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Beyond restorative justice: Understanding justice from an African perspective

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Abstract[1]

Over the past few decades, there has been a growing interest in restorative justice in terms of the alternatives it offers to the narrow limits of the criminal justice system. This has also been the case in the African context, where some argue that local justice processes reflect a restorative approach to justice. In this

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article, we explore this assertion and argue for the adoption of the term *African* restorative justice to encapsulate the ways in which local justice processes on the continent echo certain aspects of restorative justice approaches globally, but also have characteristics that make them uniquely African. Of interest is what African restorative justice can offer national, state-led interventions in relation to mass conflict.

We reference the cases of South Africa and Zimbabwe, where interviews were held, together with observations of tradition-based practices, in order to understand local understandings of justice. This article discusses the findings which include the difficulties in bringing together human rights, human dignity, customary law and the state-led justice system. It argues for the importance of community and 'endogenous' knowledge in helping us overcome and move beyond the dual thinking that is often apparent in public discourse, of either rejecting local justice practices as being undemocratic and having nothing to offer a new, contemporary democratic order, or accepting them idealistically and uncritically.

Keyword: *Restorative justice, Africa, South Africa, Zimbabwe, Tradition-based practices*

Introduction

Within the broader field of Peace Studies, there is a growing interest in restorative justice in terms of the alternatives it offers to the narrow limits of the criminal justice system. This has also been the case in the African context, where some argue that local justice processes reflect a restorative approach to justice. In this article we explore this assertion, and argue for the adoption of African restorative justice to encapsulate the ways in which local justice processes on the continent echo certain aspects of restorative justice approaches globally, but also have characteristics that make them uniquely African.

There is the sense that African ways of being are often understood and assessed through the lens of external norms and values, or being assimilated into other systems and practices that hold more legitimacy in the global community (Baines 2010 suggests this in relation to transitional justice in particular). An example of this is the way in which African systems of justice have been understood within the restorative justice paradigm, which was largely developed in Europe and North America (Robins, 2011). However, this needs to be unraveled to fully understand the differences between these paradigms.

African perspectives of justice prioritise social harmony and the interconnectedness of the community. Where the Roman-Dutch legal system is concerned with individual accountability, and the relationship between the state and an individual, we suggest that justice in most African contexts has to do with restoring relationships and balance in the cosmological sense. By cosmological, we mean that it is related to both the physical and metaphysical worlds, or as Benyera (2014) writes, the relationship between the "not yet living, the living, and the living dead".

We begin this article with a discussion of the terms and concepts used, followed by a discussion of what we understand African restorative justice to be. This is followed by an exploration of African restorative justice in South Africa and Zimbabwe. This article draws from research conducted by the three authors as part of a bigger project that looked at tradition-based justice systems and governance in Africa. It considers the case of South Africa, where, through the Truth and Reconciliation Commission (TRC), a restorative justice approach was used to deal with past injustices, and became a model for the rest of the continent. It argues that a missed opportunity of the TRC was the exclusion of traditional leaders, and that it failed to make the link between the TRC hearings and tradition-based practices explicit. It captures the ways in which justice is understood by local communities in South Africa through local idioms and expressions. It then considers the case of Zimbabwe, where local understandings of justice are explored in two districts, Buhera and Mudzi (in Manicaland and Mashonaland East provinces), through interviews and observations of tradition-based practices.

The cases in South Africa and Zimbabwe are distinctly different, although their histories and conflicts are intertwined. Zimbabwe gained its independence in 1980, following a liberation struggle that lasted fifteen years. Shortly after this, the Matabeleland Massacres, or *Gukurahundi,* engulfed the Midlands and Matabeleland provinces between 1980 and 1987, which was the first sign that there were unaddressed issues in Zimbabwe between the political parties that had been involved in the liberation struggle (Ngwenya and Harris, 2016). These massacres remained unaddressed, and in the 2000s, violent land reform and then electoral violence resulted in the death, displacement, and trauma of hundreds of thousands of people. To date, efforts to address the episodes of violence in Zimbabwe at a national level have failed to

restore relationships between people, or bring healing. Tradition-based practices continue to be widely used to meet day-to-day justice needs.

South Africa never experienced a struggle for independence, but instead was under Apartheid rule for fifty years, a period which resulted in deep structural inequalities between race groups, as well as the death, displacement and trauma of hundreds of thousands of people. Unlike in Zimbabwe, a national response was initiated through the Truth and Reconciliation Commission (TRC), a restorative justice approach used to deal with past injustices that became a model for the rest of the continent. However, we argue in this article that because the TRC excluded traditional leaders, it failed to make the link between the TRC hearings and tradition-based practices explicit, and thus missed an opportunity to deepen the healing and restoration of relationships between large parts of the South Africa population.

There is a general acknowledgement that restorative justice theory and practice can be enriched through learning from tradition-based justice processes. Even more, to obtain a comprehensive understanding of restorative justice, it is necessary to "engage with accounts of its use in historical societies and in contemporary indigenous communities" (Johnstone, 2004:10). This article argues that tradition-based justice offers an African understanding of restorative justice and a way of resolving conflict for many local communities, beyond the victim and perpetrator dichotomies that are presented by mainstream restorative justice scholarship.

A note on terms and concepts

Various scholars use different terms to describe the justice processes followed by local communities, such as 'alternative dispute resolution mechanisms', 'informal', 'indigenous', 'unofficial', and 'tradition-based' (Huyse, 2008; Lundy, 2009; Quinn 2007). In the literature, these terms are often used interchangeably, and they refer to the same or similar processes which are used to resolve conflicts at the community level. We are hesitant to use the term 'alternative' to describe these practices because, as the literature and our findings suggest, these practices are not the alternative at all, but are the primary practice for meeting justice needs in many African societies. Further, 'alternative dispute resolution mechanisms' can refer to a broad range of mechanisms that are not necessarily based in community traditions (Lynch, 2001). The term is also

limited to the resolution of disputes, whereas African conceptions of justice have to do with restoring social harmony in the cosmological sense and not simply resolving disputes between individuals. We are also hesitant to use the term 'traditional' to describe these practices as although they find their origins in long-held traditions, they are not static but constantly evolving in response to socio-cultural and political realities.

We thus choose the term 'tradition-based practices' as it speaks to the fact that these practices are based on long-held traditions, but have evolved and changed over time. These practices differ from community to community but have certain resonances across contexts including that they are passed on orally from generation to generation, include rich symbolism and ritual, involve the whole community, much dialogue, are concerned with finding consensus, prioritise compensation or redress, involve cleansing and healing and, most importantly, have as their primary focus the restoration of social harmony at the cosmological level.

When the term 'local community' is used, it is sometimes assumed that this refers to a spatial level that is separated from the national, international and global community, and one that is marked by the absence of modernity (Shaw et al., 2010). In this article, the local is understood as a standpoint based in locality but not bound by it (Sharp 2014, Shaw et al., 2010). It is a shifted centre that provides a vantage point from which people can recognise the community as a site of knowledge, informed by the experiences of the local population (McEvoy & McConnachie 2013; Sharp, 2014). The entry point of this article is, therefore, to provide an understanding of the justice practices at the local level and not the state level or from a state-centric perspective. It attempts to reflect the lived realities of people on the ground.

In a context where the tradition-based system of justice is the prevalent regulatory system, possibly in up to 90 per cent of cases (Chirayath et al., 2006), understanding the ways in which these practices function is important in relation to dealing with day-to-day conflicts as well as past injustices, and meeting the gap between processes at the macro level (typically the national justice institutions) and what happens at the local level (Zambara, 2018).

What is African restorative justice?

The restorative justice literature is broad and diverse, but the main tenets of this paradigm may be summarized as that it is about encounter, reparations, and transformation (Johnstone & Van Ness, 2007). Of importance is the relational dimension, the victim's voice, the community voice, and creating spaces for encounter and dialogue. A restorative view holds that balance and harmony cannot be restored through the imposition of pain and suffering on the offender. Rather, it is through acknowledgement of responsibility on the part of the offender and a willingness to repair the harm that the victim has suffered. This is taken further by seeking to address the underlying causes of the incident, which includes the offender's own impaired personhood and needs. This becomes framed within the overarching goal of contributing to a more just society that is understood holistically. The discourse on human dignity is prioritized over a human rights discourse (although not at the expense of human rights). The intended outcome has something to do with restoring the relationship between people, whether understood in the language of 'forgiveness' or in other ways.

Much of this resonates with what might be found in African justice systems. However, African justice systems may not always prioritize the voice of the victim, and the offender might be punished in what can be seen as retributive ways (for example, through whippings or expulsion). This is because the harmony of the whole community is prioritized over the concern of any individual within that community (including victims and offenders) (Lambourne, 2009).

Further, even where there is to be a restorative justice process which includes encounter, reparations and transformation, people would still experience the need to engage in a cleansing ritual which would acknowledge not only the parties to the conflict but the web of relationships between the living, the not yet living, and the living dead.

Honwana (1997:297), while describing the Mozambican context, said:

> if the relationships between human beings and their ancestors, between them and the environment, and among themselves are balanced and harmonious, health ensues. However, if they are disrupted in any way, the wellbeing of the community is jeopardized. There is a complex set of rules and practices that govern the maintenance of wellbeing and fecundity in the community.

John and Jean Comaroff (2001), in speaking of conceptions of identity, remind us that we cannot speak of 'the African conception' of personhood, and that we cannot simply juxtapose so-called western and African conceptions of identity, assuming one to be about the autonomous individual and the other about a collective sense of identity. Similarly, we are not proposing a homogenous 'African justice' which is at once shared across the continent and different from any other conceptions of justice. We are aware that there are many communities across the globe that share characteristics of African justice practices. We are also aware that justice is understood and practiced in many different ways across the African continent.

Even so, our findings and the literature suggest that there are certain conceptions of personhood that are central to African ways of being which have implications for restorative justice practice. These conceptions of personhood are characterised by the fact that they are relational, and that local communities are composed of complex networks of relationships. Englund and Nyamnjoh (2004:9), describe how in postcolonial African states people accommodate multiple identities and speak of a 'relational aesthetic of recognition'. Rather than recognizing distinct communities of differences, they suggest we recognize the relationships that unite groups of people, and to acknowledge these relations not only as something inserted into communities after they emerge, but as intrinsic to the very emergence of the communities.

These networks or webs of relationships are not only between people, as already mentioned, but point to the cosmological, or metaphysical (Benyera 2014). Some would even include the relationship to the ecological (Murove 2004). The intrinsic importance of the intersection of the physical and metaphysical are most visible in the cleansing rituals that characterize most African systems of justice (see for example, Baines 2010). Even were a conflict to be resolved between individuals through the formal state system, on returning to their community, these individuals would need to engage in a cleansing ritual that involves the whole community in the cosmological sense (Baines 2010; Masoga 1999; Honwana 1997).

This practice is not unique to rural communities. Mobility between urban and rural spaces is a characteristic of most African societies, to the extent that Nyamnjoh and Brudvig (2014) argue that we need to interrogate notions of 'urban' and 'rural' altogether. Although the

research focused on rural communities, many people living in urban centers have a rural 'home' they return to, where they engage in these cleansing rituals in order to restore the balance or social harmony between themselves and their community of origin.

The norms that underlie these practices are not simply behavioral, they constitute the very way in which identities, and as a consequence, justice, are understood. Justice is thus not about individual accountability, nor about any kind of social contract between an individual and the state. It is not about the rights and duties of a citizen (as in the case of the continental European civilian law system), or to protect an individual from the state (as in the case of the British common law system). It is about restoring social harmony and the balance in the web of relationships that are integral to the survival of the community. The southern African concept of Ubuntu captures something of this web of relationships, or the interdependence or "interconnectedness-towards-wholeness" (Krog 2008) that characterizes many African societies. Madlingozi (2015) describes Ubuntu as "the ontological and epistemological philosophy of the Bantu people that demands the affirmation of the dignity and humanity of every being as way of ensuring being; becoming and communal harmony".

But as is discussed in the following section, bringing together the philosophies of human dignity, human rights and customary law, and bridging international, national and local understandings of justice, is no easy feat. Attempts were made to do this in South Africa through the TRC, but, arguably, too much emphasis was placed on restorative justice, and not enough on *African* restorative justice.

Considerations from South Africa

Restorative justice was rigorously endorsed by South Africa's Truth and Reconciliation Commission (TRC Report (1): 134). In this way it has provided a template and major point of reference for engaging difficult questions about the nature of justice, proposing specific principles and presenting restorative justice as a theory of justice (Llewellyn, 2007:361). This influence is seen clearly in policy and legislation (most explicitly in the Child Justice Act, 2008, but in various other proposed and approved statutes relating to traditional leaders, family law, schools and court annexed mediation). It has also generated a valuable legacy in the South African Constitutional Court's jurisprudence (Skelton, 2013).

Furthermore, restorative justice has continued to surface in official and public discourse.[6]

From the vantage point of this text, what appears glaringly absent from the TRC process and even the subsequent debates is the fact that no tradition-based justice processes were utilized, nor does any consideration appear to have been given as to how they can be integrated into the structures and processes. This gap is perhaps understandable, given that until 1994, common law and Roman-Dutch law were superior. With the new Constitution of 1996:

> Section 211 provides that the institution, status and role of traditional leadership are recognised subject to the Constitution. Customary law must now be regarded as equal with the common law and as an "integral part of our law" and "an independent source of norms within the legal system". Like any other source of law, customary law has a status that requires respect. Customary law must also not be judged through the lens of the common law (De Vos, 2010:1).

This necessary recognition and acknowledgement of tradition-based justice has many implications, the reality of which have only just begun to be realized.

South Africa's Constitution is rooted in the philosophy of human dignity and human rights. It is often referred to in glowing terms and is globally respected. Bringing together the philosophies of human dignity and human rights and customary law, though, is not a comfortable union. Donnelly (1982:303) argues "there are conceptions of human dignity which do not imply human rights, and societies and institutions which aim to realize human dignity entirely independently of human rights". He ends his discussion on human rights in traditional African societies by concluding that "in African societies, rights were assigned on the basis of communal memberships, status or achievement", and that

[6] See for example http://www.iol.co.za/news/crime-courts/daughter-of-victim-forgives-de-kock-1.1232693; http://ewn.co.za/2017/11/17/masutha-recommends-janusz-walus-attend-therapeutic-programmes; http://www.independent.co.uk/news/people/oscar-pistorius-reeva-steenkamps-parents-request-meeting-with-athlete-following-his-sentencing-for-9735566.html; https://www.news24.com/SouthAfrica/News/ferguson-to-alleged-rapist-i-am-offering-you-a-restorative-justice-process-20171024.

> (a)lthough many of the same ideas are valued, the ways in which they are valued are quite different. Recognition of human rights was simply not the way of traditional Africa, with obvious and important consequences for political practice (Donnelly, 1982:308).

The ways in which African customary law has tended to value human dignity has been through elaborate systems of human duties (Donnelly, 1982:306).

Woolman et al. (2011:1) trace the articulation of 'dignity' in South Africa's constitutional court judgments, explaining that the concept is usually used as a value rather than as a right. This would seem to follow the distinction made by Donnelly, where he regards human rights as not entirely ends in themselves, but rather as "a means to realize human dignity".

Johann (1968:138) and others (Crosby, 2001; Grabowski, 1995; Kelly, 1992) argue that we need an understanding of the interpersonal, mutual and reciprocal nature of justice, dignity and rights. They even go so far as to say that the idea of a person with rights only begins to have meaning when we understand this person as being in a society of persons. This matches the notion of Ubuntu referred to by Madlingozi (see Tutu, 1999: 54-55 Makgoro, cited in Skelton 2005:374) stresses the element of "respect for human dignity of personhood, with emphasis on the virtues of that dignity in social relationships and practices". From this perspective, recognizing the essential mutual personhood of others, injustice arises when one person is unresponsive to the personal character and activity of another's being (a perspective echoed by Woolman et al. (2011) above in referring to the TRC's perspective about justice); this also explains the idea that the perpetrator of injustice is much worse off than the victim. The very idea of rights is thus rooted in the concept of justice.

This perspective is captured by Krog (2009:211) in her reflections on matters arising from the Truth and Reconciliation Commission, with particular reference to Mrs Ngewu, the mother of one of the Gugulethu Seven:

> Let me set out what this amazing formulation (by Mrs Ngewu) says: it says that Mrs Ngewu understood that the killer of her child could, and did, kill, because he had lost his humanity; he was no longer human. Second, she understood that to forgive him would open up the possibility for him to regain his humanity, to change profoundly. Third,

> she understood also that the loss of her son affected her own humanity; her humanity had been impaired. Fourth and most important, she understood that if indeed the perpetrator felt driven by her forgiveness to regain his humanity, then it would open up the possibility of the restoration of her own full humanity. In the TRC final report, Mrs Ngewu's response on prison sentences for the perpetrators reads as follows: "I think that all South Africans should be committed to the idea of re-accepting these people back into the community. We do not want to return the evil that perpetrators committed to the nation. We want to demonstrate humanness (ubuntu) towards them so that (it) in turn may restore their own humanity.

For Krog, reporting on the TRC as an Afrikaans woman and later seeking to make sense of the experience, southern African interconnectedness is the "interpretive foundation that enabled people to reinterpret tired and troubled Western concepts such as forgiveness, reconciliation, amnesty and justice in new and usable ways" (2009: 212). In this view, human forgiveness is less a response to having been forgiven by God than it is an exchange based on an authentic shared humanity.

The relation of restorative justice to human dignity becomes apparent at this point. Van Ness and Strong (2002: 100) for example, under the restorative justice value of reintegration, state the element of acknowledging human dignity and worth. From this perspective, the connections with customary law begin to become evident.

Faris (2015:3) has argued that in an African context restorative justice occurs within the metanarrative of the African humanistic value system, which is expressed as Ubuntu. An authentic African jurisprudence is not based on abstract reasoning divorced from social reality, but rather as an organic response to the lived experience and interconnectedness of people, families, groups and communities within a harmony model of dispute resolution.

Faris (2015:7) is of the view that the African harmony model transcends the typical win/win or win/lose outcomes found in Western dispute resolution thinking, since the mechanisms for dialogue and consensus building are applied to promote the common good rather than personal or common interests.

Furthermore, the Western dispute management model functions within a linear dimension of time. Western processes are therefore structured into stages through which a process must move in order to achieve the desired outcome, with the emphasis on technique. By

comparison, the African harmony model occurs within a cyclical notion of time. In line with the precepts of customary law and its process of lekgotla/inkundla, the African harmony model recognizes '… the continuous oneness and wholeness of the living, the living dead and the unborn'(Faris 2015:7). Consequently, an expanded perspective on time directs dispute resolution towards long-term social solutions based on human interconnectedness that includes not only the living but also the ancestors and the unborn. On the basis of an intergenerational cycle of interconnectedness, the African harmony model does not concentrate on the proximate cause of the dispute as in the case of the Western dispute management model, but traces the dispute to its first cause rooted in the past (hence the association with the ancestral living-dead) and resolves the dispute for the common good of the living with consideration being given to the future generation (the unborn).

Several African writers have said unequivocally that the African way of meting out justice is restorative (Tutu, 1999: 54; Kgosimore, 2000:69; Tshehla, 200416; Elechi, 2004; Nhlapo, 2005; Qhubu, 2005, cited in Skelton 2007:228) although the number of writers who have directly commented on the linkages between restorative justice and African tradition-based justice processes is relatively few. Archbishop Desmond Tutu is perhaps the most prominent writer to have done so. In a preface to the second edition of a book by Jim Consedine (1999:7), he makes the following observation about restorative justice processes:

> Rooted as they are in all indigenous cultures, including those of Africa, they offer to provide a better form of criminal justice than that which currently exists. They focus on repairing the damage done through crime, on victims' needs, and on the part God's great gifts of healing, mercy and reconciliation can also play.

South Africa's Department of Justice and Constitutional Development's project to garner the inputs of traditional leaders into the Restorative Justice National Policy Framework (Batley et al. 2012) was perhaps an attempt in this direction. The main instrument used to reflect the leaders' views was to document idioms and practices in each of the official languages and cultures that reflect a restorative view. These have now been included in the National Policy Framework currently being finalized. Some examples of these are:

- In Sepedi: '*Ngwana Phošadira ga a bolawe* (A person who committed an offence and has accepted responsibility should not be punished too harshly)'.
- In Tshivenda: '*Tshivhi a tshi lifhedzwi nga tshivhi* (literally, Sin is not punished by sin - you do not correct a wrong by committing another).
- A Xitsonga phrase '*Ku phahlelana mariyeta'* refers to a ritual performed to publicly proclaim forgiveness and reconciliation after conflict. It may be between individuals or clans, and specific individuals drink a prepared drink from a single container. The function is often mediated by a neutral person who may be a traditional leader or any respected member of the community. Witnesses are also required to attend.
- In isiZulu: '*Ukubeka ezithebeni* (When there is an issue, it should be brought into the open to be dealt with by the community)'.

Mbambo (2011) articulates the theme that the individual exists in a community, rather than in isolation, and is part of the whole. The African tradition-based justice system is community-based providing opportunities for dialogue among victim, offender and the community. She lists further idioms in isiZulu reflecting:

- Personal responsibility: 'you have violated your being by your actions, you have shamed yourself - *waze wazihlazisa, akufani nawe'*.
- Family responsibility: 'your conduct or actions have put your family to shame (both the living as well as your ancestors to shame) – waze wahlazisa umuzi wakini', '*wahlazisa abaphansi.'*
- Peer responsibility: 'you have dishonored your peers, your age group, they have all been tainted by your actions -*waphoxa ontanga yenu'*.
- Community responsibility: 'this community has been put to shame by your actions – *waze wathela isigodi sakithi ngehlazo, sidumele isizwe ngesenzo sakho'*.

The person is therefore required to restore harmony in all these spheres, but will receive help from family, community and peers to address the harm caused. According to Mbambo (2011), the most important principle here is that in order to address the harm caused, restoration must start at a personal level.

These writers have noted the nature and process of customary law and conflict resolution and how these compare to the nature and process of mainstream restorative justice processes. Tshehla (2004) has observed that there is a "resonance between restorative justice and justice as practiced by Africans through community courts and chief's courts". The similarities and differences have been summarized (Skelton, 2007:228-246, from a South African perspective):

- Both have the aim of reconciliation and restoring peace in the community.
- Both promote a normative system that stresses an individual or community duty as well as the dignity of the individual.
- Dignity and respect are viewed as central values.
- Neither of the two processes distinguish strongly between the civil and criminal justice systems, a wrong is a harm done to an individual and the broader community

In both tradition-based courts and restorative justice processes, unlike the common law, the outcomes are not based on prior pronouncements of law by other courts. Tradition-based justice outcomes would be informed by the heritage of the local group in question, while restorative justice outcomes are likely to be more flexible, drawing on a wider range of points of reference:

- Both encourage community participation and ownership of the process "therefore those who have perpetrated violence are more likely to accept responsibility, apologize and offer reparation for their offence".
- Both have "procedures that are powerful to bring about transformation".
- Restitution or compensation is valued by both processes.

There are also notable differences. These include that contemporary restorative justice processes tend to be progressive and dynamic. Customary or tradition-based justice tends to be conservative in approach, seeking to preserve culture. However, to draw from the past processes does not mean that all the practices of the past need to be taken along with wisdom from the past. African feminist writer Jean Marie Makang said that a rediscovery of African tradition-based approaches means "using the praxis and wisdom of our foreparents as

interpretive tools to enlighten present generations of Africans" (in Skelton 2007: 245), and that Western and African justice systems have much to learn from one another.

Tradition-based justice processes are very often embedded in a particular cosmological worldview which calls for the restoring of relationships, and harmony, not only with the physical but also metaphysical, evidenced in the cleansing rituals that often form part of the process. This is not the case in most contemporary restorative justice processes.

One of the key differences between the way restorative justice is practiced in Africa and in Western countries is reflected in the role of facilitators and mediators. While the trend in the West is to professionalize these roles and the training required, emphasizing detached neutrality and no prior knowledge of a dispute, in Africa formal training and qualifications are not required. Authority to intervene is conferred on elders because they have a reputation in the community as persons who have wisdom and integrity. The elders understand the traditions, culture and usages of the community that are interwoven in the patterns of the dispute. By listening carefully to the different and various views, the elders proffer solutions that restore unity and sustain cohesion within the community (Faris, 2015).

In the following section, these African restorative justice practices and local understandings of justice are considered from the perspective of the lived experienced of people in local communities in Zimbabwe.

Reflections from Buhera and Mudzi districts, Zimbabwe

As in the case in South Africa, in Zimbabwe, tradition-based justice systems have largely been sidelined in the national policy framework on addressing past injustices. Tradition-based justice systems however, serve most of Zimbabwe's population and are the main avenue for obtaining justice for 67 percent of the rural population, which constitutes the bulk of Zimbabwe's populace (ZimStats 2012). Drawing on interviews and focus group discussions conducted in Buhera and Mudzi districts with 36 participants comprising of community members and traditional leaders, the research findings indicate that tradition-based justice processes provide an avenue to address the personal, physical and metaphysical relations that are affected when conflict occurs.

In Zimbabwe, the liberation struggle (1965-79), which culminated in independence in 1980, was followed shortly after by intense levels of violence in Matabeleland and Midlands provinces (1980-87), violent land invasions (1999-2002) and electoral violence (since 2000), which has continued in the form of low-level violence between political parties until today. Efforts to provide redress to affected communities through state-led programmes have been forged through a narrow understanding of restorative justice that equates it to a watered-down version of forgiveness. For instance, Prime Minister Robert Mugabe in his inaugural speech in 1980 requested the nation to "let bygones be bygones," and this trend has been maintained through decades using political agreements (for example the Unity Accord signed between Robert Mugabe and Joshua Nkomo in 1987 to end the Matabeleland massacres), which encouraged warring parties to forgive and forget (Eppel and Raftopoulos 2008). Currently, the revised Constitution of Zimbabwe (2013) has made provision for the National Peace and Reconciliation Commission (NPRC) to be established to provide justice for past atrocities, truth-seeking, healing, reconciliation, and remedy to victims, as well as develop early warning and conflict prevention programs (Constitution of Zimbabwe, 2013:118).

However, the NPRC Bill that was gazetted by the executive on 18 December 2015 to enact the work of this commission created doubts regarding the commitment of government to addressing the past (Zimbabwe Human Rights NGO Forum 2016). For example, the draft NPRC Bill gave the executive unrestrained power to interfere in investigations of the commission, a provision that is *ultra vires* the constitution (Reeler 2016). This shortcoming, among others, indicate the gap of state-led justice processes. Even so, the prevailing political instability that was exacerbated by the military-assisted overthrow of President Mugabe in November 2017, makes it difficult for the interim government to execute justice through state-led mechanisms (Karimi & Dewan, 2017).

Violence in the particular study areas, Buhera and Mudzi districts, has manifested as contestations between the ruling Zimbabwe African National Union- Patriotic Front (ZANU-PF) and opposition Movement for Democratic Change-Tsvangirai (MDC)-T, which has mutated and infiltrated the family/clan structures at the community level. The community structure in these areas (which are predominantly rural) is formed out of family/clan population groupings that have settled within

the same area. These family/clan groupings are identified using totems and the totem represents the ancestral clan name, which enables the people to identify the family branch that one belongs to. Each clan gives reverence to the entity they named themselves after, like the *Dziva* clan that respects waterbodies and do not consume any water-living organism.

Research respondents, in discussions about their understanding of restorative justice revealed that it is much broader than the narrow view of the government that emphasizes forgetfulness and amnesty. Justice for respondents in Buhera and Mudzi districts is a verb and disposition that can be captured by local words such as *kuenzanisa* (creating a balance or making equal), *kunzwana nhunha* (listening to troubling issues), *lunganisa* (making things right or equal) and *kuringanisa* (making amends or creating a balance). The above expressions of justice speak to rebuilding relations in the physical and metaphysical realms in that they ascribe responsibility to the conflicting parties to work together and come up with amicable solutions that provide for social harmony at a cosmological level.

As mentioned earlier, this restorative justice focuses on re-instilling social harmony and trust among conflicting parties, rather than simply apprehending offenders following laws of the state. People in Buhera and Mudzi districts subscribe to the understanding that *kuti munhu unzi munhu, vanhu* (a person is a being because of other people), which reinforces the relevance of Ubuntu/Unhu as a fundamental value of the community. As discussed earlier, the African philosophy of *Ubuntu* denotes a moral status of wholeness or oneness of life and locates the individual human being within the larger community (Nabudere, 2011; Setiloane, 1978). Using Ubuntu/Unhu as an analytical lens it provides the understanding of human beings as interdependent entities, hence meanings of justice such as *kuenzanisa* (creating a balance), *kunzwana nhunha* (listening to troubling issues) and *lunganisa* (making things equal), shared by the respondents, describe the inter-relational responsibility that people have in their community.

In rendering *kuenzanisa* or *kunzwana nhunha*, the collaborative efforts of the family/community lighten the burden on the affected parties and often empower the individuals. Moreover, *kuenzanisa* or *lunganisa* retains an equilibrium between the conflicting parties because an injustice is understood as 'deviant behaviour' that destroys the essence of another human being. The balance mentioned by the participants is synonymous to a "modicum of normality" (a position of sustainable peace and co-existence), described in the work of Sarkin (2008:13). Furthermore, in

kunzwana nhunha, the community showers the affected party with empathy, which is a crucial component in the justice process because it gives public acknowledgement of the harm done and re-affirms the dignity of the persons involved.

Hunhu/Ubuntu (the ethical code) is central to the essence of humanity among the local community, in that even those accused of wrong doing, are still seen as human beings though they have deviated from the moral codes of the community. Hence, the justice pursued seeks to acknowledge the wrongs done and to make the offender aware of the impact their actions have on others.

Once an offender has become aware, they are expected to take responsibility by reaching out to the affected party and ask for forgiveness as well as pay any compensation that may be required. For example, in the case of murder, the offender is expected to follow the tradition-based practice of *kuripira ngozi* (appeasing avenging spirits), which is a ritual that is done to offer compensation and appeasement to the spirit of the deceased. This tradition-based practice was observed in both Mudzi and Buhera districts, as many of the respondents explained their knowledge of other community members who had been affected by *ngozi* (avenging spirit). During a focus group meeting with traditional leaders in Mudzi district, the practice of *ngozi* was described as follows:

> If a person experiences an unlawful death, the spirit of the deceased comes back to haunt those accused of causing the death. This spirit *unonogara munhu* (occupies the body of another person) within the family of the accused and speaks out its demands, which should be met for the tormenting to stop. At times, the spirit can start off by causing misfortunes and strange ordeals to the family of the accused and people usually go *kunobvunzira* (consulting with spiritual/traditional healers) so that they get a way to address the occurrences. During these consultations, the spirit of the deceased often makes its demands known and, it usually requires an appeasement. *Pachinyakare* (in the olden days) the spirit would demand a wife as compensation, but we have long moved from that method of appeasement. Nowadays we use livestock and money to appease the spirit and, we do a cleansing ritual (Chief, Mudzi district).

Benyera (2014) elaborates on this tradition-based justice process by noting that in the Zimbabwean African culture an undignified death is shameful to the ancestral community because the deceased cannot

assume the ancestral responsibility of protecting and blessing the family. He adds that the family of the deceased remains aggrieved because they have been robbed of the opportunity to be looked after by their loved one. Eppel (2006) and Nyathi (2015) further state that death in the Zimbabwean culture is a rite of passage that one ought to enter in accordance with traditions and practices of one's ancestral family. Nyathi (2015) adds that the Africans in Zimbabwe are devoted to maintaining the harmonious continuation of the cosmological community (physical and metaphysical realms) because that is the essence of their humanity, which guarantees the existence and expansion of their lineage. It is against this backdrop that the practice of appeasing avenging spirits has become a popular phenomenon of resolving conflict among the local communities.

Spiritual agency is also central to how community members relate with one another in peaceful and difficult times. Among the local community, restoration of social harmony is not only done to repair relations between the living beings (spirit of the living persons) but extends to the bigger community made up of the living dead (spirit of deceased persons) and unborn living (spirit of a person yet to exist in the physical realm). This stems from the understanding that a living being is a spirit being, who belongs to a cosmological community made up of the physical and metaphysical realms. Within each realm are living entities bound by an interdependent relationship that connects those existing in the physical world and the metaphysical. As such, when violence occurs, the justice rendered seeks to repair the damage that occurs to entities in both the physical and metaphysical realm. This captures the humanistic and spiritual values of *Ubuntu* that it preserves social harmony between the living, the not yet living and the living dead in all circumstances.

More so, compensation as described in the above narrative stands as a form of retribution to the offender in that one parts with either material or financial resources to appease the wounded party. Among the local people, compensation is a punitive measure of their justice process and it is offered to improve the well-being of the affected party or the family thereof. This can be understood as their way of balancing retributive and restorative justice, without incarcerating the offender. Incarceration is not well supported among the local people because of the economic and social burden that comes with having to look after the family of the prisoned offender. The injustices that have occurred in Buhera and Mudzi districts involve people within the same community,

some are even siblings, which means that when someone is sent to jail, the other family members would end up taking over the family responsibilities of the imprisoned party.

This section has revealed some of the ways local community members understand justice, not so much in terms of the relationship between an individual and the state, but in terms of the network of relationships within the whole community. This has implications for how restorative justice is understood.

Conclusion

The discussions on justice practices in South Africa and Zimbabwe reveal some of the complexity of restorative justice in the African context. They reveal some of the difficulties in bringing together human rights, human dignity, customary law and the state-led justice system. Part of the challenge is assuming that justice practices in these contexts reflect restorative justice practices as they have been developed in Europe and North America, but as discussed in the introduction, global understandings of restorative justice do not necessarily reflect the norms and values in relation to justice in the African context.

Without intending to homogenise justice practices across the continent, this article has pointed to some characteristics of African restorative justice, and local understandings of justice in South Africa and Zimbabwe. It also considered how these practices might inform how we understand restorative justice in an African context, in relation to national, state-led interventions in response to mass violence. Other examples exist across the continent. For example, in Sierra Leone, the Truth and Reconciliation Commission Act authorised the commission to seek assistance from the informal justice systems in holding public sessions and dealing with localised conflicts (Allen & Macdonald, 2013). In Rwanda, the tradition-based practice, *gacaca,* was adapted and became fully part of the state-recognised system (Allen & Macdonald, 2013).

From this discussion, we ask the question, how might tradition-based practices be integrated with state systems? What guidelines might assist in preventing difficulties? As a foundation, we argue that these decisions need to be rooted in the African humane values based on Ubuntu and jurisprudence outlined in this article (Faris 2015; Institute for Dispute Resolution in Africa Annual Report 2014).

Secondly, these decisions need to acknowledge the developments in understanding knowledge and a renewed appreciation for community knowledge and indigenous knowledge that can be brought together in a fraternity of knowledge to develop a new 'cognitive justice' (Faris 2014: ii). This process is also known as developing endogenous knowledge, which has been defined as being: a community-, site- and role-specific epistemology governing the structures and development of the cognitive life, values and practices shared by a particular community (often demarcated by its language) and its members, in relation to a specific life-world (Devisch & Crossman, 2002 in Rist et al., 2011:121).

Rist et al. (2011) go on to explain that endogenous knowledge is generally understood as a process of social construction carried out by a community that interacts on the basis of a shared worldview, that is, symbolic representations, epistemology, norms and values, and practices. Scientific knowledge, instead of representing a universal product of the highest cognitive development of humanity that allows humanity to get rid of 'indigenous beliefs' expressed in idolatry, superstition, and ill-understood relations between nature and society, becomes just one – albeit important– form of knowledge among others.

Kaniki and Mphahlele (2002) in Sewdass (2014:5), reflect a similar view when defining indigenous knowledge. Since indigenous knowledge and skills and innovation are shared over generations, each new generation is constantly adding to this knowledge and adapting it to fit in with the changing situations within the community and the environment. Hence, indigenous knowledge is fluid and may not necessarily be usable within a formal structure or organization (Sewdass 2014:5).

These perspectives help us move beyond the dual thinking that is often apparent in public discourse, of either rejecting tradition-based practices as undemocratic and having nothing to offer a new, contemporary democratic order, or accepting it idealistically and uncritically.

A third foundation that flows from the first two is proposed from the perspective of Schweigert (1999). He regards a restorative practice as drawing on the moral authority of the state, through mechanisms such as universal values, a country's constitution, and public representatives. It also draws on the authority of the family and local community and the values rooted in familial, cultural and religious traditions. A restorative practice is thus regarded as a public space where communal values can be expressed, but it does not guarantee that they will be incorporated into

the outcome. This is because they are subjected to the test of their alignment with universal values. Schweigert sees two movements in a restorative practice in this regard: raising consciousness of the moral values underlying democratic society, and reinforcing and testing the substantive moral values in families and communities against universal and societal values (Schweigert, 1999:32).

The distinctive features of the African worldview and the use of mediators, together with the potential suggested by the use of tradition-based practices indicates ways in which restorative justice as an approach, together with mediation, can be brought into the mainstream of the administration of justice in pursuit of the sustainable development goal of providing access to justice for all.

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