace committees", which started in the early 1990s. These worked in many townships to resolve conflicts in local communities with respected local people acting as

⁸⁸ 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, 131.

⁸⁹ Zinsstag et al, *Conferencing: A Way Forward for Restorative Justice in Europe*, 220-221.

facilitators. By the year 2004, 15 peace committees were in place and 6,000 peace gatherings had been held.⁹⁰

The establishment of the Truth and Reconciliation Commission (TRC) gained South Africa prominence in the field of restorative justice. The TRC was set up by the Government of National Unity under the Promotion of National Unity and Reconciliation Act (No. 34 of 1995) to help deal with the aftermath of apartheid rule. The conflict during this period resulted in violence and human rights abuses from all sides.⁹¹ The objectives of the Commission were, inter alia, to investigate and draw as complete a picture as possible of the nature, causes and extent of the human rights violations committed during the apartheid period, to offer victims an opportunity to relate the violations they suffered and to take measures aimed at granting reparations to victims as well as restoring their dignity.⁹² The Commission also aimed to embrace the spirit of *ubuntu* (a Zulu word meaning ‘humanness’) which connotes solidarity and humanity to others similar to restorative justice practices.⁹³ It provided forums in which victims could relate their stories and made recommendations with regard to the reparation of victims (including restitution and rehabilitation), the prevention of future abuses and the establishment of a culture of respect for human rights.⁹⁴

Presently, three pieces of South African legislation provide for restorative justice. These are the Criminal Procedure (Second Amendment) Act (No. 62 of 2001), the Probation Services Act (No. 35 of 2002) and the Child Justice (B-49 of 2002).

4.5 Rwanda

On April 6, 1994, the plane carrying then Hutu President of Rwanda Juvenal Habyarimana and the President of neighbouring Burundi was shot down as it prepared to land in the capital of Rwanda. The crash killed the plane’s occupants immediately, and within hours, targeted killing of Tutsis and those associated with them began. Prior to this, members of the government had

⁹⁰ Liebmann M, *Restorative Justice: How It Works*, Jessica Kingsley Publishers, 2007, 233.

⁹¹ <http://www.justice.gov.za/trc/> on 19 January 2018.

⁹² Section 3, *Promotion of National Unity and Reconciliation Act* (No. 34 of 1995) (South Africa).

⁹³ Skelton A, ‘Regional Views: Africa’ in Johnstone G and Van Ness D (eds), *Handbook of Restorative Justice*, Willan Publishing, 2007, 471.

⁹⁴ ‘McLeod L: Reconciliation through Restorative Justice: Analyzing South Africa's Truth and Reconciliation Process’ *George Mason University*, Spring 2015

<https://www.beyondintractability.org/library/reconciliation-through-restorative-justice-analyzing-south-africas-truth-and-reconciliation#sthash.AHWMRxhJ.dpbs> on 19 January 2018.

deliberately engendered animosity between the two main Rwandan ethnic groups—Hutu and Tutsi—which had become politicized and polarized during Belgian colonialism.⁹⁵

Over 100 days from April to July 1994 between 800,000 and 1,000,000 Tutsis and moderate Hutus were killed in Rwanda. The killings were organized by the Rwandan Government and executed by the military, armed militia groups and ordinary men and women who often killed their own relatives, friends and neighbours.⁹⁶ In the aftermath of the genocide, Rwanda was faced with a new problem. Survivors had to find a way to coexist with those who perpetrated, encouraged, or did nothing to prevent the violence.⁹⁷

In response to this, three approaches were taken in an attempt to render justice to those involved in or affected by the mass violence. First, the United Nations Security Council created the International Criminal Tribunal for Rwanda (ICTR) on November 8, 1994 in Arusha, Tanzania.⁹⁸ The Rwandan Government would also utilize its domestic judicial system and, in 2001, began to use traditional justice systems known as *gacaca* courts. To facilitate the tasks of the various tribunals, the Rwandan Government divided the perpetrators of the genocide according to their responsibility into four categories as follows:⁹⁹

Category 1:

- a) persons whose criminal acts or whose acts of criminal participation place them among the planners, organizers, instigators, supervisors and leaders of the crime of genocide or of a crime against humanity;
- b) persons who acted in positions of authority at the national, prefectural, communal, sector or cell level, or in a political party, the or fostered such crimes;
- c) notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed;
- d) persons who committed acts sexual torture.

Category 2:

⁹⁵ Brehm H, Uggen C, Gasanabo J, 'Genocide, Justice and Rwanda's Gacaca Courts' 30 *Journal of Contemporary Criminal Justice*, 3 (2014), 333-334.

⁹⁶ Corey A and Joiremann S, *Retributive Justice: The Gacaca Courts in Rwanda*, African Affairs, 2004, 73.

⁹⁷ Drumbl M, 'Punishment Post genocide: From Guilt to Shame to Civis in Rwanda' 75 *New York University Law Review* (2000), 1224.

⁹⁸ 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).

⁹⁹ Article 2, *Organic Law* (No. 8 of 1996) (Rwanda).

Persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators or accomplices of intentional homicide or of serious assault against the person causing death.

Category 3:

Persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person.

Category 4:

Persons who committed offences against property.

The ICTR was tasked to investigate and prosecute Category 1 perpetrators of the genocide. It was based in Tanzania to ensure impartiality during the proceedings. Further, until the year 2000, the official languages of the ICTR were English and French. Kinyarwanda, the native language of all Rwandans, was not used. The distance and the language barrier removed many Rwandans from the judicial process and therefore the Court was unable to contribute sufficiently to the reconciliation process.¹⁰⁰

With just over 20 judges, the Rwandan national courts were to try more than 130,000 suspects and it was estimated that the sheer number of cases could take up to 150 years to process.¹⁰¹ The judiciary also suffered from a dearth of resources, inefficiency, corruption, and executive influence.¹⁰²

For the most part, the Rwandan killings took place in the local communities where both victim and aggressor resided and the situation was truly one of neighbour killing neighbour.¹⁰³ Thus, the need for a justice system that involved all community members arose and in 2001, over 11,000 *gacaca* courts were established for this reason. *Gacaca* – literally meaning “grassroots” – were local community courts in which victims and perpetrators presented their narrative of

¹⁰⁰ 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.

¹⁰¹ Graybill L, Lanegran K, 'Truth, Justice, and Reconciliation in Africa: Issues and Cases' 8 *African Studies Quarterly*, 1 (2004), 8.

¹⁰² Bolocan M, 'Rwandan Gacaca: An Experiment in Transitional Justice' 2004 *Journal of Dispute Resolution*, 2 (2004), 374.

¹⁰³ Drumbl M, 'Punishment Post genocide: From Guilt to Shame to Civis in Rwanda', 1260.

the case. These consisted of a highly decentralized system of local courts inspired by the traditional dispute resolution mechanism existing in Rwanda since pre-colonial time.¹⁰⁴ The courts were headed by the *Inyangamugaya* (people of integrity) who were suggested and elected by the local community.¹⁰⁵ The new *gacaca* process had five goals:¹⁰⁶

- i) establish the truth about what happened;
- ii) accelerate the legal proceedings for those accused of genocide crimes;
- iii) eradicate the culture of impunity;
- iv) reconcile Rwandans and reinforce their unity; and
- v) use the capacities of Rwandan society to deal with its problems through a justice based on Rwandan custom.

Community members were not only spectators, but also active participants whose accounts and testimonies directly influenced the trial and subsequently the verdict.¹⁰⁷ *Gacaca* courts were able to try cases of Category 2 and 3 crimes and could issue sentences ranging from community work to 30-year prison sentences thus incorporating an amalgam of retributive and restorative justice outcomes.¹⁰⁸ The *gacaca* law offered strong sentence reductions as an incentive for offenders to confess and possibly commute half of their sentence into community service.¹⁰⁹

No legal representatives were employed as survivors and offenders would speak before the court personally. This greatly reduced costs of trial. In addition, as of April 2009, the *gacaca* courts had completed 1.1 million cases compared to the 10,026 and 50 cases finalized by the civil justice system and the ICTR respectively.¹¹⁰ Moreover, as part of building a unified Rwanda, *gacaca* gave the citizens participatory justice and community involvement in the proceedings.¹¹¹

The *gacaca* system was not without shortfalls. To begin with, the *gacaca* courts faced unique destruction-of-evidence problems because of the form of evidence collected and the informal

¹⁰⁴ Bolocan M, 'Rwandan Gacaca: An Experiment in Transitional Justice', 375.

¹⁰⁵ Clark P, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers*, Cambridge University Press, 2010, 67.

¹⁰⁶ Westberg M, 'Rwanda's Use of Transitional Justice after Genocide: The Gacaca Courts and the ICTR' 59 *Kansas Law Review* (2011), 337.

¹⁰⁷ Corey and Joiremann, *Retributive Justice: The Gacaca Courts in Rwanda*, 84.

¹⁰⁸ Corey and Joiremann, *Retributive Justice: The Gacaca Courts in Rwanda*, 85.

¹⁰⁹ Bolocan M. 'Rwandan Gacaca: An Experiment in Transitional Justice', 380.

¹¹⁰ Westberg M, 'Rwanda's Use of Transitional Justice after Genocide: The Gacaca Courts and the ICTR', 341.

¹¹¹ Westberg M, 'Rwanda's Use of Transitional Justice after Genocide: The Gacaca Courts and the ICTR', 349.

environment.¹¹² Human rights groups also argued that the impartiality and professionalism of the judges were not guaranteed.¹¹³ In addition, paramount rights, such as the defendants' right to legal counsel or the right to call witnesses, were disregarded. This may be problematic, as the majority of defendants have a low educational background and very limited, if any, awareness of their rights. Moreover, defendants who choose not to confess are particularly vulnerable, as *gacaca* courts can hear evidence from the public prosecutor.¹¹⁴

In summary, the *gacaca* system is a true image of the merits of a restorative criminal justice system. It demonstrates how restorative justice can lead to speedy, cost-effective, harmonious, rehabilitative and mutually accepted dispute resolution even after the commission of the most heinous of crimes.

4.6 Conclusion

The application of restorative justice practices in penal laws has been realised by a good number of countries around the world. This has been advantageous in maintaining social relations, allowing for reconciliation of victims and offenders and providing for appropriate reparations for crimes. The models adopted by each coupled with their strengths and weaknesses are an excellent framework from which Kenya can establish her own legislation on restorative justice.

¹¹² Westberg M, 'Rwanda's Use of Transitional Justice after Genocide: The Gacaca Courts and the ICTR', 353.

¹¹³ Burnet J, 'The Injustice of Local Justice: Truth, Reconciliation, and Revenge in Rwanda' 3 *Genocide Studies and Prevention Journal*, 2 (2008), 176.

¹¹⁴ Bolocan M, 'Rwandan Gacaca: An Experiment in Transitional Justice', 388.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

Restorative justice practices are indeed applicable within the criminal justice system of Kenya. This has been proven by an analysis of various Kenyan statutes which recognise restorative justice as a means of dispute resolution. The supreme law of the land, that is the 2010 Constitution, avails an avenue for their use by judges and magistrates in the exercise of judicial authority and the pursuit of access to justice for all citizens.

This study has provided a comparison of Kenya's use of restorative justice processes to those of other jurisdictions around the world. From this, it is apropos to conclude that Kenyan legislation provides a relatively limited scope of application to restorative justice processes. It is also evident that restorative justice practices are used subordinate to retributive justice practices in Kenya whereas other States, such as New Zealand, have used the former concurrently with or in lieu of the latter.

Ultimately, what is presently required is a proper and workable framework for the use, sustenance and promotion of restorative justice mechanisms within Kenya's criminal justice system. This will ensure that criminal justice is returned to the people most concerned and affected by the crime.

5.2 Recommendations

Following the findings and discussions put forward by this study, the following recommendations are suggested:

- i. That legislators formulate and pass an Act of Parliament detailing a framework for the use of restorative justice processes as diversionary measures or sentencing options in all criminal matters. This requires an amendment of the Penal Code and other relevant statutes to be more inclusive of restorative justice programs.
- ii. That a framework be created providing that before parties to a dispute file a case in court, they should first exhaust all modes of restorative justice available to them.
- iii. That judicial officers embrace the dictates of Article 159 (2) (c) of the 2010 Constitution by referring more cases to all available alternative dispute resolution mechanisms including restorative justice processes.
- iv. That cases referred to restorative justice programmes should comprise any civil or criminal matter that all parties to the dispute have agreed to resolve as such.

- v. That the framework for restorative justice adopted by Kenya should ensure that it is not completely merged with the formal legal system but able to work concurrently with it. Courts should only promote the use of restorative justice programs without interfering in their procedures.
- vi. That the framework for restorative justice adopted by Kenya should bar legal representation during the procedure. This will remove technicalities from the process and ensure that only those parties concerned with a dispute are present for its resolution.

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