

**INADEQUACY OF THE KENYAN PENAL SYSTEM: THE STUDY OF
RETRIBUTIVE JUSTICE, AND RESTORATIVE JUSTICE AS AN
ALTERNATIVE JUSTICE SYSTEM**

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DECLARATION

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

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

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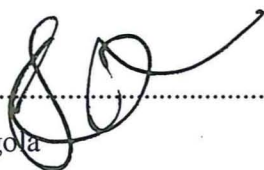


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ABSTRACT

The main objective of this dissertation was to explore the possibility of restorative justice being applied as an alternative to retributive justice, seeing that the current Kenyan penal system seem to have failed. This was done by studying and understanding the theoretical and conceptual framework of retributive justice as well as the current structures in place, and this analysing its successes and shortcomings. A comprehensive study on Restorative justice was also done, while looking into its theoretical and conceptual framework, the extent to which it has been applied in the Kenyan penal system so far and how it may be applied as an alternative justice system.

The scope of the study was within Kenyan penal system, the institutions involved such as the prisons and correctional facilities as well as its stakeholders; the offenders and the victims as well as the prison officers-in-charge of the inmates. Other jurisdictions which have successfully implemented restorative justice were also looked into as a comparative study.

The methods used for the research were desktop research as well as interviews of inmates and officers-in-charge in the prison systems.

This dissertation established that indeed the Kenyan penal system seems crippled, owing to the retributive justice system that has been used. On the bright side, restorative justice does have some qualities that are able to bring the justice system back to its feet.

In order to have a more effective penal system, there ought to be the full involvement of all its stakeholders. That would mean involving the victims more, in a bid to restore the bruised relationships with the offenders, the society, so that they be enlightened on avoiding acts that may stigmatise the ex-offenders and most importantly the government, especially in funding more reconciliation programmes.

CHAPTER ONE - INTRODUCTION

1.1 BACKGROUND

The Kenyan Penal System consists of the Judiciary, the police and prison departments. While carrying out its mandate the institutions within the system are usually guided by four principles; deterrence, retribution, utility and reformatory.¹ The Kenya prison Service's primary responsibility is to contribute to public safety and security by ensuring safe custody and social rehabilitation of offenders for community reintegration. The prison service traces its origin back to the colonial system which was hardly concerned with the rehabilitation of the offenders.² This would lead to the system leaning more on the retributive side. It would however seem that there have been attempts to shift the system to restorative justice which is more concerned with both the offenders and the victims³ and how the offenders would be rehabilitated in order to fit into society once again as is the primary function of the system, as opposed to the system of retributive justice which is seen as only focusing on punishment as a response to crime.

It is with no doubt that the current setup of the prison system provides for incapacitation and deterrence of offenders by being confined within the prisons. The Kenya Prison Rehabilitation Programme, a programme that is used in reforming offenders in prisons then comes in to cater for the restoration and rehabilitation goals through activities such as vocational training. The rehabilitation programme seeks to equip them with skills in things like carpentry or masonry that would then keep them busy which would then prevent them from committing more crime. One of the ways to determine whether the system has achieved its intended purpose is by measuring the rate of recidivism. The inmates who go through this rehabilitation programmes are expected to be reformed and thus the number of recidivists is expected to be low. Statistics would however prove otherwise with one report showing that the rate of recidivism in Kenya has increased from 12% in 1998 to 25% in 2005.⁴ Unconfirmed reports also state that the

¹ Owino B, Egesa O, Akong'a J, 'Looking in the mirror: Reflections on implementation of principles of penal system in Kenya's prisons' 3 *Journal for Academic Research for Multidisciplinary* 2015,202.

²http://www.unafei.or.jp/english/pdf/RS_No90/No90_20PA_Onyango-Israel.pdf accessed 11th December 2015.

³http://www.unafei.or.jp/english/pdf/RS_No90/No90_20PA_Onyango-Israel.pdf accessed 11th December 2015.

⁴ Musau A, Wanga D, Mulu-Mutuku M, 'Influence of Kenya Prison Rehabilitation Programme on Reformation of Offenders: A case of Kamiti Maximum Prison, Nairobi Kenya' 3 *International Journal of Innovative Research & Studies*, 2014, 65.

current rate of recidivism is at 50%⁵. This rates are alarmingly high. It ought not be the case if the Kenya prison Service is indeed carrying out its mandate.

The Norwegian prison system is said to be among those with the least rate of recidivism in the world at 20%,⁶ a huge difference from Kenya's 50%. Norway is seen to have largely adopted the Restorative Justice system within its penal system, and from the statistics, this system is clearly working to their favour seeing that they have a very low rate of recidivism. On the other hand, the Kenyan penal system, which has adamantly relied on the retributive justice method since the colonial period is seen to be failing in its mandate.

It would thus seem that there exists some loopholes within the Criminal Justice system, including the rehabilitation programmes that have frustrated the intended purpose of not only curbing crime in the society, but also rehabilitating the offenders so that they may be reintegrated back into society.

1.2 STATEMENT OF PROBLEM

The problem that arises would therefore be that the offenders seem not to be rehabilitated as they ought to be, within the prison system as evidenced by the current rates of recidivism. This would also mean that the offenders that have been released from the prison system back into the society, though they may have not committed crimes that would cause them to be sent back to prison, may not necessarily be fit for society once again. Their reintegration would therefore prove difficult and in most cases may be isolated or deemed outcasts. The current criminal justice system is thus rendered ineffective.

1.3 JUSTIFICATION OF THE STUDY

This study is justified on the basis that although there exists a system whose mandate is to ensure safe custody and social rehabilitation of offenders for community reintegration, there is an obvious deficiency in either the manner in which this mandate is carried out, which is

⁵ www.pfkenya.org accessed 11 December 2015.

⁶ www.businessinsider.com/why-norways-prison-system-is-so-successful-2014-12 accessed 11th December 2015.

through the principle of retributive justice, or the personnel and equipment required to carry out this mandate efficiently. This is what this paper will seek to address.

1.4 STATEMENT OF OBJECTIVES

The general objective of this research paper is to identify the loopholes within the Criminal Justice system, which has largely adopted the retributive justice method, that have caused it to be ineffective with regard to the rehabilitation and reintegration of the offenders. Other specific objectives will include determining the current state of living conditions within the prisons that may contribute to the outcome of the offenders as well as discussing an alternative method i.e Restorative Justice that may be adopted by the justice system that would be effective in the carrying out of the justice system's mandate.

1.5 RESEARCH QUESTION

This research will seek to answer the following question:

1. Is the current legal framework stipulated by the Kenyan penal system that is used in carrying out its mandate sufficient?
2. What are the qualities of the Restorative Justice System that make it a better alternative to Retributive Justice?

1.6 LITERATURE REVIEW

Various scholars have carried out research on the Kenyan penal system and although most of them establish the fact that the retributive justice system is what is heavily applied and the pros and cons that come with this system, the existing literature barely touches on methods that will make it more effective. This is despite there being those that have also written on and greatly acknowledged the restorative justice system. This paper will thus seek to explore on the advantages of the restorative justice system and subsequently look into how it can be implemented as an alternative system, in a bid to make the criminal justice system more effective.

Owino.B, Egesa.O and Akong'a.J explore the extent to which the principles of the penal system of deterrence, reformatory, retributive and utility are applied in Kenya. They establish that the principles of utility and retributive are adequately implemented but the same does not apply to deterrence and reformatory. They conclude that the rate of recidivism is enough evidence to show that imprisonment does not adequately reform an individual as well as the general public

from offending and reoffending.⁷ This paper will therefore look at the effectiveness or ineffectiveness thereof of retributive justice to offenders.

J.Nyaura and M.Ngugi point out the fact that the current Kenyan penal system is dilapidated seeing that it was directly borrowed from the Colonial masters. Their paper then explores on the challenges that are being faced by the prison system and more particularly, the challenges facing the prison officers and staff while carrying out their duties.⁸ Besides pointing out the fact that the system is in dire need of reforms and the advocacy for prison welfare as well as security of rights, the paper does not seem to highlight the need of implementing an alternative justice system that is more specialised to the current economic, social and political state of the country as well the current occupants/ citizens of the state. This paper will therefore seek to explore the possibility of implementing an alternative justice system to retributive justice, that is more specialised to the state and its citizens.

Odero.W, Alice.M and Dr. Milcah.M look at the rehabilitation programmes within the prison system and the role that they play in a bid to reform the offenders. They then suggest that the development of specific rehabilitation programmes targeting specific crimes.⁹ Though this article only looks at one aspect of the penal system and not the penal system as a whole, it opens doors to further explore the manner in which the given recommendation will affect the effectiveness of the justice system that is currently in place, which this paper will seek to establish.

Dr. Sarah.K has gone as far as analysing the history of restorative justice in Kenya as seen in the traditional pre-colonial justice systems in Kenya. The findings show that restorative justice is not a foreign concept to Kenyans, seeing that it was applied traditionally through customary law.¹⁰ The paper has however not looked into the possibility of implementing the principles of restorative justice to the Kenyan penal system, an issue that this paper will seek to address.

⁷ Owino B, Egesa O, Akong'a J, 'Looking in the mirror: Reflections on implementation of principles of penal system in Kenya's prisons' 3 *Journal for Academic Research for Multidisciplinary* 2015, 201.

⁸ Nyaura J, Ngugi M, 'A Critical Overview of the Kenyan Prisons System: Understanding the Challenges of Correctional Practice' 12 No.1 *International Journal of Innovation and Scientific Research*, 2014, 7.

⁹ Musau A, Wanga D, Mulu-Mutuku M, 'Influence of Kenya Prison Rehabilitation Programme on Reformation of Offenders: A case of Kamiti Maximum Prison, Nairobi Kenya' 3 *International Journal of Innovative Research & Studies*, 2014, 65.

¹⁰ Kinyanjui S, 'Restorative Justice in Traditional pre-colonial "Criminal Justice Systems" in Kenya' 10 *Tribal Law Journal*.

While seeking to establish the shortcomings of retributive justice¹¹ Z.Gabbay analyses the following aspects; the place of crime victims, efficiency and effectiveness and its fairness.¹² He then goes further ahead to stipulate the manner in which restorative justice successfully addresses the deficiencies of retributive justice. In support of this view, this paper will look at the outstanding qualities of restorative justice and how they can be used to enrich and improve the criminal justice system.

1.7 THEORETICAL AND CONCEPTUAL FRAMEWORK

This paper will look into the restitution approach in a bid to look into the manner in which the offenders restore the victims to the crime or the society at large. This is because the restitution approach requires an affirmative performance by the offender that benefits either the victim or the general public.¹³ This approach will facilitate the understanding of restorative justice and how it seeks to ensure that where there has been an offense against another then there ought to be reparations by the offender to the victim.¹⁴ Restitution also ensures redistribution of rights such that where the offender has limited a victim from a right that they are justified to, then the offender has no choice but to compensate. On the other hand this paper will look also into the retributivism approach in order to look into the justifications of retributive justice which is one must face punishment for the wrong that they have committed as greatly proposed by Kant¹⁵

¹¹ Gabbay Z, 'Justifying Restorative Justice: A theoretical Justification for the Use of Restorative' 2 *Justice Practices Journal of Dispute Resolution*, 2005, 351.

¹² Z Gabbay states that in retributive justice systems, the participation of the crime victims is usually limited to the testimonial evidence given during court proceedings and the entire focus seems to be on the offender. The efficiency of the system or inefficiency thereof comes in when implementing its goals i.e justice but it is proven difficult by the huge monetary investment required with regard to the provision and maintenance of facilities within the prison system. The funds may not always be readily available and as a result cause the ineffectiveness of the system. Furthermore, he states that the way the prison systems are structured it's primary role of rehabilitation is barely met seeing that little energy is invested in preparation for the time after which the offender will re-enter society. With regard to the fairness of the system, he states that the appearance of justice is controlled by professionals who determine what is considered to be a just outcome according to predetermined rules. The participants who lie in the other side of the coin as non-professionals may however perceive the outcome in a different way. The question however should be whether the system is satisfactory and thus fairness will be measured according to the extent of satisfaction by both the victim directly affected by the crime as well as the society at large.

¹³Barnett R. 'The Justice of Restitution' *American Journal of Jurisprudence*.
www.bu.edu/rbarnett/25amer117.htm accessed 17th March 2016

¹⁴Barnett R. 'The Justice of Restitution' *American Journal of Jurisprudence*.
www.bu.edu/rbarnett/25amer117.htm accessed 17th March 2016

¹⁵ Koritansky P 'Two Theories of Retributive Punishment: Immanuel Kant and Thomas Aquinas' 22 (4) *History of Philosophy Quarterly*, October 2005, 319-338.

By analysing this approach, the paper will seek to establish the shortcomings that arise from the retributive justice system seeing that despite it being largely applied in the Kenyan Criminal Justice, it has not proven to be as effective as it ought to be.

1.8 HYPOTHESIS

This research paper proceeds on the presumption that there are various principles that the Restorative Justice system stipulates that will be more efficient in the Criminal Justice system as compared to retributive justice bearing in mind that Retributive Justice, despite it being largely implemented within the current Criminal Justice system, has seemed to have quite a number of shortcomings that have to some extent deemed it inadequate and thus ineffective.

1.9 RESEARCH DESIGN AND METHODOLOGY

This research will take the form of qualitative research. The qualitative research shall be done through desktop research which includes library and internet searches. The desktop research will seek to critically analyse the current Criminal Justice system, how it is being applied and the loopholes that exist within it. It will also aid in the carrying out of a comparative study between the Norwegian and Kenyan criminal justice system, picking out key differences between the two and thus outlining principles that Kenya may adopt from the Norway's system in the course of betterment of the Kenyan Criminal Justice System. The aim of the qualitative data shall be to look for themes and content from the data acquired through the research. There will also be interviews conducted with various prison officials including wardens; this will help in finding out the roles that they play within the system. There shall also be interviews with a few prison inmates, especially recidivists. The purpose of getting information from the current prison inmates is to establish the following; the effect that being in prison has had on them while serving their sentences, the conditions that they are exposed to, and what effects they have on them and whether they feel that they will be able to comfortably settle back in society once they finish their sentences.

1.10 LIMITATIONS

The following limitations may arise while carrying out the research:

1. The fact that most prison officials would want to “protect” the institution that they work under and may thus end up giving biased information or concealing some vital details.
2. It may not be possible to track down former inmates who have been released back to society so as to give their experiences while settling back and whether they are of the view that the prison system indeed reformed them.

CHAPTER TWO – THEORETICAL AND CONCEPTUAL FRAMEWORK

2.1 INTRODUCTION

Criminal justice system, which may also be referred to as the law-enforcement system refers to the collective institutions through which an accused offender passes until the accusations have been disposed of or the assessed punishment concluded.¹⁶ Generally, it consists of three main parts which include; law enforcement i.e. the police; adjudication i.e. courts which include judges, prosecutors, defence lawyers; and corrections prison officials and probation officers.¹⁷

There are various theories of criminal justice which each in its own unique way determine the manner in which the system is applied. These include the utilitarian theory, the retributive or punitive theory of justice and the restorative justice system. This chapter shall however explore the theory of retributive justice and seek to decipher its shortcomings as well as look into the theory of restorative justice as a better alternative.

Despite the different approaches that each theory has towards criminal justice, they all have one aim, which is to control crime and impose penalties on those who violate the laws.¹⁸ The question however, is which system is the most suitable in crime control. In order to determine which system would work best for our country, it is vital to understand what each system stands for, its attributes as well as its shortcomings. Furthermore, it is important to decipher what each system seeks to achieve, despite the general aim of crime control and imposing of penalties.

With this in mind, this chapter seeks to explore the theories of retributive and restorative justice systems, their merits and demerits, and a specific focus on how the restorative justice system is able to meet the shortcomings of the retributive justice system. This should also be able to give an insight as to why restorative justice is a more suitable system that should be highly considered to constitute a major part of our penal system, if not wholly.

¹⁶ <http://definitions.uslegal.com/c/criminal-justice-system/> accessed 28th November 2016

¹⁷ <http://definitions.uslegal.com/c/criminal-justice-system/> accessed 28th November 2016

¹⁸ <https://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/the-criminal-justice-system> accessed 29th November 2016

2.2 THE RETRIBUTIVE JUSTICE SYSTEM

The retributive justice system, as stated by Immanuel Kant, is based on logic and reason, it mainly proposes that crime deserves punishment.¹⁹ The justification for punishment, which is known as the “just deserts” theory, is based on the ideology that an act of crime constitutes a violation of the moral of natural order and with that regard, there ought to be a payment of some kind which usually is in the form of punishment.²⁰

The main purpose of punishment, according to this theory, is that it is a means to redress the balance between law abiding citizens and criminals.²¹ By doing so, there is the removal of any unfair advantage that may have been gained by the criminal from committing the crime. This proposes the opinion that the criminals, when committing the offence, not only cause harm but also gain an advantage over the victim. Furthermore, there is the notion that what quantifies it as a crime is that the action by the criminal has caused harm to the victim, and there has therefore been a deprivation of rights and subsequently the offence has caused a set-back on the side of the victim. In this case, retributive justice will offer the option of punishment and deterrence, as a means of preventing the crime from happening again.

“The retributive justice system follows the concept according to which the most important part of the justice act is to establish the offender’s guilt and to punish him according to the seriousness of his crime, to the damage brought to the victim and community. The illicit act is a violation of a legal and social standard, thus being directed against the state.”²² This notion paints a picture of what the Kenyan Penal System is based on. It consists of the Judiciary, the police and prison departments.²³ These departments work hand in hand to fulfil the mandate of the Retributive justice system; from arrest of the suspected offender and investigations which is done by the police department, to the trial and hearing of the matter in court which is handled by the judiciary, and if found guilty, the punishment of the offender which comes in the form of imprisonment, which is handled by the prison department.

¹⁹<https://www.ukessays.com/essays/philosophy/immanuel-kant-retributive-theories-of-justice-philosophy-essay.php> accessed 28th November 2016.

²⁰ Starkweather D A, ‘The Retributive Theory of “Just Deserts” and Victim Participation in Plea Bargaining’ *Indiana Law Journal* 67 (3) Article 9, p 855

²¹<https://www.ukessays.com/essays/philosophy/immanuel-kant-retributive-theories-of-justice-philosophy-essay.php> accessed 28th November 2016.

²²Pocora M, ‘The Restorative Justice System - An Alternative to the Official Criminal System’ *EIRP Proceedings*, Vol 9 2014.

²³ Owino B, Egesa O, Akong’a J, ‘Looking in the mirror: Reflections on implementation of principles of penal system in Kenya’s prisons’ *3 Journal for Academic Research for Multidisciplinary* (2015),202

One of the main aims of a criminal justice system is crime control. The retributive justice system seeks to achieve this through harsh sentencing, long prison terms and mandatory minimum punishments. With such, prison is perceived to be the only appropriate punishment for every type of crime,²⁴ the length of the sentence that one will serve in prison then depends on the severity of the crime committed. The theory of retributive justice is also based on the concept of proportionality; a life for a life. This is basis of sentences such as capital punishments for murderers.²⁵ This then translates to the punishment given being proportionate to the offence rather than varying from offender to offender as it is administered by an impartial legal mechanism²⁶ i.e. provisions of the Criminal Procedure Code.

A factor that arises from the attributes of retributive justice is the fact that in giving punishments through sentencing, the courts usually approach the harm caused to the society at large, such that it addresses the general harm done and not the one caused to the victim.

2.2.1 The theory of 'Just Deserts'

In the practice of retributive justice, this theory seeks to preserve human dignity through punishment.²⁷ In this case when punishment is given to the offender, it is done in such a manner that respects his choice to engage in the wrongful behaviour²⁸ which is seen as an offence. This theory also stipulates that since in the commission of an offence, there has been a disturbance of the "right" relationships in society and thus it seeks to reconcile this relationships.²⁹ This is then achieved through making the offender "pay" for his wrong-doing which is mainly through punishment. This brings about the aspect of proportionality which sees to it that the amount of punishment given, reciprocates the harm done through the offence committed.³⁰

This is the manner in which retributive justice seeks to restore the relationship broken through commission of the offence, where the offender is punished only "to the extent necessary to restore the relationship."

²⁴ Gabbay Z, 'Justifying Restorative Justice: A theoretical Justification for the Use of Restorative' *Vol 2 Justice Practices Journal of Dispute Resolution* 2005,355.

²⁵ 1st Schedule Sec 203, *Criminal Procedure Code*.

²⁶ Gomez S, *Restorative Justice following Mass Atrocity: The Case of Rwanda*, 2006, 5.

²⁷ Starkweather D A, 'The Retributive Theory of "Just Deserts"', 855.

²⁸ Starkweather D A, 'The Retributive Theory of "Just Deserts"', 855.

²⁹ Starkweather D A, 'The Retributive Theory of "Just Deserts"', 857.

³⁰ Starkweather D A, 'The Retributive Theory of "Just Deserts"', 857.

In the application of this theory, it is clear that it only focuses on the offender, even while seeking to restore the relationship as he is the only one on the receiving end through punishment.

2.2.2 Inadequacy of Retributive Justice

There are several questions that arise from the theory of retributive justice that would then stipulate that indeed there are loopholes in this kind of system. This paper will seek to cover these loopholes through the recommendations given in Chapter Four, which shall be greatly based on the theory of restorative justice.

The first question that arises from this system, is why the rates of recidivism are still very high when the system is supposed to be ensuring safe custody and social rehabilitation of offenders for community reintegration. Recidivism is the greatest and most self-evident aspect of inadequacy of the retributive justice system. As stated earlier the main aim of a justice system, a good one for that matter, is to ensure that crime is controlled and justice is served.

The second question that arises is what justice is served to the victim. From the way the retributive justice system is set up, there is no doubt that there is no place for the victim in this system, and when it does occur it is usually in the form of reinforcing anger and a sense of victimhood³¹ rather than them receiving justice that they well deserve. Does the criminal being locked behind bars, for a longer time depending on the crime they have committed restore the rights lost by the victim? Does the victim even get a chance to state what they would really like to be done to them so that they feel that justice has indeed been served? This does not seem to be the case. On the contrary, the system only relies on what the law stipulates i.e. whatever the criminal procedure code states to be the punishment for a certain offence committed then it is deemed as appropriate and that justice has been served, whether or not the victim's interests have been integrated³² in the provision or not. The role of the victim in this system can only be seen to be to give evidence in court through their testimony as a witness, and it ends there. The system does not cater for any other needs of the victim especially in the case where psychological harm has been caused.

The concern for the place of the victim in the retributive justice system gives rise to the third question; whether the system is perceived to be just and fair? Generally, this would seem to be

³¹ Minow M , *Between Vengeance and Forgiveness: Feminists approach to Violent Justice*, January 1998, p2.

³² Gabbay Z, 'Justifying Restorative Justice: A theoretical Justification for the Use of Restorative' Vol 2 *Justice Practices Journal of Dispute Resolution*, 2005, 352.

the case. This is because by the time an offender is being sentenced, they have passed through various 'stages' which include, case reporting, arrest, the writing of their statement, and finally trial in which a case is brought against them by the prosecutor while they defend themselves or have a lawyer to do so on their behalf, the final verdict is then given by the presiding judge or magistrate. All these persons involved in these stages, from the investigating police officers to the prosecutors and the defence lawyers to the presiding judge are perceived to be well learned and quite knowledgeable in their respective fields. The public thus vests their faith in them and there is the presumption that whatever the outcome of the trial is, it is accurate as it has been handled by professionals. This is also the presumption that gives the notion that the system is *prima facie* just and fair. The concern however is whether a system is considered to be just and fair simply because it has been followed to the latter? Is the system itself satisfactory? Is the outcome of the entire procedure what is indeed perceived to be justice, and therefore is the appearance of justice which is considered so from the procedure stipulated by the system actual justice, and to whom is this justice served, the offender or the victim? Or will it just be a matter of a job well done by the professionals involved?

Another question that arises is whether justice can really be quantified. This is tied with the principle of proportionality which the retributive system relies on such that longer harsher sentences are given to those who have committed more severe crimes. Does this mean that the longer the time that one serves in prison, the more reformed they become? In the event that an offender is sentenced to a capital punishment, does taking another life mean that more justice has been served?

2.3 THE RESTORATIVE JUSTICE SYSTEM

"Crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation and reassurance."³³ This description of Restorative Justice is given by Howard Zehr in his book, *Changing Lenses*, where he terms it as the 'Restorative Lens'. From this description it is clear that this system seeks to involve all stakeholders to a crime or an offence; the victim, to whom the harm is caused, the offender, who causes the harm and the community at large, who may either be indirectly affected by the harm or are just

³³ Zehr H, *Changing Lenses: A New Focus for Crime and Justice*, 1990, 181.

genuinely concerned with the well-being of the victim and. The community is also concerned in so far as reintegrating the offender back to society as is one of the tenets of restorative justice.

In involving all these three stakeholders, restorative justice is mainly pegged on the concept of mediation³⁴ one of the mechanisms of alternative dispute resolution. This is seen through some of the most common restorative justice processes within criminal justice systems such as; victim-offender mediation,³⁵ which involves face-to-face negotiations between the victim and the offender and aims at fostering healing and reconciliation; family group conferencing,³⁶ where the victim's and offender's support systems such as family or social workers are encouraged to attend and aide in the negotiation process; and sentencing/peace-making circles³⁷ which focuses on communal rather than individual healing and are guided by peacemakers knowledgeable in traditional norms.

Restorative justice is mainly made up of three elements. These include; process, restitution and reintegration.³⁸ The process involves the mechanisms that are adopted which as stated before is mainly mediation. This takes place through negotiation which usually occurs mainly after both the victim and the offender have agreed to take part in beforehand.³⁹ Restitution includes the acknowledgement of the offence by the offender, which is usually followed by either an apology from the offender or an action of reparation of the harm caused by the offence.⁴⁰ Reintegration usually involves the moral and material assistance that both the victim and the offender may need in order to be able to be part of the community once again and fully function accordingly.⁴¹

2.3.1 Ubuntu Philosophy

Some of the practices involved in restorative justice such as reconciliation and the importance of reintegration are derived from the theory of Ubuntu philosophy. This theory is derived from

³⁴Love C, 'Family group conferencing: Cultural origins, sharing and appropriation: A Maori reflection' in G Burford & J Hudson (eds) *Family group conferencing: New directions in community-centred child and family practice*, 2000, 15.

³⁵Bazemore G & Umbreit M 'A comparison of four restorative conferencing models' (2001) *Juvenile Justice Bulletin*, 2001, 2.

³⁶Love C, 'Family group conferencing: Cultural origins, sharing and appropriation, 15.

³⁷K Pranis 'Peace-making circles: Restorative justice in practice allows victims and offenders to begin repairing the harm'⁵⁹ *Corrections Today*, 1997, 73.

³⁸ Gomez S, *Restorative Justice following Mass Atrocity: The Case of Rwanda*, 2006, p9.

³⁹ Gomez S, *Restorative Justice following Mass Atrocity*, p9.

⁴⁰ Gomez S, *Restorative Justice following Mass Atrocity*, 10.

⁴¹ Gomez S, *Restorative Justice following Mass Atrocity*, 11.

an *Isizulu*⁴² aphorism which states that ‘a person is a person because of or through others.’⁴³ ‘Ubuntu can be described as the capacity in an African culture to express compassion, reciprocity, dignity, humanity and mutuality in the respects of building and maintaining communities with justice and mutual caring.’⁴⁴

This aspects of brotherhood and togetherness are what foster reconciliation and reintegration as they act as an incentive for persons in a community to always maintain a cordial relationship, despite any unfortunate event that may have caused such a bond to break.

2.3.2 Restorative Justice as an alternative justice system.

Modern restorative justice is in many ways a response to the failures of the retributive model.⁴⁵ It has also been recognised in the international legal framework such as where the Development and Implementation of Mediation and Restorative Justice Measures in Criminal Justice recommends the adoption of mediation and restorative justice measures for minor disputes.⁴⁶

Seeing that restorative justice is perceived to be an alternative to retributive justice, it is usually not the norm and is used when both offender and victim opt for it. Therefore it exists within the broader framework of the retributive justice system.⁴⁷ This does not however limit the attributes of the restorative justice system which make it a better alternative. Some of these attributes are explained below.

The first attribute, which gives the restorative justice system an upper hand as compared to retributive justice is the recognition of the rights of the victims in this kind of system.⁴⁸ Restorative justice does not only recognise these rights but further goes ahead and ensures that they are respected throughout the whole process and that where they have been lost, they are restored. It attends to the needs of victims, which range from emotional, financial, material and social.

⁴² This a South African Bantu tribe.

⁴³ Khomba JK, *The African Ubuntu Philosophy*, published Phd Thesis, University of Pretoria, Pretoria, 2011, 127

⁴⁴ Khomba JK, *The African Ubuntu Philosophy*, published Phd Thesis, University of Pretoria, Pretoria, 2011, 127-128.

⁴⁵ Gomez S, *Restorative Justice following Mass Atrocity*, 4.

⁴⁶ Principles 2 & 5 Development and Implementation of Mediation and Restorative Justice Measures in Criminal Justice 1999/26, adopted by the Economic and Social Council on 28 July 1999.

⁴⁷ Gomez S, *Restorative Justice following Mass Atrocity*, 8.

⁴⁸ Among H, ‘The application of traditional justice mechanisms to the atrocities committed by child soldiers in Uganda: A practical restorative justice approach,’ *African Human Rights Journal*, p 444.

Another attribute of restorative justice is that different models of restorative justice are appropriate to different societies and different types of crime.⁴⁹ This ensures that matters are dealt with on a case to case basis, and consider the circumstances surrounding rather than having a general rigid system of law that stipulates what exactly is to be done with regard to certain cases, as is the case with retributive justice.

2.4 CONCLUSION.

It is clear from the discussion that restorative justice bases itself on responsibility, self-involvement, straightness, community view, damage repair, avoiding the discrimination, restitution and early prevention.⁵⁰ This is unlike retributive justice which only focuses on punishing the offender. The rest of this paper shall seek to establish how this concept of retributive justice has caused the system to severely fail and on the other hand, how restorative justice comes in to salvage the situation of our current Kenyan penal system.

⁴⁹ Braithwaite J, *Restorative Justice and Responsive Regulations*, 5, 2002, 7

⁵⁰ Pocora M, 'The Restorative Justice System - An Alternative to the Official Criminal System,' *EIRP Proceedings*, 9, 2014,

CHAPTER THREE – CASE STUDIES AND COMPARATIVE STUDIES

3.1 INTRODUCTION

This chapter shall include a practical study of the Kenyan Penal system generally, as well as the extent to which restorative justice has been applied within the Kenyan Penal System. It also includes studies of other systems in which Restorative Justice has largely been applied.

This chapter seeks to look into the effectiveness of Retributive Justice within the current Kenyan Penal system and on the other hand, look into how Restorative Justice may be applied to boost the effectiveness of the penal system.

The information disseminated in this chapter was acquired from interviews conducted by myself with inmates from Lang'ata Women's prison as well the Lang'ata Women's Prison Welfare Officer and a constable from the same institution. The interviewees include a total of four inmates, three of them being recidivists as well as one who has gone through the Restorative justice programme that was organised by the institution. The Welfare Officer, The Prison Counsellor and the Constable were also interviewed to give a better view of the system that is practised within the prison system and thus have a better view of its effectiveness on the inmates. They were also able to give an account of the manner in which Restorative Justice has been applied so far within the system and the extent of its success. The names of the interviewed inmates have not been revealed to maintain privacy.

The manner in which restorative justice has been applied, and deemed successful, shall be looked into and analysed through various case studies such as; the Gacaca courts of Rwanda, as well as a study of the Norwegian prison system. This information was acquired through desktop research.

3.2 CASE STUDIES WITHIN THE KENYAN PRISON SYSTEM

The questions asked whilst conducting the interviews with the inmates have been attached as *Appendix 1*. The responses from the interviews conducted with the recidivists have been recorded in tabular form, attached as *Appendix 2*.

Analysis.

These three inmates, who are all recidivists, give an insight on the general scope of the penal system and the interplay between the prison institution itself and the society, and how they both have an impact on the rehabilitation and reintegration of the offenders. There is the instance where an offender is convicted and while serving their sentence, gets rehabilitated and is equipped with necessary skills, and when released back to society, they are able to fit I back

well. The second instance is where one serves their sentence and is rehabilitated by the system but upon release, faces severe stigmatisation. There is also where one barely receives any rehabilitation but is able to settle back into society. The last scenario, which may seemingly the most dangerous is where one is not rehabilitated by the system at all, and upon release is not well received but is instead rejected by society, thus having received the short end to both sticks.

Through these three instances, we are able to decipher some of the shortcomings that have been brought about by the retributive justice system. These failures have been brought out more clearly through the issue of recidivism.

The purpose of a Criminal Justice system, is not only to control crime, but to ensure that the offender is reformed, such that they are not in a position to commit the crime again, whether they are under deterrence in prison or they have been released back to society. So far, it would seem that the only way in which the system has been able to fulfil its mandate of crime control, is through deterrence, since obviously, when one is locked away from society, they are also prevented from committing any act that may be seen as an offence to the society. When it comes to the offender being released to society having served their sentence, the system seems to have failed considering the high number of recidivists which is presumed to be currently standing at 50%.⁵¹

There are various factors that seem to have contributed to this high rate of recidivism. The first one that arose from the interviews conducted with the recidivists is the length of the sentencing. From the way the penal system is structured those who have committed light offences or those whose consequences seem to hold less gravity, referred to as misdemeanours,⁵² are likely to serve short sentences which all range below three years imprisonment to as little as two weeks of community service. The problem especially arises with those who have served short sentences that do not exceed one year. This is because the rehabilitation programme within the prison system has been designed to cater for those who are serving long sentences. This was stated by the Officer in charge of welfare at Lang'ata Women's prison. The rest of the offenders are only given odd jobs such as cleaning around or watering plants. This would rather be unfair, seeing that only a few of the inmates receive the rehabilitation that the prison system ought to provide. By the time these offenders serving short terms are released back to society, they go

⁵¹ www.pfkenya.org accessed 11 December 2015.

⁵² Article 2, *Kenya Penal Code*.

back with no skills or counselling done and pick up from where they left. If in the case of the lady who has been imprisoned more than three times due to selling of illicit brew (chang'aa) then such offenders are forced to go back to the same lifestyle, which is actually how they make ends meet. Furthermore, most of them are not moved by the light sentences that they are given and in most cases do not mind committing the offence over and over again.

To further prove this irregularity in the system, the officer in charge of welfare confirmed that it is very rare to find inmates who have served long sentences having committed other offences that would lead to their conviction and subsequent imprisonment. This is because they not only go through intense rehabilitation programmes which include counselling and being equipped with various skills such as hairdressing, they also go through a discharge board when they are due for release which seeks to hand them certain tools that are necessary to practice the skills that they have acquired. This means that even though they may have lost a lot, whether financially or time in general, while serving their sentences, they do have a place to start from which will at least enable them to put food on the table and avoid idleness thus avoid committing more crimes.

This shows that there is a bias towards felony offenders as compared to the rest. In this capacity, the system fails in its aim of crime control as there are now those who have become “serial repeat offenders” all in a bid to make ends meet.

The rest may be termed as societal factors which are major contributors to recidivism. The most common and persistent factor is stigmatization. Once a person is deemed to have gone through the prison system, whether guilty or not, society tends to brand them as a wrongdoer. In severe cases, they are considered as outcasts and no longer have a place in that society. This seems to have both psychological and socio-economic effects which unfortunately both subsequently lead to recidivism. One of the interviewed recidivists confessed that once she had been released back to society, she had a rough time with her family who aside from calling her ‘institutionalised’ they went further ahead and took her for DNA tests in a bid to prove whether she really was a member of their family by blood. Another one confesses that neighbours would not want to come near her and to make it even worse, her own children turned against her and would refuse to be associated with her.

When looked at from a psychological perspective, such persons are not able to live in peace while at home and eventually seek a way out. Being mentally tormented through name calling and the DNA tests, led *inmate 2* to deliberately cause destruction of property just so that she

could go back to prison which she claimed to be more peaceful. Things were not so different for *inmate 1* who since no one was willing to associate with her and thus did not receive any financial help, she had no choice but to steal again in a bid to make ends meet which landed her back in prison.

The analysis above gives an overview of the shortcomings of the retributive justice system that have since contributed to what is deemed to be the major indicator of its failure, recidivism. All hope is however not lost as the rest of this chapter will be the analysis of what is presumed to be a better alternative to the criminal justice system, which when incorporated into the current penal system, it will cover its loopholes towards the construction of a more successful penal system.

3.3 EFFORTS TOWARDS RESTORATIVE JUSTICE IN THE KENYAN PENAL SYSTEM

Despite the Kenyan penal system being largely based on retributive justice, restorative justice is not a foreign concept as it may seem. There have been various efforts towards restorative justice with the main aim of reconciliation of the offenders with their victims and families as well as reintegration of the offenders back to society.

It is first important to bear in mind that restorative justice did not just emerge as a new concept once the current penal system was introduced in Kenya by the colonialists. Restorative justice was also present in traditional African communities, and in Kenya to be more specific. Some of the communities that notably practiced restorative justice include the Kikuyu, Kamba and Meru.⁵³ Although these communities also practiced retributive justice whilst dealing with criminal matters, the core concept within the justice system was restorative justice.⁵⁴

Restorative justice has since been incorporated into the Kenyan criminal justice system. Though its significance has not been as much as expected, there have been steps towards making it more effective.

⁵³ Kinyanjui S, 'Restorative Justice in Traditional pre-colonial "Criminal Justice Systems" in Kenya' 10 *Tribal Law Journal* p 1.

⁵⁴ Kinyanjui S, 'Restorative Justice in Traditional pre-colonial Kenya, 2.

3.3.1 Forgiveness and Reconciliation Programme – Lang’ata Women’s Prison.

The Lang’ata Women’s Prison held a reconciliation programme tagged, ‘FORGIVENESS AND RECONCILIATION’ on September 09 2016, the first of its kind within the Kenyan Penal System. It was the prison’s own initiative, supported by well-wishers. This marked a huge milestone in the efforts towards incorporating restorative justice and reintegration into the current penal system. This programme was held mainly because it had been highly requested by the inmates.

The Forgiveness and Reconciliation programme involved the offenders and the complainants to the offences as well as their family members. They also involved the services of psychological counsellors who took the parties through the processes of mediation and reconciliation.

Though they faced challenges at first such as the other parties; the complainants and family members not willing to face the offenders, and the seeking of professionals such as counsellors to aide in the exercise, the programme proved to be successful. This has been evidenced by a notable change of behaviour in the inmates as well as more frequent visits from the family members after the programme.

One of the beneficiaries of the reconciliation programme was an inmate who had been charged with Robbery with violence. She decided to partake in the programme as she felt that there was need to mend the now broken relationship between her and her family due to the offence that she had committed. Though it was hard at first to get hold of her family members to attend the programme, they finally agreed. Through the programme she was able to reconcile with both the victim of the offence and her parents, after sessions of counselling and one-on-one conversations between the offender and the complainant. For her the exercise was successful as she states that she is confident that in the case that she is released back to society, she may be able to live a normal life with her family without facing any stigmatisation. Furthermore, she is grateful to the system which has so far equipped her with certain skills and the rehabilitation and counselling that she has undergone.

3.4 SUCCESS OF RESTORATIVE JUSTICE IN OTHER JURISDICTIONS IN COMPARISON WITH THE PRACTICE IN KENYA

Even though there have been some significant steps towards incorporating restorative justice into our criminal justice system, there are other jurisdictions that have taken more substantial

steps to the extent that restorative justice is the core concept governing their justice systems. There have also been other instances where the incorporation of restorative justice, even though in interim, has been necessary due to a traumatic occurrence in a country. The practice of restorative justice in these jurisdictions shall be looked into in comparison with the practice of restorative justice in Kenya.

3.4.1 Norwegian Prison System

When a criminal justice system is put in place, the idea behind it is to reduce crime in the society and ensure that the offenders are reformed through it so that they are no longer a threat to society and that they do not commit the offence again. The outcomes of the justice systems in Kenya and Norway have however been quite different, with the Norway having a recidivism rate of only close to 20%⁵⁵ while Kenya's is at a staggering 50% as previously mentioned. The difference in the methods used within the justice systems could perhaps be the core reason as to why there is such a huge difference.

Other than high recidivism rates, there is also a large difference in the prison population rate per 100,000 of the national population in both these countries. In 2016, While Kenya stood at 121 inmates per 100,000 of the estimated 49.65 million of the total population⁵⁶, Norway has only 74 per 100,000 of the estimated 5.25 million of the total population.⁵⁷ Furthermore, while Kenya has up to 108 institutions established to deal with crime,⁵⁸ Norway has literally half, only 54.⁵⁹ The big question that arises then simply is, what is being done in the Norwegian criminal justice system that Kenya's penal system isn't?

Norway has almost fully embraced the Restorative Justice system and this is evidenced by its *Special Act on Mediation*⁶⁰ which was first enacted in 1991. Ever since the law which when being proposed it was stated that, 'to strengthen the local communities' ability to handle petty crimes themselves and "to give the conflicts back to the people" without weakening the legal safeguards,' the law has since seen to it that every municipality has established separate and autonomous mediation services.⁶¹ These mediation services are usually set up in such a manner that the offenders and their victims come together to attempt to find an alternative solution in

⁵⁵ <http://blog.justicepolicy.org/2014/05/lessons-from-norway-different-approach.html> accessed 20th December 2016

⁵⁶ <http://www.prisonstudies.org/country/kenya> accessed 20th December 2016.

⁵⁷ <http://www.prisonstudies.org/country/norway> accessed 20th December 2016.

⁵⁸ <http://www.prisonstudies.org/country/kenya> accessed 20th December 2016.

⁵⁹ <http://www.prisonstudies.org/country/norway> accessed 20th December 2016.

⁶⁰ Norway, *Special Act on mediation*, 1991.

⁶¹ Kemeny S, *Mediation and Restorative Justice Sanctions in Norway*, 2014, 2.

place of a prison sentence.⁶² Such mediation sessions are conducted by mediation boards established by the *Norwegian Mediation Boards Act*. In such cases, where the offender gets to the stage of sentencing, the sentence is usually reduced as compared to other jurisdictions. Even so, the relationship between the offender and the victim in most cases is usually mended and reintegration of the offender once they have served their sentence becomes easier. It is also important to note that there are barely any life sentences given to convicted offenders in Norway as the longest sentence given to an individual is 21 years.⁶³ More so, even the maximum prisons have more established rehabilitation programmes that give help them acquire skills through education and job training.⁶⁴

Another aspect is that when it comes to implementing restorative justice in Norway, it is 100% funded by the government and receives 100% secure funding in the country's National budget.⁶⁵ On the other hand however, restorative justice in Kenya is merely recognised by the government, neither does it receive any funding. As seen from Lang'ata Women's prison 'Forgiveness and Reconciliation programme' it was the prison's own initiative as it had been highly requested by the inmates, and the only funding they received to conduct the programmes was from well-wishers.⁶⁶ Besides, any form of restorative justice is only seen as auxiliary to the main criminal justice system of retributive justice.⁶⁷

It is now self-evident why Norway is miles ahead in terms of curbing crime which is a great societal menace. Needless to say, Kenya ought to borrow a leaf from this Scandinavian country, but not only borrow a leaf, but also find a way to maintain the system so as to be able to bear fruits.

⁶² <http://blog.justicepolicy.org/2014/05/lessons-from-norway-different-approach.html> accessed 20th December 2016

⁶³ <http://blog.justicepolicy.org/2014/05/lessons-from-norway-different-approach.html> accessed 20th December 2016

⁶⁴ James E, The Norwegian Prison where inmates are treated like people. The Guardian, 24th February 2013. <https://www.theguardian.com/society/2013/feb/25/norwegian-prison-inmates-treated-like-people> accessed 20th December 2016

⁶⁵ Kemeny S, *Mediation and Restorative Justice Sanctions in Norway*, 2014, 2.

⁶⁶ Mrs Kirito, Counsellor, Lang'ata Women's prison.

⁶⁷ Oketch C, 'Community Rehabilitation of offenders in Kenya: Past, present and prospects. A communication' 1 (1) *African Journal of Crime and Criminal Justice*, 2009, 99.

3.4.2 Gacaca Courts in Rwanda

The *Gacaca* Court system in Rwanda was introduced to deal with the mass atrocities that had been conducted during the Rwandese genocide of 1994. Seeing that these are not normal crimes that may occur in the normal day to day life, this comparative study was mainly done to show the importance of restorative justice and the sweet fruits that it bears in form of reconciliation with the victims, reintegration and easy transition of the offenders back to society and most importantly the healing of the victims.

This system was adapted from the traditional Gacaca system, where the elderly men of the community comprised the judge's panel that sought to resolve disputes within the community.⁶⁸ The modern Gacaca system was not too different as those who were the presiding judges in the tribunal were elected by members of the community and they went through a few days of training prior to the commencement of the proceedings.⁶⁹ Other than victim-offender mediation, the community was also encouraged to participate by speaking out on the truth of what really occurred. This in turn led to the truth being flashed out which propelled the community towards reconciliation which indeed was the aim of the proceedings.⁷⁰

This system brought about more transparency in the proceedings and thus hidden grievances and resentments were brought to light and dealt with.⁷¹ This was such an important aspect as it enabled the victims to heal from the atrocities as well as fostering a better relationship between the victims and the offenders. Dialogue between the offenders and their victims also ensured easy reintegration of the offenders back to the society.

3.5 CONCLUSION

From the restorative justice system aspect, as seen through the practice in the Norwegian criminal justice system, the only punishment that the inmates receive is loss of liberty through deterrence. Beyond that, restorative justice seeks to rebuild this offender into a person that may be accepted back into the community once again. Victim-offender mediation is the first step towards fostering this which is then followed by intense rehabilitation. Besides having repaired

⁶⁸ Haberstock L, 'An analysis of The Effectiveness of the Gacaca Courts in Post-genocide Rwanda' 8 (1) Art 4 *Global Tides*, 2014, 7.

⁶⁹ Haberstock L, 'An analysis of The Effectiveness of the Gacaca Courts,' 8.

⁷⁰ Haberstock L, 'An analysis of The Effectiveness of the Gacaca Courts, 8.

⁷¹ Haberstock L, 'An analysis of The Effectiveness of the Gacaca Courts,' 9.

the bruised relationship between the offender and the victim, the offender is equipped with skills that propel them towards a crime free life.

It is clear that the Kenya criminal justice system has a long way to go with regards to restorative justice. This includes not just viewing it as an auxiliary to the system in place already, but rather as a greater alternative thus moving away from the notion that punishment is the only way out for convicted offenders.

CHAPTER FOUR - RECOMMENDATIONS

4.1 INTRODUCTION

Through the study of the Retributive and Restorative justice systems, both theoretically and practically, this paper has established that there indeed are shortcomings in the retributive justice systems, and restorative justice has the capability of covering these loopholes within the current Kenyan penal system.

This chapter shall therefore give recommendations as to what way restorative justice shall be able to make the Kenyan penal system more sufficient and effective.

4.2 Incorporation of Restorative Justice into the Kenyan Penal System

The qualities of restorative justice such as victim-offender mediation, involvement of the community, openness and transparency, damage repair⁷² and subsequent reconciliation and easy reintegration ensure that it indeed is a favourable type of justice system. The 'Forgiveness and Reconciliation' programme that was held at Lang'ata Women's prison was a first step towards incorporating into the Kenyan penal system. This programme is a clear indicator that it indeed is possible to merge the two systems without any interference in the way matters are ran.

With this regard, the Kenyan penal system ought to consider conducting more of such programmes in the future, across all correctional facilities in the country and more frequently. This would mean that the retributive justice system will still be in place, in terms of deterrence of the offender, but in this case, the offender will not remain empty handed or with bruised relationships or have to be in a situation where they are rejected by society once they are released back after serving their sentences. Instead, they will have gone through mediation sessions with both the victims of the offences they committed as well as with their family members.

Incorporating restorative justice into the current penal system will serve as a double-edged sword whereby it still ensures the deterrence and punishment of the offender, as they deserve, and at the same time foster reconciliation between the offender and the victim and the

⁷² Pocora M, 'The Restorative Justice System - An Alternative to the Official Criminal System,' *EIRP Proceedings*, 9, 2014.

offender's family members as well as ensuring a smooth transition from the correctional facility back to society.

4.3 Government Involvement

Crime is a societal menace and a great enemy of development. This gives more reason as to why the government ought to be more involved while seeking avenues that will curb this negative issues that act as a setback. The fact that government only recognises any efforts towards restorative justice such as probation as being auxiliary to the main system⁷³ shows that there still is a lot to be done.

Recognition of restorative justice as a suitable method that will assist the now crippled retributive justice system is only the first step. The next milestone is covered through active involvement in restorative justice programmes. It is quite disheartening to learn that the first, and only, restorative justice programme at Lang'ata Women's prison was only held after the inmates had repeatedly requested for it. To make it worse, the only form of support that the programme received was from well-wishers. There was not even one instance where the government was seen to have been involved. Such programmes require a lot of logistics and funding to be successful. Kenya should therefore borrow a leaf from the Norwegian system where their restorative justice programmes through mediation, are not only recognised by acts of parliament, but are also fully funded by the government.⁷⁴

4.4 Human Resource and Experienced Personnel

Restorative justice programmes are clearly not a one-man kind of task, especially if the intention is for it to be successful. Such responsibilities cannot be left to the prison wardens who are already burdened with ensuring that the inmates serve their punishments. There ought to be the involvement of various personnel to help with the mediation processes. This especially includes counsellors who are able to guide in the victim-offender and family member's reconciliation. The need for more personnel than there is currently is also evidenced by the fact that there are some inmates who usually leave the prison systems without having received any form of rehabilitation, especially those who have committed misdemeanors. More personnel will ensure that these persons are not left out but also receive attention like other inmates. This avoids and bias felony offenders, such that all convicted persons are eventually rehabilitated.

⁷³ Oketch C, 'Community Rehabilitation of offenders in Kenya: Past, present and prospects. A communication' 1 (1) *African Journal of Crime and Criminal Justice*, 2009, 99.

⁷⁴ Kemeny S, *Mediation and Restorative Justice Sanctions in Norway*, 2014, 2.

4.5 Society

It has been noted that stigmatisation of the offenders once they are released back to society is one of the main factors that contribute to recidivism. Society's mind-set has been fixed on believing that once a person is convicted, then they are not fit to belong in the society anymore. The offenders are deemed to be "institutionalised" such that there is no point of return for them. Members of society then result to not associating with the ex-offenders or even when they do so, it is only to ridicule and side-line them.

Members of society ought to learn that they too, the offenders, were and still are human beings, only that they fell short in terms of character. The society ought to learn how to accept back these people as in most cases, they may have been reformed and are no longer a threat as they were prior to their conviction. There ought to be public awareness on the importance of reintegration of previous offender back to society so that their transition is easy, and more so, that they don't have a reason to commit the crimes again in order to make ends meet, or just go back to prison. This is where the spirit of *Ubuntu* comes in, where there is brotherly love, concern and care.⁷⁵ Society should bear in mind that the ex-offenders are still human, and they do need our help to be able to live a normal life once more.

4.6 CONCLUSION

In order for the Kenyan penal system to be deemed successful, it has been seen that there needs to be the active involvement of various stakeholders in their different capacities. At the top of the pyramid is the government through recognition and funding of the restorative justice programmes; this is followed by the society at large that have to learn how to embrace the reconciliation and reintegration aspects; then the human resource and experienced personnel such as counsellors and the officers working in the prison as they work hand in hand with the inmates and aide in their mediation with their victims; and lastly, the offenders, who are usually the main focus of the penal system.

⁷⁵ Khomba JK, *The African Ubuntu Philosophy*, published Phd Thesis, University of Pretoria, Pretoria, 2011, 129.

CHAPTER FIVE - CONCLUSION

From the facts deduced by this paper on retributive justice, it is clear that the system has not been able to meet its objectives. In fact, this retributive justice system does not seem to fulfil the utilitarian goals of reduction of recidivism and public safety.⁷⁶ Instead, the retributive justice system only seems to focus on punishing the offenders with very little thought on their rehabilitation, reconciliation with family and victims as well as their resettlement back to society once having served their sentences, hence the high rate of recidivism. The system has also failed to have a place for the victims, a factor that would aid in the reconciliation with the offenders as well as healing of the victims.

The fact that the current penal system seems to be failing does not mean that it is entirely doomed and that there is no point of return. Indeed restorative justice has proven to be the proverbial light at the end of the tunnel and clearly, all hope is not lost.

Before jumping straight into what seems to be the solution to Kenya's penal system recurring problems, it is important to bear some things in mind.

The system that is currently in place is what was introduced by the colonial masters when Kenya was declared a British protectorate.⁷⁷ Once Kenya gained independence, we fully accepted this system with both hands, and did not even seek to change anything about it. The practice is still the same to date. It seems that we were so quickly westernised that we even forgot the practice of our fore-fathers of reconciliation which they practiced through the traditional African justice systems. It is quite baffling that we would so readily accept a system that was first put in place, not merely to correct the Africans then but rather to punish and ridicule the African man, even when the punishment was not deserved. Why then should we maintain such a system? A system that is but a reminder of the torture and atrocities that our forefathers went through?

We need not go far to look for answers, yet our national anthem, our symbol of patriotism, is already leading us towards the right path. The last line in the first stanza which reads, "*natukae na undugu, amani na uhuru...*" directly translates to the spirit of brotherliness that we ought

⁷⁶ Gabbay Z, 'Justifying Restorative Justice: A theoretical Justification for the Use of Restorative' Vol 2 *Justice Practices Journal of Dispute Resolution*, 2005, 355.

⁷⁷ Nyaura J, Ngugi M, 'A Critical Overview of the Kenyan Prisons System: Understanding the Challenges of Correctional Practice' 12 No.1 *International Journal of Innovation and Scientific Research*, 2014, 7.

to embody as well as peace and freedom. It also shows the humanity and cohesiveness⁷⁸ that we possess as Kenyans. What then is there to stop us from embracing restorative justice? What should stop us from seeking to mend broken relationships all in the spirit of brotherhood? What is it that would make us forget the humanity in us that would make us want to treat those convicted as offenders knowing very well that human is to err? Reconciliation and acceptance is a factor that the offenders greatly yearn for, so there ought not be any reason why we should deny them this chance. Besides, the victims of the offences in this case, who also end up being victims of the system, should be catered for through the reconciliation, a factor that will also contribute to their healing from the offences committed against them.

In conclusion, as Braithwaite stated “Restorative justice has been the dominant model of criminal justice throughout most of human’s history,”⁷⁹ showing that its success is what had made it to be quite dominant, it is an affirmation, that indeed, restorative justice is a more suitable system than retributive justice.

⁷⁸ Kinyanjui S, ‘Restorative Justice in Traditional pre-colonial “Criminal Justice Systems” in Kenya’ 10 *Tribal Law Journal*, 3.

⁷⁹ Braithwaite J, *Restorative Justice and Responsive Regulations*, 5, 2002.

APPENDIX 1

QUESTIONS ASKED DURING INTERVIEW WITH RECIDIVISTS

1. What crime were they convicted for the first time?
2. How many other subsequent times has she been arrested and convicted, and for what crimes respectively?
3. What was the reason for committing the crime the first time?
4. What was the reason for committing the other subsequent times?
5. Are there any conditions/situations that they faced once released from prison that caused them to commit the crimes the other subsequent times?
6. What was their family and society's view of them while in, and after they had been released from prison?
7. What difficulties did they face when seeking to resettle back in society?
8. Are there any programmes in place within the prison system that are of help to the in terms of rehabilitation?
9. Would they like to be reconciled with their families and/or their victims?
10. Was the prison's reconciliation programme beneficial to them?
11. From the prison's reconciliation and rehabilitation programmes, do they feel like they are well equipped to settle back to society?

APPENDIX 2

	1 st Charge	Subsequent charges	Challenges
<i>Inmate 1</i>	Stealing	Stealing	<ul style="list-style-type: none"> • Stigmatization- society considered her an outcast. Family members did not want to associate with her • Poverty and inadequate skills to enable her have a fresh start
<i>Inmate 2</i>	Possession of Narcotic Drugs	Destruction of property	<ul style="list-style-type: none"> • Severe stigmatization – name calling from her family members and being side lined (DNA) tests to prove if they are actually related
<i>Inmate 3</i>	Selling of Illicit Brew	Selling of Illicit brew	<ul style="list-style-type: none"> • No skills acquired and little rehabilitation to enable her have a fresh start.

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