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.



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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

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[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 (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.



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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.



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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

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[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.



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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

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[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.



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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).



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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

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[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.



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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.



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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*.

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[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.



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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 Eedition 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).



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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.



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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.



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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:

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[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.



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> 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.



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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 of the United Republic of Tanzania of 1977, article 107A (2).



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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).



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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, 1985[111] 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.



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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.



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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 ambits 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.



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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

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[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).



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> 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.



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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).



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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.



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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.



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established by the community as a marriage conciliatory board.[150] This provision brings on board religious communities such as BAKWATA[151] 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

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[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 responded is living in a foreign country and it is unlikely that he or she with enter the jurisdiction of Tanzania within six 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 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.



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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

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[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.



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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) Rules[163] 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]

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[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.



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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).



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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.



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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).



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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.



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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



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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.



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# 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.



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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.



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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.



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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

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[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.



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victims whose offenders cannot be apprehended[47] 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 hospitals 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 showng 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).



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