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RESTORATIVE JUSTICE:

A NEW APPROACH

TO CONTEMPORARY CRIMINAL JUSTICE IN TANZANIA

by

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Declaration

I, Ntemi Nihilwa Kilekamajenga, do hereby declare that the contents of this thesis are the result of my original authorship. Neither the whole nor part of its contents has been submitted for award of any degree at any university.

Signature _____

Date _____

Abstract

Tanzania is one of the jurisdictions that follows a common law adversarial criminal justice system. It is argued in this research that this system faces a host of challenges in addressing the needs of victims and offenders; holding offenders accountable; repairing harm and restoring relationships among parties; and involving the community in decision-making in dispute resolution. As such, this study investigates the possibility of applying restorative interventions in the criminal justice process in Tanzania Mainland. It is argued that restorative justice is a viable system for resolving minor or non-violent cases involving adult offenders.

In this regard, the thesis examines well-established practices of restorative justice in relation to juvenile as well as adult offenders in North America and New Zealand, the intention being to lay the groundwork for the development of a governing framework specifically for adult-offender programmes; in addition, an opportunity for restorative intervention for serious crimes is provided as an option for willing parties. It is proposed that in Tanzania Mainland, restorative justice interventions could operate in conjunction with adversarial criminal justice as complementary justice mechanisms at different stages of the relevant processes.

However, while the experience of restorative interventions in other jurisdictions is relevant, this research puts the emphasis on restorative justice in an African context. African jurisprudence based on the *ubuntu* or *utu* is taken as a platform for the implementation of restorative justice in Africa in general and Tanzania in particular. This research examines indigenous justice practices and how their values can be incorporated in the contemporary criminal justice system. Hence, the proposed restorative justice model in Tanzania Mainland takes on board both modern restorative justice and indigenous justice practices.

The research is divided into nine chapters. Chapter 1 sets the scene by establishing the rationale of this research. It identifies the challenges presented by the contemporary criminal justice system and defines some key concepts. The chapter establishes opportunities available within the laws of Tanzania which may foster the establishment of restorative justice programmes. The chapter further sets up the scope and provides the methodology of the research. Chapter 2 analyses modern restorative justice by considering different definitions of restorative justice and provides a background to the genesis of restorative justice theory. The elements and advantages of using restorative justice are analysed in this chapter. The

contemporary debates in restorative justice are listed and discussed in order to highlight the challenges that may arise in implementing restorative justice in Tanzania Mainland. Chapter 3 discusses different types of restorative justice practices such as victim-offender mediation, family group conferencing, conferencing circles and sentencing circles. The chapter considers other restorative justice practices with an indigenous justice approach such as the Zwelethemba justice model. The chapter also points out the stages under which diversionary measures for restorative justice may be considered. Chapter 4 views restorative justice in the perspective of indigenous justice. Hence, practices of indigenous restorative justice practices as practiced by the Maori and Navajo tribes are evaluated. The chapter further analyses the differences and similarities between modern restorative justice and indigenous restorative justice practices. Chapter 5 views restorative justice with an African indigenous justice jurisprudence. This chapter considers restorative justice in the context of transitional societies engaged in post-conflict reconstruction in Africa. Chapter 6 considers *ubuntu* and *ujamaa* as African jurisprudence that takes on board restorative justice values. A critical analysis of *ubuntu* through cases and how it has influenced the judicial thinking is addressed in this chapter.

Chapter 7 addresses the Tanzanian contemporary criminal justice system. The chapter establishes how victims, offenders and the community are involved in the criminal justice process. The chapter takes a form of comparative analysis by bringing examples from other jurisdiction which have improved the criminal justice by involving victims, offenders and the community in dispute resolution. The chapter indicates that the contemporary criminal justice in Tanzania Mainland is technical for lay persons to fairly argue their cases for justice. Also, the court language concern in Tanzania Mainland which has been a controversial for years is addressed in this chapter. Chapter 7 provides opportunities available from the laws of Tanzania Mainland which may accommodate restorative justice in the criminal justice. The provisions of the Constitution of the United Republic of Tanzania 1977, the Criminal Procedure Act, 1985 and the Magistrates' Courts Act, 1984 which may harbour the establishment of restorative justice programmes are discussed. Chapter 9 concludes the research by posing recommendations for the Tanzania restorative justice model. The proposed model may involve the Police, Social Welfare Officers, Village Council and Ward Tribunals at different stages of the criminal justice process.

Key Words

Accountability

Community

Criminal justice system

Fambul toks

Gacaca courts

Indigenous justice

Restorative justice

Tanzania

Truth and Reconciliation Commission

Ubuntu

Victims' rights

Ward Tribunal

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Chapter 1:

Introduction

1.1 Introduction

*'[C]onflicts have been taken away from the parties directly involved and thereby have either disappeared or become other people's property.'*¹

The article 'Conflicts as Property' by Nils Christie is one of the most frequently cited journal articles in restorative justice discourse. He argued that conflict, which is the 'property' of a community, has been taken away from the affected parties. This valuable 'property' has been 'stolen' by professionals who are not an actual part of the conflict.² As result, the victim's right to participate in the conflict is limited to the role of a witness.³

In response, Daly acknowledges that Christie's analysis of the value of conflict in society is an original idea and still relevant in modern societies.⁴ Froestad and Shearing, in analysing Christie's idea of restoration, link the modern concept of restorative justice to an African perspective reflected in *ubuntu* and *Zwelethemba* justice.⁵ Christie's articulation of restorative justice was based on traditional restorative justice in Arusha, Tanzania.⁶ In traditional restorative justice in Tanzania, Christie observed justice principles thus: parties were central in dispute resolution, the conflict was not 'taken over' by professionals, the procedure was participatory, with a friendly environment, and the conflict was resolved by the community itself.⁷ Christie viewed conflict resolution in the form of restorative justice as an act of 'bringing things back to old forms'.⁸ His analysis fits in with Zehr's argument that 'when properly guided, supported and safeguarded, people and communities are capable of finding

¹ Nils Christie 'Conflict as property' 17 *British Journal of Criminology* 1977 at 1.

² Christie (1977) at 4.

³ *Id* at 1.

⁴ Kathleen Daly 'More words on words' 1(1) *Restorative Justice: An International Journal* 2013 at 23.

⁵ Jan Froestad and Clifford Shearing 'Meditative reflections on Nils Christie's "Words on words", through an African lens' 1(1) *Restorative Justice: An International Journal* 2013. The *Zwelethemba* model of justice is discussed in Chapter 3. The definition of *Ubuntu* is provided below and the concept is expounded in Chapter 6.

⁶ See Christie (1977) at 2.

⁷ *Ibid.*

⁸ Nils Christie 'Words on words' 1(1) *Restorative Justice: An International Journal* 2013 at 16.

solutions to their problems'.⁹

However, despite the fact that Christie chose to illustrate his theory through a practical example from Tanzania, there are no academic publications in that country that build on this thinking. Furthermore, the formal justice system in Tanzania has taken little or nothing from traditional justice processes, and a visit to any contemporary criminal justice court in Tanzania would not give the observer the sense that this country was a site of inspiration for modern restorative justice. The colonially inherited adversarial justice system continues to offer a disappointing justice process that does not meet the needs of the participants.¹⁰ Even the juvenile justice system in Tanzania has neglected the principles of justice observed by Christie in Arusha because it involves professionals using an adversarial form of justice.¹¹

This research therefore fills a void in the documentation of Tanzania's problematic contemporary justice system and highlights the opportunities of implementing restorative measures in and alongside Tanzanian criminal justice system. The research explores the role of African philosophies such as *ubuntu* in South Africa, *utu* in east and central Africa¹² and *ujamaa* in Tanzania, with the view to exploring justice mechanisms that adopt traditional restorative practices.¹³ The philosophy of *ubuntu* was applied in conflict resolution after the apartheid regime and is the foundation of restorative justice in South Africa.¹⁴ Braithwaite links reconciliation with the historical roots of justice and further connects it to *ubuntu* in

⁹ Howard Zehr *The little book of restorative justice* Good Books USA 2002 at 67.

¹⁰ A search for the terms 'restorative justice in Tanzania' in international academic databases such as Westlaw and Hein online does not reveal a single publication with a Tanzanian perspective, except for the popular publication by Lugakingira and Peter on victim compensation. An internet search using the same phrase displays the recent publication on restorative justice by the author of this thesis. See Kahwa SK Lugakingira and Chris Maina Peter 'Victim compensation and aspects of law and justice in Tanzania' 18(3) *International Criminal Justice Review* 2008; Ntemi Nimilwa Kilekamajenga 'Learning from contemporary examples in Africa: Referral mechanisms for restorative justice in Tanzania' 63 *South Africa Crime Quarterly* 2018.

¹¹ See Chapter 8. See also the contrast made by Christie between the traditional restorative justice and juvenile justice in Scandinavia. Christie (1977) at 2-3.

¹² See Chuma Himonga, Max Taylor and Anne Pope 'Reflections on judicial views of *Ubuntu*' 16(5) *PER/PELJ* 2013. The concept of *ubuntu* and its influence on restorative justice is expounded further in Chapter 6 of this thesis.

¹³ *Ujamaa* translates to 'familyhood'. See Chapter 6 for further analysis; see also Julius K Nyerere *Freedom and unity; Uhuru na Umoja: A selection from writings and speeches 1952-65* Oxford University Press Dar es Salaam 1967 at 170.

¹⁴ See Chapter 6.

South Africa.¹⁵ In Tanzania, *ujamaa* and self-reliance, advocated by Julius Nyerere after independence, has remained a constitutional value.¹⁶ Unlike *ubuntu*, *ujamaa* has not been enshrined by judicial articulations to bring about a participatory criminal justice system that nurtures the spirit of togetherness.

This research therefore investigates the viability of implementing restorative justice in Tanzania.¹⁷ while embracing cultural factors in dispute resolution.¹⁸ It surveys restorative justice practices used elsewhere that could be adopted in the contemporary criminal justice system in Tanzania. The research explores the extent to which restorative justice can be applied in Tanzania as a complementary criminal justice system in cases involving adult offenders.¹⁹ Emphasis is placed on the opportunities for applying restorative justice such that the following outcomes may be achieved: holding offenders accountable, addressing victim needs, repairing harm caused by criminal conduct, healing victims of crime's traumatic effects, and ensuring community participation in decision-making.

The rationale for this study is that the absence of coherent, generally acceptable and implementable restorative justice programmes as an alternative to retributive justice has led to the denial of victims' rights, a backlog of petty criminal cases in courts, prison congestion and an increased reoffending rate in Tanzania. Experiments under way in various jurisdictions on the use of restorative justice for adult offenders are considered.²⁰ In addition, the application of restorative justice in juvenile justice in many jurisdictions around the world is used as a point of departure for introducing restorative measures for adult offenders in

¹⁵ John Braithwaite 'Western words' 1(1) *Restorative Justice: An International Journal* 2013 at 21-22.

¹⁶ See the Constitution of the United Republic of Tanzania of 1977, the preamble and article 9.

¹⁷ Tanzania in this thesis refers to Tanzania Mainland and occasional reference to Tanzania Zanzibar is expressly stated.

¹⁸ Much literature discusses restorative justice as a foreign concept, but it is argued in this research that traditional justice practices which are similar to modern restorative justice were and are still a prevalent model of justice in some communities in Africa. Hence, there are strong traces of restorative justice in Africa, which can be considered for implementation of modern restorative measures in Tanzania Mainland. See, for instance, the argument advanced by Fainos Mangena 'Restorative justice's deep roots in Africa' 34(1) *South Africa Journal of Philosophy* 2015.

¹⁹ As discussed in Chapter 8, juvenile justice in Tanzania makes minimal use of restorative measures.

²⁰ See, for instance, Joanna Gwen Robinson and Angela Sorsby *Restorative justice in practice: Evaluating what works for victims and offenders* Routledge London 2011.

Tanzania.²¹ The research centres on the potential application of restorative justice processes in minor and non-violent crimes falling under the jurisdiction of subordinate courts in Tanzania.²²

1.2 Context of the study

1.2.1 The adversarial criminal justice system

The adversarial criminal justice system applies in many common law jurisdictions, including Tanzania. This system of justice presents a myriad of challenges to clients and the public. It fails to meet the needs of the victim, offender and community, and role-players in the justice process and the public feel that vacuum.²³ The contemporary criminal justice normally decouples the conflict from the most affected parties.²⁴ It tends to side-line major stakeholders (victim, offender and the community) in the criminal justice process.²⁵ According to Roche, the adversarial criminal justice system is modelled on and controlled by ‘law’ and ‘professionals’.²⁶ It does not operate for the interests of the affected parties, and by recognising the State as an ‘impersonal’ victim of the crime, it leaves the individual victim aside.²⁷ Prosecutors, defence attorneys, judges and magistrates become major actors for the

²¹ As discussed in subsequent chapters, although many jurisdictions now practice restorative justice for juvenile offenders, this research has selected a number of jurisdictions as a model for discussion. Hence, the practice of restorative justice in North America, New Zealand; the jurisprudence of African restorative justice in South Africa; and the use of traditional restorative justice practices in Rwanda, Sierra Leone and Uganda are considered for the purposes of providing practice-based evidence for the application of restorative justice for adult offenders.

²² The Criminal Procedure Act, Chapter 20, Revised Edition 2002, section 2 defines a subordinate court as ‘any court, other than the court martial, which is subordinate to the High Court’.

²³ Zehr (2002) at 2; Marc Groenhuijsen ‘Victims’ rights and restorative justice: Piecemeal reform of the criminal justice system or a change of paradigm?’ in Hendrik Kaptein and Marijke Malsch (eds) *Crime, victims and justice: Essays on principles and practice* Ashgate Publishing 2004 at 67; Heather Strang and Lawrence W Sherman ‘Repairing the harm: Victims and restorative Justice’ in Carolyn Hoyle (ed) *Restorative justice: Critical Concepts in Criminology* Vol. III Routledge London 2010 at 38.

²⁴ Christie (1977) at 3-4.

²⁵ Jonathan Doak *Victims’ rights, human rights and criminal justice: Reconceiving the role of third parties* Hart Publishing Oxford and Portland Oregon 2008 at 35; Douglas E Beloof, Paul G Cassel and Steven J Twist *Victims in criminal procedure* 3rd ed Carolina Academic Press Durham, North Carolina 2010 at 11-21.

²⁶ Declan Roche *Accountability in restorative justice* Oxford University Press USA 2003 at 26.

²⁷ *Id* at 26-27.

justice of the victim, offender and community.²⁸ Legal professionals impose outcomes at the conclusion of the justice process.²⁹ Even the victim's right to compensation has been 'stolen' by the State in the name of a 'fine'.³⁰ The criminal process is sometimes unfriendly, putting justice stakeholders under pressure and causing anxiety.³¹

1.2.2 The victim in the criminal justice system

Individual victims express the sense of being ignored by the adversarial justice process.³² Victims are not at the centre of the process of justice and their wounds, needs, losses and trauma remain unattended to.³³ A crime normally has a host of effects, not only for the victim³⁴ but relatives, friends, and the community at large.³⁵ To the victim, the crime can occasion material losses,³⁶ physical injuries, and temporary or even permanent body dysfunction.³⁷ Injury to a victim's body cannot be monetarily reckoned even where the offender pays compensation.³⁸ Because of physical injury, the victim is sometimes required to seek medical treatment, which can be costly and time-consuming. The crime can place a

²⁸ See Howard Zehr *Changing lenses: A new focus for crime and justice* 3rded Herald Press Scottsdale Pennsylvania 2005 at 81; Jennifer Larson Sawin and Howard Zehr 'The ideas of engagement and empowerment' in Gerry Johnstone and Daniel W Van Ness (eds) *Handbook of restorative justice* Willan Publishing USA 2007 at 43.

²⁹ Christie (1977); Zehr (2005) at 81.

³⁰ Christie (1977) at 7.

³¹ Daniel W Van Ness 'New Wine and Old Wineskins: Four Challenges of Restorative Justice' in Declan Roche (ed) *Restorative Justice* Ashgate USA 2004 at 161; Jessica Kennedy, Patricia Easteal and Lorana Bartels 'How protected is she? "Fairness" and the rape victim witness in Australia' 35 *Women's Studies International Forum* 2012 at 335.

³² Heather Strang *Repair or revenge: Victims and restorative justice* Oxford University Press New York 2002 at 3; Zehr (2002) at 12 and 24; Sawin and Zehr (2007) at 44; Strang and Sherman (2010) at 37; Jill Schellenberg 'A victim with special needs: A case study' in John PJ Dussich and Jill Schellenberg (eds) *The promise of restorative justice: New approaches for criminal justice and beyond* Lynne Rienner Publishers USA 2010 at 55.

³³ Christie (1977) at 7; Strang (2002) at 6; Roche (2003) at 32; Zehr (2005) at 33, 63 and 82; see also James Dignan 'Evaluation restorative justice from a victim perspective: Empirical evidence in Carolyn Hoyle (ed) *Restorative justice: Critical concepts in criminology* Vol. III Routledge London 2010 at 5; Kerstin Braun 'Giving victims a voice: On the problems of introducing victim impact statements in Germany criminal procedure' 14 *German Law Journal* 2013 at 1889.

³⁴ Jamie Balson 'Therapeutic jurisprudence: Facilitating healing in crime victims' 6 *Phoenix Law Review* 2013 at 1022.

³⁵ See Zehr (2002) at 16.

³⁶ Michael S King 'Restorative justice, therapeutic jurisprudence and the rise of emotionally intelligent justice' 32 *Melbourne University Law Review* 2008 at 1103.

³⁷ King (2008) at 1103.

³⁸ Susan Daicoff 'Apology, forgiveness, reconciliation and therapeutic jurisprudence' 13 *Pepperdine Dispute Resolution Law Journal* 2013 at 149.

victim's employment or other income-generating opportunities at risk.³⁹

Furthermore, a crime can cost one or more person's life; hence family members, friends and the community are affected.⁴⁰ Even where the victim survives, the crime leaves a trail of psychological effects.⁴¹ These include depression, anxiety, fear, humiliation, anger, powerless, betrayal, post-traumatic disorder,⁴² stress, shame, blame, guilt, rage, alcoholism, mental illness, behavioural disorder, and loss of confidence, sleep or appetite.⁴³ It is also argued that crime can cause 'a loss of dignity, happiness, confidence, security, personal power and sense of self-worth'.⁴⁴ In the aftermath of the crime, the victim can be emotional and have vengeful thoughts.⁴⁵ Both violent and non-violent crimes are believed to have psychological effects to varying degrees.⁴⁶ It is argued that the psychological effects are more far-reaching for the victim than material and financial losses.⁴⁷

While a criminal case is tried for the interests of the State, the role of the victim cannot be ignored.⁴⁸ The victim is always a loser, though an important party for the case, mostly as an eye-witness.⁴⁹ Such victim-neglect generates traumatic effects for victims.⁵⁰

Apart from the victim being side-lined, the criminal justice system, especially the cross-

³⁹ Jo Goodey *Victims and victimology: Research, policy and practice* Pearson England 2005 at 122.

⁴⁰ See Christie (1977) at 37.

⁴¹ Bruce J Winick 'Therapeutic jurisprudence and victims of crime' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds) *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* Carolina Academic Press Durham 2011 at 5.

⁴² *Id* at 4.

⁴³ Susan Herman 'Is restorative justice possible without a parallel system for victim?' in Howard Zehr and Barb Toews (eds) *Critical issues in restorative justice* Willan Publishing USA 2004 at 77; Zehr (2005) at 21-23.

⁴⁴ Roche (2003) at 27.

⁴⁵ King (2008) at 1103.

⁴⁶ Zehr (2005) at 24.

⁴⁷ *Id* at 25.

⁴⁸ Jo Winter 'The trial of Rose West: Contesting notions of victimhood' in Carolyn Hoyle and Richard Young (eds) *New visions of crime victims* Hart Publishing Oxford 2002 at 175.

⁴⁹ Winter argues that where a victim cannot be identified, the crime is regarded as less serious. However, this is debatable because some offences may lack direct victims, such as drug-dealing, but still be serious. Winter (2002) at 176; Andrew Sanders 'Victim participation in an exclusionary criminal justice system' in Carolyn Hoyle and Richard Young (eds) *New visions of crime victims* Hart Publishing Oxford 2002 at 198-199.

⁵⁰ Zehr (2005) at 52; Howard Zehr 'Restorative justice and the death penalty' in John PJ Dussich and Jill Schellenberg (eds) *The promise of restorative justice: New approaches for criminal justice and beyond* Lynne Rienner Publishers USA 2010 at 135.

examination process, may be damaging to victims.⁵¹ The criminal justice process may humiliate victims;⁵² for victims of sexual abuse, it may amount to a re-experience of abuse.⁵³

It is unfortunate that the process of justice does not aim at bringing relief to victims.⁵⁴ It achieves neither healing, reconciliation, nor social harmony.⁵⁵ Courts seem to attach less weight to such aspects of victims' healing as repentance, confession, forgiveness and reconciliation.⁵⁶ As a result, victims regard the adversarial process as coercive and anti-therapeutic because it is unable to heal the traumatic effects of the crime.⁵⁷ The justice system seems to confer more rights to offenders than to victims. When justice centres on the victim's rights, the process may bring validation and assist him or her in finding healing and closure.⁵⁸ Victims' integration in the criminal justice process may be achieved by permitting victim impact statements⁵⁹ or applying restorative justice.⁶⁰

1.2.3 The offender under the criminal justice system

Under the adversarial criminal system, offenders do not seem to take 'true responsibility' as the encounter in the contemporary criminal justice process does not provide an opportunity to

⁵¹ Anne Hayden and Katherine van Wormer 'Restorative justice and gendered violence' in Katherine S. Van Wormer and Loren Walker (eds) *Restorative justice today: Practical applications* SAGE Publications 2013 at 126-127; Tinneke Van Camp *Victims of violence and restorative practices: Finding a voice* Routledge USA and Canada 2014 at 64.

⁵² J Kim Wright *Lawyers as peacemakers: Practicing holistic, problem-solving law* ABA Publishing USA 2010 at 267; see also Loren Walker 'Restorative justice for victims without offender participation' in Katherine S Van Wormer and Loren Walker (eds) *Restorative justice today: Practical applications* SAGE Publications 2013 at 34.

⁵³ Sue Lees 'Judicial rape' 16(1) *Women's Studies International Forum* 1993 at 11.

⁵⁴ Louise Ellison 'The protection of vulnerable witnesses in court: An Anglo-Dutch comparison' 3(1) *The International Journal of Evidence and Proof* 1999 at 29; Wright (2010) at 267; Camp (2014) at 64.

⁵⁵ Zehr (2005) at 51.

⁵⁶ Zehr has encountered complaints about victims being neglected by prosecutors because the victim is the state. See Roche (2003) at 26; *Id* at 51 and 81-82; Zehr (2010) at 135.

⁵⁷ See Winick (2011) at 3 and 7; E Erez, PR Ibarra and DM Downs 'Victim welfare and participation reforms in the United States: A therapeutic jurisprudence perspective' in E Erez, M Kilchling and J Wemmers (eds) *Therapeutic jurisprudence and victim participation in justice: International perspective* Carolina Academic Press Durham 2011 at 17.

⁵⁸ Erez, Ibarra and Downs (2011) at 20.

⁵⁹ *Id* at 24; see also Winick (2011) at 6; see Braun (2013) at 1890.

⁶⁰ Winick (2011) at 6; Bas van Stokkom 'Victims' needs, well-being and 'closure': Is revenge therapeutic?' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds) *Therapeutic jurisprudence and victim participation: International perspectives* Carolina Academic Press Durham 2011 at 209.

make matters right.⁶¹ Braithwaite views ‘encounter’ as a process of shaming through the community’s disapproval of the offender’s behaviour.⁶² Offenders do not face victims and therefore often fail to feel and understand the effects of the crime.⁶³ Miller argues that the punishment of the offender is given for the interest of the State and does not provide accountability for the benefit of victims.⁶⁴ Many offenders are committed to prison as a form of punishment desired by the State. As a result, the adversarial criminal justice system leads to prison overcrowding.⁶⁵

These prisoners may never know the effects of their acts or feel the costs of reparation and accountability, because they had no opportunity to hear victims.⁶⁶ Many of the offenders who are overcrowding prisons, especially in Tanzania, have committed non-violent crimes.⁶⁷ According to a report on human rights in Tanzania, some prisoners are victims of fabricated cases⁶⁸ which could be not be tried due to the costs of engaging the formal justice system.⁶⁹

⁶¹ Howard Zehr ‘Retributive justice, restorative justice’ in Gerry Johnstone (ed) *A restorative justice reader* 2nded Routledge London and New York 2013 at 24.

⁶² John Braithwaite *Crime, shame and reintegration* Press Syndicate of the University of Cambridge Australia 1989.

⁶³ Zehr (2002) at 14 and 15; Christie (1977) at 44.

⁶⁴ Susan Miller *After the crime: The power of restorative justice dialogues between victims and violent offenders* New York University Press New York 2011 at 16.

⁶⁵ On 9 December 2017 while commemorating Independence Day, the President of Tanzania said the country had 39,000 inmates and used the occasion to pardon 8,000 of them, of whom some were awaiting execution of death sentence or serving life sentences: <https://www.youtube.com/watch?v=TJuOTFoA-qw> (accessed 19 December 2017). According to the Tanzania Human Rights Report (2011), the number of inmates in 2011 in Tanzania prisons stood at 45,000 while prisons had capacity to accommodate only 26,669: this was a 100 per cent increase. See Tanzania Human Rights Report’ (2011) at 189 <http://www.policyforum-tz.org/files/TANZANIAHUMANRIGHTSREPORT2011.pdf> (accessed 5 March 2015). In addition, according to the Tanzania Human Rights Report (2013), the number of inmates was reported to be 34,355 while the prison capacity remained the same. Of this number, 18,025 inmates were pre-trial and remand prisoners, and therefore only 16,330 were convicted prisoners. Former president Jakaya Kikwete has urged judges and magistrates to apply the alternative sentences available for trifling offences. See Tanzania Human Rights Report’ (2013) at 233-234 and 238 <http://www.humanrights.or.tz/downloads/tanzania-human-rights-report-2013.pdf> (accessed 4 March 2015).

⁶⁶ Hadar Dancig-Rosenberg and Tali Gal ‘Restorative criminal justice’ 34 *Cardozo Law Review* 2013 at 2330; see also Zehr (2005) at 43.

⁶⁷ Tanzania Human Rights Report (2012) at 226, http://www.humanrights.or.tz/downloads/tanzania_human_rights_report_2012.pdf (accessed 4 March 2015); see also Tanzania Human Rights Report (2013) at 237. In the United States, only 7.6 per cent of inmates were violent offenders in 2011, http://ojp.gov/newsroom/pressreleases/2012/ojppr121712_2.pdf (accessed 13 March 2015). See also LC Sanders ‘Restorative justice: The attempt to rehabilitate criminal offenders and victims’ 2 *Charleston Law Review* 2008 at 925.

⁶⁸ See Tanzania Human Rights Report (2012) at 223 and 225; Tanzania Human Rights Report 2016 at 158.

Because of the demands of the adversarial system and the lack of an alternative approach to punishment, many convicts receive disproportionate punishment.⁷⁰ Some convicts pay fines into the State's coffers,⁷¹ leaving the victim with 'losses and grievances'.⁷² The same offender, after causing harm to the victim, community and the State at large, *ipso facto* continues to utilise taxpayer's money in prison with little contribution to the State's stake.⁷³ According to Strang, remedies under the criminal justice process such as fines, community service and incarceration sometimes have no connection to the harm caused by the offender as they are either more lenient or more severe than the harm merits.⁷⁴

It is also argued that sending an offender to prison, which is the direct outcome of the modern criminal system, is an expensive burden on taxpayers.⁷⁵ According to Keve, incarceration of a young offender in the United States for one year is a huge expense to the state that equates to sending the same person to one of the most expensive universities in the world, such as Harvard.⁷⁶ However, the cost of keeping prisoners in developing countries such as Tanzania may be low due to lower standards of services to prisoners, and this may make the cost-

⁶⁹ In Tanzania, in the budget speech of 2017/18, the Minister requested 83,718,868,000 Tanzania shillings as prison expenses. This amount excludes salaries for prison staff. See [http://www.parliament.go.tz/uploads/budgetspeeches/1494435199-Hotuba per cent20ya per cent20Bajeti-Wizara per cent20Mambo per cent20ya per cent20Ndani per cent20ya per cent20Nchi.pdf](http://www.parliament.go.tz/uploads/budgetspeeches/1494435199-Hotuba%20per%20ya%20per%20Bajeti-Wizara%20per%20Mambo%20per%20Ndani%20per%20Nchi.pdf) (accessed 15 December 2017). See also [http://www.parliament.go.tz/uploads/budgetspeeches/1494435199-Hotuba per cent20ya per cent20Bajeti-Wizara per cent20ya per cent20Mambo per cent20ya per cent20Ndani per cent20ya per cent20Nchi.pdf](http://www.parliament.go.tz/uploads/budgetspeeches/1494435199-Hotuba%20per%20ya%20per%20Bajeti-Wizara%20per%20Mambo%20per%20Ndani%20per%20Nchi.pdf) (accessed 16 April 2018).

⁷⁰ Randy E Barnett 'Restitution: A new paradigm of criminal justice' in Carolyn Hoyle (eds) *Restorative justice: Critical concepts in criminology* Vol. I Routledge USA and Canada 2010 at 40.

⁷¹ Walker (2013) at 5.

⁷² Lode Walgrave *Restorative justice, self-interest and responsible citizenship* Willan Publishing USA and Canada 2008 at 65.

⁷³ See, for instance, Barnett (2010) 40. It is an undisputed fact that governments spend money to pay prison staff, feed and provide necessities to prisoners.

⁷⁴ Strang (2002) at 1.

⁷⁵ Tom Ellis and Chris Lewis 'Prison works! Or prison works' in Tom Ellis and Stephen P Savage (eds) *Debates in criminal justice: Key themes and issues* Routledge London 2012 at 123.

⁷⁶ Paul W Keve *Prison life and human worth* University of Minnesota Press Minneapolis 1974 at 11 and 170; Lawrence W Sherman and Heather Strang 'Restorative justice: The evidence' Smith Institute 2007 at 23. The cost of housing an inmate in the UK in 2017 was £219 per night. This is equivalent to a nightly charge at the Hilton Hotel in London. See <https://www.dailystar.co.uk/news/latest-news/662677/UK-prisoner-cost-over-80-000-a-year-Whitemoor-jail-Hilton-hotel> (accessed 16 April 2018).

benefit argument more difficult to make.⁷⁷ However, it is still likely that restorative justice alternatives will be less expensive than prison as well as far more beneficial.

Though prisons are believed to reduce crimes by minimising the possibility of reoffending when the offender is taken away from the community,⁷⁸ there is a lack of evidence as to whether incarceration can reduce criminality in the community.⁷⁹ A study by Martinson highlights prisons' lack of rehabilitative value,⁸⁰ though there are mixed views on the issue.⁸¹ Even serious punishments have proved futile in reducing criminality.⁸² A study in the United States reveals that four out of ten released prisoners normally reoffend within three years after prison, and the experience of recent prison releases in Tanzania demonstrates a similar pattern.⁸³ In prison, the offender may be influenced by other criminals; the offender may acquire more criminal skills; and he or she may no longer fear prison life in the future.⁸⁴ Prison life is characterised, logically, by loss of liberty and, sometimes, inhuman treatment, which have negative effects on the offender.⁸⁵

As such, Keve argues that unless there are compelling reasons for incarceration, an offender's

⁷⁷ According to the 2017/18 budget speech, it was stated that the cost of keeping 6,000 inmates who could otherwise do community service or benefit from probation programmes was 3,285 million Tanzania shillings per year. This is a significant amount for a developing country like Tanzania to spend on prisoners who are not harmful to the community. See http://www.parliament.go.tz/uploads/budgetspeeches/1494435199-Hotuba_per_cent20ya_per_cent20Bajeti-Wizara_per_cent20ya_per_cent20Mambo_per_cent20ya_per_cent20Ndani_per_cent20ya_per_cent20Nchi.pdf (accessed 15 December 2017).

⁷⁸ Ellis and Lewis (2012) at 117-118.

⁷⁹ Keve (1974) at 9; James Bonta, Rebecca Jesseman, Tanya Rugge and Robert Cormier, 'Restorative Justice and Recidivism' in Dennis Sullivan and Larry Tiftt (eds) *Handbook of restorative justice* Routledge London 2006 at 110; Antony A Vass 'Alternatives to prison: Punishment, custody and the community' Sage London 1990 at 11.

⁸⁰ Robert Martinson 'What works? Questions and answers about prison reform' *The Public Interest* 1974; see also Vass (1990) at 39; Ybo Buruma 'Doubts on the upsurge of the victim's role in criminal law' in Hendrik Kaptein and MarijkeMalsch (eds) *Crime, victims and justice: Essays on principles and practice* Ashgate Publishing 2004 at 2.

⁸¹ See Ellis and Lewis (2012) at 118-122.

⁸² Bonta, Jesseman, Rugge and Cormier (2006) at 109 and 111.

⁸³ The Pew Center on the States (2011) at 2. A study conducted in Dar es Salaam prisons showed a reoffending rate of 11 per cent. See Liberate Missigano 'Assessing successfully of rehabilitation of prisons to convicted criminal prisoners: The case of prison in Dar es Salaam' LLM Dissertation Mzumbe University Morogoro 2014, available at http://scholar.mzumbe.ac.tz/bitstream/handle/11192/633/MSc_MPA_Liberate_per_cent20Missigaro-2014.pdf?sequence=1 (accessed 25 April 2018).

⁸⁴ Keve (1974) at 9 and 13.

⁸⁵ *Id* at 14 and 129; Vass (1990) at 38 and 43.

rehabilitation is better sought outside prison in the community.⁸⁶ According to Vass, community punishment allows the offender to remain within the family milieu; he or she need not lose liberty and job but be self-reliant and accountable.⁸⁷ Community-based sentences are comparatively cheaper than incarceration.⁸⁸ Prisons may continue to be necessary for serious offences and for offenders likely to pose a danger to the community.⁸⁹ Furthermore, incarceration denies the offender the opportunity to ‘learn to exercise responsibility’.⁹⁰ As the preferred punishment in the conventional criminal justice process, it tends to inflict pain even on innocent parties with a relationship with the offender, such as his or her partners, children and other family members.⁹¹

1.3 Movements away from adversarial criminal justice

The law has never been static. Social, economic and political pressures influence daily human interactions. The law too must embrace change. In this regard, there are campaigns such as the comprehensive law movement and victim rights’ movement that call for criminal justice transformation. According to the comprehensive law movement, ‘vectors’,⁹² such as therapeutic jurisprudence⁹³ and restorative justice,⁹⁴ are intended to address dissatisfaction

⁸⁶ Keve (1974) 129-130.

⁸⁷ Vass (1990) at 38 and 39.

⁸⁸ Ellis and Lewis (2012) at 123; see also Ezzat Fattah ‘Gearing justice action to victim satisfaction contrasting two justice philosophies: Retribution and redress’ in Hendrik Kaptein and MarijkeMalsch (eds) *Crime, victims and justice: Essays on principles and practice* Ashgate Publishing 2004 at 20.

⁸⁹ Keve (1974) at 167; see Vass (1990) at 39.

⁹⁰ Keve (1974) at 133.

⁹¹ Fattah (2004) at 24.

⁹² Thomas J Scheff ‘Community conferences: Shame and anger in therapeutic jurisprudence’ 67 *REV. JUR. U.P.R.* 1997 at 97; Susan Daicoff ‘Growing pains: The integration vs. specialization question for therapeutic jurisprudence and other comprehensive law approaches’ 6 *Thomas Jefferson Law Review* 2008 at 552.

⁹³ According to Balson ‘therapeutic jurisprudence refers to the process of using the court system to promote healing. It considers how law can be used as an instrument of healing and rehabilitation, and minimizes the law’s anti-therapeutic effects wherever possible.’ See J Balson ‘Therapeutic jurisprudence: Facilitating healing in crime victims’ 6 *Phoenix Law Review* 2013 at 1018.

⁹⁴ See Katherine Doolin ‘But what does it mean? Seeking definitional clarity in restorative justice’ 71 *Journal of Criminal Law* 2007 at 427. According to Liebmann, ‘Restorative justice aims to restore the well-being of victims, offenders and communities damaged by crime, and to prevent further offending.’ See Marian Liebmann *Restorative justice: How it works* Jessica Kingsley Publishers London and Philadelphia 2007 at 25. ‘Restorative justice is now a global social movement advocating transformation of the criminal justice system’. See John Braithwaite ‘Restorative justice and social justice’ 63 *Saskatchewan Law Review* 2000 185; George Mousourakis ‘Restorative justice: Some reflections on contemporary theory and practice’ 29 *Journal for Juridical Science* 2004 at 2; Daicoff (2006) at 1.

felt by clients about the contemporary adversarial criminal justice system.⁹⁵ Victim satisfaction;⁹⁶ victim, offender and community participation;⁹⁷ cost-effectiveness⁹⁸ and non-legal professionalism⁹⁹ fuel the acceptability of restorative justice in many jurisdictions.¹⁰⁰

Restorative justice as an approach to criminal justice that allows victim and offender to come together and discuss the offence and its effect has gained acceptance since its first test in 1970.¹⁰¹ However, its application in modern societies with increasing crime rates poses intriguing challenges. Initially, in the United States, Canada and New Zealand, restorative justice was mostly applied to juvenile offenders,¹⁰² but it is now accommodating non-violent crimes committed by adult offenders.¹⁰³ In some jurisdictions, research into its application in cases of violent crime shows promising results.¹⁰⁴ There are arguments that restorative justice

⁹⁵ Daicoff (2008) at 553; Susan Daicoff 'Law as a healing profession: The 'comprehensive law movement' 6 *Pepperdine Dispute Resolution Law Journal* 2006 at 1 and 44. According to Daicoff, other 'vectors' within the comprehensive law movement include 'preventive law, procedural justice, holistic justice, transformative mediation, collaborative law, creative problem-solving, and problem-solving courts, including mental health courts, drug treatment courts, unified family courts and other specialised, interdisciplinary courts'. See also Mike Batley 'A call to agents of change in the justice system: Guidelines in the use of restorative justice in sentencing for magistrates, judges, prosecutors and probation officers' Restorative Justice Center 2014 at 5.

⁹⁶ Hema Hargovan 'Evaluating restorative justice: Working out "what works"' 24 *Acta Criminologica* 2011 at 70; Dancig-Rosenberg and Gal (2013) at 2323.

⁹⁷ Daniel W Van Ness and Pat Nolan 'Legislating for restorative justice' 10 *Regent University Law Review* 1998 at 53.

⁹⁸ Hargovan (2011) at 67.

⁹⁹ 'Attorneys are generally not invited to be part of the process, and if they are present, their role is limited to the provision of information.' See Dancig-Rosenberg and Gal (2013) at 2320; B Naude' and D Nation 'An analysis of cases referred to restorative justice in the Tshwane metropolitan area' 20 *Acta Criminologica* 2007 at 150.

¹⁰⁰ Restorative justice is now applied worldwide. Countries applying it include the United States, Japan, Australia, Canada, Netherlands, New Zealand, Austria, South Africa, South Korea, Russia, the Ukraine, and most European and South American countries. See KE Tucker 'Mediating theft' 25 *University of Florida Journal of Law and Public Policy* 2014 at 29; Mark S Umbreit and Marilyn P Armour 'Restorative justice and dialogue, opportunities, and challenges in the global community' 36 *Washington University Journal of Law and Policy* 2011 at 69; C Menkel-Meadow 'Restorative justice: What is it and does it work?' 3 *Annual Review of Law and Social Science* 2007 at 164.

¹⁰¹ See DE Peachey 'The Kitchener experiment' in Carolyn Hoyle (ed) *Restorative justice: Critical concepts in criminology* Vol. I Routledge London 2010 at 125; Jennifer Gerarda Brown 'The Use of mediation to resolve criminal case: A procedural critique' in Declan Roche (ed) *Restorative Justice* Ashgate Publishing Ltd 2004 at 207-208; Peter Reddy 'Peace operations and restorative justice: Groundwork for post-conflict regeneration' Ashgate Publishing USA 2012 at 22-23.

¹⁰² Tucker (2014) at 29; see SS Beale 'Still tough on crime? Prospects for restorative justice in United States' *Utah Law Review* 2003 at 418.

¹⁰³ See also Joanna Shapland, Gwen Robinson and Agela Sorsby *Restorative justice in practice: Evaluating what works for victims and offenders* Routledge London 2011.

¹⁰⁴ Umbreit and Armour (2011) at 73-74; Walgrave (2008) at 101; MS Umbreit, B Vos, RB Coates and K Brown 'Victim-offender dialogue in violent cases: A multi-site study in the United States' *Acta Juridica: Restorative Justice: Politics, Policies and Prospects* 2007 at 23.

is more acceptable to victims, community and even offenders than adversarial justice.¹⁰⁵ It is also regarded as an alternative,¹⁰⁶ complementary¹⁰⁷ or even replacement¹⁰⁸ approach that criminal justice systems can take in addressing non-violent offences.

Apart from modern restorative justice being commonly used in juvenile justice,¹⁰⁹ it is also used to resolve disputes in schools,¹¹⁰ workplaces¹¹¹ and in business-related conflicts.¹¹² Set against the ancient African customary criminal justice system and that of other cultures, however, restorative justice theory does not seem to be a new idea.¹¹³ Apart from reflecting an African way of justice, restorative approaches have been applied in respect of serious violations of human rights in Africa, such as in South Africa under the Truth and Reconciliation Commission,¹¹⁴ Rwanda under *gacaca* courts¹¹⁵ and Sierra Leone under

¹⁰⁵ Walgrave (2008) at 105.

¹⁰⁶ Alfred Oseko 'The criminal justice system in Kenya: The role of alternative and traditional dispute resolution mechanisms' 81 *Arbitration* 2015 at 39.

¹⁰⁷ Hargovan (2008) at 28.

¹⁰⁸ Dancig-Rosenberg and Gal (2013) at 2314.

¹⁰⁹ See the Children, Young Persons, and their Families Act of 1989; see also Declan Roche 'Dimensions of restorative justice' 62(2) *Journal of Social Issues* 2006 at 221.

¹¹⁰ See Marian Liebmann 'New skills for children and schools' in John PJ Dussich and Jill Schellenberg (eds) *The promise of restorative justice: New approaches for criminal justice and beyond* Lynne Rienner Publishers USA 2010; Dennis Wong 'Adolescent bullying: The whole-school approach' in John PJ Dussich and Jill Schellenberg (eds) *The promise of restorative justice: New approaches for criminal justice and beyond* Lynne Rienner Publishers USA 2010.

¹¹¹ Sawin and Zehr (2007) at 41.

¹¹² See Duane Ruth-Heffelbower 'Solutions for business conflicts' in John PJ Dussich and Jill Schellenberg (eds) *The promise of restorative justice: New approaches for criminal justice and beyond* Lynne Rienner Publishers USA 2010.

¹¹³ Naudé and Nation (2007) at 138; JR Coldren 'Commentary: Transitional crime and restorative justice' 6 *Homeland Security Review* 2012 at 181; Oseko (2015) at 44.

¹¹⁴ See Desmond Tutu *No future without forgiveness* Rider Books London 1999; see also Gerry Johnstone and Daniel Van Ness 'The meaning of restorative justice' in Gerry Johnstone and Daniel W Van Ness (eds) *Handbook of restorative justice* Willan Publishing USA 2007 at 6; DK Androff 'Truth and Reconciliation Commissions and transitional justice in a restorative justice context' in KS van Wormer and L Walker (eds) *Restorative justice today: Practical applications* SAGE Publications Los Angeles 2013 at 207-208.

¹¹⁵ See Emily Amick 'Trying international crimes on local laws: The adjudication of genocide sexual violence crimes in Rwanda's *gacaca* courts' 20 *Columbia Journal of Gender and Law* 2011 at 33; Maya Goldstein Bolocan 'Rwandan *gacaca*: An experience in transitional justice' 2 *Journal of Dispute Resolution* 2004 at 375; C Stauffer 'Restorative interventions for post-war nations' in KS van Wormer and L Walker (eds) *Restorative justice today: Practical applications* SAGE Publications Los Angeles 2013 at 197; Carla De Ycaza 'Performative functions of genocide trials in Rwanda: Reconciliation through restorative justice?' *African Journal on Conflict Resolution* 2010; Janet McKnight 'The anatomy of mass accountability: Confronting ideology and legitimacy in Rwanda's *gacaca* courts' *Conflict Trends* 2014.

fambul toks.¹¹⁶ In Uganda, restorative approach has been used in reintegrating child soldiers into the community in Uganda.¹¹⁷ In addition, African philosophies such as *ubuntu* in South Africa and *ujamaa* in Tanzania echo the spirit of togetherness that demands recognition in justice administration.¹¹⁸

Restorative justice is believed to have a healing power lacking in adversarial criminal justice processes. Though the two systems of justice are not competing paradigms,¹¹⁹ comparisons between them reveal significant differences in victims' post-traumatic experience. For instance, Camp describes the experience of a victim of sexual abuse who went through both adversarial criminal justice and restorative justice processes. The victim regarded the judicial process as 'excruciating, frustrating and ridiculous', with no healing effects.¹²⁰ This was the victim's view after attending the adversarial criminal justice process:

It was the worst experience of my life other than the fact of the actual experience itself. [...] I felt humiliated and embarrassed because people were hearing me describe the things that he had done to me. That was embarrassing. It was very, very, very hard to talk about. [...] It's the defence lawyers that are the bullies, the manipulators. Basically, I call them "the dirty dogs". And they are the ones with no compassion. I know that they have to do it, it is part of their job, but there has got to be a better way to do it, you know. [...] I still relive the court in my sleep; I still have nightmares of the court in my sleep. [...] [The criminal justice system] just didn't work for me.¹²¹

When the victim attended victim-offender mediation programme, she had the following view:

I still look back on [VOM thinking] "wow". It was just one of those moments in life where you just go "wow". You just can't believe that actually happened as

¹¹⁶ See Lyn S Graybill 'Traditional practices and reconciliation in Sierra Leone: The effectiveness of *fambul tok*' *Conflict Trends* 2010. *Fambul toks* means 'family talk' in the local language in Sierra Leone. Stauffer (2013) at 198-199.

¹¹⁷ Hope Among 'The application of traditional justice mechanisms to the atrocities committed by child soldiers in Uganda: A practical restorative justice approach' *African Human Rights Law Journal* 2013.

¹¹⁸ See Chapter 6.

¹¹⁹ See Zehr (2002).

¹²⁰ Camp (2014) at 64.

¹²¹ *Id* at 65.

well as it did. [...] It was just the most gratifying thing that could have happened to me. I think that was my peace giving moment. I was able to come to peace with everything at that point. I don't believe there is any such thing as closure, but [mediation] came as close to closure for me as possible. It was the peace that I needed.¹²²

Camp's observation conforms to the views of Zehr, who raises a vital question: '[I]f crime is injury, what is justice?'¹²³ Justice is supposed to be a means for victims' healing.¹²⁴ It should balance the needs of both offenders and victims.¹²⁵ For a healing justice to be achieved, Strang lists six key elements: 'a less formal process where their [victims'] views count; information about both the processing and outcome of their cases; participation in their cases; respectful and fair treatment; material restoration; emotional restoration, especially an apology'.¹²⁶ Letschert and Van Dijk also observe that the criminal justice system which puts victims at the heart of the process can achieve healing justice through restoration and reparation.¹²⁷ This can be coupled with the provision of social support to victims to enable recovery from psychological and financial losses.¹²⁸

However, over three decades of the restorative justice movement, of all 54 African countries, only South Africa,¹²⁹ Uganda¹³⁰ and Lesotho¹³¹ have embarked on restorative justice programmes. Despite the fact that Sierra Leone and Rwanda practice traditional restorative justice, they have not committed restorative justice to statute.¹³² This thesis therefore investigates the possibility of merging the principles of modern restorative justice and those

¹²² *Ibid.*

¹²³ Zehr (2005) at 186.

¹²⁴ Van Ness (2004) at 137-138; Kay Pranis 'Restorative values' in Gerry Johnstone and Daniel W Van Ness (eds) *Handbook of Restorative Justice* Willan Publishing USA 2007 at 66.

¹²⁵ Zehr (2010) at 135.

¹²⁶ Strang (2002) at 2-3.

¹²⁷ Rianne Letschert and Jan van Dijk 'New faces of victimhood: Reflections on the unjust sides of globalisation' in Rianne Letschert and Jan van Dijk (eds) *The new faces of victimhood: Globalisation, transnational crimes and victim rights* Springer Netherlands 2012 at 4.

¹²⁸ Letschert and Van Dijk (2012) at 4.

¹²⁹ See the Child Justice Act, No. 75 of 2008.

¹³⁰ See Daniel W Van Ness and Karen H Strong *Restoring Justice: An Introduction to Restorative Justice* 4th ed Anderson Publishing 2010 at 33-38.

¹³¹ Nts'ikeng Theresa Qhubu 'The Development of Restorative Justice in Lesotho'

http://www.justice.gov.za/alraesa/conferences/2005sa/papers/s4B_qhubu.pdf (accessed 19 August 2015).

¹³² See Chapter 5.

of indigenous justice into proposed restorative justice regime in Tanzania.

1.4 Conceptual framework

1.4.1 Restorative justice

Many authors,¹³³ pieces of legislation¹³⁴ and international instruments¹³⁵ have sought to encapsulate restorative values and principles in definitions. The most popular definition of restorative justice in the field of criminal justice is that of Tony Marshall. According to him, ‘restorative justice is a process whereby all parties with a stake in a specific offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future’.¹³⁶ Restorative justice, as already alluded to above, is an approach to justice that involves the victim, offender and community in decision-making assisted by a facilitator or mediator.¹³⁷ It encourages offenders to take responsibility for the harm they caused, and it addresses the needs of victims by giving them a voice in the justice process.¹³⁸ Restorative processes encourage encounter, restitution, reparation and reintegration by reconstructing the ruptured relationships between the victim, offender and community.¹³⁹ It goes further to address the root causes of crime for the purposes of preventing future

¹³³ Ann Skelton and Mike Batley *Charting progress, mapping the future: Restorative justice in South Africa* Restorative Justice Centre South Africa 2006 at 5 and 6; Johnstone and Van Ness (2007) at 8; see also Van Ness and Strong (2010) at 41.

¹³⁴ See, for instance, the South African Child Justice Act, which defines restorative justice as ‘an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation’. The Child Justice Act (2008), section 1.

¹³⁵ See the United Nations Handbook on Restorative Justice Programmes 2006 at 7.

¹³⁶ Tony Marshall *Restorative justice: An overview* A Report by the Home Office Research Development and Statistics Directorate London 1999 at 5.

¹³⁷ Gretchen Ulrich ‘Widening the circle: Adapting traditional Indian dispute resolution methods to implement alternative dispute resolution and restorative justice in modern communities’ 20 *Hamline Journal of Public Law and Policy* 1999 at 436; see also the United Nations Handbook on Restorative Justice Programmes (2006) at 7; Gabrielle M Maxwell ‘The defining features of a restorative justice approach to conflict’ in Gabrielle M Maxwell and James H Liu (eds) *Restorative justice and practice in New Zealand: Towards a restorative justice* Wipf and Stock Publishers Eugene 2007 at 7-8; John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence*, *Criminal Law Bulletin*, at 246
[https://www.anu.edu.au/fellows/jbraithwaite/documents/Articles/Restorative Justice 2002.pdf](https://www.anu.edu.au/fellows/jbraithwaite/documents/Articles/Restorative%20Justice%2002.pdf) (accessed 9 September 2015).

¹³⁸ Christiaan Bezuidenhout ‘Restorative justice with an explicit rehabilitative ethos: Is this the resolve to change criminality?’ 20 *Act Criminologica* 2007 at 44.

¹³⁹ Bezuidenhout (2007) at 47; Maxwell (2007) at 6 and 8.

reoffending.¹⁴⁰ Generally, stakeholders' involvement in conflict management, offenders' accountability and community harmony are major elements of restorative justice.

1.4.2 Therapeutic jurisprudence

As pointed out above, the dissatisfaction with contemporary criminal justice systems has given impetus to some transformation in the legal field. As such, the comprehensive law movement encompasses, inter alia, restorative justice (discussed above), and therapeutic jurisprudence, which is perceived as the underlying motivation for using restorative justice processes.¹⁴¹ By viewing the law through a therapeutic lens, the significant impact the court process and its outcome may have on the lives and well-being of all those involved, is acknowledged.¹⁴² Therapeutic jurisprudence principles are in particular suitable, but not limited, to be applied in criminal matters involving drugs and alcohol, domestic violence and mental health issues, and have given rise to so-called 'problem-solving courts'.¹⁴³ In these matters role-players will focus on the offender's motivation, treatment and rehabilitation and non-custodial sentencing options (with conditions) are preferred.¹⁴⁴ In addition to offenders' well-being, therapeutic needs of victims may also be recognised. Special concerns exist about the victim who, despite the fact that the offender may be punished, feels alienated from the justice process, with his or her voice not clearly heard, needs and wounds not addressed, and psychological harm not attended to; hence he or she may suffer from prolonged trauma.¹⁴⁵

The quest by scholars and role-players for transformation juxtaposes law with medical mores

¹⁴⁰ Bezuidenhout (2007) at 47.

¹⁴¹ Susan Daicoff 'Growing pains: the integration vs specialization question for therapeutic jurisprudence and other comprehensive law areas' *Thomas Jefferson Law Review* 2008 at 553.

¹⁴² Susan Goldberg *Judging for the 21st century: a problem-solving approach* National Judicial Institute Canada 2005 available at <http://www.nji.ca/nji/Public/documents/Judgingfor21stcenturyDe.pdf> accessed on 14/01/18.

¹⁴³ Goldberg (2005) at 6.

¹⁴⁴ David B Wexler 'Robes and rehabilitation: how judges can help offenders 'make good'' 2001 *Court Review* 18.

¹⁴⁵ See Annette van der Merwe 'Therapeutic jurisprudence: Judicial officers and the victims' welfare – *S v M* 2007 (2) SACR 60 (W)' 23 *South African Journal of Criminal Justice* 2010 at 105-6 for an example of the court's concern and action with regards to a rape victim's trauma.

pertaining to healing effects.¹⁴⁶ Laws, legal rules and procedures are viewed as potential healing tools in the criminal justice system.¹⁴⁷ Accordingly, the law and legal professionals should play a role towards healing, initiated within the justice system, often involving an inter-disciplinary team.¹⁴⁸ Though therapeutic jurisprudence signals an ethic of care and respect,¹⁴⁹ and also concerns itself with the ‘human, emotional and psychological side of law and the legal process’,¹⁵⁰ it does not aim to be a form of judicial or ‘quasi-judicial’ therapy or covert paternalism.¹⁵¹ It is further also just one category of factors to be taken into account in order to decide how to deal with the legal matter at hand.¹⁵² Daicoff points out that a therapeutic approach could not naturally be followed by all legal role-players and that training might be necessary in ‘order to foster awareness, sensitivity and enhance personal skills, such as empathy and active listening’.¹⁵³ Both therapeutic jurisprudence and restorative justice seek to optimise human well-being in legal matters, and focus on more than legal rights in approaching legal matters.¹⁵⁴

A therapeutic justice ethos thus entails the transformation of the law itself, the legal process and/ or the conduct of role players, to enable the healing of offenders and victims within the criminal justice system. Restorative justice is a tool for achieving that therapeutic justice.

1.4.3 African traditional justice

Restorative values and procedures were well known in the pre-colonial African traditional

¹⁴⁶ According to Wexler, therapeutic jurisprudence originates from mental health law. See David B Wexler ‘Two decades of therapeutic jurisprudence’ 24 *Touro Law Review* 2008 at 17; David B Wexler ‘Therapeutic jurisprudence and its application to criminal justice research and development’ 7 *Irish Probation Journal* 2010 at 98.

¹⁴⁷ David B Wexler ‘Therapeutic jurisprudence and the criminal courts’ 35 *William and Mary Law Review* 1993 at 280; Van der Merwe (2010) at 98.

¹⁴⁸ See Deborah J Chase and Peggy Fulton Hora ‘The implications of therapeutic jurisprudence for judicial satisfaction’ *Court Review* 2000 at 12, available at http://judgehora.com/implications_tj_principles_addiction_med.pdf (accessed 9 September 2015); Van Stokkom (2011) at 209.

¹⁴⁹ David B Wexler ‘Therapeutic jurisprudence and readiness for rehabilitation’ 2006 *Fla Coastal L Rev* 113-4.

¹⁵⁰ David B Wexler ‘Therapeutic jurisprudence: an overview’ Public lecture 29/10/1999 available at <http://www.law.arizona.edu/depts/upr-intj/intj-o.html> accessed on 14/08/17 1.

¹⁵¹ Ian Richard Freckleton ‘Therapeutic jurisprudence misunderstood and misrepresented: the price and risks of influence’ *Thomas Jefferson Law Review* 2008 at 595; Van Stokkom (2011) at 209.

¹⁵² David B Wexler and Bruce J Winick (eds) *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* Carolina Academic Press Durham USA 1996 at xvii.

¹⁵³ Daicoff (2008) at 571.

¹⁵⁴ *Id* at 554-5.

criminal justice system¹⁵⁵ and even in ancient Western culture.¹⁵⁶ Indeed, ‘the African way of doing justice is restorative justice’.¹⁵⁷ Terms such as *ubuntu*,¹⁵⁸ *utu*¹⁵⁹ and *ujamaa*¹⁶⁰ denote elements of restorative justice that emphasise reconciliation, reparation, restoration and community harmony.¹⁶¹ While the term ‘restorative justice’ may be foreign to African elders, its values and procedures accord with their own understanding of justice.¹⁶² It can easily be asserted that modern restorative justice is a renaissance of ancient criminal justice.¹⁶³ Restorative justice jurisprudence in South Africa and the use of restorative justice in transitional justice in Sierra Leone and Rwanda confirm the presence of restorative justice values in Africa. Unlike other jurisdictions in the First World, where the concept of community is controversial and under retreat,¹⁶⁴ African community justice values are evident and can be tapped into for dispute resolution. The treasure of African traditional justice should not be jettisoned in criminal justice delivery. Perhaps, then, restorative justice practices in Africa could borrow from the ethos of African traditional justice.

1.5 Research question

This thesis will explore the following central research question:

- Can restorative justice mechanisms be applied in Tanzania in a manner that is complementary to the contemporary criminal justice system?

¹⁵⁵ Bruce Baker ‘He must buy what he stole then we forgive’: Restorative justice in Rwanda and Sierra Leone’ in E van der Spuy, S Parmentier and A Dissel (eds) *Restorative justice: Politics, policies and prospects* Juta South Africa 2007 at 171; see also Van Ness (2004) at 141.

¹⁵⁶ See Van Ness (2004) at 139. See also Brown (2004) at 198. See also Ann Skelton ‘Tapping indigenous knowledge: Traditional conflict resolution, restorative justice and the denunciation of crime in South Africa in E van der Spuy, S Parmentier and A Dissel (eds) *Restorative justice: Politics, policies and prospects* Juta South Africa 2007 at 229.

¹⁵⁷ Skelton (2007) at 230.

¹⁵⁸ See Douglas HM Carver ‘The Xhosa and the Truth and Reconciliation Commission: African ways’ 8 *Tribal Law Journal* 2007-2008 at 34; see also Dirk J Louw ‘The African concept of *Ubuntu* and restorative justice’ in Dennis Sullivan and Larry Tiftt (eds) *Handbook of Restorative Justice* Routledge London 2006 at 161.

¹⁵⁹ *Utu* is a term among Swahili-speakers in Africa meaning ‘humanity’. See Sara Kinyanjui ‘Restorative justice in traditional pre-colonial “criminal justice systems” in Kenya’ 10 *Tribal Law Journal* 2010 at 3.

¹⁶⁰ See Chapter 8.

¹⁶¹ Louw (2006) at 162.

¹⁶² Skelton and Batley (2006) at 116; see also Kinyanjui (2010) at 3.

¹⁶³ See Van Ness (2004) at 162.

¹⁶⁴ See Brown (2004) at 201.

The following subsidiary questions will also be addressed:

- What is restorative justice and is it compatible with African notions of justice?
- What are the current problems in the Tanzanian system?
- How might restorative justice resolve those problems?
- Which restorative justice mechanisms would be suitable for Tanzania?
- Where are the opportunities in Tanzania's system to accommodate restorative justice?
- How can the formal contemporary criminal justice system be improved taking therapeutic justice and restorative justice values into account?

1.6 The law and prospective restorative measures in Tanzania

1.6.1 Constitutional provisions

Constitutional provisions in different jurisdictions within the East African Community, such as Tanzania, Kenya and Uganda, recognise the need for an alternative approach to criminal justice. For instance, the Kenyan Constitution stipulates that 'alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted'.¹⁶⁵ A sister provision in the Constitution of Uganda mandates the courts to award adequate compensation to victims for wrongs, promote reconciliation between parties, and observes that 'substantive justice shall be administered without undue regard to technicalities'.¹⁶⁶

In Tanzania, the judiciary has the power to dispense justice¹⁶⁷ without fear or favour.¹⁶⁸ In so doing, both in civil and criminal matters, the courts are obliged to 'award reasonable

¹⁶⁵ The Constitution of Kenya of 2010, article 159(2)(c).

¹⁶⁶ The Constitution of the Republic of Uganda of 1995, article 126(2)(c)(d)(e).

¹⁶⁷ The Constitution of the United Republic of Tanzania of 1977, article 107A.

¹⁶⁸ The Constitution of the United Republic of Tanzania of 1977, in article 107B, clearly stipulates that 'in exercising the powers of dispensing justice, all courts shall have freedom and shall be required only to observe the provisions of the Constitution and those of the laws of the land'.

compensation to victims for wrong doings committed by other persons and in accordance with the relevant law enacted by the parliament’;¹⁶⁹ ‘promote and enhance dispute resolution among persons involved in dispute’;¹⁷⁰ and ‘dispense justice without being tied up with technicalities provisions which may obstruct dispensation of justice’.¹⁷¹ However, these promising provisions incorporated in 2000 in the Constitution of the United Republic of Tanzania of 1977 have yielded few innovations in the criminal justice system, probably because the overarching system is adversarial in nature.

1.6.2 Other Tanzanian legislation

The procedures to determine criminal cases in Tanzania are governed by the Criminal Procedure Act.¹⁷² The abovementioned constitutional provision is echoed in the Criminal Procedure Act, 1985 which gives discretion to any court to promote reconciliation and payment of compensation to victims of crime.¹⁷³ Furthermore, the Magistrates’ Courts Act, 1984¹⁷⁴ in its third schedule, incorporates criminal procedure rules for Primary Courts.¹⁷⁵ Drafted *in parimateria* to the provisions of the Criminal Procedure Act, 1985 is Rule 4(2), which obliges the Primary Court to promote reconciliation when handling criminal cases.¹⁷⁶ Where reconciliation is reached, the complainant can withdraw the charge.¹⁷⁷

¹⁶⁹ The Constitution of the United Republic of Tanzania of 1977, article 107A(2)(c). See, the discussion in Chapter 7. In Tanzania, less consideration is given to victims’ compensation when courts determine criminal cases. A victim may need to file a civil case based the same criminal case in order to get compensation.

¹⁷⁰ The Constitution of the United Republic of Tanzania of 1977.

¹⁷¹ *Id* at article 107A(e).

¹⁷² The Criminal Procedure Act, Chapter 20, Revised Edition 2002. The Act applies in the High Court, resident magistrates’ courts and the district courts in all criminal cases. Primary courts have separate rules of procedure under the third schedule to the Magistrates’ Courts Act, Chapter 11, Revised Edition 2002.

¹⁷³ The Criminal Procedure Act, Chapter 20, Revised Edition 2002, section 163.

¹⁷⁴ The Magistrates’ Courts Act, Chapter 11, Revised Edition 2002.

¹⁷⁵ The judicial hierarchy of Tanzania begins with primary courts at the lowest level, then the district courts, resident magistrates’ courts, the High Court and the Court of Appeal.

¹⁷⁶ The Magistrates’ Courts Act, Chapter 11, Revised Edition 2002, Third Schedule, Rule 4(2) specifically provides that ‘in the case of proceedings for common assault or for any other offence of a personal or private nature, the court may, if it is of the opinion that the public interest does not demand the infliction of a penalty, promote reconciliation and encourage and facilitate the settlement, in an amicable way, of the proceedings or terms of payment of compensation or other terms approved by the court, and may thereupon order the proceeding to be stayed’.

¹⁷⁷ Under Rule 23 of the Primary Court Criminal Procedure Code (Tanzania), ‘a complainant may, with the consent of the court, withdraw his complaint at any time before the accused person gives evidence at the trial, and where the court gives its consent to the withdrawal of the complaint, it shall withdraw the charge and, unless the accused person is remanded in custody on some other charge, discharge him’.

However, in practice the provision is rarely used, possibly for six reasons. First, reconciliation is normally left in the hands of the already wounded parties with neither an impartial facilitator nor a trained mediator. Secondly, there are no formal restorative justice mechanisms to accommodate diverted cases. The court merely stays the proceedings pending the anticipated reconciliation.¹⁷⁸ If elders of the two families do not intercede, there may be no fruitful results. Thirdly, courts retain vast powers on diversion of cases for reconciliation. Fourth, some magistrates may not be aware of the proper application of this rule. Fifth, there may be little knowledge among judicial officers of the application of reconciliation procedures in criminal cases. Sixth, there is a lack of mechanisms to refer or initiate a restorative process outside or within the criminal justice system.

In addition, ward tribunals present another dimension of the restorative approach in Tanzania, one which has not been fully exploited.¹⁷⁹ The tribunals were established to secure peace and harmony at grassroots level through mediation.¹⁸⁰ They were also meant to relieve the Primary Courts' backlog of minor cases.¹⁸¹ According to the establishing law, aggrieved parties may appeal a tribunal's decision to the Primary Court.¹⁸² There is evidence of true reconciliation and parties' satisfaction at this level.¹⁸³ Though the ward tribunals operate under local governments in Tanzania, they are a clear prototype of the complementary restorative interventions that are needed to relieve overburdened courts and allow for restorative outcomes. Unfortunately, ward tribunals as envisaged by the law have crumbled away due to lack of financial support from the responsible authorities. Instead, the ward administrative officers have now taken the role of the ward tribunals, leaving them with an improper composition.¹⁸⁴

¹⁷⁸ The Magistrates Courts Act, Chapter 11, Revised Edition 2002, the Third Schedule (The Primary Courts Criminal Procedure Code), Rule 4(2).

¹⁷⁹ The Ward Tribunals Act, Chapter 206, Revised Edition 2002, section 3 establishes ward tribunals. Under section 4, a tribunal is composed of not less than four and not more than eight members elected by the ward committee. The chairman and secretary of the tribunal are appointed from among the members elected.

¹⁸⁰ Ward Tribunals Act, Chapter 206, Revised Edition 2002, section 8.

¹⁸¹ Yusufu Q Lawi 'Justice administration outside the ordinary courts of law in Mainland Tanzania: The case of ward tribunals in Babati District' 1 *African Studies Quarterly* 1997 at 1.

¹⁸² The Ward Tribunals Act, Chapter 206, Revised Edition 2002, section 20.

¹⁸³ Lawi (1997) at 10.

¹⁸⁴ Celestine Nyamu-Musembi 'Review of experience in engaging with "non-state" justice systems in East Africa' <http://gsdrc.ids.ac.uk/docs/open/DS37.pdf> (accessed 11 August 2015).

Viewed from this angle, restorative justice in Tanzania has a green light and an uncharted road ahead of it. As such, the country should seize the initiative and develop a sustainable restorative justice programme. In so doing, the experience of other jurisdictions, such as the United States,¹⁸⁵ Canada,¹⁸⁶ Europe,¹⁸⁷ South Africa,¹⁸⁸ Uganda and Rwanda, should be considered.

1.7 Scope of the research

The focus of this research is on the possibility of invoking restorative measures in cases involving adult offenders in Tanzania. Although the criminal process for child offenders was altered through the Law of the Child Act in 2009 to accommodate such measures, in practice there is still only a dearth of restorative interventions in Tanzania, even in juvenile justice.¹⁸⁹ The proposed restorative model may well be applicable to juvenile offenders too, but the special procedures required in their case are not the principal concern of this thesis.

This research takes a comparative view, with special emphasis placed on applying restorative justice in an African context. The influence of traditional justice practices on transitional justice in countries such as Rwanda, Sierra Leone and Uganda provides a touchstone for restorative justice from an African viewpoint. Their application of a restorative justice approach to transitional justice shows the viability of restorative justice with an African

¹⁸⁵ In the United States, restorative justice processes began in 1972 in the Minnesota Department of Corrections. Research published in 2005 by Bazemore and Schiff indicated that approximately 773 restorative justice-oriented programmes were operating throughout the country. These programmes are widely used in minor offences such as minor assault, property damage, personal theft, business theft, vandalism and serious assault. See Gordon Bazemore and Mara Schiff *Juvenile justice reform and restorative justice: Building theory and policy from practice* Willan publishing USA and Canada 2005 at 27, 100 and 112.

¹⁸⁶ Several victim-offender mediation programmes handle adult and juvenile offender-related cases. Beale (2003) at 419.

¹⁸⁷ There are restorative justice programmes in European countries such as Austria, Germany and Finland. In Austria, restorative justice programmes began in the mid-1980s. See Beale (2003) at 420.

¹⁸⁸ Initiatives towards restorative justice in South Africa began in 1992 through the National Institute for Crime Prevention and the Rehabilitation of Offenders (NIRCO). However, in 1995, the Truth and Reconciliation Commission, established to deal with the aftermath of the apartheid regime, adopted a restorative approach. In 1997 a project was set up to pilot the implementation of restorative justice. Finally, a restorative programme was launched in 1999. From there on, many South African statutes adopted restorative justice models. Such statutes include the Probation Service Act 35 of 2002, the Child Justice Act 2008, the Service Charter for Victims of Crime in South Africa, and the Minimum Standards on Services for Victims of Crime. See Naudé and Nation (2007) at 139-141; see also <http://www.justice.gov.za/trc/> (accessed 18 May 2015).

¹⁸⁹ The Law of the Child Act, No. 21 of 2009; see also see the discussion in Chapter 8.

character. In addition, the jurisprudence of traditional restorative justice, articulated in South Africa through *ubuntu*, is analysed. Other African philosophies linked to restorative justice, such as *ujamaa* in Tanzania, are also evaluated to gain a deeper understanding of restorative justice in Africa. The implementation of restorative justice in other jurisdictions outside the African continent, such as Canada and New Zealand, is also considered.

1.8 Research methodology

This study is based on desktop and library research. In the research, primary sources of information were analysed to provide the pillars of the discourse.¹⁹⁰ Various statutes, especially from Tanzania, fall into the category of primary sources of information. Among them are the Constitution of the United Republic of Tanzania, 1977,¹⁹¹ the Criminal Procedure Act, 1985¹⁹² the Magistrates' Courts Act, 1984¹⁹³ the Ward Tribunals Act, 1985¹⁹⁴ the Primary Courts Criminal Procedure Rules,¹⁹⁵ other legislation and case law. Primary sources were used to identify key legal issues for discussion. Secondary materials include textbooks, journals articles, case digests, newspapers, electronic publications, and international instruments. These sources have been used to support in-depth analysis of issues discussed in the research.

1.9 Conclusion

The context for this study is that major weaknesses are apparent in contemporary criminal justice systems generally and in Tanzania in particular. Prison congestion, reoffending rates, unrehabilitated offenders, lack of offenders' accountability to victims, community isolation from the justice process, and the onerous technicalities of the criminal justice system, point to the need for a complementary criminal justice system in Tanzania. As such, the research question of this study is whether restorative justice could indeed complement the contemporary adversarial criminal justice system in Tanzania.

¹⁹⁰ See Ian Dobinson and Francis Johns 'Qualitative Legal Research' in Michael McConville and Wing Hong Chui (eds) *Research Methods for Law* Edinburgh University Press Edinburgh 2007.

¹⁹¹ The Constitution of Tanzania of (1977).

¹⁹² The Criminal Procedure Act, Chapter 20, Revised Edition 2002.

¹⁹³ The Magistrates' Courts Act, Chapter 11, Revised Edition 2002.

¹⁹⁴ The Ward Tribunals Act, Chapter 206, Revised Edition 2002.

¹⁹⁵ See the Magistrates' Courts Act, Chapter 11, Revised Edition 2002, Third Schedule.

This question and other issues that arise are answered by critically analysing restorative justice theory and its background. The analysis of restorative justice goes hand in hand with understanding restorative justice in the African context. The extent of and rationale for victim and community participation in decision-making in the modern criminal justice system are analysed. This study examines two interrelated issues: victim- and community-healing processes, restitution and reparation; and offenders' rehabilitation and possibility of reduced recidivism under the retributive criminal justice system. The pitfalls of the contemporary criminal justice, as well as the opportunities available under the current laws of Tanzania for accommodating restorative justice, are explored to furnish a basis for restorative justice implementation.

Chapter 2:

Modern Restorative Justice Theory and Contemporary Debates

2.1 Introduction

For over three decades, modern restorative justice has featured in academic and professional discourse as a complementary criminal justice system.¹ In the African context, the principles of restorative justice are not new, given that they resonate with African ways of doing justice. Nevertheless, its implementation within or alongside the criminal justice system has been slow in most jurisdictions.² In jurisdictions where restorative justice has been put in place, debates have arisen about its proper application as a paradigm of criminal justice. Despite these challenges, the suitability of restorative justice as a parallel criminal justice system has strong support.

This chapter looks at restorative justice as a theory of justice delivery. It analyses the challenges that have led to debate, and examines the diverse definitions of restorative justice, and its background and rationale for application. The purpose of the chapter is to show the extent to which modern restorative justice theory can complement the adversarial criminal justice system without prejudicing the rights of either victims or offenders.

2.2 Defining restorative justice

Because of the wide application of modern restorative justice, there is no single definition that covers all the dimensions of the theory.³ Several reasons account for the multiplicity of definitions of restorative justice. These include the rapid growth of the theory;⁴ its various

¹ See Tony F Marshall 'Restorative justice: An overview' in Gerry Johnstone (ed) *A restorative justice reader: Texts, Sources, Context* Willan Publishing USA and Canada 2003 at 31.

² Only a few African countries have embarked on modern restorative justice processes. These countries include South Africa, Uganda, Lesotho and Zimbabwe. See Daniel W Van Ness and Karen Heetderks Strong *Restoring justice: An introduction to restorative justice* 4th ed Anderson Publishing 2010 at 33-38; Nts'ikeng Theresa Qhubu 'The development of restorative justice in Lesotho', available at http://www.justice.gov.za/alraesa/conferences/2005sa/papers/s4B_qhubu.pdf (accessed 29 April 2016).

³ Kathleen Daly 'The punishment debate in restorative justice' in Jonathan Simon and Richard Sparks (eds) *The SAGE handbook of punishment and society* SAGE Publications Los Angeles 2013 at 360; Golan Luzon 'Restorative justice and normative responsibility' 4(1) *Restorative Justice: An International Journal* 2016 at 33.

⁴ Luzon (2016) at 33.

forms of justice processes;⁵ and the fear of limiting its evolution by confining it to a single definition.⁶ In addition, the debate on whether restorative justice should focus on process or outcome has resulted in multiple definitions.⁷

Zehr defines it as ‘a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs and obligations, in order to heal and to put things as right as possible’.⁸ Zehr is hailed for redefining crime through the lens of restorative justice. He describes it as

a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation and reassurance.⁹

Zehr further emphasises that justice should achieve repair, healing, reconciliation, harmony, security, and empowerment of victims, and aim at preventing reoffending.¹⁰

Marshall provides an internationally celebrated definition of restorative justice. He defines it as ‘a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future’.¹¹ Though Marshall’s definition of restorative justice is the one most referred to in the literature, it has also drawn criticism, one of which is that he defines restorative justice as based on ‘process’¹² whereas it is more than a process. According to Daly, for instance, restorative

⁵ Mark Austin Walters *Hate crime and restorative justice* Oxford University Press UK 2014 at 33-34.

⁶ See Ann Skelton and Mike Batley *Charting progress, mapping the future: Restorative justice in South Africa* Restorative Justice Centre South Africa 2006 at 5 and 6; see also Van Ness and Strong (2010) at 41; Gerry Johnstone and Daniel Van Ness ‘The meaning of restorative justice’ in Gerry Johnstone and Daniel W. Van Ness (eds) *Handbook of restorative justice* Willan Publishing USA 2007 at 8.

⁷ See Kerry Clamp ‘*Restorative justice in transition*’ Routledge USA and Canada 2014 at 14; Walters (2014) at 33.

⁸ Howard Zehr *Fundamental principles of restorative justice* Intercourse: Good Books PA 2002 at 37.

⁹ Howard Zehr *Changing lenses: A new focus for crime and justice* 3rd ed Herald Press Scottsdale, Pennsylvania 2005 at 181.

¹⁰ *Id* at 186-187.

¹¹ Tony Marshall *Restorative justice: An overview* A Report by the Home Office Research Development and Statistics Directorate London 1999 at 5.

¹² Kathleen Daly ‘Restorative justice: The real story’ in Carolyn Hoyle (ed) *Restorative justice: Critical concepts in criminology* Routledge London and New York 2010 at 284; Chris Cunneen and Carolyn Hoyle *Debating restorative justice* Hart Publishing USA and Canada 2010 at 102; Daly (2013) at 361.

justice is not a ‘type of justice’ but a ‘contemporary justice mechanism’.¹³ In contrast to Marshall’s definition, Walgrave’s definition focuses on outcomes rather than processes.¹⁴ He defines restorative justice as ‘an option for doing justice after the occurrence of an offence that is primarily oriented towards repairing the individual, relational and social harm caused by that offence’.¹⁵ Walgrave’s definition does not limit restorative justice to a single process of justice but styles it as one ‘option’ among other systems of dispute resolution.¹⁶ This argument seems compatible with Daly’s view that restorative justice is one among many justice mechanisms of justice.¹⁷ Umbreit also defines restorative justice as

a victim-centred response to crime that gives individuals most directly affected by the criminal act – the victim, the offender, their families and representatives from the community – the opportunity to be directly involved in responding to the harm caused by the crime.¹⁸

The application of restorative justice among member states obliged the United Nations (UN) to formulate basic principles on the use of restorative justice programmes in criminal matters.¹⁹ Such principles apply as guidelines for implementing restorative justice programmes to member states. The UN issued principles which define restorative process as

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.²⁰

The UN principles recognise ‘mediation, conciliation, conferencing and sentencing circles’

¹³ Kathleen Daly ‘What is restorative justice? Fresh answers to a vexed question’ 11(1) *Victims & Offenders* 2016 at 14 and 21.

¹⁴ See Lode Walgrave *Restorative justice, self-interest and responsible citizenship* Willan Publishing USA and Canada 2008 at 21; Daly (2013) at 361.

¹⁵ Walgrave (2008) at 21.

¹⁶ See Walgrave (2008) at 21; see also Peter Reddy ‘*Peace operations and restorative justice: Groundwork for post-conflict regeneration*’ Ashgate Publishing USA 2012 at 18.

¹⁷ Daly (2016) at 21.

¹⁸ Mark Umbreit *The handbook of victim-offender mediation: An essential guide to practice and research* Jossey-Bass San Francisco 2001 at xxxvii.

¹⁹ UN Principles on Basic principles on the use of restorative justice programmes in criminal matters 2002/12, part I.

²⁰ *Ibid.*

as processes that can lead to restorative outcomes.²¹ In terms of these principles, restorative justice is viewed as a programme seeking to achieve restorative outcomes.²² The UN principles state that ‘restorative outcomes include responses and programmes such as reparation, restitution, and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender’.²³ In such a restorative process, the victim, offender and any community member become role-players in the decision-making process, and such a process is steered by a facilitator.²⁴

From this vantage-point, restorative justice is a concept within the criminal justice system that seeks to knit together the victim, offender, family members, ‘community of care’²⁵ and the community in the decision-making process.²⁶ It is a way of doing justice that involves key stakeholders, namely victim, offender, family members, ‘community of care’ and the general community, in decision-making by holding the offender accountable;²⁷ making things right,²⁸ achieving repair, reconciliation and harmony, and striving to prevent future reoffending.²⁹ It is generally a paradigm of criminal justice that advocates for redefining crime³⁰ and giving voice to the affected parties in the justice process.³¹

Through a restorative justice ‘lens’, crime is more than the violation of the laws of the country; it is a violation of relationships between individuals that creates needs and

²¹ *Ibid.*

²² *Ibid.*

²³ UN principles (2002) part I; see also George Pavlich *Governing Paradoxes of Restorative Justice* Routledge New York 2005 at 2.

²⁴ UN Principles, part I.

²⁵ ‘Community of care’ is a term to describe persons indirectly affected by the crime, such as teachers, workmates, friends and neighbours. See Van Ness and Strong (2010) at 43 and 44.

²⁶ Donald J Schmid ‘Restorative justice: A new paradigm for criminal justice policy’ 34 *VUWLR* 2002 at 93.

²⁷ Martin Wright ‘Restorative justice: The basic idea, and practice in the United States’ in E. Fattah and S Parmentier (eds) *Victim policies and criminal justice on the road to restorative justice* Leuven University Press 2001 at 355.

²⁸ *Ibid.*

²⁹ Marshall (1999) at 5; Gerry Johnstone and Daniel W Van Ness ‘The meaning of restorative justice’ in Gerry Johnstone (ed) *A restorative justice reader* 2nd ed Routledge London 2013 at 12.

³⁰ Schmid (2002) at 94.

³¹ Richard Young and Carolyn Hoyle ‘Restorative justice and punishment’ in Seán McConville (ed) *The use of punishment* Willan Publishing USA and Canada 2003 at 200.

obligations.³² The victim is no longer the State but the individuals, family members and community that have directly or indirectly suffered harm.³³ Justice within restorative justice is thus meant to heal the damaged relationships between individuals, initiate a healing process and bring closure to the victim, family members and the community.³⁴ Restorative justice prepares the offender for reintegration into the society.³⁵ Because the offender is also a victim of community stigma, he or she needs healing and closure through restorative measures.³⁶

Miller categorises restorative justice into two kinds of programmes: restorative justice programmes that provide diversionary measures and ones which are therapeutic.³⁷ Restorative justice diversionary programmes operate as an alternative to the criminal justice system, while therapeutic restorative justice programmes apply after offenders' conviction.³⁸

2.3 Background to modern restorative justice

Many authors record the practical application of modern restorative justice from 1970s, when it was applied for the first time in a victim-offender reconciliation programme in Kitchener, Ontario, Canada in 1974³⁹ where a probation officer successfully persuaded a judge to apply mediation to offenders who had pleaded guilty to vandalism.⁴⁰ For many years, Albert Eglash was believed to have authored the term 'restorative justice' in his articles in the 1950s.⁴¹ However, a discovery made by Skelton reveals that the term 'restorative justice' first appeared in German literature in 1955 as '*heilende Gerechtigkeit*', meaning 'healing

³² Zehr (2005) at 181.

³³ Van Ness and Strong (2010) at 43.

³⁴ Zehr (2005) at 186.

³⁵ Cunneen and Hoyle (2010) at 19.

³⁶ Zehr (2005) at 188.

³⁷ Susan Miller *After the crime: The power of restorative justice dialogues between victims and violent offenders* New York University Press New York 2011 at 12.

³⁸ Miller (2011) at 12.

³⁹ See DE Peachey 'The Kitchener experiment' in C Hoyle (ed) *Restorative Justice: Critical Concepts in Criminology* Vol.1 2010 at 125; Declan Roche 'Dimensions of restorative justice' in Carolyn Hoyle (ed) *Restorative justice: Critical Concepts in Criminology* Routledge London and New York 2010 at 344-345.

⁴⁰ Roche (2010) at 345.

⁴¹ Ann M Skelton 'The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice' LLD thesis University of Pretoria 2005 at 84-87; Van Ness and Strong (2010) at 21;

justice'.⁴² Thereafter, it was adopted by Howard Zehr, who is considered as the 'grandfather' of restorative justice.⁴³ The theory was then adopted by many other authors and followed by a number of victim-offender mediation programmes worldwide.⁴⁴ In 2002 restorative justice received the attention of the UN in the basic principles on the use of restorative justice programmes in criminal matters,⁴⁵ followed in 2006 by a comprehensive handbook on restorative justice programmes.⁴⁶

However, this is the history of what can be termed 'modern restorative justice', as restorative justice practices are as old as human history.⁴⁷ Restorative justice practices were the ancient popular mode of dispute resolution not only in the West, Africa and America but the world at large.⁴⁸ There are several similarities between modern restorative justice and indigenous restorative practices. Skelton has done a thorough analysis of similarities between restorative justice and traditional justice practices.⁴⁹ Both processes aim at reconciliation and strive to preserve a harmonious society.⁵⁰ This aim of justice cuts across civil and criminal cases.⁵¹ The major rationale of justice is to make the offender accountable and not to inflict pain.⁵² In both processes, the community plays a major role and individual victims are central in the

⁴² Skelton (2005) at 86-87. In this work, Skelton refers to the original work of Walz and Schrey, *Gerechtigkeit in Biblischer Sicht* (1955) Gotthelf-Verlag, Zurich. Weitekamp and Parmentier also acknowledge the discovery made by Skelton on the genesis of restorative justice; see Elmar GM Weitekamp and Stephan Parmentier 'Restorative justice as healing justice: Looking back to the future of the concept' 4(2) *Restorative Justice: An International Journal* 2016 at 142.

⁴³ Paul Takagi and Gregory Shank 'Critique of Restorative Justice' 31 (3) *Social Justice* 2004 at 153; Van Ness and Strong (2010) at 24.

⁴⁴ Mark S Umbreit and Marilyn Peterson Armour 'Restorative justice and dialogue: Impact, opportunities and challenges in the global community' 36 *Washington University Journal of Law and Policy* 2011 at 69.

⁴⁵ UN Principles (2002).

⁴⁶ 'United Nations Handbook on Restorative Justice Programmes' Criminal Justice Handbook Series New York 2006.

⁴⁷ Wright (2001) at 353; see also Kaitlyn E Tucker 'Mediating theft' 25 *University of Florida journal of law and public policy* 2014 at 28-29.

⁴⁸ Elmar G M Weitekamp 'The history of restorative justice' in Gerry Johnstone (ed) *A restorative justice reader: Text, sources, context* Willan Publishing UK 2003 at 113; James R 'Chip' Coldren Jr 'Commentary: Transnational crime and restorative justice' 6 *Homeland security review* 2012 at 181.

⁴⁹ Skelton (2005); Ann Skelton 'Tapping indigenous knowledge: Traditional conflict resolution, restorative justice and the denunciation of crime in South Africa' in Elrena van der Spuy, Stephan Parmentier and Amanda Dissel (eds) *Restorative justice: Politics, policies and prospects* Juta Cape Town South Africa 2007. See also chapter 4.

⁵⁰ Skelton (2007) at 231.

⁵¹ *Id* at 233.

⁵² The argument on whether there is punishment for offenders in restorative justice is debatable. The argument is discussed below in this chapter.

process.⁵³ The processes are flexible, simple and free from legal technicalities.⁵⁴ It is easy for participants to follow the proceedings without being left behind in the process of justice. Both processes of justice encourage ‘truth-telling’ and apology is the key to justice and victims’ healing.⁵⁵ The processes are friendly and allow free, voluntary participation of both the victims and offenders.⁵⁶ These processes of justice do not abide by the rules of evidence or precedent as in the adversarial system.⁵⁷ They involve an impartial third party acting as a mediator to resolve the conflict.⁵⁸ He or she does not impose the verdict; instead, affected individuals ‘own’ the process through deliberative, transformative or restorative discussion.⁵⁹

Despite these similarities, modern restorative justice and indigenous justice practices are two different paradigms of justice.⁶⁰ For instance, Daly, who has been sceptical about likening them to each other, argues that the principles of modern restorative justice do not carry any indigenous values whatsoever and that believing any otherwise involves ‘romanticising’ the past and simultaneously discrediting the new ideas modern restorative justice advocates.⁶¹

Nevertheless, indigenous restorative justice practices portray evident similarities with those of modern restorative justice. For instance, the influence of traditional Maori family group-conferencing to modern restorative justice cannot be ignored.⁶² In addition, an African jurisprudence embedded in *ubuntu* or *utu* has many implications for a restorative justice ethos.⁶³ One is that indigenous people are already familiar with modern restorative justice,⁶⁴ and that it is a form of justice that can strengthen their communal life. As Johnstone argues, communal societies ought to establish a form of justice that is relevant to their lifestyle and

⁵³ Skelton (2007) at 232.

⁵⁴ *Id* at 234.

⁵⁵ See *Id* at 233.

⁵⁶ Hema Hargovan ‘Knocking and entering: Restorative justice arrives at the courts’ 1 *Acta Criminologica* CRIMSA Conference Special Edition 2008 at 28.

⁵⁷ Skelton (2007) at 234 and 135.

⁵⁸ See Jerry Johnstone *Restorative justice: Ideas, values and debates* 2nd ed Routledge 2011 at 13.

⁵⁹ Skelton (2007) at 236.

⁶⁰ See Daly (2010) at 290.

⁶¹ Daly (2010) at 289.

⁶² Van Ness and Strong (2010) at 14.

⁶³ Don John O Omale *Restorative justice and Victimology: Euro-African perspective* Wolf Legal Publishers Netherlands 2012 at 21.

⁶⁴ See Ness and Strong (2010) at 14.

moral values.⁶⁵ Skelton also argues that applying adversarial criminal justice to indigenous communities is failing to achieve true justice and harmony.⁶⁶ The current criminal justice system is foreign and distant from indigenous justice practices, and hence it is unlikely to create peace and harmony within indigenous communities. The New Zealand family group-conferencing and South African Zwelethamba model, discussed in the next chapter, are the best examples on how local community can apply local knowledge and capacity for community peace-building.⁶⁷

2.4 Rationale for the application of modern restorative justice

Restorative justice emerged as a response to challenging issues within the adversarial criminal justice system. There are two major reasons for the application of restorative justice in the criminal justice process. The first is that the ‘comprehensive law movement’ campaign which emerged as a result of clients’ dissatisfaction with the criminal justice system calls for a therapeutic approach to crimes.⁶⁸ The campaign identifies restorative justice as one of those therapeutic measures.⁶⁹ Secondly, whereas the criminal justice decouples the conflict from the stakeholders (victim, offender and community), restorative justice is a process that responds to the needs of the owners of the conflict.⁷⁰

2.4.1 Therapeutic approach to crimes

Restorative justice as a paradigm of criminal justice receives much support from the comprehensive law movement campaign which seeks to transform the law and role-players as ‘therapeutic agents’.⁷¹ Advocates of the movement argue that role-players within the criminal

⁶⁵ Johnstone (2011) at 37.

⁶⁶ Skelton (2007) at 231.

⁶⁷ See Jan Froestad and Clifford D Shearing *Security governance, policing, and local capacity* CRC Press London 2012.

⁶⁸ Daicoff coined the term ‘comprehensive law movement’, which denotes a campaign to transform the law and judicial officers into therapeutic agents in the judicial process. See Susan Daicoff ‘Law as a healing profession: The comprehensive law movement’ 6 *Pepperdine Dispute Resolution Law Journal* 2006 at 3.

⁶⁹ See Susan Daicoff ‘The future of the legal profession’ 37(1) *Monash university law review* 2011 at 8.

⁷⁰ Nils Christie ‘Conflict as property’ 17 *British Journal of Criminology* 1977; Zehr (2005) at 81; Jennifer Larson Sawin and Howard Zehr ‘The ideas of engagement and empowerment’ in Gerry Johnstone and Daniel W. Van Ness (eds) *Handbook of Restorative Justice* Willan Publishing USA 2007 at 43.

⁷¹ David Wexler ‘Therapeutic jurisprudence and its application to criminal justice research and development’ 7 *Irish Probation Journal* 2010 at 95.

justice system can ameliorate or exacerbate the post-traumatic effects suffered by victims.⁷² From a therapeutic jurisprudence perspective, it is argued further that the criminal justice system does not respond positively to the needs of justice stakeholders, namely clients, scholars, lawyers and legal actors.⁷³ Stakeholders in the criminal justice process, especially the victim, offender and the community, are not fully involved in the justice process and the outcomes are determined by lawyers.⁷⁴ On the basis of this argument, Daicoff considers courtroom justice as the last option in conflict resolution.⁷⁵ In other words, therapeutic measures are better than conventional criminal justice processes.

The comprehensive law movement campaign has identified eight ‘vectors’,⁷⁶ that seek to resolve disputes through therapeutic means.⁷⁷ Both therapeutic jurisprudence and restorative justice are among the ‘vectors’ advocated by the campaign.⁷⁸ Slobogin defines therapeutic jurisprudence as ‘the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects’.⁷⁹ According to therapeutic jurisprudence advocates, the law or process of justice has therapeutic or anti-

⁷² Bruce J Winick ‘Therapeutic jurisprudence and victims of crime’ in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds) *Therapeutic jurisprudence and victim participation in justice: International perspectives* Carolina Academic Press Durham 2011 at 3; Jamie Balson ‘Therapeutic Jurisprudence: Facilitating healing in crime victims’ 6 *Phoenix Law Review* 2013 at 1018; Susan Daicoff ‘Apology, forgiveness, reconciliation and therapeutic jurisprudence’ 13 *Pepperdine Dispute Resolution Law Journal* 2013 at 134.

⁷³ Susan Daicoff ‘Growing Pains: The integration vs. specialization question for therapeutic jurisprudence and other comprehensive law approaches’ 30 *Thomas Jefferson Law Review* 2008 at 553; Susan Daicoff ‘The comprehensive law movement: An emerging approach to legal problems’ *Stockholm Institute for Scandinavian law 1957-2010* at 110; Heather E Williams ‘Social Justice and comprehensive law practice’ 5 *Seattle Journal for Justice* 2006 at 411; Daicoff (2006) at 1.

⁷⁴ See Christie (1977) at 4; Zehr (2005) at 81; Williams (2006) at 417; Sawin and Zehr (2007) at 43.

⁷⁵ Daicoff (1957- 2010) at 112.

⁷⁶ The term ‘vector’ is common in the comprehensive law movement discourse. It is used to refer to processes that offer therapeutic measures in the criminal justice system. These ‘vectors’ are collaborative law, creative problem-solving, holistic justice, preventive law, problem-solving courts, procedural justice, restorative justice, therapeutic jurisprudence and transformative mediation. See Daicoff (2006) at 1-2; Williams (2006) at 412; Daicoff (2008) at 553.

⁷⁷ Daicoff (1957- 2010) at 112.

⁷⁸ David Wexler ‘Restorative justice and therapeutic jurisprudence: All in the family’ in Katherine S van Wormer and Loren Walker (eds) *Restorative justice today: Practical applications*, Sage Publication Los Angeles 2013 at 28.

⁷⁹ Christopher Slobogin ‘Therapeutic jurisprudence: Five dilemmas to ponder’ 1(1) *Psychology, Public Policy and Law* 1995 at 196.

therapeutic effects on victims.⁸⁰ While therapeutic jurisprudence and restorative justice mean different things, they share a common philosophy of ‘promoting human well-being’ through justice processes.⁸¹ They both aim at victim healing and restoring community harmony.⁸²

2.4.2 The victim in the adversarial criminal justice system

It has been argued that parties in the adversarial criminal justice system do not own the process and that the outcomes are imposed on them by professionals.⁸³ Despite the effects of the crime suffered by an individual victim, the adversarial criminal justice process recognises the State as the victim of the crime.⁸⁴ Victims normally have several needs arising out of the commission of the crime.⁸⁵ They need sympathy, respect, fairness, restoration, compensation and moral treatment that can vindicate their harm.⁸⁶ Victims need answers to their questions and information about their cases.⁸⁷ Because the crime causes insecurity to victims, they need assurance that the offence will not happen to them again.⁸⁸ They need to meet offenders who can answer why the offence was committed. Victims also need an apology⁸⁹ and possibly to forgive in order to begin healing, finding ‘closure’⁹⁰ and ‘moving on’.⁹¹ They need to be

⁸⁰ David Wexler ‘Therapeutic jurisprudence’ 20 *Touro Law Review* 2004 at 355; Williams (2006) at 412; Wexler (2010) at 95; David B Wexler ‘Therapeutic jurisprudence and family-friendly criminal law practice’ 17(1) *Barry Law Review* 2011 at 7; Winick (2011) at 3; Jo-Anne Wemmers ‘Victims in the criminal justice system and therapeutic jurisprudence: A Canadian perspective’ in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds) *Therapeutic jurisprudence and victim participation in justice: International perspectives* Carolina Academic Press Durham 2011 at 68.

⁸¹ Michael S King ‘Restorative justice, therapeutic jurisprudence and the rise of emotionally intelligent justice’ 32 *Melbourne University law review* 2008 at 1097-1098; Wexler (2013) at 28.

⁸² Saby Ghoshray ‘An equilibrium-centric interpretation of restorative justice and examining its implementation difficulties in America’ 35 *Campbell Law Review* 2013 at 298.

⁸³ Christie (1977) at 4; Zehr (2005) at 81; Sawin and Zehr (2007) at 43.

⁸⁴ Howard Zehr and Harry Mika, ‘Fundamentals of Restorative Justice’ in Declan Roche (ed) *Restorative Justice* Ashgate England 2004 at 77; Van Ness and Strong (2010) at 43 and 44; Loren Walker ‘Restorative justice: Definition and purpose’ in Katherine S van Wormer and Loren Walker (eds) *Restorative justice today: Practical applications* Sage Los Angeles 2013 at 5.

⁸⁵ Zehr (2005) at 22; Howard Zehr ‘Retributive justice, restorative justice’ in Gerry Johnstone (ed) *A restorative justice reader 2nd ed* Routledge London and New York 2013 at 23.

⁸⁶ Heather Strang ‘Is restorative justice imposing its agenda on victims?’ in Howard Zehr and Barb Toews (eds) *Critical issues in restorative justice* Willan publishing UK 2004 at 96; Pavlich (2005) at 49; Zehr (2005) at 26; Lucy Clark Sanders ‘Restorative justice: The Attempt to rehabilitate criminal offenders and victims’ 2 *Charleston Law Review* 2008 at 937; Van Ness and Strong (2010) at 44; Zehr (2013) at 23.

⁸⁷ Strang (2004) at 96; Zehr (2005) at 26; Winick (2011) at 5 and 8; Zehr (2013) at 23.

⁸⁸ Zehr (2005) at 28.

⁸⁹ Strang (2004) at 96.

⁹⁰ Zehr (2005) at 51 and 186.

⁹¹ Walker (2013) at 4.

engaged in finding a solution to their dispute.⁹² Victims need the ‘experience of justice’ as ‘justice must be experienced as real’.⁹³ Victims need a justice process that will allow sympathy for their problems; they need to be considered as necessary parties in finding answers to their problems.⁹⁴

Unfortunately, the adversarial criminal justice system does not address the needs of the victims, nor provide relevant answers to their questions. Several authorities have observed that in the criminal justice process, victims often feel they are a mere observer, ‘bystander’,⁹⁵ ‘footnote’,⁹⁶ ‘pawn’,⁹⁷ ‘Cinderella’,⁹⁸ ‘piece of evidence’,⁹⁹ ‘component of evidence’¹⁰⁰ in their own justice process. Even compensation, which ought to be paid to victims, has been ‘stolen’ by the State in the form of a fine.¹⁰¹ Individual victims remain the ‘main losers’ in the criminal justice process.¹⁰² Instead of healing the victims, the process of justice exacerbates their trauma and, in some cases, leads to secondary victimisation.¹⁰³

It is against this background that restorative justice has become pertinent. It allows the affected parties to come together and discuss the aftermath of the crime and find a solution. The process allows the voice of the victim to be heard and to be included in the agreement.

2.4.2.1 Recognition of victims in the criminal justice process

The international community has created an opportunity for integration of victims in the criminal justice processes.¹⁰⁴ Jurisdictions such as South Africa,¹⁰⁵ Canada, Australia, Israel,

⁹² Lucy Clark Sanders ‘Restorative justice: The attempt to rehabilitate criminal offenders and victims’ 2 *Charleston Law Review* 2008 at 937; Zehr (2005) at 28.

⁹³ Zehr (2005) at 28.

⁹⁴ Miller (2011) at 203.

⁹⁵ Zehr (2005) at 33.

⁹⁶ *Id* at 31.

⁹⁷ *Id* at 82.

⁹⁸ H F Snyman ‘The victim impact statement as a means of addressing the victim’s needs for rights’ 8 *Acta Criminologica*, 1995 at 32.

⁹⁹ Juan Cardenas ‘The crime victim in the prosecutorial process’ 9 *Harvard Journal of Law and Public Policy* 1986 at 37; see also Van Ness and Strong (2010) at 45.

¹⁰⁰ Miller (2011) at 203.

¹⁰¹ Christie (1977) at 43; see also Walker (2013) at 5.

¹⁰² Christie (1977) at 43.

¹⁰³ Johnstone (2011) at 11; Thomas Trenczek ‘Restorative justice: New paradigm, sensitising theory or even practice’ 3 (3) *Restorative Justice: An International Journal* 2015 at 454.

¹⁰⁴ United Nations Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power.

Australia, New Zealand, Ireland, England, Wales and the United States have adopted victim impact statements as a means to include the voice of the victim in the sentencing process.¹⁰⁶

Erez defines a victim impact statement (VIS) as a statement that ‘addresses the effects of the crime on the victim, in terms of the victim’s perceptions and expressions of the emotional, physical or economic harm he or she sustained as a result of the crime’.¹⁰⁷

VIS is an oral or written statement by the victim stating the effects of the crime.¹⁰⁸ Depending on the requirement of each jurisdiction, the VIS may be prepared by the victim,¹⁰⁹ prosecutor,¹¹⁰ probation officer,¹¹¹ social worker, psychologist or criminologist.¹¹² In most cases, the VIS may include a wide range of information concerning the crime, such as the physical, social, emotional, psychological and financial losses suffered by the victim.¹¹³ According to Van der Merwe, the VIS can include the ‘acute and long-term consequences of the criminal incident’ for the victim.¹¹⁴ The statement is normally presented to the judge, in most cases after conviction but before sentence, to inform the judge of consequences of the crime that are normally not stated before the ordinary proceeding.¹¹⁵ Where the judge or magistrate feels the statement has value in sentencing the offender, the needs of the victim are always included in the sentence.¹¹⁶ It is a way to embrace the victim’s voice in the sentencing process.¹¹⁷ Though decision-makers exercise their discretion in the sentencing process, they

¹⁰⁵ The Service Charter for victims of Crime in South Africa.

¹⁰⁶ Goodey (2005) at 165-166; Jo-Anne Wemmers ‘Victims in the criminal justice system and therapeutic jurisprudence: A Canadian perspective’ in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds) *Therapeutic jurisprudence and victim participation in justice: International perspectives* Carolina Academic Press Durham 2011 at 71; Balson (2013) at 1033; Braun (2013) at 1892; Wilson (2015) at 159.

¹⁰⁷ Erez (1999) at 546.

¹⁰⁸ Erez, Ibarra and Downs (2011) at 24; Clare Morton ‘A stronger victim’s voice’ 86 *Law Institute Journal* 2012 at 51; Braun (2013) at 1892-1893.

¹⁰⁹ Wemmers (2011) at 71.

¹¹⁰ Braun (2013) at 1092.

¹¹¹ Erez (1999) at 546.

¹¹² Annette van der Merwe ‘Addressing victim’s harm: The role of impact report’ 30(2) *Thomas Jefferson Law Review* 2008 at 394.

¹¹³ Erez (1999) at 546; Erez, Ibarra and Downs (2011) at 24; Wemmers (2011) at 72; Balson (2013) at 1031.

¹¹⁴ Van der Merwe (2008) at 394.

¹¹⁵ Erez and Roberts (2007) at 282; Braun (2013) at 1892.

¹¹⁶ Erez, Ibarra and Downs (2011) at 24; David B Wexler ‘Victim legal clinics and legal system victim impact statements: Addressing the therapeutic aspects of victim participation in justice’ in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds) *Therapeutic jurisprudence and victim participation in justice: International perspectives* Carolina Academic Press Durham 2011 at 92; Braun (2013) at 1892.

¹¹⁷ Goodey (2005) at 165; Wemmers (2011) at 71.

are encouraged to consider the victim's suffering in the sentence.¹¹⁸

The benefits of victim impact statements are legion. VIS is a platform for victim's voice to be heard in justice determination and to let the court know the wider impact of the crime.¹¹⁹ The court may give a proportionate sentence when further information about the offence is known.¹²⁰ VIS is a way to achieve integration by acknowledging the victim in the process of justice.¹²¹ Allowing VIS in court gives impetus to victims' participation in the criminal justice processes.¹²² The statement may be therapeutic by validation, empowerment, and allowing victims' healing,¹²³ 'closure',¹²⁴ and 'moving on'.¹²⁵ It is a decisive moment to the offender to know the effects of his or her illegal behaviour.¹²⁶ It is always therapeutic for the victim to voice the traumatic stress of the crime.¹²⁷ It tells the decision-maker of the essence of an individual victim who has suffered the effects of the crime.¹²⁸ The statement draws the attention of the decision-maker to the presence of a real victim in a crime rather than the State.¹²⁹ It reveals information to the court about the victim's needs, which should be addressed when preparing the offender's sentence.¹³⁰

However, there is wariness about adopting VIS in the sentencing process. In most cases, the statements may be sympathetic, hence likely to affect the sentencing process by prejudicing the decision-maker.¹³¹ If the judge or magistrate is not cautious, the statement may negatively influence the sentence, leading to severe punishment because the victims' opinion may be

¹¹⁸ See, for instance, the New Zealand Sentencing Act 2002 section 8(f) where the law states, in sentencing the offender the court shall take into account 'any information provided to the court concerning the effect of the offending on the victim'. See also Erez, Ibarra and Downs (2011) at 24.

¹¹⁹ Goodey (2005) at 166; Balson (2013) at 1031-1032; *S v. Matyityi* 2011 (1) SACR 40 (SCA), paragraph 17.

¹²⁰ *S v. Matyityi* 2011 (1) SACR 40 (SCA), paragraph 17.

¹²¹ Goodey (2005) at 166; Balson (2013) at 1031-1032.

¹²² Goodey (2005) at 166.

¹²³ Balson (2013) at 1031-1032.

¹²⁴ Cunneen and Hoyle (2010) at 132.

¹²⁵ Cunneen and Hoyle (2010) at 10; Erez, Ibarra and Downs (2011) at 24.

¹²⁶ Balson (2013) at 1032.

¹²⁷ Erez, Ibarra and Downs (2011) at 24.

¹²⁸ Erez (1999) at 552; Balson (2013) at 1032.

¹²⁹ Erez (1999) at 552.

¹³⁰ Van der Merwe (2008) at 395.

¹³¹ Dina Hellerstein 'Victim impact statement' 27 *American Criminal Law Review* 1989 at 429; Goodey (2005) at 166; Annette van der Merwe and Ann Skelton 'Victims' mitigating views in sentencing decisions: A comparative analysis' 35(2) *Oxford Journal of Legal studies* 2015 at 357.

based on vengeful emotions.¹³² Alternatively, the victim may be sympathetic to the offender, leading to a lenient sentence.¹³³ Application of VIS in court imposes a responsibility on a judge to consider three categories of interest: those of the victim, offender and the public.¹³⁴ Van der Merwe and Skelton observe that a criminal case involves public interest, hence such interest must be observed.¹³⁵ It may be challenging to a decision-maker to accommodate all interests without offending justice.¹³⁶ Most likely, the rights of the offender could be prejudiced if the victim's interests predominate in the sentencing process.¹³⁷

It is also argued that the acceptance of VIS in court may affect the consistency of decisions, depending on the strength of the victim's statement.¹³⁸ Though many victims would want the court to hear their feelings, which is therapeutic, the statement may raise expectations among victims that are not met in sentencing, given that making a VIS does not guarantee that the offender will receive a harsh sentence.¹³⁹ By the same token, whereas the victim is entitled to submit an impact statement, the offender does not have the right to contradict that statement: as such, unscrupulous victims may seek sympathetic sentences through the production of false information in court. Moreover, given that a case may take several years before conviction, the retelling of the victim's story in court could revive his or her traumatic experience: the victim might have started a healing journey but then have it undone by hearing information that reminds him or her of the crime's trauma.

In my view, though, the VIS should be viewed as more of a therapeutic measure than a statement meant to influence the court's decisions. While it may provide further information to the decision-maker than that submitted in the proceedings, the statement could be vital for the victim's well-being: it draws the victim closer to the feeling of justice than does being a

¹³² Van der Merwe and Skelton (2015) at 356.

¹³³ Van der Merwe and Skelton (2015) at 357; see also Director of Public Prosecutions, *North Gauteng v. Thabethe 2011 (2) SACR 567 (SCA)*. In this case, the victim was raped by her stepfather. During a restorative justice encounter, the victim, being a dependant of the offender, did not want him incarcerated.

¹³⁴ Ybo Buruma 'Doubts on the upsurge of the victim's role in criminal law' in Hendrik Kaptein and Marijke Malsch (eds) *Crime, victims and justice: Essays on principles and practice* Ashgate Publishing England 2004 at 9.

¹³⁵ Van der Merwe and Skelton (2015) at 357.

¹³⁶ Buruma (2004) at 9.

¹³⁷ Goodey (2005) at 166; Van der Merwe and Skelton (2015) at 357.

¹³⁸ Erez and Roberts (2007) at 283; see also Van der Merwe and Skelton (2015).

¹³⁹ Goodey (2005) at 167-168; Van der Merwe and Skelton (2015) at 357.

complainant and witness for the prosecution. Because the adversarial criminal justice process does not allow for the expression of feelings during witness hearing, the VIS is another way to express what the court was prevented from hearing during evidence production.

2.5 Elements of modern restorative justice

Through a restorative justice ‘lens’, a crime is viewed as a transgression against individuals in the community.¹⁴⁰ Restorative justice does not view a crime as the violation of law alone, but as an act which damages the relationship between the victim, community and the offender.¹⁴¹ Barnett argues that robbery does not affect the ‘society’; it is an individual person who has been robbed.¹⁴² An individual person is injured and he or she has needs that should be addressed through the justice process.

As such, mechanisms to address the needs, harm and injuries suffered by the victims are necessary.¹⁴³ The restorative justice process identifies an individual person who is responsible for the harm caused by the crime. An offender is accountable for repairing and restoring the damaged relationship. The offender has an obligation to make things right with the victim, family members, friends and the community.¹⁴⁴ Restorative justice requires the participation of all affected parties in the decision-making process.¹⁴⁵ Parties must be engaged in finding the solution to the problem and discuss the measures to prevent future reoffending.¹⁴⁶ Van Ness and Strong argue that affected parties have reason to participate in the decision-making process because it is an opportunity for them to meet their transgressors.¹⁴⁷ Their participation also has an influence on how the community reacts to

¹⁴⁰ Zehr (2005) at 181.

¹⁴¹ Zehr (2005) at 181 and 184.

¹⁴² Randy E Barnett ‘Restitution: A new paradigm of criminal justice’ in Carolyn Hoyle (eds) *Restorative justice: Critical concepts in criminology* Vol. I Routledge USA and Canada 2010 at 41.

¹⁴³ See Howard Zehr *The little book of restorative justice* Good Books USA 2002 at 21; Zehr and Mika (2004) at 77; Sawin and Zehr (2007) at 46.

¹⁴⁴ Declan Roche ‘Accountability in Restorative Justice’ Oxford University press USA 2003 at 25; see Zehr (2002) at 22; Zehr and Mika (2004) at 77-78.

¹⁴⁵ See Zehr (2002) at 22; Roche (2003) at 25 and 60; Zehr and Mika (2004) at 79; Raymond Koen ‘The antinomies of restorative justice’ in Elrena van der Spuy, Stephan Parmentier and Amanda Dissel (eds) *Restorative justice: Politics, policies and prospects* Juta Cape Town South Africa 2007 at 257.

¹⁴⁶ Zehr (2005) at 186-187.

¹⁴⁷ Van Ness and Strong (2010) at 49.

crimes committed by its members.¹⁴⁸ Parties are assisted and empowered through restorative interventions.¹⁴⁹ By engaging parties in the process of justice, victims get an opportunity for their voices to be heard. The extent to which the crime has affected the victim is discussed, their needs are considered and harms are corrected.¹⁵⁰ The restorative justice process gives an offender an opportunity to share the reasons for committing the crime. Through the process of encounter, the offender has an opportunity to make amends to the victim and the community, which paves the way for his or her reintegration in the community.¹⁵¹

Therefore, when a crime occurs, restorative justice raises crucial questions that aim at reparation. These questions are: who has been harmed, how have they been harmed, and what are their needs?¹⁵² Restorative justice does not ask what the relevant punishment is for the offender but what the offender should do to make things right.¹⁵³ This question is pertinent because victims' needs must be addressed in the process of justice. The major foci of restorative justice are reparation and reconciliation, which are achieved by engaging parties in the process of justice. Van Ness and Strong argue that if restorative justice were a structure, then its cornerstones would be 'encounter', 'amends', 'reintegration' and 'inclusion'.¹⁵⁴ However, these elements can be expressed in different ways. For instance, Miers et al. consider the triple 'Rs' as the major elements of restorative justice, namely 'responsibility', 'restoration' and 'reintegration'.¹⁵⁵ Generally, restorative justice involves an encounter between victims and offenders: the offender must be given an opportunity to make amends by taking responsibility and then to be reintegrated in the community.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ Van Ness and Strong (2010) at 43; Heather Strang and Lawrence W Sherman 'Repairing the Harm: Victims and restorative justice' in Carolyn Hoyle (ed) *Restorative Justice: Critical Concepts in Criminology* Vol. III Routledge London 2010 at 41.

¹⁵¹ See Cunneen and Hoyle (2010) at 19 and 24.

¹⁵² Zehr (2005) at 191.

¹⁵³ *Id* at 186.

¹⁵⁴ Van Ness and Strong (2010) at 49.

¹⁵⁵ David Miers, Mike Maguire, Shelagh Goldie, Karen Sharpe, Chris Hale, Ann Netten, Steve Uglow, Katherine Doolin, Angela Hallam, Jill Enterkin, Tim Newburn 'An exploratory evaluation of restorative justice schemes' Crime Reduction Research Series Paper 9 Home office London 2001 at 9.

2.6 Advantages of restorative justice

There are many advantages to resolving conflicts through restorative justice measures. Restorative justice avails the opportunity to affected parties to discuss the effects of the crime,¹⁵⁶ to empathise, reconcile, apologise, forgive¹⁵⁷ and repent, and to repair harm.¹⁵⁸ It involves the community, which is believed to understand the causes of crimes better than any outsider.¹⁵⁹ It is an opportunity for the offender to take responsibility¹⁶⁰ and to facilitate reintegration in the community.¹⁶¹ Restorative justice also avails victims with an opportunity to voice their victimisation¹⁶² and discharge the harm suffered.¹⁶³ It gives a voice to affected parties in a restorative decision-making process.¹⁶⁴ Parties in restorative justice are no longer observers of their own justice¹⁶⁵ but agentic role-players in it.¹⁶⁶ Restorative justice responds more positively to the needs of justice stakeholders than the conventional criminal justice system.¹⁶⁷

Restorative processes relieve the victim of the fear of revictimisation¹⁶⁸ and reduces recidivism.¹⁶⁹ In the process of restorative justice, harms caused by the crime are repaired and victims' needs discussed and addressed to the extent possible.¹⁷⁰ Restorative justice reduces

¹⁵⁶ Barb Toews and Howard Zehr 'Ways of knowing for a restorative worldwide' in Elmer GM Weitekamp and Hans-Jurgen Kerner (eds) *Restorative justice in context: International practice and directions* Willan publishing USA and Canada 2003 at 262; Susan Herman 'Is restorative justice possible without a parallel system for victim?' in Howard Zehr and Barb Toews (eds) *Critical issues in restorative justice* Willan publishing USA 2004 at 75; Roche (2003) at 10.

¹⁵⁷ Walgrave (2008) at 116; Roche (2003) at 2.

¹⁵⁸ Roche (2003) at 2 and 28.

¹⁵⁹ Zehr (2002) at 22.

¹⁶⁰ Zehr (2005) at 43; Roche (2003) at 32.

¹⁶¹ Roche (2003) at 29; see Koen (2007) at 257.

¹⁶² Toews and Zehr (2003) at 257; Roche (2003) at 2 and 32.

¹⁶³ Roche (2003) at 10.

¹⁶⁴ Herman (2004) at 76; Roche (2003) at 2 and 30.

¹⁶⁵ Zehr (2005) at 33; Roche (2005) at 32.

¹⁶⁶ Roche (2003) at 9.

¹⁶⁷ Sherman and Strang (2007) at 13.

¹⁶⁸ James Dignan 'Evaluation restorative justice from a victim perspective: Empirical evidence' in Carolyn Hoyle (ed) *Restorative Justice: Critical Concepts in Criminology* Vol. III, Routledge London 2010 at 8.

¹⁶⁹ Latimer, Dowden and Muise (2005) at 137; Sherman and Strang (2007) at 13, 21 and 68; Roche (2003) at 11; James Bonta, Rebecca Jesseman, Tanya Rugge and Robert Cormier 'Restorative justice and recidivism' in Dennis Sullivan and Larry Tiftt (eds) *Handbook of Restorative Justice* Routledge London 2006 at 117; Kimberly de Bues and Nancy Rodriguez 'Restorative justice practice: An examination of programme completion and recidivism' 35(3) *Journal of Criminal Justice* 2007.

¹⁷⁰ Sherman and Strang (2007) at 13.

vengeance-related crimes¹⁷¹ and facilitates reconciliation and social harmony among community members.¹⁷² Victims and offenders express greater satisfaction with restorative justice than those who go through court prosecution.¹⁷³

With restorative interventions, parties are relieved from court processes, court-related costs¹⁷⁴ and the post-traumatic effects of the crime.¹⁷⁵ The government too is relieved of prison expenses¹⁷⁶ caused by overcrowded prisons. Restorative programmes are better than prisons at rehabilitating offenders.¹⁷⁷ Restorative justice further reduces post-traumatic effects of the crime to victims.¹⁷⁸

Though there are challenges in implementing restorative justice in case of violent offences, there are promising possibilities in this regard.¹⁷⁹ Victim satisfaction in participating for therapeutic reasons in restorative justice involving violent offences is also encouraging.¹⁸⁰ The study by Umbreit et al. points to the wider possibility of achieving restorative justice outcomes among adult offenders.¹⁸¹

2.7 Contemporary debates on modern restorative justice

Restorative justice advocates have debated the challenges that arise when restorative interventions are employed to resolve criminal disputes. The issues include the role of the community in restorative justice; the question of whether restorative justice can apply to all

¹⁷¹ Sherman and Strang (2007) at 4 and 64.

¹⁷² Koen (2007) at 260.

¹⁷³ Roche (2003) at 11; Latimer, Dowden and Muike (2005) at 136; Mark S Umbreit, Robert B Coates and Betty Vos 'Victim-offender mediation: An evolving evidence-based practice' in Dennis Sullivan and Larry Tifft (eds) *Handbook of restorative justice* Routledge London 2006 at 56; Sherman and Strang (2007) at 62; Van Ness and Strong (2010) at 69; Dignan (2010) at 7-8; Elias (2015) at 78; House of Commons Justice Committee 'Restorative justice; Fourth report of session 2016-17' 2016 at 9-10.

¹⁷⁴ Sherman and Strang (2007) at 24.

¹⁷⁵ *Id* at 52.

¹⁷⁶ *Ibid.*

¹⁷⁷ Van Ness and Strong (2010) at 69.

¹⁷⁸ Sherman and Strang (2007) at 52.

¹⁷⁹ Zehr (2002) at 9; David J Cornwell *Criminal punishment and restorative justice* Waterside Press Winchester 2006 at 92; Sherman and Strang (2007) 21 and 68; Miller has shown the dire need victims of violent crimes have to meet the offenders for therapeutic reasons. See Miller (2011).

¹⁸⁰ Jeff Latimer, Craig Dowden and Danielle Muike 'The effectiveness of restorative justice practices: A meta-analysis' 85(2) *The Prison Journal* 2005; Miller (2011); Camp (2014) at 77.

¹⁸¹ Mark S Umbreit, B Vos, RB Coates and M Armour 'Victims of severe violence in mediated dialogue with offender: The impact of the first multi-site study in the US' 13(1) *International Review of Victimology* 2006.

types of offences; the use of punishment and its role; the reformative values of offenders; and the diverse outcomes of restorative justice.

2.7.1 Involving the community in restorative justice

Community participation in restorative justice is a key factor in an offender's reintegration, rehabilitation and accountability. The community is also a victim of crimes committed by its members or within its geographical space.¹⁸² The other argument for involving the community in conflict resolution is that it restores 'ownership' of the conflict to the most affected parties.¹⁸³ Christie's argument is that the conflict is normally 'stolen' from the community (affected parties) by professionals. So, the conflict is returned to the owner by involving the community through a restorative process.¹⁸⁴ The return of conflict to the community goes hand in hand with empowering the community to deal with its own disputes and setting-up reintegration measures for offenders.¹⁸⁵ Community participation is an opportunity to understand the offenders' needs and behaviour.¹⁸⁶ It is an avenue for the community to re-establish the broken social bonds through community 'justice rituals'.¹⁸⁷ The community feels the impact of the conflict more than professionals, who are normally foreign to the community and not directly affected by the conflict.¹⁸⁸ As stated earlier, crime disturbs community social order, and such order must be restored by involving the community in finding the solution.¹⁸⁹ The community may be better placed to know the cause of the crime, finding a solution and reintegrating the offender.¹⁹⁰ In addition, the community, which normally involves laypersons in dispute resolution, can 'speak the same language' as

¹⁸² Fernanda Fonseca Rosenblatt 'Community involvement in restorative justice: Lessons from an English and Welsh case study on youth offender panel' 2(3) *Restorative Justice: An International Journal* 2014 at 282.

¹⁸³ Christie (1977); Rosenblatt (2014) at 281.

¹⁸⁴ See Christie (1977) at 3.

¹⁸⁵ Albert W Dzur and Susan M Olson 'The value of community participation in restorative justice' 35(1) *Journal of Social Philosophy* 2004 at 94; Rosenblatt (2014) at 283.

¹⁸⁶ Dzur and Olson (2004) at 94.

¹⁸⁷ Meredith Rossner and Jasmine Bruce 'Community participation in restorative justice: Rituals, reintegration and quasi-professionalization' 11(1) *Victims & Offenders* 2016 at 114.

¹⁸⁸ According to Zehr, when a crime occurs the community becomes the secondary victim of the offenders illegal acts and it should therefore be involved in dispute resolution. See Zehr (2002) at 16; see also Rosenblatt (2014) at 282.

¹⁸⁹ See Cunneen and Hoyle (2010) at 24.

¹⁹⁰ See Dzur and Olson (2004) at 95.

the offender and the victim, whereas professionals may be unable to.¹⁹¹ However, considering the diverse nature of our modern societies and the tendency towards less communal modes of living, the argument that laypersons know offenders better than professionals is debatable.¹⁹²

Given that the community is the custodian or protector of its own values, its participation is thus a way to ascertain which value has been violated by the offender and a means to restore the community to order.¹⁹³ Nevertheless, the extent to which it should be involved in restorative justice has been debated. For instance, there is no guarantee that the community can ensure offender reintegration or victim support and healing.¹⁹⁴ In addition, the danger of misusing community power in restorative justice cannot be underestimated. There is concern that communities may turn restorative justice processes into adjudication centres capable of inflicting severe punishment on offenders in the name of rehabilitation or restoration.¹⁹⁵ Justice administration by community representatives, if not monitored, may be an indirect way to establish ‘little judges’ outside the judicial machinery.¹⁹⁶ Furthermore, certain offences may be treated with leniency if the community has to participate in restorative justice.¹⁹⁷ For instance, there are communities that believe that a woman’s sexual abuse is a result of her misbehaviour.

In addition, community representation in dispute resolution may be viewed as a contravention of the established common law principle of justice, *nemo iudex in causa sua*.¹⁹⁸ If the facilitator and victim belong to the affected community, there is doubt whether justice can be dispensed fairly without any degree of bias that could lead to injustice. Johnstone argues that in every community there are inequalities based on ‘wealth, gender, race, ancestry and family connections’.¹⁹⁹ Such an imbalance can adversely affect the decision-making process if the

¹⁹¹ See Dzur and Olson (2004) at 94; Rosenblatt (2014) at 284.

¹⁹² See Rosenblatt (2014) at 285-286.

¹⁹³ Walgrave (2003) at 69; Dzur and Olson (2004) at 95.

¹⁹⁴ Rosenblatt (2014) at 287-288.

¹⁹⁵ *Id* at 288.

¹⁹⁶ Rossner and Bruce (2016) at 111.

¹⁹⁷ See Johnstone (2011) at 25.

¹⁹⁸ *Nemo iudex in causa sua*, sometimes known as the ‘rule against bias’, is a common phrase in common law which that ‘no one should be a judge in his own cause’.

¹⁹⁹ Johnstone (2011) at 25.

community is involved.²⁰⁰ Furthermore, involving the community in restorative justice imposes a burden on it. According to Johnstone, dispute resolution is a cumbersome and time-consuming process that requires commitment.²⁰¹ This is one of the reasons why conflict management involves special professionals who dedicate their time to adjudication.²⁰² When involving the community in dispute resolution, how could it find a balance between justice delivery and income-generating activities?

The term ‘community’ has become contentious in restorative justice discourse for other reasons too.²⁰³ Communities have developed from rural to modern urban societies.²⁰⁴ In developed nations, where everything is administered by the State, the concept of ‘community’ is waning,²⁰⁵ losing reality and becoming contentious. For instance, convening a community to resolve a street robbery offence is almost impossible in modern societies.²⁰⁶ In such circumstances, the victim and offender do not necessarily share similar ‘social networks’.²⁰⁷ In modern societies, enforcing community moral standards is difficult in that the community may be composed of people with different values. In African communities, however, especially in rural communities, where even a minor transgression necessitates a village (community) meeting, the role of the community is evident.

Despite these controversies, community is defined in terms of the territorial boundary within which the crime is committed.²⁰⁸ It is also defined according to victims’ connections with people sharing common interests with them, such as friends, workmates, teachers, neighbours

²⁰⁰ *Ibid.*

²⁰¹ Johnstone (2011) at 125.

²⁰² Johnstone (2011) at 125-126.

²⁰³ Howard Zehr *The little book of restorative justice* Good Books USA 2002 at 26; McCold (2004) at 155; Zehr and Mika (2004) at 74; Tali Gal “‘The conflict is ours’: Community involvement in restorative justice” 19(3) *Contemporary Justice Review* 2016 at 290-291.

²⁰⁴ Gal (2016) at 290.

²⁰⁵ Zehr (2002) at 26; Jennifer Gerarda Brown ‘The use of mediation to resolve criminal case: A procedural critique’ in Declan Roche (ed) *Restorative justice* Ashgate Publishing 2004 at 201.

²⁰⁶ Lode Walgrave ‘Imposing restoration instead of inflicting pain: Reflections on the judicial reaction to crime’ in Andrew von Hirsch, Julian Roberts, Anthony E Bottoms, Kent Roach and Mara Schiff (eds) *Restorative justice and criminal justice: Competing or reconcilable paradigms?* Hart Publishing USA and Canada 2003 at 68.

²⁰⁷ Walgrave (2003) at 68.

²⁰⁸ Zehr (2002) at 26; George Pavlich ‘What are the dangers as well as the promises of community involvement?’ in Howard Zehr and Barb Toews (eds) *Critical issues in restorative justice* Willan Publishing, New York 2004 at 173; Cunneen and Hoyle (2010) at 16.

extended families, sports clubs, coaches²⁰⁹ or any person indirectly affected by the offence.²¹⁰ Accordingly, McCold categorises criminal justice stakeholders as either the ‘micro-community’ (primary stakeholders) or ‘macro-community’ (secondary stakeholders).²¹¹ Scheuerman and Keith argue that neighbours, supervisors and co-workers are part of offenders’ ‘meso-community’.²¹² The micro-community usually has special needs to be addressed by the criminal justice process. Its members include direct victims of crime such as individual victims, their families and friends.²¹³ The macro-community comprises persons indirectly affected by the crime, such as neighbours, officials and the general community.²¹⁴ A justice system is effective only when it addresses the needs of both primary and secondary stakeholders.²¹⁵ This is possible only when major stakeholders in a conflict are involved in the resolution process.

However, Johnstone questions whether offences involving strangers can attract community involvement, because in such type of offences the community is not a secondary victim.²¹⁶ In addition, some offences may involve a wider community – possibly the entire nation may be a victim.²¹⁷ How could such a large community engage in dispute resolution?

2.7.2 Using restorative justice to resolve sexual offences

Modern restorative justice system is hailed for handling diverse crimes, ranging from minor or non-violent to serious and violent offences.²¹⁸ It is also clear that restorative justice applies as a complementary criminal justice system²¹⁹ in jurisdictions where it has been written into

²⁰⁹ Zehr (2002) at 26; Pavlich (2004) at 173; McCold (2004) at 155.

²¹⁰ McCold (2004) at 155; Cunneen and Hoyle (2010) at 16.

²¹¹ McCold (2004) at 161.

²¹² Heather L Scheuerman and Shelly Keith ‘Supporters and restorative justice: How does the intersection between offenders, victim and the community influence perceptions of procedural justice and shaming?’ 3(1) *Restorative Justice: An International Journal* 2015 at 80.

²¹³ See Zehr (2002) at 26; McCold (2004) at 161.

²¹⁴ McCold (2004) at 161.

²¹⁵ McCold (2004) at 161; Pavlich (2004) at 175.

²¹⁶ Johnstone (2011) at 127.

²¹⁷ *Ibid.*

²¹⁸ Umbreit and Armour (2011a) at 65; Clamp (2014) at 18.

²¹⁹ Marshall (2003) at 31; Victoria McGeer and Philip Pettit ‘The desirability and feasibility of restorative justice’ 3(3) *Restorative Justice: An International Journal* 2015 at 325.

statutes.²²⁰ Even though it accommodates a number of offences and fosters victim and offender satisfaction,²²¹ the process is not free from criticism. Restorative justice is not a panacea,²²² and certain offences may be difficult to resolve through restorative justice processes.

For instance, using it to resolve domestic violence, sexual violence or hate crimes is debatable.²²³ While victims of sexual violence find the adversarial criminal justice process traumatising,²²⁴ the same may be felt equally when a restorative justice process is followed.²²⁵ In sexual offences, the retelling of the story by the victims has two sides: it may be either therapeutic²²⁶ or traumatic for revisiting the victim's past experience.²²⁷ Under certain circumstances, even the offender is not free to participate in the process of justice for fear of face-to-face encounter with the victim.²²⁸ Cunneen and Hoyle argue that in domestic or sexual violence offences, victims' attendance at restorative justice conference could expose them to violence and abuse.²²⁹ In such cases, the victim is more in need of reintegration in the community than the offender.²³⁰ Therefore, to ensure victims' security and avoid their revictimisation, resolving a sexual violence dispute through restorative justice need not

²²⁰ For instance, Australia, Canada, Scotland, Norway, the United States, Japan, New Zealand, and South Africa; see Latimer, Dowden and Muise (2005) at 127-128; Umbreit and Armour (2011a) at 69; see also Skelton and Batley (2006) at 10.

²²¹ Latimer, Dowden and Muise (2005) at 136; Josep Tamarit and Eulalia Luque 'Can restorative justice satisfy victims' needs? Evaluation of the Catalan victim-offender mediation programme' 4(1) *Restorative Justice: An International Journal* 2016 at 77.

²²² Walters (2014) at 55; Lode Walgrave 'Domestic terrorism: A challenge for restorative justice' 3(2) *Restorative Justice: An International Journal* 2015 at 289.

²²³ Heather Strang 'Repair or revenge: Victims and restorative justice' Oxford University Press New York 2002 at 204; Marie Keenan, Estelle Zinsstag and Caroline O'Nolan 'Sexual violence and restorative practices in Belgium, Ireland and Norway: A thematic analysis of country variations' 4(1) *Restorative Justice: An International Journal* 2016 at 87.

²²⁴ Lees regards the hearing of sex abuse cases in ordinary courts as a form of 'judicial rape', this for inflicting further trauma on the victim. See Sue Lees 'Judicial rape' 16(1) *Women's Studies International Forum* 1993 at 11; see also Donna Stuart 'No real harm done: Sexual assault and the criminal justice system' Australian Institute of Criminology (paper presented at the conference, Without consent: Confronting adult sexual violence) 1992 at 101; Keenan, Zinsstag and O'Nolan (2016) at 90.

²²⁵ Meredith C Doyle 'Circles of trust: Using restorative justice to repair organisations marred by sex abuse' 14 *Pepperdine Dispute Resolution Law Journal* 2014 at 177; Keenan, Zinsstag and O'Nolan (2016) at 92.

²²⁶ Zehr (2002) at 13.

²²⁷ See Walters (2014) at 55.

²²⁸ Cunneen and Hoyle (2010) at 146.

²²⁹ *Id* at 151.

²³⁰ *Id* at 152.

require a face-to-face encounter of the parties.²³¹ In some cases, this has led to victims' refusal to participate in restorative justice encounters.²³² For instance, in cases involving child victims, family members sometimes represent the child at a restorative justice conference.²³³ However, it is argued that restorative justice can still be useful for domestic violence, given that some victims may be seeking an expression of remorse and apology from the offender.²³⁴

It is further argued that there may be a power imbalance in restorative justice.²³⁵ Power imbalances do not only depend on the nature of the offence, but can also occur where parties are known to each other.²³⁶ For instance, restorative justice processes can be biased if elders in the discussion overpower young parties.²³⁷ Cultural, racial and gender imbalances are also likely to influence restorative justice processes if improperly managed by the facilitator.²³⁸ Victims may fear further victimisation.²³⁹ Generally, the process of justice may be traumatic and revictimising to some extent.²⁴⁰ Strang and Sherman argue that restorative justice may be harmful if applied to certain offences or where certain offenders are involved.²⁴¹ According to the authors, the process does not assist the offender of itself but has to be well coordinated.²⁴²

So, restorative justice faces challenges in the context of gender-based violence. Some of the challenges include the ability of the offender to assert power over the victim, the victim's

²³¹ Walters (2014) at 43 and 55; Thulane Gxubane 'Multi-disciplinary practice guidelines for management of youth sex offenders within restorative justice approach in South Africa' 3(1) *Restorative Justice: An International Journal* 2015 at 52.

²³² Walters (2014) at 43; Gxubane (2015) at 52.

²³³ Gxubane (2015) at 52.

²³⁴ Christina L Lyons 'Restorative justice: Can it help victims and rehabilitate offenders?' CQ Researcher: In-depth reports on today's issues, CQ Press 2016 at 125 and 127.

²³⁵ Jim Considine 'The third millennium: Restorative justice or more crime and prisons?' 11(1) *Sri Lanka Journal of International Law* 1999 at 3-4.

²³⁶ Strang (2002) at 57 and 205.

²³⁷ *Id* at 205.

²³⁸ See Strang (2002) at 205; Mark Austin Walters 'Hate crime in the United Kingdom: Promoting the values of dignity and respect through restorative justice' in Theo Gavrielides (ed) *Rights and restoration within youth justice* de Sitter Publications 2012 at 355-356.

²³⁹ Strang (2002) at 57.

²⁴⁰ *Ibid.*

²⁴¹ Heather Strang and Lawrence Sherman 'The morality of evidence: The second annual lecture for restorative justice: An international journal' 3(1) *Restorative Justice: An International Journal* 2015 at 10.

²⁴² See Strang and Sherman (2015) at 10.

revictimisation and safety concerns,²⁴³ and the lenient punishments available in restorative justice.²⁴⁴ Given that there are mixed empirical findings about the suitability of restorative justice in cases of gender-based violence,²⁴⁵ such cases need a competent mediator to facilitate them under restorative justice processes.²⁴⁶ Nevertheless, research findings by Gustafson indicate that even in serious cases such as sexual abuse, victims show willingness to confront their attackers to deal with the aftermath of the crime.²⁴⁷ Surprisingly, offenders who are involved in this kind of offence may also wish to meet their victims for the purposes of a restorative encounter.²⁴⁸

2.7.3 Restorative justice for violent offences

Restorative justice is commonly used to resolve minor cases, especially in juvenile justice.²⁴⁹ Research has been conducted to determine if restorative justice can be used for both non-violent and violent offences. It is interesting to learn that there is promising evidence on the use of restorative justice in violent offences too.²⁵⁰ Some victims want to see and listen to the attackers who brought serious harm to their lives.²⁵¹ Nevertheless, the prevalence of violent offences such as murder, domestic violence and terrorism poses a huge challenge to restorative justice encounters. For instance, terrorism offences involve offenders who would like to be regarded a ‘martyrs’.²⁵² In such kind of offences, the majority of people would

²⁴³ Clamp (2014) at 19; Gxubane (2015) at 52.

²⁴⁴ Clamp (2014) at 18.

²⁴⁵ See Emily Gaarder ‘Lessons from a restorative circles initiative for intimate partner violence’ 3(3) *Restorative Justice: An International Journal* 2015 at 344-345.

²⁴⁶ David L Gustafson ‘Is restorative justice taking too few, or too many, risks?’ in Howard Zehr and Barb Toews (eds) *Critical issues in restorative justice* Willan Publishing Collompton UK 2004 at 305; Gxubane (2015) at 52.

²⁴⁷ Gustafson (2004) at 301.

²⁴⁸ *Ibid.*

²⁴⁹ Ybo Buruma ‘Doubts on the upsurge of the victim’s role in criminal law’ in Hendrik Kaptein and Marijke Malsch (eds) *Crime, victims and justice: Essays on principles and practice* Ashgate Publishing England 2004 at 14.

²⁵⁰ See Zehr (2002) at 9; Sherman and Strang (2007) 21 and 68.

²⁵¹ In the United States, a victim whose daughter was killed by her boyfriend volunteered to meet the offender in order to understand why the offender killed her daughter. Interestingly, at the end of the mediation process, the victim’s family recommended to the court that the offender receive a lesser sentence. The recommendations by the restorative conference were partly upheld by the court, which sentenced the offender to 20 years in prison. See Lyons (2016) at 126-127.

²⁵² Walgrave (2015) at 285.

want to see offenders brought to justice and receive the longest prison sentence possible.²⁵³ It may thus not be easy for victims to consent to a restorative encounter in these instances.²⁵⁴ It is also argued that offenders in this kind of offence have little prospect of reform; hence, a restorative encounter is pointless.²⁵⁵ Depending on the nature of offences, circumstances and public safety, restorative justice is not a solution to all problems.²⁵⁶

However, there are still options for restorative encounters, even for violent offenders. A study by Sharman and Strang on the use of restorative justice with violent offenders reveals positive effects.²⁵⁷ Also, Umbreit et al. have shown the possibility of applying restorative measures to violent offenders.²⁵⁸ In the same vein, Truth and Reconciliation Commissions are further opportunities for offender-victim encounter for serious offences.²⁵⁹ Other traditional restorative justice encounters, such as *gacaca* courts in Rwanda, have paved a way for the application of restorative intervention in serious crimes.²⁶⁰

In addition, offenders of violent offences still have an opportunity for restorative encounter in prisons.²⁶¹ Because the rationale of restorative justice is, among other things, achieving victims' healing and holding offenders accountable having them understand the effects of their crimes, some victims have felt empowered by meeting violent offenders in prison.²⁶² As discussed in Chapter 3, the use of restorative justice in prisons is another opportunity for

²⁵³ See *Ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ *Id* at 284-285.

²⁵⁶ *Id* at 289.

²⁵⁷ See Sherman and Strang (2007) 21 and 68.

²⁵⁸ Mark S Umbreit, Willian Bradshaw and Robert B Coates 'Victims of severe violence meet the offender: Restorative justice through dialogue' 6 *International Review of Victimology* 1999.

²⁵⁹ The use of Truth and Reconciliation Commissions (TRCs) in bringing together offender and victims in violent cases has been applied in some African countries such as South Africa and Sierra Leone. See Chapter 6 on the discussion of the TRC.

²⁶⁰ Jimam Timchang Lar 'Post-conflict justice in Rwanda: Comparative analysis of International Criminal Tribunal for Rwanda and *gacaca* courts' *Conflict Trends* 2009; Paul E Nantulya 'The *gacaca* system in Rwanda' *Conflict Trends* 2001.

²⁶¹ Gustafson (2004) at 306.

²⁶² The story of Shad Ali, the victim of a violent act in 2008, epitomises the potential of restorative justice in violent offences. The victim was seriously injured by the offender and required four hours of plastic surgery to reconstruct his face. He was nevertheless willing to meet the offender in prison after five years. Their restorative encounter was life-changing: the offender, after showing remorse, apologised; the victim forgave and started a new chapter of his life. Both parties agreed to have the event filmed for training purposes. See 'Restorative justice works' Restorative Justice Council, 2015 at 10-11, available at <https://restorativejustice.org.uk/sites/default/files/resources/files/rjc-victims-rjc-dig1.pdf> (accessed 7 May 2018).

offenders to know the harm caused to victims and the community.²⁶³ Restorative justice in prisons allows family members, friends and the community to come together to assist the offender in understanding the impact of his or her behaviour.²⁶⁴ By so doing, participants help the offender rethink his or her behaviour before being released from prison. From the perspective of the offender, restorative justice in prison is a sign the community still values him and wants to see him reformed. So, though restorative justice may not be a solution to all problems,²⁶⁵ it has a wide range of possibilities for the reformation of offenders.

2.7.4 Punishment in restorative justice

The ‘punishment debate’ in restorative justice has attracted comment from many scholars.²⁶⁶ The major issue in this debate is whether restorative justice is an ‘alternative punishment or alternative to punishment’.²⁶⁷ According to Daly, there are three perspectives on the issue. In the first, the offender is seen as an evil person who needs to suffer pain for his or her illegal acts.²⁶⁸ This applies primarily in conventional courtroom justice where an offender is regarded as a person deserving punishment for the offence.²⁶⁹

From the second perspective, the offender is a ‘good person’ who needs reform.²⁷⁰ In this regard, restorative justice proponents see the process of justice as ‘constructive’, intended not to punish the offender but to make him or her responsible by putting things right.²⁷¹ Hence, as Walgrave argues, the offenders’ obligation to make things right with the victim and

²⁶³ Rebecca Wallace and Karen Wylie ‘Changing on the inside: Restorative justice in prisons: A literature review’ *The International Journal of Bahamian Studies* 2013 at 60.

²⁶⁴ See Kimmet Edgar and Tim Newell *Restorative justice in prisons: A guide to making it happen* Waterside Press Winchester 2006 at 85; Wallace and Wylie (2013) at 60.

²⁶⁵ Walgrave (2015) at 289.

²⁶⁶ See Antony Duff ‘Restorative punishment and punitive restoration’ in Lode Walgrave (ed) *Restorative justice and the law* Willan Publishing USA and Canada 2002 at 82-100; Martin Wright ‘Is it time to question the concept of punishment’ in Lode Walgrave (ed) *Repositioning restorative justice* Willan Publishing USA and Canada 2003; Antony Duff ‘Restoration and retribution’ in Andrew von Hirsch, Julian Roberts, Anthony E Bottoms, Kent Roach and Mara Schiff (eds) *Restorative justice and criminal justice: Competing or reconcilable paradigms?* Hart Publishing USA and Canada 2003 at 43-59; Walgrave 2008) at 44-66; Daly (2013) at 356-371.

²⁶⁷ Antony Duff ‘Alternative to punishment - or alternative punishment?’ in Wesley Cragg (ed) *Restitutivism and its critics* Franza Steiner Verlag Stuttgart 1992.

²⁶⁸ Daly (2013) at 364.

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

community is not punishment,²⁷² but a mechanism to hold the offender accountable and assist him or her to repair the effects of illegal acts.²⁷³ An offenders' obligation to make reparation, even though painful, does not amount to punishment.²⁷⁴ It is a 'painful obligation' but not a punishment in the eyes of the community.²⁷⁵ According to Walgrave, restoration cannot be achieved through punishment;²⁷⁶ rather, it is the offenders' responsibility to make things right with the victim and the community.

From the third perspective on punishment in restorative justice, the offender is a person who needs to restore the effects of his or her deeds through what can be called restorative punishment.²⁷⁷ This line of argument does not distinguish between restorative justice and punishment. According to Duff, punishment in restorative justice should aim at restoration, which is the major aim of restorative justice.²⁷⁸ In other words, Duff argues that punishment given in conventional criminal justice does not intend to achieve restoration, but punishment given in restorative justice is necessary for achieving restoration.²⁷⁹ According to Duff, punishment and restoration are 'compatible'.²⁸⁰ Punishment in restorative justice is a form of 'retributive punishment' delivered in a new restorative justice paradigm.²⁸¹

Daly, on the other hand, argues that though the idea of punishment in restorative justice might have a different meaning and form, it cannot be jettisoned.²⁸² Daly concedes that punishment is any infliction of 'burden' on an offender. Any pain amounts to punishment, even though it might be intended to compensate the victim.²⁸³ This argument contrasts with that of Walgrave, who argues that restoration is a necessary outcome in restorative justice,

²⁷² See Walgrave (2008) at 48; Daly (2013) at 364.

²⁷³ See *Ibid.*

²⁷⁴ See Lode Walgrave 'Restorative justice and the law: Socio-ethical and juridical foundations for a system approach' in Lode Walgrave (ed) *Restorative justice and the law* Willan Publishing USA and Canada 2002 at 192; Walgrave (2008) at 48.

²⁷⁵ Walgrave (2008) at 48.

²⁷⁶ *Id* at 49.

²⁷⁷ Daly (2013) at 364.

²⁷⁸ Duff (2003) at 43; Duff (2002) at 82 and 83.

²⁷⁹ Duff (2002) at 83.

²⁸⁰ Duff (2002) at 83; Duff (2003) at 43.

²⁸¹ Duff (2002) at 82.

²⁸² Daly (2013) at 368.

²⁸³ Kathleen Daly 'Revisiting the relationship between retributive and restorative justice' in Carolyn Hoyle (ed) *Restorative justice: Critical concepts in criminology* Vol. IV Routledge USA and Canada 2010 at 387.

but it cannot be achieved through punishment or pain.²⁸⁴

Barnett uses ‘punitive restitution’ and ‘pure restitution’ to make the distinction between punishment and obligation.²⁸⁵ Compensation to the victim, or restoring the stolen property, is ‘pure restitution’ and not punishment.²⁸⁶ Walgrave uses the terms ‘fine’ and ‘tax’ as a metaphor to differentiate between punishment and obligation.²⁸⁷ Duff views punishment as an ‘imposition of some kind of suffering, pain, restriction, or burden: but that imposition can take a variety of material forms’.²⁸⁸

In my view, restorative justice is a criminal justice paradigm that sees crime as a violation of the relationship between individuals and which creates needs for the victim and obligations for the offender to repair the harm of the crime. Therefore, so-called ‘punishment’ is an offender’s painful obligation to make things right. Such restorative measures may be in the form of compensation, restitution or repair to the damaged property. In this regard, the obligation to repair harm should not be considered as a punishment: it is an offenders’ obligation to be accountable to the victim.

With the new directions in thinking about criminal justice systems, the term ‘punishment’ may not be relevant when considering offenders’ accountability. Offenders’ obligations can be painful and burdensome, but they are an effective means to make the offender see the consequences of his or her illegal acts. Restorative justice is neither an alternative punishment nor alternative to punishment; instead it is a system of justice that imposes an equivalent obligation on an offender to address the crime’s harm through compensation, restitution and repair. In the same way as with court processes, the offender’s encounter with victims and the community is painful, but it is not punishment. Compensation, restitution and repair are also painful, but they are not punishment, provided they are commensurate with the harm the offender caused. Under restorative justice, punishment is an expression of offenders’ obligation to repair the harm of the crime.

²⁸⁴ Walgrave (2003) at 64.

²⁸⁵ See Barnett (2010) at 41-42.

²⁸⁶ Barnett (2010) at 42.

²⁸⁷ Walgrave (2008) at 48.

²⁸⁸ Duff (1992) at 43.

2.7.5 Using a victim as a ploy for offender's reformation

Restorative justice as a modern model of criminal justice system arose due to the weaknesses of the adversarial criminal justice system in providing effective measures for offenders' reformation.²⁸⁹ It is against this backdrop that restorative justice was adopted with the view to rehabilitating offenders and preventing reoffending.²⁹⁰ Yet while many claims are made that restorative justice is victim-centred, there are concerns about whether it is genuinely designed to address the needs of victims.²⁹¹ Some criminologists are challenging the real essence of restorative justice for victims.²⁹² They view restorative justice processes as a ploy to achieve offenders' reformation and a measure to reduce criminality while pretending, but not intending, to benefit victims.²⁹³ Strang argues that victims are regarded as 'court fodder' under the conventional criminal justice system, while under restorative justice they become 'agents' of offenders' reformation.²⁹⁴ Even reparation paid by offenders is not for the best interests of victims.²⁹⁵ According to Buruma, in restorative justice 'the perpetrator is still in the middle of the procedure'.²⁹⁶ Makiwane argues that restorative process is more advantageous to offenders than victims in that offenders can evade the criminal justice process by acknowledging responsibility.²⁹⁷ Wolhuter et al. argue that the victim's face-to-face encounter with the offender in restorative justice is 'victim prostitution' in which the victim is merely 'used' to achieve offenders' rehabilitation.²⁹⁸

In my view, every criminal justice process would want to see the offender being changed, but using the victim to that end is not the true essence of restorative justice. Restorative justice

²⁸⁹ Ghoshray (2013) at 289.

²⁹⁰ Martin Wright 'The court as the last resort: Victim-sensitive, community-based responses to crime' 42 *British journal of criminology* 2002 at 657; Cunneen and Hoyle (2010) at 136.

²⁹¹ Wright (2002) at 657; see also Howard Zehr 'Evaluation and restorative justice principles' in Gerry Johnstone (ed) *A restorative justice reader* 2nd ed Routledge London and New York 2013 at 260.

²⁹² See Strang (2002) at 205; Zehr (2013) at 260.

²⁹³ Strang (2002) at 205; PN Makiwane 'Restorative justice: Bringing justice for crime victims' *Obiter* 2015 at 85-86.

²⁹⁴ Strang (2002) at 205.

²⁹⁵ Johnstone (2011) at 67.

²⁹⁶ Buruma (2004) at 3.

²⁹⁷ Makiwane (2015) at 86.

²⁹⁸ Lorraine Wolhuter, Neil Olley and David Denham '*Victimology: Victimisation and victims' rights*' Routledge – Cavendish USA and Canada 2009 at 224.

aims at repairing the broken relationship within the community.²⁹⁹ Offenders' rehabilitation and victims' satisfaction should be achieved through this process. Offenders' reformation should neither be achieved at the expense of victims' rights, nor prejudice offenders' rights.³⁰⁰ There should be a balance between the rights of each party – victim, offender and the community. The community needs to reintegrate a changed offender, but not at the expense of the victim, which is achievable if restorative justice is properly managed. The consensual agreement and the free participation of parties in restorative justice suggest a low possibility of abusing the victim for the mere interest of offenders' reformation. In comparative terms, the victim's healing and satisfaction are greater under restorative than adversarial criminal justice system.³⁰¹ This fact suggests further that restorative justice benefits not only the offender but the victim.

2.7.6 Different outcomes for each crime

The application of modern restorative justice does not depend on the rules of evidence³⁰² or precedents.³⁰³ Every dispute is resolved based on identified needs and to the extent of the harm caused by an offender. With diverse community values and settings, restorative justice processes normally follow the needs of victims, offenders and the community. There are no uniform outcomes in restorative justice processes:³⁰⁴ restorative justice outcomes may differ from court decisions,³⁰⁵ and even under the same restorative justice process, the outcomes for the same kind of offence may be different. Usually, the wishes and demands of the victim or community may influence a restorative justice process, leading to diverse outcomes. Van der

²⁹⁹ Scheuerman and Keith (2015) at 75.

³⁰⁰ Andrew Ashworth 'Responsibilities, rights and restorative justice' 42(3) *British Journal of Criminology* 2002 at 578.

³⁰¹ Roche (2003) at 11; Latimer, Dowden and Muise (2005) at 136; Mark S Umbreit, Robert B Coates and Betty Vos 'Victim-offender mediation: An evolving evidence-based practice' in Dennis Sullivan and Larry Tifft (eds) *Handbook of restorative justice* Routledge London 2006 at 56; Lawrence W Sherman and Heather Strang, 'Restorative justice: The evidence' Smith Institute, 2007 at 62; Van Ness and Strong (2010) at 69; James Dignan 'Evaluation restorative justice from a victim perspective: Empirical evidence' in Carolyn Hoyle (ed) *Restorative Justice: Critical Concepts in Criminology* Vol. III, Routledge, London 2010 at 7-8; Roni A Elias 'Restorative justice in domestic violence cases' 9 *DePaul Journal for Social Justice* 2015 at 78.

³⁰² Cunneen and Hoyle (2010) at 142.

³⁰³ Skelton and Batley (2006) at 9.

³⁰⁴ Ann Skelton and Cheryl Frank 'How does restorative justice address human rights and due process issues?' in Howard Zehr and Barb Toews (eds) *Critical issues in restorative justice* Willan Publishing UK 2004 at 206.

³⁰⁵ Skelton and Franks (2004) at 206.

Merwe and Skelton state that a more forgiving victim is likely to lead to a more lenient outcome than a vengeful one.³⁰⁶ The same applies where the victim is a dependant or a person related to the offender, because it is likely that victim will request a lenient punishment for the offender.³⁰⁷

According to Daly, outcome disparity occurs because restorative justice not only addresses the harm and restores relationships,³⁰⁸ but also considers other important needs of the parties and the community. This flexibility makes restorative processes attractive for attending to the real needs of justice stakeholders without being bound to legal rules.

However, there are dangers in allowing the wishes of parties to dictate the criminal justice decisions, in that it leads to unfairness.³⁰⁹ As noted at the start of this subsection, where there are no uniform rules of dispute resolution, parties are likely to suffer from inconsistent outcomes – in other words, restorative justice outcomes may differ markedly not only from the outcomes of a criminal court but also between two different restorative justice processes. Some consider this outcome disparity in restorative justice as granting latitude for ‘inequality’, ‘inconsistency’ and ‘arbitrariness’ in the process of justice.³¹⁰ For instance, the case of Seedat and Thabethe shows how a restorative justice process may lead to disparity in outcomes.³¹¹ Similarly, two cases of rape that were referred to restorative justice in South Africa ended up having two distinct outcomes. While in the case of Seedat, the victim was happy with a compensation order, in the case of Thabethe the victim did not even want the offender to be incarcerated. Disparity in a court’s decisions is also likely to occur when victims’ views are allowed to influence the sentence.³¹² Hence, courts have been cautioned on the use of victim impact statements in sentencing because these are likely to bend the

³⁰⁶ See Van der Merwe and Skelton (2015) at 356-357.

³⁰⁷ See, for instance, the case of *Gauteng v. Thabethe* 2011 (2) SACR 567 (SCA); Van der Merwe and Skelton (2015) at 357.

³⁰⁸ Kathleen Daly ‘What is restorative justice? Fresh answers to vexed question’ 11(1) *Victims & Offenders* 2016 at 21.

³⁰⁹ See section 2.4.2.1 above in this chapter.

³¹⁰ Kate E Bloch ‘Reconceptualising restorative justice’ 7 *Hastings race and poverty law journal* 2010 at 209.

³¹¹ *Director of Public Prosecutions, North Gauteng v. Thabethe* 2011 (2) SACR 567 (SCA); *S v. Seedat* 2017 (1) SACR 141 (SCA). See also the discussion in Chapter 6.

³¹² Van der Merwe and Skelton (2015).

justice administration to suit the wishes of victims.³¹³

Restorative outcomes are sometimes influenced by the bargaining power of parties.³¹⁴ A weaker party is thus likely to be disadvantaged in restorative justice due weakness of influence over the discussion.³¹⁵ This occurs when the facilitator of a restorative conference is not competent enough to bring the parties to a balanced platform. Nevertheless, such imbalances exist in any criminal justice system.³¹⁶ For instance, in the adversarial criminal justice system, a party who cannot afford a legal representation is likely to fare worse than a party with a competent lawyer. However, the argument that even the criminal justice system has sentence disparities has been criticised on the ground that jurisdictions such as the United States and Canada have set sentencing guidelines to achieve consistency in court decisions.³¹⁷ Setting guidelines for restorative justice may then be a more useful approach than granting unlimited discretion to restorative justice processes.³¹⁸ Nevertheless, as noted, even courtroom justice does not guarantee uniform decisions,³¹⁹ in that courts decide cases based on the available evidence and surrounding circumstances. Generally, the success of a restorative process depends on the competence of the facilitator and how well parties are prepared before the encounter. Poor preparation can result in power imbalances, leading to inequalities and qualified outcomes.

Outcome disparity is thus a problem that needs to be addressed in restorative justice. Facilitator training and feedback sessions between facilitators where cases and outcomes are discussed are a potential means of resolving the problem. In addition, determining guidelines and standards for restorative justice could reduce outcome disparities.

³¹³ *Ibid.*

³¹⁴ Bloch (2010) at 209.

³¹⁵ *Ibid.* See also Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee and David Hubbert 'Fairness and formality: Minimizing the risk of prejudice in alternative dispute resolution' *Wisconsin law review*, 1985 at 1391.

³¹⁶ Donald J Schmid 'Restorative justice: A new paradigm for criminal justice policy' 34 *Victoria University Wellington Law Review* 2002 at 131.

³¹⁷ *Ibid.*

³¹⁸ See *Ibid.*

³¹⁹ Melissa Hamilton 'Sentencing disparities' 6 *British Journal of American Legal Studies* 2017.

2.7.7 Restorative justice: A dependant model of justice

Four decades of modern restorative justice have failed to prove whether this model of criminal justice can operate independently in the absence of the conventional criminal justice system. Normally, restorative justice can be applied at different stages; it can be a pre-trial, pre-sentence or post sentence measure.³²⁰ There is either restorative intervention before or after an offender's imprisonment.³²¹ So, where an out-of-prison restorative intervention fails or where an offender fails to comply with a restorative agreement, a case reverts to ordinary court processes. Furthermore, restorative justice mostly applies to cases where an offender confessed and where the same is willing to be diverted to restorative processes.³²² In other words, another system of justice must be in place to deal with parties who are unwilling to go through restorative interventions. Camp states that 'whether or not restorative justice is used as a diversionary or complementary intervention, it is at least dependent on the criminal justice system for referral'.³²³ As such, modern restorative justice is untenable as a fully-fledged independent paradigm of criminal justice.³²⁴ The drive to replace the conventional criminal justice system with modern restorative justice has now advanced well beyond being merely an aspiration.³²⁵

Daly seems to view restorative justice as a weaker mechanism of justice than the conventional criminal justice system. She characterises restorative justice as a 'contemporary justice mechanism' without procedures for establishing truth of facts.³²⁶ However, this is not a failure of restorative justice, because it is not a competing paradigm to contemporary criminal justice system.³²⁷ There is a concern that attaching restorative justice to the adversarial criminal justice system may soon warp it in the direction of retributive

³²⁰ A Skelton and M Batley 'Restorative justice: A contemporary South African review' 21(3) *Acta Criminologica* 2008 at 43-45.

³²¹ See Wallace and Wylie (2013) at 60.

³²² Vicky De Mesmaecker 'Victim-offender mediation participants' opinions on the restorative justice values of confidentiality, impartiality and voluntariness' 1(3) *Restorative Justice: An International Journal* 2013 at 336.

³²³ Tinneke Van Camp 'Victims of violence and restorative practices' Routledge USA and Canada 2014 at 41.

³²⁴ Camp (2014) at 41.

³²⁵ See Ashworth (2002) at 578; H Dancig-Rosenberg and T Gal 'Restorative Criminal Justice' 34 *Cardozo Law Review* 2013 at 2314.

³²⁶ Daly (2016) at 15 and 21.

³²⁷ See Zehr (2002).

procedures.³²⁸ In this regard, at the initial stage of modern restorative justice, it was envisaged that the criminal justice system would be transformed by making its processes more restorative in orientation; it has been argued therefore that the failed transformation is the result of attaching restorative justice to the contemporary criminal justice system.³²⁹ Nevertheless, where restorative justice has been applied, its role cannot be underestimated. Marshall argues that modern restorative justice works to complement contemporary criminal justice process and that where it has been applied, it has ‘improved the quality, effectiveness and efficiency of justice as a whole’.³³⁰

2.8 Conclusion

There is a lot to learn from modern restorative justice as a community-based justice system. Restorative justice is a system which can accommodate a communal lifestyle, uphold community values and strengthen social bonds. It is a paradigm of justice that can restore peace and harmony within communities. It is a system of justice that accommodates various classes of participants from professionals to laypersons. It does not require that a lawyer appear before a restorative conference, nor does it require competency in evidence production. Restorative justice has numerous advantages over conventional criminal justice due to its non-adherence to legal rules. For these reasons, many people may welcome this system of justice.

The theory may continue to generate new possibilities and prospects for an improved future criminal justice system. The debate over how restorative justice is defined is likely to continue because it is a developing concept. While many definitions fit into the principles of modern restorative justice, there are many restorative justice practices that are not accommodated. The expansion of restorative justice practices from victim-offender mediation to prison restorative programmes, even to transitional justice in post-conflict situations, heightens the desire to redefine restorative justice.

³²⁸ Froestad and Shearing (2012) at 35.

³²⁹ Lode Walgrave and G Bazemore ‘Reflections on the future of restorative justice for juveniles in G Bazemore and Lode Walgrave (eds) *Restorative juvenile justice: Repairing the harm of youth crime* Willow Tree Press New York 1999 at 377.

³³⁰ Marshall (2003) at 31.

I subscribe to Zernova and Wright's argument that the diversity of restorative justice practices will not be limited by an agreed single definition³³¹ because the theory itself is sufficiently flexible to accommodate a variety of restorative interventions. In my view this diversity of practices does not reflect a misconception of restorative justice: it is congruent with the nature of the theory itself. Yet this diversity does not mean that restorative is 'all things to all people'.³³² Because it is a form of community justice, it mirrors the needs of the community, which are dynamic. The list of challenges facing restorative justice will continue to add up and debates around it will never cease. Academics are concerned about the future of restorative justice,³³³ but it has many advantages over the conventional criminal justice system and this gives it continued appeal. The challenges experienced in restorative justice are normal; they shape the system to fit community standards.

Restorative justice accommodates both modern and rural societies. Communities see opportunities for genuine justice through restorative measures rather than the conventional criminal justice system. The conventional criminal justice system presents challenges for many people. In African communities, for instance, the conventional criminal justice system is foreign³³⁴ and therefore incompatible with African community values. Many countries in Africa, including Tanzania, may embrace restorative justice because of its similarities with indigenous justice. Some of the challenges facing modern restorative justice, such as the 'community debate' in modern societies, are not a concern in Africa because communities still have a collective lifestyle. The integration of the processes of modern restorative justice with those of indigenous African justice can, as the next chapter shows, provide the basis for instituting restorative justice mechanisms in Tanzania.

³³¹ Margarita Zernova and Martin Wright 'Alternative visions of restorative justice' in Gerry Johnstone and Daniel Van Ness (eds) *Handbook of restorative justice* Willan Publishing Devon 2007.

³³² Paul McCold 'Towards a holistic vision of restorative juvenile justice: A reply to maximalist model' 3 *Contemporary Justice Review* 2000 at 358.

³³³ Daly (2016) at 10-11.

³³⁴ In this thesis, use of the term 'foreign' when referring to the conventional criminal justice means a justice system that was inherited from colonialism. In Tanzania for instance, the criminal justice system is a common law system that was imposed from England by colonial intrusion. Though some of its procedures have been adapted to suit local needs, in reality the criminal justice process does not suit the majority because it is technical and carries values that are not African in nature.

Chapter 3: Modern Restorative Justice Practices

3.1 Introduction

Modern restorative justice continues to diversify the practice of the criminal justice system. Restorative justice is regarded by many as a healing form justice and hence more beneficial than the conventional criminal justice system.¹ Its proponents hope it will continue to provide an alternative to the criminal justice system. Restorative procedures are relevant to community justice because they embrace the needs of victims, offenders and the community. This is evident in the higher levels of satisfaction victims and offenders obtain from restorative justice processes than those of conventional criminal justice.² Victims need a process of justice which addresses harm, restores relationships and works to secure the future peace of the community.³ Because modern restorative justice is anchored in these values, it will continue to influence the practice of conventional criminal justice system.

However, the adoption of restorative practices in Africa may take different forms, resulting in such modified forms of restorative intervention as the Zwelethemba model.⁴ In Kenya, a pilot project on community juvenile justice employed a mixed approach merging the practices of both New Zealand juvenile justice and Kenyan indigenous justice.⁵ In African jurisprudence, restorative processes may include further practices that combine the tenets of modern restorative justice and indigenous justice practice. For instance, modern restorative justice processes, which began as mediation programmes, have now expanded to include victim-

¹ Berb Blake 'My restorative justice experience' 3 *Los Angeles Public Interest Law Journal* 2010-2012 at 163.

² Latimer, Dowden and Muise, The effectiveness of restorative justice practices, 136; Mark S Umbreit, Robert B Coates and Betty Vos, Victim-offender mediation: An evolving evidence-based practice, in Dennis Sullivan and Larry Tiffit (eds), *Handbook of restorative justice*, London: Routledge, 2006, 56; Sherman and Strang (2007) at 62; Van Ness and Strong, *Restoring justice*, 69; Roni A Elias, Restorative justice in domestic violence cases, *DePaul Journal for Social Justice* 9 (2015), 78.

³ See Jan Froestad and Clifford D Shearing *Security governance, policing, and local capacity* CRC Press London 2012.

⁴ The Zwelethemba model was a restorative justice practice adopted in South Africa to deal with community disputes in Zwelethemba township in Cape Town. See Froestad and Shearing (2012). The model is discussed extensively in this chapter.

⁵ See Diego Ottolini *The family conferencing: A ground-breaking practice for community-based child protection in Kenya* Franciscan Kolbe Press Kenya 2011.

offender encounters, shuttle mediation, family group conferences and conferencing panels. This chapter therefore analyses both modern restorative justice approaches and restorative interventions that are similar in nature to an indigenous justice approach. The rationale of this exploration is to establish a coherent restorative justice approach, and at the end propose a model that may best suit the African community in general and Tanzania in particular.

3.2 The process of justice under restorative justice

When restorative justice is conceptualised in an ideal form, it can be contrasted with the conventional criminal justice processes where lawbreaking is the major issue to be addressed. However, the two concepts are not ‘competing paradigms’ but complementary ones.⁶ Ideally, restorative justice focuses on the broken relationship that needs repair and on establishing measures for the victim’s closure.⁷ Just as a justice process can be injurious, restorative justice can be healing. Restorative justice processes allow parties to discuss the aftermath of the crime,⁸ find a solution, and set up measures to prevent future reoffending.⁹ Parties voluntarily participate¹⁰ in a safe environment;¹¹ they share feelings about the crime and devise measures to address needs.¹² The process is informal,¹³ non-adversarial,¹⁴ friendly,¹⁵

⁶ Zehr (2002).

⁷ See Lode Walgrave *Restorative justice, self-interest and responsible citizenship* Willan publishing USA and Canada 2008 at 44 and 52.

⁸ Declan Roche *Accountability in restorative justice* Oxford University press USA 2003 at 30; Howard Zehr and Harry Mika ‘Fundamentals of Restorative Justice’ in Declan Roche (ed) *Restorative justice* Ashgate England 2004 at 77.

⁹ Daniel W Van Ness and Pat Nolan ‘Legislating for restorative justice’ 10 *Regent University Law Review*, 1998 at 53; Tony F. Marshall ‘Restorative justice: An overview’ A Report by the Home Office Research Development and Statistics Directorate London 1999 at 5; Daniel W Van Ness and Karen Heetderks Strong *Restoring justice: An introduction to restorative justice* 4th ed Anderson Publishing 2010 at 58.

¹⁰ Zehr and Mika (2004) at 77; Carrie Menkel-Meadow ‘Restorative justice: What is it and does it work?’ 3 *Annual Review of Law and Social Science* 2007 at 168; Hema Hargovan ‘Knocking and entering: Restorative justice arrives at the courts’ 1 *Acta Criminologica* CRIMSA Conference special edition 2008 at 28; Amy Holloway and Gale Burford ‘Hate left me that day: Victim-offender dialogue in Vermont’ in Katherine S van Wormer and Loren Walker (eds), *Restorative justice today: Practical Applications* Sage Publications Los Angeles 2013 at 145.

¹¹ Daniel W Van Ness Karen Heetderks Strong ‘Encounter’ in Gerry Johnstone (ed) *A restorative justice reader* 2nd ed Routledge USA and Canada 2013 at 83; Heath L Scheurman and Shelley Keith ‘Supporters and restorative justice: How does the intersection between offenders, victims and the community influence perceptions of procedural justice and shaming’ 3(1) *Restorative Justice: An International Journal* 2015 at 77.

¹² Van Ness and Strong (2010) at 43.

¹³ Walgrave (2008) at 44; Emily Gaarder ‘Lessons from a restorative circles initiative for intimate partner violence’ 3(3) *Restorative Justice: An International Journal* 2015 at 343.

non-coercive,¹⁶ and private.¹⁷ Parties are not regarded as adversaries;¹⁸ rather, they are stakeholders in finding a solution to their problems. The process of retelling the story under restorative justice has a healing effect.¹⁹

Depending on the willingness of participants, a restorative justice process may sometimes begin with rituals such as a prayer, to allow moral sentiments to be included in the process.²⁰ Such rituals may enhance parties' grasp of the aim of the process²¹ and link all participants to a spiritual realm.²² However, this aspect is voluntary and should only be used if all parties agree to it. Though emotions may arise during the meeting,²³ restoration of harmony is paramount. The victim, offender and community are major players in the process and an agreement therefrom is normally consensual.²⁴ Stakeholders decide their case; they discuss the causes of the crime²⁵ and assist victims with healing and offenders with reformation. Victims 'experience justice',²⁶ as they are part of the decision-making process. There is no 'forgotten actor'²⁷ in the process of justice under restorative justice. The conflict is a 'community property';²⁸ the process of justice is a 'healing' 'community justice'.²⁹

¹⁴ Gordon Bazemore and Mara Schiff *Juvenile justice reform and restorative justice: Building theory and policy from practice* Willan publishing USA and Canada 2005 at 28.

¹⁵ United Nations Handbook on Restorative Justice Programmes (2006) at 8.

¹⁶ Kerry Clamp *Restorative justice in transition* Routledge USA and Canada 2014 at 18.

¹⁷ Clamp (2014) at 19.

¹⁸ See Lawrence W Sherman and Heather Strang 'Restorative justice: The evidence' Smith Institute 2007 at 12.

¹⁹ Wright (2010) at 267.

²⁰ Bazemore and Schiff (2005) at 209-210; Howard Zehr *Changing lenses: A new focus for crime and justice* 3rd ed Herald press Scottsdale, Pennsylvania 2005 at 47.

²¹ Robert Yazzie and James W Zion 'Navajo restorative justice: The law of equality and justice' in Gerry Johnstone (ed) *A restorative justice reader* 2nd ed Routledge USA and Canada 2013 at 125.

²² Mark Umbreit and Marilyn Peterson Armour *Restorative justice dialogue: An essential guide for research and practice* Springer publishing company USA 2011 at 76.

²³ Walgrave (2008) at 44 and 46.

²⁴ Van Ness and Nolan (1998) at 81; Donald J Schmid 'Restorative justice: A new paradigm for criminal justice policy' 34 *VUWLR* 2002 (2002) at 93; Sherman and Strang (2007) at 12; Ann Skelton 'Tapping indigenous knowledge: Traditional conflict resolution, restorative justice and the denunciation of crime in South Africa' in Elrena van der Spuy, Stephan Parmentier and Amanda Dissel (eds) *Restorative justice: Politics, policies and prospects* Juta Cape Town South Africa 2007 at 232; Ann Skelton and Mike Batley 'Restorative justice: A contemporary South African review' 21(3) *Acta Criminologica* 2008 at 49.

²⁵ Howard Zehr *The little book of restorative justice* Good Books USA 2002 at 60.

²⁶ See Zehr (2005) at 28.

²⁷ See Chris Cunneen and Carolyn Hoyle *Debating restorative justice* Hart publishing US and Canada 2010 at 10.

²⁸ See Christie (1977).

Restorative justice process identifies harms,³⁰ and victim and offender's needs are addressed accordingly. Physical, material, financial, social and psychological consequences of the crime are discussed and attended to.³¹ The offender shares the other side of the story, and may apologise,³² repent,³³ empathise,³⁴ and receive forgiveness.³⁵ However, not every restorative processes ends with apology and forgiveness,³⁶ neither does forgiveness always follow after apology. A study conducted by Dhami into the records of mediation agreements conducted in the United Kingdom shows that the word 'sorry' was used in about fifty per cent of mediated cases.³⁷ This does not necessarily mean that a true apology was given; it can be a mere acknowledgment of responsibility.³⁸ Parties can make things right in the absence of apology and forgiveness. As stated below, forgiveness and apology are voluntary offers;³⁹ they cannot be forcefully exacted from the parties.⁴⁰ However, even where there is no apology and forgiveness, victims may still be satisfied and healing can begin to take place.⁴¹ But where apology is given, it hastens the victim's psychological healing process by restoring respect, relationship, dignity, power and general vindication.⁴² In addition, apology or remorse is a sign of offenders' willingness to change, seeing as there is anecdotal evidence of a higher

²⁹ Gretchen Ulrich 'Widening the circle: Adapting traditional Indian dispute resolution methods to implement dispute resolution and restorative justice in modern communities' 20 *Hamline Journal of Public Law and Policy* 1999 at 436; Raymond Koen 'The antinomies of restorative justice' in Elrena van der Spuy, Stephan Parmentier and Amanda Dissel (eds) *Restorative justice: Politics, policies and prospects* Juta Cape Town South Africa 2007 at 258; Saby Ghoshray 'An equilibrium-centric interpretation of restorative justice and examining its implementation difficulties in America' 35 *Campbell Law Review* 2013 at 294.

³⁰ Mona Schatz 'Community members: Vital voices to the restorative justice process' in Katherine S van Wormer and Loren Walker (eds) *Restorative justice today: Practical Applications* Sage Publications Los Angeles 2013 at 114.

³¹ Cunneen and Hoyle (2010) at 6.

³² Roche (2003) at 32; see also Walgrave (2008) at 116.

³³ Walgrave (2008) at 52.

³⁴ *Id* at 115.

³⁵ Roche (2003) at 32. According to Walgrave, apology is vital in restorative justice: 'Forgiveness is a gift by the victim to the offender, because it conveys to him the victim's trust that he will refrain from causing further harm and opens hope for constructive relations in the future; it is also a gift from the victim to the community as a whole, because the community will benefit from the elimination of enduring conflict and unsettled accounts its midst.' See Walgrave (2008) at 116 and 117.

³⁶ See Miles and Raynor (2014) at 46.

³⁷ Mandeep K Dhami 'Apology in victim-offender mediation' 19(1) *Contemporary Justice Review* 2016 at 36.

³⁸ Dhami (2016) at 36.

³⁹ John Braithwaite 'Setting standards for restorative justice' 42 *British Journal of Criminology* 2002 at 571.

⁴⁰ A Skelton and M Batley 'Restorative justice: A contemporary South African review' 21(3) *Acta Criminologica* 2008 at 38-39; see also Froestad and Shearing (2012) at 34.

⁴¹ See Froestad and Shearing (2012) at 40-41.

⁴² Wright (2010) at 271.

possibility of reoffending among unremorseful offenders.⁴³

The process of justice allows for whoever is affected by the crime to attend and share the story for the purposes of rebuilding the relationships.⁴⁴ The offender takes responsibility by understanding the effects of the crime.⁴⁵ He or she makes amends with the victim and community.⁴⁶ Reparation, restitution,⁴⁷ restoration,⁴⁸ compensation,⁴⁹ and fine⁵⁰ are common in restorative justice.⁵¹ The offender may do community service as part of reparative measures⁵² and is prepared for reintegration.⁵³ The offender who normally feels community rejection may experience less stigma through a reintegrative process even if he or she feels shame.⁵⁴ Community harmony is restored and the broken relationship is re-established between the offender, victim and the community. The offender is no longer a threat to community safety.

The process empowers both the victim⁵⁵ and the offender.⁵⁶ The victim's original status is restored by rebuilding the broken relationships⁵⁷ and the community's broken values are re-established through the restorative justice process. A new chapter of healing, 'closure' and

⁴³ Miles and Raynor (2014) at 46.

⁴⁴ See Cunneen and Hoyle (2010) at 8.

⁴⁵ Zehr and Mika (2004) at 77.

⁴⁶ Van Ness and Nolan (1998) at 53; Zehr (2002) at 27.

⁴⁷ United Nation Handbook on Restorative Justice Programmes (2006) at 7; Mark S Umbreit and Marilyn Peterson Armour 'Restorative justice and dialogue: Impact, opportunities and challenges in the global community' 36 *Washington University Journal of Law and Policy* 2011 at 80.

⁴⁸ Andrew Ashworth 'Responsibilities, rights and restorative justice' 42 *British Journal of Criminology* 2002 at 583; Christiaan Bezuidenhout 'Restorative justice with an explicit rehabilitative ethos: Is this the resolve to change criminality?' 20(2) *Act Criminologica* 2007 at 47.

⁴⁹ Van Ness and Nolan (1998) at 54.

⁵⁰ Unlike in the conventional criminal justice system, where a fine is normally paid to the government, in restorative justice it is paid to the victim as a measure of accountability. See Christie (1977); Scheuerman and Keith (2015) at 77.

⁵¹ Van Ness and Nolan (1998) at 54.

⁵² *Ibid*; see also Walgrave (2008) at 47 and 64; United Nations Handbook on Restorative Justice Programmes (2006) at 7; Scheuerman and Keith (2015) at 77.

⁵³ Roche (2003) at 32.

⁵⁴ John Braithwaite *Crime, shame and reintegration* Press Syndicate of the University of Cambridge Australia 1989.

⁵⁵ Koen (2007) at 254; Kate E Bloch 'Reconceptualising restorative justice' 7 *Hastings Race and Poverty Law Journal* 2010 at 207; Cunneen and Hoyle (2010) at 8.

⁵⁶ Mark S Umbreit, Betty Vos, Robert B Coates and Kathy Brown 'Victim-offender dialogue in violent cases: A multi-site study in the United States' *Acta Juridical: Restorative Justice: Politics, Policies and Prospects* 2007 at 26; Koen (2007) at 256.

⁵⁷ Koen (2007) at 251; Kaitlyn E Tucker 'Mediating theft' 25 *University of Florida Journal of Law and Public Policy* 2014 at 28.

‘moving on’ is opened for the victim.⁵⁸ When restorative justice is successful, there is a ‘survivor’, not a victim.⁵⁹ In an analysis of the South African restorative Zwelethemba model, Froestad and Shearing state that ‘when the process unfolds like this, people feel a sense of fairness, equality and rightness, and having been offered a credible hope of a better tomorrow, they seem to feel that justice has been done’.⁶⁰

3.3 Restorative justice processes

Restorative justice continues to grow both theoretically and practically, prompting several mediation programmes worldwide.⁶¹ Its acceptance as a complementary criminal justice model is promising. Internationally, restorative justice is a popular model of justice in schools, prisons, labour disputes and particularly, child justice.⁶² In Africa, apart from its having had a long history of taking restorative approaches to conflict resolution, countries such as Rwanda, Uganda, Sierra Leone and South Africa have used restorative justice mechanisms in resolving disputes involving mass violation of human rights.⁶³ As discussed below, some African countries such as Lesotho, Malawi, South Africa and South Sudan have adopted restorative justice approaches to juvenile justice by merging modern restorative justice principles with a traditional justice ethos.⁶⁴ This may be the African response to restorative justice within the criminal justice system.

The most common processes used so far in modern restorative justice are victim-offender mediation, victim-offender encounter, family group-conferencing, conferencing circles and

⁵⁸ Umbreit, Vos, Coates and Brown (2007) at 26 and 28-29; Sherman and Strang (2007) at 64.

⁵⁹ Zehr (2005) at 47.

⁶⁰ Froestad and Shearing (2012) at 40.

⁶¹ See Umbreit and Amour (2011b) at 112.

⁶² Robert A Baruch Bush and Joseph G Folger ‘The future of mediation’ in Gerry Johnstone (eds) *A restorative justice reader 2nd ed* Routledge USA and Canada 2013 at 96.

⁶³ The application of restorative justice interventions in mass atrocities in Africa is detailed in Chapters 5 and 6 of this thesis. See MG Bolocan ‘Rwandan *gacaca*: An experience in transitional justice’ 2 *Journal of Dispute Resolution* 2004 at 375; E Amick ‘Trying international crimes on local laws: The adjudication of genocide sexual violence crimes in Rwanda’s *gacaca* courts’ 20 *Columbia Journal of Gender and Law* 2011 at 33; C Stauffer ‘Restorative interventions for post-war nations’ in KS van Wormer and L Walker (eds) *Restorative Justice today: Practical applications* 2013 at 197. See also the experience of Uganda and Sierra Leone in Chapter 5.

⁶⁴ See the discussion below in this chapter.

restorative boards.⁶⁵ Most, if not all, of these processes share similarities with indigenous criminal justice practices. The list of modern restorative justice practices could therefore continue to grow by adopting the philosophy of indigenous community justice. I believe the indigenous criminal justice system has the unexploited potential to influence the contemporary criminal justice system and still achieve the major goal of criminal justice, namely offender accountability and reformation, victim-healing and community peace. This chapter now considers what can be learnt from international and African practices in developing an alternative criminal justice process in Tanzania.

3.3.1 Victim-offender mediation

Initially, modern restorative justice developed in the form of mediation.⁶⁶ With the introduction of family group-conferencing in New Zealand⁶⁷ and conferencing circles in North America,⁶⁸ the practice of modern restorative justice was broadened. Victim-offender mediation, sometimes known as victim-offender reconciliation, is a process of justice that seeks to bring victim and offender to the discussion table with the assistance of an impartial trained facilitator or mediator.⁶⁹

Victim-offender mediation can take two forms: direct or indirect mediation.⁷⁰ Mediation is direct when victim and offender meet face to face to discuss the aftermath of the crime. Where the victim is unwilling to confront the offender in a restorative meeting, the mediator can facilitate distant conversations.⁷¹ As discussed below, this is sometimes referred to as

⁶⁵ David R Karp and Olivia Franks 'Anxiously awaiting the future of restorative justice in the United States' 11 (1) *Victims & Offenders* 2016 at 51; William R Wood and Masahiro Suzuki 'Four challenges in the future of restorative justice' 11(1) *Victims & Offenders* 2016 at 150.

⁶⁶ Zehr (2002) at 7.

⁶⁷ New Zealand introduced family group conferences through the Children, Young and their Families Act in 1989.

⁶⁸ Van Ness and Strong (2010) at 69.

⁶⁹ Kimmitt Edgar and Tim Newell *Restorative justice in prisons: A guide to making it happen* Waterside Press UK 2006 at 11; Van Ness and Strong (2010) at 66; Umbreit and Amour (2011b) at 84.

⁷⁰ Marian Liebmann *Restorative justice: How it works* Jessica Kingsley Publishers London and Philadelphia 2007 at 73-76.

⁷¹ *Id* at 76.

‘shuttle mediation’.⁷² The mediation may be facilitated by one or two mediators⁷³ depending on the circumstances of the case.

Initially, victim-offender mediation programmes were used to resolve minor offences committed by young offenders, but research by Umbreit and Armour unveils the possibility of applying restorative interventions to determine serious offences committed by adults.⁷⁴ In many cases, restorative justice programmes absolve violent adult offenders at the post-sentence stage.⁷⁵ Unlike in the court system, restorative justice mediation involves having the victim and offender finding a solution to their dispute.⁷⁶ The facilitator’s role is limited to facilitating parties to achieve a consensus agreement; he or she does not foist outcomes on them.⁷⁷ For the purposes of assisting the victim and offender in decision-making, certain cases may allow the participation of victim’s parents or friends, and child offenders or victims are usually assisted by a parent or other suitable adult.⁷⁸

In practice, before the meeting, a caucus with the mediator is necessary in order to inform the parties on the role of the process;⁷⁹ elicit necessary information; understand the nature of the crime; direct parties to pertinent issues; and prepare parties for mediation, given that face-to-face meetings may be emotional or even traumatic.⁸⁰ The dialogue in a mediation process identifies the crime’s harms, holds the offender accountable, and seeks to prevent reoffending.⁸¹

The major aim of victim-offender mediation is to find a consensual agreement between the

⁷² Joanna Shapland ‘Key elements of restorative justice alongside adult criminal justice’ in Paul Knepper, Jonathan Doak, Joanna Shapland (eds) *Urban crime prevention, surveillance, and restorative justice: Effects of social technologies* CRC Press USA 2009 at 127.

⁷³ Jeff D May ‘Restorative justice: Theory, process and application in rural Alaska’ 31 *Alaska Justice Forum* 2015 at 2.

⁷⁴ Umbreit and Armour (2011b) at 84; May (2015) at 2.

⁷⁵ Camp (2014) at 45.

⁷⁶ Van Ness and Strong (2010) at 66.

⁷⁷ *Ibid.*

⁷⁸ Umbreit and Armour (2011b) at 84; May (2015) at 2.

⁷⁹ Edgar Newell (2006) at 11.

⁸⁰ Umbreit and Armour (2011b) at 84.

⁸¹ Van Ness and Strong (2010) 67.

parties and to ameliorate harm caused by the offender.⁸² During the mediation process, the offender may apologise and the victim offer forgiveness. Of course, apology and forgiveness are just ‘gifts’, so it is not mandatory that every meeting occasions apology and forgiveness.⁸³ Braithwaite places remorse, apology, forgiveness and mercy under the emergent values of restorative justice; they become meaningful only when given voluntarily.⁸⁴ Building on Braithwaite’s discussion, Skelton and Batley explain that ‘restorative justice is not forgiveness[:] the theory does not require forgiveness, nor does a restorative justice process seek it’.⁸⁵ Even where the victim forgives, it ‘does not always indicate mercifulness’.⁸⁶ According to Tutu and Allen, forgiveness is a ‘grace’ that relieves a person from the past; it unties the victim from the knots of the unpardoned agony of the crime.⁸⁷

However, Bennett views apology as a mechanism to regain certain rights curtailed by the community after the crime.⁸⁸ One victim whose daughter was shot by her boyfriend said, ‘[W]hen people can’t forgive they’re stuck...Forgiveness for me was self-preservation.’⁸⁹ A victim said in relation to forgiveness: ‘If I kept the hatred inside me and refused to forgive, the offender was not suffering, I was.’⁹⁰ Another victim explained that ‘forgiving (the offender) has set me free. When we forgive someone, it ends. It puts a stop to the anger we feel. It’s over. We are then free to live our lives in peace.’⁹¹

⁸² Dieter Dölling and Arthur Hartmann ‘Re-offending after victim-offender mediation in juvenile court proceedings’ in Elmar GM Weitekamp and Hans-Jürgen Kerner (eds) *Restorative justice in context: International practice and directions* Willan publishing USA and Canada 2003 at 209.

⁸³ Braithwaite (2002) at 571; Froestad and Shearing (2012) at 33.

⁸⁴ Braithwaite (2002) at 570-571.

⁸⁵ Skelton and Batley (2008) at 38-39.

⁸⁶ According to Leo, although victims may forgive, they could still believe the death penalty was appropriate for the offender. Leo G Barrile ‘I forgive you, but you must die: Murder victim family members, the death penalty, and restorative justice’ 10 *Victims & Offenders: An International Journal of Evidence-based Research, Policy, and Practice* 2016 at 243 and 245-250.

⁸⁷ Desmond Tutu and Allen J *The essential Desmond Tutu* Philip Publishers Cape Town 1997 at 61.

⁸⁸ Christopher Bennett *The apology ritual: A philosophical theory of punishment* Cambridge University Press UK 2008 at 175.

⁸⁹ Christina L Lyons ‘Restorative justice: Can it help victims and rehabilitate offenders?’ CQ Researcher: In-depth reports on today’s issues, CQ Press, an imprint of SAGE Publications 2016 at 126.

⁹⁰ Jill Schellenberg ‘A victim with special needs: A case study’ in John PJ Dussich and Jill Schellenberg (eds) *The promise of restorative justice: New approaches for criminal justice and beyond* Lynne Rienner Publishers USA 2010 at 59.

⁹¹ Susan Miller *After the crime: The power of restorative justice dialogues between victims and violent offenders* New York University Press New York 2011 at 30.

In some cases, the offender pays a price to the community's lost rights through an apology.⁹² Though apology and forgiveness are not mandatory requirements of restorative justice, the two elements are vital signs of offenders' remorse and victims' willingness to accept apology. Bennett suggests that apology should be regarded as a sanction in restorative justice.⁹³ While this argument seems attractive, mechanisms to induce a true apology from an offender are far beyond reach. First, it is against the values of restorative justice because it involves coercion. Secondly, victims want more than a lip-service apology but genuine one.⁹⁴ Of course, an apology appeases victims, enables them to move on,⁹⁵ and should be a catalyst for an offender to change. This is possible where the offender gives a free and genuine apology rather than otherwise. For instance, in the case of *Le Roux and others v. Dey*,⁹⁶ the court ordered the applicant to apologise to the respondent; under such circumstances, the apology could not be genuine. In that case, the Supreme Court of South Africa raised concern about the genuineness of the apology. Skelton also has criticised the act of directing the applicants to apologise in that such apologies may lack genuine remorse.⁹⁷

Victim-offender mediation is normally empowering by giving recognition to parties through participatory decision-making.⁹⁸ When an agreement is reached, the mediator assists parties in documenting agreed outcomes and setting up measures for executing restitution.⁹⁹ However, there are challenges for victim-offender mediation for not involving the wider community because some needs may not be attended to.¹⁰⁰

3.3.2 Victim-offender encounter

Modern restorative justice practice has developed another branch of victim-offender

⁹² Bennett (2008) at 175.

⁹³ *Id* at 175-176.

⁹⁴ Braithwaite (2002) at 571.

⁹⁵ Jim Consedine 'The third millennium – restorative justice or more crime and prisons?' 11(1) *Sri Lanka Journal of International Law* 1999 at 7.

⁹⁶ *Le Roux and others v. Dey* 2011 (3) SA 274 CC.

⁹⁷ Ann Skelton 'The South African Constitutional Court's restorative justice jurisprudence' 1(1) *Restorative Justice: An International Journal* 2013.

⁹⁸ Van Ness and Strong (2010) at 66; Bush and Folger (2013) at 97.

⁹⁹ Van Ness and Strong (2010) at 67; Umbreit and Amour (2011b) at 84.

¹⁰⁰ See Umbreit and Amour (2011b) at 85.

mediation referred to as victim-offender encounter.¹⁰¹ Unlike victim-offender mediation, where the victim meets face to face with the offender under the assistance of a mediator, victim-offender encounter is an alternative available to victims of crimes who are not willing to meet their offenders, but for therapeutic reasons need to engage with surrogate offenders.¹⁰²

As discussed below, there are two categories of encounter in this process. The first is an encounter between the actual victim and offender but conducted remotely through a facilitator. The process may involve the use of videos, letters of apology or recorded interviews sent to the parties.¹⁰³ The second category is where the victim meets with a proxy or surrogate offender who committed an offence of the similar nature.¹⁰⁴ This type of encounter may include groups of victims and offenders or can be one-on-one. Victims need to share their experiences with other victims of similar offences in order to be free of anger and begin a new journey in life.¹⁰⁵ Victims may wish to know why the offence happened to them and why offenders committed such crimes.¹⁰⁶ In addition, victims may wish to inform the offenders of similar offences of the extent to which their behaviour harms victims physically, financially and psychologically.¹⁰⁷

Reasons for victims' unwillingness to meet their offenders are legion. First, meeting one's offender may be traumatic and a revictimising experience. Secondly, victims' security concerns and anxiety are some of the reasons for opting to victim-offender encounter instead of victim-offender mediation. Thirdly, where the victim's offender was not arrested or even identified, a surrogate offender is used as a way to vent victims' pain.¹⁰⁸ Fourth, victims of sexual abuse who experience the stressful judicial process do not wish a second encounter

¹⁰¹ Camp (2014) at 46.

¹⁰² See Liebmann (2007) 76; Camp (2014) at 65.

¹⁰³ Rebecca Wallace and Karen Wylie 'Changing on the inside: Restorative justice in prisons: A literature review' *The international Journal of Bahamian Studies* 2013 at 58; 'Restorative justice works' Restorative Justice Council, 2015 at 5, available at <https://restorativejustice.org.uk/sites/default/files/resources/files/rjc-victims-rjc-dig1.pdf> (accessed 3 May 2018)

¹⁰⁴ Camp (2014) at 46.

¹⁰⁵ See *Id* at 65-66.

¹⁰⁶ See Lorenn (2013) at 34.

¹⁰⁷ Camp (2014) at 66.

¹⁰⁸ Lorenn (2013) at 33.

with the offender because of fear of revictimisation. Therefore, meeting a surrogate offender is an alternative to meeting the offender. Victim-offender encounters are common in Canada, especially for victims of sexual violence.¹⁰⁹

As with victim-offender mediation, victim-offender encounter also needs victims to be psychologically prepared.¹¹⁰ A unique feature of some victim-offender encounters is the attendance of other victims of similar offences at the conference.¹¹¹ It is a therapeutic experience for the victim to learn that he or she is not the only person grappling with the traumatic aftermath of the crime¹¹² and to understand the experience of other victims who suffered the same harm.

Victim-offender encounter opens a new dimension of restorative justice interventions. It is different from other processes such as victim-offender mediation, family group-conferencing and conferencing circles. In all other processes, the victim-offender face-to-face encounter is the major characteristic. A process that involves surrogate offenders challenges the rationale of restorative justice. It is normally expected that the meeting of the victim and offender in a restorative conference allows the offender to understand the harm of the crime, empathise and seek forgiveness. It is therapeutic for the offender if forgiveness is given by the victim in his presence. Meeting the offender also ensures the victims' security even after the release of the offender from prison. Face-to-face encounters between parties has therapeutic consequences that cannot be achieved without them.

However, though victim-offender encounter may have therapeutic value or it may sometimes be the only way the victim can heal, especially where the offender was not identified or arrested, in my view it is unlikely to achieve the other intended purposes of restorative justice. For instance, in a face-to-face encounter with the real victim, the offender has an opportunity for making things right with the victim. Where the real offender is involved, compensation or other remedies are realistic possibilities. Of course, face-to-face meeting is a traumatic experience, but it might be the only way to release the victim's anger and

¹⁰⁹ Camp (2014) at 46.

¹¹⁰ *Id* at 66.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

psychological trauma. Through victim-offender encounter, the expression of anger is directed to a non-responsible person, the surrogate offender. The victims' story may not occasion true remorse because the offender is hearing a 'surrogate victim'. Though the offender wounded another person in the same way, the story is less touching than hearing an actual victim. Even the circumstances of the crime would obviously be different. Offenders do not need to apologise before a surrogate victim. An apology given under such circumstances is actually illusory, as there can be no meaningful apology to a surrogate victim. A surrogate offender owes certain responsibilities to his or her victim who is available somewhere. In my view, for a productive restorative intervention an encounter with the offender is necessary for both parties' fates.

3.3.3 Family group-conferencing

Family group conferences were first introduced in New Zealand in 1989 by the Children, Young and Their Families Act¹¹³ as a way of dealing with juvenile justice in a country where the criminal justice system failed to uphold the Maori culture by decoupling offenders from their cultural affiliation.¹¹⁴ Before the use of family group conference in New Zealand, the criminal justice system had failed to reduce reoffending and recidivism, especially among Maori youth groups.¹¹⁵ In addition, there was a concern from the Maori community that children were removed and were required to take criminal responsibility outside the community.¹¹⁶ The same spirit of restorative justice as in the Children, Young and Their Families Act of 1989 was extended to adults by the Sentencing Act of 2002, which emphasised taking on board 'offender's personal, family, whanau, community and cultural background' in the sentencing process.¹¹⁷

¹¹³ New Zealand Children, Young and Their Families Act of 1989, section 247; Van Ness and Strong (2010) at 68.

¹¹⁴ Maxwell (2013) at 104.

¹¹⁵ Tauri Juan Tauri 'Family group conferencing: A case-study of the indigenisation of New Zealand's justice system' 10 *Current Issues in Criminal Justice* 1998-1999 at 168; Umbreit and Armour (2011b) at 146-147.

¹¹⁶ Donald Schmid 'Restorative justice in New Zealand: A model for US criminal justice' 2001 at 11, available at https://www.fulbright.org.nz/wp-content/uploads/2011/12/axford2001_schmid.pdf (accessed 3 May 2018).

¹¹⁷ Initially, family group conferences began as a justice approach to juvenile offenders but their application has gone as far as accommodating crimes involving adult offenders in New Zealand and other jurisdictions. According to Schmid, Judge McElrea proposed the use of family conferencing with adult offenders in 1994. Schmid (2001) at 14; New Zealand Sentencing Act 2002 section 8(i); Van Ness and Strong (2010) at 68.

Family group conferences are forms of restorative justice encounter that involve participants from the community who come together to resolve strife. The process involves a wide range of participants, including the victim, offender, family members, school teachers, and friends.¹¹⁸ The New Zealand family group-conferencing model draws on Maori cultural practices and allows the attendance of representatives of *iwi*, *hapu* and *whanau*¹¹⁹ who come from the cultural social service of the community.¹²⁰ During the conference, professionals such as prosecutors, barristers, solicitors, advocates, social workers, and probation officers also attend.¹²¹

The New Zealand model thus allows a youth offender to have the moral support of the community. The attendance of these groups is necessary too for the offender's well-being, especially in the process towards reformation.¹²² The other rationale for involving several groups from the community in family group conferences is that crimes affect not only individual victims but members of the community, who are secondary victims.¹²³ Secondary victims are all members of the community who have been indirectly harmed by the crime; hence, they have a reason to jointly hold the offender accountable and ensure that future transgression is deterred. Unlike victim-offender mediation and encounter, which involve a mediator, family group conferences are normally guided by facilitators.¹²⁴ They are also distinctive among other restorative justice processes in that legal professions participate in them.¹²⁵

When these pieces of legislation were passed, delivery of justice through family group conferences was not a new approach among the Maori community.¹²⁶ Family group-conferencing originates from the indigenous justice practices of the Maori who believe that

¹¹⁸ New Zealand Children, Young and Their Families Act of 1989, section 251.

¹¹⁹ *Iwi*, a social group in Maori society, consists of small clans called *hapu* and, below clans, a group of families called *whanau*. <https://teara.govt.nz/en/tribal-organisation> (accessed 23 April 2018).

¹²⁰ New Zealand Children, Young and Their Families Act of 1989, section 251.

¹²¹ New Zealand Children, Young and Their Families Act of 1989, section 251; Edgar and Newell (2006) at 12; Maxwell (2013) at 103.

¹²² Edgar and Newell (2006) at 12.

¹²³ *Ibid.*

¹²⁴ Roni A Elias 'Restorative justice in domestic violence cases' 9 *DePaul Journal for Social Justice* 2015 at 75.

¹²⁵ New Zealand Children, Young and Their Families Act of 1989, section 251.

¹²⁶ Umbreit and Armour (2011) at 85.

true justice cannot be achieved without involving the community.¹²⁷ Apart from building community peace and harmony, holding offenders' accountable and addressing victims' and community needs, the 'indigenisation' of the criminal justice system in New Zealand reduced reoffending in the country considerably.¹²⁸

In other countries in the Pacific region where family group-conferencing has been adopted as a model of modern restorative justice for adult offenders, it has played a similar role.¹²⁹ The reoffending rate has decreased and victim satisfaction, increased, in comparison to cases tried under court processes.¹³⁰ Writing on the experience of a project in Kenya, Ottolini points out some of the advantages of family decision-making model. The family decision-making model is a 'sandwich' programme merging the principles of New Zealand family conferencing and African indigenous justice principles in Kenya.¹³¹ He says family group conferences reduces family-related conflicts and improves communication within the community.¹³² When decisions are made in a community at a family level, the community gets an opportunity to understand its members. Also, the same community can follow up on the outcomes of the conference for the betterment of the victim, offender and the general community.¹³³ The community makes plans to reduce criminality and protect their children, given that it understands areas of potential criminality.¹³⁴

From an African perspective, true reconciliation cannot be achieved if the necessary parties, those directly and indirectly harmed by the crime, are not involved. Omale argues that 'for the elders to be sure that genuine reconciliation has been achieved after dispute mediation, both parties may be expected to eat from the same bowl, drink palm wine, *burukutu* or local

¹²⁷ Tauri (1998-1999) at 174.

¹²⁸ See Gabrielle Maxwell and Hennessey Hayes 'Restorative justice development in the Pacific region: A comprehensive survey' 9(2) *Contemporary Justice Review* 2006 at 131.

¹²⁹ Family group conferences have been adopted in Australia in a variety of projects, including the Wagga Wagga Police conferencing project. In the United Kingdom, family group conferencing has been used, notably in the Thames Valley Police Conferences. Liebmann (2007) at 80-81; Van Ness and Strong (2010) at 68.

¹³⁰ Elias (2015) at 78.

¹³¹ Diego Ottolini *The family conferencing: A ground-breaking practice for community-based child protection in Kenya* Franciscan Kolbe Press Kenya 2011 at 103.

¹³² Ottolini (2011) at 109 and 111.

¹³³ See *Id* at 113.

¹³⁴ See *Ibid*.

gin from the same cup and/or break and eat *kola* nuts'.¹³⁵ A true reconciliation restores social bonds and rebalances the community equilibrium.

3.3.4 Conferencing circles

Conferencing circles are more closely linked to indigenous traditional practices, as compared to victim-offender mediation and family group-conferencing. The genesis of conferencing circles lies in Navajo justice practices in America and indigenous aboriginal communities in Canada.¹³⁶ Unlike other restorative justice processes, conferencing circles involve larger numbers of participants. Healing circles, which are a form of conferencing circles, may be conducted privately.¹³⁷ As the name suggests, participants in a conferencing sit in a circle, which symbolises the shape of the universe (it has no beginning or end) and human dependence on the community.¹³⁸ In terms of the metaphor of a circle, participants have an equal right to discuss the conflict and reach an agreement.¹³⁹ Sometimes an eagle feather is used as a sign of 'respect' and 'wisdom' that is passed along the circle as participants contribute to the discussion.¹⁴⁰ The discussion goes round the circle and a facilitator moderates the process.

The process involves rituals to focus participants on the core values of human interdependence and the need to secure community harmony.¹⁴¹ As in any other dispute resolution mechanism, the essence of justice is to secure community peace, harmony, and assist victims and seek offenders' reformation. This goal of justice is achieved by involving community members who are not only directly or indirectly victims of the crime but who share common values with the victim and offender. In Canada, circles are used for sentencing purposes in regard to offenders who have pleaded guilty or been convicted by the court.¹⁴²

¹³⁵ Don John O Omale 'Restorative justice and victimology: Euro-Africa perspectives' Wolf Legal Publisher Netherlands 2012 at 24.

¹³⁶ Umbreit and Armour (2011) at 182; Kay Pranis 'Peace-making circles' in Gerry Johnstone (eds) *A restorative justice leader 2nd ed* Routledge USA and Canada 2013 at 117.

¹³⁷ Pranis (2013) at 119.

¹³⁸ Umbreit and Armour (2011) at 179 and 180.

¹³⁹ *Id* at 179.

¹⁴⁰ Pranis (2013) at 119.

¹⁴¹ Umbreit and Armour (2011) at 183; Pranis (2013) at 118.

¹⁴² Tom Ellis and Steve Savage 'Restorative justice or retribution?' in Tom Ellis and Stephen P Savage (eds) *Debate in criminal justice: Key themes and issues* Routledge USA 2012 at 94.

Unlike in other restorative justice process, offenders are not referred to circles for a hearing; rather, the community is involved in the sentencing of the offender.¹⁴³

3.3.5 Sentencing circles

Indigenous restorative traditions have been incorporated in some modern criminal justice systems in the interests of an integrative sentencing process.¹⁴⁴ Sentencing circles originates in aboriginal traditional justice in Canada.¹⁴⁵ While conferencing circles are restorative justice processes outside the criminal justice setting, these circles are employed by the court for sentencing purposes.¹⁴⁶ With the emergence of restorative justice approach within the criminal justice system, such traditions have been revived to operate as restorative justice mechanisms.¹⁴⁷ Though aboriginal justice is different from modern restorative justice, sentencing circles have aspects in common with it, including coming together to find solutions to the impact of the crime and re-establishing damaged relationships within the community.¹⁴⁸ Decisions to invoke sentencing circles may be made by a trial judge, the offender's attorney or the community through the community justice committee.¹⁴⁹ Sentencing circles allow persons affected by the offenders' misconduct to come together in order to find consensus in handling the aftermath of the crime.¹⁵⁰ Unlike other restorative justice processes, sentencing circles involve prosecutors, judges, attorneys, probation officers, police officers, social workers, victims, offenders and community members.¹⁵¹ Sentencing circles sits in two circles: primary participants sit in the inner circle, though there is no formal seating arrangement for participants;¹⁵² the outer circle involves friends, relatives and persons

¹⁴³ *Ibid.*

¹⁴⁴ Nicholas A Jones and Rob Nestor 'Sentencing circles in Canada and the *gacaca* in Rwanda: A comparative analysis' 21(1) *International Criminal Justice Review* 2011 at 50; Meagan Berlin 'Restorative justice practices for Aboriginal offenders: Developing an expectation-led definition for reform' 21(3) *Appeal* 2016 at 9.

¹⁴⁵ Valerie Footz 'Sentencing circles' 23(3) *Law Now* 1999 at 45.

¹⁴⁶ Jones and Nestor (2011) at 49.

¹⁴⁷ Fred Fenwick 'Sentencing circles: Aboriginal justice and restorative justice' 26(5) *Law Now* 2002 at 42.

¹⁴⁸ Fenwick (2002) at 42.

¹⁴⁹ Julian V Roberts and Carol LaPrairie 'Sentencing circles: Some unanswered questions' 39(1) *Criminal Law Quarterly* 1996 at 70.

¹⁵⁰ Footz (1999) at 45.

¹⁵¹ Roberts and Carol LaPrairie (1996) at 70-71; Maureen Linker 'Sentencing circles and the dilemma of difference' 42(1) *Criminal Law Quarterly* 1999 at 117.

¹⁵² Roberts and LaPrairie (1996) at 71.

interested in the dispute.¹⁵³

Sentencing circles allow an offender who has admitted responsibility in court to be diverted to ‘judicially convened’ sentencing circles.¹⁵⁴ Sentencing circles are moderated by a judge, who does not apply court rules in this process. He or she directs participants to the dispute, its cause, the harm caused to the victim and the community and any possible sentence outcome.¹⁵⁵ The main rationale for invoking sentencing circles is to encourage the offender to understand the feelings of the victim and the community regarding the crime.¹⁵⁶ The process is used to restore damaged relationships and reconnect the offender to the community.¹⁵⁷ Sentencing circles are also used to gather information from the community for the judge to formulate a sentence for the offender.¹⁵⁸ Though the judge is not bound to follow the recommendations from the sentencing circle, such community observations are necessary to form an integrative sentence.¹⁵⁹ It is also meant to create a sense of harmony by involving the community in deciding cases that affect their well-being.¹⁶⁰ The process is thought to be rehabilitative, preventive, cost-effective and promotive of community solidarity.¹⁶¹

Roberts and LaPrairie are pessimistic about the real essence of sentencing circles in relation to reducing recidivism rates and providing uniform sentencing standards. Sentencing circles may create power imbalance between victim and offender, leading to sentencing disparities. Sentencing circles may also apply discretionary by every judge imposing criteria for their application. For some judges, the seriousness of the offence and its impact on the community may make the use of sentencing circle necessary; others may consider the possibility of the

¹⁵³ *Id* at 70; Linker (1999) at 117.

¹⁵⁴ Roberts and LaPrairie (1996) at 70; Fenwick (2002) at 42; Angela Cameron ‘Sentencing circles and intimate violence: A Canadian feminist perspective’ 18 *CJWL/RFD* 2006 at 484; Toby Susan Goldbach ‘Sentencing circles, clashing world views, and the case of Christopher Pauchay’ 10(1) *Journal of the Centre for Studies in Religion and Society* 2011 at 54-55.

¹⁵⁵ Linker (1999) at 117.

¹⁵⁶ Toby S Goldbach ‘Instrumentalizing the expressive: Transplanting sentencing circles into the Canadian criminal trial’ 25 *Transnational Law and Contemporary Problems* 2015 at 89.

¹⁵⁷ Fenwick (2002) at 42.

¹⁵⁸ Roberts and LaPrairie (1996) at 71; Linker (1999) at 116; Megan Lynn Johnson ‘Coming full circle: The use of sentencing circles as federal statutory sentencing reform for native American offenders’ 29 *Thomas Jefferson Law Review* 2007 at 273.

¹⁵⁹ Goldbach (2015) at 68.

¹⁶⁰ Linker (1999) at 117.

¹⁶¹ Roberts and LaPrairies (1996) at 82-83; Goldbach (2011) at 57;

<http://www.courts.ca.gov/documents/SentencingCircles.pdf> (accessed 23 April 2018).

offender's rehabilitation the most important fact for invoking sentencing circles.¹⁶² However, there is evidence suggesting that many judges prefer cases to be diverted to sentencing circles.¹⁶³ In addition, through case law, criteria have been developed for allowing sentencing circles.¹⁶⁴

It is important to note that sentencing circles are adopted as a mechanism to bridge the gap between the modern criminal justice system and an indigenous community that views it as a colonial imposition.¹⁶⁵ Here, the court decision seeks to incorporate opinions from people living with the offender and victim rather than committing the offender to prison. When the community is involved, justice is more likely to be of benefit to the offender, victim and the community itself. The view of aboriginals that modern criminal justice is a colonial system is found through the world, including among the Hudzabe and Maasai in Tanzania, where there are no criminal justice mechanisms serving to integrate their opinions. While section 718.2 of the Canadian criminal code obliges the judge to take into account the 'circumstances of Aboriginal offenders', there is no such provision in the Tanzanian Penal Code. This does not mean that such indigenous communities are happy with the criminal justice system, which resolves disputes based on colonially inherited technical legal rules. However, the local community can be given a voice in their disputes for the benefit of their communal well-being rather than have a decision imposed by an outsider magistrate or judge.

3.5 Restorative justice, diversion and sentencing processes

3.5.1 Restorative justice and diversion

Modern restorative justice allows diversion of criminal cases at any stage during the criminal

¹⁶² Roberts and LaPrairie (1996).

¹⁶³ Goldbach (2015) at 85.

¹⁶⁴ *Id* at 86-87.

¹⁶⁵ *Id* at 77-78.

justice process.¹⁶⁶ Restorative justice processes can be at the pre-trial, pre-sentence, sentencing or post sentencing stage.¹⁶⁷ Practices discussed above, namely victim-offender mediation, family group-conferencing and conferencing circles are mostly pre-trial or pre-sentencing procedures.¹⁶⁸ However, it does not mean that they cannot be used for incarcerated offenders. The point at which restorative justice process applies, differs from one jurisdiction to another, and also depends on the nature of the offence.¹⁶⁹

The New Zealand restorative justice model, which is embedded in the law, allows restorative justice for juvenile offenders at the police and court level.¹⁷⁰ At the police level, cautioning is an approach to restorative justice in which an offender who is willing to take responsibility is diverted from the normal court processes to restorative interventions.¹⁷¹ Police diversion of a case occurs after an offender has been arrested, especially before drafting a charge. This depends on the needs of the victim and offender as well as on the nature of offence with which the offender is to be charged.¹⁷²

In countries such as the United Kingdom and Australia, cautions have been given in the form

¹⁶⁶ United Nations, Economic and Social Council resolution, Basic principles on the use of restorative justice programmes in criminal matters, 2002; Jeff Latimer, Craig Dowden and Danielle Muise 'The effectiveness of restorative justice practices: A meta-analysis' *The Prison Journal* 2005 at 128; UN handbook (2006) at 13; Ann Skelton and Mike Batley 'Charting progress, mapping the future: Restorative justice in South Africa' Restorative justice centre South Africa 2006 at 10; B Naude and D Nation 'An analysis of cases referred to restorative justice in Tshwane Metropolitan area' 20(2) *Acta Criminologica* 2007 at 142; Hargovan (2008) at 30; Cunneen and Hoyle (2010) at 101.

¹⁶⁷ Skelton and Batley (2008) at 43-45.

¹⁶⁸ Post-sentencing restorative justice is usually applied via prison programmes; this is discussed in detail in this chapter.

¹⁶⁹ As discussed below in this chapter, the use of restorative justice processes is common in juvenile justice and in minor offences involving adult offenders. However, restorative justice in prisons has been very useful in dealing with violent offences, which are rarely subject to restorative intervention at pre-trial or pre-sentencing stage. In addition, as discussed in Chapter 6, Truth and Reconciliation Commissions, as a form of restorative intervention, have been used to bring together victims and offenders in instances of mass atrocities.

¹⁷⁰ Gabrielle Maxwell 'Diversionary policing of young people in New Zealand: A restorative approach' in Gabrielle M Maxwell and James H Liu (eds) *Restorative justice and practices in New Zealand: Towards a restorative justice* Wipf and Stock Publishers Eugene 2007 at 111; FWM McElrea 'Restorative justice for adult offenders: Practice in New Zealand today' in Gabrielle M Maxwell and James H Liu (eds) *Restorative justice and practices in New Zealand: Towards a restorative justice* Wipf and Stock Publishers Eugene 2007 at 96.

¹⁷¹ Robert A Braddock 'Rhetoric or restoration? A study into the restorative potential of the conditional cautioning scheme' 13(3) *International Journal of Police Science and Management* 2011 at 196.

¹⁷² See Van Ness and Nolan (1998) at 71; Zehr (2002) at 49; United Nations Handbook on Restorative Justice Programmes (2006) at 13; Skelton and Batley (2006) at 10; Hargovan (2008) at 30; Cunneen and Hoyle (2010) at 101.

of police cautioning for minor offences.¹⁷³ Where there are good reasons, police cautions can be applied even in serious offences.¹⁷⁴ According to Braddock, cautioning is only classified as a restorative measure when it incorporates the meeting of victim and offender.¹⁷⁵ So, the process involves the participation of key stakeholders in the conflict in order to allow for victims' needs to be addressed and to assist the offender in taking responsibility. Apart from achieving other restorative justice benefits, the process helps to reduce the number of cases for prosecution. The court is also relieved from minor cases which otherwise can congest the criminal justice process.¹⁷⁶ The process helps to monitor offenders' reoffending.¹⁷⁷ For juvenile offenders, police cautioning is a measure 'to avoid the stigma of court appearance' at an early stage of their life.¹⁷⁸

The dual pattern of restorative intervention was adopted in Australia, the United Kingdom and Northern Ireland.¹⁷⁹ In other words, police diversion does not ouster the power of the court to divert a case to restorative justice where such need arises.¹⁸⁰ Where the offender is charged, the prosecutor may request restorative interventions before a trial is conducted.¹⁸¹ South Africa has a different approach to case diversion for child offenders. The Child Justice Act gives power to the prosecutor to divert a case to a restorative justice process,¹⁸² especially when the offender has admitted responsibility and has consented to diversion.¹⁸³ The proposal by the prosecutor to divert the case to a restorative intervention takes effect

¹⁷³ In the United Kingdom, police cautioning, which is popular thanks to the Thames Valley police cautioning programme, is provided by the Criminal Justice Act 2003 as amended in 2006. Maxwell (2007) at 111; see also Braddock (2011) at 196.

¹⁷⁴ Susan Dennison, Anna Stewart and Emily Hurren 'Police cautioning in Queensland: The impact of juvenile offending pathways' 306 *Trends and Issues in Crime and Criminal Justice* 2006 at 2.

¹⁷⁵ Braddock (2011) at 198.

¹⁷⁶ See *Id* at 198-199.

¹⁷⁷ Dennison, Stewart and Hurren (2006) at 1.

¹⁷⁸ *Ibid*.

¹⁷⁹ Maxwell (2007) at 111.

¹⁸⁰ Gabrielle Maxwell 'Restorative and diversionary responses to youth offending in New Zealand' in Katherine S van Wormer and Loren Walker (eds) *Restorative justice today: Practical applications* SAGE Publications UK 2013 at 104.

¹⁸¹ Van Ness and Nolan (1998) at 74; Zehr (2002) at 49; United Nations handbook on Restorative Justice Programmes (2006) at 13; Hargovan (2008) at 30.

¹⁸² Child Justice Act 75 of 2008, section 41.

¹⁸³ *Id* at section 52.

after a court's order.¹⁸⁴

Other countries in Africa such as Uganda have adopted diversionary measures for juvenile justice in a more traditional set-up. First, the Ugandan Executive Committees (Judicial Powers) Act gives civil and criminal jurisdiction to local councils to resolve cases originating in their territorial jurisdictions.¹⁸⁵ Secondly, the Ugandan Children's Statute allows a case involving a juvenile offender to be diverted to village courts for determination. Such councils, which are local administrative bodies at the level of a county, subcounty, parish and villages, facilitate reconciliation, compensation, restitution, caution and other restorative remedies for the parties.¹⁸⁶ Apart from seeking compliance with international instruments,¹⁸⁷ the other rationale for involving the community (village courts) as a diversionary measure is to shame, reform and reintegrate the child in the responsible community.¹⁸⁸

3.5.1 Restorative justice, sentencing processes and informal mediation

The court can divert a case to restorative measures at any time during the trial, provided the victim's interests are not jeopardised.¹⁸⁹ Alternatively, the court may wish to refer the parties for restorative processes where the offender pleads guilty.¹⁹⁰ Where the offender pleads not guilty, after conviction but before sentence, the court may too divert the case for a restorative justice process.¹⁹¹ For that matter, a restorative justice intervention after the offender's conviction is an opportunity for the judge to allow the offender to take responsibility for his or her criminal behaviour, to put things right and restore harmony with the victim and community. At this stage, a restorative justice agreement may be availed to the court for

¹⁸⁴ *Id* at section 42.

¹⁸⁵ Ugandan Executive Committees (Judicial Powers) Act, section 6 and 28.

¹⁸⁶ See Ugandan Children's Statute, section 92; see also Ugandan Local Council (Judicial Powers) Act, sections 19 and 20; Lillian Tibatemwa Ekirikubinza 'Juvenile justice and the law in Uganda: Operationalisation of the children statute' *International Survey of Family Law* 2005 at 516.

¹⁸⁷ For instance, article 40(3)(b) of the UN Convention on the Rights of the Child encourages member states to deal with child offender without necessarily involving judicial proceedings.

¹⁸⁸ See Ekirikubinza (2005) at 515-516.

¹⁸⁹ See, for instance, United Nations handbook on Restorative Justice Programmes (2006) at 13.

¹⁹⁰ Hargovan (2008) at 30; Kathleen Daly 'Restorative justice: The real story' in Carolyn Hoyle (ed) *Restorative justice: Critical concepts in criminology* Routledge London and New York 2010 at 283.

¹⁹¹ Van Ness and Nolan (1998) at 74-75; Zehr (2002) at 49; Cunneen and Hoyle (2010) at 101.

approval, implementation or consideration in the sentence.¹⁹² However, the court is not bound by the decisions of the restorative processes where the court finds good reason to depart from them. Restorative justice can also apply to sentenced offenders; it can apply simultaneously to non-custodial sentences or as part of a rehabilitation plan for incarcerated offenders.¹⁹³ Hence, both the police and court may divert a case for restorative measures.¹⁹⁴

According to the New Zealand sentencing model, at the pre-sentencing stage the court may request a report from the probation officer. The pre-sentencing report contains relevant information concerning the offender's community and cultural background, the offender's needs that are relevant to rehabilitation, circumstances that contributed to the commission of the offence, and information on restorative outcomes, sentencing opinions or detention options as well as information about community service.¹⁹⁵ Apart from considering the 'gravity of the offence' in sentencing the offender, the court is obliged furthermore to consider the offender's cultural background.¹⁹⁶ The sentencing process brings in the 'offender's family, whanau and community' for the purposes of offender's rehabilitation.¹⁹⁷ The community participates in the sentencing process of the offender and even for rehabilitation programmes.¹⁹⁸ In addition, in making the offender accountable to the victim, the court takes into account any agreement reached through family group conferences in restoring the offender's wrong, loss or damage.¹⁹⁹ The court is further required to consider any response or measure that is or is likely to be taken by the offender's family or *whanau* in the sentence.²⁰⁰ Where the matter was referred or is likely to be diverted to restorative interventions, the Act obliges the court to consider any outcomes therefrom when sentencing or otherwise dealing with the offender.²⁰¹ The spirit of the Sentencing Act cannot, at any rate,

¹⁹² Zehr (2002) at 49; Stephen J O'Driscoll 'Youth justice in New Zealand: A restorative justice approach to reduce youth offending' 136th International training course visiting experts' Papers Resource Material series number 75 at 56.

¹⁹³ Zehr and (2002) at 49; United Nations handbook on Restorative Justice Programmes (2006) at 13; Hargovan (2008) at 30; Cunneen and Hoyle (2010) at 101.

¹⁹⁴ See Maxwell (2013) at 104; Zehr (2002) at 49.

¹⁹⁵ New Zealand Sentencing Act 2002 section 2(1)(2).

¹⁹⁶ *Id* at section 8 (a)(b) and (i).

¹⁹⁷ *Id* at section 8 (i)

¹⁹⁸ *Id* at section 51.

¹⁹⁹ *Id* at section 10(1)(b).

²⁰⁰ *Id* at section 10(1).

²⁰¹ *Id* at section 8(j).

be decoupled from the indigenous Maori spirit of justice,²⁰² in terms of which the community is regarded as the custodian of moral values. Such values have to be applied in dispute resolution in order to restore community order. In the process of justice, the offender has an opportunity for restoration, compensation, apology and making things right.²⁰³

In South Africa, for adult offenders, the law still provides an opportunity for the magistrate to refer the matter for restorative measures. Under the Criminal Procedure Act, the magistrate can request information that will assist him or her in forming a judicious sentence.²⁰⁴ Such information is supposed to be given after the conviction of the offender. Between conviction and sentence, there is a time for the magistrate to allow other processes to take place before the offender is convicted.²⁰⁵ When restorative justice is conducted at this stage, agreement reached during the conference assists the magistrate in forming the sentence.²⁰⁶ Because a restorative process involves people who know the offender, their advice is crucial for the magistrate's sentence.²⁰⁷ Based on their advice, the magistrate can decide to impose a suspended sentence instead of incarceration, or even a fine and hours of community service. However, a wave of restorative justice that began to rise in South Africa on the court's power to invoke restorative justice as a complementary criminal justice approach²⁰⁸ seems to have been thwarted by decisions of the Supreme Court.²⁰⁹

South Africa has embarked on informal mediation in cases involving adult offenders as a way to secure justice through Alternative Dispute Resolution Mechanisms. Little is documented

²⁰² Stephanie Vieille 'Maori customary law: A relational approach to justice' 3(1) *The international indigenous policy journal* 2012 at 2.

²⁰³ See the stipulation of the New Zealand Sentencing Act 2002 section 10; Maxwell (2013) at 105.

²⁰⁴ South Africa Criminal Procedure Act, section 274.

²⁰⁵ The same provision of the law is also found in the Criminal Procedure Act of Tanzania, section 236 but it is never used for restorative justice purposes. The practice indicates that after the offender's conviction, the magistrate can adjourn the case for another day to deliver the sentence. Where the magistrate proceeds to sentence the offender immediately after conviction, in most cases he or she will request mitigating factors to be included in the sentence. Countries that have realised the essence of restorative justice use this period as an opportunity for restorative intervention as well as a time in which other information, such as victim impact statements, is presented to the magistrate for sentencing purposes.

²⁰⁶ See Skelton and Batley (2008) at 44.

²⁰⁷ See *Ibid.*

²⁰⁸ See *S v. Shilubane* 2008 (1) SACR 295 (T); *S v Maluleke* 2008 (1) SACR (T). See also chapter 6.

²⁰⁹ *Director of Public Prosecutions, North Gauteng v. Thabethe* 2011 (2) SACR 567 (SCA); *S v. Seedat* 2017 (1) SACR 141 (SCA). Chapter 6 provides an extensive analysis of judicial decisions and restorative justice in South Africa.

about informal mediation in South Africa, but a publication by Anderson gives a critical analysis on the process.²¹⁰ According to Anderson, a quarter of cases were referred to informal mediation in 2015/16,²¹¹ a huge achievement bearing in mind that the directives to govern the process were formulated in 2014. Further records show that 180,000 cases were resolved through informal mediation in one year in South Africa.²¹² Informal mediation applies to willing parties (both offender and victim) under the condition that prosecution may be withdrawn when an agreement is reached.²¹³ Unlike restorative justice, informal mediation involves the offender, victim, social worker and prosecutor with a help of a mediator.²¹⁴ A prosecutor may act as a mediator with the assistance of a social worker.²¹⁵ Members of the community do not attend,²¹⁶ and it only involves minor offenses.²¹⁷ According to Anderson, parties may be willing to engage in informal mediation because of the likelihood of compensation for victims and the offenders' possibility to evade prosecution.²¹⁸ It is also quicker to resolve a case under informal mediation as compared to prosecution in a court.²¹⁹

As discussed in Chapter 8, traditional restorative practices regarding adult offenders in Tanzania, practices which have survived colonialism, are reflected in a number of statutes, including the Constitution.²²⁰ Southern Sudan, apart from embracing traditional justice in many aspects of the criminal justice system, has law governing restorative justice

²¹⁰ Adriaan Anderson 'Disposal of criminal disputes by informal mediation: A critical analysis' 30(2) South African Journal of Criminal Justice 2017 at 162-178.

²¹¹ Anderson (2017) at 166.

²¹² According to the report given in 2016. See <https://www.businesslive.co.za/bd/opinion/2016-11-21-decline-in-convictions-could-be-down-to-preference-for-informal-mediation/> (accessed 19 June 2018).

²¹³ Prosecuting Policy Directives, 2014 Part 7 (F) (9).

²¹⁴ Anderson (2017) at 167; See also Prosecuting Policy Directives, 2014 Part 7 (F) (2).

²¹⁵ Prosecuting Policy Directives, 2014 Part 7 (F) (3).

²¹⁶ Anderson (2017) at 167.

²¹⁷ Prosecuting Policy Directives, 2014 Part 7 (F) (5).

²¹⁸ Anderson (2017) at 169

²¹⁹ *Id* at 170.

²²⁰ The Constitution of the United Republic of Tanzania of 1977 encourages the promotion of reconciliation in both civil and criminal matters; the Ward Tribunal Act of 1985 establishes tribunals which have original jurisdictions in criminal and civil matters at the level of the ward. These tribunals are not within the Tanzanian judiciary hierarchy but fall under local governments. The Criminal Procedure Act of 1985 too provides diversionary measures for a limited number of offences for reconciliation. Primary courts, the lowest courts in the judicial ladder, also encourage reconciliation in criminal and civil matters. See the Primary Court Criminal Procedure Code, Rule 4.

interventions for child offenders.²²¹ Under the Child Act, traditional practices of justice handle many minor cases involving juvenile offenders, while serious offences are tried by the formal system.²²² In Kenya, though the law does not explicitly provide for restorative justice for juvenile offenders, the Children's Act has certain provisions that divert a child offender from ordinary orders to restorative remedies such as payment of a fine, compensation, community service, or placement in foster care, a rehabilitation school or under a qualified counsellor.²²³ In Lesotho, apart from the spirit of restorative justice inherent in the African cultural background,²²⁴ the restorative approach has been adopted in the Children's Protection and Welfare Act of 2011.²²⁵ As with the child law of Uganda, the law in Lesotho allows the application of restorative approach through Village Child Justice Committees, an approach that brings together international law norms and elements of the traditional justice ethos 'that are more promotive or protective of the rights of children'.²²⁶

3.6 Restorative justice practices in prisons

Prisons normally face many challenges,²²⁷ among them overcrowding of inmates,²²⁸ boredom, an unfriendly environment,²²⁹ poor diet, clothing and sleeping environment.²³⁰ This atmosphere is believed to be the major reason for aggression, anger, violence, conflict and

²²¹ Cyndi Banks 'Protecting the rights of the child: Regulating restorative justice and indigenous practices in Southern Sudan and East Timor' 19 *International Journal of Children's Rights* 2011 at 168; see also Marisa O Ensor 'African children's right to participate in their own protection: Perspective from South Sudan' 22 *International Journal of Children's Rights* 2014.

²²² Southern Sudan Child Justice Act 2008, section 3 and 4.

²²³ See Kenyan Children Act No. 8 of 2001, section 191(1).

²²⁴ See Ntsi'keng Theresa Qhubu 'The development of restorative justice in Lesotho' 2005. Paper presented to the Conference of the Association of Law Reform Agencies of Eastern and Southern Africa, at 1, available at http://www.justice.gov.za/alraesa/conferences/2005sa/papers/s4B_qhubu.pdf (accessed 4 May 2018; see also Edmund A Foley 'It still "takes a village to raise a child": An overview of restorative justice mechanism under the Children's Protection and Welfare Act, 2011 Lesotho' 16(1) *OA African Journal Archive* 2014 at 16.

²²⁵ The aims of restorative justice under the Children's Protection and Welfare Act, 2011 (Act No.7 of 2011) of Lesotho, are provided under section 120.

²²⁶ The Children's Protection and Welfare Act, 2011 (Act No.7 of 2011) of Lesotho, section 2.

²²⁷ The challenges facing prisons are detailed in Chapter 8 of this thesis.

²²⁸ Laurel Kaufer, Douglas E Noll and Jessica Mayer 'Prisoner-facilitated mediation: Bringing peace to prisons and communities' 16 *Cardozo Journal of Conflict Resolution* 2014-2015 at 189.

²²⁹ Wallace and Wylie (2013) at 60.

²³⁰ See, for instance, Mamoqeli Malea and Brian Stout 'The treatment of children in custody in Lesotho' at 10-11, available at <http://www.cyc-net.org/cyc-online/cycol-0603-lesotho.html> (accessed 4 May 2018).

bullying among prisoners.²³¹ In prison, the offender is surrounded by so-called ‘criminals’ and overall, the environment is more ‘criminogenic’ than reformatory.²³² Moreover, prison rehabilitative measures do not seem to work.²³³ The higher rate of recidivism among released offenders points to the failure of prison reformatory measures.²³⁴ Offenders are not prepared to be responsible citizens; many go to prison without taking responsibility for their criminal behaviour.²³⁵ They have no opportunity to meet their victims and the community for true accountability.²³⁶ Offenders’ criminogenic behaviour, which is likely to be exacerbated by incarceration and to cause further harm in the community, makes reintegration difficult.²³⁷ Furthermore, as prisons are secluded institutions, the community views them as mere ‘warehouses for the people society considers undesirable’.²³⁸ So, the community may not smoothly accept offenders without some stigma due to the lack of relationship between the community and prisons. Hence, restorative justice in prisons has been introduced to make offenders understand the harmfulness of crime, involve offenders in repairing such harm and preparing them for reintegration.²³⁹ These factors have an impact on offenders’ reformation and on bridging the gap between prisons and the community.

Against this backdrop, several programmes have been established to run restorative justice programmes in prisons. These include the Sycamore Tree Programme (STP), which is

²³¹ David J Cornwell *Doing justice better: The politics of restorative justice* Waterside Press Hampshire UK 2007 at 116; Kaufer, Noll and Mayer (2014-2015) at 189-190.

²³² See Dot Gaoulding, Guy Hall and Brian Steels ‘Restorative prisons: Towards radical prison reform’ 20(2) *Current Issues in Criminal Justice* 2008-2009 at 237; Unlocking prisons: How we can improve New Zealand’s prison system, Just Speak 2014 at 19, available at https://www.hrc.co.nz/files/2714/2550/8324/JustSpeak_2014_-_Unlocking_Prisons.pdf (accessed 4 May 2018).

²³³ Gaoulding, Hall and Steels (2009-2009) at 232.

²³⁴ Theo Gavrielides ‘The truth about restorative justice in prisons’ 228 *Prison Service Journal* 2016 at 44; see, for instance, Annaliese Johnston ‘Beyond the prison gate: Reoffending and reintegration in Aotearoa New Zealand’ A report by The Salvation Army Social Policy and Parliamentary Unity 2016 at 3.

²³⁵ Howard Zehr ‘Retributive justice, restorative justice’ in Gerry Johnstone (ed) *A restorative justice reader* 2nd ed Routledge London and New York 2013 at 24.

²³⁶ Zehr (2013) at 24.

²³⁷ Gaoulding, Hall and Steels argue that ‘not only do prisons destroy law-abiding networks, they often build anti-social networks. When a prisoner is released from prison, many previous pro-social contacts have been lost and have been replaced with anti-social networks built up during the period of incarceration.’ Gaoulding, Hall and Steels (2009-2009) at 232.

²³⁸ Kaufer, Noll and Mayer (2014-2015) at 192.

²³⁹ See Kimmitt Edgar ‘Restorative segregation’ 228 *Prison Service Journal* 2016 at 31.

normally run in the form of a course to convicted and pleaded offenders.²⁴⁰ Other programmes are, for example, are the Hope Prison Ministry of South Africa, Supporting Offenders through Restoration Inside (SORI) and the Insight Development Group and Opening Doors of USA.²⁴¹ Gavrielides groups restorative justice in prisons into four categories. First, offenders may be involved in a programme that aims at behavioural change within prisons. This programme does not necessarily involve victim participation.²⁴² In the second category is the awareness programme run by STP in the form of courses for offenders on the impact of crime on victims. The programme is run for a certain number of hours and involves surrogate victims through direct or indirect encounter.²⁴³ The third category is a pre-release programme that involves offenders by working through community service.²⁴⁴ In addition, restorative justice may be a mechanism of justice used by prison authorities to deal with disputes arising within prisons.²⁴⁵ Restorative justice in prisons may involve prison officers, probation officers, community mediators, or inmates for mediation.²⁴⁶

Restorative justice in prisons is an opportunity for an offender to make amends to victims and the community.²⁴⁷ Bringing the offender face to face with the victim is an opportunity for the offender to understand the impact of his or her criminal behaviour.²⁴⁸ The offender understands not only the material effects of the crime, but its traumatic psychological consequences.²⁴⁹ After understanding the effects of the crime, the offender takes responsibility and makes a commitment to behavioural change.²⁵⁰

Restorative justice in prisons is a reciprocal process: offenders too wish to move on, by

²⁴⁰ Penny Parker 'Restorative justice in prison: A contradiction in terms or a challenge and a reality' 228 *Prison Service Journal* 2016 at 16.

²⁴¹ Gerry Johnstone 'Restorative justice in Prisons' 228 *Prison Service Journal* 2016 at 9.

²⁴² Gavrielides (2016) at 42.

²⁴³ *Ibid*; see also Parker (2016).

²⁴⁴ Gavrielides (2016) at 42.

²⁴⁵ *Ibid*.

²⁴⁶ Shapland (2009) at 127; Kaufer, Noll and Mayer (2014-2015) at 194.

²⁴⁷ Johnstone (2016) at 13.

²⁴⁸ Wallace and Wylie (2013) at 60.

²⁴⁹ Johnstone (2016) at 10.

²⁵⁰ Parker (2016) at 19; see also Kim Workman 'Restorative justice in New Zealand prisons: Lessons from the past' 228 *Prison Service Journal* 2016 at 25-26; Gavrielides (2016) at 44.

expressing remorse to their victims and apologising.²⁵¹ Though these values cannot be forced during the restorative process,²⁵² they are necessary for restoring relationships and healing the offender. Most violent offences committed by adults cannot easily be subjected to restorative intervention during the trial; hence restorative intervention in prison is more appropriate.²⁵³ An offender may be unwilling to attend a restorative intervention before sentencing, but later feel remorseful while in prison. Restorative in prisons is also a platform to address offenders' needs, which are not attended to by the criminal justice process. According to Cornwell, the reoffending rate is high because offenders commonly have needs that stem from issues such as unemployment, drug abuse or homelessness, needs and issues which the criminal justice process and prisons do not address.²⁵⁴ Through prison restorative justice, the community comes to understand the offenders' needs and can find solutions to reduce criminality.²⁵⁵

Restorative justice in prison is also crucial for offenders' pre-release preparation.²⁵⁶ Before the offender is considered for parole, restorative justice gauges reformation achieved by the offender in prison.²⁵⁷ It can even apply when the offender has been released from prison or is on suspended sentence.²⁵⁸ The shattered relationship between the offender, victim and community normally hinders the offender after release.²⁵⁹ The offender often may need to make things right with the victim before he or she rejoins the community.²⁶⁰ The offender may feel rejected or stigmatised by the community. If this relationship is not amended, it increases the possibility of reoffending.²⁶¹ Therefore, a prison restorative conference, which normally involves family members, friends, and the community, is an opportunity for

²⁵¹ Johnstone (2016) at 10; Workman (2016) at 26.

²⁵² Braithwaite (2002) at 570.

²⁵³ Johnstone (2016) at 10-11.

²⁵⁴ Cornwell (2007) at 119

²⁵⁵ See Gavrielides (2016) at 44.

²⁵⁶ Shapland (2009) at 127.

²⁵⁷ See Skelton and Batley (2008) at 45.

²⁵⁸ Restorative justice works, Restorative Justice Council, 2015 at 4, available at <https://restorativejustice.org.uk/sites/default/files/resources/files/rjc-victims-rjc-dig1.pdf> (accessed 4 May 2018); Johnstone (2016) at 11.

²⁵⁹ Wallace and Wylie (2013) at 59-60.

²⁶⁰ Johnstone (2016) at 11.

²⁶¹ Wallace and Wylie (2013) at 59-60; see Workman (2016) at 27.

reconciliation and reintegration.²⁶² The community does not see the offender as a stranger, because he or she has made amends with the victim and community. So, restorative justice in prison is an opportunity for the community to interact with prisons and ensure smooth reintegration.²⁶³

Restorative justice in prison does not deal only with conflicts between victims and offenders; it is also a justice mechanism for a myriad of disputes arising in prisons.²⁶⁴ The prison environment tends to divide inmates into factions.²⁶⁵ Restorative justice in prisons is thus also used to resolve conflicts between inmates, such as bullying. It is also applied to resolve disputes between prisoners and prison staff in an amicable way.²⁶⁶

However, there are challenges to using restorative justice in prisons. Gavrielides worries whether all restorative justice programmes in prisons are restorative in nature.²⁶⁷ Unlike pre-sentencing restorative measures, prison restorative justice practices have different forms.²⁶⁸ Some prison restorative processes do not involve victims²⁶⁹ or merely uses surrogate parties.²⁷⁰ Some prison officers engage in restorative intervention without proper training, which is detrimental to the process and parties too.²⁷¹ As with any restorative justice process, it is not mandatory for the offender to attend a restorative justice programme in prison.²⁷² Thus, restorative processes do not apply to all incarcerated offenders, and as a result some come out of prisons without having benefited from them. Such offenders may well attend other programmes in prison meant to achieve reformation, but the gap between the offender

²⁶² Wallace and Wylie (2013) at 60; see also Parker (2016) at 19.

²⁶³ Gaoulding, Hall and Steels (2008-2009) at 241; Wallace and Wylie (2013) at 60.

²⁶⁴ Michelle Butler and Shadd Maruna 'Rethinking prison disciplinary processes: A potential future for restorative justice' 11(1) *Victims & Offenders: An International Journal of Evidence-based Research, Policy and Practice* 2016 at 140; Edgar (2016) at 32; see also United Nations Standard Minimum Rules for Treatment of Prisoners, Rule 38.

²⁶⁵ Cornwell (2007) at 116; Kaufer, Noll and Mayer (2014-2015) at 189-190.

²⁶⁶ Edgar and Newell (2006) at 82.

²⁶⁷ See Gavrielides (2016) at 42-43.

²⁶⁸ William Wood 'Through the belly of the beast? The promises and problems of restorative justice in prisons' 228 *Prison Service Journal* 2016 at 48.

²⁶⁹ Gavrielides (2016) at 42; Wood (2016) at 52.

²⁷⁰ See Parker (2016) at 16-19.

²⁷¹ Gavrielides (2016) at 43.

²⁷² Luyt and Matshaba observe that some offenders withdrew from a programme to avoid meeting their victims. In addition, some victims were not willing to meet their offenders in prison. See WFM and TD Matshaba 'The application of restorative justice amongst sentenced offenders in an Eastern Cape correctional centre: A South African case study' 27(2) *Acta Criminologica* 2014 at 95 and 98.

and the community, normally bridged after involving the community, remains in effect when the offender does not attend a restorative programme. This gap can cause stigma and see the offender joining a criminal gang.²⁷³ This behaviour increases the chance of recidivism if the matter is not addressed by the community. Despite the challenges, the benefits of restorative justice programmes in prisons are legion, as already noted. These include addressing victims and offenders' needs, offenders taking responsibility, victims' healing processes, offenders' behavioural change, reintegration of offenders, and community involvement.²⁷⁴

3.7 The South African Zwelethemba justice model

The South African Zwelethemba model of peace-making highlights an aspect of restorative justice based on local community settings. Though the model is named after a township in Cape Town, the name's meaning in Xhosa conveys what it aspires to: *Zwelethemba* means 'place or country of hope'.²⁷⁵ The model was an import from Canada, a 'trial and error' research project meant to achieve peace in insecure townships.²⁷⁶ The establishment of Zwelethemba peace-making processes in South African townships was necessitated by escalating insecurities, especially after the apartheid era.²⁷⁷ The Zwelethemba model sought to view justice in a new dimension, regarding it as pertinent only if it worked towards a better future.²⁷⁸ The model entailed a code of good practice, framed in alignment with the country's democratic principles that provided the guidelines for so-called peace committees to conduct the process.²⁷⁹ The process was restorative in nature; it allowed the attendance of participants from within the community. The peace committees were composed with members from the same insecure communities. The communities were encouraged to seek peace using 'local knowledge and capacity' in restorative interventions.²⁸⁰

²⁷³ See Braithwaite (1989).

²⁷⁴ See Skelton and Batley (2008) at 45; Workman (2016) at 23; Gavrielides (2016) at 44.

²⁷⁵ John Cartwright and Madeleine Jenneker 'Governing security: A working model in South Africa – the peace committee' Criminal justice: Consolidating transformation conference 2005; Jan Froestad and Clifford Shearing 'Meditative reflections on Nils Christie's "Words on words", through an African lens' 1(1) *Restorative Justice: An International Journal* 2013 at 33.

²⁷⁶ Froestad and Shearing (2013) at 33.

²⁷⁷ Froestad and Searing (2012) at 14-15.

²⁷⁸ Froestad and Shearing (2013) at 42.

²⁷⁹ Cartwright and Jenneker (2005); Froestad and Shearing (2013) at 35.

²⁸⁰ See Cartwright and Jenneker (2005); Froestad and Shearing (2012) at 18.

Though the Zwelethemba model was a restorative process, it was different from other processes such as victim-offender mediation, family group-conferencing and conferencing circles, which aim at multiple outcomes like restoration, compensation, reconciliation and healing. Its aim was to secure peace in the community.²⁸¹ Even where forgiveness and restoration were achieved, the creation of future peace was paramount for the Zwelethemba model.²⁸² It was also unique in that it did not require the offenders' confession for the dispute to be referred to community intervention.²⁸³ At the beginning of the project, peace committees had jurisdiction to receive complaints directly from the community rather than as referrals from the police or courts.²⁸⁴ When disputes were received from the community, the process was linked directly to the community and minimised the State's interference in community conflicts. It also reduced bureaucracy and police discretion over disputes in the community.

In line with the Zwelethemba philosophy, terms such as 'victim and offender' were eschewed for fear of prejudicing or 'prejudging' parties.²⁸⁵ These terms may have negative connotations for the parties concerned²⁸⁶ and make the victim feel inferior to the offender. The word 'victim' seems to portray a person as the most affected individual in the community. Of course, the victim suffers harm from the offender's behaviour, but why impose stigma through the justice process by naming him or her 'victim'? The naming may be psychologically wounding for the parties and may even delay the healing process when he or she recalls the previous agony of having been a 'victim'. However, according to Wright, being a victim is something different from having a 'victim mentality'.²⁸⁷ In other words, not every victim sustains psychological harm after the crime. You become a victim when crime impacts on your mental faculties.²⁸⁸

Likewise, naming a party an 'offender' signifies an unchanged person who is constantly

²⁸¹ Froestad and Shearing (2013) at 34.

²⁸² Cartwright and Jenneker (2005); Froestad and Shearing (2013) at 35, 38 and 42.

²⁸³ Clamp (2014) at 111.

²⁸⁴ Ann Skelton '*The influence of the theory and practice of restorative justice in South Africa with special reference to child justice*' LLD thesis University of Pretoria 2005 at 235.

²⁸⁵ Cartwright and Jenneker (2005); Froestad and Shearing (2013) at 34.

²⁸⁶ See Christie (2013) at 18.

²⁸⁷ See Wright (2010) at 267.

²⁸⁸ See *Ibid.*

feared by the community. The nomenclature of ‘offender’ resonates even after making right with the victim.²⁸⁹ However, the ‘victim/offender’ label imposes a responsibility on the party who has harmed the other. If you are an offender, it presupposes there is a person somewhere who is a victim of your act and he or she needs redress.²⁹⁰ The Zwelethemba model discovered the dividing line between victims and offenders were sometimes blurred and therefore discouraged the use of ‘victim or offender’ when referring to parties; ‘participants’ was used instead.²⁹¹ Proper naming of parties creates an atmosphere of reconciliation and cultivates a spirit of peace-making. In addition, the term ‘dispute’ was used instead of ‘conflict’,²⁹² because a ‘dispute’ denotes ‘disagreements, differences of opinion, which in principle can be identified and discussed’.²⁹³ ‘Conflict’ signifies a ‘win-lose’ situation²⁹⁴ or something which does not favour peace-making or reconciliation.

Another characteristic of the Zwelethemba model was the use of a dispute as an ‘asset’ for peace-building in the community.²⁹⁵ Being at the grassroots level, Zwelethemba justice was easily accessible by community members. Peace committees were composed of five to twenty people who worked as registry points for disputes. They were responsible for coordinating meetings and resolving disputes without imposing penal sanctions.²⁹⁶ As a result, disputes reached peace committees before escalating into serious conflict. The ‘chicken’ dispute resolved by the Zwelethemba model has become a popular illustration how a dispute can escalate into significant strife. The neighbour’s failure to tame his or her chickens led to ‘insult’, ‘assault’ and finally arson.²⁹⁷ Disputes were settled at the community level, though enabling restorative meetings with the view to create a new community that is based on acceptable moral standards.²⁹⁸

The Zwelethemba model was designed to make the community more peaceful. While other

²⁸⁹ See Christie (2013) at 17.

²⁹⁰ *Id* at 18.

²⁹¹ Froestad and Shearing (2013) at 34.

²⁹² *Id* at 37.

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ Froestad and Shearing (2013) at 36.

²⁹⁶ Cartwright and Jenneker (2005); Froestad and Shearing (2012) at 20; Froestad and Shearing (2013) at 36.

²⁹⁷ Froestad and Shearing (2012) at 16-17; Froestad and Shearing (2013) at 36.

²⁹⁸ See Clamp (2014) at 112.

restorative interventions work to restore broken relationships, the Zwelethemba model goes further to establish plans for improved future peace.²⁹⁹ When payments were made to the peace committees before a meeting, one-third of the income was deposited in a peace-building fund established for the betterment of the community.³⁰⁰ Community members not only experienced community peace but ‘lived it’.³⁰¹ Notably, peace was promoted by dealing with disputes before they escalated into larger conflicts endangering the community. The approach taken towards this end was to apply restorative mechanisms for peace-building within the community. Even where reconciliation failed, the major goal was to establish a strategy for future peace, such as advising conflicting parties to live apart.³⁰²

Unlike victim-offender mediation, where the role of the mediator is central, the Zwelethemba model operated under the assumption that the parties themselves could bring about positive outcomes. Neither peace committees nor invited participants influenced the outcome; parties had a major role in peace-building in the community.³⁰³ Apart from improving peace and security, the Zwelethemba model resolved several disputes in the community³⁰⁴ that would otherwise have gone to court.

Though the Zwelethemba model came to an end before being adopted as a justice or peace-making model across the country,³⁰⁵ it has influenced community-based peace-making programmes in parts of Africa such as Uganda.³⁰⁶ The model made a positive contribution to restorative practices and provided a valuable learning opportunity. First, its ability to harness resources within the community was commendable. The use of trained or untrained

²⁹⁹ Froestad and Shearing (2012) at 18; Froestad and Shearing (2013) at 38.

³⁰⁰ Cartwright and Jenneker (2005); Clamp (2014) at 112.

³⁰¹ Froestad and Shearing (2013) at 38.

³⁰² See *Ibid.*

³⁰³ Froestad and Shearing (2013) at 39-40.

³⁰⁴ According to Froestad and Shearing, until the end of 2009 when the project ended, more than 40,000 conflicts throughout the Western Cape were resolved by means of the Zwelethemba model. See Froestad and Shearing (2013) at 36.

³⁰⁵ See Froestad and Shearing (2012) at 22.

³⁰⁶ See Tukwasiibwe Moses ‘Grassroots-led strategies and actions for changing urban governance: A case of the community peace programme in Mbarara Uganda’, available at http://n-aerus.net/web/sat/workshops/2007/papers/Final_Tukwasiibwe_per_cent20Moses_paper.pdf (accessed 28 October 2016).

mediators,³⁰⁷ particularly if they were outsiders, was discouraged: the community, regardless of its volatile state, managed its own disputes and ‘trouble-makers became peace-makers’.³⁰⁸ This demonstrates the community’s ability to create its own peace without external interference. The community, whether composed of laypersons, non-professionals or inexperienced people, can handle its disputes. Secondly, the Zwelethemba model is a reminder that justice should be a peace-building mechanism for the community. True justice cannot be achieved if there is no peace after restoration. A victim might have been compensated or stolen property restored, but is there future peace after that restoration? That question captures the essence of the Zwelethemba model, and answering it in the affirmative should be the aspirational goal of the criminal justice process.

3.8 Conclusion

Restorative justice processes discussed above reveal, among other things, the multi-dimensions of restorative justice processes. The diversity of restorative processes may continue because there are many processes which are restorative in nature.³⁰⁹ Restorative may be ‘fully restorative, mostly restorative, or partially restorative’.³¹⁰ In Africa, restorative justice processes are unlikely to detach from values of justice that are based on traditional justice. Restorative justice will be adopted with a qualification to embrace African values of justice which are generally restorative in nature. The influence of indigenous restorative justice practices on restorative justice processes is a sign of the role of traditional justice in our communal life. The similarities between modern restorative justice practices and indigenous justice processes remind us that there is a system of justice which is relevant to our communal life. Unfortunately, justice based on indigenous restorative justice practices has been ignored for many years. The success of modern restorative justices therefore triggers a search for knowledge of traditional restorative practices and their contribution to an

³⁰⁷ Froestad and Shearing (2014) at 39.

³⁰⁸ Froestad and Shearing (2012) at 19.

³⁰⁹ See Kerry Clamp and Jonathan Doak ‘More than words: Restorative justice concepts in transitional justice settings’ 12 *International Criminal Law Review* 2012 at 344.

³¹⁰ Paul McCold ‘Towards a holistic vision of restorative juvenile justice: A reply to the maximalist model’ 3 *Contemporary Justice Review* 2000; Margarita Zernova and Martin Wright ‘Alternative visions of restorative justice’ in Gerry Johnstone and Daniel Van Ness (eds) *Handbook of restorative justice* Willan Publishing Devon 2007.

improved criminal justice system. Traditional justice, regarded as repugnant by civilised criminal justice systems, could be of value in a reformed criminal justice that seeks more positive outcomes.³¹¹ The major issue addressed in the next chapter is the extent to which traditional justice can contribute towards improved criminal justice processes.

³¹¹ Pádraig McAuliffe *‘Transitional justice and rule of law reconstruction: A contentious relationship’* Routledge USA and Canada 2013 at 247.

Chapter 4:

Indigenous Restorative Justice Practices

4.1 Introduction

New Zealand, Australia and North America are good examples of jurisdictions that have incorporated aspects of traditional justice in the criminal justice system.¹ Victim-offender mediation, conferencing circles and family group conferences are restorative procedures similar to indigenous justice traditions.² Discussion in this chapter highlights key differences and similarities between restorative justice and indigenous justice practices. The differences indicate that modern society cannot adopt traditional justice principles without modifying them; the similarities suggest that the traditional justice ethos is still relevant today regardless of mixed traditions.

The chapter goes on to analyse indigenous justice practices and their influence on modern restorative justice, showing in particular how such practices have influenced the criminal justice systems in New Zealand, North America and Australia. It is argued that the re-emergence of indigenous justice, in the form of restorative interventions, has influenced criminal justice systems not only in these countries but in other jurisdictions around the world.³ The indigenous justice applied to young offenders in the countries above was soon

¹ Matt Hakiha 'What is the state's role in indigenous justice processes?' in Howard Zehr and Barb Toews (eds) *Critical issues in restorative justice* Willan Publishing UK 2004a 353.

² See Daniel Van Ness and Karen Heetderks Strong *Restoring justice: An introduction to restorative justice* 4th ed Anderson Publishing 2010 at 13-14 and 26-30; see also Stephanie Vieille 'Frenemies: Restorative justice and customary mechanisms of justice' 16(2) *Contemporary Justice Review* 2013 at 174; Lindsey C Pointer 'Understanding transformational space: An analysis of restorative justice conferences through religious studies theoretical lenses' 4(2) *Restorative Justice: An International Journal* 2016 at 152.

³ As discussed below and in other chapters, the New Zealand restorative justice model has been adopted in Australia and United Kingdom. In North America, the influence of traditional justice propelled establishment of peace-making courts, which are also restorative in nature. In African countries such as Uganda, South Sudan, Kenya and Lesotho, traditional justice principles have been adapted to juvenile justice. In South Africa, restorative justice is implicit in *ubuntu*, the philosophy which was applied by Bishop Desmond Tutu in the Truth and Reconciliation Commission.

applied to adult offenders.⁴ Tauri describes this trend as an ‘indigenisation’ of the criminal justice system.⁵ The issue to be addressed is whether the ‘indigenisation’ of the criminal justice system is necessary in our modern societies. It is argued that restorative justice, which has adopted a form of traditional justice, restores peace and reduces recidivism in the community.⁶

It is argued further that restorative justice, like indigenous justice, accommodates community values, culture, and spirituality, which are necessary elements for offenders’ reformation.⁷ The abolition of indigenous justice processes with the introduction of Western legal systems propelled criminality and repeat-offending in some communities.⁸ However, in modern societies, indigenous justice has been adopted with modification, in the name of modern restorative justice, in order to suit modern communities. It is also argued in this chapter that some communities, especially in Africa, still value communal life, hence the application of colonially inherited criminal justice systems shatters community relationship in the same way as happened to Maori in New Zealand.⁹ Side-lining indigenous values entails ignoring key

⁴ Schmid mentions Judge McElrea and Jim Consedine as the first advocates of restorative justice for adult offenders. In addition, research by Umbreit and Armour reveals the potential that exists for applying restorative interventions to adult offenders. See Donald J Schmid ‘Restorative justice in New Zealand: A model for US criminal justice’ 2001 at 16, available at https://www.fulbright.org.nz/wp-content/uploads/2011/12/axford2001_schmid.pdf (accessed 4 May 2018); Mark Umbreit and Marilyn Peterson Armour ‘*Restorative justice dialogue: An essential guide for research and practice*’ Springer Publishing Company New York 2011 at 84.

⁵ See Juan Tauri ‘Family group conferencing: A case-study of the indigenisation of New Zealand’s justice system’ 10 *Current Issues in Criminal Justice* 1998-1999 at 169.

⁶ Jeffery G Hewitt ‘Indigenous restorative justice: Approaches meaning and possibilities’ *University of New Brunswick Law Journal* 2016 at 331-332.

⁷ Braithwaite, in outlining the theory of reintegrative shaming, argues that shaming is productive when the community is involved. Of course, when the community participates in the reintegration, the offender becomes responsible to the community. It is an opportunity for the community to make the offender understand the community values he or she has broken. John Braithwaite ‘*Crime, shame and reintegration*’ Press Syndicate of the University of Cambridge, Australia 1989.

⁸ The impact of colonially inherited criminal justice processes on the Maori in New Zealand and aboriginals in Canada have are good examples. The conventional criminal justice process, which was imposed by colonialists, had adverse effects on Maori and aboriginal youth, and hence the community called for reform of the youth justice process. As discussed below, the use of family group-conferencing in child justice, which entailed adopting Maori indigenous justice processes, has considerably reduced offending among youth Maori in New Zealand. See Schmid (2001) at 13-14; Hewitt (2016) at 324.

⁹ In New Zealand, the criminal justice system had an impact on the community because juvenile offenders were taken out of the community for criminal culpability. As a result, criminality increased in the community. On the other hand, Braithwaite observes that when the community is involved in shaming offenders, crime can be easily controlled. So, the introduction of restorative interventions in New Zealand involved making the resolution of conflicts the responsibility again of communities. Braithwaite (1989) at 8.

stakeholders in the justice process, namely the victim, offender and the community. Where stakeholders are not fully involved, the process of justice is ‘foreign’ and unable to address the causes of crimes in society. But where the community is involved, community norms are shared and protected.

4.2 Background

Though the genesis of restorative justice practices is debatable,¹⁰ restorative approaches to conflict have been adopted throughout human history.¹¹ In the West, restorative measures were a popular model of justice, especially before the twelfth century.¹² Ancient ‘acephalous’ communities with economic dependence on hunting and food-gathering activities resolved conflicts through informal legal systems.¹³ There was no formal legal structure for dispute resolution; uncodified community values, orders and rituals were the rules of peace-keeping in the society.¹⁴ Justice administration was generally restorative in nature. Of course, ancient restorative practices were different from the modern restorative system. Ancient forms of restitution were different; the current elements of ‘restoration, amends, repayment, compensation or forgiveness’ in modern restorative justice would be ‘blood revenge, retribution, ritual satisfaction and restitution’ in ancient restorative justice.¹⁵ Communities with a common economic struggle protected a communal lifestyle; any threat to community

¹⁰ Jennifer J Llewellyn, Bruce P Archibald, Donald Clairmont and Diane Croker ‘Imagining success for restorative approach to justice: Implications for measurement and evaluation’ 36 *Dalhousie Law Journal* 2013 at 287-288.

¹¹ Martin Wright ‘Restorative justice: The basics, ideas, and Practice in the United States’ in E Fattah and S Parmentier (eds) *Victim policies and criminal justice on the road to restorative justice* Leuven University press 2001 at 353; see also Kaitlyn E Tucker ‘Mediating theft’ 25 *University of Florida Journal of Law and Public Policy* 2014 at 28-29.

¹² Elmar G M Weitekamp ‘The history of restorative justice’ in Gerry Johnstone (ed) *A restorative justice reader: Text, sources, context* Willan publishing UK 2003 at 113; B Naude and D Nation ‘An analysis of cases referred to restorative justice in Tshwane Metropolitan area’ 20(2) *Acta Criminologica* 2007 at 138; Van Ness and Strong as quoted in Declan Roche ‘Dimensions of Restorative Justice’ in Carolyn Hoyle (ed) *Restorative justice: Critical concepts in criminology* Routledge London and New York 2010 at 348; James R ‘Chip’ Coldren Jr ‘Commentary: Transnational crime and restorative justice’ 6 *Homeland security review* 2012 at 181.

¹³ Weitekamp (2003) at 111; Theo Gavrielides ‘Restorative practices: From the early societies to the 1970s’ *Internet Journal of Criminology*, 2011 at 4.

¹⁴ Gavrielides (2011) at 4.

¹⁵ Weitekamp (2003) at 111; Gavrielides (2011) at 5.

peace obliged the whole community to undertake peace restoration.¹⁶ A crime was a transgression against the whole community and conflict management at a ‘personal level’ was believed to foster offenders’ rehabilitation, deter immoral behaviour, and restore peace in the community.¹⁷ The community had absolute ownership over the justice process and mediation both in civil and criminal matters was a common practice.¹⁸

Acephalous societies were later replaced by state-governed societies; monarchies extended their powers to dispute resolution and the spirit of restorative justice began to disappear.¹⁹ Kings confiscated victims’ right to compensation and a new form of justice based on retributive justice emerged.²⁰ Though the history of justice may be debatable,²¹ the king’s control of dispute resolution was a complete shift of the criminal justice process from the community to the State. Punishment began to be imposed on the offender by the State with less or no restitution to the victim. The meaning of punishment also changed because ‘punishment’, from *pune* in Greek, means ‘an exchange of money for harm done’.²²

In addition, the word ‘guilt’ as used in criminal law is actually payment as understood from the original language *geldam* (referring to money) in Anglo-Saxon terminology.²³ It is a concept infused with the spirit of reparation inherent in restorative justice. Consedine, who argues in line with ancient canon law, says the law on proportionality based on an ‘eye for an eye’ or ‘tooth for a tooth’ has been misinterpreted in favour of a retributive system.²⁴ Under the law of proportionality, a person deserves compensation to the value of harm incurred (an

¹⁶ See Weitekamp (2003) at 113; Chris Cunneen ‘Reviving restorative justice traditions?’ in Gerry Johnstone and Daniel W Van Ness (eds) *Handbook of restorative justice* Willan publishing US 2007 at 114; Weitekamp (2003) at 113; Gavrielides (2011) at 5.

¹⁷ Daniel W Van Ness ‘New wine and old wineskins: Four challenges of restorative justice’ in Declan Roche (ed) *Restorative Justice* Ashgate USA 2004 at 139 and 140; Gavrielides (2011) at 5.

¹⁸ Gavrielides (2011) at 5 and 6.

¹⁹ *Id* at 7 and 8.

²⁰ See Weitekamp (2003) at 118 and 120; Johnstone (2006) at 36; Gavrielides (2011) at 8 and 10.

²¹ Franklin Taylor ‘Justice’ 10 *Brooklyn Law Review* 1940.

²² Gavrielides (2011) at 6.

²³ *Ibid.*

²⁴ Jim Consedine ‘*Restorative justice: Healing the effects of crime*’ Ploughshares New Zealand 1999 at 149.

eye).²⁵ Dispute resolution was thus a ‘community property’ involving the community.²⁶ Canonical justice aimed at restitution, restoration, compensation, amends, making things right, and achieving peace (*shalom*).²⁷ *Shalom* means ‘the presence of right relationship between people, relationships which are harmonious, whole, wholesome and complete’.²⁸ Because a crime disturbs *shalom*,²⁹ it must be restored by ‘restitution’, ‘recompense’, ‘pay back’,³⁰ or ‘*shillem*’,³¹ in Hebrew, which creates peaceful relationship between individuals.³² *Shalom* justice restores community peace through victim compensation.³³

4.3 Indigenous justice under international law

The rights of indigenous communities have continued to receive recognition both at the national³⁴ and international level. In 2007 the UN passed a resolution to recognise several rights of the world’s indigenous peoples. The UN Declaration of the Rights of Indigenous Peoples (UN Declaration) grants the right to indigenous communities to establish, among other things, their distinct ‘legal’ and cultural institutions, and a discretionary right to participate in the State’s political, economic, social and cultural life.³⁵ Article 34 provides for the establishment, promotion and maintenance of indigenous juridical systems.³⁶ The Declaration empowers indigenous peoples by promoting, developing and maintaining institutions based on ‘distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems and customs, in accordance with international

²⁵ Michael Lapsley ‘The heart of justice: Truth, mercy, healing, forgiveness’ in Helen Bowen and Jim Consedine (eds) *Restorative justice: Contemporary themes and practice* Ploughshares Publications New Zealand 1999 at 48; Consedine (1999) at 147; Peggy M Tobolowsky *Crime victim rights and remedies* Carolina Academic Press 2001 at 4; Tom Ellis and Steve Savage ‘Restorative justice of retribution?’ in Tom Ellis and Steven P Savage *Debates in criminal justice: Key themes and issues* Routledge London 2012 at 83-84.

²⁶ See Nils Christie ‘Conflict as property’ *British Journal of Criminology* 1977.

²⁷ Consedine (1999) at 147 and 149.

²⁸ Charles W Colson ‘Truth, justice, peace: The foundations of restorative justice’ 10(1) *Regent University Law Review* 1998 at 6.

²⁹ Colson (1998) at 7.

³⁰ Consedine (1999) at 151; Van Ness (2004) at 140.

³¹ See Colson (1998) at 7; Consedine (1999) at 149.

³² See Colson (1998) at 6; Consedine (1999) at 151; Van Ness (2004) at 140.

³³ Van Ness (2004) at 141.

³⁴ Apart from the New Zealand Children, Young and Their Families Act of 1989, which takes on board principles of indigenous justice in dealing with juvenile offenders, there is in Canada, for instance, the Criminal Procedure Act, of which section 718(2)(e) provides principles for sentencing indigenous offenders.

³⁵ United Nations Declaration of the Rights of Indigenous Peoples 2007, article 5.

³⁶ *Id* at article 5.

human rights standards'.³⁷

This UN declaration reinforced two other earlier international instruments.³⁸ First, the International Labour Organization convention obliges national law to recognise the customary law of indigenous peoples³⁹ and to retain customs and indigenous 'institutions' provided they do not compromise fundamental international human rights standards.⁴⁰ The convention requires member states to respect criminal justice methods customarily practised by tribal peoples.⁴¹ Indigenous penal sanctions used by tribal peoples shall also be considered by the authorities or courts dealing with offences committed in such jurisdictions.⁴² Secondly, the UN Declaration on the right of persons belonging to national or ethnic, religious and linguistic minorities requires member states to create favourable conditions for indigenous communities which are normally minorities to 'express their characteristics and to develop their culture, language, religion, traditions and customs', save where they are incompatible with national law and international standards.⁴³

Therefore, the role of indigenous justice cannot be ignored within the criminal justice discourse at either the national and international level. Modern restorative justice has similarities with indigenous justice. Apart from complying with international instruments, such principles also have the potential to uphold communal relationships in the society.

4.4 Maori traditional justice in New Zealand

Many post-colonial societies in the world have similar history to Maori communities in New Zealand.⁴⁴ Such communities had dispute settlement mechanisms in place before colonial

³⁷ *Id* at article 34.

³⁸ Padraig McAuliffe 'Romanticization versus integration? Indigenous justice in rule of law reconstruction and transitional justice discourse' 5(1) *Goettingen Journal of International Law* 2013 at 42.

³⁹ International Labour Organisation Convention concerning indigenous and tribal peoples in independent countries 1989, article 8(1). The convention came into force on 5th September 1991.

⁴⁰ *Id* at article 8(2).

⁴¹ *Id* at article 9(1).

⁴² *Id* at article 9(2).

⁴³ United Nations Declaration on the right of persons belonging to national or ethnic, religious and linguistic minorities 1992, article 4.

⁴⁴ The impact of colonial intrusion on the Maori in New Zealand is almost the same as that on aboriginals in Canada and Australia. See Hewitt (2016) at 324.

intrusion.⁴⁵ But colonialism had an adverse effect on many communities in terms of dispute settlement management. Colonial masters, for instance, did not favour Maori dispute settlement mechanisms. They regarded the Maori justice system as ‘uncultured’, ‘barbaric’⁴⁶ and ‘repugnant’.⁴⁷ As a result, a foreign justice system was introduced to replace indigenous justice mechanisms.⁴⁸ For the Maori, the substitution of the legal system led to increased criminality in the community.⁴⁹ After decolonisation, there was a higher record of offending among indigenous people than among any similar group not only in New Zealand⁵⁰ but also in other parts of the world such as Australia.⁵¹ The reasons for this criminal behaviour are disputed,⁵² but an alien criminal justice system is cited as the major reason.⁵³ The Maori community do not respect the foreign criminal justice system because it seeks to secure justice through ‘law and force’, contrary to indigenous justice.⁵⁴ It is a system which neither ‘speaks to’ indigenous people nor upholds community values.⁵⁵ In addition, unequal representation in court has been cited as a reason for the increased incarceration of the

⁴⁵ Valmaine Toki ‘Will therapeutic jurisprudence provide a path forward for Maori?’ 13 *Waikato Law Review* 2005 at 169; Gabrielle Maxwell and Hennessey Hayes ‘Restorative justice development in the Pacific region: A comprehensive survey’ 9(2) *Contemporary Justice Review* 2006 at 128; Jeff Berryman ‘The fourth world in the first world – the Maori in New Zealand’ 2 *Sri Lanka Journal of International Law* 1990 at 38.

⁴⁶ Vieille (2012) at 1.

⁴⁷ Consedine (1995) at 94.

⁴⁸ Toki (2005) at 170; McMullan (2011) at 73.

⁴⁹ Hakiha (2004) at 352-353; Toki (2005) at 170. In addition, the criminal justice system imposed by the British did not distinguish between adult and juvenile offenders, leading to a class of ‘destitute and neglected children’ which in turn exacerbated criminality in the community. A minor offence could be punished regardless of whether it was committed by an adult or youth offender. Imprisonment meant detaching the child from the care of the family. See Allison Morris ‘Youth justice in New Zealand’ 31 *Crime and Justice* 2004 at 245-250; Alex Latu and Albany Lucas ‘Discretion in the New Zealand criminal justice system: The position of Maori and Pacific islanders’ 12(1) *Journal of South Pacific Law* (2008) at 84.

⁵⁰ Goodyer (2003) at 185; Toki (2005) at 169; McMullan (2011) at 83-84.

⁵¹ Consedine (1995) at 118; Thomas Clark ‘*Ko nga take ture Maori: Sentencing indigenous offenders*’ 20 *Auckland University Law Review* 2014 at 245. In Australia, though the population of indigenous people is less than five per cent, the number of youth offenders under detention is almost half of the total number of detained youth offenders. See Sarah Xin Yi Chua and Tony Foley ‘Implementing restorative justice to address indigenous youth recidivism and over-incarceration in the Act: Navigating law reform dynamics’ 18 *AILR* 2014-2015 at 138.

⁵² See Morris (2004) at 245-251; Clark (2014) at 245.

⁵³ Alex Latu and Albany Lucas ‘Discretion in the New Zealand criminal justice system: The position of Maori and Pacific islanders’ 12(1) *Journal of South Pacific Law* 2008 at 84; Vieille (2012) at 4; Joanna Hess ‘Addressing the overrepresentation of the Maori in New Zealand’s criminal justice system at the sentencing stage: How Australia can provide a model for change’ 20 *Pacific Rim Law and Policy Journal Association* 2011 at 179-180.

⁵⁴ Goodyer (2003) at 185; see also, Hess (2011) at 179-180.

⁵⁵ McMullan (2011) at 84 and 85.

Maori.⁵⁶ Generally, the conventional criminal justice system has failed to achieve justice and maintain community peace for the Maori.

To know why the colonially inherited criminal justice system failed to achieve justice for the Maori, one needs to understand the background of their justice system, which has survived colonial influence and societal modernisation. The Maori indigenous legal system is founded on ‘values’ and customs that form customary laws for dispute resolution.⁵⁷ The Maori have managed to live by abiding by these customs (*tikanga*) for centuries.⁵⁸ *Tikanga* are customary ethics, principles and practices developed as a system of doing things in the community.⁵⁹ They are a form of uncodified social ‘moral guidance’ governing community members in their daily life.⁶⁰ They include ‘practices, principles, processes, procedures, traditional knowledge, ritual, custom, spiritual and social-political dimension that go well beyond the legal domain’.⁶¹ These principles bind every community member and continue to be taught from one generation to another through rituals, practices and traditional ways of knowledge transfer.

Because the community values relationships (*whanaungatanga*) through customs and traditions, community activities, including conflict management, embellish community customs.⁶² Dispute resolution under Maori custom is a communal event that requires community accountability.⁶³ Family members take responsibility for offenders’ criminal deeds and strive for reconciliation and rehabilitation.⁶⁴ Community accountability ensures community peace-keeping, offenders’ responsibility and reformation. Because the whole

⁵⁶ Berryman (1990) at 52; Hess (2011) at 180-181.

⁵⁷ Consedine (1995) at 89; Hakiha (2004) at 352; Toki (2005) at 169.

⁵⁸ Neil Lionel Nettmann ‘*Enabling restorative justice through sentencing guidelines*’ PhD thesis University of South Africa 2013 at 345; Vieille (2013) at 174.

⁵⁹ Stephanie Vieille ‘Maori customary law: A relational approach to justice’ 3(1) *The International Indigenous Policy Journal* 2012 at 1; Khylee Quince ‘Therapeutic jurisprudence and Maori’ in Warren Brookbanks (ed) *Therapeutic jurisprudence: New Zealand perspectives* Thomson Reuters New Zealand 2015 at 349.

⁶⁰ Quince (2015) at 349.

⁶¹ Carwyn Jones ‘A Māori constitutional tradition’ 12 *NZJPIL* 2014 at 189.

⁶² For the Maori, relationships, which are paramount in communal life, are maintained by creating a good relationship between individuals, communities, people, their gods, and the surrounding natural world. See Jones (2014) at 191.

⁶³ Hannah Goodyer ‘Rethinking justice in New Zealand – a critical assessment of restorative justice’ 9 *Canterbury Law Review* 2003 at 185.

⁶⁴ John Braithwaite ‘Doing justice intelligently in civil society’ 62(2) *Journal of Social Issues* 2006 at 395.

community participates in decision-making, justice is a mutual agreement of all community members.⁶⁵

Unlike the case in modern restorative justice, under Maori indigenous justice the community is not represented by a few members in the justice conference; rather, every member has an obligation to participate in community peace-building.⁶⁶ An offender is not viewed as an individual but as a community member owing the community responsibility and needing attention.⁶⁷ According to Braithwaite, it was considered ‘barbaric to allow an offender to stand alone accused of a crime. The offender should be surrounded by the support of his loved ones in the face of allegations against him, and they should stand ready to share the burden of the responsibility that falls to him’.⁶⁸ Vieille further says that in a conflict management, individuality does not exist in the Maori community because ‘you are nobody unless you belong to a community, to some land, and some people’.⁶⁹

So, taking the offender away from the community to take criminal responsibility alone, is against the philosophy of Maori justice.⁷⁰ According to Maori customs, criminal responsibility imposed by a ‘foreign’ judge through courtroom justice keeps the offender away from the community and prevents the possibility of restoring the community ethos.⁷¹ In order to preserve the values of the Maori community, indigenous justice regards the process of justice as more important than the outcomes.⁷² Consedine says ‘justice is tested by the outcome’.⁷³ The community does not intend to punish, but to heal by bringing back the offender to community values by taking responsibility through family accountability.⁷⁴ Therefore, retributive measures are not necessary to achieve this aim; the restoration of community peace (*mana*) through compensation (*utu*) for the crime committed is always

⁶⁵ Vieille (2012) at 4.

⁶⁶ Juan Tauri ‘Indigenous perspectives and experiences: Maori and the criminal justice system’ at 6, available at <https://pdfs.semanticscholar.org/ff1f/4606916dfb54ec126c11a5d6aab186256f74.pdf> (accessed 4 May 2018).

⁶⁷ Harry Blagg ‘Restorative visions and restorative justice practices: Conferencing, Ceremony and reconciliation in Australia’ 10 *Current Issues in Criminal Justice* 1998-1999 at 8.

⁶⁸ Braithwaite (2006) at 395.

⁶⁹ Vieille (2012) at 6.

⁷⁰ Consedine (1995) at 92; Quince (2015) at 351.

⁷¹ Quince (2015) at 351.

⁷² *Id* at 350-351.

⁷³ Consedine (1995) at 152.

⁷⁴ *Id* at 82 and 84.

paramount.⁷⁵

4.5 The influence of Maori indigenous justice

As discussed above, New Zealand's conventional criminal justice system had failed to deter escalating offending behaviour in the community. In response to this, the government took an extraordinary stance to enact the Children, Young Persons and Their Families Act of 1989, aspects of which are based on Maori indigenous justice.⁷⁶ Of course, there are some disagreements on whether the family group-conferencing provided in the Act is a form of Maori indigenous justice.⁷⁷ However, there are close similarities between Maori indigenous practices and family group conferences as used under New Zealand juvenile justice.⁷⁸

The adoption of family group conference in New Zealand was a unique experience for a Western nation because conferences exemplify values of indigenous justice. According to Consedine, '[M]any claim that the restorative process adopted with juvenile offenders in Aotearoa is the most important positive piece of social legislation adopted in a generation.'⁷⁹ Maxwell says, 'Its provisions were unprecedented in the English-speaking world.'⁸⁰ The legislation impacted not only on New Zealand's domestic youth criminal justice process but other jurisdictions and the international community.⁸¹ After the 1989 legislation, coincidentally, the international community under the UN formulated guidelines for child

⁷⁵ Consedine (1995) at 89; Goodyer (2003) at 185; Toki (2005) at 175 and 176; Sam McMullan 'Maori self-determination and the Pakeha criminal process: The missing link' 10 *Indigenous Law Journal* 2011 at 85.

⁷⁶ New Zealand Children, Young and Their Families Act of 1989; New Zealand Sentencing Act 2002; see also Tauri (1998-1999) at 174; Gabrielle M Maxwell 'Alternatives to prosecution for young offenders in New Zealand' in T Wing Lo, Dennis Wong and Gabrielle M Maxwell (eds) *Alternatives to prosecution: Rehabilitative models of youth justice* Marshall Cavendish Academic Singapore 2005 at 210; Umbreit and Armour (2011) at 85.

⁷⁷ Another side of the discourse argues that restorative justice in form of family group-conferencing has never been the practice of the Maori and that the state invented the idea instead and 'sold it back' to them. Research by Moyle reveals that some indigenous Maori who participated in family group conferences found it a different process from the indigenous one. See Schmid (2001) at 12; see also Paora Moyle and Juan Marcellus Tauri 'Māori, Family group conferencing and mystification of restorative justice' 11(1) *Victims & Offenders: An International Journal of Evidence-based, Research, Policy and Practice* 2016 at 97.

⁷⁸ See also Tauri (1998-1999).

⁷⁹ Consedine (1995) at 107.

⁸⁰ Maxwell (2005) at 208.

⁸¹ Morris (2004) at 244.

rights in 1989 which has similar aspects to the New Zealand restorative model.⁸² In addition, authors such as Zehr⁸³ and Braithwaite⁸⁴ who had not known of the New Zealand statute, published leading works on restorative justice. The New Zealand legislation made no specific mention of the term ‘restorative justice’ even though the provisions were restorative in nature. The family group-conferencing model has become a widely adopted process of justice under modern restorative justice interventions.⁸⁵ However, the idea of restorative justice existed before the said legislation:⁸⁶ it is simply the case that New Zealand is credited for having penned the idea into statute for the first time.⁸⁷ The concern is not how the idea proliferated to other jurisdictions but how a form of indigenous justice which had formerly been regarded as ‘barbaric’⁸⁸ could have such an impact on modern society’s criminal justice process. The legislation on family group conferences makes New Zealand the first country to appreciate the potential available in indigenous communities.⁸⁹

There are two observations for consideration here. First, it is evident that communities have values to be protected through the justice process. Even modern societies possess community moral standards, certain values that inform their humanity and communal life. Even the most heinous offenders are likely to sympathise when they are given opportunities to hear their victims in the presence of people they respect, such as parents, elders or close friends.⁹⁰ There is a sense of humanity in every individual regardless of his or her character. That

⁸² See the UN Convention on the Rights of the Child; Gabrielle M Maxwell, T Wing Lo and Dennis SW Wong ‘Introduction: The changing themes in youth justice’ in T Wing Lo, Dennis Wong and Gabrielle Maxwell (eds) *Alternative to prosecution: Rehabilitative and restorative models of youth justice* Marshall Cavendish Academic Singapore 2005 at 13-14.

⁸³ Howard Zehr ‘*Changing lenses: A new focus for crime and justice*’ 3rd ed Herald press Scottsdale, Pennsylvania 2005. This work was first published in 1990. See also Maxwell, Wing Lo and Wong (2005) at 14-15.

⁸⁴ See Braithwaite (1989).

⁸⁵ Morris (2004) at 259.

⁸⁶ See Ann Skelton ‘The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice’ LLD thesis University of Pretoria 2005 at 86-87; Elmar GM Weitekamp and Stephan Parmentier ‘Restorative justice as healing justice: Looking back to the future of the concept’ 4(2) *Restorative justice: An International Journal* 2016 at 142.

⁸⁷ Karen Smith Rotabi, Joan Pennell, Jini L Roby and Kelley McCreery Bunkers ‘Family group conferencing as a cultural adaptable intervention: Reforming intercountry adoption in Guatemala’ 55(3) *International Social Work* 2012 at 406-407.

⁸⁸ Vieille (2012) at 1.

⁸⁹ Family Group Conference which embodies aspects of Maori traditional justice is a form of *whanau hui* which is a family meeting used to resolve conflicts within the community. Morris (2004) at 258.

⁹⁰ Braithwaite (1989).

humanity is essential for offenders' reformation if exploited through a participatory process. For instance, criminals do not fear committing crimes, but fear exposure of such acts to their own communities. According to Colson, 'a standard of decency exists which is legally binding on all nations, irrespective of culture, creed, or history'.⁹¹ Though it is impossible to have a crime-free society, reduced offending is feasible. To reach this goal, 'we must appeal to an objective moral standard, a standard that judges our own lives as well as those of others'.⁹² Batley argues that crime does not only affect our bodies, but also impacts on our hearts, both at an individual and community level.⁹³ Therefore the criminal justice process must engage with community norms in order to achieve psychological healing and also reconnect people to their community. We can learn from indigenous communities who secure justice through rituals; others achieve this goal by allowing God to impact their lives.⁹⁴ Generally, although it is secular, the criminal justice process should be a life-changing event, and the community has a major role to play in this regard.

The New Zealand legislation sought to protect community values by establishing a modern criminal justice system with elements of indigenous culture.⁹⁵ It was not a process to replace the conventional criminal justice system with customary law. The law aimed at diverting cases for juvenile offenders from the ordinary criminal justice process to community-based processes through which the cases would be resolved by families, friends, and cultural community (*iwi*) and with less State influence.⁹⁶ During the family group conference, professionals bring in legal aspects to ensure that laws and human rights principles are not prejudiced.⁹⁷ There is a well-founded belief that customary process, if not properly managed, may lead to human rights violations.⁹⁸ The justice process becomes unique for involving customary processes through a participatory system.⁹⁹ Like many other traditional justice

⁹¹ Colson (1998) at 3.

⁹² *Id* at 4.

⁹³ Michael Batley 'What is the appropriate role of spirituality in restorative justice' in Howard Zehr and Barb Toews (eds) *Critical issues in restorative justice* Willan publishing USA 2004 at 365.

⁹⁴ *Id* at 362 and 364.

⁹⁵ Maxwell (2005) at 210.

⁹⁶ Shari Tickell and Kate Akester 'Restorative justice: The way ahead' A Justice Publication London 2004 at 39.

⁹⁷ New Zealand Children, Young and Their Families Act of 1989 section 251.

⁹⁸ Pádraig McAuliffe '*Transitional justice and rule of law reconstruction: A contentious relationship*' Routledge USA and Canada 2013 at 248.

⁹⁹ See Tickell and Akester (2004) at 39.

processes around the world, a restorative conference aims at accountability, restoration, compensation, apology, reconciliation, social harmony and offenders' rehabilitation.¹⁰⁰ Because the process works in parallel to the conventional criminal justice system, the agreement and any outcomes reached in the conference impacts on the offenders' accountability as determined by the court.¹⁰¹ A court sentence is not simply based on legal provisions, but takes into consideration the victim, offender and community needs brought to light through a customary procedure in the conference. It is a commendable approach, one that led New Zealand to enact the 2002 Sentencing Act which is informed by the same philosophy.¹⁰²

Family group conferences have thus gone beyond juvenile justice to form part of pre-sentencing mechanisms for adult offenders in New Zealand.¹⁰³ Apart from restoring community peace and harmony, holding offenders' accountable, and addressing victims' needs, the use of restorative measures has reduced reoffending.¹⁰⁴ The first five years of the application of the Act saw a notable drop of young offenders of 27 per cent.¹⁰⁵ Reduced offending rates went hand in hand with the closure of some relevant facilities,¹⁰⁶ thus saving the government money. In addition, the level of criminality among the youth reduced three times.¹⁰⁷ The system is generally faster and more efficient than the court system.¹⁰⁸

4.6 The Navajo and the peace-making philosophy

The Navajo are another indigenous group that has been influential in the North American

¹⁰⁰ See New Zealand Sentencing Act 2002, section 10; Roni A Elias 'Restorative justice in domestic violence cases' 9 *DePaul Journal for Social Justice* 2015 at 75.

¹⁰¹ New Zealand Sentencing Act 2002, sections 8(j) and 10(1); see also Hakiha (2004) at 352.

¹⁰² Vieille (2012) at 2.

¹⁰³ See Helen Bowen 'Making justice work' in Helen Bowen and Jim Consedine (eds) *Restorative justice: Contemporary themes and practice* Ploughshares Publications New Zealand 1999 at 21; Tickell and Akester (2004) at 39.

¹⁰⁴ See Judge Edward Ryan 'Creative criminal justice' in Helen Bowen and Jim Consedine (eds) *Restorative justice: Contemporary themes and practice* Ploughshares Publications Lyttelton New Zealand 1999 at 53; Maxwell and Hayes (2006) at 131; Wood, McIntosh, Nichols, Hohaia and Sstefano (2015); Chua and Foley (2014-2015) at 139-140.

¹⁰⁵ Consedine (1995) at 168.

¹⁰⁶ Rupert Ross *Returning to the teachings: Exploring Aboriginal justice* Penguin Books Toronto 1996 at 23.

¹⁰⁷ Gabrielle Maxwell 'Restorative and diversionary responses to youth offending in New Zealand' in Katherine S van Wormer and Loren Walker (eds) *Restorative justice today: Practical applications* SAGE Publications USA 2013 at 107.

¹⁰⁸ Consedine (1995) at 106.

criminal justice system. The name ‘Navajo’ reflects their justice practices, which are founded on values that protect their community peace and harmony (*hózhq’* or *hozho*).¹⁰⁹ To the Navajo, the community remains in balance whenever there is peace.¹¹⁰ This is similar to *shalom* under canon justice.¹¹¹ Any transgression, such as crime (*naayéé’*), disturbs this important aspect of communal life because it threatens the peace of the whole community by creating *hóchxq*, which is the opposite of *hozho*.¹¹² Even in modern societies, a crime creates anxiety, anger and insecurity, and disturbs the balanced state of social life.¹¹³ Hence, the community must be involved in finding a solution to the problem. The aim of justice is the restoration of valuable community treasures, that is, peace and harmony, rather than the punishment of transgressor.¹¹⁴ Restoration of peace in the community is not an individual task because the balance of communal life has been upset. The justice process aims at building a harmonious society based on the philosophy embedded in community values.

As happened in New Zealand, the colonially inherited legal system failed to bring justice to the Navajo because it is informed by a spirit of justice contrary to the one shared by the community. According to Elshamy, justice became ‘too expensive and time-consuming’;¹¹⁵ justice became the right of the few people who could afford such expenses. If the system cannot equally work for all community members, it is discriminatory. Yazzie observes that

money is a driving force in modern American society. Lawyers operate the adversarial system, and money buys lawyers. The best lawyers cost the most. Legal procedures are costly, and only the most wealthy litigants can afford them. Money for justice turns it into a commodity to be bought and sold.¹¹⁶

If the system of justice is such an expensive commodity, seeking justice in court is no longer a victim’s right but a property which can be purchased by litigants with higher purchasing

¹⁰⁹ Nielsen (1999) at 106.

¹¹⁰ Robert Yazzie “‘Life comes from it’: Navajo justice concepts’ 24 *New Mexico Law Review* 1994 at 175; Ibrahim M Elshamy ‘Traditional Navajo peace-making (Bee Hózhq’ N’ahodeedleel) in tribal court’ 9 *The Dartmouth Law Journal* 2011 at 20.

¹¹¹ See Consedine 1999 at 147 and 149.

¹¹² Elshamy (2011) at 20-21.

¹¹³ Zehr (2005) at 25.

¹¹⁴ Pointer (2016) at 152.

¹¹⁵ Elshamy (2011) at 18.

¹¹⁶ Yazzie (1994) at 178.

power in the community.

The colonially inherited legal system did not fit the Navajo lifestyle because of its ‘confusing’ litigation procedures.¹¹⁷ As has been argued in another chapter of this thesis, the legal technicality of the adversarial criminal justice system presents a barrier to access for laypersons wishing to secure justice. Moreover, it was ‘frustrating’ for the Navajo to seek justice in a ‘confrontational’ process, one which contravenes the Navajo peace-keeping philosophy¹¹⁸ of ‘*dine* justice’.¹¹⁹ According to the Navajo, imprisonment does not bring healing or harmony; instead, it subjects the offender to a lonely environment away from the community.¹²⁰

4.7 The Navajo justice philosophy and nation courts

Several indigenous communities in the American continent have never departed from a restorative approach to conflict resolution.¹²¹ The Navajo and Hawaiians in the United States provide good examples of indigenous restorative justice practices.¹²² Navajo people consider the conventional criminal justice system that entrusts powers of adjudication to an individual judge as ‘incompatible’ with their values, culture and lifestyle.¹²³ The Western legal system tried to jettison indigenous Navajo justice processes, but these still survived. Both the Navajo and the Hawaiian alternative dispute mechanisms are re-emerging in American criminal justice processes.¹²⁴

Yazzie observes that decision-making directed towards community peace, organised dispute resolution mechanisms, respect and equal treatment of parties, a friendly approach in

¹¹⁷ Elshamy (2011) at 18.

¹¹⁸ See Nielsen (1999) at 109; Elshamy (2011) at 18.

¹¹⁹ Pointer (2016) at 2016.

¹²⁰ Elshamy (2011) at 18-19.

¹²¹ Loren Walker and Leslie A Hayashi ‘Pono Kaulike: A pilot restorative justice program’ *Hawaii Bar Journal* 2004 at 6; Carol A Hand, Judith Hanks and Toni House ‘Restorative justice: The indigenous justice system’ 15(4) *Contemporary Justice Review* 2012 at 450.

¹²² See Walker and Hayashi (2004) at 6.

¹²³ Elshamy (2011) at 18.

¹²⁴ Marianne O Nielsen ‘Navajo nation courts, peace-making and restorative justice issues’ 44 *Journal of legal pluralism* 1999 at 105; Katherine Beaty Christie ‘The origins of modern restorative justice: Five examples from the English-speaking world’ 46 *UBC Law Review* 2013 at 76.

decision-making, and impartiality and restitution are principles of Navajo justice.¹²⁵ Navajo traditional justice practice has influenced the conventional criminal justice system in two ways. First, the establishment of Navajo nation courts, or peace-maker courts, that apply customary law entails recognition of indigenous justice practices in modern criminal justice.¹²⁶ Peace-making circles are similar to the sentencing circles common in Canada.¹²⁷ Peace-making circles based on the Navajo justice philosophy have ushered in the establishment of peace-maker courts and Navajo nation courts in America.¹²⁸ It is a revival of old trends of justice delivery under the rubric of restorative justice. Unlike the conventional criminal justice process, where a judge decides the dispute on behalf the community, peace-making processes involve the community in decision-making in a form of mediation.¹²⁹ In accord with the spirit of Navajo justice, the offender makes things right through compensation and the restoration of relationships.¹³⁰ Peace-making outcomes may require him or to undertake certain cultural ceremonies.¹³¹ Community peace-makers (*naat'aanii*), appointed within the community, have a role in resolving disputes amicably through a consensual agreement.¹³² This is similar to the Zwelethemba model of justice discussed in the previous chapter.

Secondly, the Navajo philosophy of justice has influenced modern restorative justice through

¹²⁵ Robert Yazzie 'Whose criminal justice system? New conceptions of indigenous justice' 19(2) *Justice as Healing: A Newsletter on Aboriginal Concepts of Justice* 2014 at 4.

¹²⁶ Justice Raymond D Austin 'American Indian customary law in the modern courts of American Indian nations' 11(2) *Wyoming Law Review* 2011 at 351; Yazzie (2014) at 2.

¹²⁷ See Melanie Spiteri 'Sentencing circles for Aboriginal offenders in Canada: Furthering the idea of Aboriginal justice within a western justice framework' Masters Degree Thesis University of Windsor 2001 at 77-78; Suvi Hynynen Lambson 'Peace-making circles: Evaluating a Native American restorative justice practice in a state criminal court setting in Brooklyn' Centre for Court Innovation 2015 at 1.

¹²⁸ Christe (2013) at 76; Yazzie (2014) at 2; see also Joseph Robinson and Jennifer Hudson 'Restorative justice: A typology and critical appraisal' 23 *Willamette Journal of International Law and Dispute Resolution* 2015-2016 at 354.

¹²⁹ Austin (2011) at 354; Robert Yazzie and James W Zion 'Navajo restorative justice: The law of equality and justice' in Gerry Johnstone (ed) *A restorative justice reader* 2nd ed Routledge USA and Canada 2013 at 122.

¹³⁰ *Ibid.*

¹³¹ Donna Coker 'Restorative justice, Navajo peace-making and domestic violence' 10(1) *Theoretical Criminology* (2006) at 72-73.

¹³² In Navajo tradition, *naat'aanii* is a person of high esteem in the community who is appointed to assist parties in dispute settlement; he or she may be a community or clan leader. Yazzie (1994) at 180; Nielsen (1999) at 108; Yazzie and Zion (2013) at 122.

the use of conferencing circles.¹³³ The Navajo and the aboriginals in Canada have practised conferencing circles for centuries. In Canada, sentencing circles currently apply as platforms for the community to share views with the court before sentencing the offender.¹³⁴ The restorative justice approach of both the Navajo in America and aboriginals in Canada has influenced the establishment of modern restorative justice conferencing circles.¹³⁵ In conferencing circles, all participants sit in a ‘perfect and unbroken’ circle to symbolise equality, justice and harmony in the community.¹³⁶ The circle has no ‘right or left’, and has neither ‘beginning nor end’; it therefore allows participants to share their views by ‘talking things out’.¹³⁷ As noted earlier, opening up in a restorative dialogue has healing effects on the parties. The offender sees the value of speaking the truth rather denying the acts he or she committed; the victim vents the emotions caused by the offender’s vile acts. Denial of responsibility normally thwarts the opportunities for assistance from the community and hinders rehabilitation. The truth sets the offender free from the stigma of criminality; the community understands what is needed for reformation when the offender admits responsibility.

At the centre of the Navajo conferencing circle is the paramount need for community justice.¹³⁸ With restorative justice interventions, the focus is not on the offender’s punishment but community peace. In this restorative circle, participants attend not because they have been directly or indirectly affected but because their relative has wronged or been affected by the crime.¹³⁹ Because the focus of justice is repair, compensation, restoration and peace-making, ‘correcting the action’ is always better than ‘correcting the person’.¹⁴⁰ Restitution can take material form, such as monetary compensation or transfer of horses and jewellery, or be symbolic in nature and intended to vindicate and empower the victim.¹⁴¹ Navajo

¹³³ Umbreit and Armour (2011) at 182; Kay Pranis ‘Peace-making circles’ in Gerry Johnstone (eds) *A restorative justice leader* 2nd ed Routledge USA and Canada 2013 at 117.

¹³⁴ Toby S Goldbach ‘Instrumentalizing the expressive: Transplanting sentencing circles into the Canadian criminal trial’ 25 *Transitional Law and Contemporary Problems* 2015 at 67-68 and 77.

¹³⁵ Umbreit and Armour (2011) at 182; Pranis (2013) at 117.

¹³⁶ Yazzie (1994) at 180; see Umbreit and Armour (2011) at 86.

¹³⁷ Yazzie (1994) at 180 and 182; Nielsen (1999) at 107.

¹³⁸ Yazzie (1994) at 180.

¹³⁹ Yazzie (1994) at 183; Nielsen (1999) at 107.

¹⁴⁰ Nielsen (1999) at 108; Yazzie and Zion (2013) at 125.

¹⁴¹ Yazzie and Zion (2013) at 125.

traditional justice entails a healing process that does not intend to punish the wrongdoer.¹⁴² Its impact on victim and offender's satisfaction and on reducing the juvenile reoffending rate is encouraging.¹⁴³

If New Zealand, North America and Canada have adopted aspects of indigenous justice in their criminal justice processes, the same approach can apply in other jurisdictions. According to UN statistics, the population of indigenous people in the world is more than 370 million.¹⁴⁴ This number does not include other communities, such as African communities that abide by customary norms, but which are not regarded as indigenous in the same sense. As with the Maori, Navajo and Canadian aboriginals, many African countries, including Tanzania, are burdened with a colonially inherited adversarial criminal justice system; alas, though, while traditional justice is common in Africa, its impact on the contemporary criminal justice system has been minimal.¹⁴⁵ It is unfortunate that African countries adopt the New Zealand model while at the same time ignoring the old ways of African justice.

It is also unbecoming of African countries to resort to traditional justice only when the conventional criminal justice system crumbles. As discussed in other chapters, countries such as Rwanda, Burundi, Uganda, Mozambique and Sierra Leone have demonstrated the value of traditional justice in conflict management after their systems of justice were challenged by civil disorders. Where the wider community is affected, modes of traditional justice has proved fruitful in restoring relationships. This is evidence that foreign laws and procedures are unknown in the ordinary community. In reality, even professionals have never mastered the rules of conventional criminal justice; hence, many cases fail on procedural irregularities, despite their having been handled by professionals. By contrast, justice under indigenous justice does not fail on technical grounds, because the process is simple and participatory, and the outcomes reflect what the community believes to be true justice.

¹⁴² See Nielsen (1999) at 105 and 109; Hand, Hanks and House (2012) at 452.

¹⁴³ Jeff D May 'Restorative justice: Theory, processes, and application in rural Alaska' 31 *Alaska Justice Forum* 2015 at 3.

¹⁴⁴ <http://www.iwgia.org/human-rights/international-human-rights-instruments/undeclaration-on-the-rights-of-indigenous-peoples> (accessed 2 June 2016).

¹⁴⁵ As discussed in Chapter 7, aspects of traditional justice in Tanzania apply only in limited instances such as minor offences, matrimonial disputes, and village land disputes.

4.8 Human interconnection and the spirit of indigenous justice

There is always something that brings the community together – the human social fabric. A place or group of people is called a community because there is ‘interconnection’ maintained by peace when all things are in the right balance.¹⁴⁶ This state of balance can be expressed in different ways. As discussed in Chapter 6, in South Africa *ubuntu* means something similar to ‘humanity’ and centres on the notion that ‘a human being is a human being because of other human beings’.¹⁴⁷ Other Bantu-speaking communities call it *utu*.¹⁴⁸ The Maori call it *whakapapa*, while the Navajo call it *hozho* or *hózhq*.¹⁴⁹ According to the Navajo, your personality is determined by the existence of other people around you because one cannot work alone.¹⁵⁰ You are therefore part of the community. All these terms point to the existence of a social fabric within the community which conflict resolutions mechanisms must focus on restoring.

As such, community values such as *shalom*, *hozho*, or *whakapapa* are not created by law but are community values. They are reflected in all aspects of our life, from greetings to lifestyle. For instance, a Swahili-speaker salutes by saying ‘*salama*’, which means ‘peace’. So, a process of justice that acknowledges community values will always be fruitful. According to Zehr, ‘restorative justice is based upon an old, common-sense understanding of wrongdoing’.¹⁵¹ It does not require a law to understand that a crime is a wrongful action, because, plainly, a crime is that which violates community norms. Therefore, the dispute which disrupts *hozho*, *shalom*, *ubuntu*, *utu* or peace, should be resolved by restoring it and balancing the community equilibrium.¹⁵² As elaborated on earlier, the rationale for dispute settlement in indigenous communities is the restoration of relationships, which is a vital

¹⁴⁶ Howard Zehr *The little book of restorative justice* Good books Pennsylvania USA 2002 at 17.

¹⁴⁷ See Zehr (2002) at 17; Dirk J Louw ‘The African Concept of *Ubuntu* and Restorative Justice’ in Dennis Sullivan and Larry Tifft (eds) *Handbook of Restorative Justice* Routledge London 2006 at 161; Douglas HM Carver ‘The Xhosa and the Truth and Reconciliation Commission: African Ways’ 8 *Tribal Law Journal*, 2007-2008 at 34; Mokgoro as cited in Sara Kinyanjui ‘Restorative Justice in Traditional Pre-colonial ‘Criminal Justice Systems’ in Kenya’ 10 *Tribal Law Journal* 2009-2010 at 3.

¹⁴⁸ Kinyanjui (2009-2010) at 3.

¹⁴⁹ Zehr (2002) at 17; Elishamy (2011) at 20.

¹⁵⁰ Yazzie and Zion (2013) at 127.

¹⁵¹ Zehr (2002) at 17.

¹⁵² Toki (2005) at 176.

element of peace-building.¹⁵³ To achieve true justice, reduce criminality, and maintain peace and harmony in our communities, justice process should embody this philosophy. This is only possible when a community and its justice stakeholders are involved in dispute resolutions.

For the Navajo, law is a ‘fundamental’ or ‘absolute’ thing which ‘existed from the beginning of time’ as created by the ‘holy people’.¹⁵⁴ Kelsen’s theory of legal jurisprudence calls it the basic norm or *grundnorm*.¹⁵⁵ There is a source of law somewhere which does not depend on the written codes. Indigenous communities did not have to attend law schools to resolve conflicts. Their experience of justice can have a lot of influence on the contemporary legal system. Indigenous people believe the law was meant for the community to strengthen their relationships as human beings while allowing the wrongdoer to remain part of the community.¹⁵⁶ The wrongdoer could only be ostracised if community reformation failed. Even today, the most heinous offender is incarcerated to ensure community safety.

However, as discussed below, the wholesale adoption of indigenous aspects of justice without modification in modern societies is impracticable. Though there are similarities between modern restorative justice and indigenous justice, there are vital differences too. Circumstances and communities have changed and a new wave of criminality, including terrorism, drug abuse, and cybercrimes, challenge the use of indigenous justice. However, the spirit of justice embodied in indigenous communities can guide the reconstitution of a better criminal justice system to suit modern communities.

4.9 Indigenous justice and restorative justice compared

4.9.1 Similarities

The discourse on indigenous justice as a blueprint of restorative justice has drawn

¹⁵³ *Ibid*; McMullan (2011) at 85; Vieille (2012) at 5; Yazzie and Zion (2013) at 127.

¹⁵⁴ Yazzie (1994) at 175 and 176.

¹⁵⁵ MDA Freeman ‘*Lloyd’s introduction to jurisprudence*’ 8th ed Sweet and Maxwell UK 2008 at 309.

¹⁵⁶ See Pointer (2016) at 152.

criticism.¹⁵⁷ Despite the differences between the two paradigms of justice, there are obvious similarities. Skelton has identified nine similarities, as noted in Chapter 2, though others emerge when comparing restorative justice and indigenous justice as paradigms of justice.¹⁵⁸ When examining the jurisprudence of restorative justice and indigenous justice, four other similarities can be noted.

First, both of them respect human dignity in their processes. They do not regard an offender as an evil person unworthy of respect. In indigenous justice, for instance, this is rooted in the belief that a person (offender) is worthy because he or she is part of us;¹⁵⁹ he or she therefore needs respect. This is a main feature both in indigenous Maori justice¹⁶⁰ and African justice based on *ubuntu*.¹⁶¹ In Uganda, for instance, the use of indigenous justice to handle crime related to armed conflict was embodied in *obuntu* (humanity).¹⁶² Moreover, respecting dignity is key to the restoration of community harmony in that a disrespected person has minimal opportunities for change. The community owes him or her the dignity necessary for reformation. Human dignity in the justice process is crucial for human interconnection and creating a spirit of togetherness in the community. So, both indigenous justice and restorative processes create an atmosphere that favours human dignity and respect in order to reach the intended agreement. This is vital because both processes aim at restoring relationships and harmony in the community.

Secondly, both indigenous justice and restorative justice emphasise using local knowledge in resolving disputes rather than colonially inherited legal rules. These processes encourage the free participation of offender, victim and the community with the assistance of a mediator or facilitator. The majority of these participants are non-professionals; the dispute is therefore

¹⁵⁷ Kathleen Daly 'Restorative justice: The real story' in Carolyn Hoyle (ed) *Restorative justice: Critical concepts in criminology* Vol. I Routledge USA and Canada 2010 at 288-291.

¹⁵⁸ See Ann Skelton 'Tapping indigenous knowledge: Traditional conflict resolution, restorative justice and the denunciation of crime in South Africa' in Elrena van der Spuy, Stephan Parmentier and Amanda Dissel (eds) *Restorative justice' Politics, policies and prospects* Juta 2007 at 230-237.

¹⁵⁹ As reflected in the philosophy of *ubuntu*, for example. See I Keevy 'The constitutional court and *ubuntu*'s "inseparable trinity" 34(1) *Journal for Judicial Science* 2009 at 65.

¹⁶⁰ Moana Jackson 'The Maori and the criminal justice system: A new perspective' Policy and Research Division Department of Justice Wellington New Zealand 1987 at 16.

¹⁶¹ See the discussion on *ubuntu* in Chapter 6.

¹⁶² In Uganda, *obuntu* is equivalent of *ubuntu*. See Among (2013) at 170 and 173.

resolved through local knowledge supplied by participants. Similarly, the attendance of professionals in restorative justice conferences has little influence on the agreement. As stated earlier, professionals in restorative justice advise the conference on certain legal issues, such as alternative court sentences that may be imposed on an offender. Attendance of other professionals, such as police officers, guarantees victim security during the conference.¹⁶³

Moreover, in line with the use of local knowledge, both restorative justice and indigenous justice use local language and resources. A restorative conference can be convened at one of the community buildings or at one of the participants' homes. An indigenous gathering can even be held on open ground within the community.¹⁶⁴ This goes hand in hand with the use of language with which the community is familiar. Unlike conventional courts, which use colonially inherited languages, rules of procedures, and courtrooms situated outside the community environment,¹⁶⁵ indigenous justice and restorative processes use local knowledge, resources and language for justice determination. Participants feel at home when deliberating community disputes, using their home language within their home setting.

Thirdly, both indigenous justice and restorative justice consider community participation as the most significant requirement for community justice.¹⁶⁶ However, as discussed below, the manner and role of community participation can differ. There is normally a certain extent of responsibility attached to community attendance. Even though traditional justice places more emphasis on community oversight of offenders' acts than modern restorative justice does, the community nevertheless has a responsibility to bear for the offenders' transformation.¹⁶⁷ The community does not attend for the mere purpose of witnessing the process but to be key players in securing community peace and offenders' reformation. Under indigenous justice,

¹⁶³ See Anne Hayden and Peter Henderson 'Victims: The invisible people' in Helen Bowen and Jim Consedine (eds) *Restorative justice: Contemporary themes and practice* Ploughshares Publications Lyttelton 1999 at 81.

¹⁶⁴ Arthur Molenaar 'Gacaca: Grassroots justice after genocide: The key for reconciliation in Rwanda? African Studies Centre Research Report No. 77 2005 at 12, available at <https://openaccess.leidenuniv.nl/bitstream/handle/1887/4645/ASC-1236144-071.pdf;sequence=1> (accessed 4 May 2018).

¹⁶⁵ See the discussion on the criminal justice in Tanzania in Chapter 7.

¹⁶⁶ Skelton (2007) at 236; Vieille (2013) at 174.

¹⁶⁷ See Braithwaite (1989).

family members carry the responsibility for payment of compensation whenever required.¹⁶⁸

Fourth, the seating arrangement in both indigenous and restorative justice conferences is of vital significance. Both under indigenous justice and restorative justice processes, participants sit in a circle¹⁶⁹ to symbolise human interdependence and equality.¹⁷⁰ According to Pointer, the seating arrangement in restorative justice creates a ‘distinctive space of equality’.¹⁷¹ In a courtroom setting, where parties are placed on lower witness boxes and a judge on an ‘elevated platform’, the atmosphere is imbued with inequality.¹⁷² When this atmosphere is coupled with the role of professionals, the process is completely detached from the affected individuals. Parties simply remain silent to await their fate, which is in the hands of distinctively higher classes, namely professionals. In such an imbalanced environment, some parties feel marginalised, undignified and that justice is taken away from them by the most powerful participants, who are mostly lawyers. Restorative justice and indigenous justice, on the other hand, place the determination of justice in a more equalised setting, albeit that power imbalances can still occur.

4.9.2 Differences

Despite the similarities between restorative and indigenous justice, there are also significant differences between them. According to Skelton, while restorative justice is ‘progressive and dynamic’, indigenous justice is rigid in reserving cultural virtues.¹⁷³ Restorative justice also differs from indigenous justice in that it involves professionals in the process.¹⁷⁴ Based on field research, Vieille cautions against the implications of putting restorative justice and indigenous justice on an equal scale. He therefore distinguishes between restorative justice, family group conferences and indigenous justice.¹⁷⁵ These differences, however, do not invalidate the fact that restorative justice and indigenous justice have similar patterns of justice administration: they both address the ‘well-being of the community’ through

¹⁶⁸ See Among (2013) at 202.

¹⁶⁹ Skelton (2007) at 236.

¹⁷⁰ Umbreit and Armour (2011) at 179 and 180.

¹⁷¹ Pointer (2016) at 157.

¹⁷² *Ibid.*

¹⁷³ Skelton (2007) at 237.

¹⁷⁴ *Id* at 238.

¹⁷⁵ See Vieille (2013) at 185.

restorative measures.¹⁷⁶

Modern restorative justice has been hailed for its focus on restoration as an outcome of justice through offenders' accountability.¹⁷⁷ Of course, indigenous justice also aims at restoration, reconciliation, retribution, deterrence, reintegration and building community peace.¹⁷⁸ However, the outcomes of indigenous justice are not always restorative.¹⁷⁹ While healing the community is paramount, indigenous justice sometimes takes a harsher approach to punishment¹⁸⁰ than ordinary restorative justice processes. While it is debatable whether punishment is necessary in restorative justice and whether restorative justice is a new approach to punishment,¹⁸¹ indigenous justice takes a varied approach towards offenders' punishment. Restoration under indigenous justice does not merely focus on victims, as is the case in modern restorative justice; it is a 'holistic approach' intended to protect culture¹⁸² and the well-being of the community, because justice is about peaceful living in the community.¹⁸³ To indigenous communities, justice is the reinstatement of a relationship lost due to a crime. In order to protect the community, indigenous justice sometimes involves taking a harsher stance towards offenders' misbehaviour. Outcomes such as offenders' banishment, ostracism, corporal punishment, flogging and death sentences are common.¹⁸⁴ This practice of indigenous justice has not been reflected in modern restorative justice. As discussed below, though modern restorative justice reflects patterns of justice similar to those of indigenous justice, it is an improved form of justice for application to contemporary communities. Contrarily, modern restorative justice is more protective of human rights than is indigenous justice.

¹⁷⁶ Consedine (1995) at 129; Batley (2004) at 366.

¹⁷⁷ See Vieille (2013) at 184.

¹⁷⁸ See Consedine (1995) at 89; Hope Among 'Restorative justice and the reintegration of former child soldiers into communities: A case of Uganda' LLD Thesis University of Pretoria 2013 at 168.

¹⁷⁹ Cunneen (2004) at 346.

¹⁸⁰ Ross (1996) at 14.

¹⁸¹ See Duff Antony 'Alternative to punishment – or alternative punishment?' in Wesley Cragg (ed) *Retributivism and its critics* Franca Steiner Verlag Stuttgart 1992.

¹⁸² Skelton (2007) at 237.

¹⁸³ Vieille (2013) at 184 and 185.

¹⁸⁴ Consedine (1995) at 89; Ross (1996) at 14; Chris Cunneen 'What are the implications of restorative justice's use of indigenous traditions?' in Howard Zehr and Barb Toews (eds) *Critical issues in restorative justice* Willan Publishing UK 2004 at 346; Vieille (2013) at 184; Among (2013) at 174.

Indigenous justice is also a display of community culture and values. The community comes together to share its culture, spirituality and rituals and to impart that knowledge to the new generation.¹⁸⁵ For instance, the Maori believe that man is a breath of God and that peaceful living in a community is an acknowledgment of common origin.¹⁸⁶ The Xhosa in South Africa believe man's survival depends on other people around him.¹⁸⁷ This knowledge must be imparted from generation to generation through peaceful living. The same spirit of justice empowered Bishop Tutu to recognise *ubuntu* as an indigenous moral standard worthy of being applied to achieve reconciliation around the atrocities committed in South Africa during the apartheid era.¹⁸⁸ Indigenous communities have valuable knowledge to impart through community justice. Justice is a reminder of a community's 'heritage, history and genealogy',¹⁸⁹ which is lacking in restorative justice. Indigenous justice is an expression of community spirituality¹⁹⁰ and the rituals attached to it.¹⁹¹ Of course, every justice process has a background in spirituality, and it has been argued that restorative justice so too has some degree of spirituality.¹⁹²

Modern restorative justice, however, normally emphasises offenders' accountability.¹⁹³ Under restorative justice, offenders' supporters, such as family members and friends, are participants but bear no responsibility.¹⁹⁴ Their role is normally limited to that of mere participants. Even their attendance can be limited,¹⁹⁵ because not every community member attends a restorative meeting. Of course, unlike indigenous justice, restorative justice allows even the attendance of children in the conference.¹⁹⁶ Indigenous justice has a different view

¹⁸⁵ For instance, the Iteso community in Uganda performs rituals to cleanse a murderer before reintegration in the community. See Among (2013) at 174-175.

¹⁸⁶ See Hakiha (2004) at 355-356.

¹⁸⁷ See the discussion of *ubuntu* in Chapter 6.

¹⁸⁸ See the discussion in Chapter 6.

¹⁸⁹ Hakiha (2004) at 356.

¹⁹⁰ Hakiha (2004) at 354.

¹⁹¹ See, for instance, the rituals of indigenous African justice among the Teso, Acholi and Lugbara communities in Uganda in Among (2013) at 173-174, 175-176, and 179-181, respectively.

¹⁹² Michael Batley 'What is the appropriate role of spirituality in restorative justice?' in Howard Zehr and Barb Toews *Critical issues in restorative justice* Willan Publishing UK 2004 at 371.

¹⁹³ Zehr Howard 'Evaluation and restorative justice principles' in Gerry Johnstone (ed) *A restorative justice reader* 2nd ed Routledge London and New York 2013 at 24.

¹⁹⁴ See Vieille (2013) at 182.

¹⁹⁵ *Id* at 183.

¹⁹⁶ Skelton (2007) at 238.

of offenders' accountability and community attendance. Among the Maori, whose approach is the role model of restorative justice conferences, community attendance has wider implications than mere participation in the justice process. The conference does not impose accountability on the offender alone; rather, the community carries that responsibility.¹⁹⁷ For instance, in Uganda, where indigenous justice was used to determine crimes committed during the armed conflict, compensation to victims was not an offender's obligation alone but that of the whole clan or family of the offender.¹⁹⁸ Under indigenous justice, the community is responsible through offenders' family members to find a solution to the problem, carry responsibility with the offender, and prevent future offending.¹⁹⁹ The conflict does not belong to an individual: it is the concern of the whole community, which is why all community members attend the conference. Generally, the process strengthens social bonds by psychologically returning the offender to the community. The community can easily track the offenders' reformation progress and correct any sign of misbehaviour is likely to jeopardise community peace. The community also ensures victims' security against the offender.²⁰⁰ This is a major difference between restorative justice and indigenous justice practices.

As stated earlier, family group conferences under restorative justice allow the attendance of professionals on youth justice. However, indigenous justice does not require the attendance of professionals. Traditional elders, as custodians of community values, guide the conference by ensuring free participation towards a consensual agreement. Attendance of professionals under restorative justice is both advantageous and detrimental. While professionals ensure that the conference does not violate human rights and guide the process through the provisions of the law, the process may be biased towards modern court systems.²⁰¹ If this happens, a conference does not reflect the values embodied in traditional justice. Though Vieille argues that the role of professionals in family group conferences should be kept to a minimum,²⁰² their attendance creates the risk of making the process of justice semi-

¹⁹⁷ Donna Durie Hall 'Restorative justice: A Maori perspective' in Helen Bowen and Jim Consedine (eds) *Restorative justice: Contemporary themes and practice* Ploughshares Publications New Zealand 1999 at 28.

¹⁹⁸ Among (2013) at 202.

¹⁹⁹ Hall (1999) at 28-29.

²⁰⁰ See Maori Council and Hall (1999) at 33.

²⁰¹ Vieille (2013) at 180.

²⁰² *Ibid.*

judicial.²⁰³

However, the attendance of professionals in restorative justice is unnecessary. Restorative justice is not an adjudication: there is no production of evidence that entails rules of evidence requiring a lawyer. Restorative justice is a voluntary process for victims and offenders. The process does not intend to find the offenders' guilty and punish them; instead it seeks a way for responsibility to be taken. The offender does not need to prepare a professional defence to reduce liability or convince the panel otherwise. Of course, victim security in restorative justice is always paramount; police attendance at the conference is therefore a security measure.²⁰⁴ In addition, lawyers' attendance also assists the conference in possible sentences, especially where restorative justice has been ordered as a pre-sentencing measure for the court.²⁰⁵ Daly argues that restorative justice is not an independent mechanism of justice as it lacks 'fact-finding' processes.²⁰⁶ Restorative justice does not use evidence to reach an agreement. As noted earlier, offenders who are unwilling to attend restorative conferences go to another system for justice. There, evidence will be adduced and their guilt determined. Of course, the role of the State in any criminal process cannot be jettisoned: the State is the engineer of any transformation, its funding reservoir, supervisor and guarantor.²⁰⁷ A parallel mechanism is crucial for victims' security and support and for keeping criminal records.²⁰⁸ The State is also responsible for apprehending the offender, whether he or she is tried by the court or taken to restorative intervention. Though indigenous justice can work with a minimal assistance from professionals,²⁰⁹ in modern societies the State inevitably participates in the process of justice.

Restorative justice is an informal kind of justice that allows the attendance of direct and

²⁰³ See Carsten Erbe 'What is the role of professionals in restorative justice?' in Howard Zehr and Barb Toews (eds) *Critical issues in restorative justice* Willan Publishing Cullompton 2004 at 297.

²⁰⁴ Hayden and Henderson (1999) at 81.

²⁰⁵ *Id* at 80.

²⁰⁶ Kathleen Daly 'What is restorative justice? Fresh answers to a vexed question' 11(1) *Victims & Offenders* 2016 at 15.

²⁰⁷ Vernon E Jantzi 'What is the role of the state in restorative justice?' in Howard Zehr and Barb Toews (eds) *Critical issues in restorative justice* Willan Publishing Cullompton 2004 at 191-195.

²⁰⁸ Susan Herman 'Is restorative justice possible without a parallel system for victims?' in Howard Zehr and Barb Toews (eds) *Critical issues in restorative justice* Willan Publishing Cullompton 2004 at 80-81.

²⁰⁹ Skelton (2007) at 238.

indirect victims, offenders and the community to discuss the crime and its effects.²¹⁰ The process is flexible compared to that of the conventional court system; but when compared to indigenous justice, restorative justice is slightly rigid. Vieille argues that, because most restorative justice programmes are attached to State agencies, they need to work under legal guidance, something which traditional justice does not need to. Indigenous justice usually proceeds according to the circumstances, needs, and well-being of the general community. For that reason, the process of justice under indigenous justice may be longer than that under restorative justice. It may involve several meetings in search of a permanent solution to the problem. Though restorative justice is both a backward- and forward-looking mechanism of justice, it has been questioned for its failure to address the key causes of crimes in the society. Lofton argues that before an offender became involved in the crime, he or she was a victim of something else that came before.²¹¹ Some offenders are victims of economic imbalances, social stratification, drug abuse, and so on.²¹² Ross illustrates this argument with the story of a young offender who was sexually abused by relatives before he committed rape.²¹³

While restorative justice in prison is appropriate in such circumstances, Ross argues that such victimisation is a chain that connects one generation to another.²¹⁴ This calls for a criminal justice process which addresses the cause of criminality.²¹⁵ If not, the offender may go to prison, come back and reoffend, because the source of criminality has not been addressed. Therefore, restorative justice has to address these needs to sustain its relevance in the community, otherwise the cycle of criminality is likely to continue, given that crime is a result of a number of factors.²¹⁶ This is the focus of indigenous justice: to know the cause of crime, its effects, how it can be prevented, and how to assist other members who are likely to be victims of such social stratification before they too become offenders.²¹⁷ It is impossible to

²¹⁰ Tony F Marshall 'Restorative justice: An overview' A report by the home office Research Development and Statistics Development London 1999 at 5.

²¹¹ Bonnie Price Lofton 'Does restorative justice challenge systematic injustice' in Howard Zehr and Barb Toews (eds) *Critical issues in restorative justice* Willan Publishing UK 2004 at 381.

²¹² See Lofton (2004) at 380-381.

²¹³ See Ross (1996) at 40-43.

²¹⁴ *Id* at 43.

²¹⁵ The discussion in Navajo nation courts normally addresses, among other things, the causes of crime in society, this in order to facilitate change in the offender's behaviour. Austin (2011) at 354.

²¹⁶ See Lofton (2004) at 377-379.

²¹⁷ See *Id* at 381-382.

adopt indigenous justice *per se* in modern societies, but restorative justice can fill this gap.

The final significant difference between restorative justice and indigenous justice pertains to the model of facilitating the meeting. While restorative justice uses trained mediators or facilitators,²¹⁸ indigenous justice makes use of indigenous knowledge from the community. Indigenous justice meetings are facilitated by reputable elders with traditional knowledge of the community's philosophy of justice. These can be people holding titles such as 'king, chief or headman'.²¹⁹ Indigenous justice also draws on people with outstanding integrity in the community, such as *naat'aanii* among the Navajo²²⁰ or *inyangamugayo* in Rwanda.²²¹ There is certainly a considerable difference between a trained facilitator and a lay judge from the local community.

The upshot of this analysis is that although restorative justice appears to be a new movement within the criminal justice system, its practices are similar in principle to what indigenous societies have been doing since time immemorial. Many speak of modern restorative justice as an idea that originated in indigenous communities in New Zealand, Canada, America and Australia. However, restorative justice principles are evident in communities throughout the world that still value communal life. In Africa, New Zealand's indigenous justice practices have much been discussed much more widely than African ones. Countries have been quick to recognise the former and adopt them in youth justice processes, and academics have seized on the New Zealand model and used it to popularise the idea of restorative justice. But the latter is as 'deep-rooted' in Africa as in other indigenous communities in the world.²²² As argued in the next chapters, Africans in Rwanda, Uganda, Sierra Leone and South Africa did

²¹⁸ See Martin Wright 'Restorative justice: From punishment to reconciliation: The role of social workers' 6 *European Journal of Crime, Criminal Law and Criminal Justice* 1998 at 271.

²¹⁹ Batley (2004) at 366.

²²⁰ Ross (1996) at 26.

²²¹ Roelof H Haveman 'Gacaca in Rwanda: Customary law in case of genocide' in Jeanmarie Fenrich, Paolo Galizzi and Tracy E Higgins (eds) *The future of African customary law* Cambridge University Press USA 2011 at 388.

²²² Mangena argues that in Africa restorative practices were used for centuries before colonial intrusion. He gives an example of Mozambique where restorative justice practices have been used long before the coming of the Portuguese. This is evidenced by the use of traditional justice to resolve conflicts originating from the civil war that erupted immediately after attaining independence. The use of *magamba* spirits as a traditional justice approach was accepted by the community despite the absence of a law to promote its use. See Fainos Mangena 'Restorative justice's deep roots in Africa' 34(1) *South Africa Journal of Philosophy* 2015 at 9.

not invoke foreign indigenous practices in dealing with human rights violations. Atrocities in those countries just reminded communities that there is a system other than international courts or conventional criminal justice that restores relationships.

The influence of indigenous justice in the New Zealand criminal justice system is clear proof that indigenous values can contribute towards a better criminal justice system. But unlike the case in New Zealand, in Africa such traditional justice values have continued to be regarded as inferior to colonially inherited criminal justice processes. In many African countries, indigenous justice is considered an informal justice system.²²³ For instance, the use of *magamba* spirits in dealing with the aftermath of civil war in Mozambique had no legal recognition and even less government involvement in it.²²⁴ Still, the community used that system, believing it was the only way to restore peace and harmony. Even though the community can be forced to follow a colonially inherited system, there is a system that better suits them.

In Africa, restorative interventions embody the spirit of *utu* or *ubuntu*.²²⁵ African communal life has much to offer in enriching togetherness and creating relationships. Mbiti, an African philosopher, argues that Africans carry their religion wherever they go because it infuses their way of living.²²⁶ While modern societies equate ‘time with money’, in Africa, time is given value by spending it together with others.²²⁷ A process of justice that advocates for strengthening relationship cannot be decoupled from the African way of life. This argument does not advocate for laxity or a return to traditional criminal justice systems, but it is founded on an acknowledgment of the reality of African life.

Based on the same philosophy, many conflicts in Africa could thus be handled restoratively without burdening the conventional criminal justice system. Unfortunately, the formal application of traditional restorative justice has been reserved for minor conflicts such as

²²³ See Endalew Lijalem Enyew ‘Ethiopian customary resolution mechanisms: Forms of restorative justice’ *African Centre for the Constructive Resolution of Disputes* 2014 at 125.

²²⁴ See the discussion of *magamba* spirits in Chapter 5.

²²⁵ Mongena argues that it is difficult to decouple *ubuntu* as an African way of life from African restorative justice practices. See Mongena (2015) at 11.

²²⁶ John S Mbiti *African religions and philosophy* 2nd Ed. Heinemann Educational Publishers UK 1989 at 2.

²²⁷ Mbiti (1989).

matrimonial disputes, matters relating to inheritance, or where customary law is in dispute.²²⁸ In Tanzania, for instance, even though the spirit of restorative justice is evident,²²⁹ traditional justice processes have limited impact on the criminal justice system. However, South Sudan, Uganda, Lesotho and others are now adopting the same principles for juvenile justice. As New Zealand's experience suggests, such practices remain apt for offences involving adult offenders and can apply as a diversionary measure alongside the conventional criminal justice system in Africa.

The differences between traditional justice and restorative justice reveal the dynamic nature of societies and their organisation. Even though it is debatable whether restorative justice is rooted in traditional justice,²³⁰ the influence of traditional justice on modern restorative justice is certain. While family group-conferencing is adopted from Maori family meetings,²³¹ victim-offender mediation is a shadow of traditional mediation practices in many communities.²³² In addition, conferencing circles as a restorative justice process have been borrowed from aboriginal justice practices in Canada.²³³ These differences show that the traditional justice model may not be compatible with contemporary communities. For instance, while communal societies are prevalent in rural Africa, an ancient traditional justice system cannot be used to resolve conflict without modification, because circumstances have changed. When ancient traditional justice was predominant, other areas of law such as human rights were not advocated as they are today. Previously, traditional justice could be applied with cruel punishments, such as flogging or using girls as tokens of compensation; these acts

²²⁸ As discussed in Chapter 7, in Tanzania a restorative justice approach applies to a limited extent to minor offences as per Rule 4 of the Primary Courts Criminal Procedure Rules; section 163 of the Criminal Procedure Act, Chapter 20, Revised Edition 2002 and section 161 of the Law of Marriage Act Chapter 29, Revised Edition 2002, provide the mandatory requirement that parties go through a reconciliation board before petitioning the court for divorce or separation.

²²⁹ Chapter 8 provides a comprehensive discussion of the ethos of restorative justice in Tanzania.

²³⁰ Daly (2010) at 288-291; Daly (2016) at 21.

²³¹ See Donald J Schmid 'Restorative justice: A new paradigm for criminal justice policy' 34 *Victoria University of Wellington Law Review* 2002 at 106; George Mousourakis 'Restorative justice conference in New Zealand: Theoretical foundations and practical applications' 2002 at 50, available at <https://www.kansai-u.ac.jp/ILS/publication/asset/nomos/27/nomos27-04.pdf> (accessed 4 May 2018).

²³² For instance, in Tanzania informal mediation of parties sometimes take place outside the court with the assistance of a facilitator who might be a relative or close friend to the parties.

²³³ Van Ness and Strong (2010) at 69.

now contravene human rights law.²³⁴

Thus, although restorative justice adopts traditional justice principles, these have been adapted to fit in with modern communities. In the case of its adoption of elements of Maori traditional justice, New Zealand had to sieve the relevant processes to ensure that other laws of the country were not contradicted. In pre-colonial African communities, traditional justice worked in isolation of other legal systems, but it is now impossible to apply restorative justice without the presence of a complementary system, given the changing nature of offences and the needs of the community – for instance, sometimes an offender must be incarcerated for the security of the community. Generally, societies have changed, hence the adoption of a traditional justice ethos in the criminal justice system must involve circumspection so that other standards of justice practices are not eroded. Whereas traditional justice embodies values that are relevant to a traditional community, modern restorative justice is an improved model developed to suit modern communities.

4.10 Conclusion

In the jurisdictions considered above, there is an evident reflection of indigenous justice in creating what can be regarded as a new trend in the modern criminal justice system. But what is a common factor that motivates jurisdictions to embrace indigenous approaches? Some of the reasons have been discussed above, such as the inability of the justice process to reduce offending in the community and the failure of the justice system to address community's key needs. Yet there are other factors which need to be examined.

Considering the lifestyle of the Maori in New Zealand, the Navajo, Hawaiians and rural Alaskans in the United States, and the aboriginals in Canada and Australia, these peoples share certain similarities. They live in small groups in rural areas,²³⁵ and their way of life necessitates strong ties between family and community members. Every community member is valuable in the eyes of the other because communal life does not function independently of

²³⁴ Previously, traditional justice in Uganda used girls as a means to compensate the victim's family for serious offences such as murder. See the discussion in Chapter 5.

²³⁵ Fahey (1975-1976) at 12; Vieille (2012) at 4; Polly E Hyslop 'Restorative justice in rural Alaska' 1 *Alaska Journal of Dispute Resolution* 2012 at 19.

them. The community is unwilling to lose any of its members to indulgence in immorality. Transgressions committed by a community member affect the whole community, which shares the same communal life. Some communities share common rituals, properties, economic activities, social functions and so on. As May observes,

... rural Alaska is filled with individuals, Native and non-Native alike, who recognise their dependence on one another and value community harmony. These residents may be isolated from urban population, but they are not isolated from each other in their respective communities. Many communities consist of a web of people bonded by blood relations or marriage. The need for harmony, restoration, and healing is greater because many crimes involve persons who will continue to be in close proximity and association with each other. These close relations often make the collateral impacts of crime more pronounced. When someone is victimised or punished their loss is left by the collective community. It is not like Fairbanks, Anchorage, Juneau, or other urban areas where many residents are only exposed to the community's crime through the news media.²³⁶

If the whole community indirectly suffers the consequences of a transgression, then finding a common solution is highly prized. Community members do not want to destroy their interrelationships. The justice system that takes away their producer, friend, or relative is against the spirit of their communal life, where everything must be done by the community. This simply implies that communal life should be mirrored in the justice process. The same applies to other jurisdictions with the same kind communities, such as the Maasai in East Africa who value the traditional council of elders than the court system.²³⁷ Even where there is formal criminal justice system, communities living in communal bondage continue to practice restorative interventions to uphold the spirit of togetherness. In addition, in most cases, formal courts are remote from justice-seekers.²³⁸ The technicalities of the legal system do not encourage communities to seek justice through courtrooms; formal justice is also expensive for an ordinary person.

²³⁶ May (2015) at 5.

²³⁷ Eva A Maina Ayiera “‘Justice be our shield and defender’”: *Local justice mechanisms and fair trial rights in Kenya*’ The Danish Institute for human rights Copenhagen 2013 at 34.

²³⁸ See May (2014-2015) at 5.

This chapter has discussed merely a sample of forms of indigenous justice. Beyond these are an even greater number of communities whose dissatisfaction with the modern criminal justice system has not been researched and acknowledged to the extent of communities in the United States, Canada, New Zealand and Australia. The conventional criminal justice system in such societies continues to fragment communities rather than promote peace and unity. If this is the case, what contribution could African indigenous justice make to improved justice delivery? Where is the African justice system that advances the jurisprudence of *ubuntu* or *utu*?

Chapter 5:

African Jurisprudence of Restorative Justice

5.1 Introduction

The previous chapter examined restorative justice practices among indigenous communities in other parts of the world such as New Zealand, North America and Australia. Indigenous communities have always been bound to justice practices that involve the community in conflict management. While these communities share the characteristic of a communal lifestyle, they also share forms of justice administration that strive to maintain relationships within the community. The African continent is well known for the prevalence of community living. The relationship between individuals is what determines humanity in Africa, and a number of factors have kept alive the spirit of togetherness.

First, many African communities have not broken the intergenerational cycle of poverty, hence there is a balanced level of economic capacity. Under this circumstance, bonds are strengthened by the sense of economic equality. Secondly, many African communities still live in rural areas where interrelationship is the order of life. The rural community in Africa requires a strong bond between individuals inasmuch as the members of a family are interdependent on each other. This communal rural life entails a common way of life that requires the sharing of economic and social life. As a result, families assist each other in economic activities such as agriculture activities and socially in matters such as weddings, funerals and conflict management. Thirdly, togetherness in Africa is a spirit that has long been in existence.. Individualism has never been an African lifestyle, as illustrated in the common slogan, ‘we share poverty in Africa’, which means that even though Africa is poor, people share what they have.

It is therefore not easy to decouple the African way of life from particular mechanisms of justice administration, because the latter strengthens the former. A restorative justice approach that brings the community together to find a solution for the transgression

committed by one of its member has been common in Africa.¹ As discussed in this chapter, Africa has never had a prison system that takes the offender away from the community for accountability, because conflict management has always been restorative. According to Skelton, the African way of justice has been restorative in nature. Perennial conflicts in Africa have shown the world that restorative justice is intrinsic to Africa. Even in the face of the mass violation of human rights in civil wars, African countries resorted to indigenous African restorative justice in preference to the modern court system. The experience of Rwanda, Uganda, Sierra Leone and Mozambique in applying indigenous justice to international crimes demonstrates the spirit of restorative justice in Africa.

5.2 Restorative justice under *gacaca* courts in Rwanda

5.2.1 Background

After the outbreak of genocide in 1994, it was not easy to imagine that Rwanda would ever see the political, economic and social stability that we witness today.² The genocide impacted on almost every sector necessary for the country's peace-building. The massacre, orchestrated and executed in less than a hundred days, claimed close to a million lives among the minority Tutsi and moderate Hutu, leaving the country in complete distress.³ The judiciary was in total paralysis and the prosecution machinery had collapsed.⁴ In such a chilling environment, some judicial officers sought refuge in foreign countries to save their

¹ Ann Skelton and Cheryl Franks 'Conferencing in South Africa: Returning to our future' in Allison Morris and Gabrielle Maxwell (eds) *Restorative justice for juveniles: Conferencing, mediation and circles* Hart Publishing Portland Oregon 2001 at 104.

² Dan Wadada Nabudere and Andreas Velthuisen '*Restorative justice in Africa: From trans-dimensional knowledge to a culture of harmony*' Africa Institute of South Africa Pretoria South Africa 2013 at 48.

³ Nabudere and Velthuisen (2013) at 48; Janet McKnight 'The anatomy of mass accountability: Confronting ideology and legitimacy in Rwanda's *gacaca* courts' 1 *Conflict trends* 2014 at 35.

⁴ Mark R Amstutz 'Is reconciliation possible after genocide? The case of Rwanda' 48 *Journal of Church and State* 2006 at 551; Bert Ingelaere 'The *gacaca* courts in Rwanda' in Luc Huyse and Mark Salter (eds) *Traditional justice and reconciliation after violent conflict: Learning from African experience* International Institute for Democracy and Electoral Assistance Sweden 2008 at 35; Emily Amicky 'Trying international crimes on local lawns: The adjudication of genocide sexual violence crimes in Rwanda's *gacaca* courts' 20 *Columbia Journal of Gender and Law* 2011 at 23-24; Nabudere and Velthuisen (2013) at 49; McKnight (2014) at 37; Martien Schotsmans 'Official hybridisation of tradition: A case study of Rwanda' in Eva Brems, Giselle Corradi and Martien Schotsmans (eds) *International actors and traditional justice in sub-Saharan Africa* Intersentia Cambridge 2015 at 57.

lives and some were killed.⁵ Thousands of criminal suspects and countless victims needed justice.⁶ The need to restore community peace and harmony was of paramount importance.

The genocide crimes required the immediate establishment of justice mechanisms to prosecute offenders. In response, an International Criminal Tribunal for Rwanda (ICTR) was established in 1994 in Arusha, Tanzania.⁷ Not all crimes could be prosecuted by the international tribunal; instead they required an effective national judicial machinery,⁸ which was lacking. Nevertheless, the government tried to ensure that justice was done, arresting more than 120,000 suspects, but was unprepared for this immense number of culprits, resulting in unprecedented prison overcrowding.⁹ Strategies were also devised to restore order in the community. These included relieving prison congestion,¹⁰ prosecuting crimes within a reasonable time,¹¹ reducing the backlog of the cases in courts¹² and restoring peace through reconciliation.¹³ The government consequently decided to establish courts that could try crimes not only at national but grassroots level.

The result was the establishment of the *gacaca* courts based on the traditional justice system.¹⁴ *Gacaca* traditional justice was not an extraordinary approach in the eyes of the local community, though, because it had been in existence since the pre-colonial era.¹⁵ These courts worked in parallel with the national courts and the international tribunal. The aim was

⁵ Amstutz (2006) at 551; Amicky (2011) at 24; Roelof H Haveman 'Gacaca in Rwanda: Customary law in case of genocide' in Jeanmarie Fenrich, Paolo Galizzi and Tracy E Higgins (eds) *The future of African customary law* Cambridge University Press USA 2011 at 393.

⁶ See Amstutz (2006) at 551.

⁷ Ingelaere (2008) at 45.

⁸ Crimes committed during the genocide were categorised in four groups. Crimes in category one were tried by the ICTR, while those in categories two to four were tried in national courts and *gacaca* courts. See Nabudere and Velthuisen (2013) at 50; McKnight (2014) at 38.

⁹ Amstutz (2006) at 551; McKnight (2014) at 37; Schotsmans (2015) at 57.

¹⁰ Amstutz (2006) at 558; Ingelaere (2008) at 35; Amick (2011) at 29; Schotsmans (2015) at 57.

¹¹ Amstutz (2006) at 558; Ingelaere (2008) at 38; Nabudere and Velthuisen (2013) at 49; McKnight (2014) at 35.

¹² Ingelaere (2008) at 35; Hope Among 'Restorative justice and the reintegration of former child soldiers into communities: A case of Uganda' LLD Thesis University of Pretoria 2013 at 224.

¹³ Amstutz (2006) at 558-559; Ingelaere (2008) at 38; Amicky (2011) at 22; Nabudere and Velthuisen (2013) at 49; Schotsmans (2015) at 58.

¹⁴ *Gacaca* literally translates 'on the grass' or sometimes referred to as 'grass courts' or 'justice on the grass'. The name originates from a type of soft grass found in Rwanda (*umugaca*) where people used to sit and discuss disputes. The same name was later used to mean traditional courts. See Amstutz (2006) at 542 and 545; Ingelaere (2008) at 33; Emily Amiky (2011) at 21; McKnight (2014) at 35.

¹⁵ Ingelaere (2008) at 34 and 35; Amick (2011) at 27; Nabudere and Velthuisen (2013) at 49-50.

to bring justice and restore community harmony in the shortest time possible. Hence, all available means of justice were fully utilised. According to McKnight, the genocide in Rwanda involved every community member and therefore a system which could involve every member was pertinent. It is against this backdrop that restorative justice became a system of justice that could address the key needs of the Rwandan community.¹⁶

5.2.2 *Gacaca* courts and their jurisdiction

Unlike South Africa and Sierra Leone, Rwanda rejected blanket amnesty for genocide perpetrators and pursued prosecution instead.¹⁷ The main reasons for this were that, first, the government wanted to address impunity because the country had experienced heinous killings in the past,¹⁸ and, secondly, it anticipated victims would seek revenge if perpetrators were not held accountable.¹⁹ To this end, the government established various levels of prosecution such as the ICTR, the national courts, the military courts and the traditional *gacaca* courts.²⁰ The focus of this study is on the role of traditional *gacaca* courts in bringing justice to Rwanda.

In 2000, a law was enacted to establish *gacaca* courts²¹ which, among other things, aimed to bring large numbers of suspects to account²² and to restore community harmony through reconciliation.²³ As the whole country was generally affected in one way or the other; if a person was not a suspect, he or she was either a victim or a witness;²⁴ it was prudent, therefore, to apply a system of justice that would reconcile the community from the lowest

¹⁶ See Maya Goldstein Bolocan 'Rwandan *gacaca*: An experiment in transitional justice' *Journal of Dispute Resolution* 2004 at 376.

¹⁷ Haveman (2011) at 393; Amick (2011) at 25; McKnight (2014) at 38; Schotsmans (2015) at 56.

¹⁸ Bert Ingelaere 'The *gacaca* courts in Rwanda' in Luc Huyse and Mark Salter *Traditional justice and reconciliation after violent conflict: Learning from African experience* International Institute for Democracy and Electoral Assistance Sweden 2008 at 38; Amick (2011) at 22; McKnight (2014) at 36.

¹⁹ Haveman (2011) 393; Amick (2011) at 25; McKnight (2014) at 38; Schotsmans (2015) at 56.

²⁰ See Amick (2011) at 41; Nabudere and Vethuizen (2013) at 49; McKnight (2014) at 37.

²¹ Organic Law No. 40/2000 of 26/01/2001, article 3, set up *gacaca* jurisdictions and authorised prosecutions for offences constituting the crime of genocide or crimes against humanity committed between October 1, 1990 and December 31, 1994.

²² Bert Ingelaere 'The *gacaca* courts in Rwanda' in Luc Huyse and Mark Salter *Traditional justice and reconciliation after violent conflict: Learning from African experience* International Institute for Democracy and Electoral Assistance Sweden 2008 at 38.

²³ Amick (2011) at 25.

²⁴ Janet McKnight 'The anatomy of mass accountability: Confronting ideology and legitimacy in Rwanda's *gacaca* courts' 1 *Conflict trends* 2014 at 35.

community level upwards by addressing the roots of the genocide.

Unlike the ordinary courts, traditional *gacaca* courts made use of local knowledge and capacity, using lay or local judges (*inyangamugayo*) who were appointed from the local community-based on their integrity.²⁵ These courts were supported by the government through laws and close monitoring. As per the law, *gacaca* courts had jurisdiction over certain offences, while other offences were tried by the ICTR and the national courts.²⁶ Traditional courts had jurisdiction to try perpetrators, conspirators, accomplices of homicide or serious assaults that did not lead to death, and persons who committed serious assault and property offences.²⁷

What seems to be the most immense power ever given to a traditional court in the modern world was the power to impose prison sentences of up to 30 years.²⁸ Though it is argued that retribution was not the major focus of the traditional courts, which focused more on reconciling neighbours whose relationships were ruined by the genocide,²⁹ they imposed unprecedented retributive sentences on offenders. Nevertheless, the courts managed to bring justice to the grassroots level by bringing the affected community to the ‘community grass’

²⁵ Amstutz (2006) at 556; Bert Ingelaere ‘The *gacaca* courts in Rwanda’ in Luc Huyse and Mark Salter *Traditional justice and reconciliation after violent conflict: Learning from African experience* International Institute for Democracy and Electoral Assistance Sweden 2008 at 35-36; Organic Law No. 40/2000 of 26/01/2001, article 10 and 11; see also Organic Law No. 33/2001 of 22/6/2001 modifying and completing Organic Law No. 40/2000 of January 26, 2001 setting up ‘*gacaca* jurisdictions’ and organising prosecutions for offences constituting the crime of genocide or crimes against humanity, committed between October 1, 1990 and December 31, 1994, article 7. See too Roelof H Haveman ‘*Gacaca* in Rwanda: Customary law in case of genocide’ in Jeanmarie Fenrich, Paolo Galizzi and Tracy E Higgins (eds) *The future of African customary law* Cambridge University Press USA 2011 at 388; Amick (2011) at 28; Roelof H Haveman ‘*Gacaca* in Rwanda: Customary law in case of genocide’ in Jeanmarie Fenrich, Paolo Galizzi and Tracy E Higgins (eds) *The future of African customary law* Cambridge University Press USA 2011 at 388.

²⁶ See Organic Law No. 40/2000 of 26/01/2001 setting up *gacaca* jurisdictions and organising prosecutions for offences constituting the crime of genocide or crimes against humanity committed between October 1, 1990 and December 31, 1994, articles 2 and 51.

²⁷ See Organic Law No. 08/96 of August 30, 1996 on the organisation of prosecutions for offences constituting the crime of genocide or crime against humanity committed since October 1, 1990, article 2; see also Organic Law No. 40/2000 of 26/01/2001, articles 2 and 51.

²⁸ Jimam Timchang Lar ‘Post-conflict justice in Rwanda: A comparative analysis of the international criminal tribunal for Rwanda and *gacaca* courts’ 2009(2) *Conflict Trends* 2009 at 54.

²⁹ Bert Ingelaere ‘The *gacaca* courts in Rwanda’ in Luc Huyse and Mark Salter *Traditional justice and reconciliation after violent conflict: Learning from African experience* International Institute for Democracy and Electoral Assistance Sweden 2008 at 36; Among (2013) at 225.

for reconciliation.³⁰ Every participant was heard and given voice in the justice process,³¹ and the process was restorative in nature.

5.2.3 Advantages of traditional *gacaca* courts

The major cause of the genocide was the widespread promotion of hatred between the Hutu and Tutsi.³² Restoring harmony in Rwanda thus required a justice mechanism that could knit together communities on an ‘open’ discussion ground. Traditional *gacaca* courts enabled the community to seek reconciliation and restoration of peace through traditional justice in an amicable way.³³ It is doubtful whether social reconstruction could be achieved in such a situation through an alien international tribunal such as the ICTR.³⁴ As Nabudere and Velthuisen have remarked:

[T]he task of healing and national reconciliation is not a job that can be undertaken by an international court or tribunal. Healing and forgiveness are profoundly personal acts that involve the decision of each individual affected by the crime. This involves forgiveness, acceptance of what happened as well as the right to reject forgiveness as an option.³⁵

Gacaca restorative processes brought together victims and offenders to discuss the genocide and find a solution to prevent future massacres. Traditional conferences were convened in

³⁰ See Bert Ingelaere ‘The *gacaca* courts in Rwanda’ in Luc Huyse and Mark Salter *Traditional justice and reconciliation after violent conflict: Learning from African experience* International Institute for Democracy and Electoral Assistance Sweden 2008 at 33; Emily Amik ‘Trying international crimes on local lawns: The adjudication of genocide sexual violence crimes in Rwanda’s *gacaca* courts’ 20 *Columbia Journal of Gender and Law* 2011 at 21; McKnight (2014) at 35.

³¹ Nabudere and Vethuisen (2013) at 52.

³² Vadi Moodley, Alphonse Gahima and Suveshnee Munien ‘Environmental causes and impacts of genocide in Rwanda: Case studies of the towns of Butare and Cyangugu’ 10(2) *African Journal of Conflict Resolution* 2010 at 105; Donatien Nikuze ‘The genocide against the Tutsi in Rwanda: Origins, causes, implementation, consequences, and the post-genocide era’ 3(5) *International Journal of Development and Sustainability* 2014 at 1088-1089.

³³ See Amstutz (2006) at 554 and 556; Amick (2011) at 22; Haveman (2011) at 395; Ifeonu Ebrechi ‘Who will save these endangered species? Evaluating the implications of the principle of complementarity on the traditional African conflict resolution mechanisms’ *African Journal of International and Comparative Law* 2012 at 38; Nabudere and Vethuisen (2013) at 49.

³⁴ See Ingelaere (2008) at 38; Nabudere and Vethuisen (2013) at 60; Janet McKnight ‘The anatomy of mass accountability: Confronting ideology and legitimacy in Rwanda’s *gacaca* courts’ 1 *Conflict trends* 2014 at 35 and 42.

³⁵ Nabudere and Vethuisen (2013) at 60.

public places at ‘community lawns’ within the precinct of the affected community.³⁶ The process was therefore more accessible than that of the ICTR or national courts, and hence it encouraged attendance by every affected individual.

Under such a friendly process, facts were openly discussed, something to which an adversarial criminal justice system is not amenable.³⁷ Truth-telling in the presence of the community facilitated apology, amends, repair, forgiveness, closure, healing and the reintegration of offenders.³⁸ Some victims simply wanted to know how their loved ones were killed and where they were buried, this to enable them to start a healing process.³⁹ Victims were able to face their offenders, an act which is therapeutic. Whereas the law encouraged apology by reducing the sentence for apologetic offenders,⁴⁰ the restorative process relieved offenders of the fear of revenge by victims and stigmatisation by the community.⁴¹ As a result of the reconciliation process, even where the offender was imprisoned, reintegration after the prison sentence was smoother than when the offender had been tried by ordinary courts.⁴²

Traditional justice under *gacaca* courts did not vex participants with procedural technicalities, given that every community member was familiar with its processes. There was no strict adherence to the rules of evidence, such as examination in chief and cross-examination. It was thus easy for lay participants to understand the proceedings.⁴³ Justice procedures were conducted in the local language and in the community’s cultural setting.⁴⁴ Local language enabled a fast tracking of cases, bearing in mind that one of the reasons for delays in cases before the ICTR was the translation of proceedings.⁴⁵ The international tribunal, which spent billions, secured convictions in 75 cases in 15 years, while traditional

³⁶ Amick (2011) at 45.

³⁷ Nabudere and Vethuizen (2013) at 50.

³⁸ Mark R Amstutz ‘Is reconciliation possible after genocide? The case of Rwanda’ 48 *Journal of Church and State* 2006 at 542, 548 and 557; Among (2013) at 225.

³⁹ Among (2013) at 225.

⁴⁰ Amstutz (2006) at 552; Amick (2011) at 42; McKnight (2014) at 38.

⁴¹ Amstutz (2006) at 548.

⁴² Among (2013) at 225.

⁴³ Amstutz (2006) at 555; Amick (2011) at 29.

⁴⁴ Nabudere and Vethuizen (2013) at 53.

⁴⁵ See Amstutz (2006) at 552 and 553; Ingelaere (2008) at 52; Haveman (2011) 394; Schotsmans (2015) at 56.

gacaca convicted more than 1,500 offenders in five years.⁴⁶ The process was generally participatory, speedy and inexpensive.

5.2.4 Challenges to *gacaca* courts

The trial of genocide crimes in *gacaca* courts sparked debate in national and international forums. Some international organisations challenged *gacaca* courts for not meeting minimum standards of justice delivery.⁴⁷ For instance, it was documented that participants in *gacaca* courts had no right to legal counsel, as in the ICTR and national courts.⁴⁸ Parties could thus not argue their cases in the legal framework, which is contrary to the principles of fair trial. Rules of evidence were not followed either, leading to the admissibility of fabricated or unchallenged information. It has also been argued that, because so many people were either hiding in or running away from their homes during the genocide, it is questionable whether the testimony of a person who alleges to have seen an act of violence while running or hiding should be admissible.⁴⁹ Some participants took advantage of the *gacaca* process to fabricate information in order to compound rifts, while in other instances false confessions were given to secure offenders' release from prison.⁵⁰

The trial of such grievous offences before a lay judge also drew criticism,⁵¹ on the ground that a genocide crime trial needs competent professionals who can judiciously determine cases in accordance with national and international laws. Convictions under *gacaca* courts were instead based purely on an informal judicial process.⁵² In some cases, the weakness of lay judges was discernible in decisions reflecting bias, sectarianism, partiality and corruption.⁵³ The fact that judges were elected from the same communities where they decided cases also raised questions as to how they dealt with conflicts of interest.⁵⁴ Some

⁴⁶ See *Ibid.*

⁴⁷ Amstutz states that the Amnesty International and Human Rights Watch challenged the application of *gacaca* justice in genocide cases. See Bolocan (2004) at 385; Amstutz (2006) at 557; Ebrechi (2012) at 37; Schotsmans (2015) at 59.

⁴⁸ Bolocan (2004) at 388; Amstutz (2006) at 557; McKnight (2014) at 39.

⁴⁹ McKnight (2014) at 40.

⁵⁰ Amstutz (2006) at 557.

⁵¹ See Ifeonu Ebrechi (2012) at 37.

⁵² See Amstutz (2006) at 557.

⁵³ Bolocan (2004) at 386; Amstutz (2006) at 557; McKnight (2014) at 40.

⁵⁴ Amick (2011) at 47.

people viewed *gacaca* courts as a tool of the government to punish the Hutu.⁵⁵ This claim is given credence by the Hutu's low attendance at *gacaca* courts, as a result of which the government had to compel their participation in the process.⁵⁶ It finally became a coercive justice process with mandatory evidence production.⁵⁷ The argument is supported, moreover, by anecdotal evidence about reluctance to prosecute atrocities committed by the Tutsi-led Rwandan Patriotic Front army.⁵⁸

The trial of sexual violence under traditional courts also faced challenges.⁵⁹ Victims of sexual violence did not want to disclose their trauma before the community. Sexual violence cases were initially under the jurisdiction of national courts, until amendments in 2008 gave *gacaca* courts jurisdiction over them.⁶⁰ Even though *gacaca* courts held sexual violence trials in camera, the number of cases dropped considerably after 2008.⁶¹ Among the factors accounting for this were that the confidentiality of victims' information was not observed;⁶² judges' non-professional standing may also have led to judicial ethics being comprised.

Despite all these weaknesses, *gacaca* courts ensured the accountability of offenders⁶³ and contributed to the restoration of ruptured relationships in Rwandan communities. Arguably, if the government had not employed *gacaca* courts, it would have taken the national courts a hundred years to try all the genocide cases.⁶⁴ *Gacaca* courts delivered justice by dealing with the causes of genocide, especially those relating to cultural impunity.⁶⁵ As mentioned earlier, after the genocide community members had negative perceptions of their neighbours, so they

⁵⁵ See McKnight (2014) at 40 and 41.

⁵⁶ McKnight (2014) at 39.

⁵⁷ See McKnight (2014) at 39-40.

⁵⁸ See Ingelaere (2008) at 56; McKnight (2014) at 41.

⁵⁹ See Amick (2011) at 3; Schotsmans (2015) at 60.

⁶⁰ Amick (2011) at 3.

⁶¹ *Id* at 4 and 46; Schotsmans (2015) at 60.

⁶² Amick (2011) at 2; McKnight (2014) at 40; Schotsmans (2015) at 60.

⁶³ Schotsmans (2015) at 60.

⁶⁴ Haveman (2011) at 393; Nabudere and Vethuizen (2013) at 49; Shehana Gomez 'Restorative justice following mass atrocity: The case of Rwanda' Law and Development series, available at <http://www.lawanddevelopment.org/docs/restorativejustice.pdf> (accessed 28 July 2016).

⁶⁵ Ingelaere (2008) at 38; Haveman (2011) at 395; Among (2013) at 224.

needed to resolve differences among themselves.⁶⁶ Hence, truth-telling was the only way forward, and a restorative approach facilitated this goal.

5.3 Acholi traditional justice in Uganda

According to Quinn, ‘cultures and societies around the world have traditionally had highly complex, highly developed systems for dealing with conflict and conflict resolution, and the social deficits brought by conflict; these are called customary law’.⁶⁷ Uganda embraced a traditional justice approach in addressing heinous acts committed by rebel groups.⁶⁸ Indigenous justice was the major model of conflict resolution in Uganda even before the British invasion.⁶⁹ As in any other colonised nation, traditional mechanisms of justice were suppressed and had to give way to the Westernisation of the juridical sphere, with the use of customary law in Uganda having been officially abolished in 1962.⁷⁰ Despite these changes, many ethnic groups have continued to abide by their own culture, including by way of using traditional justice mechanisms.⁷¹ Such communities include the Acholi, Iteso, Baganda, Bafumbira, Langi, Lugbara and Madi.⁷²

Traditional justice mechanisms were given less weight by the government until severe conflicts ravaged the country’s economy and challenged the judicial mechanisms. For instance, many people were injured and killed during Idi Amin’s dictatorship, which ended

⁶⁶ See Ingelaere (2008) at 44; Luke Fletcher ‘Turning *interahamwe*: Individual and community choices in the Rwandan genocide’ 9(1) *Journal of Genocide Research* 2007 at 26 and 31; Amick (2011) at 25; Nabudere and Vethuizen (2013) at 52; McKnight (2014) at 42.

⁶⁷ Joanna R Quinn ‘The impact of internal conflict on customary institutions and law: The case of Uganda’ 59(2) *Journal of African Law* 2015 at 222.

⁶⁸ Lucy Hovil and Joanna R Quinn ‘Peace first, justice later: Traditional justice in northern Uganda’ Refugee Law Project Working Paper No. 17, Makerere University 2005 at 22; Among (2013); Quinn (2015); Jeremy Sarkin ‘The interrelationship and interconnectedness of transitional justice and the rule of law in Uganda: Pursuing justice, truth, guarantees of non-repetition, reconciliation and reparations for past crimes and human rights violation’ *Hague Journal of the Rule of Law* 2015 at 134.

⁶⁹ James Ojera Latigo ‘Northern Uganda: Traditional-based practices in the Acholi region’ in Luc Huyse and Mark Salter (eds) *Traditional justice and reconciliation after the violent conflict: Learning from African experience* International IDEA Publications Stockholm Sweden 2008 at 102.

⁷⁰ Uganda’s Independent Constitution of 1962, article 24(8); see also Quinn (2015) at 223. In Tanzania, customary criminal law was abolished in 1963; see Simon Robins, A Place for Tradition in an Effective Criminal Justice System: Customary Justice in Sierra Leone, Tanzania and Zambia, Institute for Security Studies, Policy Brief No. 17, South Africa, 2009 at 2.

⁷¹ Hovil and Quinn (2005) at 22; Owor (2012) at 123-124; Quinn (2015) at 223.

⁷² Among (2013) at 170-184; Quinn (2015) at 224-225.

with a war with Tanzania in 1979.⁷³ The new regime under Milton Obote also experienced enduring civil war, with President Yoeli Kaguta Museveni taking power in 1986 with military support.⁷⁴ Matters did not seem to change under Museveni. Under his leadership, the country has witnessed several insurgencies that adversely affected economic and social stability.⁷⁵

Most notable in this regard is the Lord's Resistance Army (LRA), which under Joseph Konyi has destabilised northern Uganda,⁷⁶ a region said to be vulnerable to insurgency on account of its alleged marginalisation from the south. It is also argued that the strata created by the colonial regime, which treated the northern population as 'problematic',⁷⁷ uneducated and suited only to serve as mere soldiers, had consequential effects.⁷⁸ Many people have been abducted, killed, enslaved, injured, mutilated, and raped by the LRA.⁷⁹ The group abducts children from schools and dragoons them into training as militants, after which they return to commit atrocities against their own communities under the compulsion of the LRA.⁸⁰ In turn, the government has been blamed for serious violations of human rights in the same region in its response to the insurgency.⁸¹

To bring reconciliation and restore peace and harmony, the government of Uganda entered into a peace agreement with the insurgencies.⁸² Apart from granting amnesty to perpetrators of atrocities committed by the insurgencies,⁸³ the agreement recognises traditional justice

⁷³ Thomas and Gardner (2014) at 97; Sarkin (2015) at 114; Quinn (2015) at 221.

⁷⁴ Sarkin (2015) at 113 and 114; Quinn (2015) at 221.

⁷⁵ David P Thomas and Rachel Gardner 'Restorative justice in post-conflict northern Uganda: Exploring reconciliation and reconstruction through transitional justice mechanisms' 3(7) *Online Journal of African Affairs* 2014 at 97; Quinn (2015) at 221; Sarkin (2015) at 114-115.

⁷⁶ Sarkin (2015) at 115. Janet McKnight 'Accountability in northern Uganda: Understanding the conflict, the parties and the false dichotomies in international criminal law and transitional justice' 59(2) *Journal of African Law* 2015 at 194 and 196.

⁷⁷ Latigo (2008) at 85.

⁷⁸ Jeremy Sarkin 'Providing reparations in Uganda: Substantive recommendations for implementing reparations in the aftermath of the conflicts that occurred over the last few decades' 14 *African Human Rights Law Journal* 2014 at 531; Sarkin (2015) at 112; see also Knight (2015) at 195.

⁷⁹ Thomas and Gardner (2014) at 95; Sarkin (2014) at 531-533; Sarkin (2015) at 112; McKnight (2015) at 198-199.

⁸⁰ Hovil and Quinn (2005) at 3; McKnight (2015) at 198-199.

⁸¹ McKnight (2015) at 196 and 199-200; Sarkin (2015) at 112.

⁸² See the Preamble to the Agreement on Accountability and Reconciliation between the government of the Republic of Uganda and the Lord's Resistance Army/Movement. The agreement defines reconciliation as 'the process of restoring broken relationships and re-establishing harmony'.

⁸³ See Uganda's Amnesty Act of 2000, section 4.1(c); Quinn (2015) at 222.

mechanisms as necessary processes to restore peace and harmony in the community.⁸⁴ In Uganda, which is rich in traditional justice, the agreement has simply bolstered a mechanism of justice which was already long available within the community.⁸⁵ In addition, traditional justice in Uganda is recognised under several laws. For instance, the Constitution, apart from recognising the use of customary law,⁸⁶ establishes courts with jurisdiction up to the village level.⁸⁷ The Children Act also empowers local councils to mediate cases involving child offenders⁸⁸ in order to secure reconciliation, compensation, restitution and apology.

Traditional justice was used in many communities for reintegrating child soldiers in the community.⁸⁹ However, this cannot be regarded as the prosecution of offenders of armed conflicts; instead, it is a mechanism for affected communities to restore harmony and find justice for the victims of atrocities. The Acholi applied traditional rituals and justice to compensate victims and hold offenders accountable at the community level. The process involved a cleansing ritual of ‘stepping on eggs’ (*nyono tong gweno*) before the offender rejoined the community.⁹⁰ Thereafter, the offender was required to confess and identify his or her victims.⁹¹ This was followed by community leader’s convening a traditional conference to determine remedies for the confessed crimes.⁹² At the end of the justice process, the offender, together with the victim’s family, were required to perform cleansing rituals such as drinking a concoction of bitter herbs (*oput*), with these rituals symbolising reconciliation and the start of a new life.⁹³ Drinking bitter roots also meant that the ‘bitterness’ of the conflict was taken away by the parties.⁹⁴

⁸⁴ Agreement on Accountability and reconciliation, paragraph 3.1. The agreement specifically provides that ‘traditional justice mechanisms, such as *Culo Kwor*, *Mato Oput*, *Kayo Cuk*, *Ailuc* and *Tonu ci Koka* and others as practices in the communities affected by the conflict, shall be promoted, with necessary modifications, as a central part of the framework for accountability and reconciliation’.

⁸⁵ See Hovil and Quinn (2005) at 23-24; Thomas and Gardner (2014) at 101.

⁸⁶ See Constitution of the Republic of Uganda 1995, article 246.

⁸⁷ See Constitution of the Republic of Uganda 1995, article 129.

⁸⁸ See the Children Act of Uganda, Cap. 59, section 10.

⁸⁹ Among (2013); Quinn (2015) at 224.

⁹⁰ Hovil and Quinn (2005) at 24; Latigo (2008) at 105; Among (2013) at 175; Sarkin (2015) at 134; McKnight (2015) at 216.

⁹¹ Among (2013) at 176; Sarkin (2015) at 134.

⁹² Hovil and Quinn (2005) at 24; Among (2013) at 176; Thomas and Gardner (2014) at 101.

⁹³ Hovil and Quinn (2005) at 24; Latigo (2008) at 105; Among (2013) at 177; Thomas and Gardner (2014) at 101; Quinn (2015) at 224; Sarkin (2015) at 134.

⁹⁴ Thomas and Gardner (2014) at 101.

This form of traditional justice was applied to determine disputes involving minor and serious crimes, such as theft and murder, among the Acholi.⁹⁵ It reflected the African philosophy of *ubuntu*, as the Acholi believe that ‘crime is both a personal and social affair’.⁹⁶ According to Hovil and Quinn, an individual person is important to the well-being of the whole community, because ‘for one to stay away from his home for a long time, that is never acceptable, that is always something bad, something associated with bitterness’.⁹⁷ Similar rituals were performed by the Langi (*kayo cuk*), Lugbara (*terege*) in the west Nile, Iteso (*ailuc*) in eastern Uganda, and Madi (*tonu ci koka*).⁹⁸ The processes were followed by moments of truth-telling, compensation and reconciliation with the victims’ families.⁹⁹

In Uganda, traditional justice has been instrumental in the country’s peace-building process. According to Sarkin, the advantages of traditional justice mechanisms are legion, such as the process being available in the community and conducted in the local language within an accessible distance. The processes of traditional justice are simple for every participant to understand without the assistance of professionals. Unlike courtroom justice that requires the parties have ample time to attend, traditional justice proceedings are held at the convenience of the community, especially in the evening, hence allowing other economic activities to continue. Overall, the process of justice is cheap.¹⁰⁰ Indigenous justice is fast and convenient, because there are no frequent adjournments, objections and appeals against orders during the process. Traditional justice apply to disputes not only between individuals and the community but between one community and another, such as the reconciliation process between the Acholi and Madi, Kakwa, Lugbara or Alur which involved the bending of spears (*gomo tong*) as a symbol of reconciliation.¹⁰¹

However, the use of traditional justice in Uganda has been criticised. Apart from the fact that most of the crimes were international crimes that required prosecution by the International Criminal Court, traditional justice failed to provide appropriate remedies that the community

⁹⁵ Hovil and Quinn (2005) at 24; Quinn (2015) at 224.

⁹⁶ Lajul (2016).

⁹⁷ Hovil and Quinn (2005) at 24.

⁹⁸ Among (2013) at 170-184; Quinn (2015) at 224-225; McKnight (2015) at 215.

⁹⁹ See Hovil and Quinn (2005) at 39; Among (2013) at 176.

¹⁰⁰ Sarkin (2015) at 134.

¹⁰¹ See Quinn (2015) at 224.

needed.¹⁰² Even though reconciliation was possible at the community level, there was no fair reparation for the victims.¹⁰³ Some offenders failed to pay the awarded compensation through their personal means or of their clans, seeing as families were living in camps where economic survival depended on government aid.¹⁰⁴ Furthermore, the nature of the crimes and the enormous number of people affected by them were major challenges for traditional justice mechanisms.¹⁰⁵ It has also been argued that these mechanisms did not meet international law standards, given the inconsistency of its decisions and the possibility of combining restorative and retributive measures in the same process.¹⁰⁶ Furthermore, traditional justice was practised by particular ethnic groups, but was not relevant to all communities.¹⁰⁷ The identification of offenders and victims was also challenging, as some of the offenders were children who were abducted at a young age, so recalling memories of their victims was not easy.¹⁰⁸

Moreover, unlike the traditional courts in Rwanda, which mostly resolved disputes relating to ‘land rights, cattle, marriage, loans and damage to properties’,¹⁰⁹ those in Uganda took measures such as floggings, exposing offenders to wild animals by tying them to trees, and using girls as a means of compensation, all which contravene human rights.¹¹⁰ Most of the processes were discriminatory in that they failed to include women.¹¹¹ Even though indigenous justice was used, the process was nuanced due to particular factors. For instance, the *mato oput* process used during this time was different from the traditional one as it had been ‘modernised’.¹¹²

Again, the government seemed to distance itself from the reconciliation process. For instance,

¹⁰² Wilfred Lajul ‘Justice and post-LRA war in Northern Uganda: ICC versus Acholi traditional justice system’ The European conference on Ethics, Religion and Philosophy, International Academic Forum 2016.

¹⁰³ Lajul (2016).

¹⁰⁴ Hovil and Quinn (2005) at 26; Thomas and Gardner (2014) at 101.

¹⁰⁵ Hovil and Quinn (2005) at 30; Hope Among ‘The application of traditional justice mechanisms to the atrocities committed by child soldiers in Uganda: A practical restorative approach’ 13 *African Human Rights Law Journal* 2013.

¹⁰⁶ Hovil and Quinn (2005) at 40.

¹⁰⁷ Thomas and Gardner (2014) at 101.

¹⁰⁸ See Among (2013) 195 and 197; Thomas and Gardner (2014) at 95.

¹⁰⁹ Vandeginste S ‘Justice, reconciliation and reparation after genocide and crimes against humanity: The proposed establishment of popular *gacaca* tribunals in Rwanda’ All-Africa Conference on African Principles of Conflict Resolution and Reconciliation, United Nations Conference Centre, Addis Ababa 1999 at 17.

¹¹⁰ See Among (2013) at 203, 206-207

¹¹¹ Thomas and Gardner (2014) at 101-102.

¹¹² McKnight (2015) at 209-210.

apart from the recognition of traditional justice mechanisms in the Juba agreement protocol, the government did not legitimise the processes.¹¹³ Despite all these challenges, many people still favour traditional means of justice in Uganda.¹¹⁴

5.4 Restorative justice and *fambul toks* in Sierra Leone

Sierra Leone was in a state of civil war for more than a decade, during which thousands of people were killed, injured, amputated, raped, tortured and psychologically wounded.¹¹⁵ As in Uganda, rebels in Sierra Leone abducted and used children as combatants to perpetrate unprecedented human rights abuses.¹¹⁶ The Lomé Peace Agreement granted to amnesty to rebels and the signing of the agreement was followed by the establishment of the Truth and Reconciliation Commission.¹¹⁷ The peace-building process was coupled with the establishment of special courts which prosecuted the perpetrators of atrocities committed after the signing of the peace agreement.¹¹⁸

However, the majority of Sierra Leoneans neither felt justice nor reconciliation under the Truth and Reconciliation Commission. The Commission only covered a few places, leaving the majority of victims unattended.¹¹⁹ In areas where the Commission reached, time and resources did not allow adequate time for truth-telling.¹²⁰ Hence, few victims and perpetrators benefited from the Commission's reconciliation process. The special court, on the other hand, was very slow in bringing accountability to offenders. First, the special court's justice process was too formal, was established in foreign settings, and the proceedings were conducted in a

¹¹³ See Lajul (2016).

¹¹⁴ Hovil and Quinn (2005) at 26; Among (2013b) at 458; Quinn (2015) at 225.

¹¹⁵ Joe AD Alie 'Reconciliation and transitional justice: Tradition-based practices of the Kpaa Mende in Sierra Leone' in Luc Huyse and Mark Salter (eds) *Traditional justice and reconciliation after violent conflict: Learning from African experience* International IDEA Publications Stockholm Sweden 2008 at 140 and 145.

¹¹⁶ Alie (2008) at 125 and 141.

¹¹⁷ See Lomé Peace Agreement 1999, article XXVI(1); Truth and Reconciliation Commission Act of 2000. According to section 6 of the Act, the Commission was mandated with the task of investigating human rights violations caused by the conflict; dealing with impunities and address the needs of the victims; reconciling and the local community and assist in the healing process and set up mechanisms to prevent future abuse of human rights.

¹¹⁸ John L Hirsch 'Peace and justice: Mozambique and Sierra Leone compared' in Chandra Lekha Sriram and Suren Pillay (eds) *Peace versus Justice? The dilemma of transitional justice in Africa* University of KwaZulu-Natal Press South Africa 2009 at 212; Among (2013) at 293.

¹¹⁹ Aile (2008) at 131; Courtney E Cole 'All in the 'fambul': A case study of local/global approaches to peace-building and transitional justice in Sierra Leone' United States Institute of Peace 2012 at 3.

¹²⁰ Aile (2008) at 131.

foreign language.¹²¹ In an interview with Mgbako and Baehr, one person described the court process as ‘a spectator sport’ full of ‘black magic’ with no relevance to the general community.¹²² Secondly, as with the International Criminal Tribunal in Rwanda, proceedings were conducted in a local language and translated in a local language for the participants to understand. The court could not deliver justice for the myriad traumatised victims.¹²³ In addition, running the court was highly expensive. For instance, it was questioned for having spent \$200 million to prosecute 11 people.¹²⁴ Even so, justice was not fully achieved. Generally, the Commission and the court were more or less ‘international instruments’ with little relevance to the local community.¹²⁵

After the work of these formal and expensive organs, the local community still yearned for meaningful reconciliation, restoration, reintegration and healing.¹²⁶ According to Aile, ‘[for] reconciliation to be successful, meaningful and long-lasting, it has to be done at the community level and by the people of the community themselves’.¹²⁷ The community, especially at the grassroots level, needed an opportunity for truth-telling, apology, forgiveness and reconciliation. This situation propelled the establishment of *fambul toks*, which means ‘family talk’ in the local Krior language.¹²⁸ Like the *gacaca* courts in Rwanda, *fambul toks* enabled the local community, including victims, perpetrators and witnesses, to come together, discuss the aftermath of the atrocities, and reconcile parties.¹²⁹ Though *fambul toks* were externally funded,¹³⁰ the local community coordinated proceedings through chiefs

¹²¹ Chi Mgbako and Kristina Scurry Baehr ‘Paralegal organisations and customary law in Sierra Leone and Liberia’ in Jeanmarie Fenrich, Paolo Galizzi and Tracy E Higgins (eds) *The future of African customary law* Cambridge University Press New York 2011 at 174.

¹²² Mgbako and Baehr (2011) at 174.

¹²³ See Mgbako and Baehr (2011) at 174.

¹²⁴ John Caulker ‘Fambul tok: Reconciling communities in Sierra Leone’ *Accord Issue 23* at 52, available at http://www.c-r.org/downloads/CON1222_Accord_23_11.pdf (accessed 4 May 2018). See also Alie (2008) at 132.

¹²⁵ Caulker at 52.

¹²⁶ Cole (2012) at 4; Among (2013) at 163; Caulker at 52; Carly Stauffer ‘Restorative interventions for post war nations’ in Katherine S van Wormer and Loren Walker (eds) *Restorative justice today: Practical applications* SAGE Publications Los Angeles 2013 at 198; see also Among (2013) at 163.

¹²⁷ Aile (2008) at 142.

¹²⁸ *Fambul toks* are a form of traditional justice practised since the pre-colonial era but re-established in 2008 to deal with civil war atrocities. See Cole (2012) at 4-5; Stauffer (2013) at 198.

¹²⁹ Cole (2012) at 4.

¹³⁰ John Caulker ‘Fambul tok: Reconciling communities in Sierra Leone’ *Accord Issue 23* at 52-53, available at http://www.c-r.org/downloads/CON1222_Accord_23_11.pdf (accessed 4 May 2018).

and volunteers.¹³¹ Restorative meetings used resources that were available in the local community for peace-building.¹³² Meetings were held in the chief's place (*barray*); they were therefore cheap and sustainable.¹³³ As with traditional justice in Uganda, reconciliation involved community rituals such as seeking the intervention of spirits of ancestors, storytelling, bonfires, songs, dances and cleansing ceremonies.¹³⁴ However, one of the distinctive features of *fambul toks* of the Acholi in Uganda is the involvement of women in the justice process.¹³⁵

The major aim of *fambul toks* was to secure confession, truth-telling, forgiveness, healing and reintegration. Unlike the Commission and the special court, *fambul toks* were accessible to all members of the community at the village level. Justice processes under *fambul toks* engaged the ordinary members by invoking cultural practices that were already known to community members¹³⁶ because Sierra Leone has used customary law for centuries. Customary law is also recognised under the Constitution and national laws.¹³⁷ In addition, traditional justice is accessible, cheap, fast and easily understandable by the local community. The proceedings are conducted in the local language for participants to follow easily and freely express their grievances. Traditional justice involves the community, hence there is a low possibility of miscarriages of justice, and participants have enough time for truth-telling, forgiveness, apology and reconciliation. Participants aim at achieving the major needs of the community, which are community peace and harmony. Even where retributive measures are imposed on the offender, the intention is to restore order for the future community peace.¹³⁸ However, traditional justice is centralised and rigid; justice practices that apply to Uganda or Sierra Leone may not be relevant to other societies due to the distinctive rituals that attach them. In addition, the use of elders in the justice process marginalises other groups such as youth and

¹³¹ Caulker at 53

¹³² Cole (2012) at 7.

¹³³ Caulker at 53; Alie (2008) at 134.

¹³⁴ Aile (2008) at 133; Cole (2012) at 1 and 5; Caulker at 53

¹³⁵ Alie (2008) at 133.

¹³⁶ Cole (2012) at 6 and 7.

¹³⁷ The Constitution of Sierra Leone of 1991, article 170; EEC Shears-Moses 'The interaction of customary law, traditional religions and statutes' A paper for the conference on the law and religion in Africa – comparative practices, experiences and prospects at 11-12, available at <https://www.iclrs.org/content/events/28/1743.pdf> (accessed 4 May 2018).

¹³⁸ Aile (2008) at 143.

children; moreover, if these elders do not transfer their knowledge to the new generation, traditional justice is in danger of extinction.¹³⁹

5.5 Reconciliation under *magamba* spirits in Mozambique

In Mozambique, the ten-year fight for independence was immediately followed by another vicious civil war, one that lasted two decades.¹⁴⁰ Many were killed, tortured and raped; hatred and shattered communities were the evident effects of the war.¹⁴¹ As in the case of Sierra Leone and Uganda, perpetrators were from the injured communities since they had been forced to harm their own kin. Unlike Sierra Leone, however, the authorities in Mozambique did not set up mechanisms for reconciliation after the war.¹⁴² Mere forgiveness, reflected in such catchphrases as a ‘policy of silence’¹⁴³ and ‘not to look back’,¹⁴⁴ was advocated without there being a proper forum for truth-telling, forgiveness, reparation, reintegration and reconciliation. Various groups such as religious leaders, chiefs and traditional healers ventured into the peace-building process by encouraging people to forgive and open a new chapter of life.¹⁴⁵ However, peace-building without a reconciliation process was a daunting task because there was no formal restoration process for the victims. While the need for true reconciliation was pertinent, especially at the local community level, there were no initiatives to bring communities together to vent their grievances and restore the harmony ruptured by the conflict. Generally, victims lived alongside their perpetrators without any meaningful

¹³⁹ *Id* at 144-145.

¹⁴⁰ The country fought for independence from 1964-74, then entered into civil war from 1976-92. Nelson Alusala and Dominique Dye ‘Reintegration in Mozambique: An unresolved affair’ Institute of Security Studies ISS Paper No. 217 2010 at 1; Lisa Reppell, Jonathan Rozen and Gustavo de Carvalho ‘Planning for peace: Lessons from Mozambique’s peace-building process’ Institute for Security Studies ISS Paper No. 291 2016 at 5.

¹⁴¹ See Victor Igreja ‘The politics of peace, justice and healing in post-war Mozambique: “Practices of rapture” by *magamba* spirits and healers in Gorongosa’ in Chandra Lekha Sriram and Suren Pillay (eds) *Peace versus Justice? The dilemma of transitional justice in Africa* University of KwaZulu–Natal Press South Africa 2009 at 280-281.

¹⁴² Igreja (2009) at 278.

¹⁴³ *Id* at 281.

¹⁴⁴ Hirsch (2009) at 202.

¹⁴⁵ Victor Igreja and Beatrice Dias-Lambranca ‘Restorative justice and the role of *magamba* spirits in post-civil war Gorongosa, central Mozambique’ in Luc Huyse and Mark Salter (eds) *Traditional justice and reconciliation after violent conflict: Learning from African experience* International IDEA Publications Stockholm Sweden 2008 at 67.

reconciliation.¹⁴⁶

In what may be regarded as extraordinary in modern society, the communities in Mozambique have a strong belief in influence of the spirits of the dead on living persons.¹⁴⁷ People believed that the spirits of dead male soldiers (*magamba* spirits) who suffered atrocities during the civil war possessed individual family members and demanded justice.¹⁴⁸ This was coupled with perceived afflictions among possessed victims, such as miscarriage, the sudden death of new-borns, and the inability to conceive.¹⁴⁹ Family members of the possessed victim would consult a *gamba* healer whenever symptoms of unusual spirits were suspected. The healer was believed to possess divine powers to rouse the *magamba* spirits so that the secret behind the suffering could be revealed.

This was where the reconciliation process originated. The *magamba* healer would convene a gathering of community members by drumming to sound the alarm.¹⁵⁰ The presence of community members was vital, as the *magamba* spirits' secret was supposed to be heard by the community. After being roused, the spirit used the victim's voice to show the denial of justice for past atrocities.¹⁵¹ The spirit named the perpetrator and the committed transgression; the perpetrator was then brought before the community for accountability, restoration and reconciliation.¹⁵² This was followed by restoration measures and reconciliation ceremonies to let the spirit go.¹⁵³ In case the perpetrator was dead, his family members were responsible on his behalf.

Magamba healers acted as mediators by convening community gatherings, facilitating

¹⁴⁶ The ceasefire agreement enabled community members who were involved in the conflict to come back and resettle in their places next to their perpetrators and victims. This situation could occasion future violence because the community was not brought to reconciliation. See Igreja (2009) at 279.

¹⁴⁷ Alcinda Manuel Honwana 'Healing for peace: Healers and post-war reconstruction in Southern Mozambique' 3(3) *Peace and Conflict: Journal of Peace Psychology* 1997 at 296-297.

¹⁴⁸ The local community used the bodies of dead soldiers to immunise themselves against war-related deaths; hence the spirits of dead soldiers possessed the relatives of those who had abused the corpses to call for justice. Igreja and Dias-Lambranca (2008) at 61-62; Igreja (2009) at 287-288.

¹⁴⁹ Igreja and Dias-Lambranca (2008) at 68 and 70; Igreja (2009) at 278 and 290.

¹⁵⁰ Igreja and Dias-Lambranca (2008) at 73-74.

¹⁵¹ Igreja (2009) at 288-289.

¹⁵² Igreja and Dias-Lambranca (2008) at 72; Igreja (2009) at 289.

¹⁵³ See Igreja (2009) at 292-293.

discussions and assisting in implementing the agreement.¹⁵⁴ The perpetrator was supposed to apologise and take responsibility for his transgression. The damaged relationship was restored, harmony was re-established and the offender was reintegrated in the community. The healer also had to ask the spirit to set the victim free. If no reconciliation were achieved, the *magamba* spirit continued demanding justice by tormenting the victim. Reconciliation through *magamba* spirits was not the only way of restoring harmony in Mozambique. Rituals to honour the spirits of the dead (*Ku pahla*) were applied in order to bring peace and healing after the war.¹⁵⁵

Restorative intervention in form of *magamba* spirits and *Ku pahla* are quite different to the modalities used in Uganda, Sierra Leone and Rwanda. First, the use of *magamba* spirits as a form of justice was not formal; the community embarked on the process only to resolve the rifts created by the civil war. Secondly, *magamba* spiritual intercession was used only in the Gorongosa district in Mozambique.¹⁵⁶ Thirdly, those who acted as mediators were supposed to possess divine power to rouse the spirits before the reconciliation process begins. Fourth, the victims identified by *magamba* spirits were not necessarily actual victims. In fact, few victims of war were involved as the process applied as a mechanism for reconciliation claimed by *magamba* spirits.

Nonetheless, the significance of such a traditional justice approach in Africa cannot be ignored. It reveals the essential togetherness that needs to be maintained by the whole community. The process is also significant in ushering in a form of justice that the African community needs, as it (the process) was able to involve the responsible parties in reconciliation. Even though the government encouraged the community to forgive, the community believed true forgiveness comes after taking responsibility. They believed that *magamba* spirits could only leave the victim after the offender had taken responsibility and reconciliation was achieved. The process was a reflection of the justice process that the government of Mozambique ought to have adopted. It was a system that endeavoured to understand the cause of the problem and find a solution to it in the interests of the betterment

¹⁵⁴ See Igreja and Dias-Lambranca (2008) at 74; Igreja (2009) at 289.

¹⁵⁵ Honwana (1997) at 296.

¹⁵⁶ Igreja (2010) at 53 and 56.

of the community.

The Mozambican experience also share some significant similarities with other forms of traditional justice in Africa. In all these experiences, reconciliation is the major concern of the community. For instance, in Sierra Leone, even though the government established prosecution machinery (the special courts), the community needed reconciliation that could restore community peace. The local community believed that true reconciliation was not possible without involving the affected ordinary members of the community. In all these experiences, indigenous justice was practised with minimal supervision by the State. In other words, the community has a sense of true justice in its own eyes. Despite the amnesty law in Uganda, the community still applied indigenous justice to reintegrate ex-soldiers. In the absence of formal justice measures in Mozambique, the community had an alternative approach to reconciliation. In Mozambique, the ‘forgive and forget’ policy advocated by the government did not prevent the community from invoking spirits to achieve justice.¹⁵⁷ The community believed that relinquishing the past was not possible without proper redress for the victims of civil war. In Mozambique some in the community believed the war came as retaliation visited on the country by the unvenerated spirits of ancestors.¹⁵⁸ It was therefore necessary to restore peace by involving the community.

All these experiences point to the high value attached to individual members of the community. Offenders were still valued despite the heinous atrocities they committed against their community. In ways similar to the restorative justice approach, indigenous justice did not intend to punish offenders but to repair and restore the broken relationships between individuals; similarly, the community was the major stakeholder in restoration of peace. The needs of the victims were addressed and the offender was made responsible to the victim and the community.

5.7 Conclusion

It is impossible to ignore the role of restorative justice mechanisms in Africa. Today the

¹⁵⁷ Victor Igreja ‘Traditional courts and struggle against state impunity for civil wartime offences in Mozambique’ 54(1) *Journal of African Law* 2010 at 52.

¹⁵⁸ Honwana (1997).

African communal lives in many parts still favour the use of justice mechanisms that support community relationships. Indigenous justice in Africa has historical roots¹⁵⁹ and managed to survive the colonially inherited criminal justice systems which regarded indigenous justice as barbaric. Many African communities still use informal restorative justice mechanisms in conflict management. In addition, in other parts of the world, especially where communal life exists, the indigenous criminal justice system has been the common justice mechanism at the community level. Africa, New Zealand¹⁶⁰ and Canada¹⁶¹ are good samples of indigenous restorative justice. Indigenous restorative justice practices potentially have a key role to play in the future of criminal justice system in Africa. When principles of indigenous justice are adopted in the criminal justice process, decisions are not simply based on enacted laws: the well-being of the community becomes the focal point. Victims will have an opportunity to share grievances arising from the crime; the offender communicates his or her needs to the community. In this way, the conflict is returned to the community and the same community takes responsibility for offenders. As a result, the community will understand its needs and those of the victim and offender and thereby find ways to reduce criminality.

This kind of justice process has been practised in many communities, including those in Africa, for centuries. Before colonial intrusion in Africa, chiefs used uncodified laws to determine disputes under chief courts. A dispute reached the chief as an appellate body for conflicts arising from the families and clans. Under this traditional dispute settlement, the rules of justice were simple and the process convenient.¹⁶² In many communities, dispute resolution process was a community event for members to attend. The process was convened within the community's public surroundings to make it easy to attend events.¹⁶³ Under indigenous justice process, there were no precedents, though similar facts could be used for other similar cases. The major aim of the justice process was restoration, restitution,

¹⁵⁹ Daniel W Van Ness 'New wine and old wineskins: Four challenges of restorative justice in Declan Roche (ed) *Restorative Justice* Ashgate USA 2004 at 141.

¹⁶⁰ See Jim Consedine '*Restorative justice: Healing the effects of crime*' Ploughshares Lyttelton New Zealand 1995 at 83-84 and 89.

¹⁶¹ Martin Wright 'Restorative justice: The basic idea, and practice in the United States' in E Fattah and S Parmentier (eds) *Victim policies and criminal justice on the road to restorative justice* Leuven University Press 2001 at 353.

¹⁶² Jim Consedine '*Restorative justice: Healing the effects of crime*' Ploughshares New Zealand 1999 at 169-171 and 173.

¹⁶³ *Ibid.*

compensation and restoring broken relationships in the community.¹⁶⁴ Punishment of the offender was secondary to social harmony and tranquillity; the offender remained part of the community after taking responsibility for his misbehaviour.¹⁶⁵

In order to take a new direction in criminal justice systems in Africa, the values of indigenous restorative justice can be adopted in these systems and applied as diversionary measures. In Nigeria, traditional law is part of the criminal law that applies in customary courts.¹⁶⁶ In Sierra Leone, customary courts work in parallel to conventional courts.¹⁶⁷ In many African countries, traditional justice applies as an informal justice mechanism in minor conflicts. For instance, Christie's monumental work on conflict as property records an informal application of traditional justice in Tanzania.¹⁶⁸

¹⁶⁴ *Id* at 171.

¹⁶⁵ *Id* at 170 and 171.

¹⁶⁶ Omale (2012) at 1.

¹⁶⁷ Ochieng Adala' Sierra Leone: A country review of crime and criminal justice, 2008' 2009 (160) *Institute for Security Studies Monographs* 2009 at 5.

¹⁶⁸ See chapter 1.

Chapter 6:

Ubuntu and Restorative Justice under Transitional Justice in Africa

6.1 Introduction

Like *utu*,¹ *ubuntu*, a widespread philosophy in South Africa,² refers to concepts about humanity.³ Each of the terms reflects the cardinal value African culture attaches to community peace and harmony.⁴ A dispute normally disturbs humanity and therefore a need for restoration arises. On the other hand, restorative justice is a mechanism of justice that values the restoration of relationships, which is one of the tenets of *ubuntu* or *utu* in the society. Therefore, justice should restore broken relationships; it should aim at reconciliation, restoration, restitution, reparation and community peace-building.

The African way of life is naturally against any justice process that exacerbates enmity or damages community relationships, given that the majority of people lead a communal life that stresses the survival value of mutual interdependence.⁵ Though some criticise this

¹ See Sara Kinyanjui 'Restorative justice in traditional pre-colonial 'Criminal Justice Systems' in Kenya' 10 *Tribal Law Journal* 2009-2010 at 3.

² Dirk J Louw 'The African concept of *ubuntu* and restorative justice' in Dennis Sullivan and Larry Tiffit (eds) *Handbook of restorative justice* Routledge London 2006 at 161; Douglas HM Carver 'The Xhosa and the Truth and Reconciliation Commission: African ways' 8 *Tribal Law Journal* 2007-2008 at 34; Don John O Omale 'Restorative justice and victimology: Euro-Africa perspective' Wolf Legal Publishers 2012 at 21.

³ Ann Skelton 'Tapping indigenous knowledge: Traditional conflict resolution, restorative justice and the denunciation of crime in South Africa' in Elrena van der Spuy, Stephan Parmentier and Amanda Dissel (eds) *Restorative justice: Politics, policies and prospects* Juta Cape Town South Africa 2007 at 232.

⁴ Skelton (2007) at 232.

⁵ Nonso Okafo 'Relevance of African traditional jurisprudence on control, justice, and law: A critique of the Igbo experience' 2(1) *African Journal of Criminology and Justice Studies* 2006 at 42-43. In Tanzania, for instance, almost 80 per cent of the population live in rural villages. They are organised in communities which allow every member to be known and recognised by the entire rural community. Such communal life allows them to share certain communal activities, and therefore their communal life is of much importance and should be protected. To achieve unity and harmony, a transgression normally attracts the attention of the whole community and the whole community therefore has an automatic interest in dispute resolution. Taking the conflict away from the community, as the adversarial legal system does, is a denial of the community's right to restore broken harmony within itself. See <http://worldpopulationreview.com/countries/tanzania-population/> (accessed 2 February 2016).

lifestyle and consider it a weakness of *ubuntu*,⁶ it is an aspect of African culture which cannot be easily changed because, after a conflict, the same people come back to the same community to resume communal life.⁷ In some places, access to formal justice is remote and expensive.⁸ Therefore, many people cannot abandon this cheaper and affordable traditional restorative justice for dispute resolution. In line with African jurisprudence, traditional justice may be a mechanism to ‘restore social harmony’ and ‘reconcile the parties’⁹ so that communal relationships are strengthened. Under certain circumstances, the adversarial criminal justice system may be irrelevant to these communities because of its technicalities. Such communities may need a system that upholds their communal lifestyle, unless it be that the offence requires such technical processes.¹⁰

It is not prudent to ignore this African jurisprudence because it is a natural system of life. The system does not require formal training to understand humanity; this understanding is embedded in human nature. This chapter examines the spirit of restorative justice in *ubuntu*. The restorative justice approach taken by the South African Truth and Reconciliation Commission and its influence on other commissions in Africa under transitional justice are also analysed. It is argued in this chapter that South Africa applied values of restorative measures which mirrored traditional justice processes to a greater or less extent, to restore peace in the wake of the apartheid regime. It is further argued that the spirit of *ubuntu* portrays the African culture that aligns with restorative justice approach. Therefore, restorative approach is necessary in Africa as it nurtures culture and communal lifestyle. African restorative justice processes based on *ubuntu* are more relevant to Africa than imported foreign models. As *ubuntu* justice belongs to Africa hence application of restorative interventions based on African philosophy, which can work alongside with the conventional

⁶ See Tom W Bennett ‘*Ubuntu: An African equity*’ in Frank Diedrich (ed) *Ubuntu, good faith and equity: Flexible legal principles in developing a contemporary jurisprudence* Juta South Africa 2011 at 15.

⁷ In African rural communities, many activities demand the participation of families in a communal way, such as traditional celebrations, ritual functions, funerals, village meetings, and agricultural activities. Lack of rain, for instance, may involve the whole community in performing rituals to appease the ancestors. Some villages, especially in Tanzania, form security groups (*sungusungu*) for the welfare of the community. See also Omale (2012) at 22.

⁸ See Don John O Omale *Restorative Justice and Victimology: Euro-Africa Perspective* Wolf Legal Publishers 2012 at 22.

⁹ *Ibid.*

¹⁰ See Omale (2012) at 22.

criminal justice system, is an ‘Africanisation’ of the criminal justice process.¹¹ As discussed in previous chapters, New Zealand sets a good example, but African countries under transitional justice have also proved their worthiness. The values of traditional justice should apply not only in transitional periods, but should generally inform Africa’s regular approach to conflict management.¹²

6.2 *Ubuntu* as the African philosophy of justice

Restorative justice in South Africa traces back to the jurisprudence of *ubuntu*, which is regarded as the major philosophy of reconciliation in the country. *Ubuntu* became popular after being adopted as a constitutional value enshrined in the South African interim Constitution of 1993.¹³ However, the spirit of *ubuntu* has existed for centuries.¹⁴ Even though the philosophy does not directly feature in the 1996 constitution,¹⁵ it still exists through the Bill of Rights and has continued to influence judicial interpretations by the Constitutional Court.¹⁶ In daily interactions, *ubuntu* manifests itself in ‘human dignity, respect, inclusivity, compassion, concern for others, honesty and conformity’.¹⁷

It is difficult to define *ubuntu* precisely as it connotes various aspects of the African communal lifestyle and the spirit of humanity.¹⁸ Even trying to define *ubuntu* using a foreign

¹¹ See J Sloth Nielsen and J Gallinetti ‘Just say sorry? *Ubuntu*, africanisation and the child justice system in the Child Justice Act 75 of 2008’ 14(4) *PER Potchefstroom* 2011. Also available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812011000400004 (accessed 11 July 2017); Khunou Samwel Freddy ‘Judging *ubuntu* and Africanisation of the Child Justice Act’ Published on Pambazuka News 2013, available at <https://www.pambazuka.org/printpdf/86536> (accessed 11 July 2017).

¹² See Skelton (2007) at 232.

¹³ See Constitution of the Republic of South Africa, Act 200 of 1993 article 251; see also Mokgoro (2012) at 321.

¹⁴ See Sylvester B Maphosa and Alphonse Keasley ‘Disrupting the interruptions: Re-considering *ubuntu*, reconciliation and rehumanization’ 12(2) *African Renaissance* 2015 at 27.

¹⁵ See Drucilla Cornell and Karin van Marle ‘Exploring *ubuntu*: Tentative reflections’ in Drucilla Cornell and Nyoko Muvangua (eds) *Ubuntu and the law: African ideals and post-apartheid jurisprudence* Fordham University Press New York 2012 at 354.

¹⁶ See Ann Skelton ‘The South African Constitutional Court’s restorative justice jurisprudence’ 1(1) *Restorative Justice: An International Journal* 2013 at 123-127; Koos Malan ‘The suitability and unsuitability of *ubuntu* in constitutional law – inter-communal relations versus public office bearing’ *De Jure* 2014 at 233-234.

¹⁷ Yvonne Mokgoro ‘*ubuntu* and the law in South Africa’ in Drucilla Cornell and Nyoko Muvangua (eds) *Ubuntu and the law: African ideals and post-apartheid jurisprudence* Fordham University Press New York 2012 at 320.

¹⁸ Mokgoro (2012) at 317.

language may be misleading,¹⁹ because ‘it is one of those things that you know when you see it’.²⁰ It is described as ‘a philosophy of life which in its most fundamental sense represents personhood, humanity, humanness and morality’,²¹ and ‘social justice and fairness’.²² Zimunya and Gwara consider ‘humanness, benevolence, kindness, charitableness, altruism selfishness, and love for fellow human beings’ as the values of *ubuntu*.²³ It is ‘a culture, which places some emphasis on the commonality and on the interdependence of the members of the community’.²⁴

It is sometimes compared to *shalom* under canon law,²⁵ but something different from social contract theory.²⁶ Bennett equates *ubuntu* with equity under Western common law jurisdictions and regards it as ‘a *lived* system of norms’.²⁷ Sachs compares *ubuntu* and *amende honourable*,²⁸ for two main reasons. First, the two concepts refer to forms of restorative justice encounter. Secondly, they intend to restore shattered harmony in the community.²⁹ Though the concept of *amende honourable* seems to be an old concept, it resurfaces in South Africa through *ubuntu* and restorative justice.³⁰ It seems to attach importance to apology in dispute resolution. Others equate *ubuntu* with natural justice.³¹ Some compare *ubuntu* to the socialist ideology of *ujamaa* espoused by Julius Nyerere of

¹⁹ Desmond Tutu *No future without forgiveness* Rider Books London 1999 at 34.

²⁰ Mokgoro (2012) at 317.

²¹ Cornell (2012) at 331; Mokgoro (2012) at 317; *S v. Makwanyane* 1995 (3) SA 391 (CC).

²² Justice Mandala in *S v. Makwanyane* 1995 (3) SA 391 (CC), paragraph 237.

²³ Clive Tendai Zimunya and Joyline Gwara ‘The feasibility of an *ubuntu* ethic in a modernised world’ 2(1) *Journal of African Foreign Affairs* (JoAFA) 2015 at 9.

²⁴ Justice Jajbhay in *City of Johannesburg v. Rand Properties (Pty) Ltd and Others* 2006 (2) All SA 240 (W), paragraph 63.

²⁵ André Mukheibir ‘*Ubuntu* and the *amende honourable* – a marriage between African values and Medieval Canon Law’ 28 (3) *Obiter* 2007.

²⁶ Cornell (2012) at 328.

²⁷ TW Bennett ‘*Ubuntu*: An African equity’ in Frank Diedrich (ed) *Ubuntu, good faith and equity: Flexible legal principles in developing a contemporary jurisprudence* Juta South Africa 2011 at 17. *Italic* is taken from the original text.

²⁸ *Amende honourable* is a Roman-Dutch legal concept which ‘emphasises apology and retraction’. Mukheibir (2007) at 588; see also Ann Skelton ‘Civilising civil justice’ in David J Cornwell, John Blad and Martin Wright *Civilising criminal justice: An international restorative justice agenda for penal reform* Waterside Press 2013 at 175.

²⁹ Justice Sachs in *Dikoko v. Mokhatla* 2007 (1) BCLR 1 (CC), paragraph 116.

³⁰ Skelton (2013) at 177-183; see also *Dikoko v. Mokhatla* 2007 (1) BCLR 1 (CC);

³¹ Maureen Owor ‘Creating an independent traditional court: A study of Jopadhola clan courts in Uganda’ 56(2) *Journal of Africa Law* 2012 at 222.

Tanzania or the ‘humanism’ of Kenneth Kaunda of Zambia.³² Justice Mokgoro considers *ubuntu* as the philosophy that ‘emphasises respect for human dignity, marking a shift from confrontation to conciliation’.³³

It remains the fact, then, that *ubuntu* is a complex term, albeit one easily understood from within the African way of life. *Ubuntu*, which originates from Zulu and Xhosa in South Africa, simply means ‘a human being is a human being because of other human beings’.³⁴ It amplifies the personality of an individual within a community where the communal life is valued.³⁵ *Ubuntu* in an African community is aptly reflected in daily lives through the communitarian life that does not count individuality as a vital value.³⁶ According to Cornell, *ubuntu* is ‘the life force by which a community of persons [is] connected to each other’.³⁷ The key ‘values of *ubuntu* include group solidarity, conformity to basic norms, compassion, respect, human dignity, humanistic orientation and collective unity’.³⁸

6.2.1 Criticisms of *ubuntu*

There are several criticisms advanced against this African jurisprudence. It is argued that *ubuntu* as a philosophy is a fragile concept, hence it cannot apply a value to the wider community.³⁹ Some scholars argue that *ubuntu* cannot be a constitutional principle as it contravenes other constitutional values of a democratic nation.⁴⁰ According to this criticism, *ubuntu* has two sides: one that advocates for humanity and togetherness; and the other a discriminatory ideology which disfavours human rights principles such as women’s dignity,

³² Bonny Ibhawoh ‘Beyond retribution: Truth and Reconciliation in South Africa as universal paradigm for restorative transitional justice’ 2(2) *Covenant University Journal of Politics and International Affairs* 2014 at 5-6.

³³ Justice Makgoro in *S v. Makwanyane* 1995 (3) SA 391 (CC), paragraph 308.

³⁴ Mokgoro (2012) at 317.

³⁵ See Narnia Bohler-Müller ‘Some thoughts on the *ubuntu* jurisprudence of the constitutional court’ in Drucilla Cornell and Nyoko Muvangua (eds) *Ubuntu and the law: African ideals and post-apartheid jurisprudence* Fordham University Press New York 2012 at 370.

³⁶ Cornell (2012) at 331; Mokgoro (2012) at 318.

³⁷ Cornell (2012) at 331.

³⁸ Justice Mokgoro in *S v. Makwanyane* 1995 (3) SA 391 (CC), paragraph 308; Mokgoro (2012) at 318.

³⁹ Thaddeus Metz ‘*Ubuntu* as a moral theory and human rights in South Africa’ 11 *African Human Rights Law Journal* 2011 at 533.

⁴⁰ Ilze Kevvy ‘*Ubuntu*: Ethnophilosophy and core constitutional values’ in Frank Diedrich (ed) *Ubuntu, good faith and equity: Flexible legal principles in developing a contemporary jurisprudence* Juta South Africa 2011 at 37.

gender equality and sexuality.⁴¹ For instance, the ‘dark side of *ubuntu*’ has always considered women as men’s tool of sexual satisfaction,⁴² or women as ‘minors under the care of their husbands’.⁴³ Some argue that *ubuntu* can only be pertinent if it becomes part of the solution to overarching African issues such as corruption, political instability, human rights violations, and perennial conflicts.⁴⁴ According to Zimunya and Gwara, corruption, unemployment, dictatorship, xenophobia, nepotism, violent crime and an increasing poverty raise questions as to whether the idea is still relevant in African modern societies.⁴⁵

While the campaign for *ubuntu* continues, evidence on the ground may suggest a deterioration of this African ideology.⁴⁶ Also, when certain communities claim ownership of *ubuntu*, individualistic behaviours that generate vile acts such as xenophobia and nepotism begin to emerge.⁴⁷ Some have argued that *ubuntu* was a meaningful value in the past, but has little pertinence to present and future generations.⁴⁸ In urban areas, some have little understanding of the concept; some subsume *ubuntu* into Western culture.⁴⁹ *Ubuntu* is also criticised for being a quasi-religious doctrine with no scriptural background. Its emphasis on humanity does not make it unique, because other religions such as Christianity and Islam also accentuate respect for humanity.⁵⁰ In fact, other cultures also value humanity.⁵¹ Keevy views *ubuntu* as a notion which is more of an African value; it is connected to rituals and beliefs.⁵² It links living humans, the spirits of the dead and the generation to come.⁵³ It is further argued that although *ubuntu* seems to convey the ideology of African humanity, it is not necessarily understood on the whole continent. While it is true that people in sub-Saharan

⁴¹ See Keevy (2011) at 37-38; Cornell (2012) at 328-329.

⁴² See Keevy (2011) at 37.

⁴³ Cornell (2012) at 329.

⁴⁴ See Mwizajo Nkhata ‘Towards constitutionalism and democratic governance: *Ubuntu* and equity as a basis for regulating public functionaries in common-law Africa’ in Frank Diedrich (ed) *Ubuntu, good faith and equity: Flexible legal principles in developing a contemporary jurisprudence* Juta South Africa 2011 at 92.

⁴⁵ Gert Breed and Kwena Semanya ‘*Ubuntu, koinoia and diakonia, a way of reconciliation in South Africa?*’ 71(2) *HTS Teologiese Studies/Theological Studies* 2015 at 3-5; Zamunya and Gwara (2015) at 11-23.

⁴⁶ See Zamunya and Gwara (2015).

⁴⁷ Breed and Semanya (2015) at 2.

⁴⁸ Cornell and Van Marle (2012) at 344; see also Zamunya and Gwara (2015).

⁴⁹ Neville Curle ‘A Christian theological critique of *ubuntu* in Swaziland’ 20 *Conspectus* 2015 at 16.

⁵⁰ Keevy (2011) at 33-34.

⁵¹ Breed and Semanya (2015) at 1.

⁵² Keevy argues that *ubuntu* is a concept that runs from generation to generation, linking the dead and the living African generations. It is hence a religious concept rather than a legal one. See Keevy (2011) at 35-36.

⁵³ Breed and Semanya (2015) at 2.

Africa profess and, at least to some extent, live by this value, it is still an ‘ethnocentric’ ideology, with limited relevancy to the rest of the world.⁵⁴ Even the terms used to express the concept of *ubuntu*, such as ‘communality, respect, dignity, value, acceptance, sharing, co-responsibility, humaneness, social justice, fairness, personhood, morality, group solidarity, compassion, joy, love, fulfilment, conciliation’, have vague interpretations.⁵⁵ It is argued that the concept ‘means everything to everyone’, hence it does not qualify as a constitutional value.⁵⁶

6.2.2 Justification of *ubuntu* from an African perspective

According to Khunou and Nthai, criticisms of *ubuntu* seek to demean African values while elevating Western ones.⁵⁷ Such arguments may be more attached to colonial ideology which justifies their ‘humanism’ and challenge aspects of African civilisation.⁵⁸ *Ubuntu* has survived for generations through rituals, morality and traditional knowledge. Africans have continued to indoctrinate the younger generation based on their concept of personhood that recognises communality as a vital institution in the society. *Ubuntu* requires appreciation of the community because ‘I am fully me because of my community’.⁵⁹ Amoral behaviour such as xenophobic attacks, corruption, nepotism, dictatorship and violation of human rights are signs that the philosophy which unites Africans has been left behind. Such acts do not demonstrate that *ubuntu* is irrelevant today; instead they underline that respect for humanity needs to be retained so as to protect the community from the danger of anti-*ubuntu* sentiments. This is a major distinguishing factor from Western culture, where individualism

⁵⁴ See Keevy (2011) at 32-33.

⁵⁵ Irma J Kroeze ‘Doing things with values’ in Drucilla Cornell and Nyoko Muvangua (eds) *Ubuntu and the law: African ideals and post-apartheid jurisprudence* Fordham University Press New York 2012 at 340.

⁵⁶ Cornell and Marle (2012) at 344.

⁵⁷ SF Khunou and S Nthai ‘The contribution of *ubuntu* to the development of constitutional jurisprudence in a democratic South Africa’ in Frank Diedrich (ed) *Ubuntu, good faith and equity: Flexible legal principles in developing a contemporary jurisprudence* Juta South Africa 2011 at 65.

⁵⁸ Siphamandla Zondi ‘The rhetoric of *ubuntu* diplomacy and implications for making the world safe for diversity’ 5 *African Journal of Rhetoric* 2013 at 107-108; Dial Dayana Ndima ‘Reconceiving African jurisprudence in a post-imperial society: The role of *ubuntu* in constitutional adjudication’ XLVIII *CILSA* 2015 at 363.

⁵⁹ See also Mokgoro (2012) at 317.

is more pertinent than a communal lifestyle.⁶⁰

However, it is undisputable that going back to the pre-colonial values of *ubuntu* is impossible; such a campaign may not materialise because history and circumstances dictate otherwise.⁶¹ *Ubuntu* under ancient community varies from the modern world. This social transformation does not suggest the absence of the spirit of humanity (*ubuntu*) in modern societies. A new form of *ubuntu* is inevitable; while hosting a stranger was safe, in the past, today it can be as dangerous as opening doors to robbers.⁶² This is not to lack *ubuntu* but to apply it differently in changed times.

On the other hand, the effects of the contemporary criminal justice system necessitate a search for a complementary mechanism of justice. This justice can be form of restorative measures based on *ubuntu*.⁶³ Cornell, commenting on Mokgoro's analysis of *ubuntu*, notes that

as a matter of equality, we should respect the role and importance of African values in a society that has completely repudiated the very notion that black Africans had anything of ethical worth to add to the legal or moral culture to which they were subjected.⁶⁴

Therefore, *ubuntu* is not mere 'romantic idealism' but a 'potent catalyst'.⁶⁵ The sense of humanity and togetherness enshrined in *ubuntu* exists in every African country especially within the sub-Saharan Africa.⁶⁶ The word for *ubuntu* may differ from one community to another, but the philosophy remains the same. While it is known as *ubuntu* in Zulu, Xhosa

⁶⁰ Thino Bekker 'The re-emergence of *ubuntu*: A critical analysis' in Drucilla Cornell and Nyoko Muvangua (eds) *Ubuntu and the law: African ideals and post-apartheid jurisprudence* Fordham University Press New York 2012 at 380-381.

⁶¹ Mokgoro (2012) at 319.

⁶² Zamunya and Gwara (2015) argue that while beggars roam the streets looking for help, the same people who ought to help them under the mantle of 'brotherly love' close their doors for fear of being robbed. While the argument makes sense, it should be remembered that only a small proportion of Africans live in urban cities. There is huge population in Africa where *ubuntu* is not only an ideology but a lifestyle. These are places where neighbours still share the least commodity such as salt.

⁶³ See Nkhata (2011) at 92.

⁶⁴ Cornell (2012) at 329.

⁶⁵ See Nkhata (2011) at 92.

⁶⁶ Cornell and Marle (2012) at 345.

(South Africa)⁶⁷ and Kirundi (Burundi), it is *utu* in east Africa.⁶⁸ Other communities have a similar expression for *ubuntu*, such as *hunhu* for Shona, *okra* in Ghana, *umunna* for Igbo (Nigeria),⁶⁹ *umunthu* for Chewa, *umundu* for Yao, *botho* for Basotho,⁷⁰ *bumunhu* for Sukuma (Tanzania), *vhuthu* for Venda, *bunhu* for Tsonga, *numunhu* for Shangani, *umundu* in Kikuyu (Kenya), *vumuntu* for shiTsonga (Mozambique), *gimuntu* for Kikongo (DRC), and *gimuntu* in giKwese (Angola),⁷¹

6.3 *Ubuntu* and the Truth and Reconciliation Commission of South Africa

Atrocities committed during the colonial regime spring to mind when discussing South Africa. Heinous violations of human rights under the apartheid government captured the concern of the world. Many people were brutally killed and injured; some lost their loved ones in the fight against the apartheid government.⁷² According to Justice Langa, ‘Life became cheap, almost worthless’.⁷³ While revisiting memories of apartheid, Justice Langa further notes that ‘some communities have been ravaged much more than others. In some, there is hardly anyone who has not been a victim in some way or has not lost a close relative in senseless violence’.⁷⁴ The suffering was immense and the number of victims huge.⁷⁵ Unfortunately, many people died before seeing the fruit of the struggle. However, those who witnessed the fall of apartheid had another restorative experience anchored in an African jurisprudence of justice.

In the wake of apartheid, the struggle to rebuild the nation by restoring the peace and

⁶⁷ Mokgoro (2012) at 317.

⁶⁸ Keevy seems to confuse *utu* and *ujumaa*. While *utu* is similar to *ubuntu*, *ujumaa* is a philosophy that brings together *utu* and communism. See Keevy (2011) at 33; also Kinyanjui (2009-2010) at 3.

⁶⁹ Fainos Mangera ‘Restorative justice’s deep roots in Africa’ 34(1) *South African Journal of Philosophy* 2015 at 7.

⁷⁰ Mokgoro (2012) at 317.

⁷¹ Keevy (2011) at 33

⁷² See the testimony of an apartheid victim. Antjie Krog ‘The Truth and Reconciliation Commission – A national ritual?’ 26(1) *Missionalia* 1998 at 5-7; Don Foster ‘The Truth and Reconciliation Commission and understanding perpetrators’ 30(1) *South African Journal of Psychology* 2000 at 2; Cody Corliss ‘Truth commissions and the limits of restorative justice: Lessons learned in South Africa’s Cradock four case’ 21(2) *Michigan State International Law Review* 2013 at 273-274.

⁷³ Justice Langa in *S v. Makwanyane* 1995 (3) SA 391 (CC), paragraph 226.

⁷⁴ *Ibid.*

⁷⁵ Audrey R Chapman and Hugo van der Merwe ‘Assessing the South African transitional justice model’ in Audrey R Chapman and Hugo van der Merwe (eds) *Truth and reconciliation in South Africa: Did the TRC deliver?* Philadelphia University of Pennsylvania Press 2008 at 6-7.

harmony that had been shattered by apartheid was imperative. Hence, different mechanisms were devised, including the establishment of the Truth and Reconciliation Commission (the Commission).⁷⁶ The objectives of the Commission were threefold: amnesty consideration for perpetrators; determination of human rights violations; and reparation to victims.⁷⁷ The major focus, however, was reconciliation and restoration of relationships in affected communities.⁷⁸ The commission aimed at achieving ‘healing’ through reconciliation both at an individual and national level.⁷⁹ According to Bradshaw, ‘the term *healing* and *reconciliation* resonate deeply with the language of the basic human needs scholars, and their quest for the complete resolution, as opposed to the mere settlement, of conflict’.⁸⁰ It was therefore more than a mere process of justice, but a moment of truth-telling between victims and offenders which finally leads to a new chapter in life.⁸¹ Not every criminal process can bring about healing or reconciliation; under the Commission, the reconciliation process was an opportunity for accountability and healing the broken relationships.⁸²

The establishment of the Commission in South Africa marked the renaissance of peace through an African jurisprudence of *ubuntu*.⁸³ For the first time, an Africa jurisprudence of justice was put in practice by the Commission to determine serious violation of human rights. The commission, chaired by Bishop Desmond Tutu, strove for justice through an African

⁷⁶ The Truth and Reconciliation Commission in South Africa was established under the Promotion of National Unity and Reconciliation Act 34 of 1995.

⁷⁷ To accomplish the task of the Commission, three committees were formed, each responsible for a particular objective. A Committee on Amnesty was formed by the Act to consider the suitability for amnesty of perpetrators involved in the Commission of atrocities. Section 12 of the Promotion of National Unity and Reconciliation Act established the Committee on Human Rights Violations which dealt with the violation of human rights under the apartheid government from 1960 to 1994. The third committee was responsible for reparation and rehabilitation of victims of crimes as per section 23 of the Act. See Liebenberg (1996) at 133; Bradshaw (2002) at 81-82.

⁷⁸ Maphosa and Kearsley (2015) at 20 and 25.

⁷⁹ Ian Liebenberg ‘The Truth and Reconciliation Commission in South Africa: Context, features and some imponderables’ 11 *SAPR/PL* 1996 at 127; Marietjie Oelofse and Leo Barnard ‘The value of the victim hearings of the Truth and Reconciliation Commission of South Africa in sharing narratives’ 34 (3) *Joernaal/Journal* 2009 at 111.

⁸⁰ Gavin Bradshaw ‘Truth, reconciliation and resolution in South Africa’ 32(1) *Africanus* 2002 at 83.

⁸¹ Bradshaw (2002) at 84; M Oelofse and A Oothuysen ‘The knowledge and perceptions of history students of South Africa’s Truth and Reconciliation Commission (TRC)’ 10(1) *TD The Journal of Transdisciplinary Research in South Africa* 2014 at 255.

⁸² Marietjie Oelofse and Leo Barnard ‘The value of the victim hearings of the Truth and Reconciliation Commission of South Africa in sharing narratives’ 34 (3) *Joernaal/Journal* 2009 at 111.

⁸³ Liebenberg (1996) at 130; Alson Jones ‘“The settler problem”, *ubuntu* and South Africa’s Truth and Reconciliation Commission’ 3(1and2) *Ubuntu: Journal of Conflict and Social Transformation* 2014 at 25-28.

indigenous philosophy that advocated for national reconciliation. Unlike other countries whose judicial mechanisms crumbled due to incivility,⁸⁴ South Africa had an option to prosecute perpetrators nationally or by an international court.⁸⁵ Instead, the philosophy of reconciliation, guided by the spirit of *ubuntu*, became an axis of the Commission's jurisprudence.⁸⁶

The seeds of reconciliation planted in the soil of the 1993 interim Constitution started to bear fruit. Despite the impact of apartheid on South Africa, African *ubuntu* provided hope for future peace.⁸⁷ South Africa had a solution in the form of a justice process that brought the community together. Offenders had an opportunity to apologise and take responsibility for their behaviour. Victims also had an opportunity for forgiveness, which is a prerequisite for closure and healing. The process enabled both parties to begin a healing process and focus on the country's future well-being. The process did not exacerbate hatred; rather, it addressed the crying needs of the community through restorative encounter. Even though current South Africa is a country of mixed races and nationalities that continues to struggle with deep inequality, the peace and harmony founded on *ubuntu* is evident.

The remarkable thing about the Commission is the way an Africa way of life ascended through *ubuntu* into the process of justice and reconciliation. *Ubuntu* has proved to be a philosophy of justice which can resolve strife and restore peace and harmony. Through *ubuntu*, victims faced offenders and vented anger; perpetrators could make amends. South Africans embraced so-called enemies because they believed in humanity. The philosophy of 'we are humans because of other humans around us' had relevance in the Commission's reconciliation processes.

Despite the challenges analysed below, the Commission was still advantageous to South

⁸⁴ As discussed in the previous chapter, Rwanda, for instance, had to invoke traditional justice mechanisms to deal with human rights violation because the judicial machinery had collapsed and needed re-establishment.

⁸⁵ Some argue that prosecuting the perpetrators of atrocities could have affected the power-sharing agreement entered into immediately after the end of apartheid rule. But atrocities committed under apartheid were declared crimes against humanity by the United Nations in 1973, and therefore perpetrators could be prosecuted by an international court. See Oelofse and Barnard (2009) at 113; Liebenberg (1996) at 127.

⁸⁶ Ibhawoh (2014) at 2.

⁸⁷ Ibhawoh (2014) at 3.

Africa by assisting the community in healing the past wounds.⁸⁸ It has been a model for truth and reconciliation commission in other countries under transition justice. Its role in restoring human dignity, peace and tranquillity in the community cannot be ignored.⁸⁹ It allowed different categories of parties, regardless of their social background, to open up about apartheid.⁹⁰ With the promise of receiving amnesty, offenders emerged to tell their stories and seek forgiveness from victims rather than denying the truth. The commission's justice process was close to victims and used processes that did not challenge participants, including lay victims.⁹¹ Hence, victims could tell their story in a comprehensible language and within their local settings.⁹² The commission is credited for addressing racial segregation in the community⁹³ and for being a model of justice to mass human rights violation.⁹⁴ Victims were able to meet their transgressors in a restorative setting to discuss crimes.⁹⁵ Perpetrators and victims met to share experiences of both the physical and emotional consequences of apartheid.⁹⁶ Sympathy, forgiveness and apology could be shared by both parties before the wounded community.⁹⁷ The commission worked on two principles; it embraced both the African jurisprudence of *ubuntu* and Christian principle of forgiveness through restorative interventions.⁹⁸

6.3.1 The challenges faced by the Commission

Numerous criticisms were directed at the Commission. While the Commission's role centred on truth-finding and reconciliation, the real meaning of reconciliation as per the

⁸⁸ Corliss (2013) at 279.

⁸⁹ Oelofse and Barnard (2009) at 115.

⁹⁰ David Dyzenhaus 'Debating South Africa's Truth and Reconciliation Commission' 49 *University of Toronto Law Journal* 1999 at 313; Oelofse and Barnard (2009) at 114.

⁹¹ Oelofse and Oothuysen (2014) at 257.

⁹² See Tutu (1999) at 86-88.

⁹³ Oelofse and Oothuysen (2014) at 257-258

⁹⁴ As discussed below, many truth and reconciliation commissions were established after the South African experience. In most of these, the aim was reconciliation and healing the community from the past experience of war.

⁹⁵ See Hugo van der Merwe 'What survivors say about justice: An analysis of the TRC victim hearings' in Audrey R Chapman and Hugo van der Merwe (eds) *Truth and reconciliation in South Africa: Did the TRC deliver?* Philadelphia University of Pennsylvania Press 2008 at 27.

⁹⁶ Stuart Wilson 'The myth of restorative justice: Truth, reconciliation and the ethics of amnesty' 17 *South African Journal of Human Rights* 2001 at 533.

⁹⁷ See Wilson (2001) at 533.

⁹⁸ Chapman and van der Merwe (2008) at 9; Oelofse and Oothuysen (2014) at 257.

Commission's mandate has been disputed.⁹⁹ The term 'reconciliation' is not defined in the Act establishing the Commission, and thus the Commission had to develop multiple concepts to achieve the projected reconciliation.¹⁰⁰ The commission is further criticised for failing to fully involve the community in the reconciliation process. Only primary victims had the opportunity to share their story, whereas the wider community which had suffered as a result of atrocities was not engaged in venting grievances.¹⁰¹ Community members attended the Commission's conferences as mere observers, not as secondary victims. In addition, many victims expected more accountability from perpetrators of human rights violations.¹⁰² Even the anticipated compensation was not fully realised because the compensation coffer was ill-funded by the State.¹⁰³

On the other hand, the demand for retributive actions, including prosecution of perpetrators, was a pertinent expectation of some victims.¹⁰⁴ Many victims could not grasp the essence of the Commission, as it seemed to trade away victim's rights in the name of mercy to achieve national reconciliation.¹⁰⁵ Some have described this phenomenon as 'panel-beating and spray-painting' that had little impact on the nation.¹⁰⁶ Amnesty provision was possibly a strategy to persuade the apartheid government to surrender power.¹⁰⁷ So, it was a sacrifice of victims' rights for the sake of reconciliation, which can be regarded as a 'commodification of

⁹⁹ Audrey R Chapman 'The TRC's approach to promoting reconciliation in the human rights violation hearings' in and Hugo van der Merwe (eds) *Truth and reconciliation in South Africa: Did the TRC deliver?* Philadelphia University of Pennsylvania Press 2008 46-47.

¹⁰⁰ *Ibid.*

¹⁰¹ Chapman and van der Merwe (2008) at 9-10.

¹⁰² Hazel Barnes 'Ancestors, rain spirits and reconciliation: Evoking healing through ritual and culture' 28(1) *South African Theatre Journal* 2015 at 29.

¹⁰³ Many victims were not compensated; those who were received the comparatively small sum of R30,000, or approximately \$2,370. This was contrary to the Commission's recommendations on reparation for victims. See Chapman and van der Merwe (2008); Bradshaw (2002) at 96.

¹⁰⁴ For instance, in the case of *Azania Peoples Organisation v President of the Republic of South Africa* 1996 BCLR 1015 (CC) the applicants, including the widow of Steve Biko, the leader of an anti-apartheid movement who died in police custody, challenged the Commission's decision to grant amnesty to perpetrators of human rights violations. The victims of apartheid wanted prosecution of key perpetrators. They believed justice could not be achieved through reconciliation without retributive measures.

¹⁰⁵ Wilson (2001) at 542

¹⁰⁶ Daniel Nina 'Panel-beating for the smashed nation? The Truth and Reconciliation Commission, nation-building and the construction of privileged history in South Africa' 13 *Australian Journal of Law and Society* 1997.

¹⁰⁷ Van der Merwe (2008) at 23.

justice'.¹⁰⁸ The commission, by granting amnesty to perpetrators, expectations of many black South Africans seemed to wane.¹⁰⁹ But it is also argued that the ANC was involved in some human rights violations, so the Commission was a 'political compromise' to protect some political figures from prosecution.¹¹⁰ Hence, the Commission was viewed as a platform for moral realisation rather than a legal process for victim justice.¹¹¹ Amnesty was criticised the most for not treating perpetrators as ordinary criminals who deserved accountability through court processes.¹¹² Negotiations during the drafting of the interim Constitution seemed to 'impose' the idea of amnesty on the Commission.¹¹³ The commission has been criticised for putting more emphasis on perpetrators' rights than those of the victims.¹¹⁴ As a result, the Commission has been criticised for persuading forgiveness than being given at the free will of victims.¹¹⁵

6.3.2 The Commission as a model of transitional justice

The South African commission set both a national and international precedent for the application of restorative justice in cases of mass violation of human rights.¹¹⁶ Like other truth and reconciliation commissions, it was a process of reconciliation than retribution.¹¹⁷ Of course, reconciliation could still be possible with retribution,¹¹⁸ but South Africa will remain a landmark for various reasons. First, the Commission forged *ubuntu* into the reconciliation process. Mercy, forgiveness and peace-building were possible because victims, who were mostly black Africans, understood the essence of forgiveness preached in the name of *ubuntu*. Secondly, the Commission invoked principles of restorative justice for atrocities

¹⁰⁸ See *Id* at 23-24.

¹⁰⁹ Wilson (2001) at 542.

¹¹⁰ Wilson (2001) at 533; Corliss (2013) at 274.

¹¹¹ See Chapman and van der Merwe (2008) at 8; Barnes (2015) at 32.

¹¹² Van der Merwe (2008) at 32; Ibhawoh (2014) at 7.

¹¹³ Van der Merwe (2008) at 26.

¹¹⁴ Chapman and van der Merwe (2008) at 13.

¹¹⁵ Wilson (2001) at 547-548; Chapman and van der Merwe (2008) at 13; Chapman (2008) at 51-52.

¹¹⁶ Ibhawoh observes that within a decade many more truth and reconciliation commissions had been formed. Many of these commissions have taken a restorative justice approach in handling disputes. However, the South African model remains unique for being transparent and adopting indigenous principles in the Commission's approach to justice. Ibhawoh (2014) at 7-8.

¹¹⁷ Ibhawoh (2014) at 4.

¹¹⁸ See Wilson (2001) at 546.

which otherwise deserved retributive measures.¹¹⁹ Again, restorative justice was aligned with the spirit of reconciliation implied by *ubuntu*. With a restorative justice viewpoint, the Commission identified harm, availed the opportunity to make things right, enabled face-to-face encounters between perpetrators and victims, and procured symbolic reparation and restitution.¹²⁰ The Commission advocated for a new approach to justice which was necessary for national reconciliation,¹²¹ an approach which informed other justice machineries such as the judiciary. The major need of the nation was for reconciliation and restoration of peace. In such a situation, the sacrifice of certain rights was necessary to achieve community reconciliation and healing, especially for the betterment of its future prospects. In fact, it was restorative justice in practice that encouraged a win-win approach.

6.4 *Ubuntu* and judicial decisions in South Africa

The spirit of reconciliation that emanates from the African cultural background (*ubuntu*) was viewed as a constitutional value in the interim Constitution and then applied by the Truth and Reconciliation Commission.¹²² It has finally become a judicial philosophy in interpreting humanity, personhood, respect and dignity.¹²³ *Ubuntu* is thought to apply in diverse disciplines other than law such as Christian theology¹²⁴ and sustainable development.¹²⁵ The same spirit of *ubuntu* has proliferated into various areas of law, including public law,¹²⁶ family law,¹²⁷ and social and economic rights.¹²⁸

In judicial decisions, the case of Makwanyane is a landmark precedent of the Constitutional

¹¹⁹ Jonathan Allen 'Between retribution and restoration: Justice and the TRC' 20(1) *South African Journal of Philosophy* 2001 at 30-31; Corliss (2013) at 275.

¹²⁰ Wilson (2001) at 543-544; Van der Merwe (2008) at 27.

¹²¹ Van der Merwe (2008) at 26.

¹²² The epilogue of the South African Interim Constitution of 1993 provided that 'there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation'.

¹²³ See Mokgoro in *S v. Makwanyane* 1995 (3) SA 391 (CC).

¹²⁴ See Curle (2015); Breed and Semanya (2015) at 6-8.

¹²⁵ Jacqueline Church 'Sustainable development and the culture of *ubuntu*' *De Jure* 2012.

¹²⁶ *S v. Makwanyane* 1995 (3) SA 391 (CC).

¹²⁷ *Bhe and Others v. Magistrate, Khayelitsha and Others* 2005 (1) BCLR 1 (CC); *Badenhorst v. Badenhorst* (2005) JOL 13583 (C).

¹²⁸ *Khosa and Others v. Minister of Social Development and Other; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC); *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC).

court that invoked *ubuntu* justice. While referring to a similar case in Tanzania,¹²⁹ judges delved into an intensive analysis of the nexus of the right to life and the death sentence. Though the African jurisprudence of *utu*, which has the same attributes as *ubuntu*, was not expressly stated in the Tanzanian case, the protection of human life and respect for human dignity which are normally challenged by death sentences were axes of the discussion.¹³⁰ Tanzania is, however, slow in honouring proposals against the death sentence.

The Makwanyane case picked up a new justice trend as stated in the interim Constitution, which emphasises the ‘need for understanding, but not for vengeance, need for reparation, but not for retaliation, a need for *Ubuntu*, but not for victimisation’.¹³¹ In the case, judges unanimously concurred that a sanction that takes someone’s life is contrary to the African jurisprudence of *ubuntu*. The spirit of *ubuntu* as an African value speaks aloud about respect for human dignity; hence, taking an offender’s life as punishment is a violation of human rights and African virtues.¹³²

After that decision, *ubuntu* continued to resonate in judicial interpretations, especially where human dignity was threatened. In an application against an eviction order, Justice Sachs asserted the eviction of occupiers without alternative housing was a violation of *ubuntu*.¹³³ Justice Jajbhay in the case of *City of Johannesburg v Rand Properties*, which has similar material facts, took the same stance. The judge averred that

in South Africa the culture of *ubuntu* is the capacity to express compassion, *justice*[emphasis added], reciprocity, dignity, harmony and humanity in the interests of building, maintaining and strengthening the community. *Ubuntu* speaks to our *inter-connectedness* [emphasis added] our common humanity and the responsibility to each that flows from the connection.¹³⁴

¹²⁹ In the case of Makwanyane, paragraph 224, Justice Langa referred to a Tanzanian case of *DPP v. Daudi Pete* [1993] TLR 22, which decided against the death sentence for its being contrary to the right to life. The court proposed an abolition of death sentence in Tanzania.

¹³⁰ See *DPP v. Daudi Pete* [1993] TLR 22.

¹³¹ Constitution of the Republic of South Africa, Act 200 of 1993, article 251.

¹³² See Justice Mokgoro on paragraphs 300, 307, 308, 311 and 315; Justice Langa on paragraphs 225 and 226; Justice Madala on paragraphs 237 and 260 in the case of *S v. Makwanyane* 1995 (3) SA 391 (CC).

¹³³ See *Port Elizabeth Municipality v. Various Occupiers* 2004 (12) BCLR 1268 (CC), paragraph 37.

¹³⁴ *City of Johannesburg v. Rand Properties (Pty) Ltd and Others* 2006 (2) All SA 240 (W), paragraph 63.

The spirit of *ubuntu* is also reflected in an application for a social grant where Justice Mokgoro stated that the denial of social support to non-citizens has more to tell in the realm of communal life.¹³⁵ Even where compensation for defamatory damages was over-calculated, *ubuntu* was applied to moderate the amount to be awarded.¹³⁶ In this case, Justice Mokgoro reiterated that African culture is inclined towards building a society that survives as a community. Financial compensation, even though it may financially benefit the complainant, does not create community harmony; it simply exacerbates grudges between parties. In the realm of *ubuntu*, financial compensation should aim at the complainant's dignity, recognition and restoration of harmony.¹³⁷ Courts should appreciate the role of apology and symbolic reparation with the view to restoring the parties to the right relationships through justice process.¹³⁸ This is an African jurisprudence of justice through a 'lens' of *ubuntu* or *utu*.

6.5 *Ubuntu* and restorative justice in judicial decisions in South Africa

The same philosophy is regarded as the genesis of restorative encounter in an African perspective.¹³⁹ For instance, Justice Bertelsmann makes two profound insights through Maluleke's case: first, he acknowledges, albeit with caution, the potential of indigenous justice for an improved criminal justice system. Apart from conceding that African indigenous justice 'did not know prisons', he also cites the experience of Canada, New Zealand and Australia, where indigenous justice is employed to provide an alternative route to offenders' incarceration. The judge opines thus:

[T]here appear to be little reasons why similar results could not be achieved in South Africa. Eventually, legislative interventions may be required to recognise aspects of customary law – but this should not deter courts from investigating the possibility of introducing exciting and vibrant potential alternative sentences into our criminal justice system.¹⁴⁰

¹³⁵ *Khosa and Others v. Minister of Social Development and Other; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

¹³⁶ *Dikoko v. Mokhatla* 2007 (1) BCLR 1 (CC).

¹³⁷ *Justice Mokgoro in Dikoko v. Mokhatla* 2007 (1) BCLR 1 (CC), paragraph 68.

¹³⁸ See *Mokgoro in Dikoko v. Mokhatla* 2007 (1) BCLR 1 (CC), paragraph 69 and 70.

¹³⁹ See *S v. Maluleke* 2008 (1) SACR 49 (T); Skelton (2013) at 122.

¹⁴⁰ *S v. Maluleke* 2008 (1) SACR 49 (T), paragraph 38-40.

Secondly, the judge avers that restorative justice is not a solution to all criminal behaviour but it is a better approach to address reoffending, reconcile parties, reintegrate offenders in the community and provides an alternative sentence.¹⁴¹

However, the South African Supreme Court of Appeal seems to restrain the use of the restorative justice approach in serious offences. In two cases of *Thabethe*¹⁴² and *Seedat*,¹⁴³ the court opined that:

I have no doubt about the advantages of restorative justice as a viable alternative sentencing option provided it is applied in appropriate cases. Without attempting to lay down a general rule, I feel obliged to caution seriously against the use of restorative justice as a sentence for serious offences which evoke profound feelings of outrage and revulsion amongst law-abiding and right-thinking members of society. An ill-considered application of restorative justice to an inappropriate case is likely to debase it and make it lose its credibility as a viable sentencing option. Sentencing officers should be careful not to allow some overzealousness to lead them to impose restorative justice even in cases where it is patently unsuitable.¹⁴⁴

While the court regarded victims' views as important in the sentencing process, it warned courts not to allow the victim to dictate courts' decisions.¹⁴⁵ The court further stated the purposes of sentencing are, among other things, to accommodate the interests of the public. Though a sentence does not necessarily satisfy the public, it should accommodate interests of the community (public).¹⁴⁶ The two decisions are important because they bind lower courts to the application of restorative justice, especially in serious offences.

However, the Supreme Court might have misconceived the rationale of using restorative

¹⁴¹ *S v. Maluleke* 2008 (1) SACR 49 (T), paragraph 32-34.

¹⁴² *Director of Public Prosecutions, North Gauteng v. Thabethe* 2011 (2) SACR 567 (SCA).

¹⁴³ *S v. Seedat* 2017 (1) SACR 141 (SCA).

¹⁴⁴ *Director of Public Prosecutions, North Gauteng v. Thabethe* 2011 (2) SACR 567 (SCA), paragraph 20; *S v. Seedat* 2017 (1) SACR 141 (SCA), paragraph 38.

¹⁴⁵ *Director of Public Prosecutions, North Gauteng v. Thabethe* 2011 (2) SACR 567 (SCA), paragraph 21; see also the discussion in Chapter 2.

¹⁴⁶ *S v. Seedat* 2017 (1) SACR 141 (SCA), paragraph 39; see also Annette van der Merwe and Ann Skelton 'Victims' mitigating views in sentencing decisions: A comparative analysis' 35(2) *Oxford Journal of Legal Studies* 2015 at 357.

justice in criminal proceedings. Courts may use restorative justice at different stages and for different purposes.¹⁴⁷ Victims' questions may be answered through restorative encounter. Restorative justice is a mechanism to hear victims and get opinions before sentencing the offender.¹⁴⁸ It may be a means for the court to learn the extent of harm suffered by the victim and get an assurance that the offender will not attack the victim again.¹⁴⁹ It allows the offender to understand the harm he or she has caused the victim and the community. It is a form of offender accountability through understanding the effects of the crime and facing the harm thereof. It may also be rehabilitative to the offender. The court may award a proportionate compensation after hearing the victim and offender.

Restorative justice brings about satisfaction to parties and empowerment to victims; it starts a healing process for the victim. When courts base their sentences entirely on deterrence, it leaves the victims without any form of reparation. This may be an unfair approach because incarceration without any form of compensation leaves the victim unattended to by the justice process. It seems the court may fail to address victims' needs through the justice process when restorative justice is restrained. For instance, in the case of Seedat, the court left the victim without any form of compensation for the harm suffered. After the offender served four years in prison, the victim may continue to grieve with psychological pain without any form of reconciliation.

It seems the Supreme Court viewed restorative justice as a sentencing option that could replace other forms of punishment.¹⁵⁰ Mahajan opines that 'restorative justice in severe violence cases is not done in lieu of [a] trial or retributive justice system, rather it is coupled with the retributive system'.¹⁵¹ Courts may use restorative justice even in serious offences, not as an alternative sentence, but as a sentencing approach. Restorative justice may be used and a prison sentence still be imposed, albeit perhaps with a reduced sentence.¹⁵² In addition, research indicates the positive possibilities of using restorative justice even in serious

¹⁴⁷ See the discussion in Chapters 2 and 3.

¹⁴⁸ Margo Kaplan 'Restorative justice and campus sexual misconduct' 89 *Temple Law Review* 2017 at 718.

¹⁴⁹ Kaplan (2017) at 719.

¹⁵⁰ See the quoted statements, which are repeated in the two Supreme Court decisions.

¹⁵¹ Bhavya Mahajan 'Victim-offender mediation: A case study and argument for expansion to crimes of violence' 10 *American Journal of Mediation* 2017 at 131.

¹⁵² Mahajan (2017) at 131.

offences.¹⁵³ Nevertheless, the Supreme Court decisions do not entirely suspend the application of restorative justice, provided the approach takes on board both the interests of the public and the victim.

In another case, that of *Saayman*,¹⁵⁴ the application of restorative shaming was considered inappropriate. The accused, with 203 previous convictions, was found guilty of six counts of fraud. The trial court ordered her to stand before the court's foyer with a placard showing the offence. This was done as an alternative to incarceration and to secure an apology for unidentified victims, but the appellate court declared it unconstitutional. This shaming approach, taken under the umbrella of restorative justice, violated the accused's dignity. While shaming may be necessary, it should not stigmatise the offender, but aim at achieving reintegrative values.

Justice Sachs acknowledges the nexus between restorative justice and African traditional justice. Traditional processes of justice 'have long been, and continue to be, underpinned by the philosophy of *ubuntu-botho*'.¹⁵⁵ In other words, restorative justice is not a novel concept in African justice; it stems from the African way of life, which is communitarian rather than individualistic in orientation. Justice Bosielo too sees the justification for 'humane and balanced' sentences.¹⁵⁶ These are possible only where an alternative approach is taken to criminal justice, an approach that includes alternative sentences and restorative interventions.¹⁵⁷ While imprisonment ignores the victim's right to compensation, the price paid by the community for an unreformed prisoner is always high.¹⁵⁸ Restorative justice preserves African communal life; it restores harmony and upholds community bonds. The African 'lens' of *ubuntu* needs to be appreciated in the judicial process, rather than foreign notions of justice. It creates the possibility of relieving overcrowded prisons and reforming offender within the community. Rather than resorting to New Zealand's model of restorative justice, it should be borne in mind that Africa already has restorative justice mechanisms of

¹⁵³ Mark S Umbreit *The handbook of victim-offender mediation: An essential guide to practice and research* 2001 at 255; Mahajan (2017) at 130.

¹⁵⁴ *S v. Saayman* 2008 (1) SACR 393 (E).

¹⁵⁵ Justice Sachs in *Dikoko v. Mokhatla* 2007 (1) BCLR 1 (CC), paragraph 114.

¹⁵⁶ Justice Bosielo in *S v. Shilubane* (2005) JOL 15671 T, paragraph 5.

¹⁵⁷ See *Ibid.*

¹⁵⁸ See Justice Bosielo in *S v. Shilubane* (2005) JOL 15671 T, paragraph 4, 5 and 6.

its own that are rooted in humanity and togetherness, that is to say, in *ubuntu*. Africans know this justice system better than foreign ones. Justice Sachs does not see the rationale for limiting restorative justice to juvenile courts in South Africa. He wishes to see the restorative encounter extend to other statutes and have wide application.¹⁵⁹

6.6 Judicial decisions and the spirit of reconciliation

An analysis of the case law shows that *ubuntu* is a philosophy that embodies ‘collective community or unity, interdependence or a sense of belonging, individuals as human beings supportive of one another, and reciprocity of rights and duties’.¹⁶⁰ Constitutional Court decisions portray *ubuntu* as a praxis that calls for compassion, humanity and dignity rather than revenge.¹⁶¹ It shifts the axis of justice from antagonism to peace-building and restoration of relationships between community members through the restorative approach.¹⁶²

The analysis above reveals that *Ubuntu* proliferated from the interim Constitution to the establishment of the Commission. The interim Constitution’s focus was more on nation-building through reconciliation than punishing perpetrators. The objectives of the Commission also focused on reparation for victims and restoration of national unity rather than revenge and divisiveness. The spirit of reconciliation also informed the functioning of the Commission in that negotiators, victims and offenders were already influenced by the need to reconstruct national unity through truth-telling and healing from past experience.¹⁶³

According to Skelton, the same ethos of nation-building and reconciliation was adopted by the Constitutional Court, which infused the spirit of *ubuntu* into judicial decisions.¹⁶⁴ In the first place, the role of the Court was to instil the spirit of unity and reconciliation because the country’s immediate need at the time was nation-building.¹⁶⁵ The Court contributed to nation-building by advocating for reconciliation of parties rather than vengeance. The same jurisprudence extended from the Constitutional Court’s decisions into a new criminal justice

¹⁵⁹ Justice Sachs in *Dikoko v. Mokhatla* 2007 (1) BCLR 1 (CC), paragraph 115.

¹⁶⁰ Skelton (2013) at 125.

¹⁶¹ *Ibid.*

¹⁶² Malan (2014) at 238-239.

¹⁶³ See Skelton (2013) at 122.

¹⁶⁴ Skelton (2013) at 124.

¹⁶⁵ Skelton (2013).

dimension of restorative justice, though limited by the decisions of the Supreme Court to exclude certain cases, especially those of violent nature.¹⁶⁶ *Ubuntu* can therefore be regarded as the foundation of restorative justice in South Africa in particular and Africa in general.

South Africa is the first country in Africa to boldly invoke aspects of customary law in civil and criminal cases. In other countries such as Tanzania, application of customary law in criminal cases was abolished on the ground that they are contrary to criminal justice.¹⁶⁷ But the application of *Ubuntu* in interpreting the Constitution and criminal law principles has proved that African customary values have relevance in the criminal justice process. African courts are fond of colonially inherited legal principles, yet overlook indigenous principles that could serve to engender a new atmosphere in criminal justice. In the South African Constitutional Court, judges avoided foreign legal doctrines such as equity in order to deliver the results the country needed.¹⁶⁸ While African countries may welcome the re-emergence of restorative justice, it should be remembered that there is a form of restorative justice relevant to Africa which is based on the customary values of *ubuntu*.¹⁶⁹ Where necessary, African courts should depart from foreign doctrines and draw on such African values of justice.

6.7 The influence of *Ubuntu* on other African commissions

A few years after the South African commission, numerous other commissions in Africa were established to investigate human rights violations and seek reconciliation.¹⁷⁰ Many commissions took the South African approach as a model,¹⁷¹ which was influential because of a certain peculiarity. The Commission was a product of an Act of Parliament, which took cognisance of public opinion. Unlike other commissions, the South African commission had

¹⁶⁶ The stance of the South African Supreme Court on the use of restorative justice in serious offences is discussed above. See *Director of Public Prosecutions, North Gauteng v. Thabethe* 2011 (2) SACR 567 (SCA); *S v. Seedat* 2017 (1) SACR 141 (SCA).

¹⁶⁷ Simon Robins 'A place for tradition in an effective criminal justice system: Customary justice in Sierra Leone, Tanzania and Zambia' Policy Brief No. 17 2009 at 2.

¹⁶⁸ See Skelton (2013) at 142-143.

¹⁶⁹ Skelton (2013) at 142.

¹⁷⁰ Other countries that established truth and reconciliation commissions include Chile, Argentina, Uruguay, Chad, Zimbabwe, Ethiopia, Kenya, Liberia, Sierra Leone, Nigeria, Morocco, Ghana and the Democratic Republic of Congo. Corliss (2013) at 276.

¹⁷¹ Philip Kasaija Apuuli 'Forty-four years of independence: Finally a Truth and Reconciliation Commission (TRC) for Uganda?' 4(1 and 2) *East African Journal of Human Rights and Democracy* 2006 at 24.

a wider range of representations with the legal mandate to summon parties.¹⁷² With the same spirit, the commission of countries that experienced bloodshed, such as Liberia and Sierra Leone, were vital in restoring peace.¹⁷³ These commissions have taken a restorative justice approach in addressing injustice.¹⁷⁴ In South Africa, the idea of restorative justice was drawn from the African jurisprudence of *ubuntu* and the need for reconciliation. In other commissions, the need for reconciliation and healing of the community was a key reason for employing a commission through a restorative approach.¹⁷⁵

In other African commissions, such as those in Kenya, Liberia and Sierra Leone, some common features were apparent. First, commissions were formed to investigate human rights violations that the country experienced.¹⁷⁶ Secondly, it was within the jurisdictions of the Commissions to identify causes of conflicts. In Sierra Leone, for instance, tribal differences are argued to be among the causes of horrendous conflicts.¹⁷⁷ In Kenya, for instance, ethnic differences were an unattended problem until the 2007 general elections led to killings and internal displacements.¹⁷⁸ In Uganda, regional disparity caused the northern part of the country to become a source of perennial internal conflict.¹⁷⁹ In Liberia, previous rifts that were not properly addressed caused bloody killings in the 1990s.¹⁸⁰

So, for reconciliation commissions investigating heinous acts caused by conflicts, understanding the genesis of these conflicts was imperative. Knowing the cause of conflict helps in the development of plans for future community peace. The process included the

¹⁷² Apuuli (2006) at 24.

¹⁷³ In Uganda, for instance, it was hoped that establishment of the truth and reconciliation commission would bring reconciliation after the country was ravaged by civil conflict. See Apuuli (2006) at 20. Laura Olson 'Mechanisms complementing prosecution' 845 *International Review of the Red Cross* 2002 at 176; Apuuli 2006 at 20 and 24; Corliss (2013) at 276; Ibhawoh (2014) at 7-8.

¹⁷⁴ Ibhawoh (2014) at 7-8.

¹⁷⁵ See William A Schabas 'Conjoined twins of transitional justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court' 2(4) *Journal of International Criminal Justice* 2004 at 1082-1083.

¹⁷⁶ In South Africa, for instance, a committee under the Commission was formed to investigate human rights violations under apartheid.

¹⁷⁷ Lydia A Nkansah 'The dance of truth and justice in post-conflict peace-building in Sierra Leone' 23 *African Journal of International and Comparative Law* 2015 at 210-211.

¹⁷⁸ Dani Wadada Nabudere, Marcus Garvey and Andreas Velthuisen 'Restorative justice and knowledge management in Africa: A multidimensional approach' 10(2) *Indilinga – African Journal of Indigenous Knowledge System* 2011 at 161-162.

¹⁷⁹ See Apuuli (2006) at 25-26.

¹⁸⁰ See Gwendolyn Heaner 'Religion, law and human rights in post-conflict Liberia' 8 *African Human Rights Law Journal* 2008.

understanding of the historical background that gave rise to conflicts.

Commissions were to deal with impunity either restoratively or retributively to ensure that further conflicts are deterred.¹⁸¹ In all commissions, reconciliation among community members was the major philosophy underlying the process. This was characterised by truth-telling and perpetrators admitting responsibility. Some countries took a stance to prosecute the masterminds after being identified by the Commission.¹⁸² In other countries, such as South Africa, amnesty was granted to qualified perpetrators after taking responsibility.¹⁸³ Truth-telling was important for the victims' healing; accepting responsibility by perpetrators was also vital for the reconciliation process.¹⁸⁴ The process went hand in hand with victim compensation. Though compensation for victims was challenging, some believed that justice was not fairly done because perpetrators did not receive the punishment they deserved.¹⁸⁵ For many commissions, compensation was a reparation measure towards reconciliation, rather than a means of justice for victims. Hence, compensation was merely symbolic for perpetrators' accountability. Commissions were not prosecuting machineries, hence they aimed at finding justice for victims and ensuring reintegration of perpetrators in the community. Perpetrators were supposed to admit responsibility and apologise before the injured community. The community, on the other hand, was responsible for granting forgiveness and receiving the member who had become disconnected from the community.

As argued above, though *ubuntu* seems to be an African jurisprudence of justice, humanity and togetherness exists in all societies. Where other justice mechanisms fail to achieve the spirit of togetherness, the community finds an appropriate approach to restore community bonds. In Kenya, despite the suspects of the 2007 violence being prosecuted by the International Criminal Court, a reconciliation commission was sought to resolve the major

¹⁸¹ Nkansah (2015) at 199 and 210.

¹⁸² Sierra Leone, for instance, took the two-pronged approach of establishing both the truth commission and a special court to prosecute perpetrators of crime. Abdul Tejan-Cole 'The complementary and conflicting relationship between the special court for Sierra Leone and the Truth and Reconciliation Commission' 6 *Yale Human Rights and Development Law Journal* 2003 at 143.

¹⁸³ Mary Burton 'Custodians of memory: South Africa's Truth and Reconciliation Commission' 32 *International Journal of Legal Information* 2004 at 491.

¹⁸⁴ Nkansah (2015) at 199.

¹⁸⁵ *Id* at 200.

differences in the community.¹⁸⁶ In Uganda, even when the conflict was reported to the international community for prosecution, the local community resorted to traditional justice. In Rwanda, the prosecution of perpetrators under the ICTR did not prevent the community from the reconciliation process through *gacaca* courts. The spirit of reconciliation, especially in Africa, though not expressly stated in many commissions, is moved by the philosophy of *ubuntu*. As humans who live in the same community, there must be an end to injustice through reconciliation. This is the philosophy behind many truth and reconciliation processes. Apart from being manifested in commissions, the spirit of *ubuntu* has been the source of restorative processes in Africa. According to Nabudere et al., justice processes in Africa are a way of sharing knowledge through restorative mechanisms.¹⁸⁷ He highlights five aspects of restorative justice:

[P]rotection of victims in the judicial process; remembering and sharing information on what happened without fear of retribution; apology on the part of all perpetrators and willingness to pay compensation; forgiveness of perpetrators by the community if they accepted the apology; compensation, not in monetary terms but also in meeting emotional needs of both perpetrators and victims – in some cases communities play a part in contributing to compensation; rehabilitation and integration into society of all who become disconnected from it during the conflict.¹⁸⁸

In fact, such values must also be met in a truth and reconciliation process. Hence, truth and reconciliation commissions formed in African to deal with human rights violations were pure forms of restorative justice. In other countries such as South Africa, such processes invoked multidimensional approaches by merging *ubuntu* justice and Christian doctrines. In other commissions, the spirit of reconciliation was the yardstick for justice.

6.8 Ujamaa and the ‘Africanisation’ philosophy

In many African countries, the transitional period after independence was marked by the

¹⁸⁶ Nabudere, Garvey and Velthuisen (2011) at 161-162.

¹⁸⁷ Nabudere, Garvey and Velthuisen (2011).

¹⁸⁸ *Id* at 168.

sense of rediscovering the roots of African virtues. South Africa was not the only country in Africa which sought to elevate African values through *ubuntu*. In Zimbabwe, the relevant expression was *hunhuism*.¹⁸⁹ ‘Africanisation’ was also evident in Zambia and Ghana.¹⁹⁰ In Tanzania, the celebration of independence in 1961 was followed by the desire for economic transformation through socialism. By then socialism was not a new concept, because Western and Asian countries had embarked on socialism. Tanzania, at that time Tanganyika, wanted to adopt – through ideas propagated by the first president, Julius Kambarage Nyerere – socialism with an African view-point.¹⁹¹ Hence, the word *ujamaa* was coined to signify an African form of socialism.¹⁹² *Ujamaa* is a Swahili word which means ‘familyhood’ or the state of being together as a Tanzanian community.¹⁹³

Nyerere argued that Africa had a form of socialism even before the spread of Western socialism; hence, he advanced the idea of ‘familyhood socialism’.¹⁹⁴ He argued that, in Africa, famine was likely to affect the whole community, both rich and poor, so Africans lived in a condition of socialism.¹⁹⁵ He aimed to instil a spirit in the nation to consider itself a community that needs to retain the spirit of interconnection, known as *wajamaa*.¹⁹⁶ He believed Africans did not need to be taught the tenets of socialism because they are born into a socialist society where a person is ‘an individual within the community’.¹⁹⁷

The concept gained momentum because the country was in a transitional period after having emerged from colonial subjection. Various campaigns were initiated, including villages (*vijiji vya ujamaa*) being reorganised in order to allow provision of social services and social

¹⁸⁹ Christian BN Gade *A discourse on African philosophy: A new perspective on Ubuntu and transitional justice in South Africa* Lexington Books New York 2017 at 12.

¹⁹⁰ *Id* at 9-10.

¹⁹¹ Julius K Nyerere *Freedom and unity: Uhuru na Umoja: A selection from writings and speeches 1952-65* Oxford University Press Dar es Salaam 1967.

¹⁹² Nyerere (1967).

¹⁹³ *Id* at 170.

¹⁹⁴ Issa G Shivji ‘The rule of law and *ujamaa* in the ideological formation of Tanzania’ 4 *Social and Legal Studies* 1995 at 158.

¹⁹⁵ Nyerere (1967) at 164.

¹⁹⁶ *Wajamaa* means ‘familyhood’ or close friends or relatives. It gives a sense of togetherness within the community.

¹⁹⁷ Nyerere (1967) at 166.

cohesion through community economic production.¹⁹⁸ People who lived far apart were brought close together in order to form an identifiable village. People worked together in community farms with one spirit of unity and interconnection. Community shops were also established in the same spirit that interconnection between community members was better than disintegration. Later the phrase *ujamaa na kujitegemea* became popular in the Tanzanian community, meaning ‘*ujamaa* and self-reliance’ and referring to the creation of economic independence without affecting community interconnection. Nyerere wanted to plant the seeds of socialism with an African character and not simply follow the socialism of Western civilisation which could negatively affect African values.¹⁹⁹ Currently, *ujamaa* and self-reliance are constitutional values appearing in the preamble:

[N]ow therefore, this constitution is enacted by the constituent assembly of the United Republic of Tanzania, on behalf of the people, for the purpose of building such a society and ensuring that Tanzania is governed by a government that adheres to the principles of democracy and socialism and shall be a secular state.²⁰⁰

This constitutional principle further informs the Constitution with a special article articulating the spirit of *ujamaa* and self-reliance as follows:

[T]he object of this constitution is to facilitate the building of the United Republic as a nation of equal and free individuals enjoying freedom, justice, fraternity and concord, through the pursuit of the policy of Socialism and Self-Reliance which emphasizes the application of socialist principles while taking into account the conditions prevailing in the United Republic.²⁰¹

The marginal note to this article of the Constitution features the words ‘*ujamaa* and self-reliance’.²⁰² The article further obliges the government to conduct its activities in a manner

¹⁹⁸ Eckhard Baum ‘Ujamaa villages – an approach to rural development in Tanzania’ 3(2) *South African Journal of African Affairs* 2010 at 37.

¹⁹⁹ Alison Jones *Iron cages: Paradigms, ideologies and the crisis of the post-colonial state* University of KwaZulu-Natal Press South Africa 2010 at 195-196.

²⁰⁰ See the preamble to the Constitution of the United Republic of Tanzania of 1977.

²⁰¹ The Constitution of Tanzania (1977), article 9.

²⁰² *Ibid.*

which enables the utilisation of national wealth and heritage.²⁰³ In line with the spirit of *ujamaa*, and in order to restrain individualism and ensure equality in the community, concentration of wealth in the hands of the few is prohibited.²⁰⁴ Though *ujamaa* and self-reliance as a social policy seems to have lost its efficacy in the current economic struggle, they are parts of Tanzania's heritage that need to be harnessed in the application of justice principles that uphold the spirit of *ujamaa*.

On the basis of the same argument regarding socialism and the African way of life advanced by Nyerere, Africa has lived in a system of justice which embodies restorative justice principles. The spirit of *ujamaa* should be retained through a justice process that enriches community unity. A justice process that can cause division in the community is contrary to the spirit of *ujamaa*. Togetherness has been and continues to be an African way of life; for this reason, therefore, it needs to be strengthened by justice mechanisms that uphold the spirit of 'familyhood'. *Ujamaa* has played a major role in enhancing peace and security in Tanzania; however, unlike *ubuntu*, it is less articulated in the area of justice administration, possibly because it is considered a purely political idea with no relevance to this area.²⁰⁵ However, a justice process that advocates for stakeholders to come together to discuss the crime and its effects is just a new form of expression of what has been practised in Africa for centuries before and even after colonial invasion.

6.9 Conclusion

The role of the African way of justice is essential despite some weaknesses. Apart from having been weakened by colonially inherited principles of justice, it fails to uphold human rights values regarding women and children. However, *ubuntu* justice reflects the African way of justice administration. *Ubuntu* as a way of justice that emanates from African culture and the shared tenets of communal life has proved to be a doctrine that can deliver justice in even the most volatile nation reconciliation processes. In the wake of apartheid, negotiations for national reconciliation in South Africa sought to apply the African philosophy of justice, and as a result the spirit of *ubuntu* was written into the interim Constitution. It was not long

²⁰³ *Id* at article 9(c).

²⁰⁴ *Id* at article 9(j).

²⁰⁵ See Shivji (1995).

when the Promotion of Nation Unity and Reconciliation Act was enacted to usher in the reconciliation process. The spirit of reconciliation embodying aspects of humanity, togetherness, compassion and nation-building is evident in this statute, and informs too the object of the Truth and Reconciliation Commission, which, inter alia, sought to investigate human rights abuse, seek reparation for victims and grant amnesty to perpetrators. It needed the spirit of forgiveness for the Commission's amnesty committee to achieve this objective. Despite some challenges, amnesty was available to perpetrators who were willing to share the truth of the offence. Coupled with the African spirit of *ubuntu*, the process was made more empowering for South Africans because the community was involved in addressing the harm of apartheid rule.²⁰⁶

The philosophy of justice based on *ubuntu* was applied by the supreme organ of the judiciary in a number of cases. Even though the court's decisions were influenced by the national reconciliation that was the priority at the time, the decisions paved the way for the emergence of restorative justice in the country. Despite the existence of indigenous restorative justice in South Africa and Africa in general, the emergence of *ubuntu* justice has entrenched the relevance of restorative justice in the country. From the interim Constitution and the Commission and finally to judicial decisions, the value of restorative interventions is evident. However, there are challenges to applying restorative justice in some cases, especially those of violent nature, as stated by the South African Supreme Court. Even in such cases, restorative justice is still an appropriate mechanism for community-building and victim reparation; making exclusive use of the adversarial system leaves the wounds of victims unattended to.

Furthermore, the South African commission has been a model of justice for other nations under transitional justice. While the spirit of *ubuntu* moved the Commission, other African commissions see reconciliation and healing of the past atrocities as the aim for truth commissions. The role of *ubuntu* has spread to other jurisdictions through truth commissions as a way of reconciliation after civil conflicts. Some countries such as Sierra Leone and Uganda employed both indigenous restorative justice approaches and truth commissions for

²⁰⁶ See Tutu (1999).

nation reconciliation. In my view, this fact attaches more importance to community reconciliation and healing than retributive measures. While restorative measures based on *ubuntu* justice are pertinent in Africa, the latter needs to resonate more deeply in judicial decision-making. South African courts prove that it possible to eschew received doctrines of justice and apply African forms of justice both in civil and criminal disputes.

While common law doctrines are useful in rendering justice, the African philosophy of justice has a role to play in influencing judicial positivism of the African continent. In Tanzania, the spirit of *ujamaa*, which is founded on socialism, remains a seminal value in the Constitution. Under the current Constitution, *ujamaa* is a philosophy that governs the conduct of the government of Tanzania. This philosophy demands that Tanzanians live as *wajamaa* by upholding *utu*, humanity and familyhood. The peace and security enjoyed since independence might be the result of spirit of togetherness enshrined in the spirit of *ujamaa*. While *ujamaa* may not be a relevant philosophy in the economic spectrum, it is still a key social value for keeping the community together. In addition, having been founded on African communal values, *ujamaa* is a vital cornerstone for founding restorative justice in Tanzania. The use of restorative justice may uphold the spirit of *utu* and *ujamaa* as articulated in the Constitution.

Chapter 7:

The Contemporary Criminal Justice System in Tanzania

7.1 Introduction

Tanzania is one of the African countries that follow the common law system. Despite some adaptations to suit the Tanzanian community, the vast majority of rules governing criminal conduct are modelled on the British common law adversarial justice system. The earlier chapters provide a basis to argue that the adversarial criminal justice system is contrary to the African way of justice.¹ The adversarial system engages the parties in dispute resolution with an assistance of a magistrate or judge who sits as an independent observer.² While the community can witness the process, their participation is always restrained.³ The adversarial system imposes a responsibility on parties to argue for their justice regardless of whether they understand the law or not.⁴ While the State takes over the victim's case, the offender has a right to representation by an attorney.⁵

This chapter argues that the adversarial processes relegate victims to the status of mere witnesses.⁶ The adversarial system exposes parties, including the victim, who is already a wounded party, to cross-examination, which inflicts further pain. Apart from hostile questions from lawyers, cross-examination contradicts the truth and suggests to the court that

¹ As argued in Chapter 6, the African way of justice is based on *ubuntu* or *utu* which is non-confrontational and participatory. It can be argued that the adversarial system, which treats victim and offender as adverse parties, exacerbates conflict rather than bridging the gap the crime has created between them.

² Worku Yaze Wodage 'The role and status of victims of crime in the Ethiopian criminal justice system' 2 *Bahir Dar University Journal of Law* 2011 at 111.

³ It is argued that the participation of assessors in decision-making in the courts of Tanzania is based on the principle of justice that 'justice should not only be done but seen to be done'. See LA Kyando and Chris Maina Peter 'The people's representation in the courts of law in Tanzania: The need to retain the assessors' *Commonwealth Law Bulletin* 1994.

⁴ See Laura Ann Wilson 'The rights of victims vs the rights of the accused: Striking a balance between the rights of victims and accused persons in the international criminal justice setting' 38 *University of Western Australia Law Review* 2015 at 153.

⁵ The meaning of 'victim' in this discussion includes individual persons, relatives, friends, neighbours and the 'community of care', such as schoolteachers, who are directly or indirectly impacted on by the immoral acts of the offender. See Declan Roche *Accountability in Restorative Justice* Oxford University press USA 2003 at 26; Daniel W Van Ness and Karen Heetderks Strong *Restoring justice: An introduction to restorative justice* 4thed Anderson Publishing 2010 at 43.

⁶ Wilson (2015) at 154.

the victim is a liar.⁷ The process may be humiliating and revictimising to victims.⁸ Under the adversarial process, courts in Tanzania always seek to prove the existence or non-existence of the facts in issue yet overlook the incidental harm suffered by victims.⁹ This chapter argues that the tripartite set of professionals (judge, prosecutor and attorney) takes the conflict from the hands of the justice stakeholders (victim, offender and the community) who ought to be fully engaged in finding the solution.¹⁰ As a result, court processes do not address the needs of victims, offenders and the community.¹¹ The process of justice is determined by the parties' relative strength, thereby leading to a win-lose situation.

The chapter therefore analyses adversarial criminal justice procedures in Tanzania, specifically addressing processes detrimental to the well-being of parties, namely the victim, offender and the community. The discussion raises the question of whether there is a better system of justice that the court may employ for the benefit of justice stakeholders. The discussion in this chapter draws on the challenges of the adversarial system in other jurisdictions as a platform for analysing the weaknesses of criminal justice in Tanzania. The chapter evaluates the role, needs and rights of the victim, offender and the community in the adversarial criminal justice system. The purpose of this discussion is to expose the need to put justice stakeholders at the centre of the criminal justice processes through restorative measures.

⁷ It is painful for a person harmed to be cross-examined by the offender in a confrontational way and in the process have it suggested that his or her testimony is untrustworthy. As discussed below, some Western jurisdictions such as the United States and Canada have recognised the victim's right against embarrassing judicial processes. See Edna Erez and Julian Roberts 'Victim participation in the criminal justice system' in Robert C Davis, Arthur J Lurigio and Susan Herman (eds) *Victims of Crime* 3rd ed Sage Publications Los Angeles 2007 at 277-278; Wodage (2011) at 113; Wilson (2015) at 154.

⁸ Sam Garkawe 'Victims and international criminal court: Three major issues' 3 *International Criminal Law Review* 2003 at 347.

⁹ Section 7 of the Evidence Act, Chapter 6, Revised Edition 2002, provides that 'subject to the provisions of any other law, evidence may be given in any suit of proceeding of the existence or non-existence of every fact in issue, and other facts in issue as are *hereinafter declared to be relevant, and of no others*' (emphasis added). Therefore, only facts declared by the law to be relevant can be admitted in court and the incidental effects of the crime may not be considered.

¹⁰ Nils Christie 'Conflict as property' 17 *British Journal of Criminology* 1977.

¹¹ Howard Zehr *Changing lenses: A New focus for crime and justice* 3rd ed Herald Press Scottsdale 2005.

7.2 The Court system in Tanzania

Tanzania (at that time Tanganyika) gained independence from the British in 1961.¹² Tanzania is a union government formed between Tanganyika and Zanzibar in 1964.¹³ However, the Judiciary of Tanzania is a union matter only in relation to the Court of Appeal of Tanzania. Tanzania Mainland and Tanzania Zanzibar which form the United Republic of Tanzania each has its own court system and laws. As stated earlier, the discussion in this thesis focusses on Tanzania Mainland though reference to Tanzania Zanzibar is given for exemplary purposes. In Tanzania Mainland, six core values govern the judiciary, namely ‘fairness, independence, competence, accessible, timeliness and impartiality’.¹⁴ The judicial hierarchy in Tanzania Mainland is composed of the Court of Appeal, the High Court, Resident Magistrates’ Courts, District Courts, Primary Courts and quasi-judicial tribunals such as Tax Tribunal, Tax Appeals Tribunal, District Land and Housing Tribunals and Ward Tribunal.¹⁵

7.2.1 The Court of Appeal

The Court of Appeal is a creature of the Constitution of the United Republic of Tanzania¹⁶ and it is among the 22 items of the union matters between Tanzanian Mainland and Zanzibar.¹⁷ Therefore, the Court of Appeal is the unitary organ that serves both jurisdictions (Tanzania Mainland and Zanzibar). The Court of Appeal is the highest appellate body in the country with no original jurisdiction.¹⁸ This highest court only enjoys appellate jurisdiction from both the High Court of Tanzania Mainland and Zanzibar.¹⁹ It has power to hear and determine appeals from the High Court or decisions pronounced by a Resident Magistrate with an extended jurisdiction.²⁰ Court of Appeal Rules govern procedures in the Court of

¹² Colin Leys ‘Tanganyika: The realities of independence’ 17 *International Journal* 1962.

¹³ For further information about the union, see The Union of Zanzibar and Tanganyika Law, 1964, Government Notice No. 243 published on 1/5/64; see also Palamagamba John Kabudi ‘The United Republic of Tanzania after a quarter of a century: A legal appraisal of the state of the union of Tanganyika and Zanzibar’ 5 *African Journal of International and Comparative Law* 1993.

¹⁴ <http://www.judiciary.go.tz/primary-functions-and-values/> (accessed 7 August 2017).

¹⁵ The Ward Tribunal is discussed in Chapter 8.

¹⁶ There is the Constitution of the United Republic of Tanzania and that of Zanzibar. The Court of Appeal is established by the Constitution of the United Republic of Tanzania of 1977, article 117.

¹⁷ See the Constitution of the United Republic of Tanzania of 1977, First Schedule.

¹⁸ *Id* at article 117(3).

¹⁹ See *Id* at article 117.

²⁰ *Id* at article 117(3); see also the Magistrates’ Courts Act, Chapter 11, Revised Edition 2002, section 45.

Appeal both in civil and criminal matters.²¹ The chief justice or the presiding judge determines the language of the court, be it either English or Kiswahili, though court records and judgments are in English.²² The president appoints the chief justice, who is the head of the judiciary and the Court of Appeal.²³ The court is normally presided over by not less than three justices of appeal and decisions are based on majority opinion.²⁴ The chief justice may convene the Court of Appeal in any part of the country depending on the needs and availability of cases.²⁵

7.2.2 The High Court

The High Court of Tanzania is below the Court of Appeal. While Tanzania Mainland has its High Court established under the Constitution of the United Republic of Tanzania,²⁶ Zanzibar has its High Court established under the Constitution of Zanzibar.²⁷ The High Court of Tanzania has unlimited jurisdiction in Tanzania Mainland over civil and criminal matters unless ousted by law.²⁸ The High Court of Zanzibar also has unlimited jurisdiction in both civil and criminal matters.²⁹ The president has power to appoint the Principal Judge and judges of the High Court in consultation with the Judicial Service Commission of Tanzania.³⁰ High Court judges preside over the High court in determining cases and hearing appeals from subordinate courts and quasi-judicial tribunals.³¹ In the High Court, the Criminal Procedure Act, 1985 governs criminal conducts³² while the Civil Procedure Code, 1966 governs civil matters.³³ The Principal Judge manages the overall administration of the High Court and

²¹ The Tanzania Court of Appeal Rules of 2009.

²² *Id* at Rule 5.

²³ The Constitution of the United Republic of Tanzania of 1977, article 118.

²⁴ *Id* at article 119.

²⁵ For discussion of Tanzania's court hierarchy, see Rainer Michael Bierwagen and Chris Maina Peter 'Administration of justice in Tanzania and Zanzibar: A comparison of the two judicial system in one country' 38 *International and Comparative Law Quarterly* 1989.

²⁶ The Constitution of the United Republic of Tanzania of 1977, article 108. Currently, there are 15 High Court zones in the country. See <http://www.judiciary.go.tz/judiciary-hierarchy/> (accessed 7 August 2017).

²⁷ The Constitution of Zanzibar, Chapter 1, Revised Edition 2006, article 93.

²⁸ The Constitution of the United Republic of Tanzania of 1977, article 108(2).

²⁹ The Constitution of Zanzibar, Chapter 1, Revised Edition 2006, article 93.

³⁰ The Constitution of the United Republic of Tanzania of 1977, article 109. The qualifications for appointment to the High Court judge are provided under article 109(7) of the Constitution.

³¹ *Id* at article 109.

³² The Criminal Procedure Act, Chapter 20, Revised Edition 2002.

³³ The Civil Procedure Code, Chapter 33, Revised Edition 2002.

subordinate courts; he or she is the head of the High Court and an assistant to the Chief Justice in that matter.³⁴

7.2.3 The Resident Magistrates' Court

The Resident Magistrates' Court and District Court are subordinate to the High Court and have concurrent jurisdictions. Like the District Court, the Resident Magistrates' Court has both civil and criminal jurisdiction.³⁵ In practice, it has no appellate jurisdiction because all appeals from Primary Courts go to the District Court.³⁶ Initially, Resident Magistrates' Courts were civil courts, which were presided over by Resident Magistrates who were regarded as civil magistrates.³⁷ District Magistrates presided over District Courts, which were a kind of criminal court.³⁸ Currently, Resident Magistrates preside over both Resident Magistrates' Courts and District Courts. Unlike District Courts, resident magistrates' courts are in a region's headquarters. The Criminal Procedure Act, 1985 governs the Resident Magistrates' Court in criminal trials and appeals from this court goes directly to the High Court unless presided over by a Resident Magistrate with extended jurisdiction, where appeals go to the Court of Appeal.³⁹

7.2.4 District Court

District Courts are established in almost every district in Tanzania.⁴⁰ They are possibly the highest in number after Primary Courts.⁴¹ A District Court has jurisdiction within the

³⁴ The Constitution of the United Republic of Tanzania of 1977, article 109. See also Bierwagen and Peter (1989).

³⁵ See the Magistrates' Courts Act, Chapter 11, Revised Edition 2002, section 41 and the Second Schedule to the Act.

³⁶ See Magistrates' Courts Act, Chapter 11, Revised Edition 2002, section 20.

³⁷ *Id* at section 2 defines a civil magistrate as a resident magistrate. There is no proper definition of a resident magistrate. A person qualifies to be a resident magistrate after obtaining a degree in law from a university. See Bierwagen and Peter (1989) at 401.

³⁸ Initially, a person qualified to be a district magistrate by way of promotion from primary court magistrate. Currently, district magistrate posts are a dying cadre. See also Wierwagen and Peter (1989) at 401.

³⁹ The Criminal Procedure Act, Chapter 20, Revised Edition 2002, section 359.

⁴⁰ The Magistrates' Courts Act, Revised Edition 2002, section 4.

⁴¹ Currently there are about 109 district courts in Tanzania Mainland. See 'Managing records as reliable evidence for ICT/ e-government and freedom of information: Tanzania court case study' International Record Management Trust 2011 at 4, available at www.irmt.org/documents/.../TANZANIA_per_cent20COURT_per_cent20CASE_per_cent20STUDY.doc (accessed 23 March 2018).

jurisdiction where it is established.⁴² In practice, every district normally has a single District Court, though in some regional centres there are both a District and Resident Magistrates' Court within one district. The District Court has original jurisdiction on both civil and criminal cases arising from the district where it is established.⁴³ The Criminal Procedure Act, 1985 governs criminal procedure in the District Court.⁴⁴ The Court also exercises appellate and revision jurisdictions for matters decided by Primary Courts within its district.⁴⁵ The District Court may sit with assessor(s) where an issue of Islamic or customary law is involved.⁴⁶ The Court is presided over by a resident magistrate who is recruited by the Judicial Service Commission.⁴⁷

7.2.5 Primary Court

Primary Courts are the lowest establishment of formal courts within the Tanzania judicial hierarchy.⁴⁸ Their territorial jurisdiction is limited to the geographical limits of the district where the court is established.⁴⁹ To ensure access to justice at the grassroots level, a district normally has more than one Primary Court.⁵⁰ Primary Courts exercise jurisdiction on civil and criminal matters.⁵¹ Their criminal jurisdiction is limited to offences specified under the first schedule to the Magistrates' Court Act.⁵² Though in some offences such as cattle theft the court may impose a higher sentence as per the Minimum Sentences Act, 1972⁵³ offences tried by the Primary Courts are those petty offences for which the punishment does not

⁴² The Magistrates' Courts Act, Revised Edition 2002, section 4(1).

⁴³ *Id* at section 40.

⁴⁴ See the Criminal Procedure Act, Chapter 20, Revised Edition 2002, First Schedule.

⁴⁵ The Magistrates' Courts Act, Chapter 11, Revised Edition 2002, sections 20-21.

⁴⁶ *Id* at section 7(3).

⁴⁷ The Constitution of the United Republic of Tanzania of 1977, article 112; see also Bierwagen and Peter (1989).

⁴⁸ Primary courts are established under the Magistrates' Courts Act, Chapter 11, Revised Edition 2002, section 3.

⁴⁹ The Magistrates' Courts Act, Chapter 11, Revised Edition 2002, section 3(2). See 'Managing records as reliable evidence for ICT/ e-government and freedom of information: Tanzania court case study' International Record Management Trust 2011 at 4, available at www.irmt.org/documents/.../TANZANIA_per cent20COURT_per cent20CASE_per cent20STUDY.doc (accessed 23 March 2018).

⁵⁰ Currently, there are about 1,105 primary courts.

⁵¹ The Magistrates' Courts Act, Chapter 11, Revised Edition 2002, section 18.

⁵² See *Id* at First Schedule.

⁵³ The Minimum Sentences Act, Chapter 90, Revised Edition 2002, section 10.

exceed one-year imprisonment, fine or corporal punishment.⁵⁴ Primary Courts also exercise appellate jurisdictions from Ward Tribunals' decisions.⁵⁵ An appeal against a Primary Court lies to the District Courts.⁵⁶ Currently, Primary Courts are presided over by Resident Magistrates⁵⁷ and some by Primary Court Magistrates with a diploma in law. In every proceeding, the Primary Court is fully constituted when presided over by a magistrate and not less than two assessors.⁵⁸ While some Primary Courts are located in urban centres, the majority are in villages. However, not every village or ward has a Primary Court; they are insufficient in relation to the country's population.⁵⁹

7.3 The adversarial criminal justice processes

In Tanzania, the State, through the office of the Director of Public Prosecution (DPP), conducts criminal prosecution through the cooperation of the police, the judiciary and the prison department.⁶⁰ The police are responsible for arrests and investigation of cases, while the office of the DPP prosecutes.⁶¹ Judges and magistrates administer rules of procedure, preside over matters and make decisions.⁶² The prison department is responsible for rehabilitation and correction of sentenced offenders.

Tanzania follows the adversarial criminal justice system, which is similar to other adversarial justice systems in that an impartial judge or magistrate moderates dispute resolution through

⁵⁴The Magistrates Courts Act, Chapter 11, Revised Edition 2002, the Third Schedule (The Primary Courts Criminal Procedure Code), Rule 2.

⁵⁵ The Ward Tribunals Act, Chapter 206, Revised Edition 2002, section 20. As discussed in another chapter, ward tribunals are not under the judiciary though their appeals lies to the Primary Court.

⁵⁶ The Magistrates' Courts Act, Chapter 11, Revised Edition 2002, section 20.

⁵⁷ A person qualifies to be resident magistrate if he or she holds a degree from a university. See also Bierwagen and Peter (1989).

⁵⁸ The Magistrates' Courts Act, Chapter 11, Revised Edition 2002, sections 6-7.

⁵⁹ Tanzania's population is an estimated 54.2 million people. See <http://www.thecitizen.co.tz/News/Tanzania-s-population-projected-to-reach-54-2m-this-year/1840340-4324142-133b8moz/index.html> (accessed 22 March 2018).

⁶⁰ The National Prosecutions Service Act of 2008, section 16; Matilda T. Philip 'Victims of criminal justice in Tanzania – the need for radical approach in advancing juvenile justice' Paper presented at Tanganyika Law Society annual general meeting in Arusha, 2015 at 1.

⁶¹ Philip (2015) at 1.

⁶² *Ibid.*

court procedures.⁶³ In the Court of Appeal, High Court, Resident Magistrates' Court and District Court, a prosecutor represents the State as the victim of a crime.⁶⁴ A defence counsel may also represent an offender in court, save in Primary Courts where prosecutors and advocates do not appear, so people argue their cases.⁶⁵ According to the procedures of proving facts, the person alleging an existence of a certain fact has a burden to prove that that fact exists.⁶⁶ That burden is normally taken over by the State that stands as the victim of the crime; the victim becomes prosecution witness number one for the State's case. The standard of proof demands that the prosecution prove the existence of the crime beyond reasonable doubt.⁶⁷ In order to be exonerated from criminal liability, the offender simply sheds doubt on the facts adduced by the prosecution.⁶⁸

In Tanzania, professionals, namely the prosecutor and defence lawyer, guide victim and offender in adducing relevant facts.⁶⁹ Under the requirement of Tanzanian law of evidence, the court only records and admits relevant facts.⁷⁰ The adversarial system takes the position that only relevant facts, which support the elements of the crime, are vital. In Tanzania, parties stand as adversaries in a confrontational and professionally guided dispute resolution system.⁷¹

The adversarial criminal justice system is criticised for taking the dispute from individuals (victim and offender). While it is true that some offences lack direct individual victims, such as drug trafficking, vandalism and drunk driving, in the majority of crimes the victims are individual persons. Even where there is an individual victim, in Tanzania the State stands in

⁶³ See Erez and Roberts (2007) at 277; Jane Creaton and Francis Pakes 'Adversarial and inquisitorial justice?' in Tom Ellis and Stephen P Savage (eds) *Debate in criminal justice: Key themes and issues* Routledge USA 2012 at 53.

⁶⁴ In Tanzania, under the Criminal Procedure Act, Chapter 20, Revised Edition 2002, section 99, private prosecution of criminal cases is allowed, albeit that it is more commonly applied in primary courts than in higher courts.

⁶⁵ In primary courts, the victim (complainant) stands as a private prosecutor and the offender appears in person.

⁶⁶ The Evidence Act, Chapter 6, Revised Edition 2002, section 110.

⁶⁷ The Evidence Act, Chapter 6, Revised Edition 2002, section 3(2).

⁶⁸ See *Id* at section 114.

⁶⁹ *Id* at section 146.

⁷⁰ See *Id* section 7 and 145(2).

⁷¹ On the examination of witnesses in Tanzania, see the Evidence Act, RE 2002, sections 148-176. For the situation in other jurisdictions, see Mary Fan 'Adversarial justice's casualties: Defending victim-witness protection' 55 *Boston College Law Review* 2014 at 775.

for the victim. Christie argues against ‘stealing’ conflicts from affected parties.⁷² According to Creaton and Pakes, when professionals take conflicts from individuals, it becomes a ‘game’ of professions (judge, prosecutor and attorney).⁷³ For instance, Mgbako and Baehr opine that the adversarial criminal process is like a ‘spectator sport’ between professionals.⁷⁴ In addition, when the conflict is taken from affected individuals, the incidental effects of the crime that the victim suffers are irrelevant and justice is determined by professionals who are not direct parties to the crime.

7.4 Victims in the criminal justice process

7.4.1 The victim and the pre-trial process

The justice process in Tanzania begins with the police receiving information and commencing an investigation.⁷⁵ A victim, community or any person may report the commission of a crime to the police.⁷⁶ In some cases, the police may suspect the commission of a criminal act and start an investigation.⁷⁷ In practice, depending on the nature of the offence, the police may ask the victim to trace the accused and inform the police. The police or any person may arrest an accused without a warrant, depending on the circumstances of the commission of the offence.⁷⁸ During the investigation, the victim may be required to appear before the police to give further information. In Tanzania, however, the police avail little information to the victim on the progress of the investigation. The prosecutor rarely informs the victim of the charge against the offender, nor is he or she consulted during the framing of the charge. In other jurisdictions for instance, plea-bargaining may be conducted

⁷² Christie (1977).

⁷³ Creaton and Pakes (2012) at 54.

⁷⁴ Chi Mgbako and Kristina Scurry Baehr ‘Paralegal organisations and customary law in Sierra Leone and Liberia’ in Jeanmarie Fenrich, Paolo Galizzi and Tracy E Higgins (eds) *The future of African customary law* Cambridge University Press New York 2011 at 174.

⁷⁵ Philip (2015) at 1.

⁷⁶ The Criminal Procedure, Chapter 20, Revised Edition 2002, section 7; for information on other jurisdictions, see JA Scutt ‘Criminal investigation and the rights of victims of crime’ 14 *University of Western Australia Law Review* 1979 at 3-4.

⁷⁷ The Criminal Procedure Act, Chapter 20, Revised Edition 2002, section 10.

⁷⁸ *Id* at section 14 and 16.

or the charge reduced without the victim's knowledge.⁷⁹ The prosecutor may even drop the charge against the offender without the victims' knowledge. In cases which require the consent of the DPP before prosecution, the prosecutor sometimes does not explain the process to the victim. Where the DPP enters *nolle prosequi*, which is at the prosecutor's non-appealable discretion, the victim may not be aware of the reasons for the offender's release.⁸⁰

As experience from other jurisdictions shows, while the adversarial system grant minimal rights to the victim during the pre-trial process,⁸¹ the Criminal Procedure Act, 1985 in Tanzania provides several safeguards for the offender. This includes restraint on the use of unreasonable force during arrest,⁸² knowing the reason for arrest,⁸³ and being charged within 24 hours after the arrest unless it is a non-bailable offence.⁸⁴ In addition, the police may interrogate the offender for not more than four hours, save where the same consents to an extension of time.⁸⁵ The offender has the right to communicate with a lawyer⁸⁶ and the right to medical treatment while under the police custody.⁸⁷

In the United Kingdom, programmes to recognise victims' role in the criminal justice system have been set up. This includes the right to present a victim personal statement (VPS) before framing a charge.⁸⁸ Unlike a victim impact statement, a VPS is information given to the police or prosecutor by the victim showing the extent to which the crime has affected him or her.⁸⁹ When the victim provides information about the crime, the charge may accommodate

⁷⁹ Tanzania intends to adopt plea-bargaining agreements in criminal justice processes as a measure to reduce the backlog of cases. In the United States, the victim is always involved in the plea-bargaining stage. See <http://www.thecitizen.co.tz/News/CJ--Plea-bargaining-ideal-for-TZ/1840340-2171864-r4xtjqz/index.html> (accessed 28 April 2018); for other jurisdictions, see also Dana Pugach and Michal Tamir 'Nudging the criminal justice system into listening to crime victims in plea agreement' 28(1) *Hastings Women's Law Journal* 2017.

⁸⁰ On *nolle prosequi* in Tanzania, see the Criminal Procedure Act, Chapter 20, Revised Edition 2002, section 91.

⁸¹ See Douglas E Beloof, Paul G Cassell and Steven J Twist *Victims in criminal procedure* 3rd ed Carolina Academic Press Durham North Carolina 2010 at 3; Wodage (2011) at 111-112.

⁸² The Criminal Procedure Act, Chapter 20, Revised Edition 2002, section 21.

⁸³ *Id* at section 23.

⁸⁴ *Id* at section 32.

⁸⁵ *Id* at section 50 and 51.

⁸⁶ *Id* at section 54.

⁸⁷ *Id* at section 55.

⁸⁸ Chris Lewis and Jacki Tapley 'Victims' rights or suspects' right?' in Tom Ellis and Stephen P Savage (eds) *Debate in criminal justice: Key themes and issues* Routledge USA and Canada 2012 at 220.

⁸⁹ Lewis and Tapley (2012) at 220.

harm and suffering.⁹⁰ The United States, Canada, France and New Zealand recognise the role of the victim at different stages of the criminal justice process.⁹¹ According to Erez and Roberts, the victim's right to information during pre-trial is a necessity. This includes the right to information on the investigation process, plea-bargaining, trial process and application for bail.⁹² The protection of the victim goes as far as providing a secure place for the victim while awaiting the trial in court.⁹³

In Tanzania, information is not provided to victims, as a result of which their experience of the justice process is one of fear, insecurity, disempowerment and disappointment. The experience of other jurisdictions using an adversarial system shows that a victim needs proper information about the case, such as the anticipated hearing date and the possibility of the offender's being released on bail.⁹⁴ The police in Tanzania should assure the victim's security after the offender's bail release. When the Tanzanian criminal justice process does not provide information to victims about their cases, victims begin to see the justice process as biased and may lose trust in it.

Due to the lack of proper information given to the victim in Tanzania, the criminal justice process tends to aggravate the crime's psychological effects, even where these were not especially severe. To begin with: the criminal justice process becomes stressful and risks subjecting the victim to secondary victimisation.⁹⁵ For instance, the offender's release may have far-reaching effects on the victim when not communicated to the latter. It may create unnecessary suspicion about the investigation or prosecution machinery, leading to surmise about the use of corrupt practices. The victim becomes uncertain about the offender's

⁹⁰ *Ibid.*

⁹¹ Most Western jurisdictions, such as the United States, Canada, France and New Zealand, have legislated to protect the victim from the trauma of the adversarial system. These protections include providing a safe place for the victim while waiting for the case; restraining the defence from cross-examining victims on their previous sexual experience; admitting victims' videotaped evidence instead of face-to-face encounter in court; the right to fully participate in the criminal justice process; participating in bail and parole applications; and the right to present a victim impact statement. See Erez and Roberts (2007).

⁹² Erez and Roberts (2007) at 278.

⁹³ *Ibid.*

⁹⁴ Zehr (2005) at 26; Wilson (2015) at 156.

⁹⁵ Other jurisdictions which have not put the victim at the centre of the criminal justice process experience the same problem as Tanzania. See, for instance, Garkawe (2003) at 345-346; Paul G Cassell 'Introduction: The maturing victims' rights movement' 13(1) *Ohio State Journal of Criminal Law* 2015 at 2.

prosecution, and victim's security may be jeopardised. This might be one of the reasons why the police in Tanzania rank highly in surveys of perceived corruption.⁹⁶ If the prosecution in Tanzania were to inform victims about the prosecution process, it would aid the latter's psychological healing, comfort and trust in the process.⁹⁷

7.4.2 Victim's needs in the criminal justice process

Under the Tanzanian criminal justice system, the State regards the victim as the most important witness for establishing the existence of the crime. The witness protection law in Tanzania shields only whistle-blowers in corruption-related matters, not crime victims.⁹⁸ The Prevention and Combating Corruption Act, 2007 also has a provision to protect persons who report corrupt transactions or abuse of public offices.⁹⁹ As a victim protection measure in Tanzania, all cases involving juveniles and sexual offences involving adults are normally heard in camera.¹⁰⁰ Even under the juvenile justice, the victim has to meet the offender in court, given that proceedings in camera do not prevent the offender from appearing in court. As discussed in Chapter 8, procedures governing juvenile justice still take the form of an adversarial system and so include, for instance, the cross-examination of witness.¹⁰¹ An exception is that evidence concerning a child can be received in court in video- or tape-recorded form rather than via a personal encounter in court.¹⁰² While the Anti-Money Laundering Act, 2016 protects reporters of criminal transactions and victims,¹⁰³ there is no law to protect adult victims of a crime in Tanzania. A victim is an important 'piece of evidence', but the criminal justice does not address her needs. The prosecution 'uses' the victim to secure a judgment against the offender without understanding needs of his or her

⁹⁶ <http://www.mwananchi.co.tz/habari/Polisi--Mahakama-zaongoza-kwa-rushwa/1597578-4198480-anf2svz/index.html> (accessed 24 April 2018).

⁹⁷ The same finding has been made in other jurisdictions which have taken steps to recognise the victim at a pre-trial processes. See Bruce J Winick 'Therapeutic jurisprudence and victims of crime' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds) *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* Carolina Academic Press Durham 2011 at 8; Jamie Balson 'Therapeutic jurisprudence: Facilitating healing in crime victims' 6 *Phoenix Law Review* 2013 at 1022.

⁹⁸ The Whistle-blower and Witness Protection Act of 2015.

⁹⁹ The Prevention and Combating Corruption Act of 2007, section 52.

¹⁰⁰ The Law of the Child Act of 2009, section 99.

¹⁰¹ *Id* at sections 99 and 109.

¹⁰² Child Protection Regulations of 2014, Regulation 17.

¹⁰³ The Anti-Money Laundering Act of 2016, section 22.

that arise as the result of the crime. Criminal justice in Tanzania does not provide an opportunity in the process to understand the harm the victim has suffered due to the crime.

As in other jurisdictions, victims in Tanzania suffer physical, financial and psychological harm.¹⁰⁴ Normally a crime creates needs for the victim as well as the obligation that the offender takes responsibility and make things right.¹⁰⁵ Through the crime's effects on the victim, he or she suffers emotional and psychological distress.¹⁰⁶ As a result, victims have several needs that arise the offender's criminal behaviour.¹⁰⁷ Zehr urges that the criminal justice process recognise the stories of victims.¹⁰⁸ Victims of crime need a process of justice that understands their victimhood and feels sympathy for them.¹⁰⁹ Criminologists have argued for a criminal justice system that expresses sympathy, respect, fairness, material reparation and moral treatment and which vindicates the victim.¹¹⁰ A victim needs compensation and restitution¹¹¹ so as to be closer to the position he or she was in before the occurrence of the crime.¹¹² The victim may need property repair¹¹³ and/or restitution,¹¹⁴ allowing that bodily and psychological injuries are difficult to quantify in monetary terms.¹¹⁵ Nevertheless, all these needs are beyond the purview of the Tanzanian criminal justice system. It lacks opportunities to answer victims' questions,¹¹⁶ avails little information to

¹⁰⁴ See Loren Walker 'Restorative justice: Definition and purpose' in Katherine S van Wormer and Loren Walker (eds) *Restorative justice today: Practical applications* Sage Los Angeles 2013 at 5.

¹⁰⁵ Howard Zehr and Harry Mika 'Fundamentals of restorative justice in Declan Roche (ed) *Restorative justice*, Ashgate England 2004 at 77; Zehr (2005) at 181.

¹⁰⁶ Van Ness and Strong (2010) at 43.

¹⁰⁷ Heather Strang *Repair and revenge: Victims and restorative justice* Oxford University Press 2002; Van Ness and Strong (2010) at 44.

¹⁰⁸ Zehr (2005) at 22; Howard Zehr 'Retributive justice, restorative justice' in Gerry Johnstone (ed) *A restorative justice reader* 2nd ed Routledge London and New York 2013 at 23.

¹⁰⁹ See Zehr (2005) at 22.

¹¹⁰ Heather Strang 'Is restorative justice imposing its agenda on victim?' in Howard Zehr and Barb Toews (eds) *Critical issues in restorative justice* Willan publishing UK 2004 at 96; Lucy Clark Sanders 'Restorative justice: The attempt to rehabilitate criminal offenders and victims' 2 *Charleston Law Review* 2008 at 937; Van Ness and Strong (2010) at 44; Zehr (2013) at 23.

¹¹¹ George Pavlich *Governing paradoxes of restorative justice* Routledge New York 2005 at 49; Zehr (2005), at 26; Zehr (2013) at 23.

¹¹² Raymond Koen 'The antinomies of restorative justice' in Elrena van der Spuy, Stephan Parmentier and Amanda Dissel (eds) *Restorative justice: Politics, policies and prospects* Juta Cape Town South Africa 2007 at 251-252.

¹¹³ Zehr (2005) at 26.

¹¹⁴ Strang (2004) at 96; Pavlich (2005) at 49; Sanders (2008) at 937.

¹¹⁵ Zehr (2005) at 26.

¹¹⁶ See Zehr (2005) at 26; Zehr (2013) at 23.

victim about the case,¹¹⁷ seems to deprive victims of power rather than empower,¹¹⁸ there are no proper mechanisms for compensation, and victims' security is not a concern.¹¹⁹

The adversarial criminal justice process applicable in Tanzania is unable to address victims' needs because it does not engage victims in finding the solution for the problem.¹²⁰ Restorative measures may cater for victims' needs when victims are able to meet offenders, seek answers to questions, and possibly get an apology.¹²¹ Apology from the offender may initiate victims' healing.¹²² Victims should get an 'experience of justice' through the criminal justice process, because 'justice must be experienced as real'.¹²³ Victims should be part of the process of justice, possibly through restorative interventions, and not merely as witnesses for the prosecution. Judicial processes Tanzania may exacerbate victim's trauma and secondary victimisation because victims are not full involved.¹²⁴

7.4.3 Treatment of victims under the criminal justice system

The Tanzania Constitution presumes the offender's innocence until declared guilty by the court.¹²⁵ The system of justice requires proof beyond reasonable doubt before the offender is found guilty; any doubt benefits the offender and the victim remains a loser.¹²⁶ Under the Tanzanian criminal justice system, the offender enjoys a better bundle of rights guaranteed by the law than the victim does.¹²⁷ The onus of proving any fact lies with the party who alleges that fact.¹²⁸ In Tanzania, a witness, including the victim, is subject to cross-examination to

¹¹⁷ Strang (2004) at 96; Jo Goodey *Victims and victimology: Research, policy and practice* Pearson England 2005 at 121-122; Zehr (2005) at 26; Winick (2011) at 5 and 8.

¹¹⁸ See Zehr (2005) at 27; Zehr (2013) at 23.

¹¹⁹ Ayubu Yusuf Mwenda 'Witness protection in Tanzania' Resource Materials Series Number 86, available at http://www.unafei.or.jp/english/pdf/RS_No86/No86_10PA_Mwenda.pdf (accesses 27 March 2018).

¹²⁰ Sanders (2008) at 937; Zehr (2005) at 28.

¹²¹ See Strang (2004) at 96.

¹²² Zehr (2005) at 186; Walker (2013) at 4

¹²³ Zehr (2005) at 28.

¹²⁴ See Gerry Johnstone *Restorative justice: Ideas, values and debates* 2nd ed Routledge USA and Canada 2011 at 11; Thomas Trenczek 'Restorative justice: New paradigm, sensitising theory or even practice' 3 (3) *Restorative Justice: An International Journal* 2015 at 454.

¹²⁵ See, for instance, the Constitution of the United Republic of Tanzania of 1977, article 13(6) (b).

¹²⁶ See the Evidence Act, Chapter 6, Revised Edition 2002, section 3(2) (a).

¹²⁷ See, for instance, the Criminal Procedure Act, Chapter 20, Revised Edition 2002, sections 52-56; see also, for a comparison of offenders' rights in the adversarial criminal justice system, the Constitution of South Africa 1996, article 35.

¹²⁸ The Evidence Act, Chapter 6, Revised Edition 2002, sections 110 and 112.

unveil the truth.¹²⁹ Cross-examination tends to determine the veracity, weight and credibility of victims' evidence by 'weakening, qualifying, or destroying the case of the opponent; and [seeking] to establish the party's own case'.¹³⁰ According to Kennedy, for instance, cross-examination procedures normally exert pressure on victims, leading to anxiety and fear.¹³¹ Lee considers the cross-examination of victims as the most humiliating actions that are carried out 'in the name of justice',¹³² equating it to 'judicial rape'.¹³³ Wodage views cross-examination as an offender's way of retaliating against the victim.¹³⁴ Creaton and Pakes regard cross-examination of 'traumatised victims' as inappropriate,¹³⁵ since it embarrasses, terrifies, traumatises and psychologically damages victims of crime.¹³⁶

In Tanzania, victims have a face-to-face encounter with offenders in court, something which

¹²⁹ *Id* at sections 146-47; for other jurisdictions, see also Fan (2014) at 776; Wilson (2015) at 154.

¹³⁰ See, for instance, the Evidence Act, RE 2002, section 155; BD Chipeta *A handbook for public prosecutors* 3rd ed Mkuki na Nyota Publishers Dar es Salaam 2009 at 249; see also, for other jurisdictions, Louise Ellison 'The protection of vulnerable witnesses in court: An Anglo-Dutch comparison' 3(1) *The International Journal of Evidence and Proof* 1999 at 35; Goodey (2005) at 154.

¹³¹ Jessica Kennedy, Patricia Easteal and Lorana Bartels 'How protected is she? "Fairness" and the rape-victim witness in Australia' 35 *Women's Studies International Forum* 2012 at 335.

¹³² Lee argues that the court may require a victim of sexual abuse to narrate 'loudly and clearly' the act of rape in public. Sue Lees 'Judicial rape' 16(1) *Women's Studies International Forum* 1993 at 11; see also Donna Stuart 'No real harm done: Sexual assault and the criminal justice system' Australian Institute of Criminology (paper presented at the conference, Without consent: Confronting adult sexual violence) 1992 at 101. However, courts normally hear sexual offence cases in camera to protect the dignity of victims and reduce the level of revictimisation during the proceedings.

¹³³ Lees (1993) at 11; J Kim Wright *Lawyers as peacemakers: Practicing holistic, problem-solving law* ABA Publishing USA 2010 at 267.

¹³⁴ Wodage (2011) at 113.

¹³⁵ Creaton and Pakes (2012) at 55.

¹³⁶ However, other countries such as Australia and France have incorporated provisions to protect the rights of the victims in the criminal justice process. In Australia, the Criminal Procedure Act prohibits cross-examination of the victim's previous sexual experience which has no relevance to the case in dispute. In recognition of the victim's rights in court, France allows victims to be regarded as a 'civil complainants' in a criminal case. Under Spanish law, the victim can become one of the prosecutors in a criminal case. Edna Erez, Peter Ibarra and Daniel M Downs 'Victim welfare and participation reforms in the united states: A therapeutic jurisprudence perspective' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds) *Therapeutic jurisprudence and victim participation in justice: International perspectives* Carolina Academic Press Durham 2011 at 28-29; Walker (2013) at 34; Anne Hayden and Katherine van Wormer 'Restorative justice and gendered violence' in Katherine S. Van Wormer and Loren Walker (eds) *Restorative justice today: Practical applications* SAGE Publications 2013 at 126-127; Tinneke Van Camp *Victims of violence and restorative practices: Finding a voice* Routledge USA and Canada 2014 at 64. Wilson (2015) at 155 and 159.

may haunt and traumatise them.¹³⁷ The court processes expose victims and offenders to each other in a confrontational atmosphere. In this stressful environment, the prosecutor merely uses the victim as a ‘tool’ in the judicial ‘battle’.¹³⁸ In Tanzania, there is little security for victims after court hearing; hence, the victim’s trauma may fester even after the case ends because the process of justice exposes the victim to insecurity and confrontational dispute mechanisms. In Tanzania, victims (witnesses) are legally obliged to give evidence, otherwise they may be considered refractory witnesses.¹³⁹ In addition, it is a mandatory rule of evidence that the victim give evidence by word of mouth unless it is documentary evidence.¹⁴⁰ As in other jurisdictions using the adversarial system, it is very likely that victims will suffer secondary victimisation through the judicial process.¹⁴¹ In other jurisdictions, victim trauma under the adversarial criminal justice process is a factor for attrition in rape cases.¹⁴²

In Tanzania, the law ought to treat a victim as a special person who needs attention, protection and psychological healing. Hence, most Western countries now protect victims of violent crime and child victims from secondary victimisation by admitting testimony through videotapes than face-to-face contact with offenders.¹⁴³ Even though courts in Tanzania try sexual assault cases in camera, the justice process does not exclude victims from cross-examination. Winick, writing in relation to other jurisdictions, has argued that judges, magistrates, prosecutors and attorneys should be equipped with therapeutic techniques to empower the victim.¹⁴⁴

¹³⁷ Erez, Ibarra and Downs (2011) at 16; Helmut Kury and Michael Kilchling ‘Accessory prosecution in Germany: Legislation and implementation’ in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds) *Therapeutic jurisprudence and victim participation in justice: International perspectives* Carolina Academic Press Durham 2011 at 42; Kerstin Braun ‘Giving victims a voice: On the problems of introducing victim impact statement in German criminal procedure’ 14 *German Law Journal* 2013 at 1893; Zehr (2013) at 23.

¹³⁸ This phenomena is described by Goodey (2005) at 154, but it also is applicable in the Tanzania criminal justice system.

¹³⁹ A person is considered a refractory witness after refusing to take an oath or, after taking an oath, refusing to testify. A person may be committed to custody after refusing to testify until such time as he or she is willing to give evidence. See the Criminal Procedure Act, Chapter 20, Revised Edition 2002, section 199.

¹⁴⁰ According to the Evidence Act, Chapter 6, Revised Edition 2002, sections 61-62; see also, for other jurisdictions, Louise Ellison ‘Rape and the adversarial culture of the courtroom’ in Mary Childs and Louise Ellison (eds) *Feminist perspectives on evidence* Cavendish Publishing 2000 at 50; Goodey (2005) at 154.

¹⁴¹ Ellison (1999) at 29; Wright (2010) at 267; Camp (2014) at 64.

¹⁴² Jeanne Gregory and Sue Lee ‘Attrition in rape and sexual cases’ 36(1) *The British Journal of Criminology* 1996 at 10-11.

¹⁴³ Erez and Roberts (2007) at 278.

¹⁴⁴ Winick (2011) at 6.

In Tanzania, the meeting between victim and offender in such a tense and unsafe environment is traumatic.¹⁴⁵ In Tanzania, the court convenes in special places, in most cases, away from the victim, offender and the affected community.¹⁴⁶ Some court buildings in Tanzania are simple, ‘old and dilapidated’;¹⁴⁷ some are so complex and modern in the eyes of the responsible stakeholders that even finding a way in and out can be daunting.¹⁴⁸ According to Winick, victims under an adversarial system consider court processes as coercive.¹⁴⁹ Therefore, judicial officers should attentively listen to and empathise and sympathise with the victim.¹⁵⁰ Some victims may be dumb, deaf, illiterate, or have a disability and so need extra attention and encouragement.¹⁵¹ The judge must clearly explain the process of justice to the victim and create a friendly environment. If the process of justice is unfriendly or anti-therapeutic, the victim is likely to lose trust in the judicial process.¹⁵² The adversarial system that Tanzania follows is coercive in nature.¹⁵³ Court processes are oriented towards punitive measures rather than the restoration of relationships.

7.4.4 Victims’ voice in the criminal justice process

In Tanzania, the victim’s voice does not appear at any stage in the records of proceedings, save where his or her testimony is taken as that of an ordinary witness for the prosecution.¹⁵⁴ As in other jurisdictions, in cases where the police do not arrest the offender, the victim will

¹⁴⁵ This is a common feature of adversarial systems, as described by Susanne Walther ‘Victim’s rights: Procedural and constitutional principles for victim participation in Germany’ in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds) *Therapeutic jurisprudence and victim participation in justice: International perspectives* Carolina Academic Press Durham 2011 at 100.

¹⁴⁶ This is described as a common phenomenon in countries using the adversarial court system. See Christie (1977) at 39. For Tanzania, see Robert V Makaramba ‘The Practical and Legal Challenges of Justice Delivery in Tanzania: Experience from the Bench’. Paper presented at the Annual Conference of the Tanganyika Law Society in Arusha, Tanzania 2012 at 10.

¹⁴⁷ Makaramba (2012) at 10.

¹⁴⁸ See, for instance, Christie (1977) at 39.

¹⁴⁹ Winick (2011) at 7

¹⁵⁰ *Id* at 8.

¹⁵¹ *Id* at 6.

¹⁵² *Id* at 8.

¹⁵³ Daniel W Van Ness ‘New wine and old wineskins: Four challenges of restorative justice’ in Declan Roche (ed) *Restorative justice* Ashgate Publishing 2004 at 161.

¹⁵⁴ See KSK Lugakingira and CM Peter ‘Victim Compensation and Aspects of Law and Justice in Tanzania’ 18 *International Criminal Justice Review* 2008.

not have voice at all.¹⁵⁵ Where the offender pleads guilty, the criminal justice system silences the victim's voice because there is no necessity of adducing evidence.¹⁵⁶ The same applies in many common law jurisdictions, where victims serve a mere 'source of evidence for the prosecution'.¹⁵⁷

As discussed in Chapter 2, there are good reasons for the court to hear the victims' voice in the justice process in Tanzania. It may allow the court to apprehend the extent to which the crime affects the victim. By hearing the victim, the material, financial, economic and psychological effects of the crime are unveiled to both the court, community and the offender. However, victims' having a say in the nature and severity of the sentence is a complex issue.¹⁵⁸ In Tanzania, as in other adversarial jurisdictions, because the victim normally states the facts, facts which are relevant only for proving the existence of the State's case, the court does not hear of the psychological, emotional and traumatic effects of the crime.¹⁵⁹ When the court hears the victim, the process of justice becomes participatory; the outcome is likely to satisfy the victim, offender and the community even though the court may sentence the offender to imprisonment, the payment of a fine, or otherwise.¹⁶⁰

7.4.5 Victims' right to compensation

In Tanzania, the victim's right to compensation under the criminal justice process is a constitutional right.¹⁶¹ Lugakingira and Peter categorise victims into two groups: victims of individual offenders and victims of acts committed by persons acting on behalf of the government.¹⁶² Under the Constitution, courts are obliged 'to award reasonable compensation

¹⁵⁵ This is a common problem in many countries which neglect the role of victims in the criminal justice process. See Erez and Roberts (2007) at 279.

¹⁵⁶ Erez and Roberts (2007) at 279.

¹⁵⁷ Wodage (2011) at 113.

¹⁵⁸ See the discussion in Chapter 2 of victims' views on sentencing.

¹⁵⁹ See, for instance, the Evidence Act, RE 2002, section 7. See the experience of other jurisdictions in Susan Daicoff 'Law as a healing profession: The 'comprehensive law movement' 6 *Pepperdine Dispute Resolution Law Journal* 2006 at 5.

¹⁶⁰ Winick (2011) at 7; Edna Erez 'Who's afraid of the big bad victim? Victim impact statements as victim empowerment and enhancement of justice' *Criminal Law Review* 1999 at 551 and 553; Heather E Williams 'Social justice and comprehensive law practice' 5 *Seattle Journal for Justice* 2006 at 415; Balson (2013) at 1026; Susan Daicoff 'Teaching students to be healers: The comprehensive law movement' Arizona summit law school, 2015, available at http://works.bepress.com/susan_daicoff/43/ (accessed 16 March 2016).

¹⁶¹ See the Constitution of Tanzania (1977), article 107A.

¹⁶² Lugakingira and Peter (2008).

to victims of wrong doings committed by other persons, and in accordance with the relevant law enacted by the parliament'.¹⁶³ The Criminal Procedure Act, 1985 amplifies the constitutional provision on victim compensation as follows:

[W]here an accused person is convicted by any court of any offence not punishable with death and it appears from the evidence that some other person, whether or not he is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed and that substantial compensation is, in the opinion of the court, recoverable by that person by civil suit, the court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation, in kind or in money, as the court deems fair and reasonable.¹⁶⁴

The awarding of compensation to victims after the offender's conviction is echoed in numerous judicial decisions. For instance, in the case of *Leonard Jonathan v. Republic*¹⁶⁵ the accused was sentenced to serve 30 years in prison, together with ten strokes, by the trial court for the offence of rape. The magistrate further stated that the victim's compensation shall be paid after institution of a civil claim in the same court. The Court of Appeal observed that the victim's right to compensation ought to be awarded after the offender's conviction unless the amount is higher than the reasonable amount to be awarded in a criminal case. In Tanzania, oftentimes a token amount of compensation is awarded in criminal cases. For instance, in the case of *Saidi Haruna v. Republic*¹⁶⁶ the trial court sentenced the offender to 30 years in prison for the offence of raping a 15-year-old girl. The court also ordered the offender to pay Tanzania shillings 30,000 (15 USD) as compensation to the victim.¹⁶⁷ This amount of money may not be regarded as 'compensation'; it may be a mere symbolic expression of guilt.¹⁶⁸

While compensation to the victim is a constitutional right and courts insist that it be awarded

¹⁶³ The Constitution of the United Republic of Tanzania of 1977, section 107A(2)(c).

¹⁶⁴ The Criminal Procedure Act, Chapter 20, Revised Edition 2002, section 348.

¹⁶⁵ *Leonard Jonathan v. Republic*, Criminal Appeal No. 225 of 2007, Court of Appeal of Tanzania at Arusha.

¹⁶⁶ *Saidi Haruna v. Republic*, Criminal Appeal No. 227 of 2007, Court of Appeal of Tanzania at Arusha.

¹⁶⁷ This is according to the currency exchange rate on 15 August 2017. The amount could have been lower still in 2007 when the court granted the award of compensation.

¹⁶⁸ Jonathan Doak *Victims' rights, human rights and criminal justice: Reconceiving the role of third parties* Hart Publishing USA and Canada 2008 at 227.

in criminal trials, the compensation has been disproportionate to the loss and pain suffered by victims. In a recent case of *Republic v. Salum Njwete Salum (Scorpion)*,¹⁶⁹ the offender attacked the victim at night, piercing the victim's eyes and resulting in permanent blindness. The victim further sustained bodily injuries by having been stabbed with a knife. After the brutal attack, the offender attempted to hide the trail of evidence by dragging the victim to a road to be hit by cars. The life of the victim was saved thanks to good Samaritans who later picked up the victim and delivered him to hospital. At the conclusion of the criminal case, the court sentenced the offender to serve seven years in prison and pay Tanzania shillings 30 million (about 14,000 USD) as compensation to the victim. The victim was dissatisfied by both the award of compensation and sentence. When the court's decision was pronounced, the victim, together with his family members, literally wept in court.¹⁷⁰

Considering the harm suffered by the victim, the amount of compensation awarded by the court was very low. In addition, it is not clear how the offender was going to pay the compensation because he was going to prison where he cannot work or earn income to pay the compensation. Even where the offender has property to be attached to satisfy the compensation award, the process may create collateral victims such as children and family members of the offender (if any). In addition, attachment of a residential house is contrary to the law's human rights values. Despite disproportionate victim's compensation in criminal cases, when such compensation is coupled with a long sentence it is effective a denial of the victim's rights. This might be the result of the criminal justice system's failure to listen to the victims about the collateral damages caused as result of the crime. When a victim is given voice in the criminal justice process, the court may understand the holistic harm caused to the victim and award meaningful compensation. The victim's voice can be integrated using restorative justice where the aftermath is fairly discussed or by the use of victim impact statements.¹⁷¹

In Tanzania, a victim may seek compensation through a civil claim simultaneously with the criminal case or after the criminal case is determined. However, the criminal case may take

¹⁶⁹ *Republic v. Salumu Njwete Salum (Scorpion)*, Criminal Case No. 305 of 2018, in the District Court of Ilala, Dar es Salaam (unreported).

¹⁷⁰ <https://globalpublishers.co.tz/breaking-news-scorpion-ahukumiwa-kwenda-jela> (accessed 28 March 2018).

¹⁷¹ The advantages of using victim impact statements in criminal justice process are discussed in Chapter 2.

several months or possibly years. The civil claim may have prescribed due to the time lapse after the criminal case is concluded. Furthermore, a small amount of compensation awarded in the criminal case may be an impediment to a subsequent civil suit, because it implies that compensation was awarded in the criminal case. As mentioned, where the victim secures a compensation order through a civil claim, executing a decree on an imprisoned offender is a thorny issue. In the case of poor offenders who have caused severe harm to victims, the establishment of a compensation fund under the government may be necessary.¹⁷²

In Tanzania, it is a daunting endeavour for victims to seek compensation, while simultaneously struggling with the crime's harm. A victims' right to compensation in criminal courts seems to be up to the court's discretion. However, compensation in criminal cases should be commensurate with the harm suffered, in order to relieve the victim of protracted double court processes. Restorative mechanisms may be applied to resolve the overarching issues of the contemporary adversarial justice in Tanzania. For instance, in the Scorpion's case,¹⁷³ the award of compensation might have made a difference if restorative interventions were taken as a sentencing approach. The same amount of money and length of prison sentence would possibly have satisfied the victim if given in a restorative manner. An apology from the offender, if it were given, might have seen the victim accepting the court's decision without tears when it was announced.

7.5 Offenders in the adversarial criminal justice system

7.5.1 Offenders' needs and accountability

Under the adversarial system in Tanzania, the defence counsel (if any) or the court advises the offender to stick to only those facts that are relevant to refuting the State's evidence.¹⁷⁴ The process gives little opportunity for an offender to relate the experience from his or her

¹⁷² Despite numerous recommendations having been made for the establishment of a compensation fund for victims of crime, Tanzania does not have a special fund for the victims of crimes committed by poor offenders or agents of the government. See Report on statutory system of compensation to victims of crime, the Law Reform Commission of Tanzania 1978; Lugakingira and Peter (2008).

¹⁷³ See chapter 7 paragraph 7.4.5.

¹⁷⁴ See the Evidence Act, Chapter 6, Revised Edition 2002, section 144.

perspective.¹⁷⁵ In most adversarial justice processes, it is common for the offender to deny responsibility by pleading not guilty to a charge.¹⁷⁶ Even where the offender feels remorse, criminal justice attaches little weight to an apology, even though giving it involves a crucial moral and human sentiment.¹⁷⁷ The encounter between victim and offender in court does not address the needs of either party but merely proves or disproves the case for the state. Under the law, the offender normally gives mitigating factors after conviction,¹⁷⁸ but in practice courts in Tanzania may or may not consider such facts when forming a sentence.

The current adversarial criminal justice system in Tanzania may be as equally inefficient as any other jurisdiction.¹⁷⁹ It fails to make the offender see the holistic picture of the harm his or her act has caused.¹⁸⁰ Knowing harm is an accountability process and helps to reduce criminality. The Tanzanian criminal justice ought to hold the offender accountable by making things right.¹⁸¹ Making things right includes meeting the victim, listening, answering questions, apologising,¹⁸² paying compensation, making restitution and even serving the community.¹⁸³ A restorative encounter enables the offender to know the extent of harm caused to the victim and the community.¹⁸⁴ Zehr defines meaningful offender accountability as follows:

¹⁷⁵ The Evidence Act, Chapter 6, Revised Edition 2002, section 7.

¹⁷⁶ See Gretchen Ulrich 'Widening the circle: Adapting traditional Indian dispute resolution methods to implement dispute resolution and restorative justice in modern communities' 20 *Hamline Journal of Public Law and Policy* 1999 at 437; Zehr (2005) at 51.

¹⁷⁷ Zehr (2005) at 51; Hema Hargovan 'Knocking and entering: Restorative justice arrives at the courts' 1 *Acta Criminologica* 2008 at 25.

¹⁷⁸ The Criminal Procedure Act, Chapter 20, Revised Edition 2002, section 236.

¹⁷⁹ James Bonta, Rebecca Jesseman, Tanya Ruge and Robert Corner 'Restorative justice and recidivism: Promises made, promises kept' in Dennis Sullivan and Larry Tiff (eds) *Handbook of restorative justice* Routledge USA and Canada 2006 at 109; Chris Cunneen and Carolyn Hoyle *Debating restorative justice* Hart publishing US and Canada 2010 at 122; Zehr (2013) at 23; Alucia Mabuza and Cornelis Roelofse 'A study of contributory factors towards recidivism among incarcerated youth in the Barberton Youth Development Centre South Africa' 26(1) *Acta Criminologica* 2013 at 49.

¹⁸⁰ Saby Ghoshray 'An equilibrium-centric interpretation of restorative justice and examining its implementation difficulties in America' 35 *Campbell Law Review*, 2013 at 289.

¹⁸¹ See Zehr (2005) at 43 and 188; see also Walker (2013) at 5.

¹⁸² Gerry Johnstone and Daniel W van Ness 'The meaning of restorative justice' in Gerry Johnstone (ed) *A restorative justice reader* 2nd ed Routledge London and New York 2013 at 18.

¹⁸³ Robert B Coates, Mark S Umbreit and Betty Vos 'Responding to hate crimes through restorative dialogue' in Gerry Johnstone (ed) *A restorative justice reader* 2nd ed Routledge London and New York 2013 at 162.

¹⁸⁴ Zehr (2005) at 201.

[G]enuine accountability means, first of all, that when you offend, you need to understand and take responsibility for what you did. Offenders need to be encouraged to understand the real human consequences of their actions. But accountability has a second component as well: offenders need to be encouraged to take responsibility for making things right, for righting the wrong. Understanding ones' actions and taking responsibility for making things right – that is the real meaning of accountability.¹⁸⁵

The adversarial criminal justice system encourages offenders to deny charges and contravene the law in order to exonerate themselves from liability. In addition, the Tanzanian criminal justice system should involve offenders in a restorative way because they have needs for the court to address.¹⁸⁶ A crime normally stigmatises the offender,¹⁸⁷ in that the community considers him or her a threat and a person who does not deserve to be in society.¹⁸⁸ Such stigmatisation may impel the offender to throw in his lot with criminals rather than good persons in the community.¹⁸⁹ The stigmatisation of the offender thus calls for healing,¹⁹⁰ rehabilitation,¹⁹¹ empowerment¹⁹² and proper measures for reintegration in the community.¹⁹³

7.5.2 Sentencing the offender

Courts in Tanzania must convict the offender before passing a sentence. Sentencing is thus the last step in the courtroom process. After the offender is found guilty, either on plea or by proof beyond reasonable doubt, the court enters a conviction; the court may then impose a sentence immediately upon convicting the offender or adjourn the case to allow the magistrate or judge to prepare a judgment. According to the Tanzania Criminal Procedure

¹⁸⁵ Zehr (2013) at 24; see also Pavlich (2005) at 70; Lorenn Walker and Ted Sakai 'Restorative justice skills building for incarcerated people' in Katherine S van Wormer and Lorenn Walker (eds) *Restorative justice today: Practical applications* SAGE Publications Los Angeles 2013 at 166.

¹⁸⁶ Pavlich (2005) at 70; see also Zehr (2005) at 200.

¹⁸⁷ Nils Christie 'Words on words' 1(1) *Restorative justice: An International Journal* 2013 at 17.

¹⁸⁸ See Pavlich (2005) at 70; Cunneen and Hoyle (2010) at 12; Scheuerman and Keith (2015) at 76.

¹⁸⁹ Heath L Scheuerman and Shelley Keith 'Supporters and restorative justice: How does the intersection between offenders, victims and the community influence perceptions of procedural justice and shaming' 3(1) *Restorative justice: An International Journal* 2015 at 76 and 78.

¹⁹⁰ Zehr (2005) at 188.

¹⁹¹ Van Ness and Strong argue that the victim needs healing while the offender needs rehabilitation. See Van Ness and Strong (2010) at 43.

¹⁹² Zehr (2013) at 24.

¹⁹³ Van Ness and Strong (2010) at 57.

Act, 1985 '[T]he court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.'¹⁹⁴ The process includes considering the offender's previous convictions, information which can influence the sentence.¹⁹⁵ Such information is necessary for the court to form a judicious opinion on the offender's sentence.

However, in most cases, courts use the above provision to receive information provided by the prosecutor on the offender's demeanour.¹⁹⁶ In practice, courts take the provision to embrace the offender's mitigation rather than the victim's victimisation by the crime. While the offender's mitigating circumstances are relevant in Tanzania, at the sentencing stage courts do not consider the victim's information regarding the effects of the crime. In fact, there is no room for victim's voice at this stage other than via a prosecutor's opinion. It is common for a prosecutor to pray to the court for a more or less severe sentence for the offender.

The prosecutor's prayer may be valuable if the court bases the sentence on the victim's information about the crime's effects or the community's needs. Information garnered about the community at sentencing stage is crucial for the well-being of the victim, community and offender. In Canada, for instance, courts may take on board victim information gleaned from sentencing circles and victim impact statements.¹⁹⁷ When the court allows information from stakeholders at the sentencing stage, the offender becomes aware of the harm caused by the crime.¹⁹⁸ Such information is necessary to elicit empathy and apology from the offender, which is necessary in turn for making things right. On the other hand, when the community is involved in decision-making, the offender becomes responsible to the community and vice versa.¹⁹⁹ Even after serving a prison sentence, the offender may experience less stigma because he or she had an encounter with the victim and community before going to prison. An encounter facilitates the offender's reintegration in that it reconnects him or her with law-

¹⁹⁴ The Criminal Procedure Act, Chapter 20, Revised Edition 2002, sections 236 and 320.

¹⁹⁵ *Id* at section 237.

¹⁹⁶ Chipeta (2009) at 76.

¹⁹⁷ Sentencing circles and victim impact statements are discussed in other chapters.

¹⁹⁸ See Zehr (2013) at 24.

¹⁹⁹ See John Braithwaite *Crime, shame and reintegration* Cambridge University Press USA 1989.

abiding citizens in the community.

7.5.3 Prison rehabilitation of offenders

Imprisonment is often justified, in Tanzania as elsewhere, on the basis that it serves the offender's reformation or rehabilitation.²⁰⁰ The task of rehabilitation of offenders in Tanzania is entrusted to the prison services.²⁰¹ Different programmes are devised to equip the offender with skills to enable him or her to earn an income after prison life. According to the Minister of Home Affairs' budget speech of 2017/18, rehabilitation programmes in Tanzania include vocational training (such as carpentry, shoe-making and masonry) and education in other skills.²⁰² This is coupled with social rehabilitation programmes involving, for instance, sports, religious activity and counselling.²⁰³

However, these programmes seem ineffective in reducing recidivism in the community.²⁰⁴ A study conducted by Missigano in Dar es Salaam prisons shows a high rate of recidivism of 11 per cent.²⁰⁵ This finding is fortified by recent concerns raised by the President, who pardoned offenders in December 2017, only to find that some had already reoffended by January 2018. He called on courts to impose alternative sentences other than incarceration for minor offences.²⁰⁶ Reoffending can be a result of a number of factors. For instance, if poverty is the major cause, the offender is likely to reoffend if he or she is returned to the same environment without being empowered for employment. Tanzania is experiencing the same challenges as other countries regarding the lack of rehabilitative value of prison sentences.²⁰⁷ In Tanzania,

²⁰⁰ <http://www.commonlii.org/tz/other/TZLRC/report/R3/3.pdf> (accessed 25 April 2018); see, for the experience of other countries, John O'Sullivan 'The capital question' 52(13) *National Review* 2000 at 42.

²⁰¹ Tanzania Human Rights Report 2016 at 256.

²⁰² For instance, Karanga prison in Moshi is famous for shoe-making. In this prison-owned factory, prisoners make shoes for sale. See the budget speech by the Minister of Home Affairs 2017/18 at 39-42.

²⁰³ The budget speech of the Minister of Home Affairs 2017/18 at 40.

²⁰⁴ Liberate Missigano 'Assessing successfully of rehabilitation of prisons to convicted criminal prisoners: The case of prison in Dar es Salaam' LLM Dissertation Mzumbe University Morogoro 2014, available at http://scholar.mzumbe.ac.tz/bitstream/handle/11192/633/MSc_MPA_Liberate_per_cent20Missigaro-2014.pdf?sequence=1 (accessed 25 April 2018); for other jurisdictions, see Ortmann R 'The effectiveness of social therapy in prison: A randomized experiment' 46 *Crime and Delinquency* 2000.

²⁰⁵ Missigano (2014) at 52.

²⁰⁶ The President's speech on Law Day, 1 February 2018, is available at <https://www.youtube.com/watch?v=bOWRdYg0jXY> (accessed 28 March 2018).

²⁰⁷ Issa G Shivji, Hamidu I Majamba, Robert V Makaramba and Chris M Peter *Constitutional and legal systems in Tanzania: A civics sourcebook* Mkuki na Nyota Publishers Dar es Salaam 2004 at 270.

lack of skilled staff, an outdated rehabilitation curriculum, and financial constraints are cited as the major reasons underlying the State's failure to provide effective prison rehabilitation.²⁰⁸

Research by Martinson that challenges the value of prison rehabilitative programmes in reforming offenders is also relevant in Tanzania.²⁰⁹ His view is that 'nothing works' in prison programmes seeking to reform offenders.²¹⁰ Even the argument that imprisonment incapacitates offenders from committing crimes is baseless, given that offences continue to be committed in prisons.²¹¹ Murder, arson and theft, for instance, are common in prisons, and Tanzania is no exception in this regard.²¹² Even the community's protection from offenders is only temporary, seeing as most prisoners rejoin the community after serving sentences.²¹³

If prison rehabilitation is to work properly in Tanzania, the approach recommended by Latessa and Lowenkamp may be relevant. The authors group offenders into two categories: higher-risk and low-risk offenders.²¹⁴ Rehabilitative programmes for higher-risk offenders are different from those for the other group.²¹⁵ In fact, mixing these offenders may be detrimental as higher-risk offenders may influence low-risk offenders.²¹⁶ International standards demand that prisoners be separated depending on their age, sex and criminal record.²¹⁷ For low-risk offenders, prison rehabilitative measures can lower offenders' recidivism when 'principles of effective intervention' are employed.²¹⁸ This involves identifying high-risk offenders, understanding their needs, and dealing with their behavioural

²⁰⁸ Missigano (2014) at 28.

²⁰⁹ Robert Martinson 'What works? Questions and answers about prison reform' *The Public Interest* 1974; see also Edward Latessa 'What works in correctional intervention' 23 *Southern Illinois University Law Journal* 1999 at 415.

²¹⁰ John Braithwaite and S Mugford 'Conditions of successful reintegration ceremonies: Dealing with juvenile offenders' 34 *British Journal of Criminology* 1994.

²¹¹ Leopold (1966) at 33.

²¹² Leopold (1966) at 33; K Booyens, A Hesselink-Louw and P Mashabela 'Male rape in prison: An overview' 17 (3) *Acta Criminologica* 2004; Mbuba (2012) at 237-238.

²¹³ Shivji, Majamba, Makaramba and Peter (2004) at 270; Malik (2011) at 23.

²¹⁴ Edward J Latessa and Christopher Lowenkamp 'What works in reducing recidivism?' 3 (3) *University of St. Thomas Law Journal* 2006 at 522-523.

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ United Nations Standard Minimum Rules for the Treatment of Prisoners of 1955, Rule 8.

²¹⁸ Latessa and Lowenkamp (2006) at 522.

change through training, counselling and treatment.²¹⁹ Rehabilitative measures can work effectively when the number of inmates is commensurate with resources.²²⁰ This can be achieved by using alternative sentences to ensure that the number of inmates is manageable and by employing community rehabilitative measures for non-violent offenders.²²¹ Latessa and Lowenkamp argue that low-risk offenders can be accountable through lesser sentences, given that – as their designation as ‘low-risk’ implies –the risk of their reoffending is low.²²² This category of offenders can be held accountable through community services or non-custodial sentences. Apart from enhancing relationships between the offender and the community, community services are cheaper than incarceration.²²³

Unfortunately, the public, both in Tanzania and elsewhere, believes in severe sentences, a belief that predisposes prisons to be more about punishment than rehabilitation.²²⁴ As a result, non-violent offenders with minor offences are incarcerated in the same way as violent offenders.²²⁵ When offenders are categorised in terms of their behaviour and the nature of offences, the offenders in real need of rehabilitation may be few, making it more likely that prisons can succeed in rehabilitating them. The use of alternative sentences alongside with restorative justice interventions for minor offences may help to trimdown the number of offenders and make rehabilitation possible.²²⁶

7.5.3.1 The prisons

²¹⁹ See Latessa and Lowenkamp (2006) at 522-525; Lior Gideon, Efrat Shoham and David L Weisburd ‘Changing prison into therapeutic milieu: Evidence from the Israel national rehabilitation centre for prisoners’ 90(2) *The Prison Journal* 2010; Friedo Johann Willem Herbig and Ann-Mari Elizabeth Hesselink ‘Seeing the person, not just the number: Needs-based rehabilitation of offenders in South African prisons’ 40 *South African Crime Quarterly* 2012 at 31.

²²⁰ See Leopold (1966) at 34; Makubatse Sekhonyane ‘First things first: Rehabilitation starts with alternatives to prison’ 7 *South African Crime Quarterly* 2004 at 34.

²²¹ Sekhonyane (2004) at 34.

²²² Latessa and Lowenkamp (2006) at 523.

²²³ Marti Flacks ‘Combining retribution and reconciliation: The role of community service sentencing in transitional justice’ 1(1) *Interdisciplinary Journal of Human Rights Law* 2006 at 1.

²²⁴ See <http://www.commonlii.org/tz/other/TZLRC/report/R3/3.pdf> (accessed 28 April 2018); see also Brandon K Applegate, Francis T Cullen and Bonnie S Fisher ‘Public support for correctional Treatment: The continuing appeal of the rehabilitative ideal’ 77 *The Prison Journal* 1997 at 237-238.

²²⁵ See <http://www.thecitizen.co.tz/News/national/1840392-1832512-tyuvhaz/index.html> (accessed 25 April 2018).

²²⁶ See Sekhonyane (2004) at 35-36.

The treatment of prisoners in Tanzania is contrary to international standards.²²⁷ For instance, an interview conducted in Dar es Salaam by the Legal and Human Rights Centre revealed that women prisoners are sexually abused and embarrassed by prison staff during searches that involve removing their underwear.²²⁸ The babies of mothers who gave birth while incarcerated remain with their mothers in prison.²²⁹ In Tanzania, prisoners also receive only one meal a day.²³⁰ The environment is poor and the sleeping arrangements fall sharply below international standards.²³¹ In Tanzania, many prisoners are concentrated in poorly ventilated cells.²³² The concentration of many prisoners in one cell forces them to sleep facing in one direction.²³³ Recently, a Member of Parliament was sent to prison after being charged with organising an illegal protest. After his release on bail, he complained that prisoners sleep facing in one direction until an alarm sounds for them to change sleeping positions.²³⁴ In addition, according to the Tanzania human rights report, prisoners are subjected to unfair treatment from prison staff, treatment which includes whipping as a punishment, harsh living conditions, and lack of access to water, toilets and other hygiene services.²³⁵ Generally, prisoners in Tanzania lead a life of loneliness, unhappiness and boredom, which is described as common features of prison life by Wildeman et al.²³⁶

Apart from the hostile living environment, the offender in prison is surrounded by so-called

²²⁷ See Standard Minimum Rules for the Treatment of Prisoners (1955).

²²⁸ Human Rights Report (2016) at 258.

²²⁹ See Human Rights Report (2016) at 257-258. On 26 April 2018, while commemorating Union Day, the President pardoned various categories of offenders, including women offenders who have children. See <http://www.mpekuzihuru.com/2018/04/breaking-news-rais-magufuli-atoa.html> (accessed 28 April 2018).

²³⁰ Prisoners in Tanzania receive breakfast and one other meal a day. See also Tanzania Human Rights Report 2012 at 223.

²³¹ At an international level, prisoners enjoy a bundle of rights provided by international instruments. These rights include the right to fair treatment, respect for dignity and the right to life. Under these laws, prisoners have the right to clean accommodation, clothing and bedding, and medical services. See Universal Declaration of Human Rights 1948, articles 5 and 8; International Covenant on Civil and Political Rights 1966, articles 6-10; Standard Minimum Rules for the Treatment of Prisoners 1955; Tanzania Human Rights Report 2012 at 245; Tanzania Human Rights Report 2016 at 257; see also, for other jurisdictions, Rebecca Wallace and Karen Wylie 'Changing on the inside: Restorative justice in prisons: A literature review' *The International Journal of Bahamian Studies* 2013 at 60.

²³² This is contrary to the Standard Minimum Rules for the Treatment of Prisoners (1955), Rule 11.

²³³ Tanzania Human Rights Report 2012 at 245. This situation is contrary to the Standard Minimum Rules for the Treatment of Prisoners (1955), Rule 9, which requires every prisoner to sleep in his or her own cell.

²³⁴ <https://www.youtube.com/watch?v=syuFfpoAl40> (accessed 25 April 2018).

²³⁵ Tanzania Human Rights Report 2012 at 223.

²³⁶ Christopher Wildeman, Kristin Turney and Jason Schnittker 'Criminology: The hedonic consequences of punishment revised' 104(1) *Journal of Criminal Law and Criminology* 2014 at 140-141.

‘criminals’, hence the environment non-reformative.²³⁷ This atmosphere is believed to be the major reason for aggression, anger, violence, conflict and bullying among prisoners.²³⁸ Moreover, prison rehabilitative measures do not seem to work.²³⁹ In an environment where offenders’ liberty is limited, there is poor diet and living conditions, and an offender is likely to be abused by other inmates, it is very likely that this person will be influenced in negative ways. In prison, the offender meets other offenders who teach him or her the ways and means of being a criminal.²⁴⁰ If the offender is a drug user, the association with other offenders may lead him or her into behaviour that is even more addictive. As a result, the offender may learn to associate with criminals rather than with good citizens.

This phenomenon may have consequences for the offender’s life after prison, inasmuch that many ex-prisoners in Tanzania fail to reintegrate into community life after prison and end up reoffending.²⁴¹ The high rate of recidivism among released offenders is the primary manifestation of the failure of reform measures in prison.²⁴² Offenders are not prepared to be responsible citizen; many of them go to prison without understanding the harm they caused to the community. Offenders’ criminal tendencies are likely to be reinforced by incarceration and bring further harm to the community, not less.²⁴³ Isolating offenders in the prison environment undermines the prospects for reintegration.²⁴⁴ The community may thus not easily accept such offenders but instead stigmatise them due the poor relationships between prisons and the community. As argued in Chapter 3, restorative justice in prisons makes offenders understand the harmfulness of crime, involves them in repairing harm and prepares them for reintegration.²⁴⁵ This impacts positively on offenders’ reformation and in bridging

²³⁷ See Dot Gaoulding, Guy Hall and Brian Steels ‘Restorative prisons: Towards radical prison reform’ 20(2) *Current Issues in Criminal Justice* 2008-2009 at 237.

²³⁸ David J Cornwell *Doing justice better: The politics of restorative justice* Waterside Press Hampshire UK 2007 at 116; Mbuba (2012) at 235; Kaufer, Noll and Mayer (2014-2015) at 189-190.

²³⁹ Martinson (1974); Gaoulding, Hall and Steels (2009-2009) at 232.

²⁴⁰ Paul W Keve *Prison Life and Human Worth* North Central Publishing 1974 at 13.

²⁴¹ Shivji, Majamba, Makaramba and Peter (2004) at 270.

²⁴² Theo Gavrielides ‘The truth about restorative justice in prisons’ 228 *Prison Service Journal* 2016 at 44.

²⁴³ Sekhonyane (2004) at 33.

²⁴⁴ Gaoulding, Hall and Steels argue that ‘not only do prisons destroy law-abiding networks, they often build anti-social networks. When a prisoner is released from prison, many previous pro-social contacts have been lost and have been replaced with anti-social networks built up during the period of incarceration.’ Gaoulding, Hall and Steels (2009-2009) at 232.

²⁴⁵ See Kimmet Edgar ‘Restorative segregation’ 228 *Prison Service Journal* 2016 at 31.

the gap between prisons and the community.

7.5.3.2 Prisoners' release

Prisons in Tanzania face challenges such as unprecedented overcrowding.²⁴⁶ Statistics indicate that Tanzania has a prison population with a ratio of 69 per 100,000 persons.²⁴⁷ This is lower than the ratios of other African countries, such as Rwanda (434/100,000), Kenya (118/100,000), Uganda (115/100,000) and South Africa (292/100,000).²⁴⁸ Countries worldwide with the highest prison population include the United States (698/100,000) and Russia (445/100,000).²⁴⁹ Nevertheless, Tanzania's prison population is highly congested in terms of the number of prisoners vis-à-vis prison capacity.²⁵⁰ In 2014, the country's number of inmates was 32,315, while the prison capacity was 29,552.²⁵¹ In 2016, the number of prisoners increased to 33,000, while the capacity of prisons remained the same.²⁵² According to the Human Rights Report 2016, half of these inmates were remandees awaiting trial.²⁵³ According to an Independence Day speech by the President of Tanzania on 9th December 2017, the country had 39,000 prisoners. Of them, 522 were waiting execution of death sentence and 666 were serving life imprisonment.²⁵⁴ These figures suggest that the majority of prisoners are serving shorter sentences, which means they committed minor offences.

However, efforts are under way to deal with prison overcrowding through the use of

²⁴⁶ See the number of prisoners in Tanzania in the discussion below. Generally, prisons in Tanzania are overcrowded. Tanzania Human Rights Report 2016 at 157; see also, for other jurisdictions, Laurel Kaufer, Douglas E Noll and Jessica Mayer 'Prisoner facilitated mediation: Bringing peace to prisons and communities' 16 *Cardozo Journal of Conflict Resolution* 2014-2015 at 189.

²⁴⁷ Roy Walmsley 'World prison population list' 11thed World Prison Brief 2015 at 3-14, available at http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf (accessed 7 May 2018).

²⁴⁸ Walmsley (2015) at 4-5.

²⁴⁹ *Id* at 5 and 12.

²⁵⁰ See the discussion below.

²⁵¹ Tanzania Human Rights Report, Legal and Human Rights Center and Zanzibar Legal Services Center, Dar es Salaam 2014 at 275.

²⁵² Tanzania Human Rights Report, Legal and Human Rights Center and Zanzibar Legal Services Center, Dar es Salaam 2016 at 157.

²⁵³ *Ibid*.

²⁵⁴ <https://www.youtube.com/watch?v=TJu0TFoA-qw> (accessed 19 December 2017).

alternative sentences and probation orders.²⁵⁵ For instance, according to the 2017 budget speech of the Minister of Internal Affairs, 6,000 prisoners were eligible for alternative sentences such as community service or probation. It was costing the government Tanzania shillings 3,285,000,000 a year to keep them in prison.²⁵⁶ Presidential pardons are also increasing frequent.²⁵⁷ For instance, in order to reduce prison overcrowding, the president pardoned 8,157 prisoners in December 2017. Of that number, 61 had been sentenced to death and two were imprisoned for life.²⁵⁸ On 26th April 2018 he pardoned another batch of 3,319 prisoners. Out of that number, 585 were immediately released, while the prison terms of 2,734 were reduced by a quarter.²⁵⁹ This phenomena suggests that there might be political will to embrace alternative justice mechanisms aimed at lowering the number of prisoners. The judiciary has also taken measures to address overcrowding of prisons and reduce the backlog of cases. Such measures include a ‘zero case-backlog’ policy²⁶⁰ and the use of plea-bargaining to speedup justice delivery.²⁶¹ Furthermore, some judges have called upon subordinate courts to exhaust alternative sentences before applying prison sentences.²⁶²

However, there are key issues to be addressed in combating prison congestion in Tanzania. While the early release of prisoners through exercise of the presidential power of pardon is

²⁵⁵ For instance, the former president Jakaya Mrisho Kikwete urged judges and magistrates to utilise alternative sentences for non-violent offenders, such as community service and probation orders. See Tanzania Human Rights Report, Legal and Human Rights Center and Zanzibar Legal Services Center, Dar es Salaam 2013 at 238.

²⁵⁶ See http://www.parliament.go.tz/uploads/budgetspeeches/1494435199-Hotuba_per_cent20ya_per_cent20Bajeti-Wizara_per_cent20ya_per_cent20Mambo_per_cent20ya_per_cent20Ndani_per_cent20ya_per_cent20Nchi.pdf (accessed 19 December 2017).

²⁵⁷ The power of the President to pardon offenders is provided under article 45 of the Constitution. The President pardoned 4,160 prisoners in November 2015 during the official ceremony to swear in the newly elected president. A month later, the new president, Dr John Pombe Magufuli, pardoned another group of 2,336 prisoners, on 9 December 2015 in commemoration of Independence Day. See <http://www.mwananchi.co.tz/habari/Kitaifa/Kikwete-asamehe-wafungwa-4-160/-/1597296/2944898/-/107itag/-/index.html> (accessed 1 February 2016); <http://www.eatv.tv/news/current-affairs/dkt-magufuli-asamehe-wafungwa-zaidi-ya-elfu-mbili> (accessed 1 February 2016).

²⁵⁸ <https://www.youtube.com/watch?v=TJu0TFoA-qw> (accessed 9 December 2017).

²⁵⁹ <http://www.mpekuzihuru.com/2018/04/breaking-news-rais-magufuli-atoa.html> (accessed 28 April 2018).

²⁶⁰ Under the zero-backlog policy, each judge and magistrate is required to decide a certain number of cases per year (Primary Court magistrates: 260 cases, District Court and Resident magistrates: 250 cases; and High Court judges: 220 cases). See Parliamentary Speech by the Minister of Constitutional and Legal Affairs for the financial year 2016/207.

²⁶¹ See <http://www.tanzanianewsreports.com/cj-plea-bargaining-ideal-for-tz/> (accessed 10 November 2015).

²⁶² Tanzania Human Rights Report (2013) at 238 <http://www.humanrights.or.tz/downloads/tanzania-human-rights-report-2013.pdf> (accessed 4 March 2015). See also Tanzania Daily News on 6 December 2013, available at <http://allafrica.com/stories/201312060247.html> (accessed 10 November 2015).

commendable, evidence from other jurisdictions indicates that early release does not assist in reducing prison overcrowding.²⁶³ It is just a temporary solution to a serious problem. First, because prison rehabilitation is ineffective, the possibility of reoffending is high. Secondly, conflict resolution that does not allow offenders to make things right with the community exposes them to mob justice after their release.²⁶⁴

Therefore, the best way forward is to introduce justice mechanisms that do not necessarily commit them to prison, especially where the offences are minor or non-violent. The judiciary seems to hold to the common belief that severe sentences are required to combat crime in the community; as a result, there are a significant number of imprisoned offenders without an alternative sentence. Imprisonment seems to be used for both violent and non-violent offenders. Even offenders who could take responsibility through community service, probation orders or payment of fines or compensation, are committed to prison in the same manner as violent offenders. For instance, the rationale for sentencing a person to ten years in prison for the illegal possession of two live hyenas, which the offender used for traditional dancing, is unclear.²⁶⁵ A fine or community service would have been preferable. In another example, on Law Day in February 2017 a widow complained before the President about her pending case on the administration of an estates.²⁶⁶ The same woman was later arrested for allegedly entering an area that had been secured in anticipation of a State visit by the president of Uganda. In court, she defended herself by saying that she, together with other women who were not prosecuted, setup makeshift places for selling food to the anticipated gathering during the presidential visit. The Primary Court in Tanga sentenced her to three months in prison without an option of a fine.²⁶⁷ Higher courts might understand the rationale for using alternative sentences, which includes reduction of prison congestion. In a parliamentary debate of the budget allocation for the Ministry of Justice for 2018/19, a

²⁶³ See Sekhonyane (2004) at 33-34.

²⁶⁴ Early release of prisoners may be viewed by the community as a lenient approach to crimes by the judiciary. Sekhonyane (2004) at 34.

²⁶⁵ See *Republic v. Ming'hwa Mizanza*, criminal case No. 70 of 2014 (unreported), Misungwi District Court, Tanzania; *Mtanzania* newspaper, 2 October 2015. See <http://mtanzania.co.tz/msanii-jela-miaka-10-kwa-kumiliki-fisi/> (accessed 4 April 2017).

²⁶⁶ <https://www.youtube.com/watch?v=cHpcWNw7jWo> (accessed 29 March 2018).

²⁶⁷ <http://www.mwananchi.co.tz/habari/Aliyemlilia-JPM-jela-miezi-mitatu/1597578-4363072-v30dysz/index.html> (accessed 29 March 2018).

Member of Parliament suggested that some offenders simply be ‘slapped’ with the payment of a fine and then be allowed to go back home rather than add to prison congestion.²⁶⁸ This is a positive indication of the will to impose alternative measures of justice.

Released offenders are not prepared for reintegration in the Tanzanian community. It may be difficult for released offenders to cope, as a result of which they end up reoffending.²⁶⁹ For instance, one of the 8,157 prisoners pardoned by the President one was reported to have reoffender within four days after his release and was sentenced to prison for 15 years upon pleading guilty to the offence with which he was charged.²⁷⁰ There are several reasons for this trend. First, during the trial, the offender did not have an opportunity to discuss the aftermath of the crime with the victim and the community. Therefore, the offender feels the stigma of going back to the same community in which he or she offended. Secondly, the victim and the community are not involved in any stage of the offenders’ early release. Even parole boards do not involve victims and community in the process. While it is unjust for the offender to be released without the knowledge of the victim, it is unsafe for the offender as well. In a country like Tanzania where mob justice is rampant, the offender feels unsafe in his or her own community.²⁷¹ For instance, a pardoned prisoners died in mob justice a few months after his release.²⁷² In May 2018, the Inspector General of Police urged ex-prisoners to change their behaviour because of those who were released between December 2017 and April 2018, five of them were killed after reoffending.²⁷³ Thirdly, the prison environment might have negatively influenced the offender, such that he or she feels more connected to the community of criminals than to law-abiding citizens; at this point, the offender does not fear the prison milieu anymore. A restorative justice approach, however, may facilitate

²⁶⁸ <https://www.youtube.com/watch?v=dCvJf2EZ50w> (accessed 28 April 2018).

²⁶⁹ Shivji, Majamba, Makaramba and Peter (2004) at 270.

²⁷⁰ <https://swahilitimes.com/mfungwa-aliyesamehewa-na-raais-magufuli-afungwa-tena-jela/> (accessed 9 December 2017).

²⁷¹ Cases of mob justice in Tanzania are very common. Even a minor offence such as pick-pocketing can cost someone his or her life. Recorded cases of mob justice are as follows: in 2013, 1,669 cases; 2014, 785 cases; 2015, 995 cases; 2016 (January – August), 705 cases. This trend points to a lack of community trust in the police and judiciary. The community believes arrested criminals are not prosecuted; even sentenced criminals return to the community after only after a short period. See Tanzania Human Rights Report 2016 at 16-19.

²⁷² This was reported in the Uwazi newspaper, 19 December 2017; see <https://globalpublishers.co.tz/magazeti-ya-tanzania-leo-jumanne-dec-19-2017> (accessed 19 December 2017).

²⁷³ <https://www.eatv.tv/news/current-affairs/igp-sirro-awapa-onyo-waliopata-msamaha-wa-raais-jpm> (accessed 19 June 2018).

offenders' reintegration by involving victims and community.

7.6 Community needs under the criminal justice process

In Tanzania, the community attends a criminal proceeding as mere observers of justice. The community may be present in the courtroom, save in sexual offence cases and cases involving children, where the court conducts proceedings in camera.²⁷⁴ Principles of justice demand that 'justice is not only done but seen to be done'. As discussed in Chapter 8, the involvement of the community in the adversarial criminal justice system in Tanzania occurs only through the use of assessors.²⁷⁵ The use of assessors is also limited because the proceedings takes a form of guided rules through adversarial process. There is no free discussion of the offence and its effects, as in restorative justice. Even the participation of assessors is limited to rules of procedures. Assessors may not accurately represent the views of the community, because the law does not require an assessor to be a member of that community. Also, the number of assessors is limited: in most cases, courts sit with not less than two assessors.²⁷⁶ This cannot be regarded as community participation in the criminal justice process in Tanzania; in other words, the process side-lines the participation of the community.

As a result, courts have no opportunity to hear of the impact of the crime from the community's perspective. Community participation in the criminal justice system is premised on the idea that crime causes harm to the victim and the community. It creates fear and disturbs neighbourhood settings, social harmony, values and the equilibrium of the community.²⁷⁷ It contravenes the law and erodes values, as a result of which the community becomes a secondary victim.²⁷⁸ The need thus arises for the community to participate in the

²⁷⁴ See Chapter 8.

²⁷⁵ On the use of assessors in Tanzania, see Chapter 8.

²⁷⁶ See, for instance, the Magistrates' Courts Act, Chapter 11, Revised Edition 2002, section 7.

²⁷⁷ When a crime occurs, the community's harmony and stability becomes vulnerable and insecure because of the offender's misbehaviour. Paul McCold 'What is the role of the community in restorative justice theory and practice?' in Howard Zehr and Barb Toews (eds) *Critical issues in restorative justice* Willan Publishing New York 2004 at 157; McCold (2004) at 157; Cunneen and Hoyle (2010) at 23; Cunneen and Hoyle (2010) at 18; Ghoshray (2013) at 306.

²⁷⁸ Zehr (2002) at 16; Cunneen and Hoyle (2010) at 23-24.

restoration of relationships.²⁷⁹

If they are properly reformed, courts may play a role in repairing the broken relationships in the community in Tanzania. According to McCold, broken neighbourhoods, coupled with fear of crime and poor living conditions, generate criminal behaviour among young people.²⁸⁰ Other factors include alcoholism, poverty, *broken families* (emphasis added), congested homes, and school dropout.²⁸¹ In Canada, for instance, factors contributing to high rates of aboriginal imprisonment include 'low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness and *community fragmentation* [emphasis added]'.²⁸² All these are signs of community disorder. Therefore, crime, which is a manifestation of, and cause of, community dysfunction, has proliferating effects in the community. It is for this reason that the community in Tanzania needs to be involved in finding the solution for crimes committed within its locality. The community in Tanzania may be better positioned to know the cause of criminality than the courts. The crime may just be one of the symptoms of other social disorder that fuels crimes in the community.²⁸³ As such, courts should find a way to involve the wider community in conflict resolution in Tanzania. This includes devising strategies to deter future reoffending and reduce criminality. Community involvement, coupled with that of the victim and offender, may allow the community to setup measures to reduce illegal behaviour and reoffending. Community participation in dispute resolution may also be a measure for securing offenders' rehabilitation and preparing them for reintegration.²⁸⁴

7.7 The technicalities of the adversarial justice process

In Tanzania, the adversarial system is a product of colonialism. For instance, apart from the adoption of common law principles in different national laws, the laws of the United Kingdom passed before 1920; the Indian Succession Act of 1865; and the Hindu Wills Act of

²⁷⁹ Cunneen and Hoyle (2010) at 24.

²⁸⁰ McCold (2004) at 157.

²⁸¹ Mabuza and Roelofse (2013) at 49.

²⁸² Thomas Clark 'Konga take ture Maori: Sentencing indigenous offenders' 20 *Auckland University Law Review* 2014 at 247.

²⁸³ Zehr (2002) at 67.

²⁸⁴ Roche (2003) at 29

1870, still bind the practice of justice in Tanzania.²⁸⁵ In other words, justice delivery abides by principles of justice that are not based on African norms. In order to obtain justice, a party needs to be acquainted with foreign doctrines of justice. Hence, justice for ill-equipped parties is put at risk by a lack of legal skills. ‘Justice’ becomes a matter of the ability or not to play the game of legal rules. In Tanzania, the process can be frustrating to lay litigants because few of them can afford the extortionate cost of legal representation.²⁸⁶ The complexity of the legal process, coupled with frequent adjournments, makes the search for justice financially draining and time-consuming.²⁸⁷

In Tanzania, Primary Courts are staffed by a magistrate (lawyer) assisted by not less than two assessors.²⁸⁸ Most Primary Courts are located in rural areas, where most of the parties know each other and possibly undertake social and economic activities together. These lay parties are obliged to engage in confrontational dispute resolution.²⁸⁹ Parties are required to apply common law legal techniques of examination of witnesses, which they do not know.²⁹⁰ Court procedures create a confrontational atmosphere by cross-examining an adverse party who might be a neighbour or relative. Because in rural areas many people intermarry and live a communal life, the adverse parties may be friends, neighbours or relatives in the community. The process has little relevance and is contrary to the African culture of *Ubuntu*, *utu* or *ujamaa*. The process exacerbates conflicts rather than restoring broken relationships. Even the possibility of allowing attorneys to appear in Primary Courts may not achieve true justice, as few parties can afford attorneys in rural areas. In addition, the new law to enable legal representation for penniless clients is also likely to take away conflicts from the

²⁸⁵ The Judicature and Application of Laws Act, Chapter 358, Revised Edition 2002 (Tanzania), section 9. See also the First and Second Schedule to the Act.

²⁸⁶ Susan Daicoff ‘The future of the legal profession’ 37(1) *Monash University Law Review* 2011 at 13.

²⁸⁷ See Daicoff (2011) at 8.

²⁸⁸ The Magistrates’ Courts Act, Chapter 11, Revised Edition 2002, section 7.

²⁸⁹ Adversarial systems use a confrontational style in deciding the rights of the parties. Parties stand opposed to each other and the magistrate sits as referee to coordinate the procedures. Ulrike Wanitzek ‘Legally unrepresented women petitioners in the lower courts of Tanzania: A case of justice denied?’ 30-31 *Journal of Legal Pluralism* 1990-1991 at 256.

²⁹⁰ Research confirms that few people are acquainted with the procedures of the courts of law in Tanzania. See Elizabeth Minde ‘Research on effectiveness of court procedures in Kilimanjaro region: Analysis of Primary, District, Magistrate Resident and High Court’ KWIECO 2013 at 11-12, available at [http://www.kwieco.org/Pdf/RESEARCH per cent20ON per cent20EFFECTIVENESS per cent20OF per cent20COURT per cent20PROCEDURES per cent20IN per cent20KILIMANJARO per cent20REGION.pdf](http://www.kwieco.org/Pdf/RESEARCH%20ON%20EFFECTIVENESS%20OF%20COURT%20PROCEDURES%20IN%20KILIMANJARO%20REGION.pdf) (accessed 10 August 2017).

community.²⁹¹

Daicoff thus observes that the adversarial criminal justice system seems to fail to satisfy litigants, clients, lawyers and the public.²⁹² Clients are not satisfied with the justice process because they are not fully involved.²⁹³ In other courts where lawyers are allowed to appear, unethical behaviour by professionals has given them a bad reputation of being dishonest.²⁹⁴ Lack of trust damages perceptions of judicial officers and the legal system in general. Research by Lawi confirms that the rural community prefers ward tribunals to court processes for dispute resolution.²⁹⁵ Those interviewed expressed satisfaction about the openness and informality of proceedings, which allow parties to engage in discussion.²⁹⁶ The tribunals seemed preferable to lower-income parties, who are the majority in villages in Tanzania.²⁹⁷ Another study shows that ward tribunals are cheaper and more accessible for the local community than courts.²⁹⁸ Furthermore, a recent study shows that many people still have confidence in ward tribunals. As a result, many cases are instituted in ward tribunals, especially so given that their jurisdiction has been extended to include land matters.²⁹⁹ However, despite receiving many cases, the Ward Tribunal has irregular meetings because committee members' salaries depend on the fees that parties pay to it (the Tribunal).³⁰⁰ This fact has caused the tribunals to be inefficient and sometimes corrupt. Many of them lack the necessary facilities because they are not adequately funded despite their vital role in the

²⁹¹ The Legal Aid Act, No. 1 of 2017. This Act provides legal aid for poor clients who cannot afford to pay for attorneys.

²⁹² Susan Daicoff 'Growing Pains: The integration vs. specialization question for therapeutic jurisprudence and other comprehensive law approaches' 30 *Thomas Jefferson Law Review* 2008 at 553-554; Daicoff (2011) at 12.

²⁹³ Heather E Williams 'Social justice and comprehensive law practice' 5 *Seattle Journal for Justice* 2006 at 417.

²⁹⁴ Williams (2006) at 412; Susan Daicoff 'The comprehensive law movement: An emerging approach to legal problems' *Stockholm Institute for Scandinavian Law* 2010 at 110; Susan Daicoff (2011) at 12.

²⁹⁵ Yusufu Q Lawi 'Justice Administration outside the ordinary courts of law in Mainland Tanzania: The case of Ward Tribunals in Babati District' 1(2) *African Studies Quarterly* 1997.

²⁹⁶ Lawi (1997) at 12-13.

²⁹⁷ Lawi (1997) at 10-11.

²⁹⁸ Karin Mader and Godje Bialluh (eds) 'Ward tribunals: How to enhance the rule of law at local level' 2010 at 4, available at http://www.sulgo.or.tz/uploads/media/Ward_Tribunals.pdf (accessed 26 April 2018).

²⁹⁹ Doris Wilson Mangure 'Effectiveness of Ward Tribunals in dispensing justice as land courts in Tanzania: Case of Arusha city' 6(5) *International Journal of Science and Research* 2017 at 2046-47.

³⁰⁰ Sigsbert Ngemera 'Land dispute settlement machineries: Is inaccessibility a source of village land disputes in Morogoro?' 7 (3) *International Journal of Scientific and Research Publications* 2017 at 345.

community.³⁰¹

7.8 The language dilemma and the courts in Tanzania

In Tanzania, the language of the Court of Appeal and High Court is English or Swahili, though records are in English.³⁰² The Resident Magistrates' Court and District Court likewise uses English or Swahili.³⁰³ The only court that uses Swahili *per se* in proceedings is the Primary Court.³⁰⁴ The language dilemma in Tanzania's courts has been on the agenda for decades.³⁰⁵ The colonialists who wanted to control the country wanted a language for purposes of administration.³⁰⁶ The foreign legal system remained embedded in the justice system even after independence. Today, despite their limited mastery of English, Members of Parliament draft bills in English whereas the parliamentary debates themselves are in Swahili,³⁰⁷ which, along with other local languages, is the language spoken by the majority of Tanzanians.³⁰⁸ That is to say, although English and Swahili are both official languages, Swahili is the national language and the most spoken.³⁰⁹ In secondary school, tertiary and higher learning institutions, English is the language of instruction.³¹⁰

As English is the language of legal education, it has become the language used in courts.³¹¹ It is believed furthermore that Swahili is short of the vocabulary required in law and courts.³¹² Generally, few Tanzanians, including lawyers, can use English fluently, so it is odd that the organ with powers to render justice still employs a foreign language with little relevance to the local community. As a result, parties need lawyers' assistance to know the rights stated in

³⁰¹ Mangure (2017) at 2048.

³⁰² Makaramba (2012) at 8.

³⁰³ The Magistrates' Courts Act, Chapter 11, Revised Edition 2002, section 13(2).

³⁰⁴ The Magistrates' Courts Act, Chapter 20, Revised Edition 2002, section 13(1).

³⁰⁵ Lyndon Harries 'Language and law in Tanzania' 10 *Journal of African Law* 1966; Telli Godfrey 'The language of instruction issue in Tanzania: Pertinent determining factors and perceptions of education stakeholders' 5(1) *Journal of Languages and Culture* 2014.

³⁰⁶ Ulrike Wanitzek and Fauz Twaib 'The presentation of claims in matrimonial proceedings in Tanzania: A problem of language and legal culture' 47 *AAP* 1996.

³⁰⁷ Wanitzek and Twaib (1996) at 118-119.

³⁰⁸ Ronald J Allen, Timothy Fry, Jessica Notebaert and Jeff van Dam 'Reforming the Law of Evidence of Tanzania (Part one) : The Social and legal challenges' 31 *Boston University International Law Journal* 2013 at 244-245. See also Makaramba (2012) at 8.

³⁰⁹ Godfrey (2014) at 9.

³¹⁰ *Ibid.*

³¹¹ Wanitzek and Twaib (1996) at 117-118.

³¹² Harries (1966) at 166.

judgements: it is unfortunate that courts expose parties to a system that uses a foreign language to determine their rights, in the process tying these parties to professionals who charge exorbitant fees. The system inhibits ordinary citizens from pursuing justice in person, given that every record in court must be in English. As Justice Makaramba observes, lawyers are proud of ‘speaking in tongues’,³¹³ referring to their inclination to use archaic English legal jargon and Latin maxims in court which clients, including the offender, victim and community, cannot understand. Hence, the court process side-lines justice stakeholders from freely participating in dispute resolution. In other jurisdictions, campaigns to simplify the language of official documents, including the law, are under way.³¹⁴ A simplified language balances the bargaining power of parties, thus ensuring true justice.³¹⁵

7.9 Conclusion

Tanzania is among the jurisdictions in Africa with a host of problems in its criminal justice system. Since independence, few reforms have been adopted to embrace newly emerging trends in criminal justice. It is obvious that criminal justice in Tanzania imposes cumbersome procedures on laypersons seeking justice. Criminal justice processes in Tanzania rely on colonially inherited rules of procedure that necessitate retaining legal professionals. For a layperson, seeking justice under Tanzanian criminal procedure is almost impossible. As a result, parties are represented by professionals: victims by the State, and offenders by attorneys. In Tanzania, complicated rules of procedure tend to decouple the conflict from the persons directly affected by the crime. Professionals argue their cases in terms of prescribed rules without necessarily addressing the real needs of the affected persons. Rules of procedure are founded on foreign principles of justice, and the language used in most courts is English. It is problematic that a Swahili-speaking country like Tanzania embraces a foreign language for justice delivery. The public finds this language to be a barrier and this results in profit for lawyers who benefit from conflicts that are not theirs. As a result, parties exchange their conflicts with professionals for a high price for the simple reason that they fail to

³¹³ Makaramba (2012) at 9.

³¹⁴ Frances Gordon and Candice Burt “‘Plain language’ without prejudice” 2010; Marietjie Botes ‘Plain language’ 12 *Without Prejudice* 2012.

³¹⁵ Gordon and Burt (2010) at 59.

understand the procedures and the language used.³¹⁶ The complexity of formal legal systems tends to affect participants negatively in many countries, but in Tanzania the added effect of using a non-vernacular language, together with the general lack of education of the population, makes this complexity a particularly severe problem.

Victims have a limited participation in the criminal justice process. In Tanzania, at the pre-trial stage the victim has no right to give an opinion other than providing information to the police for investigation. The charge against the offender is normally framed without involving the victim. He or she is normally informed about the case when needed as a witness for the prosecution. If the offender cannot be arrested, the victim's pain and suffering may not be heard. If the offender cannot be arrested, neither social support nor counselling may be provided. In Tanzania, the victims' participation in the criminal justice system is limited to that of a witness. Being a witness for the prosecution, the victim has no opportunity to inform the court on the wider range of effects of the crime, such as its psychological and emotional impacts. On top of that, the same wounded victim is exposed to hostile cross-examination procedures as per Tanzania's Evidence Act. In this environment, victims in Tanzania suffer a double victimisation: being victims of the crime and being victimised by the hostile criminal justice process. In Tanzania, the victim's right to compensation, though provided by the Constitution, is a right denied, given that criminal courts do not offer meaningful compensation. While the victim may secure compensation through a civil claim, this could take years to conclude. Victims are therefore unlikely to feel a sense of satisfaction with the justice system in Tanzania.

In Tanzania, the criminal justice system treats offenders as persons who deserve only punishment. There is no opportunity for the offender to understand the harm he or she has caused to the victim and the community. In most cases in Tanzania, offenders are incarcerated without making things right. The offender's conviction simply means that he or she has contravened the penal law rather than taking responsibility for the harm. In prison, the possibility of reformation is remote because the offender is exposed to a hostile, criminogenic environment. In addition, the criminal justice system does not address the needs

³¹⁶ See Christie (1977).

of offenders. This leads to recidivism in Tanzania. Moreover, offenders who rejoin the community after prison sentences suffer from stigmatisation. The community regards them as unworthy of staying in the community because they did not make amends to the victim and the community. To ameliorate stigmatisation, offenders should be given an opportunity to understand the effects of the crime, take appropriate accountability and make amends. This includes restoring relationships, apologising, paying compensation to affected persons, restoration and reparation. To achieve this goal in Tanzania, restorative measures should be introduced, especially for offences that do not pose security risks to the community.

The only community involvement in criminal justice in Tanzania is through assessors. This limited representation of the community is insufficient. The community, though marginalised in the criminal justice system, has a role to play in offenders' reformation. In Tanzania, the offender always rejoins the community after prison, save for few offenders who receive a life sentence or death penalty. The criminal justice system has failed to realise that rehabilitation sought in prisons may also be available in the community. The community, as a custodian of norms, can contribute to reforming offenders who are its members. Accountability within the community may assist in offenders' reintegration. Restorative justice may achieve better outcomes for victims, offenders and the community. Indeed, laws in Tanzania are amenable to restorative justice interventions in ways that have not been fully utilised. The next chapter thus explores these aspects of Tanzania's pluralistic system, and considers what opportunities it holds for realising restorative justice.³¹⁷

³¹⁷See Chapter 8.

Chapter 8:

The Spirit of Restorative Justice and the Law of Tanzania

8.1 Introduction

In Africa, the spirit of restorative justice has a historical foundation.¹ In Tanzania and many African communities, dispute resolution based on mediation, reconciliation, negotiation and adjudication were the prevalent models of justice, especially before colonial intrusion.² The traditional system of dispute settlement was ‘adulterated’ by colonialists, who introduced a foreign legal system.³ Despite the move to eradicate the African way of doing justice in the criminal justice system, communities have always remained loyal to traditional justice mechanisms.⁴ In Tanzania, for instance, the traditional model of justice was reserved through the establishment of the Ward Tribunal.⁵ The tribunals use a mediation approach to restore and preserve peace and harmony at grassroots level. In addition, laws and practices in Tanzania still embrace and promote reconciliation in criminal dispute resolution. These laws include the Constitution,⁶ the Criminal Procedure Act, 1985⁷ and the Primary Court Criminal Procedure Code.⁸

In addition, the use of assessors as community representatives at various court levels in the criminal justice system is crucial for the recognition of a restorative approach in Tanzania. A further trend is to recognise traditional mechanisms of justice by granting power to the

¹ Fainos Mangena ‘Restorative justice’s deeper roots in Africa’ 34(1) *South African Journal of Philosophy* 2015.

² Ajayi Adeyinka Theresa and Buhari Lateef Oluwafemi ‘Methods of conflict resolution in African traditional society’ 8 (33) *African Research Review: An International Multidisciplinary Journal*, Ethiopia 2014 at 149-151.

³ Theresa and Oluwafemi (2014) at 154.

⁴ See, for instance, Digby Sqhelo Koyana ‘Traditional courts in the twenty-first century’ in Jeanmarie Fenrich, Paolo Galizzi and Tracy E Higgins (eds) *The future of customary law* Cambridge University Press Cambridge 2011 at 228-231. See also Chi Mgbako and Kristina Scurry Baehr ‘Engaging legal dualism: Paralegal organisation and customary law in Sierra Leone and Liberia’ in Jeanmarie Fenrich, Paolo Galizzi and Tracy E Higgins (eds) *The future of customary law* Cambridge University Press Cambridge 2011 at 171-175.

⁵ The Ward Tribunals Act, Chapter 206, Revised Edition 2002. The Act was enacted in 1985 to establish tribunals to resolve criminal and civil disputes in every ward. Ward tribunals are analysed extensively in this chapter.

⁶ The Constitution of the United Republic of Tanzania of 1977.

⁷ The Criminal Procedure Act, Chapter 20, Revised Edition 2002.

⁸ See The Magistrates Courts Act, Chapter 11, Revised Edition 2002, the Third Schedule (The Primary Courts Criminal Procedure Code).

community to resolve conflicts through institutions such as the ward tribunals and village land councils.⁹ The trend is fortified by the establishment of an independent justice mechanism on land matters which extends power of reconciliation to village land councils.¹⁰ Other laws include the Law of Marriage Act, which provides for an obligatory reconciliation procedure before a matrimonial dispute reaches the courts.¹¹ The Constitution also obliges courts to avoid technical procedures, which are likely to defeat justice.¹² This trend embraces elements of restorative justice in justice administration. Despite the dearth of a formal restorative justice regime, laws in Tanzania embody the spirit of restorative justice.

This chapter therefore analyses various such laws, juxtaposing both civil and criminal laws to unveil the potential for a restorative justice regime. The purposes of this discussion is to provide a foundation on which a criminal restorative justice regime can be based. The chapter is divided into three parts. The first provides background to the criminal justice system in both the pre- and post-colonial period. It also examines informal restorative justice practices that are applicable in dispute resolution within the Tanzania community. The second part analyses legal provisions regarding reconciliation processes outside the judicial processes. The third part discusses the laws that embody the spirit of restorative justice within the contemporary criminal justice system. The aim is to ascertain the extent to which the current criminal laws can accommodate restorative justice programmes in Tanzania.

8.2 Background to the justice system in Tanzania

Pre-colonial dispute settlement in Tanzania is not markedly different from the experience of other African countries, and Western countries had a similar history before the twelfth

⁹ See the Courts (Land Dispute Settlements) Act of 2002, which gives powers to the Village Land Council to resolve land disputes at the village level.

¹⁰ Land dispute settlement is discussed below in this chapter as a model which embraces the application of mediation in land matters. In this chapter, it is argued that the same approach can be extended to cover minor criminal disputes at the community level.

¹¹ As discussed below, it is the mandatory requirement of the law for a matrimonial dispute to be reconciled before a petition of divorce or separation can be filed. See the Law of Marriage Act, Chapter 29, Revised Edition 2002, section 101. This approach is commendable for allowing the community to participate in dispute resolution in disputes affecting its members. It is argued in this chapter that this approach to reconciliation can be adopted as a platform for the application of restorative justice within the community.

¹² The Constitution of the United Republic of Tanzania of 1977, article 107A.

century.¹³ Disputes were resolved under indigenous dispute mechanisms governed by uncodified customary rules and traditions. Criminal conflicts were resolved in the community with the assistance of chiefs, elders or clan leaders who acted as impartial mediators.¹⁴ This was and remains the common practice in African communities.¹⁵ Under kingships, there were no courthouses, judges, magistrates, formal prisons or written laws as there are today. Conflict management was an event that brought together relatives, friends and community members. To use the words of Christie, the ‘conflict was a property’¹⁶ which drew the concern of not only the most affected parties but also other people who were indirectly harmed.¹⁷ As the conflict involved the community, the transgressor was entirely responsible to the victim, family members and the community. Compensation was availed even for capital offences such as murder.¹⁸ It was therefore appropriate for a deceased’s life to be quantified into cows as part of compensation or reparation.¹⁹ Dispute settlement mechanisms aimed at reparation, restitution and the restoration of community harmony.²⁰

In Tanzania, the evidence of traditional justice mechanisms in many tribes such as the Haya, Meru and Chagga is unquestionable.²¹ The offender sat with the victim, family members and community in search of redress. The person who was believed to have disturbed social tranquillity was made accountable by taking part in restoring the broken relationships. This was done through undertaking repair, restitution, restoration or compensation to affected individuals and the community.²² Compensation applied symbolically by showing remorse for the criminal act. It was also a way to reconstruct the ruptured relationship between the

¹³ Philippe Gailly ‘Restorative Justice in England and Wales’ at 3, available at [http://www.arpegeasbl.be/site/FCK_STOCK/File/Restaurative per cent20Justice per cent20in per cent20England per cent20and per cent20Wales.pdf](http://www.arpegeasbl.be/site/FCK_STOCK/File/Restaurative%20Justice%20in%20England%20and%20Wales.pdf) (accessed 16 November 2015).

¹⁴ Adenike Aiyedun and Ada Ordor ‘Contemporary dispute resolution in Africa’ 20 *Law, Democracy and Development* 2016 at 156.

¹⁵ Theresa and Oluwafemi (2014).

¹⁶ Nils Christie ‘Conflict as Property’ 17 *British Journal of Criminology* 1977.

¹⁷ Kahwa SK Lugakingira and Chris Maina Peter ‘Victim compensation and aspects of law and justice in Tanzania’ 18 (3) *International Criminal Justice Review* 2008 at 293.

¹⁸ Lugakingira and Peter (2008) at 293; Leila Chirayath, Caroline Sage and Michael Woolcock ‘Customary law and policy reform: Engaging with the plurality of justice system’. Background paper for the World Development Report: Equity and Development 2006 at 11.

¹⁹ Alfred Oseko ‘The criminal justice in Kenya: The role of alternative and traditional dispute resolution Mechanisms’ 81 *Arbitration* 2015 at 38.

²⁰ Lugakingira and Peter (2008) at 293.

²¹ See Chirayath, Sage and Woolcock (2006) at 10-13.

²² Chirayath, Sage and Woolcock (2006) at 10-13.

offender, victim and community.

The colonisation of Africa marked the turning point of the criminal justice process in many countries, including Tanzania. The Germans who colonised Tanzania from 1885 to 1918 considered traditional dispute mechanisms as repugnant to justice.²³ As a result, they established a stratified court system for native and non-natives.²⁴ Native courts were meant for Africans and non-native courts for Europeans.²⁵ This marked the beginning of the current formal courts based on the colonially inherited legal system. The system of justice was transformed to suit colonial masters; whence justice became a court process under lawyers who are actually alien to the conflict.²⁶ After the Second World War, Tanzania was made a British protectorate; again, the non-native court system worked apace with the native courts.²⁷ Under the court system, criminal conflicts were derailed from the victim and community; the State took the place of the victim. Conflicts began to be labelled as ‘Republic versus Offender’.²⁸ Dispute resolution processes became formal, confrontational, expensive and adversarial. Offender and victim became ‘adversaries’ guided by professionals and technical legal procedures. Two years after independence, customary criminal law, which applied in native courts, was officially abolished.²⁹ Currently, customary law applies in minor civil claims in courts in Tanzania.³⁰

8.3 Mediation processes within the community

Despite the influence of received laws, there are traces of restorative justice values in many

²³ Kenneth McK Norrie ‘Administration of justice in Tanzania and Zanzibar: A comparison of two judicial systems in one country’ 38 *International and Comparative Law Quarterly* 1989 at 396.

²⁴ Norrie (1989) at 396.

²⁵ <http://tanzanialaw.blogspot.co.za/2011/10/brief-history-of-judiciary-of-tanzania.html> (accessed 11 November 2015).

²⁶ Christie (1977).

²⁷ Chirayath, Sage and Woolcock (2006) at 13; Simon Robins ‘A place for tradition in an effective criminal justice system: Customary justice in Sierra Leone, Tanzania and Zambia’ Institute for Security Studies, Policy Brief Nr 17, South Africa, 2009 at 1.

²⁸ See the Magistrates Courts Act, Chapter 11, Revised Edition 2002, the Third Schedule (The Primary Courts Criminal Procedure Code), Rule 21(2).

²⁹ Tanzania gained independence from the British in 1961, and the application of customary criminal law was abolished in 1963. See Robins (2009) at 2.

³⁰ The Judicature and Application of Laws Act, Chapter 358, Revised Edition 2002, section 11; see also Robins (2009) at 1.

African traditional justice systems.³¹ Such a restorative ethos fosters community well-being in societies where the role of community is more defined. In other continents such as Asia, the philosophy of restorative justice is a valuable element of the legal system. For instance, Japan stresses restitution and the restoration of community harmony despite the existence of foreign legal rules.³² Though courts in many African countries currently avoid the direct application of indigenous rules of criminal justice, indigenous communities apply restorative justice either formally, informally or otherwise.³³ In Malawi, for instance, local courts still resolve disputes, including those of a criminal nature.³⁴ In Nigeria, traditional law is part of the criminal law that applies in customary courts.³⁵ In Ghana, indigenous justice is informally practised through ‘customary arbitration’.³⁶

In Tanzania, despite the abolition, customary criminal law, informal dispute settlement mechanisms, for both civil and criminal disputes, are used to resolve conflicts in different communities.³⁷ The prologue to one of Christie’s major work points out an indigenous justice process that was practised in Arusha, Tanzania.³⁸ This was possibly an informal mediation process, which many communities invoke in conflict management. This practice is essential in communities where the spirit of reconciliation is honoured. It is argued that a great number of conflicts are resolved informally at community level before having to reach the courts of law.³⁹ Justice practices that abide by amicable dispute resolution at family level are a manifestation of *ubuntu*, *utu* and *ujamaa*. This mirrors the appreciation of humanity that

³¹ See Jim Consedine *Restorative justice: Healing the effects of crime* Ploughshares New Zealand 1999 at 178.

³² See Daniel W Van Ness ‘New Wine and Old Wineskins: Four Challenges of Restorative Justice’ in Declan Roche (ed) *Restorative Justice* Ashgate USA 2004 at 141.

³³ Kariuki Muigua ‘Traditional dispute resolution mechanisms under article 159 of the Constitution of Kenya 2010’ at 2, available at http://www.kmco.co.ke/attachments/article/111/Paper_per_cent20on_per_cent20Article_per_cent20159_per_cent20Traditional_per_cent20Dispute_per_cent20Resolution_per_cent20Mechanisms_per_cent20FINAL.pdf. (accessed 4 August 2017).

³⁴ Franza von Benda-Beckmann *Legal pluralism in Malawi: Historical development 1858-1970 and emerging issues* Kachere Series Zomba Malawi 2007 at 46-49.

³⁵ Don John O Omale *Restorative Justice and Victimology: Euro-Africa Perspective* Wolf Legal Publishers 2012 at 1.

³⁶ Joseph B Akamba and Isidore Kwadwo Tufuor ‘The future of customary law in Ghana’ in Jeanmarie Fenrich, Paolo Galizzi and Tracy E Higgins (eds) *The future of African customary law* Cambridge University Press Cambridge 2011 at 205.

³⁷ See, for instance, Christie (1977) at 2-3.

³⁸ See Christie (1977).

³⁹ Marc Galanter ‘Justice in many rooms: Courts, private ordering and indigenous law’ 19 *Journal of Legal Pluralism* 1981 at 2-3.

dictates communitarian daily interactions and hence its adoption in dispute resolution.⁴⁰ *Ubuntu* or *utu* reflects humanitarian values that advocate for forgiveness and enhancing community harmony within African communities.⁴¹ The practice of informal mediation in Tanzania reveals the existence of the spirit of restorative justice in African culture.

In a country like Tanzania, where about 80 per cent of the population live in village settings,⁴² accesses to formal courtroom justice may be remote and expensive.⁴³ Furthermore, village communal life trusts in a system of justice that enhances relationships among community members. As stated earlier, the same people normally come to live together and assist each other in social, political and economic activities.⁴⁴ The value of using tradition-based justice lies in the restoration of social harmony and the reconciliation of parties.⁴⁵ Hence, the contemporary criminal justice system, which is based on professionalism and technical, adversarial received laws, may not be relevant in maintaining the spirit of *utu* in such village-based communities and even semi-urban areas.⁴⁶

8.3.1 The Village Land Council and the reconciliation process

The spirit of reconciliation and the role of the community are also reflected in dispute resolution in land matters in Tanzania. Before 2002, land disputes were resolved through the normal judicial processes of the Primary Courts through to the Court of Appeal.⁴⁷ The Primary Courts had jurisdiction over land disputes for customary land rights situated within

⁴⁰ See Ann Skelton 'Tapping indigenous knowledge: Traditional conflict resolution, restorative justice and the denunciation of crime in South Africa' in Elrena van der Spuy, Stephan Parmentier and Amanda Dissel (eds), *Restorative justice: Politics, policies and prospects* Juta Cape Town South Africa 2007 at 232.

⁴¹ See Ann Skelton (2007) at 232.

⁴² See <http://worldpopulationreview.com/countries/tanzania-population/> (accessed 2 February 2016).

⁴³ See Omale (2012) at 22.

⁴⁴ See *Ibid.*

⁴⁵ Patience M Sone 'Relevance of traditional methods of conflict resolution in the justice system in Africa' 46 *Africa Insight* 2016 at 53.

⁴⁶ See Omale (2012) at 22.

⁴⁷ The Courts (Land Disputes Settlements) Act of 2002, changed the pattern of dispute settlement on land matters. Land disputes were separated from the normal judicial process. In the new system, dispute settlement starts with extrajudicial bodies and finally rejoins the judicial machinery at the High Court level and with the Court of Appeal having the final word.

the district where the Primary Court has jurisdiction.⁴⁸ Appeals moved from these courts to the District Courts and finally to the High Court. Where a point of law was involved, an appeal could reach the Court of Appeal for final determination. On the other hand, District Courts and resident magistrates' courts had original jurisdiction on matters originating from registered lands, with the High Court having unlimited jurisdiction.

The enactment of the Land Act and the Village Land Act of 1999, however, both proposed a separate process for land disputes.⁴⁹ Through these Acts, the government decided to create 'an efficient, effective, economical and transparent system' of dispute resolution in land matters.⁵⁰ Interestingly, the new system intended to 'to enable all citizens to participate in decision-making on matters connected with their occupation or use of land'.⁵¹ In addition, an increase in the backlog of land disputes in courts required an effective legal process. The burgeoning land cases were believed to be an outcome of an inefficient dispute settlement mechanism. Ordinary courts seemed decoupled from the local community and locale of land disputes. Even Primary Courts were still far from the source of land conflicts. Concomitantly, the community occupying or adjacent to the disputed land had an interest in the dispute, and hence they needed to be involved in the decision-making process. Even where disputes were resolved outside the local community, courts had to visit the land to establish factual information. This complexity, coupled with the presence of other civil and criminal disputes, meant courts were laden with disputes that could otherwise be resolved by the local community through mediation before judicial intervention.⁵² Hence, the Courts (Land Disputes Settlements) Act was enacted to create an alternative system for land disputes.

Accordingly, the law established the following courts: the Village Land Council, the Ward Tribunal, the District Land and Housing Tribunal, the High Court and the Court of Appeal of Tanzania.⁵³ While the High Court and Court of Appeal are staffed by the judiciary, the District Land and Housing Tribunal is presided over by a chairperson who is an employee of

⁴⁸ According to the Magistrates' Courts Act, Chapter 11, Revised Edition 2002, section 3(1), primary courts' territorial jurisdictions are limited to the district where the court is situated.

⁴⁹ The Land Act, Chapter 113, Revised Edition 2002; the Village Land Act, Chapter 114, Revised Edition 2002.

⁵⁰ The Land Act, Chapter 113, Revised Edition 2002, section 3(1)(h).

⁵¹ *Id* at section 3(1)(i).

⁵² See the Courts (Land Disputes Settlements) Act of 2002, section 7.

⁵³ The Courts (Land Disputes Settlements) Act of 2002, section 3(2).

the Ministry of Lands. The village land councils and ward tribunals fall under the local government authorities. The Act created ‘sandwich’ justice mechanisms involving extrajudicial bodies and judicial courts.

Village land councils are a modified form of the Village Council;⁵⁴ they are composed of members from the local community whose appointment is approved by village assemblies.⁵⁵ They are the lowest mechanisms of justice delivery established at the village level. Because the land must be located in the village, land village councils are always acquainted with the parties and the land in dispute. The village knows the genesis of the dispute and hence it can reconcile the parties based on customary law. Their major functions are threefold: to receive complaints, convene meetings based on filed complaints, and mediate parties.⁵⁶ The focus of justice is on the amicable settlement of disputes about land matters within the village.⁵⁷ On the other hand, ward tribunals, which officially existed since 1985, had their jurisdiction extended to cover land disputes within the ward.⁵⁸ They receive referrals from the Village Land Council.⁵⁹ The tribunals’ spirit of reconciliation, stated in the Ward Tribunals Act of 1985, is replicated in the Courts (Land Disputes Settlements) Act, thus securing peace and harmony in the community through mediation that invokes customary values in dispute resolution.⁶⁰ In land disputes, their appeals lies to the District Land and Housing Tribunal presided over by a chairperson and not less than two assessors.⁶¹ A person aggrieved by the decision of this tribunal can appeal to the High Court and finally to the Court of Appeal.

The establishment of justice machinery outside the judiciary on land matters provides a clear reflection of the role of the community in dispute resolution. When the community was distanced from land disputes, adverse effects ensued for the administration of justice outside

⁵⁴ Village councils are established under the Local Government (District Authorities) Act, Chapter 287, Revised Edition 2002, while village land councils are established under section 60 of the Village Land Act, Chapter 114, Revised Edition 2002.

⁵⁵ The Courts (Land Disputes Settlements) Act of 2002, section 5(1).

⁵⁶ *Id* at section 7.

⁵⁷ *Id* at section 7(c).

⁵⁸ See the Ward Tribunals Act, Chapter 206, Revised Edition 2002. A detailed analysis of these tribunals is provided below in this chapter.

⁵⁹ The Courts (Land Disputes Settlements) Act of 2002, section 9.

⁶⁰ The Ward Tribunals Act, Chapter 206, Revised Edition 2002, section 8; the Courts (Land Disputes Settlements) Act of 2002, section 13.

⁶¹ The Courts (Land Disputes Settlements) Act of 2002, section 23.

the community which had interest in the dispute. If the land is located within the community, the community has an unchallengeable interest in participating in the resolution of the dispute. The return of conflicts from the court system to community-based justice machineries was a return of conflicts to affected communities. Courts which determined disputes outside the disputed land had little information concerning the source of conflict. It was therefore pertinent that the community to be involved in the conflict as it knows the land and the needs of the conflicting parties. The community would prefer reconciliation to court processes as the parties are part of the community's production cycle. Whereas courts may exacerbate the dispute, the community's aim is the restoration of peace and harmony. For this reason, village land councils and ward tribunals apply amicable dispute settlement mechanisms rather than trials.

Where the community is involved in dispute resolution, shaming is involved, which creates a sense of community responsibility.⁶² As well as being closer to the community, the procedures used by the Land Village Councils and Ward Tribunals are simple and more understandable by ordinary people than court processes. Customary principles of justice do not confuse the parties, and agreements are reached for the betterment of the community. This system provides a model for criminal disputes, which are always taken away from the affected community.⁶³ When the dispute is decided away from the community, community members are denied the opportunity to participate in the correction of offenders because disputes are tried by courts that are alien to the conflicting parties. Courts are judicial bodies created by the State and use received judicial processes which the community is not familiar with. Apart from the fact that courts are few and far between, magistrates are sometimes ill-versed in the customary practices of the respective jurisdictions. Nevertheless, even in courts where the magistrate sits with assessors, he or she retains a casting vote over the final decision.⁶⁴

The new system, however, has faced various challenges. For instance, only few district land and housing tribunals have been established at district level, and hence accessing justice is a

⁶² See John Braithwaite *Crime, shame and reintegration* Cambridge University Press USA 1989.

⁶³ See Christie (1977).

⁶⁴ The Magistrates' Courts (Primary Courts) (Judgment of Court) Rules, Rules 3-4.

daunting task. While the Ward Tribunals Act, 1985 establishes tribunals both in district and urban authorities, the functioning of ward tribunals in urban authorities on land disputes is excluded by the Courts (Land Disputes Settlements) Act. As a result, district land and housing tribunals in urban authorities, where ward tribunals are excluded from resolving land disputes, are overburdened with land cases.⁶⁵ This supports the argument that involving the community in dispute resolution may relieve courts of the backlog of cases.

Moreover, the fact that village land councils, ward tribunals and district land and housing tribunals are beyond the control of the judiciary contravenes the constitutional provision that entrusts the judiciary with power to deliver justice.⁶⁶ In 2013 the Law Reform Commission of Tanzania recommended that the Village Land Council and Ward Tribunal be accommodated within the judiciary in order to ensure their independence and credibility.⁶⁷ However, it may also be advantageous for such institutions to remain outside the judiciary. Once under the control of the judiciary, such institutions may be forced to abide by colonially inherited written rules of procedure, whereas, while detached from the judiciary, they may provide another dimension of justice administration outside the rules of written laws.

8.3.2 Ward tribunals and restorative justice practices

As in many Africa countries which underwent colonisation, Tanzania's indigenous dispute settlement mechanisms were adversely affected by the introduction of a foreign legal system. However, the Tanzanian community still needed a system of justice at grassroots level that was relevant to the local community, namely the system which upholds African norms by embellishing communal life and retaining the African jurisprudence of *ubuntu* or *utu*.⁶⁸ As discussed in previous chapters, African countries such as Sierra Leone, Rwanda, and South Africa continue to value justice grounded in traditional justice. These countries are models answering the African need for communal justice based on humanity or *utu*.

⁶⁵ Godfrey Eliseus Massay 'Adjudication of land cases in Tanzania: A bird's-eye overview of the District Land Housing Tribunal' Haki Ardhi 2013 at 6.

⁶⁶ The Constitution of the United Republic of Tanzania of 1977, article 107A(1).

⁶⁷ The Review of the legal framework on land dispute settlement in Tanzania (*Mapitio ya mfumo wa Sheria zinazohusu utatuzi wa migogoro ya ardhi*), the Law Reform Commission of Tanzania 2013 at 4.

⁶⁸ *Ubuntu* or *utu* do not only apply in South Africa. Most countries in sub-Saharan Africa are familiar with the doctrines attached to them. The influence of *ubuntu* justice on the contemporary criminal justice system has been discussed extensively in Chapter 6.

After the abolition of customary criminal law in formal courts, community needs necessitated the establishment of a relevant communal justice under the Arbitration Tribunals in 1969.⁶⁹ These tribunals, which were administered by laypersons, were established in every village to resolve disputes by way of reconciliation.⁷⁰ The tribunals were later replaced by the Ward Tribunals Act in 1985.⁷¹ Among other reasons, ward tribunals were established to achieve amicable dispute resolution at the community level.⁷² As a complementary justice mechanism, ward tribunals are believed to have reduced the number of disputes going into the court process.⁷³ Ward tribunals are extrajudicial bodies with jurisdiction to resolve civil and criminal disputes within the ward.⁷⁴ They are under the administration of local governments and hence they are not judicial bodies. In terms of local government administration, villages can form a ward;⁷⁵ the village is further subdivided into *vitongoji*.⁷⁶ These are the administrative authorities within the district. For this reason, a district can have several wards. Implicitly, districts can have an equivalent or greater numbers of ward tribunals, given that the Minister has power to establish one or more tribunals within a ward.

Ward tribunals are composed of a chairperson, four to eight members, and a secretary who is appointed by the local government authority.⁷⁷ All members of the tribunal belong to the community within the location of the ward. Professionals such as members of the national assembly, civil servants, and persons legally qualified or employed by the judiciary are excluded from the decision-making process of the tribunals.⁷⁸ Tribunals resolve disputes by

⁶⁹ Yusufu Q Lawi 'Justice Administration outside the ordinary courts of law in Mainland Tanzania: The case of Ward Tribunals in Babati District' 1(2) *African Studies Quarterly* 1997 at 1.

⁷⁰ Chirayath, Sage and Woolcock (2006) at 14-14.

⁷¹ See Chirayath, Sage and Woolcock (2006) at 15. Section 3 of the Ward Tribunals Act, Chapter 206, Revised Edition 2002, establishes tribunals in every ward to be known as the Ward Tribunal. Ward tribunals under the local government also bifurcate into rural and urban authorities. Establishment of wards can be done either under the Local Government (District Authorities) Act, No. 7 of 1982, which governs the establishment of rural authorities, or under the Local Government (Urban Authorities) Act, No. 8 of 1982, which establishes urban authorities. Both statutes require a district to be divided into wards depending on its size.

⁷² The Ward Tribunals Act, Chapter 206, Revised Edition 2002, section 8(1).

⁷³ Lawi (1997) at 1.

⁷⁴ See the Ward Tribunals Act, Chapter 206, Revised Edition 2002, section 9(1).

⁷⁵ The whole country, consisting of 3,956 wards, has only 976 primary courts.

<http://allafrica.com/stories/201602291629.html> (accessed 21 September 2017).

⁷⁶ A ward is normally divided into villages and the village into *vitongoji*. A *kitongoji* is a composition of households below the village authority.

⁷⁷ *Id* at section 4.

⁷⁸ *Id* at section 5(1).

way of mediation based on customary law applicable in the area.⁷⁹ Hence, they are not bound by rules of evidence applicable in courts.⁸⁰ The establishing law specifically states the aim of the tribunal as ‘securing peace and harmony in the area for which it is established by mediating and endeavouring to obtain just and amicable settlement of disputes’.⁸¹ The following remedies may be imposed by the tribunal: apology, admonishment, fine, restoration of property, community work, compensation, or an order do any act that symbolises reconciliation.⁸²

However, the functioning of ward tribunals faces some challenges. Falling as they do under local government authorities, they are ill-funded and their true purpose is thus in jeopardy.⁸³ Currently, the so-called ward tribunals do not have the proper composition as envisaged by the law.⁸⁴ Notwithstanding some anomalies, the community still uses them for dispute resolution. As discussed below, their role in matrimonial disputes cannot be circumvented, as a petition for divorce must be accompanied by a certificate from the reconciliation boards, and ward tribunals are reconciliation boards for this purpose. Ward Executive Officers (WEO), who are employees of the local government and initially meant to carry out administrative duties, have illicitly taken over the functions of the tribunals.⁸⁵ The same tribunals are also appellate bodies for disputes originating in the village land councils.⁸⁶ In addition, with such inadequate funding, the tribunals are likely to succumb to corruption.⁸⁷ As a result, their credibility as justice machineries is open to question. Nevertheless, a study conducted by Lawi on the acceptability of the Ward Tribunal in one of the districts in Tanzania found that the community believes that Ward Tribunal’s decisions are fair and just.

Lawi also found that many people would prefer to use the tribunals for justice administration

⁷⁹ *Id* at section 8.

⁸⁰ *Id* at section 15.

⁸¹ *Id* at section 8(1).

⁸² *Id* at section 17.

⁸³ Celestine Nyambu-Musembi ‘Review of experience in engaging with non-state’ justice system in East Africa’ Institute of Development Studies, Sussex University 2003 at 15.

⁸⁴ Nyambu-Musembi (2003) at 15.

⁸⁵ *Ibid.*

⁸⁶ The Courts (Land Disputes Settlements) Act of 2002, section 9.

⁸⁷ Lawi (1997) at 6.

rather than have to go to court.⁸⁸ There are many justifications for adopting ward tribunals as an alternative justice mechanism at grassroots level. Courtroom justice is remote, expensive and technical. Filing a complaint in the Ward Tribunal is simple: it is done either orally or in writing to the secretary of the tribunal, village chairman or *kitongoji*.⁸⁹ Unlike that in the Ward Tribunal, justice in courts is based on a winner-take-all than rather than win-win approach. In a country where the majority reside in rural communities, a system of justice which is orientated towards amicable dispute settlement is more pertinent. In such communities, dispute resolution outcomes such as apology, compensation, reconciliation, and restoration of community harmony may be more meaningful than punishment of offenders.

In the realm of restorative justice, ward tribunals lend support to the argument that restorative justice is an ‘old wine in a new wineskin’.⁹⁰ The term ‘restorative justice’ may sound new and modish, but its features, values, and principles are similar to those of the Tanzanian ward tribunals. Of course, the New Zealand model may be a new form of restorative intervention that fits modern societies. Comparing justice under the Ward Tribunal with that of New Zealand may be an oversimplification, as the process and remedies in modern restorative justice may slightly vary from those of the tribunals. For instance, while modern restorative justice uses trained mediators, ward tribunals are chaired by persons appointed from the community. However, the philosophy behind these mechanisms of justice may be the same, which is to achieve reconciliation, repair, restoration and peace-building within the community.

To an ordinary Tanzanian, then, the principles of restorative justice are not new, even though the phrase ‘restorative justice’ may be perplexing even to professionals. In other words, restorative interventions may be a renaissance of the principles of indigenous justice. Indeed, ward tribunals ought to be the role model for restorative justice in Tanzania and considered ahead of New Zealand’s model in that they were established earlier than the New Zealand system. If the government realises the value of restorative interventions, restorative practices

⁸⁸ Lawi (1997).

⁸⁹ The Ward Tribunals Act, Chapter 206, Revised Edition 2002, section 11.

⁹⁰ Daniel W Van Ness ‘New wine and old wineskins: Four challenges of restorative justice’ 4(2) *Criminal Law Forum* 1993.

could conceivably be extended to apply to adult offenders. Even the scholarly discourse on restorative justice in Tanzania tends to sway towards foreign restorative justice models, overlooking a legally founded complementary justice mechanism that needs only enhancement.

8.4 Courts and the restorative justice approach in Tanzania

8.4.1 The Constitution and the spirit of reconciliation

In Tanzania, what can be termed the spirit of restorative justice is not only embedded in traditional justice but also reflected in laws.⁹¹ The word ‘spirit of restorative’ is preferred because Tanzania has not formalised restorative justice as a diversionary measure despite a number of legal backups.⁹² A restorative approach is also reflected in informal mediation processes at family and community level for dealing with minor disputes. Informal reconciliation processes cut across civil and criminal misdemeanours at family and community levels. The same spirit transcends into the laws from the Primary Court to the High Court.⁹³

The Constitution is the supreme law of the country, while other sources of law include written laws, customary law, Islamic law, received laws, judicial precedents and international treaties and conventions.⁹⁴ The spirit of restorative justice is enshrined in article 107A.⁹⁵ The provision came through the thirteenth constitutional amendment in 2000.⁹⁶ Apart from empowering the judiciary to dispense justice, the Constitution establishes principles for the fair administration of justice. In particular, article 107A (2) seems to capture the spirit of restorative justice in dispute resolution:

⁹¹ These laws are discussed in this chapter.

⁹² See the Constitution of the United Republic of Tanzania of 1977; the Criminal Procedure Code, Chapter 20, Revised Edition 2002; the Primary Courts Criminal Procedure Code.

⁹³ As discussed in Chapter 8, the court system in Tanzania is composed of the Court of Appeal, the High Court, the Resident Magistrates’ Court and District Court, which have concurrent jurisdiction, and the Primary Court. Primary courts have original jurisdiction both in civil and criminal matters. In addition, they have appellate jurisdiction on appeals from the Ward Tribunal. However, ward tribunals are under the authority of local government and not the judiciary.

⁹⁴ See <http://www.nyulawglobal.org/globalex/Tanzania.html> (accessed 3 August 2017).

⁹⁵ The Constitution of the United Republic of Tanzania of 1977, article 107A(1).

⁹⁶ Lugakingira and Peter (2008) at 293; see also the marginal note to the Constitution of Tanzania of 1977.

In delivering decisions in matters of civil and criminal matters in accordance with the laws, the court shall observe the following principles, that is to say:(a) impartiality to all without due regard to one's social or economic status;(b) not to delay dispensation of justice without reasonable ground;(c) to award reasonable compensation to victims of wrongdoings committed by other persons, and in accordance with the relevant law enacted by the Parliament; (d) to promote and enhance dispute resolution among persons involved in the disputes; (e) to dispense justice without being tied up with technicalities provisions which may obstruct dispensation of justice.⁹⁷

This is one of the noteworthy provisions in Tanzania. It embodies elements of restorative intervention and also ensures expedient dispute resolution if properly exploited. This provision of the Constitution has much more relevance for restorative justice than its application in ordinary criminal justice process. First, the nature of the criminal justice process, especially under the adversarial system, is based on confrontation. The adversarial system involves a winner-take-all approach in which it possible for a powerful party to win a case on the basis of its power alone, that is, an economically dominant party can hire a better lawyer than the impecunious party. Social stratification in the community is likely to influence justice where a confrontational system is applied. Even the recent Legal Aid Act may not resolve the difference, because a hired advocate is likely to put more effort into the case than a pro bono legal aid provider.⁹⁸ Parties are always unequal in some way, and some people easily lose their tempers. Legal technicalities for self-defence vary; some parties cannot withstand confrontation. Hence, this provision of the Constitution may be more meaningful when employed in a restorative justice setting where all parties tend to acquire an equal status before an impartial facilitator and where the process is more informal than in court. Differences in social or economic status that could defeat justice can be minimised in restorative interventions.

Secondly, delay of justice under the adversarial criminal justice system is a common phenomenon in Tanzania. The maxim 'justice delayed is justice denied' has no relevance in

⁹⁷ The Constitution of the United Republic of Tanzania of 1977, article 107A (2).

⁹⁸ The Legal Aid Act, No. 1 of 2017. In 2017 Tanzania passed this Act which aims at enabling parties to be legally assisted even when they are incapable of hiring a legal representative.

many African jurisdictions, including Tanzania.⁹⁹ The system of justice is technically complex, which contributes to delay of justice. While the Constitution insists on expeditious justice, the technicality of the system creates grounds for delays through objections and appeals.

Thirdly, the constitutional requirement to award compensation to victims of crime reflects the spirit of restorative justice, but in practice it leads to an array of complications. When the offender is finally imprisoned, a court order for compensation is automatically effected. Unlike a civil claim, a criminal charge does not contain a clause for victim compensation. So, it is at the discretion of the court to award compensation, otherwise the victim may be ‘a loser’.¹⁰⁰ If a case takes years to reach final determination, the victim has to wait all this time to receive compensation. In the event that the offender was not arrested, the victim suffers a double loss in that no compensation will be paid. When the offender is sentenced to serve a prison sentence, the execution of the decree on compensation is a further ordeal. Some countries, such as Great Britain, New Zealand and the United States have special funds for victim compensation.¹⁰¹ The recommendation by the Msekwa Commission, one supported by Justice Lugakingira and Professor Peter, that Tanzania follow this route has hitherto been in vain.¹⁰²

Fourth, while Tanzania has no restorative justice measures alongside the criminal justice system, the Constitution obliges courts to ‘promote and enhance dispute resolution among persons involved in the dispute’.¹⁰³ This provision envisages a justice system that would take the approach of reconciliation, in that promoting and enhancing dispute resolution is the more meaningful if the persons involved gain a sense of satisfaction, which in turn is possible if they are brought together to discuss the harm of the crime with a view to making things right. However, the prospect of meaningful dispute resolution is remote if the dispute is handled in a confrontational way. Even where the offender is punished, the dispute is not actually

⁹⁹ Issa G Shivji ‘Law and access to justice’. Paper presented at the Regional Conference of Citizens, Communities and Constitutionalism held in Arusha, Tanzania, 2000 at 16.

¹⁰⁰ Lugakingira and Peter (2008) at 295.

¹⁰¹ JC Von Bonde ‘Victims of crime in international law and constitutional law: Is the state responsible for establishing restitution and state-funded compensation schemes?’ 2 *SACJ* 2010 at 185.

¹⁰² Lugakingira and Peter (2008).

¹⁰³ The Constitution of the United Republic of Tanzania of 1977, article 107A (2).

resolved; instead, further grudges may arise as result, aggravating the dispute. Promoting dispute resolution among parties is pointless if the offender does not make things right with the victim and the community. While the Constitution aims at creating an amicable atmosphere in dispute resolution, the courts, under the adversarial justice system, may not be the best platform for achieving this: it calls for a system that settles disputes harmoniously and leaves parties feeling restored.

The drafting of this constitutional provision aimed at enhancing dispute resolution in courts of law but this law fits squarely into restorative justice. This reading is reinforced by the principle that courts should not be ‘tied up with technical provisions which may obstruct dispensation of justice’.¹⁰⁴ By implication, courts are obliged to utilise procedures that are less technical than usual. In other words, while court processes are governed by technical procedures of which some are based on principles of common law, there is an opportunity to institute processes that do not obstruct justice for the parties. Since the Constitution recognises procedures that enable dispensation of justice without burdening parties with legal technicalities, a restorative justice programme working as a mechanism complementary to the criminal justice process is envisaged by the supreme law of Tanzania. This opens the door for the possibility of using restorative interventions without contravening the Constitution.

8.4.2 Constitutional provisions of other East African Countries

Tanzania is not the only country in East Africa with constitutional provisions that favour the application of alternative or complementary justice mechanisms. Uganda and Kenya have similar constitutional provisions. In Uganda, for instance, power of adjudication, both in civil and criminal cases, is entrusted to courts. To ensure fairness,

justice shall be done to all irrespective of their social or economic status; justice shall not be delayed; adequate compensation shall be awarded to victims of wrongs; reconciliation between parties shall be promoted; and substantive justice shall be administered without undue regard to technicalities.¹⁰⁵

¹⁰⁴ The Constitution of the United Republic of Tanzania of 1977, article 107A(2)(e).

¹⁰⁵ Constitution of the Republic of Uganda of 1995, article 126(2).

Like the Constitution of Tanzania, which aims at ‘promoting and enhancing dispute resolution among persons’,¹⁰⁶ the Ugandan constitution calls upon courts to promote reconciliation between parties. By implication, though the Tanzanian Constitution does not expressly use the word ‘reconciliation’, the words ‘promotion and enhancing dispute resolution’ links the judicial process to a reconciliation approach.

The Kenyan Constitution adds something not mentioned in the other two constitutions. Courts and tribunals in Kenya shall apply ‘alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted’.¹⁰⁷ Apart from recognising that justice must be expeditious and that the social and economic status of parties should not affect the ends of justice,¹⁰⁸ the Constitution provides complementary mechanisms that can achieve this constitutional requirement. As such, in Kenya, unlike in Tanzania and Uganda, traditional justice mechanisms – which, as argued in other chapters, are restorative in nature – are constitutionally recognised as complementary justice mechanisms, provided they do not contravene constitutional values or infringe upon other rights.¹⁰⁹ In addition, as in Tanzania and Uganda, the Kenyan constitution enjoins courts to avoid ‘procedural technicalities’ that can obstruct the delivery of justice.¹¹⁰ The insistence on avoiding the legal technicalities with which the adversarial criminal justice system is laden, points to the need for mechanisms that will bring parties together to discuss the harm of the crime in the spirit of reconciliation. In the light of the Kenyan constitution, such processes include traditional dispute mechanisms.

8.4.3 Reconciliation under the Tanzania Criminal Procedure Act, 1985

The above provision of the Constitution of Tanzania is cascaded into other laws of the country such as the Criminal Procedure Act, 1985¹¹¹ and the Magistrates’ Courts Act,

¹⁰⁶ See the Constitution of the United Republic of Tanzania of 1977, article 107A(2).

¹⁰⁷ The Constitution of Kenya of 2010, article 159(2)(c).

¹⁰⁸ *Id* at article 159(2).

¹⁰⁹ See *Id* at article 159.

¹¹⁰ *Id* at article 159(2)(d).

¹¹¹ The Criminal Procedure Act, Chapter 20, Revised Edition 2002, section 163.

1984.¹¹² For instance, the Criminal Procedure Act, 1985 provides that

in the case of proceedings for common assault or for any other offence of a personal or private nature the court may, if it is of the opinion that the public interest does not demand the infliction of the penalty, promote reconciliation and encourage and facilitate the settlement, in an amicable way, of the proceedings or on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed.¹¹³

Courts are therefore obliged to invoke reconciliation processes in criminal matters provided the offence meets the following criteria. First, the offence must relate to ‘common assault’ or otherwise an offence of ‘personal or private nature’. Secondly, reconciliation applies where the court believes that ‘the public interest does not demand the infliction of the penalty’ to the offender. When the offence meets these major conditions, the court may stay the proceeding to allow reconciliation. Apart from assisting parties to reach an amicable resolution, payment of compensation and other outcomes may be reached which can be approved by the court. Under this provision, there is an implied application of restorative measure as a sentencing stage where the court is able to garner information for passing a judicious sentence. The other rationale is to ‘promote reconciliation’, ‘encourage and facilitate the settlement’ of the dispute ‘in an amicable way’.

However, there are certain challenges in the application of this law. The law restricts offences that can benefit from a reconciliation process. Even few offences that can be diverted to restorative interventions can vaguely be interpreted. It is not clear which offences fall into the category of ‘offences of a personal or private nature’. Normally, an offence involves the State as an impersonal victim, and hence it has the power to prosecute the offender. Nonetheless, most offences involve an individual victim who suffers direct harm. Categorising offences using the words ‘personal or private nature’ may be controversial because most offences involve an individual offender and a victim.

¹¹² See the Magistrates Courts Act, Chapter 11, Revised Edition 2002, the Third Schedule (The Primary Courts Criminal Procedure Code), Rule 4(2).

¹¹³ The Criminal Procedure Act, Chapter 20, Revised Edition 2002, section 163.

For instance, in the case of *Republic v. Muhidin Twalib*¹¹⁴ the accused was charged in the District Court with burglary. Upon realising that the accused was the son-in-law of the complainant, the Court ordered an out-of-court reconciliation. It seems, however, that the complainant (victim) did not want a reconciliation process, and proceeded to challenge the order of the court. In the High Court, where the case went for review, the case was excluded from reconciliation on the ground that burglary is a serious offence and therefore does not fall within the ambit of common assault or an offence of personal or private nature. The judge further insisted that ‘the relationship between the accused and the complainant is not relevant’ in deciding whether the case should go for reconciliation or not.

The case raises the further question of the seriousness of the matter is the deciding factor for reconciliation. According to the Criminal Procedure Act, 1985 a case can be diverted to reconciliation for the public interest.¹¹⁵ It is not clear how the court knows the interest of the public without involving at least some representatives from the community. As discussed below, in Primary Courts the public interest can be gleaned from assessors who participate in every proceeding. In the High Court, the situation is different because assessors are normally involved in capital offences and the law does not allow reconciliation in such serious crimes. Prosecutors and attorneys cannot be said to represent the community and thus be entitled to declare what is in the public interest and what is not. Involving the community is therefore relevant, as judges, magistrates, prosecutors and attorneys cannot form an opinion for the public. Though the differences and similarities of meaning between the words ‘community’ and ‘public’ are a matter of contention, professionals in a criminal proceeding hardly opine on behalf of the community and their opinions thus do not reflect community needs.

Another problem with this law is the dearth of special programmes for reconciliation. According to this law, the court may divert a case for restorative measures; however, the aim may not be achieved if there are no special programmes to handle reconciliation processes. Even though there are ward tribunals, usually very few cases are referred to them for reconciliation. Oftentimes, tribunals mediate fresh disputes from the community. However,

¹¹⁴ *Republic v. Muhidin Twalib* [1989] TLR 8 (HC).

¹¹⁵ The Criminal Procedure Act, Chapter 20, Revised Edition 2002, section 163.

this does not suggest that tribunals are in any way incompetent to mediate referrals from courts. In cases referred from courts, it is left to close friends, relatives or elders to mediate between parties. This process can lead to miscarriage of justice because the dispute is placed in the hands of wounded parties without a mediator or facilitator. Welfare offices are sometimes involved, but they are few in number and most are located in urban centres.

8.4.4 Reconciliation under Primary Courts

Primary Courts, which are the lowest in the judicial hierarchy, have both original and appellate jurisdiction in criminal and civil cases. They receive appeals from ward tribunals which work as mediation bodies outside the judiciary.¹¹⁶ The territorial jurisdiction of Primary Courts encompasses the districts where they are located.¹¹⁷ While Primary Courts are governed by adversarial criminal procedures, they are also legally empowered to promote reconciliation among the parties.¹¹⁸ This power derives from the Constitution, which obliges courts to promote amicable dispute settlement and avoid procedural technicalities that are likely to impede justice.¹¹⁹ Apart from the constitutional provision discussed above, Primary Courts' criminal procedures also have a provision as that of the Criminal Procedure Act, 1985.¹²⁰ In addition to the above provisions, the Primary Courts' criminal procedure code provides another opportunity for reconciliation, as follows:

Where a court by which a person is convicted of an offence is of the opinion that, having regard to the circumstances, including the nature of the offence and the character of the offender, it is inexpedient to inflict punishment, the court may make an order discharging him on his executing a bond with or without sureties in such sum as the court may think fit, on condition that during a period not

¹¹⁶ According to section 20 of the Ward Tribunals Act, Chapter 206, Revised Edition 2002, a person aggrieved by the decision of the Ward Tribunal can appeal to the Primary Court. The Primary Court is the final appellate body for matters originating from the Ward Tribunal, unless a point of law is involved where the District Court shall have final appellate authority.

¹¹⁷ The Magistrates' Courts Act, Chapter 11 Revised Edition 2002, section 3.

¹¹⁸ See the Constitution of the United Republic of Tanzania of 1977, article 107A(2); the Magistrates Courts Act, Chapter 11, Revised Edition 2002, the Third Schedule (The Primary Courts Criminal Procedure Code), Rule 4.

¹¹⁹ See the Constitution of the United Republic of Tanzania of 1977, article 107A(2).

¹²⁰ Section 163 of the Criminal Procedure Act, Chapter 20, Revised Edition 2002 is replicated in the Magistrates Courts Act, Chapter 11, Revised Edition 2002, the Third Schedule (The Primary Courts Criminal Procedure Code), Rule 4(2).

exceeding one year he shall appear and receive sentence when called upon and in the meantime he shall keep the peace and be of good behaviour.¹²¹

This provision does not serve as an opportunity for case adjournment pending a sentence; rather, it provides the court the power to permit an offender's conditional discharge depending on the nature and circumstances of the offence and offender's character. However, the provision is rarely applied. A situation in which a convicted offender is discharged after furnishing a bond not necessarily with sureties while awaiting sentence is not common in practice. The rationale for this provision is not clear.

However, the same law can be applied in line with another provision which allows the court 'before passing sentence to receive such evidence as it thinks fit, in order to inform itself as to the sentence to be passed'.¹²² These two provisions can provide space for restorative intervention for parties before a sentence is pronounced by the court. A restorative conference, at this stage, functions as a reconciliatory board for parties with the view to making things right. An agreement from the restorative conference can contain recommendations for the court to adopt in passing the sentence. By so doing, the discharge of the offender under Rule 4(1) becomes fruitful because the offender is brought before a restorative encounter with the aim of making amends with the victim during the time of the discharge. Otherwise, merely discharging the offender into the community without any attempt at reconciliation can be perceived as an injustice to victims. Even where no direct victim is involved, the community would like to see the offender taking responsibility. The community may wrongly perceive a discharge, and in a community with burgeoning mob justice, this could endanger an offender's safety even overtrifling offences.¹²³ The discharge may also lead to surmise about corruption, hence damaging the reputation of the judiciary. When that discharge is applied in conjunction with restorative measures, it fits in squarely with the Constitution and Rule 4(2) of the Primary Court Criminal Procedure Code, both of

¹²¹ The Magistrates Courts Act, Chapter 11, Revised Edition 2002, the Third Schedule (The Primary Courts Criminal Procedure Code), Rule 4(1).

¹²² *Id* at Rule 28.

¹²³ See Tanzania Human Rights Report 2016 at 16.

which oblige courts to promote reconciliation between parties.¹²⁴

8.4.5 Court assessors in the criminal justice administration

Involving assessors in decision-making is a common phenomenon in African courts.¹²⁵ Its genesis can be traced back to colonial courts when decision-makers needed assistance in cases which involved technical customary law. In Tanzania, the system of assessors was inherited from colonial practice with the idea of ensuring ‘just decisions’ in courts.¹²⁶ Currently, Primary Courts sit with not less than two assessors.¹²⁷ The Primary Court is not the only court that sits with assessors – so does the High Court, especially when adjudicating capital offences such as murder.¹²⁸ Assessors can enquire from the parties to unveil any fact.¹²⁹ According to Kyando and Peter, in the High Court, which seems distanced from the community, assessors represent the larger community in the decision-making process.¹³⁰ In the Primary Court, as assessors are part of the court, decisions are reached after consultation.¹³¹ In case of disagreement between the magistrate and assessors, a majority vote determines the decision, albeit with the magistrate having a casting vote.¹³² In the High Court, assessors’ opinions are necessary, though the judge can depart from their views.¹³³ While it is not always the case, assessors are appointed from the surrounding community within the locality of the court. It is also argued that assessors may come from any part of the

¹²⁴ See the Constitution of the United Republic of Tanzania of 1977, article 107A(2); see also The Magistrates Courts Act, Chapter 11, Revised Edition 2002, the Third Schedule (The Primary Courts Criminal Procedure Code), Rule 4(2).

¹²⁵ South Africa also involves assessors in the judicial process.

¹²⁶ Justice LA Kyando and Chris Maine Peter ‘The people’s representation in the courts of law in Tanzania: The need to retain the assessors’ *Commonwealth Law Bulletin* 1994 at 319.

¹²⁷ The Magistrates’ Courts Act, Chapter 11, Revised Edition 2002, section 7. The law clearly provides that ‘in every proceeding in the primary court, including a finding, the court shall sit with not less than two assessors’.

¹²⁸ See the Criminal Procedure Act, Chapter 20, Revised Edition 2002, section 265. The law provides that ‘all trials before the High Court shall be with the aid of assessors the number of whom shall be two or more as the court thinks fit’.

¹²⁹ The Evidence Act, Chapter 6, Revised Edition 2002, section 177; *Michael Luhiye v. Republic* 1994 TLR 181 (CA).

¹³⁰ Kyando and Peter (1994) at 321.

¹³¹ *Agnes Maloda v. Richard Mhando* 1995 TLR 137 (HC).

¹³² The Magistrates’ Courts Act, Chapter 11, Revised Edition 2002, section 7(2); The Magistrates Courts Act, Chapter 11, Revised Edition 2002, the Third Schedule (The Primary Courts Criminal Procedure Code), Rule 37(2); see also *Neli Manase Foya v. Damian Mlinga*, the Court of Appeal of Tanzania at Arusha, Civil Appeal No.25 of 2002.

¹³³ *Hatibu Gandhi and others v. Republic* 1996 TLR 12 (CA).

country, provided they are Tanzanians.¹³⁴ Whereas Primary Court magistrates are lawyers, assessors are laypersons with a reputation for integrity, unless exempted by the law.¹³⁵

There are good reasons for involving assessors in the judicial process. According to Justice Kyando and Peter, assessors advise magistrates on customary issues during the trial.¹³⁶ The presence of assessors is imperative as magistrates do not necessarily come from the same community where the court is located. In a country with more than 120 tribes,¹³⁷ there are innumerable customary practices that are ordinarily beyond the comprehension of the magistrate. In a court where neither prosecutor nor advocate appears, the magistrate needs a second eye even in certain factual matters.¹³⁸ Overall, assessors represent the community in the adjudication process. Parties feel that the case has been handled by the community and not by a magistrate, who is just an employee of the State.¹³⁹ Therefore, assessors work as an eye for the public to ensure that ‘justice is not only done but also seen to be done’.¹⁴⁰

All courts that sit with assessors in Tanzania use the adversarial system: with assessors being lay community representatives, the process can be challenging, especially when it comes to rendering sound opinions for decision-making. However, it has been argued that assessors appear in court only as ‘judges of facts and not law’.¹⁴¹ Indeed, involving professionals as court assessors proved to be a misnomer as they direct themselves to the implication of the law than to the facts.¹⁴² However, using lay assessors is still relevant. With assessors as its representatives, the community is justly represented by a person with an equal status to that of the general public. A lawyer might not render a fair representation of the community where the majority are not lawyers or even literate. This is the major reason why the law

¹³⁴ Kyando and Peter (1994) at 323.

¹³⁵ The Magistrates’ Courts Act, Chapter 11, Revised Edition 2002, section 8. The following persons are prevented by the law to serve as assessors in courts: magistrates, ministers, members of the National Assembly, magistrates, judges, priests, physicians, surgeons, dentists, legal practitioners, members of the armed force, police or prisoner officers and any person exempted the Chief Justice.

¹³⁶ Kyando and Peter (1994) at 318.

¹³⁷ 28 Too Many ‘Country profile: FGM in Tanzania’ 2013 at 23, available at http://www.28toomany.org/media/uploads/tanzania_final_final_final.pdf (accessed 21 July 2017).

¹³⁸ See Kyando and Peter (1994) at 318.

¹³⁹ *Id* at 318.

¹⁴⁰ See Kyando and Peter (1994) at 322.

¹⁴¹ *Id* at 324.

¹⁴² *Id* at 325.

clearly excludes professionals from serving as court assessors.¹⁴³ On the other hand, the use of assessors in courts has been criticised for allowing decisions to be made based on majority opinion.¹⁴⁴ The possibility of outnumbering the magistrate raises some concerns, albeit that the number of assessors appearing for each session does not, in practice, exceed two. When the magistrate applies the casting vote on top of his or her own vote, it still comes to an equal decision. In a country where corruption is frequently mentioned, majority decisions may compromise justice.

As decisions are based on law, assessors' opinions may only relate to general ideas. However, their input cannot be underestimated for its value in assuring the public of the credibility of these decisions. They are required to advise a judge or magistrate on general norms relevant for a just decision. It is wise for the community to be involved in the adjudication process of its members. Assessors can tell the courts what the community's need are, and these recommendations can be adopted by the court. As representatives of the community, assessors make the community responsible for the parties: when assessors are fully involved in the decision-making process, the community owns the conflict.¹⁴⁵ Judicial decisions are sandwiched between professionals and lay community representatives.

8.4.6 Reconciliation under the Law of Marriage Act of 1971

In matrimonial disputes, the law in Tanzania provides for a reconciliatory approach before the dispute reaches the court.¹⁴⁶ The law requires spouses to go through a reconciliation board before petitioning for divorce.¹⁴⁷ Under the law, the Minister has power to establish board(s) in every ward for marriage reconciliation purposes.¹⁴⁸ As noted previously, the ward tribunals function as reconciliation boards;¹⁴⁹ the Minister may designate a committee

¹⁴³ See the Magistrates' Courts Act, Chapter 11, Revised Edition 2002, section 8.

¹⁴⁴ Kyando and Peter (1994) at 323-324.

¹⁴⁵ See Christie (1977).

¹⁴⁶ The Law of Marriage Act, Chapter 29, Revised Edition 2002, section 101.

¹⁴⁷ *Id* at section 101 specifically provides that 'no person shall petition for divorce unless he or she has first referred the matrimonial dispute or matter to a board and the board has certified that it has failed to reconcile the parties'.

¹⁴⁸ The Law of Marriage Act, Cap. 29 RE 2002 (Tanzania), section 102.

¹⁴⁹ The Ward Tribunals Act, Chapter 206, Revised Edition 2002, section 9; see also Ulrike Wanitzek and Fauz Twaib 'The presentation of claims in matrimonial proceedings in Tanzania: A problem of language and legal culture' 47 *AAP* 1996 at 125.

established by the community as a marriage conciliatory board.¹⁵⁰ This provision brings on board religious communities such as BAKWATA¹⁵¹ and Christian organisations for dispute management.¹⁵² It is vital for religious communities to engage in conflict resolution because they are part of the community. Hence, their role should be felt beyond matrimonial disputes.

Reference to a board is a mandatory requirement unless the dispute falls under exceptions provided by the Act.¹⁵³ Where a petition for divorce is filed in court without going through the reconciliation board it is considered premature.¹⁵⁴ There are a number of reasons for this form of diversion. First, recommendations from the board inform the court that the marriage has broken down beyond repair.¹⁵⁵ Secondly, it is an opportunity for spouses to discuss the dispute with the community before filing a divorce petition.¹⁵⁶ The board reconciles spouses by creating the opportunity for them to consider the consequences of the dispute for the children (if any), family and the community. It is a moment to pause for reflection before the dispute goes to court for divorce processes.

Because boards are composed of community members, close friends and relatives of the parties are involved in the reconciliation process. In this process, the community shoulders responsibility for its members. It is therefore not a mere requirement of the law but a process that keeps the community together. In Africa, unlike in Western culture, a marriage involves

¹⁵⁰ The Law of Marriage Act, Chapter 29, Revised Edition 2002, section 102.

¹⁵¹ *Baraza Kuu la Waislamu wa Tanzania* (BAKWATA) is an organisation representing the Islamic community in Tanzania.

¹⁵² See the Law of Marriage Act, Chapter 29, Revised Edition 2002 (Subsidiary legislation).

¹⁵³ Under the Law of Marriage Act, Chapter 29, Revised Edition 2002, section 101, the court can only waive this requirement if the spouse is deserted and does not know where the other spouse can be found; where the respondent is living in a foreign country and it is unlikely that he or she will enter the jurisdiction of Tanzania within six months after the date of the petition; where the respondent wilfully refuses to appear before the board; where the respondent is imprisoned for life or a term not less than five years; where the respondent is suffering from mental illness or where there are extraordinary circumstances which make reference to the board impossible.

¹⁵⁴ *Athanas Makungwa v. Darini Hassani* 1983 TLR 132 (HC).

¹⁵⁵ Under the Law of Marriage Act, Chapter 29, Revised Edition 2002, section 99 and 107(2), there is only one ground for divorce – that the marriage has broken down – but a decree of divorce can only be granted if the marriage has broken down irreparably so. The law provides for evidence to show the breakdown of the marriage, which includes adultery, sexual perversion, cruelty, wilful neglect by the respondent, desertion, three years' voluntary separation, the respondent's imprisonment for life or for a period of more than five years, and mental illness of the respondent.

¹⁵⁶ Barth Rwezaura 'Gender justice and children's rights: A banner for family law reform in Tanzania' *The International Survey of Family Law* 1997 at 421.

a wider range of family members than the spouses.¹⁵⁷ Hence, communal life is enriched through sharing and resolving disputes that are likely to affect the well-being of the community. At this stage, spouses as well as the community understand the cause of the dispute. The community also tries to settle the rift amicably. Where reconciliation under the board fails, a certificate together with recommendations is issued, which becomes an essential appendix to the divorce petition in court.¹⁵⁸

Resolution of matrimonial disputes in Tanzania provides a basis for asserting the relevance of the community in conflict management. This procedure is only viable in civil-related matters, not in criminal disputes, as there is an assumption that offenders are violent and thus they cannot be invited for a dialogue in the community. They warrant the immediate intervention of the State to keep them away from the community. However, this assumption may be wrong: there are many minor offences that go for trial where offenders are not a threat to the community. In many jurisdictions, including Tanzania, such offenders are granted bail and immediately rejoin the community pending determination of their cases. Such cases may take years or months before final trial. In such cases, the so-called ‘offender’ – which implies a bad person – ends up being fined or imprisoned for a short period of time. Again, they immediately resurface from prison and join the community. In fact, their sentence is a temporary removal from the community where they belong. Hence, it is prudent to rethink the role of reconciliation boards in criminal matters because a matrimonial dispute can be as violent as a criminal offence. Indeed, many matrimonial disputes may have some criminal aspects to them. Therefore, the role of reconciliation boards attached to matrimonial disputes can be extended to resolve minor offences in a more restorative way.

8.4.7 Restorative justice under the juvenile courts in Tanzania

The strong desire to venture into the restorative approach in Tanzania is apparent in the enactment of the Law of the Child Act.¹⁵⁹ This Act repealed the erstwhile laws which regulated matters pertaining to child protection and welfare, such as the Children and Young

¹⁵⁷ Wanitzek and Twaib (1996) at 122.

¹⁵⁸ See, for instance, *John David Mayengo v. Catharina Malembeka*, in the High Court of Tanzania at Dodoma, Civil Appeal No. 32 of 2003. See also *Bibie Maurid v. Mohamed Ibrahim* [1989] TLR 162 (HC).

¹⁵⁹ The Law of the Child Act of 2009.

Persons Act.¹⁶⁰ The former law did not strive to protect the welfare of the child who came into conflict with law. Neither stakeholders nor restorative interventions were involved in the process of juvenile justice. The child could be prosecuted, convicted and sentenced like an adult offender; hence, the law was in total contravention of international standards and norms.¹⁶¹ For instance, the recent release of prisoners under the presidential power of mercy brought to light an offender who was awaiting execution of death sentence. According to his testimony, he was sentenced at the age of 12 years and stayed in prison for more than 30 years without any possibility of parole.¹⁶² A criminal justice system that embraces child rights and welfare would not have imposed such a sentence to a child even in a homicide case.

The new law of the child sets in a motion an integrative criminal justice system that operates under juvenile courts. The same law has also propelled the establishment of the Law of the Child (Juvenile Court Procedure) Rules¹⁶³ and the Child Protection Regulations.¹⁶⁴ The Law of the Child Act sets forth as its main objective the ‘promotion, protection and maintenance of the welfare and rights of the child’.¹⁶⁵

Major transformations made by this law are fourfold: first, it establishes juvenile courts.¹⁶⁶ In compliance with this law, the Chief Justice of Tanzania has designated 130 Primary Courts to operate as juvenile courts.¹⁶⁷ Resident magistrates are vested with power to preside over cases where a child is involved as an offender, victim, complainant, respondent or beneficiary in any way.¹⁶⁸ Juvenile courts have both civil and criminal jurisdiction.¹⁶⁹

¹⁶⁰ Other laws repealed by the Law of the Child Act of 2009 include the Affiliation Act, the Adoption Act, the Day Care Centres Act, and the Children Home (Regulations) Act. See the Law of the Child Act of 2009, section 160.

¹⁶¹ See the UN Convention on the Rights of the Child of 1989, articles 37 and 40.

¹⁶² <https://www.youtube.com/watch?v=ZUwnKHilDtg> (accessed 22 January 2018).

¹⁶³ The Law of the Child (Juvenile Court Procedure) Rules of 2016.

¹⁶⁴ The Child Protection Regulations of 2014.

¹⁶⁵ The Law of the Child Act of 2009, section 2.

¹⁶⁶ *Id* at section 97(1).

¹⁶⁷ See the Law of the Child Act of 2009, section 97(2); the Law of the Child (Designation of Juvenile Courts) Notice, 2016, Government Notice No. 314 published on 09/12/2016.

¹⁶⁸ The Law of the Child Act of 2009, section 97(3). A person qualifies to be a Resident Magistrate after obtaining a first degree in law from a recognised institution. Resident magistrates ordinarily preside over cases in primary courts in Tanzania.

¹⁶⁹ The Law of the Child Act of 2009, section 98.

Secondly, the composition of juvenile courts now embraces stakeholders in the welfare of the child such as the magistrate, court clerk, prosecutor, attorney, welfare officer, parents, guardian, relatives, friend or any other person that may contribute towards fair justice for the child.¹⁷⁰ To protect the child against any unfair advantage during the proceedings, the child shall at all times be represented.¹⁷¹ Thirdly, the juvenile court departs from the ordinary process of adversarial justice. Even though the seating arrangement is regulated, the court still creates an informal setting.¹⁷² The process is more ‘informal and friendly’ than in ordinary courts.¹⁷³ So that the child can feel that the court’s atmosphere is friendly, Court personnel do not appear in formal apparel.¹⁷⁴ The child should be able to understand the language used by the court, and if not, an interpreter is provided.¹⁷⁵ Under the law, the child is protected from the ordinary technical cross-examination processes.¹⁷⁶

Fourth, sentencing and procedure have been altered in the juvenile courts in order to safeguard the interest and welfare of parties. The focus of sentencing shifts from punishment, as administered in ordinary courts, to the rehabilitation and reintegration of the offender (child).¹⁷⁷ Where the offender (child) is found guilty of an offence, a social welfare officer prepares a social inquiry report for sentencing purposes.¹⁷⁸ The report is meant to reveal the child and family’s circumstances to assist the magistrate in forming a judicious sentence. It is also meant to indicate the child’s needs to be addressed by the court in order to ensure that the child is rehabilitated. However, the report differs from a victim impact statement in that it does not state the harm suffered by the victim. Sentencing the offender is integrative inasmuch as it considers factors such as the harm caused, willingness of the child offender to take responsibility, the offender’s needs, circumstances of commission of the offence,

¹⁷⁰ The Law of the Child Act of 2009, section 99; the Law of the Child (Juvenile Court Procedure) Rules of 2016, Rule 11.

¹⁷¹ The Law of the Child (Juvenile Court Procedure) Rules of 2016, Rule 27.

¹⁷² *Id* at Rule 7(2).

¹⁷³ The Law of the Child Act of 2009, section 99; the Law of the Child (Juvenile Court Procedure) Rules of 2016, Rule 8.

¹⁷⁴ See the Law of the Child (Juvenile Court Procedure) Rules of 2016, Rule 7(5).

¹⁷⁵ *Id* at Rules 9 and 45.

¹⁷⁶ *Id* at Rule 45.

¹⁷⁷ *Id* at Rule 47(1)(g) and 49(1)(b).

¹⁷⁸ Social inquiry reports normally contain the child and family’s background and other circumstances that have led to the commission of the offence. The Law of the Child (Juvenile Court Procedure) Rules of 2016, Rule 3, 47 and 49(2).

rehabilitation value, and protecting the welfare of the child.¹⁷⁹ In protecting the welfare of offender child, imprisonment of whatever term is restrained and alternative sentences are to be imposed instead.¹⁸⁰ The following orders may be imposed against the convicted child: conditional discharge,¹⁸¹ fine, compensation,¹⁸² probation order,¹⁸³ or committal to an approved school.¹⁸⁴

The juvenile justice in Tanzania sets a new direction for restorative interventions within the criminal justice system. It is a commendable approach because it involves stakeholders in the juvenile justice. The process is meant to protect a child due to his or her vulnerability in courts. However, children are not the only group of persons who suffer from the adverse effects of the adversarial criminal justice system. Victims of crime, including adults, especially victims of sexual abuse and domestic violence, are also vulnerable and in need of protection from a criminal justice system laden with technical rules of dispute resolution. Comparatively, more court cases involve adults than children. This means there are may be more vulnerable parties in ordinary courts than in juvenile courts. Adults can be as unacquainted with courts' rules of procedure as children. Hence, they have an equal need for a criminal justice system that upholds victims' welfare and protection.

As mentioned, then, the juvenile justice in Tanzania has ventured to some extent on a journey towards restorative intervention. The mandatory participation of the social welfare officer is particularly welcome for introducing a new dimension into the criminal justice system. In addition, a child in conflict with the law may be protected from any abuse by the criminal justice system, such as humiliating cross-examination procedures. Audio-recorded and videotaped evidence regarding the child can now be admitted in court without an opportunity for the offender to cross-examine the victim (child).¹⁸⁵ Furthermore, under the juvenile justice system, the police have power over the child offender's bail pending the filing of a case in court, unless it is a homicide case. This is commendable because it gives other organs

¹⁷⁹ The Law of the Child (Juvenile Court Procedure) Rules of 2016, Rule 49.

¹⁸⁰ The Law of the Child Act of 2009, section 119.

¹⁸¹ The Law of the Child (Juvenile Court Procedure) Rules of 2016, Rule 50.

¹⁸² *Id* at Rule 51.

¹⁸³ *Id* at Rule 52.

¹⁸⁴ *Id* at Rule 54.

¹⁸⁵ Child Protection Regulations of 2014, Regulation 17.

in the criminal justice continuum the mandate to handle matters without necessarily having to wait for the court to decide.

However, there are weaknesses in juvenile justice especially when viewed from a restorative justice viewpoint. The establishment of juvenile courts is meant to create a friendly environment which, in contrast to the usual sinister courtroom milieu, fosters the welfare of the child, but most of the current juvenile courts use Primary Courts' premises – and there are only 130 such designated courts in the entire country.¹⁸⁶ This number is low in relation to Tanzania's population and territorial size. Notwithstanding that juvenile courts are believed to provide a friendly seating arrangement and composition, a child may still be intimidated by knowing that he or she is appearing before a court of law. It is also the case that the magistrates who are trained to handle cases in adversarial processes still preside over juvenile courts. The use of magistrates and legal professionals is unlikely to distance the court from rituals of professionalism that could jeopardise the child's welfare. Though stakeholders are involved in juvenile courts, their contribution in decision-making may be minimal given the lack of restorative measures. There may be limited discussion about the crime and its effects because the same procedures of examination of witnesses are applied. The only difference is that cross-examinations have been softened up so as to avoid intimidating the child.

In my view, the participation of stakeholders may simply be window-dressing to create a comforting environment for the child, this while the stakeholders' actual influence on the decision is negligible. This argument is borne out by the fact that neither pre-trial nor pre-sentence diversion exists in the Tanzanian juvenile justice system. There is generally no restorative intervention at the stage of trial to sentencing stage; family group-conferencing and victim-offender mediation appear only as part of conditional discharge, which is a post-sentence approach.¹⁸⁷ This approach may deny stakeholders' the ability to share their views on juvenile justice. Apart from the presentation of a social inquiry report at the sentencing stage, the influence of other stakeholders in the criminal justice system in Tanzania may be insignificant. There is no rationale for thwarting restorative measures for juvenile offenders.

¹⁸⁶ The Law of the Child (Designation of Juvenile Courts) Notice, 2016, Government Notice No. 314 published on 09/12/2016.

¹⁸⁷ Law of the Child (Juvenile Court Procedure) Rules of 2016, Rule 50(3)(vii).

Similarly, the argument that Tanzania does not have a conducive environment for out-of-court restorative interventions does not hold water, given that the law establishes child protection conferences for determining the safety, health and well-being of a harmed child.¹⁸⁸ Such a conference is composed of people who are necessary for the welfare of the child, such as parents, relatives, social welfare officers, foster parents, professionals (doctor, nurse, teacher, child-care worker or psychologist), the police or any person considered by the social welfare officer as necessary for the well-being of the child.¹⁸⁹ The same conferences could operate as restorative diversion mechanisms for disputes involving a child in order for a child to take responsibility of a crime through restorative interventions. The current juvenile justice system in Tanzania may be lacking a mechanism to bring stakeholders together with the view to making things right.

The sister jurisdiction in Zanzibar diverts a child offender who admits responsibility to less serious offences before being charged in a juvenile court.¹⁹⁰ At this stage, the child is diverted to a family group conference or victim-offender mediation under the facilitation of a welfare officer.¹⁹¹ Diversion mechanisms may also be in the form of an apology, caution, counselling, therapy, payment of compensation, or restitution of property.¹⁹² Diversion is done by the Director of Public Prosecution upon the consent of the child or parent.¹⁹³ When diversion is done at this stage, no criminal record or prosecution of the same offence should be conducted against the child.¹⁹⁴ The Tanzanian juvenile process seems to differ from other jurisdictions, such as New Zealand and South Africa, which allow restorative interventions at different levels.¹⁹⁵

8.5 Conclusion

Evaluation of the laws in Tanzania sheds light on the possibility of invoking restorative interventions in criminal cases. All levels of court processes below the Court of Appeal

¹⁸⁸ Child Protection Regulations of 2014, Regulation 27.

¹⁸⁹ *Ibid.*

¹⁹⁰ The Children's Act of 2011 (Zanzibar), section 42(1).

¹⁹¹ *Id* at section 42(2)(h).

¹⁹² *Id* at section 42(2).

¹⁹³ *Id* at section 42(1).

¹⁹⁴ *Id* at section 42(5) and 52.

¹⁹⁵ See Chapter three.

provide robust indication of the need for a complementary mechanism of justice. While the High Court involves assessors in some cases, it is also bound by the provisions of the Criminal Procedure Act, 1985 which allow diversion of certain cases to reconciliation. Courts subordinate to the High Court and Primary Court are also obliged to promote reconciliation in decision-making. Moreover, the Constitution allows for procedural flexibility so that justice can be dispensed without abiding by needlessly complex legal processes. Such technical procedures can endanger justice for the parties as many of these procedures are based on received laws. They are therefore of little relevance in achieving justice as it is required by the community.

Nonetheless, the community and the judiciary itself have not been sensitive enough in exploiting provisions of the law that require diversion of cases to reconciliation. It appears that the community has to be involved in handling minor disputes at the ward level before a formal proceeding can be filed. Even though no law empowers village councils to resolve criminal conflicts other than land disputes, in reality there is a plethora of conflicts that village administrative bodies handle before going to the Ward Tribunal. Ward tribunals, which now seem to be paralysed for lack of proper composition, need to be strengthened. This should include the provision of funding and closer monitoring.

It is proposed that ward tribunals should adopt both roles: they should function as reconciliation bodies at the grassroots level and as institutions for receiving diverted cases from courts which require restorative interventions. On the other hand, there is no rationale for limiting the jurisdiction of village councils solely to land disputes. Given that such administrative bodies informally resolve countless disputes at the village level, their jurisdiction could be extended to resolve minor disputes that do not necessarily need the intervention of courts. Where the Ward Tribunal is found *functus officio* for cases diverted from courts of law, village councils should take the role of mediating parties. However, the functioning of ward tribunals may need readjustment to conform to the current needs of the community. While the current composition limits the participation of professionals, there is a need to open the door to certain groups of professionals, such welfare officers and police officers, especially in urban centres. Professionals may be co-opted members of tribunals to assist in reaching proper decisions. This approach can enhance the efficiency of ward

tribunals in dispute resolution within the community. In addition, proper training may be needed for members of ward tribunals in order to adopt some aspects of restorative justice rather than sticking to customary laws some of which may contravene human rights law.

Chapter 9:

Conclusion: Proposals for the Introduction of a Restorative Justice Approach in Tanzania

9.1 Introduction

This study has addressed several issues pertaining to the Tanzanian criminal justice system. It is clear that Tanzania inherited its criminal justice system from colonisers who supplanted indigenous forms of justice. The adversarial system went hand in hand with the codification of laws, the establishment of formal courts, and the use of English as an adjudication language. This resulted in a number of consequences.

The use of English compounded ignorance of justice processes in Tanzania, because the most widely spoken language is Swahili. Training professionals to make decisions on behalf of laypersons became necessary because the procedures of justice are technical. The local community was no longer necessary in the decision-making process, and conflicts were decoupled from the parties. It is in the nature of the current criminal justice system in Tanzania to address the vast majority of criminal disputes through formal court processes. The system is also directed towards punishment rather than making things right, because the role of the parties and community is limited. Hence, alternative punishments to imprisonment are rarely used and many offenders end up going to prison after a criminal trial. This approach has led to prison congestion and inhumane conditions, which come at a price in both human and fiscal terms. This is particularly reprehensible in cases where the offenders committed minor offences and pose no threat to community peace.

There is, as such, a need to adopt new forms of criminal dispute resolution. These would provide better access to a more satisfactory form of justice, and allow courts to deal with serious cases that really do need the involvement of professionals. Similarly, if incarceration is reserved for the few offenders who commit serious violent crime, and their incarceration is required to protect the public, prison congestion will be reduced, humane conditions can be introduced, and rehabilitation programmes are likely to be more effective.

The adversarial criminal justice has resulted in victims in Tanzania losing their essence as affected individuals, because it is the State that is regarded as the victim. The criminal justice process does not address victims' needs. It does not strive to restore the shattered relationships between the victim, offender and the community. The system of justice is unsatisfactory because it does not address the needs of the affected parties. The contemporary criminal justice system in Tanzania also does not allow the participation of the community. The community is a major stakeholder in disputes arising within its jurisdiction. Therefore, it has direct interests in the process. The participation of the community should go hand in hand with sharing views necessary for the rehabilitation of offenders for the sake of the community well-being. The community understands the needs of parties better than judges, magistrates or prosecutors, who may be detached from victims, offenders and the community. Where the offender needs counselling or treatment, the community may know what kind of counselling or treatment is needed. Involving the community re-attaches the offender to it.

While judicial decisions are necessary, it is also important to ensure justice as understood by ordinary members of the community. When the community is detached from justice administration, the process and outcomes may not be accepted by them and the punishment of offender then becomes central, rather than reconciliation and making things right. As a result, the community becomes less able to play a cohesive role; instead, the punishment and rehabilitation of offenders are carried out by the State. An offender who rejoins the community after prison life is unlikely to be reintegrated in the community where he or she lives. As a result, recidivism is more likely.

However, in the past few decades a new trend has emerged that incorporates traditional and aboriginal knowledge about justice processes and restores the role of victims and the community in justice administration. While courts remain relevant, there is a plethora of conflicts which could be resolved harmoniously through restorative interventions alongside the current criminal justice processes. Like the aboriginal thinkers who contributed to the renewal of justice processes in New Zealand, Canada and North America, Africans can and should infuse their justice systems with well-founded African principles that underpin restorative justice. Tanzania could develop restorative justice from the practices of ward tribunals and other informal dispute resolution mechanisms available at the community level.

This thesis reveals the possibility of using restorative interventions at various levels of criminal dispute in Tanzania. Apart from evincing similarities to indigenous justice, restorative justice is a flexible process that does not demand strict observance to rules of procedure. It allows the involvement of parties and the community in a friendly environment.

Restorative justice allows intervention at any stage of the criminal justice process. It may be applied as a pre-trial measure; the police, after investigation, may refer the dispute for restorative interventions. At this stage, the offender may be cautioned in lieu of criminal prosecution. A harmonious agreement may be achieved without the offender obtaining a criminal record. Filing a case in court does not render restorative justice defunct; it can still be applied in case the offender pleads guilty, provided both parties are willing. At this stage, restorative justice gives the offender an opportunity for accountability. In addition, restorative justice may be used as a sentencing option, positioned after conviction, but before the final passing of sentence. Parties' needs may be addressed and recommendations made to the court for sentencing purposes. Restorative justice at this stage allows courts to consider the needs of justice stakeholders. Referral to a restorative justice process can also form part of the sentence itself, provided that the victim is willing to agree to this option. In this instance, a court may wish to make the plan or agreement an order of court. Restorative justice may also be applied as a post-sentence approach: first, for the smooth reintegration of the offender after prison life; secondly, as a measure for understanding the victim's feelings and addressing his or her needs after 'justice' has been served by the courts; and thirdly, as a checkpoint on the offender's needs after serving a sentence, either in prison or through community service or probation.¹

9.2 A proposed restorative justice regime

There is a need to establish a system of justice that will take a restorative approach in handling criminal disputes in Tanzania. Tanzania may apply the proposed framework alongside, and outside, the criminal justice system. The proposed restorative justice regime aims at securing peace and harmony by returning conflicts to the affected parties. Application

¹ Ann Skelton and Mike Batley 'Restorative justice: A contemporary South African Review' 21 (3) *Acta Criminologica* 2008.

of restorative justice will also impose a responsibility on the community, as the custodian and protector of norms, to monitor and reproach a misbehaving member. The proposed application of restorative justice intends to engage existing institutions which are currently not fully involved in dispute resolution in Tanzania. Such institutions may handle minor disputes at the community level before these escalate into serious strife. They may also run restorative justice processes for cases diverted by the police and courts. The proposed regime may enable formal courts to deal with disputes in which there is a need for an interpretation of law, or a finding of guilt when the offender claims innocence, or where the parties are unwilling to attend restorative justice processes.

However, implementing a restorative justice regime needs careful planning and organisation. Wright identifies three important components of the implementation of restorative justice. First, it is important to decide on the model of the process to be used, for example, victim-offender mediation or group conferences. The nature of these processes are different, so it is therefore important, while planning for the introduction of the new processes, to be clear on the type of process that will be used in restorative justice.² Secondly, it is important to know whether the persons who will manage restorative processes are volunteers or paid workers. While there are advantages to using paid staff in restorative justice, the use of volunteers is also viable, and may be necessary in Tanzania.³ According to Wright, volunteers normally come from the community. Hence, they know the needs of the community and the cultural settings. So, using volunteers who are not employed can be advantageous: apart from giving them confidence and skills for their future careers, it is cost-effective. However, a successful restorative justice process cannot depend entirely on volunteers. It is necessary to have paid staff who work hand in hand with volunteers. Both paid staff and volunteers must be trained in how to manage restorative justice meetings. The payment of stipends may help to attract and motivate volunteers.⁴ Thirdly, it is also important to understand the relationship between

² Martin Wright 'Restorative justice: From punishment to the reconciliation: The role of social workers' 6 (3) *European Journal of Crime, Criminal Law and Criminal Justice* 1998 at 271.

³ Wright (1998) at 272.

⁴ *Id* at 272-273.

the criminal justice and institutions running restorative justice processes.⁵

9.2.1 The proposed police diversionary measure and restorative justice

In most criminal disputes the police receive information or complaints before commencing an investigation process. The police's power over criminal disputes includes taking caution statements, investigation, issuing warrants (arrest and search warrants), apprehending suspects, gathering evidence, and charging the offender. In Tanzania, prosecution of crimes is entrusted in the office of the Director of Public Prosecution (DPP).⁶ However, few offices of the DPP have been established countrywide. Hence, the power to prosecute is delegated to the police in some cases.⁷ Therefore, based upon a received crime report, the police have an opportunity to meet the complainant (victim). In case the suspect is arrested, they have also the same opportunity to know both parties, the victim and offender. The police determine the seriousness of a crime; and based on the nature of the offence, they direct the case to the court with appropriate jurisdiction. The police, as professionals, can gauge the likelihood of a successful prosecution, in the light of the weight of evidence gathered in the crime investigation.

In a country like Tanzania where legal services are expensive, the police are the immediate officers with a clear knowledge of the crime and its elements. However, their discretion in dispute resolution is limited. Despite their exposure to the crime at the first point and their understanding the nature of the crime, they have no option but to prosecute the suspect in courts. In fact, they are supposed to charge an arrested suspect within 24 hours of arrest.⁸ Even where parties are willing to engage in a restorative meeting, the police have no legal power to order or facilitate reconciliation. Consequently, the route to criminal prosecution has always been the same: suspects are prosecuted even when the offence is minor and parties are willing to apply an alternative measure. The only power the police have is granting bail to the

⁵ Martin Wright 'The rights and needs of victims in the criminal justice process' in Hendrick Kaptein and Marijke Malsch (eds) *Crime, victims and justice: Essays on principles and practice* Ashgate Publishing England 2004 at 149.

⁶ See the National Prosecutions Service Act, No. 27 of 2008, section 4; the Criminal Procedure Act, Chapter 20, Revised Edition 2002, section 90.

⁷ The National Prosecutions Service (2008), section 22.

⁸ The Criminal Procedure Act, Chapter 20, Revised Edition 2002, section 32.

offender while awaiting trial.⁹ There are, as such, two proposals for restorative justice interventions by the police.

9.2.1.1 Police diversion to welfare services, the Ward Tribunal and Village Council

The first proposal is that, after discerning the seriousness of the crime and having evidence available that could lead to prosecution of the offenders, the police may divert a dispute for restorative interventions to a welfare officer, Ward Tribunal or Village Council. This approach is possible only where both parties are willing to engage in a restorative process. When they are willing, and where the offence is minor, the dispute can be diverted before the suspect is charged in court. After the restorative measures, an agreement can be forwarded to the police for approval. The police must be involved at this stage to supervise the implementation of the restorative agreement. If the intervention fails, or where the offender fails to honour the agreement, ordinary process of prosecution may follow. In case the offender agrees to pay compensation, repair or return of the stolen property, or in the event of any other outcome, such an agreement shall be witnessed a police officer. In fact, this is the informal practice in some cases despite the absence of any legal mandate.

9.2.1.2 Police cautioning

The second proposal is for police cautioning. Where an offence is minor and does not necessarily demand the prosecution of offender, the police may invite the victim, offender, friends and relatives from both parties to discuss the effects of the crime and the way forward. Of course, the major requirement of restorative justice is the willingness of all parties to engage in a restorative justice meeting. At this level, the police can be trained to organise police-based restorative justice processes. Because conducting a restorative justice meeting may be a demanding task for the responsible police officer, the office of the government should see the need to motivate police who are running restorative processes. As stated below, the essence of the government's task to set up a fund for restorative justice

⁹ *Id* at section 148.

becomes relevant. Where reconciliation is successful at this point, the offender need not be prosecuted; instead he or she may be cautioned. The offender may be required to implement restorative justice outcomes. In case restorative interventions are not successful, the police may prosecute the offender in court.

This approach would take the form of police cautioning as practised in United Kingdom and other jurisdictions.¹⁰ The advantages of police cautioning are legion.¹¹ The process can trim down cases which do not necessarily have to go for prosecution in courts. It therefore helps to reduce the number of cases that go to courts. Police cautioning is likely to save time and money for the government by reducing prosecutions for minor disputes which can be resolved out of court. For instance, while a restorative meeting may take merely a few hours, the prosecution of the same offences could take months or years. During the trial, a police officer will be required to attend in order to produce evidence and other information as required by the law. Likewise, the parties themselves have to continue to attend before the court over this extended period. Prosecution is thus costly for both sides – the government as well as the parties. However, police would need to be properly trained to be equipped with the skills required for their new responsibilities within a restorative justice approach.

9.2.2 Engaging village councils for realising restorative justice aims

Many Tanzanians are organised in village communities; they share many things in common. Hence, mechanisms of justice administration that espouse communal life are likely to be more meaningful to such communities than the adversarial system, which tends to aggravate conflicts. Currently, villagers' disputes are resolved by formal courts, with Primary Courts functioning at the lowest level of the community. Primary Courts are few in number and technically challenging to ordinary people due to the use of the adversarial system. Furthermore, it would be expensive to establish a Primary Court in every village.

However, there is a plan to establish Primary Courts in every ward, which, as argued earlier, is likely to take away conflicts from the management of the community. On the other hand,

¹⁰ Chapter 3.

¹¹ See Chapter 2.

village authorities have councils for administrative functions.¹² Through these administrative boards, village councils informally resolve many disputes, including those of a criminal nature, as a way of safeguarding peace and order within the community. They are the first reference point for resolving disputes in villages. A complainant often consults the village authority before calling the police for intervention. In 2002, the jurisdiction of the Village Council was extended to include land disputes.¹³ A land dispute begins at the Village Council before going to the Ward Tribunal, District Land and Housing Tribunal, High Court and finally to the Court of Appeal. Before the establishment of the law that gave jurisdiction over land disputes to the village councils, land disputes were also being resolved informally by the same councils. Therefore, the proposal is to officially extend their jurisdictions to resolve criminal disputes with a restorative justice approach, in two ways.

9.2.2.1 Resolution of disputes without resorting to courts

Village councils may resolve criminal disputes within villages based on customary procedures. The aim is to provide a dispute resolution mechanism closer to the community (at village level). Dispute resolution at this level may take a form of peace-building through reconciliation. This approach can take a form similar to the South African Zwelethemba model, where disputes were resolved before they escalate into serious strife.¹⁴ This is also similar to the functioning of traditional *gacaca* courts in Rwanda and *fambul toks* in Sierra Leone.¹⁵ In a manner similar to ward tribunals, village councils should also have the power to resolve disputes and possibly order compensation, fines, or community service for defaulting parties.¹⁶ As in the Zwelethemba model, the fine, which may be ordered to offenders who have no direct victims, can be used for a special fund for development projects in the community.¹⁷ Payment of fines is necessary especially for offences without a direct individual victim. Fines can be managed by the village committees which already exist in every village. When reconciliation fails under the Village Council, the dispute may be

¹² Village Councils are established under section 25 of the Local Government (District Authorities) Act, 1982.

¹³ See Chapter 8; the Courts (Land Dispute Settlements) Act 2002, section 7. See also the Village Land Act 1999, section 61.

¹⁴ Chapter 3.

¹⁵ Chapter 5.

¹⁶ See the Ward Tribunals Act, Chapter 206, Revised Edition 2002, section 17.

¹⁷ See Chapter 3.

referred to the Ward Tribunal or a Primary Court for trial.

9.2.2.2 Referrals from the criminal justice system

Village councils may be used to receive disputes referred by courts for restorative measures. Referrals to the Village Council may be made by the police before prosecuting the offender (a pre-trial diversion). Courts may also stay the prosecution and refer parties to restorative justice if there are good reasons to do so. In Primary Courts, diversion at this stage would be in line with Rule 4(2) of the Primary Court Criminal Procedure Code.¹⁸ Diversion to Village Council from courts may also be done when the court convicts the offender, especially before sentence. This approach could enhance the application of section 236 of the Criminal Procedure Act, 1985 and Rule 28 of the Primary Court Criminal Procedure Code in sentencing processes.¹⁹ Diversion at this stage may be similar to Canadian sentencing circles, which are used to deliver community opinions to the court for sentencing procedures.²⁰ When restorative justice is conducted as a sentencing measure, a restorative agreement from the council may be forwarded to the court with the necessary information to allow a magistrate to form a proper sentence. Village councils may advise the court on the proper sentence to be imposed because they know the offender better than the court. Village councils can also inform the court on the needs of the victim, offender and the community. When the offender has made amends through a restorative process, but goes to prison because of the seriousness of the crime, reintegration after prison may be smoother because he or she had an opportunity to make these amends.

In addition, when the offender is sentenced to do community work, probation or payment of compensation, restorative justice may be applied as a measure to restore relationships. Restorative justice under the Village Council at this level makes the community responsible for its members. The use of restorative interventions under village councils may involve members of the council. Restorative meetings can also involve victims and offender, along

¹⁸ See the Primary Court Criminal Procedure Code, Rule 4(2); see also Chapter 8.

¹⁹ See Chapters 7 and 8; the Criminal Procedure Act, Chapter 20, Revised Edition 2002, section 236 states that 'the court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed'. See also the discussion in Chapters 7 and 8.

²⁰ Chapter 3.

with the relatives and friends of both parties, as justice stakeholders. In urban areas where there are no village councils, a similar authority called *Serikali za Mitaa* may be used in the same manner.

9.2.3 Ward tribunals and restorative processes

Tanzania is a country which is divided into regions, districts, wards and villages. The division is meant to decentralise administrative functions to local authorities. At the ward level the law establishes a tribunal to resolve disputes within the ward. The tribunals were established in 1985 with the view to safeguarding community peace and order by rendering justice through reconciliation.²¹ They are established outside the judiciary albeit their appeals lie to the Primary Courts.²² Being under the local government, Ward Tribunals have suffered financial constraints.²³ There is also anecdotal evidence of corrupt practices in their administrative and/or judicial functions. Despite their improper constitution, the community finds tribunals as immediate institutions for amicable dispute settlement. Because Primary Courts are sparsely located, ward tribunals serve as proximate places for dispute settlement. Despite some weaknesses, the community believes fair justice can be better achieved through ward tribunals than through the court system.²⁴ Tribunals serve as important justice mechanisms for the community both in rural and urban areas.²⁵

If Tanzania had ward tribunals in a restorative manner for adult offenders' cases since their establishment in 1985, it could possibly then be the first country in Africa to have legislated on restorative justice practices. Tribunals resolve both civil and criminal disputes which could otherwise be tried by Primary Courts. Their role as reconciliation boards under the Law of Marriage Act is vital.²⁶ Apart from their civil and criminal jurisdiction, their power was enhanced by the Courts (Land Dispute Settlements) Act of 2002. Under this law, tribunals were empowered to receive appeals from Village Councils on land disputes. Ward tribunals'

²¹ Chapter 8; Ward Tribunals Act, Chapter 206, Revised Edition 2002, section 8.

²² Ward Tribunals Act, Chapter 206, Revised Edition 2002, section 20.

²³ See Chapter 8.

²⁴ Yusufu Q Lawi 'Justice administration outside the ordinary the courts of law in Mainland Tanzania: The case of Ward Tribunals in Babati District' 1(2) *African Studies Quarterly* 1997.

²⁵ Chapter 8.

²⁶ See *Ibid.*

appeals on land matters go to the District Land and Housing Tribunal while appeals on other disputes go to the Primary Court.²⁷

In terms of the proposed diversionary measure for restorative justice in Tanzania, the Ward Tribunal may be engaged in restorative justice in the same way as the Village Council – that is to say, by conducting restorative justice processes without engaging courts and working as referral mechanisms for diverted cases from the police and courts. As discussed in Chapter 8, resolving disputes without involving courts would still be among the functions mandated to the ward tribunals by law.²⁸ In this instance, though, they may need to work as restorative justice mechanisms. However, their composition may need to be revisited to meet the current demand and the community's need and to work as restorative institutions. They may therefore work as mechanisms for restorative interventions at pre-trial, during trial, after conviction and at post-sentence.

In order for ward tribunals to function properly as restorative mechanisms, their members would have to be equipped with restorative justice skills, which would require training and financial empowerment. In addition, the employment of Ward Executive Officers who might serve as Ward Tribunal Secretaries needs to be revisited. There is a pool of Diploma in Law graduates from different tertiary institutions who can be employed for that post. Hence, they could serve as administrative officers at ward level and act as facilitators in restorative meetings. The current composition of tribunals may also need revision. Currently, professionals cannot be members of ward tribunals. Since the tribunals' establishment in 1985, circumstances have changed because there are now more qualified and learned people. There are important professionals in their jurisdictions, such as welfare officers, who could serve as members in urban ward tribunals. The way to approach conflicts should be different. For instance, human rights values were not recognised as fully in the past as they are today. Therefore, the composition should not continue to restrict utilisation of the growing number of professionals who could enable the tribunals to function more strongly in a restorative way.

²⁷ Ward Tribunals Act, Chapter 206, Revised Edition 2002.

²⁸ *Ibid.*

9.2.4 The use of restorative justice in criminal courts

In Tanzania, most criminal cases go to courts for prosecution. The court's role is to guide the parties in the rules of procedures and either acquit or convict, and if the latter, pass sentence. In Tanzania, apart from the Criminal Procedure Act, 1985²⁹ and the Primary Court Criminal Procedure Code³⁰ that provide for criminal reconciliation, the courts' power to apply restorative intervention is limited. Despite the constitutional mandate on alternative justice processes, cases diverted for reconciliation are also restricted.³¹ The current law allows reconciliation in criminal cases for minor offences which are of personal or private nature.³² There are three options for courts in Tanzania to allow the use of restorative interventions during trial processes. First, when the offender pleads guilty, before sentence, the court may divert the case to restorative justice either to a welfare officer, Ward Tribunal or Village Council. In Tanzania, when the offender pleads guilty, the prosecutor or complainant (in Primary Courts) adduces the particulars of the case, and then the court enters a conviction against the offender. The court proceeds thereafter to sentence the offender. As argued earlier, when the offender pleads guilty, the victim's voice is normally marginalised. Even the role of the victim as a witness for the prosecution does not materialise because submission of evidence is unnecessary. On the other hand, the victim has needs to be attended to by the criminal justice process. With the offender's guilty plea, the process of justice closes all opportunities for the victim to share the other side of the story. Under these circumstances, it may therefore be pertinent for courts to allow the voice of the parties to permeate the criminal justice process through restorative justice.

Secondly, referrals to restorative justice processes may also be done by the court after conviction. Restorative justice at this stage allows parties to discuss the crime and manner of taking responsibility. An agreement from a restorative justice meeting may be routed back to the court for approval or sentencing purposes. At this stage, the needs of justice stakeholders may feature in the restorative agreement and in the court's decision. The agreement can even

²⁹ See the Criminal Procedure Act, Chapter 20, Revised Edition 2002, section 163

³⁰ See Primary Court Criminal Procedure Code, Rule 4.

³¹ See the Constitution of the United Republic of Tanzania of 1977, article 107A.

³² See Chapter 8; the Criminal Procedure Act, Chapter 20, Revised Edition 2002, section 163; Primary Court Criminal Procedure Code, Rule 4.

propose the best way to make the offender responsible through community service rather than committing the same to prison. Where the offender needs treatment, the restorative agreement may propose the same to the judicial officer making a court's judgement. The process may allow the community and parties to share their views concerning the sentence to be imposed on the offender. The offender also can have an opportunity to make things right with the community and the victim before sentence, if he or she is willing to take responsibility at that stage.

It is an approach which can incorporate the voice of the victim as well at the sentencing stage. Through a restorative meeting, the victim will have an opportunity to vent the effects of the crime in an open manner which is not possible in the adversarial criminal justice system. The victim may disclose the physical, psychological and financial harm that he or she has suffered as a result of the crime. Such effects can be reflected in the agreement for the court to take into consideration when sentencing the offender. By so doing, the voice of the victim will be included in the sentence, the needs of both parties will be taken care of and a more rehabilitative sentence can be proposed by the restorative conference. In Tanzania, this approach may not need a major amendment of the law, because already there are provisions which can embrace restorative measures at sentencing stage.³³

Thirdly, restorative justice may be provided as a court order after the offender is sentenced to do community work or probation. This may be an opportunity for the offender to make amends with the victim and the community. For an effective application of restorative justice, the training of judicial officers is necessary in order to understand the reason and stages at which restorative justice may be applied. As stated below, the government may need funds to train staff involved in the chain of restorative justice.

9.2.5 Prison restorative justice programme for offenders' reintegration

Restorative justice, as a process that allows the meeting of parties to discuss and find a solution to crimes, can also be used in prison settings. In Tanzania, as discussed in Chapter 7, the trend has been to release prisoners to resolve prison overcrowding. This trend may be

³³ See the Criminal Procedure Act (Tanzania), section 236; Primary Court Criminal Procedure Code, Rule 28.

problematic because in the absence of prior rehabilitation programmes, it is most likely that reoffending will occur. In addition, such early release may have little contribution in reducing reoffending if proper mechanisms for rehabilitation are not employed. On the other hand, early release may seem overly lenient to the community. The implications for early release of prisoners may be more adverse than expected. Offenders who benefit from parole programmes may not be properly prepared for smooth reintegration in the community. Victims and the community do not have an opportunity to express an opinion on an offenders' parole at any point. It is common therefore for a victim to meet the offender in the community without any prior knowledge of release.

The situation has three major implications for both the offender and the victim. First, the release of the offender without victim's knowledge threatens the latter's security. Secondly, where the dispute was resolved without any form of reconciliation, the victims may believe justice was not properly served and feel disempowered by the offender's presence in the community. Thirdly, early release without a restorative process may endanger the life of the offender in the community. The community expected an offender to be in prison; now he or she has returned as a free person within a short period. Because the offender did not make amends with the community, pre-release can raise security concerns, with community members then taking the law into their own hands.

Therefore, a proposal for restorative interventions with prisoners is important. This can be arranged for those who are willing to meet their victims and the community to make things right, provided that the victims are also willing to participate.³⁴ Restorative justice in prison may be run by trained prison staff in collaboration with welfare services or non-governmental organisations. When viewed as a rehabilitation programme, restorative justice in prison may be sponsored by the government. Alternatively, non-governmental and other charity organisations such as religious groups may be allowed to run restorative justice processes for incarcerated offenders. Restorative interventions for prisoners may be part of prison rehabilitative programmes or a condition for parole or any other early release project. Under this programme, offenders who are willing to participate in restorative justice may meet the

³⁴ See Chapter 3.

victim and some community members for restorative measures.

Such a programme provides an opportunity for offenders to understand the harm caused in the community and to present the reasons for their offending behaviour, an opportunity which is normally limited under the adversarial justice. By understanding the offender's needs, the community too is likely to plan measures to assist offenders after their prison sentences. This is an integrative measure that can enable the community to be part of the solution to offenders' criminality. It also places a responsibility on the community to participate in offenders' welfare rather than leaving the entire responsibility to the prison department. The process which 'shames' the offender may have positive effects on the offender.³⁵ In addition, as earlier stated, the offender is likely to feel more empathy through encountering the people he or she understands rather than strangers. It is an opportunity for the community to deliver a message to offenders that they still have a role to play in society. The community will be giving the offender another chance to reform and be a law-abiding citizen.

As argued earlier, prison reformation is a complex process³⁶ and hence calls for integrative measures between the State, the community, non-governmental organisations and religious organisations. The role of the State in offenders' reformation is crucial, but the community's responsibility cannot be ignored. So long as it is the case that the offender returns to the community after prison sentence, the community has to be involved. Engaging willing prisoners in restorative encounters where they may apologise and promise to reform, is a necessary step in their reformation.

9.3 The workforce for the system

Implementing restorative justice in Tanzania may involve different government agencies and non-governmental organisations. Restorative justice in Tanzania may work through the use of social welfare services, which are now available in many districts. In Tanzania, welfare officers are employees of the government under the local government authorities. If they are trained, they may be able to organise and facilitate restorative justice processes in their

³⁵ John Braithwaite *Crime, Shame and reintegration* Cambridge University Press USA 1989.

³⁶ See Chapter 7.

jurisdictions. Currently, they are engaged in all cases involving juveniles, not as mediators or facilitators but as mandatory workers under the juvenile justice laws.³⁷ Hence, involving welfare officers in restorative justice for disputes concerning adult offenders may still be within their current capabilities.

The implementation of restorative justice may also involve the police. It is necessary to involve them because they get to know the dispute before it goes to court. They are also paid staff of the government, and in one way or the other they handle criminal disputes though without involving restorative justice processes. They would certainly need training to be able to play their role – which would include a referral role, and a role in community-involved cautioning.

In addition, implementing restorative justice may involve the Ward Tribunal and Village Council. These two institutions are staffed by government employees under the local government authorities. In fact, many of the Ward Executive Officers and Village Executive Officers possess a range of qualifications, including diplomas in law and degrees in other disciplines. Currently, ward tribunals handle both civil and criminal disputes, including land matters for reconciliation as mandated by the law.³⁸ In practice, village councils informally manage minor civil and criminal disputes and are legally empowered to address land disputes. These two institutions may need to be introduced to restorative justice measures through training. They would probably be able to set up and facilitate restorative justice processes.

However, Tanzania may not have the resources to train or hire qualified mediators to run restorative justice conferences at every level of the community. In the alternative, the first line of referral to restorative justice – in minor conflicts between individuals – may be implemented by using the resources that already exist, such as volunteers from the communities. Serious cases may be reserved for professionals, such as welfare officers, but there is nonetheless a plethora of criminal disputes which can be resolved through restorative interventions using the local community.

³⁷ See Chapter 8.

³⁸ See Chapter 8.

9.4 Restorative justice as a programme under the government

In many jurisdictions, restorative justice serves as a complementary justice mechanism alongside the criminal justice system. It is a system of justice established to work as a diversionary measure for certain cases or else as a sentencing approach. In the proposed restorative justice regime in Tanzania, what is envisaged, is using pre-established institutions and non-governmental organisations in an innovative way, namely as diversionary points for restorative justice. On the other hand, for a sustainable restorative justice regime in Tanzania, there is a need for policies and guidelines on the use of restorative justice. These may be engineered and supervised by the government, particularly local government, in collaboration with other law enforcement agencies (police and prison) and the judiciary.

There is therefore a need for the government to inject funds into improving the contemporary criminal justice system. This would include the funding of restorative justice projects under the judiciary. As mentioned above, the government may need to fund the running of restorative justice through its agencies such as the police, the local government (including, in particular, welfare offices), village councils and ward tribunals. Regarding the training of staff, the Institute of Judicial Administration –Lushoto, which is under the judiciary, as well as other research institutions, may be useful. Restorative justice could begin in the form of pilot projects involving research institutions and designated courts.

9.5 Proposal to improve the contemporary criminal justice system in Tanzania

Apart from the above proposed restorative justice regime for Tanzania, there are also certain measures that need to be taken in order to improve the country's criminal justice system. These proposed improvements are not part of the restorative justice regime, but they are matters which, in line with therapeutic and restorative justice values, need to be addressed for the welfare of parties within the criminal justice system. The proposed improvement may require some amendment of laws or enactment of new ones. In order to improve the contemporary criminal justice system in Tanzania, the following improvements need to be considered:

- rethink the role of Primary Courts in relation to communities they serve;

- incorporate the voice of the community in the criminal justice system through the use of community representatives in all courts;
- allow victims' voice in the criminal justice process; and
- establish a victim compensation fund under the government coffer.

9.5.1 Transforming Primary Courts into reconciliation courts

In Tanzania, Primary Courts are judicial institutions closer to the community. Most minor offences are tried at the Primary Court level before appealing to higher courts. Their role in dispute resolution is paramount in the community. As discussed earlier, these courts use the adversarial system despite the fact that attorneys do not appear. They are, however, presided over by a lawyer as a magistrate; they are only fully constituted when sitting with not less than two assessors.³⁹ Assessors, who are meant to be observers to the practice of justice and advise the magistrate on facts, do not necessarily come from the local community within the locality of the court.⁴⁰ Despite having a composition that includes assessors as representatives of the community, procedural technicalities may defeat the end of justice. Most Primary Courts serve the community of laypersons, who are required to engage in a technical justice process.

The establishment of Primary Courts was meant to bring justice closer to the local community. Currently, there is a plan to establish Primary Courts in every ward to ensure access to justice for the Tanzanian community. It is a commendable plan because disputes need to be resolved at venues closer to the community. However, bringing formal courts to the community which apply colonially inherited procedures to secure justice may not be the need of the Tanzanian community.

The application of adversarial procedures in Primary Courts should thus be reconsidered. The recent deployment of lawyers as magistrates in Primary Courts is commendable if it is done

³⁹ The Magistrates' Courts Act, Chapter 11, Revised Edition 2002, section 7.

⁴⁰ LA Kyando and Chris Peter Maina 'The people's representation in the courts of law in Tanzania: The need to retain the assessors' *Commonwealth Law Bulletin* 1994.

with the aim of improving delivery of justice. But the idea of allowing attorneys or paralegals in Primary Courts to represent the accused in Primary Courts may not be fruitful because conflict resolution will be an expensive endeavour. Unless it is done with the aim of creating working opportunities for lawyers and paralegals,⁴¹ involving lawyers in the Primary Court has little advantage to Tanzanians. Hence, there is a need to transform Primary Courts into reconciliation courts. Primary Court Magistrates who are lawyers and some hold a diploma in law can be trained to be mediators. The role of assessors will still be retained to represent the community. Conflicts may therefore be amicably settled without necessarily committing offenders to prison, given that most of the offences tried in Primary Courts are trifling. Working as reconciliation courts, Primary Courts may be able to impose sanctions, such as fines, compensation, community service or probation orders, and restore relationships within the community.

9.5.2 Reconsidering the role of assessors

Participation of assessors in Tanzanian courts has a historical dimension.⁴² Their role as community members should therefore not be jettisoned, yet it differs substantially between the various court levels. Assessors in Primary Courts are part of the court and they are perceived as key role-players. In contrast, their participation in the District and Resident Magistrates' Court is discretionary, but they are hardly ever appointed. In the High Court the role of assessors is marginal as they are only involved when courts determine capital offences. Many cases are thus decided without them – in other words, without community involvement.

There are numerous benefits from having assessors involved in criminal matters. Firstly, they function as community representatives, advising courts on the community opinion in relation to the facts of the case and providing oversight of the practice of justice. Secondly, they bring in an element of participatory justice in the adversarial system. The presence of assessors also imbues dispute resolution with the atmosphere of the ordinary community. Lastly, assessors, who are always laypersons, provide a different perspective on justice other than justice

⁴¹ The Legal Aid Act of 2017 recognises paralegals in Tanzania.

⁴² On the role of assessors in courts in Tanzania, see Chapter 8.

understood according to the law. Where they are not involved, this perspective is missing.

To ensure the participation of the community in the decision-making process, it is recommended that all courts sit with assessors when determining cases. Their role as bearers of witness to justice is central to the rationale for this proposal, which is to develop a culture of justice which is in line with the perspective of the community.

9.5.3 Establishment of a victims' compensation scheme

The importance of compensation to victims of crimes cannot be overstated. It is a significant need for such victims since they may need recovery of any loss of or damage to property, as well, as compensation for psychological harm caused by the crime. Nevertheless, there is little emphasis on compensation for victims in the criminal justice system in Tanzania, and most offenders can, in any case, not afford to compensate their victims.⁴³

A State compensation scheme may be the answer. It is restorative by nature and would help to repair the consequences of the crime. Yet, such scheme has been criticised in that it is 'not fully restorative because [it does] not involve the offender'.⁴⁴ Notwithstanding, Tanzania investigated the establishment of a government-run victim compensation scheme already more than four decades ago. In 1977 the Msekwa Commission Report proposed as much, but nothing came of it.⁴⁵ Academics and respected judicial officers have also mooted a special fund for victims of crime,⁴⁶ recommendations to which the government again turned a deaf ear. Admittedly, there are challenges to setting up such a fund in a developing country like Tanzania. Apart from the financial constraints, it may open the gate for unsubstantiated claims. Nevertheless, given the State's responsibility to protect its citizens, a compensation fund is key. It is recommended that the above proposals are revisited and implementation thereof seriously considered.

The government fund would not only compensate victims of impoverished offenders but also

⁴³ Trends in victim compensation in Tanzanian criminal justice are discussed in Chapter 8.

⁴⁴ Wright (2004) at 146.

⁴⁵ Pius Msekwa 'The report on the judicial service review commission' Government Printer Dar es Salaam 1980.

⁴⁶ See Kahwa SK Lugakingira and Chris Maina Peter 'Victim compensation and aspects of law and justice in Tanzania' 18 (3) *International Criminal Justice Review* 2008.

victims whose offenders cannot be apprehended⁴⁷ and victims who suffer harm through the acts of the State.⁴⁸ Many victims suffer human right violations through government operations.⁴⁹ Some victims have died at the hands of the police in the process of maintaining peace.⁵⁰ Despite the conviction and sentencing of such offenders, who could include government officials, victims' survivors may not find a place to lodge their compensation claim.⁵¹ Those who have tried to execute compensation orders against the government experienced further frustration and disappointment.

It is always difficult for an ordinary victim to compel compensation against the government unless supported by a lawyer. The government is an impersonal figure which seems to be everywhere but nowhere. Though the Civil Procedure Code provides for the execution of orders against this impersonal figure, attaching government properties for an individual victim is easier said than done. These difficulties underline why a government compensation

⁴⁷ For instance, recently a popular politician and a Member of Parliament was shot at more than 30 times. Despite being hit by eight bullets, he survived. He has been undergoing treatment in an expensive hospital in Kenya. It is estimated that the charges for his treatment amount to ten million Tanzania shillings per day, and his full recovery is likely to cost millions. Assuming his assailants are not apprehended (at the time of writing, no one had been arrested), the victim will shoulder all medical expenses without any possibility of compensation. Even when such offender can be arrested, it is virtually out of the question that this person would be able to provide meaningful compensation for the injury caused to the victim. A compensation fund under the government, however, could cater for such critical cases.

⁴⁸ See Attorney in General Roseleen Kombe (as the administratrix of the late Lieutenant General Imran Husssein Kombe, deceased) Civil Appeal No. 80 of 2002 (CA).

⁴⁹ See, for instance, the case of Attorney in General Roseleen Kombe (as the administratrix of the late Lieutenant General Imran Husssein Kombe, deceased) Civil Appeal No. 80 of 2002 (CA). In this controversial case, the deceased, a former Director General of Intelligence, was accidentally shot to death by the police. The widow sued the government for damages and the government was ordered by the Court of Appeal to pay her and other dependants the amount of 200 million Tanzania shillings. The case is available at <http://www.saflii.org/tz/cases/TZCA/2004/22.html> (accessed 22 September 2017).

⁵⁰ See *R v. G 2573 PC Pacificus Cleophance Simon*, Criminal Case No. 45 of 2013 High Court of Tanzania at Iringa (unreported).

⁵¹ See *R v. G 2573 PC Pacificus Cleophance Simon*, Criminal Case No. 45 of 2013 High Court of Tanzania at Iringa (unreported). In this case the deceased, one Daudi Mwangosi, who was a television reporter was accidentally killed by a police officer in the process of preventing a political rally organised by an opposition party (CHADEMA) in Tanzania. The accused was sentenced to 15 years in prison for the offence of manslaughter. In the judgment, there was provision for compensation to the survivors of the victim despite the judge having acknowledged that 'in any case nothing will compensate the victim's family from the great loss of their loved one who in my view did not deserve to die the way he did'. In the words of the judge, the accused had shown remorse and was highly unlikely to reoffend. The accused was a government officer, with the government having the duty to shoulder the compensation expenses – a further case in point showing the need to establish a dedicated victim compensation fund. The case is available at <http://dlawlibrary.org/index.php/cases/high-court-main-registry/1077-the-republic-v-g-2573-pc-pacificus-s-o-cleophance-simon-criminal-session-case-no-45-of-2013-hc-unreported?showall=andstart=8> (accessed 22 September 2017).

fund is imperative in Tanzania.

9.6 Conclusion

Introducing a restorative justice approach to complement the criminal justice is likely to benefit the government and the community in Tanzania. Restorative justice may enable justice to be achieved closer to affected parties within the community. Restorative justice may return conflicts to the community and justice may be cheaper while allowing offenders to make amends with their victims before taking responsibility. Restorative justice may contribute towards cohesive communal life by involving the community in the criminal justice process. Through the use of restorative measures, the judiciary may be relieved from the backlog of minor cases. The prison service is also likely to be relieved of overcrowding.

The proposal for an integrative justice mechanism may not be easily understood by readers from communities that have long placed their faith in the adversarial system. Even though African countries departed from the African way of dispute resolution during colonisation, instinct that demands the presence of humanity even in dispute resolution continues to be understood by Africans, and in some countries has re-emerged to take its place in the resolution of serious harm. Africa has more innate restorative justice potential than the countries in the Western world where modern restorative justice is believed to have originated. As much as this would probably seem obvious to scholars of restorative justice, fully appreciating it, will ironically, require a considerable mind-shift in Africa communities and those in Tanzania in particular, given the extent to which inherited justice systems have become entrenched in thought and practice. Hopefully, though, our communities will not have departed very far from the reality of community togetherness. The implementation of restorative justice in Tanzania would have considerable value for Tanzanians, because it would reawaken the spirit of togetherness that underlies African culture and traditions.

In Tanzania, application of restorative justice is not a new approach to justice. Tanzania has, for centuries, applied restorative justice practices without using the name 'restorative justice'. It is, however, deeply disappointing to realise that the country which provides a background to the argument for restorative justice by Christie in his profound 'Conflicts as property' article has failed to recognise the value of its indigenous system. Tanzania can and should

learn about restorative justice approaches in other jurisdictions, but its own experience, embedded in its own unique culture, must not be jettisoned. Introducing restorative justice in cases involving adult offenders in a country like Tanzania may be challenging but it is likely to create a precedent that other jurisdictions may come to learn from. Restorative justice in the Tanzanian criminal justice system must start from somewhere.

This research hopes to serve as a starting-point of a journey for the implementation of restorative justice in Tanzania, and the Institute of Judicial Administration should consider taking up the task of making justice administration more meaningful to the community through the introduction of a restorative justice approach.

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