

The Role of Restorative Justice in the Social Reintegration of Offenders in Kenya

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By
Susan Njoki Waireri
076813

Prepared under the supervision of
Mr. Harrison Mbori Otieno

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DECLARATION

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

Signed:

Date:

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

Signed:

Date:

Mr. Harrison Mbori Otieno

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TABLE OF CASES, STATUTES AND ACRONYMS

Table of Cases

Afri-Forum & Another v Julius Malema & Others (2011), 6 SA 240 EqC.

Constitution

The Constitution of Kenya, 2010.

Table of Statutes

The Criminal Procedure Code, Chapter 75, Laws of Kenya.

Table of Acronyms

UNODC: United Nations Office on Drugs and Crime.

UNAFEI: The United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders.

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ABSTRACT

The criminal justice system in Kenya enforces punishment as the primary means of dealing with an offence.¹ Punishment is more often than not effected through incarceration.² This means that the offender is incarcerated, which isolates the offender from the outside world. The majority of the offenders who are incarcerated will eventually be released and will have to return to the community. Reintegration becomes significant to facilitate the re-entry of the offender into the community.³ Successful reintegration requires a system of justice that is cognizant of the needs and roles of the stakeholders once a crime is committed.⁴ This will promote healing and reconciliation for all the stakeholders and will encourage receptivity of the offender back into the community once released. In order to guarantee this, restorative justice should be foundational to the social reintegration of offenders. Through restorative justice, offenders accept responsibility for their offending behaviour, make reparations to the victim and the community and this in turn guarantees a successful reintegration.⁵ This paper assesses the role that restorative justice has to play in the social reintegration of offenders.

¹ Wenzel M, Okimoto TG, Feather NT, Platow MJ, 'Retributive and Restorative Justice Michael Wenzel' *32 Law Human Behaviour*, 2008, 375.

² Kiage P, *Essentials of Criminal Procedure in Kenya*, Law Africa, 2010, 178.

³ Wenzel *et al*, 'Retributive and Restorative Justice Michael Wenzel', 376.

⁴ Barton C, 'Empowerment and Retribution in Criminal and Restorative Justice', *2 Australian Journal of Professional Ethics* (1999), 2-3.

⁵ Bazemore G, 'Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration', *41 American Behavioral Scientist* 1998, 768.

CHAPTER ONE

RESEARCH PROPOSAL

Background of the Problem

The criminal justice system in Kenya heavily borrows from those of her colonial predecessors.⁶ The components of the system and the legal framework of criminal procedure is derived from the English criminal law model.⁷ The main participants in the justice system are the police in investigations and arrests, the prosecution in carrying out legal proceedings against the accused, the judiciary in implementing criminal procedure, the prison service in reformation and rehabilitation, the probation and aftercare department in offender supervision and the community.⁸

The Western model of a court-based criminal justice system offers a specific notion of justice as a response to rule-breaking.⁹ The justice system is retributive in nature. This system enforces punishment as the primary means of dealing with an offence or transgression against the law.¹⁰ Once a punishment is imposed, justice is often considered done. The motives for retributive justice correspond to behaviour control.¹¹ In retributive justice, an offender, having violated rules or laws, deserves to be punished and, for justice to be administered, has to be punished in proportion to the severity of the wrongdoing.¹² Punishment of the offender is sufficient, or even necessary, to restore justice after criminal offences.¹³

Punishment is an act that intentionally inflicts pain on another person.¹⁴ For an act to be defined as punishment, it must conform to five basic rules: First, it must create human suffering. Second, it should arise as a direct result of the perpetration of an offence. Third, it must only be directed to

⁶ Coldham S, 'Criminal Justice Policies in Commonwealth Africa: Trends and Prospects', 44 *Journal of African Law*, 2000, 218-238.

⁷ Coldham S, 'Criminal Justice Policies in Commonwealth Africa: Trends and Prospects', 218-238.

⁸ Obondi CAO, 'Effective Resettlement of Offenders by Strengthening 'Community Reintegration Factors': Kenya's Experience', UNAFEI 145th International Training Course Participants and Observers' Papers, 2009, 59.

⁹ Wenzel *et al*, 'Retributive and Restorative Justice Michael Wenzel', 375.

¹⁰ Wenzel *et al*, 'Retributive and Restorative Justice Michael Wenzel', 375.

¹¹ Duff RA, *Punishment, Communication, and Community*, Oxford University Press 2001.

¹² Carlsmith KM *et al*, 'Why do we punish? Deterrence and just deserts as motives for punishment', 83 *Journal of Personality & Social Psychology*, 2002, 284-299.

¹³ Darley J, 'Just punishments: Research on Retributional Justice' In M Ross and DT Miller (eds) *The Justice Motive in Everyday Life*, Cambridge University Press 2002, 314-333.

¹⁴ Antony Flew, 'The Justification of Punishment', 29 *Cambridge Journals*, 1954, 291-307.

the person who undertook the offence. Fourth, punishment must be the intentional creation of other humans in response to the offence. Fifth, punishment must be inflicted by an authorised body representing the embodiment of rules or laws of the society in which the offence was committed.¹⁵

The philosophical justifications of punishment can be categorized into two clusters. First, the punishing future crimes. Second, the punishing past crimes.¹⁶

The justifications in the first category are the principles of ensuring the offender does not relapse into crime post penal sanctions thus punishing future crime. They include reform, rehabilitation, deterrence and incapacitation.¹⁷ The second category justifies punishment through principles that ensure the offender is actually punished for the crimes committed. This includes retribution and just deserts.¹⁸

Moreover, there are principles that go beyond the punishment of offenders which are visions of inclusionary, rather than exclusionary, social control that are rooted in social integration and in the community.¹⁹ These principles include redress, reparation, restitution, repayment, reconciliation and reintegration.²⁰

The criminal justice system in Kenya, which is a replication of the Western criminal system mainly disseminates retributive justice.²¹ Punishment of offenders in Kenya is effected by the courts through sentencing.²² There are various types of sentences nevertheless the most prevalent is incarceration. The period of incarceration varies with the crime committed and according to the guidelines provided by the Sentencing Policy Guidelines.²³ Incarceration temporarily removes offenders from the community. Reform and rehabilitation are executed by the Kenya Prisons Service.²⁴ The offender's entry back into the community is facilitated by the Department of

¹⁵ Scott D *et al*, *Prisons and Punishment: The Essentials*, SAGE 2014, 18.

¹⁶ Scott D *et al*, *Prisons and Punishment: The Essentials*, 19-26.

¹⁷ Scott D *et al*, *Prisons and Punishment: The Essentials*, 27.

¹⁸ Carlsmith KM *et al*, 'Why do we punish? Deterrence and just deserts as motives for punishment', 284–299.

¹⁹ Cohen S, *Visions of Social Control: Crime, Punishment and Classification*, Cambridge: Polity Press 1985.

²⁰ Cohen S, *Visions of Social Control: Crime, Punishment and Classification*.

²¹ Coldham S, 'Criminal Justice Policies in Commonwealth Africa: Trends and Prospects', 218-238.

²² Kiage P, *Essentials of Criminal Procedure in Kenya*, 178.

²³ The Judiciary, *Sentencing Policy Guidelines*, 2016, 5-6.

²⁴ Obondi, CAO, 'Effective Resettlement of Offenders by Strengthening 'Community Reintegration Factors': Kenya's Experience', 60.

Probation and Aftercare Services.²⁵ The Department implements an Aftercare Support program, which provides supervision, and support to ex-offenders as a re-entry program in society.²⁶

The overwhelming majority of people sentenced to prison will be released back into society, more often than not into the communities in which their offending behaviour took place.²⁷ Reintegration comes into play to facilitate the re-entry of the offender into the community to which he had been previously detached.²⁸

Reintegration aims to ensure that offenders do not relapse into the cycle of crime and recidivism.²⁹ The importance of reintegration of offenders is instrumental to any comprehensive and effective crime prevention strategy.³⁰ Other than the prevention of recidivism, reintegration is significant owing to the fact that it contributes to public safety.³¹ Offenders are imprisoned to protect society. The period of imprisonment must be used constructively to guarantee that when offenders return to the community, they are not only willing but able to lead a life as a law-abiding citizen.³² The ability of the offender to do this is affected by the attitude and the reception of the community of offenders after they are released from prison.³³

Offenders face significant social adaptation issues, which can include family and community stigmatization and ostracism, and the ensuing negative impact on their ability to find jobs or housing, return to formal education or build or re-build individual and social capital.³⁴ They are preys of becoming caught up in a cycle of failed social integration, reoffending, reconviction and social rejection.³⁵ Accordingly, communities should understand and accept the importance of

²⁵ Obondi, CAO, 'Effective Resettlement of Offenders by Strengthening 'Community Reintegration Factors': Kenya's Experience', 61.

²⁶ Obondi, CAO, 'Effective Resettlement of Offenders by Strengthening 'Community Reintegration Factors': Kenya's Experience' 61.

²⁷ *United Nations Office on Drugs and Crime (UNODC), 'Custodial and Non-Custodial Measures: Social Reintegration'* (Criminal Justice Assessment Toolkit, 2006), 1.

²⁸ Wenzel *et al*, 'Retributive and Restorative Justice Michael Wenzel', 376.

²⁹ *United Nations Office on Drugs and Crime (UNODC), 'Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders'* (Criminal Justice Handbook Series, 2012), 1.

³⁰ *UNODC, 'Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders'*, 1.

³¹ *UNODC, 'Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders'*, 5.

³² Barton C, 'Empowerment and Retribution in Criminal and Restorative Justice', 2-3.

³³ *UNODC, 'Custodial and Non-Custodial Measures: Social Reintegration'*, 1.

³⁴ Barton C, 'Empowerment and Retribution in Criminal and Restorative Justice', 16.

³⁵ *UNODC, 'Custodial and Non-Custodial Measures: Social Reintegration'*, 2.

ensuring the successful reintegration of offenders. If not, they remain unwilling or unable to facilitate that process or to play an active role in the rehabilitation of offenders.

Furthermore, reintegration seeks to address the social costs of the crime.³⁶ The law handles the costs of law enforcement and imprisonment which solely impact the offender. However, other stakeholders in the criminal dispute are not considered.³⁷ The victim of the crime and the community do not have a voice in the process and thus do not reconcile their differences with the offender.³⁸

Where the reintegration fails, there are additional social and economic costs to be borne by the state. Consequently, successful reintegration is key to the reduction of costs to be borne and thus attractive to the state.³⁹

Successful reintegration will also help curb the quandary of prisons population. In Kenya, the prison population rate and the total number of offenders is increasing annually due to a deficiency in the legal framework to address reintegration of offenders.⁴⁰

Social reintegration refers to programs and initiatives designed to help offenders who have been placed in an institution successfully reintegrate into the community after their stay in an institution.⁴¹ Social support should be provided to them before, during and after the release of the offender and the re-entry into society.⁴² The community has a fundamental role to play in assisting offenders return to society and supporting ex-offenders in rebuilding their lives.⁴³ Research indicates that having strong social support is one of the most important factors contributing to successful reintegration.⁴⁴

³⁶ UNODC, *Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders*, 8.

³⁷ Barton C, 'Empowerment and Retribution in Criminal and Restorative Justice', 2-3.

³⁸ Wenzel *et al*, 'Retributive and Restorative Justice', 376.

³⁹ UNODC, *Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders*, 8.

⁴⁰ World Prison Brief and Institute for Criminal Policy Research paper available at <http://www.prisonstudies.org/country/kenya>

⁴¹ Hai NY, Dandurand Y, 'The Social Re-integration of Offenders', 29 *VNU Journal of Legal Studies* 2013, 24-38.

⁴² Hai NY, Dandurand Y, 'The Social Re-integration of Offenders', 24-38.

⁴³ Michigan Justice Statistics Center, *Understanding the Challenges Facing Offenders upon their Return to the Community: Final Report*, School of Criminal Justice, 2007, 3.

⁴⁴ Quaker Council for European Affairs (QCEA), *The Social Reintegration of Ex-Prisoners in Council of Europe Member States* 2011, 107-116.

To guarantee the successful social reintegration of offenders into the community, there is a need for a justice system which is cognizant of all the stakeholders in a criminal dispute.⁴⁵ This system should work towards empowering them in the process and subsequently enhancing the settlement of the dispute and the administration of justice. This is the realm of Restorative Justice.

Restorative justice is defined as a process through which remorseful offenders accept responsibility for their misconduct to those injured and to the community, that, in response allows the reintegration of the offender into the community.⁴⁶ Restorative justice has challenged the assumption underlying the existing criminal justice system that punishment of the offender is sufficient, or even necessary, to restore justice after criminal offenses.⁴⁷ While punishment can be, and often is, part of restorative justice practices, it is not central. Crucial for proper restorative justice is a process of deliberation that places emphasis on healing rather than punishing.⁴⁸ This allows for restoration of the offender in terms of his or her self-respect, restoration of the relationship between offender and victims, as well as restoration of both offenders and victims within the community.⁴⁹

Restorative justice ensures that the affected parties are involved in the justice process.⁵⁰ This endows the different communities of care to respond effectively to the causes and consequences of the crime.⁵¹ Restorative justice seeks to understand the needs and obligations of the offender, the victim and the community in order to promote healing as well as repairing the harm done.⁵² Restorative justice regards transgressions as conflicts that need to be given back to their rightful owners for them to resolve: offenders, victims, and their respective communities.⁵³

⁴⁵ Barton C, 'Empowerment and Retribution in Criminal and Restorative Justice', 2-3.

⁴⁶ Bazemore G, 'Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration', 768.

⁴⁷ Wenzel *et al*, 'Retributive and Restorative Justice Michael Wenzel', 376.

⁴⁸ Brathwaite J, 'Setting Standards for Restorative Justice', 42 *British Journal of Criminology*, 2002, 564.

⁴⁹ Brathwaite J, 'Setting Standards for Restorative Justice', 564.

⁵⁰ Wenzel *et al*, 'Retributive and Restorative Justice Michael Wenzel', 377.

⁵¹ Barton C, 'Empowerment and Retribution in Criminal and Restorative Justice', 21.

⁵² Zehr H and Gohar A, *The Little Book of Restorative Justice*, Good Books Intercourse, USA, 2002, 40.

⁵³ Bazemore G, 'Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration', 768.

The legal framework in Kenya allows for the use of alternative forms of dispute resolution in the exercise of judicial authority by the courts.⁵⁴ These include reconciliation mediation, arbitration and traditional dispute resolution mechanisms.

Statement of the Problem

The problem lies in the inability of the offender, post incarceration to lead life as a law-abiding citizen as a result of the social stigmatization of the offender.⁵⁵ The inability is instigated by the disempowerment of the primary stakeholders in the criminal justice dispute, who are the victim, the offender and their respective social circles of care.⁵⁶ The victim and the community at large are not sensitized and included thus they do not understand the role that reintegration plays in the prevention of recidivism and re-entry of the offender into society.⁵⁷ This hampers the social reintegration of the offender and stimulates recidivism.⁵⁸

Justification of the Study

Restorative justice is an evolving response to crime that respects the dignity and equality of each person, builds understanding, and promotes social harmony through the healing of victims, offenders and communities.⁵⁹ Restorative justice is as such is noteworthy for the various components of the criminal justice system.

First, the Judiciary. The court's mandate in the criminal justice system should be informed by more than theories of punishment and should go beyond punishment to offer solutions that have the overall effect of addressing the injustice committed by the offender and making reparations to the victims of the offence.⁶⁰ Restorative justice will be able to afford the court process a way of reconciliation and resolution of the dispute. This will enable the proper administration of justice.

⁵⁴ Article 159(2) (c), *Constitution of Kenya* (2010).

⁵⁵ UNODC, *Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders*, 5.

⁵⁶ Barton C, 'Empowerment and Retribution in Criminal and Restorative Justice', 15.

⁵⁷ UNODC, *Custodial and Non-Custodial Measures: Social Reintegration*, 2.

⁵⁸ UNODC, *Custodial and Non-Custodial Measures: Social Reintegration*, 1.

⁵⁹ Zehr H, Gohar A, *The Little Book of Restorative Justice*, Good Books Intercourse USA, 2003, 11.

⁶⁰ Obondi, CAO, 'Effective Resettlement of Offenders by Strengthening 'Community Reintegration Factors': Kenya's Experience', 60.

Second, the Prisons Service. This study will inform their reintegration programs in order to facilitate for restorative justice models. For successful reintegration, efforts must be made while the offender is imprisoned to reconcile the offender with the victim and the community as well as make them realize the harm they have done.⁶¹ This will be contributory in promoting reconciliation with the victim and other communities of care.

Third, the Department of Probation and Aftercare Service. The department plays a huge role in the re-entry of offenders and their resettlement in the community. This study is significant in informing the principles of probation and aftercare.⁶² The focus on social reintegration will shed some light onto the correlation between restorative justice and the prevention of recidivism through hedging against risk factors that are making it difficult for the offender to function normally in society.⁶³

Fourth, policy makers. The reintegration of offenders back in to local community has been one of the greatest contemporary challenges.⁶⁴ This is owing to the fact that a huge percentage of incarcerated offenders will ultimately be re-entering the community after they finish serving their sentence.⁶⁵ This is especially the case in Kenya where there is incarcerations of minor offences which means the offenders will be out in a short time. Public policy will be interested in re-entry programs that integrates some sort of preparation of offenders for their reintegration.⁶⁶

Fifth, this study will be significant for the community. The community has to understand its role in the social reintegration of offenders.⁶⁷ Additionally, the community, more so the victim, should be included and empowered in the criminal justice system in order to facilitate fair administration of justice.

⁶¹ UNODC, *Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders*, 93.

⁶² Obondi, CAO, 'Effective Resettlement of Offenders by Strengthening 'Community Reintegration Factors': Kenya's Experience', 61.

⁶³ Hai NY, Dandurand Y, 'The Social Re-integration of Offenders', 26.

⁶⁴ Michigan Justice Statistics Center, *Understanding the Challenges Facing Offenders upon their Return to the Community: Final Report*, 3.

⁶⁵ Michigan Justice Statistics Center, *Understanding the Challenges Facing Offenders upon their Return to the Community: Final Report*, 3.

⁶⁶ Michigan Justice Statistics Center, *Understanding the Challenges Facing Offenders upon their Return to the Community: Final Report*, 5.

⁶⁷ UNODC, *Custodial and Non-Custodial Measures: Social Reintegration*, 15.

The rising prison populations in the country require a final and sustainable solution which will in turn reduce the costs of law enforcement of the state. Through offender reintegration programs, offenders are rehabilitated and successfully reintegrated into the community which reduces the costs of law enforcement, monitoring offenders post penal sanction and this will control the costs of running prisons due to a reduction in the incarceration of second time offenders.

Literature Review

There exists an affluence of literature on restorative justice.⁶⁸ However, there is a scarcity in the discourse of the role of restorative justice in the reintegration of offenders more so in relation to Kenya

The Little Book of Restorative Justice provides an overview of restorative justice. It elucidates on the core principles of restorative justice in order to bring clarity to restorative justice. It begins by dispelling misunderstood notions of restorative justice and in doing so brings out the main idea behind restorative justice. The book emphasizes on the harm caused by crime, the roles and needs of the communities of care as well as their obligations once a crime is committed.

Barton emphasizes the chief strength of restorative justice interventions does not lie in their rejection of punishment and retribution, but the empowerment of communities of care who are the most likely to respond effectively to both the causes and the consequences of criminal wrongdoing.⁶⁹ He asserts that what is overlooked is that restorative justice responses often contain retributive and punitive elements themselves and sometimes, such as in serious cases, necessarily so. Therefore, blaming retribution, 'or even punishment, for the ills of the criminal justice system is largely beside the point. Punishment and retribution cannot be ruled out by any system of justice. However, he does not examine the use of restorative justice in the social reintegration of offenders.

Bazemore provides a comprehensive discussion of the new reintegrative and restorative justice theories and the preliminary success of the application of these theories.⁷⁰ He argues that the retributive paradigm offers only a simplistic choice between helping and hurting offenders which

⁶⁸ Zehr H and Gohar A, *The Little Book of Restorative Justice*.

⁶⁹ Barton C, 'Empowerment and Retribution in Criminal and Restorative Justice'.

⁷⁰ Bazemore G, 'Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration'.

fails to adequately address the needs of communities and victims. He suggests the reintegrative and restorative model. He stresses that neither punitive nor rehabilitation focusses models are meeting the needs of communities, victims and offenders. He does not nevertheless link restorative justice to offender reintegration.

Wenzel discusses the emergence of restorative justice as having important implications for the psychology of justice.⁷¹ He proposes that that two different notions of justice affect responses to rule-breaking: restorative and retributive justice. Retributive justice essentially refers to the repair of justice through unilateral imposition of punishment, whereas restorative justice means the repair of justice through reaffirming a shared value-consensus in a bilateral process. Among the symbolic implications of transgressions, concerns about status and power are primarily related to retributive justice and concerns about shared values are primarily related to restorative justice. At the core of these processes, however, lies the parties' construal of their identity relation, specifically whether or not respondents perceive to share an identity with the offender. This author does not address the issue of social reintegration of offenders and how it can be realized through restorative justice models.

Haley contends that an integrated approach to restorative justice offers an alternative to the retributive models that far more effectively and efficiently achieve each of the three principal aims of criminal justice such as victim reparation, offender correction, and crime prevention.⁷² He investigates retribution and restorative as competing moral values or defining attributes of justice. His aim is to establish which value best serves the social interests and fundamental aims of criminal justice. He concludes that that an integrated approach based on the principles of restorative justice is by far superior. Haley does not address the question of restorative justice in the social reintegration of offenders.

⁷¹ Wenzel M *et al*, 'Retributive and Restorative Justice'.

⁷² Haley J, 'Beyond Retribution: An Integrated Approach to Restorative Justice' 36(4) *Washington University Journal of Law and Policy*, 2011.

Statement of Objectives

The primary objective of this study is to investigate on how restorative justice values can be used to enhance the social reintegration of offenders in society. The secondary objectives of this study are:

- I. To appraise retributive justice vis-à-vis restorative justice.
- II. To investigate the suitability of restorative justice in the social reintegration of offenders.
- III. To investigate the incorporation of restorative justice in reintegration programs in Kenya.

Research Questions

This study will aim to answer the following interlinked questions:

- I. Is restorative justice suitable in the social reintegration of offenders?
- II. How can restorative justice models be incorporated into the criminal justice system in Kenya?

Hypothesis

This research paper proceeds on the presumption that:

- I. Restorative justice in the criminal justice system is significant in the successful social reintegration of offenders.
- II. Restorative justice in the criminal justice system enhances the effective resolution of criminal disputes.

Research Methodology

This research will principally take the form of a qualitative desk based research and will use primarily library resources, online resources, journal articles, handbooks, national and international legislation. The value of a qualitative research is that they provide a holistic view of the phenomena under investigation. Additionally, it will enable an in depth research into the study.

Quantitative research will be also be used. This will be carried out through interviews. The value of qualitative research will enhance the reliability of the study and eliminate the subjectivity of judgement. Quantitative research will be carried out through interviews of the following people:

1. The Lang'ata Women's Prison who will be instrumental in acquiring a better understanding of the application of restorative justice in the prison system in Kenya.
2. The Director of the Probation and Aftercare Services branch at Makadara, Nairobi. This institution is credited with the provision of aftercare services to ex-offenders. The interview will be influential in understanding how reintegration is currently effected in Kenya.

Limitations

- I. The time constraints of the study. This study is part of the course work for the requirements for the award of the degree of Bachelor of Laws. The study, therefore, has to be conducted and submitted within the prescribed period.
- II. Research design and methodology. The study will rely primarily on qualitative research compared to quantitative research.

CHAPTER TWO: THEORETICAL FRAMEWORK

Introduction

This chapter will explore the theoretical foundations of restorative justice with an aim of providing a legal basis for the practice of restorative justice. In order to enunciate on the legal backing of restorative justice, an understanding of the concept of justice is necessary. The main proposition of restorative justice is that the criminal justice system does not administer justice to the offender, the victim and the community owing to the procedures involved and the understanding as well as response to crime.⁷³

This chapter will explore three legal theories namely: the Nicomachean Conception of Justice which is the theory of justice as articulated by Aristotle, A Theory of Justice by John Rawls and The Post-Modern Theory of Justice. This chapter will also discuss the Ubuntu Philosophy which though not a legal theory is a philosophy that is central to the idea of restorative justice and is relevant to the Kenyan situation owing to the fact that the Philosophy is an African Philosophy.

The Nicomachean Conception of Justice

Aristotle sets out to inquire about justice and the acts concerned with it.⁷⁴ Justice signifies a habit or character that disposes man to be just, do what is just and wish what is just.

The term 'just' according to Aristotle has two different meanings. In the first conception, a just thing is that which is in accordance with the law. In the second conception, a just thing is that which is fair.⁷⁵

In the first sense, we can discern that all lawful things are just, that whatever the law prescribes is just. Aristotle recognizes that the law legislates on all manner of things and is aimed at the common interest of all. He thus qualifies what is just as that which is applied to whatever tends to produce

⁷³ Nesser JJ, 'Restorative justice as a Reaction to Crime: Development and Conceptualization' Crime Research in South Africa, Volume 2, Number 2, 2001, 2.

⁷⁴ Peters FH, *The Nicomachean Ethics of Aristotle as Translated by FH Peters*, 5th ed, William Clowes and Sons Limited, London, 1893, 136.

⁷⁵ Peters FH, *The Nicomachean Ethics of Aristotle as Translated by FH Peters*, 138.

and preserve the happiness of the community and the several elements of that happiness.⁷⁶ It follows that justice denotes conduct that conforms to the observance of authoritative rules of human conduct which are concerned with the happiness of the community. Justice in this sense, according to Aristotle is in relation to the sphere of morality and is complete virtue. It is referred to as moral justice.⁷⁷

Aristotle conceives justice as not only a virtue but also as complete virtue. This is for the reason that justice is the exhibition of complete virtue and that man who has the virtue of justice is able to exhibit it in dealing with others which is different from other virtues which man exhibits in his own private affairs.⁷⁸ Justice is therefore a social virtue since it directs the conduct of man in relation to others.

In the second sense, justice signifies equality. Aristotle asserts that justice constitutes a fair mean and proportional fairness. Justice is thus both a mean quantity, the balance of extremes as well as proportional, a fair amount in relation to something else and to other persons. This sense of justice is founded on the principle of equality. It is concerned with external and commensurable things. This means that for something to be just it has to be proportional, an ideal mean or the midway between two extremes.⁷⁹

Consequently, justice comprises moral justice and equality. Aristotle describes the relationship between moral justice and equality by elucidating that equality is related to moral justice in the same way a part is related to the whole.⁸⁰ Aristotle opines that not everything that run counter to the concept of moral justice will run counter to principle of equality while whatever runs counter to the principle of equality will run counter to the concept of moral justice.⁸¹ Equality is therefore not a derivative of moral justice rather an element of moral justice essential to the complete understanding of the implication and significance of it.

⁷⁶ Peters FH, *The Nicomachean Ethics of Aristotle as Translated by FH Peters*, 139.

⁷⁷ Chorust AH and Osborn DL, 'Aristotle's Conception of Justice' 17 *Notre Dame Law Review* 2, 1942, 130.

⁷⁸ Peters FH, *The Nicomachean Ethics of Aristotle as Translated by FH Peters*, 139.

⁷⁹ Chorust AH and Osborn DL, 'Aristotle's Conception of Justice' 130.

⁸⁰ Chorust AH and Osborn DL, 'Aristotle's Conception of Justice' 131.

⁸¹ Chorust AH and Osborn DL, 'Aristotle's Conception of Justice' 131.

In criticism of the Nicomachean theory of Justice, Aristotle opines his theory of justice is unsatisfactory. He thought it unsound and impractical to comprehend all phenomena within a theory of justice.⁸² He argues that if justice as the practice of virtue toward others requires a disregarding of virtues conducive to one's own good, to insist upon this disregard may be not only to ask the impossible of human beings, but to ask the undesirable as well. Consequently, we could not consistently defend as correct and beneficial such a stance.

Aristotle's conception of justice is significant for formulating a basis for the use of restorative justice owing to the fact that Aristotle's theory of justice defines justice as complete virtue owing to the fact that justice is exhibited in dealings with others unlike other virtues. Justice is therefore a social virtue and consequently advocates for the happiness of the community as the determinant of what is just. Restorative justice seeks to address the needs of the communities of care which are involved when a crime is committed in order to preserve and restore the community. Likewise, Aristotle's principle of equality is in line with restorative justice as it advocates for an offender to be treated as any other member of the community and thus be able to reintegrate into the community.

A Theory of Justice

John Rawls develops a theory of justice that offers a fair choice situation in which parties would choose mutually acceptable principles of justice. Rawls tries to answer the question: What is the best organization of the distribution of primary goods in society? Rawls progresses a theory of justice that uses the social contract as an illustration and introduces the concept of the original position and the veil of ignorance to demonstrate the theory of justice as fairness.⁸³ He proposes that the structure of society is the primary subject of justice. For him, justice is the first virtue of a social institution.⁸⁴

The approach of Rawls in his theory of justice which is based on the social contract changes the focus from a discussion of what the parties to the social contract had agreed on to what reasonable

⁸² Winthrop D, 'Aristotle and Theories of Justice' 72 *The American Political Science Review* 4, 1978, 1202.

⁸³ Rawls J, *A Theory of Justice*, 3.

⁸⁴ Rawls J, *A Theory of Justice*, 3.

people might agree to if they were to reach an agreement.⁸⁵ The basis of the agreement by the parties will be the principles of justice. The principles of justice are principles which free and rational persons in their original positions would accept as defining the fundamental terms of their association.⁸⁶ The original position corresponds to the state of nature in the social contract theory. It is a state of equality where there is no knowledge of social paradigms.⁸⁷ The principles of justice are chosen under a veil of ignorance. The veil of ignorance ensures that no one is disadvantaged in the choice of the principles of justice.⁸⁸ The veil is to ensure that all parties to an agreement are similarly ignorant of their positions in society. This is for the reason that different positions in life create differing self-interests. Any agreements made in this state will be acceptable and will hold. The principles of justice are therefore a result of a fair agreement. Rawls therefore defines justice as fairness.

Justice as fairness is the idea that the principles of justice are principles that determine a fair resolution of conflicts of interest among persons in a society. He discerns the principles of justice as: First, equality in the assignment of basic rights and duties. Each person should have equal rights to the most extensive liberties consistent with others enjoying the same liberties. Restorative justice is concerned with the roles of the offenders, the victim and the community once a crime is committed. Second, where there are any social or economic inequalities, they are to be arranged such that they are to the benefit of everyone and more specifically, the least advantaged and should be attached to all offices from which no person should be blocked from applying.⁸⁹ Restorative justice seeks to address the social inequalities that offenders face post-incarceration and consequently promote the social reintegration of offenders.

Rawls was dissatisfied with the traditional philosophical arguments about what makes a social institution just and about what justifies political or social actions and policies. He argued his theory of justice as a superior approach to utilitarianism and other perspectives.⁹⁰

⁸⁵Rawls J, *A Theory of Justice*, 207.

⁸⁶Rawls J, *A Theory of Justice*, 207.

⁸⁷ Rawls J, *A Theory of Justice*, 208.

⁸⁸ Rawls J, *A Theory of Justice*, 208.

⁸⁹ Rawls J, *A Theory of Justice*, 210.

⁹⁰ Rawls J, *A Theory of Justice*, 14.

For Rawls, utilitarianism was the most formidable version of teleology. Utilitarianism defines the good (happiness/pleasure) as independent from the right and identifies the right with maximizing the good. Utilitarianism advanced that society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it.⁹¹ Utilitarianism, however, according to Rawls raises three points of contention.

First, utilitarianism does not take seriously the distinction between persons. To the utilitarian, the amount (total or average) of good distributed to all is what matters, not the rules of distribution to each. Second, to the utilitarian, the optimum society is one which distributes resources with the greatest efficiency; that is, in a manner productive of the greatest benefit (total or average) as this distribution might be assessed by a hypothetical, omniscient ideal observer. Finally, utilitarianism asks too much of some individuals; namely, that they should forego advantages for the sake of the greater good of the whole.⁹²

Rawls is pre-eminently concerned with the right principles of distribution. Justice as fairness conceives the just society as a scheme of association that would be devised by an assembly of rational individualists, for their reciprocal advantage, under conditions that all would agree are fair. Because of this greater emphasis upon the individual and his equal access to advantages, Rawls believes that his conception would be preferred by the parties in the original position. Justice as fairness assures equal liberty to all and stipulates that unequal distributions of primary goods are allowable only if the least endowed gain thereby. It follows that Rawls's well-ordered society is far more stable than the society based upon utilitarian principles.

The critique of Rawls work vests primarily in the communitarian critique that Rawls ideas are excessively individualistic.⁹³ The communitarians claim that Rawls's work surreptitiously draws on an implausible version of individuals as free from all deep moral ties and thus bound only by ends and roles they choose for themselves. The fact is that most of what we value is not a matter

⁹¹ Bentham J, *An Introduction to the Principles of Morals and Legislation*, Batoche Books, Kitchener, 2000, 14.

⁹² Rawls J, *A Theory of Justice*, 20.

⁹³ Sandel M, *Justice: What's the Right Thing to Do?* Farrar, Straus and Giroux, New York, 2010.

of choice but inheritance what really matters is the sustenance of strong communities, in which we can live out the values in which we have been brought up.

Rawls argument on a theory of justice posits that justice in all its guises is concerned with distribution.⁹⁴ The particular focus of all such distributions is to maximize liberty. How well a particular distribution delivers justice can be measured against an evaluative criteria. This criteria argues that: First, a just distribution is one that gives people what they deserve in both a positive and negative sense. Restorative justice advocates for the offender to be held accountable for the crime committed and at the same time, works towards promoting reconciliation between the victim and the offender. Second, distribution should treat people equally while accommodating their differences. Restorative justice strives to enhance the equal treatment of the offender, the victim and the community by trying to address their needs which ensures that none of the stakeholders are neglected. Third, a just distribution will treat people in a manner consistent with their rights and gives effect to those rights. Finally, a just distribution is one that promotes harmonious social relationships between persons affected by the wrong doing. Restorative justice has the aim of improving the relationship between the offender and the victim as well as the offender and the community. This is possible as it is geared towards stimulating the reconciliation and restoration of the offender into the community therefore creating strong social bonds.

Ubuntu Philosophy

Ubuntu is the African philosophy of personhood. Ubuntu is the capacity in an African culture to express compassion, reciprocity, dignity, humanity and mutuality in the interests of building and maintaining communities with justice and mutual caring.⁹⁵ Ubuntu as a concept is founded upon the belief that *umntu ngumntu ngabantu, motho ke motho ba batho ba bangwe*, literally translated as a human being is a human being because of other human beings.⁹⁶

Ubuntu provides a sense of self-identity, self-respect and achievement. Desmond Tutu has said the following on Ubuntu:

⁹⁴ Foley T, *Developing Restorative justice Jurisprudence: Rethinking Responses to Criminal Wrongdoing*, Ashgate Publishing Ltd, 2014.

⁹⁵ Gade CBN, 'The Historical Development of the Written Discourses on Ubuntu' 1.

⁹⁶ Gade CBN, 'What is Ubuntu?' 31 *South African Journal of Philosophy* 3, 2012, 1.

“Africans have this thing called Ubuntu, the essence of being human. It is part of the gift that Africans will give the world. It embraces hospitality, caring about others, willing to go the extra mile for the sake of others. We believe a person is person through another person. That my humanity is caught up and bound up inextricably in yours. When I dehumanise you I inexorably dehumanise myself. The solitary individual is a contradiction in terms and, therefore, you seek to work for the common good because your humanity comes into its own community, in belonging.”⁹⁷

Ubuntu therefore draws upon the humanistic values that have been perpetuated throughout history. It expresses the interconnectedness, common responsibility and the responsibility of individuals to each other. The philosophy has significant application to all spheres of African life. This includes the religious, metaphysical, social and political life.

The themes of humanity and reconciliation run through the philosophy. Ubuntu is viewed as the essence of being human. One’s humanity is bound to the humanity of others.⁹⁸ A high value is placed on the life of a person. Humanity comes into its own in the community. Ubuntu is seen to embody the African philosophy of respect and human dignity which recognizes that each individual belongs to a greater community.⁹⁹ Humane behaviour is thus critical to Ubuntu since it symbolises the reverence of respect and dignity in the community.

Ubuntu philosophy is used in a daily basis to settle disputes and it is the foundation of reconciliation. The object of reconciliation is to maintain or restore equilibrium, the oneness and the flow of life in the community.¹⁰⁰ The act of reconciliation therefore is considered in the community to have the full force of recognition, legitimacy and the sovereignty of the people.¹⁰¹ Reconciliation restores harmony in the relationship of the stakeholders in a crime and in turn this will lead to a restoration of the dignity of the offender.¹⁰²

⁹⁷ Tutu D, *No Future Without Forgiveness*, Ebury Publishing, 2012.

⁹⁸ <http://www.drfranklipman.com/archbishop-desmond-tutu/> on 09 September 2016.

⁹⁹ Khomba JK and Ulaya ECK, ‘Indigenization of Corporate Strategies in Africa: Lessons from the Ubuntu Philosophy’ 12 *China-USA Business Review* 7, 2013, 131.

¹⁰⁰ Nabudere DW, ‘Ubuntu Philosophy, Memory and Reconciliation’ 2005, 7.

¹⁰¹ Nabudere DW, ‘Ubuntu Philosophy, Memory and Reconciliation’ 6.

¹⁰² *Afri-Forum & Another v Julius Malema & Others* (2011) 6 SA 240 EqC.

The humanistic values of dignity, compassion, group solidarity and respect are most notable in the Ubuntu Philosophy. The sharing of burdens during hard times which results in diminished suffering enables the community to express continued compassion and perseverance.¹⁰³ Individuals express a sense of deep caring for and understanding of each other. Group solidarity on the other hand denotes that the success of an individual should not be aggressively achieved at the expense of others.¹⁰⁴ In the spirit of Ubuntu, cooperative and collaborative environments are employed by allowing individuals to contribute their best efforts in order to support all community members. Respect requires an objective and unbiased consideration of and regard for the rights, values, beliefs and property of another. Respect for a person's dignity irrespective of what he person has done is also encouraged.¹⁰⁵ There have, however, been some challenges in the use and application of the Ubuntu Philosophy which serve as criticisms of the Philosophy.¹⁰⁶ First, the Philosophy is based on unrecorded practice which has resulted in an undocumented Philosophy that makes it harder to transmit to future generations which results in a difficulty in practicing it and fully embracing it. Second, there is insufficient dissemination and sensitization of the Philosophy. Some people do not know about the Philosophy or its foundational concepts. The dissemination of the Philosophy cannot be put on the same plane as Western and Eastern Philosophies which have received massive dissemination into educational systems. Third, the Philosophy is challenged by the proliferation of foreign ideologies. The synchronization of the Ubuntu Philosophy with some aspects of foreign cultures has challenged the principles and beliefs that are foundational to the Philosophy.

Despite these challenges, the Philosophy is relevant to the theme of restorative justice since it advocates for reconciliation and upholds humanity which are significant for understanding restorative justice. Moreover, the Philosophy through the humanistic values of compassion, group solidarity, and respect provide for consideration, understanding and openness with each other which is significant since such values provide a backbone to enable restorative justice to work at

¹⁰³ Nussbaum B, 'Ubuntu: Reflections of a South African on Our Common Humanity' The Society for the Organizational Learning and the Massachusetts Institute of Technology, Volume 4 Number 4, 2003, 24.

¹⁰⁴ Khomba JK and Ulaya ECK, 'Indigenization of Corporate Strategies in Africa: Lessons From the Ubuntu Philosophy' 143

¹⁰⁵ Battle M, *Reconciliation: The Ubuntu Theology of Desmond Tutu* The Pilgrim Press, Cleveland, 2009, 3.

¹⁰⁶ Khomba JK and Ulaya ECK, 'Indigenization of Corporate Strategies in Africa: Lessons From the Ubuntu Philosophy' 147-151.

both the individual and community level. Ubuntu Philosophy therefore provides justification for restorative justice in the Kenyan.

CHAPTER THREE

RESTORATIVE JUSTICE AND SOCIAL REINTEGRATION

Introduction

The criminal justice system is characterized by its understanding of crime and its response to crime.¹⁰⁷ Crime under the criminal justice system in Kenya is considered to be a law breaking or deviant behaviour which amounts to a violation against the state which is then prosecuted by the state.¹⁰⁸ Prosecution in Kenya is aimed at determining on whom criminal culpability is assigned. The offender is thus blamed for the crime and a successful outcome is considered to be a win-loss outcome.¹⁰⁹

The response to crime under the criminal justice system in Kenya encompasses a punitive model.¹¹⁰ This system embraces retributive justice as its *modus operandi*. Retributive justice implies that the primary means of dealing with crime is punishment of the offender and once the punishment is imposed, justice is considered done.¹¹¹ Punishment is therefore seen to establish justice. Punishment is required to be proportional to the severity of the wrongdoing and is sufficient and necessary for justice. Punishment of offenders in Kenya is effected by the courts through sentencing.¹¹²

In terms of participation in the criminal justice system, participation in the justice system primarily involves persons who are remote from the offence which are the state and professionals working on behalf of the state.¹¹³ The victim of the offence is often ignored or neglected and rarely has a chance to communicate about the losses or injury suffered and needs.¹¹⁴ The role of the victim is limited to adducing evidence in court and to submitting victim impact statements that provide

¹⁰⁷ Umbreit MS, Vos B, Coates RB and Lightfoot E, 'Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls' 8 *Cardozo Journal of Conflict Resolution* 2005, 514.

¹⁰⁸ Nesser JJ, 'Restorative Justice as a Reaction to Crime: Development and Conceptualization' 5.

¹⁰⁹ Kiage P, *Essentials of Criminal Procedure in Kenya*, 52.

¹¹⁰ Coldham S, 'Criminal Justice Policies in Commonwealth Africa: Trends and Prospects', 218-238.

¹¹¹ Wenzel M, Okimoto TG, Feather NT, Platow MJ, 'Retributive and Restorative Justice' 375.

¹¹² Kiage P, *Essentials of Criminal Procedure in Kenya*, 178.

¹¹³ Umbreit MS, Vos B, Coates RB and Lightfoot E, 'Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls' 516.

¹¹⁴ Barton C, 'Empowerment and Retribution in Criminal and Restorative Justice', 17.

particulars of the personal harm suffered by the primary victim.¹¹⁵ In addition to this, the role of the community is also limited to the adducing of evidence in court. Where the community is not directly involved with the crime, the community is not seen to have an interest in the crime.

This chapter will develop the objectives of the research by assessing restorative justice vis-à-vis retributive justice by expounding on restorative justice to assess what it has to offer to the criminal justice system in order to ensure that justice is achieved for all the communities of care involved in a crime. Additionally, the chapter will elucidate on the value of reintegration for offenders and in particular risk and reintegration factors in order to give a clear understanding of why reintegration of offenders is significant post-incarceration. Finally, this chapter will address the suitability of restorative justice in the reintegration of the offender.

Restorative Justice

Restorative justice is a system of justice that provides a different approach to understanding crime and responding to crime. Restorative justice provides a shift in focus from the retributive justice model. In order to understand the true value of restorative justice, it is important to dispel any misunderstood notions of what restorative justice is and why it is a departure from the current model.

Restorative justice scholars often assert that the primary problem with the criminal justice system is that it is only interested in punishment of offenders.¹¹⁶ The rejection of punishment is, however, misguided. It is clear that the restorative justice response contains punitive elements. Additionally, punishment plays a major role in deterrence not only of offenders but also of the community as a whole and consequently the maintenance of order in society.¹¹⁷ Punishment cannot then be ruled out as an effective response to crime in any criminal justice system.

The primary role of restorative justice and its value comes from the fact that owing to a different understanding of crime and response to crime, restorative justice focuses on empowering the primary stakeholders in crime and highlighting their needs and roles once a crime is committed.¹¹⁸

¹¹⁵ The Judiciary, *Sentencing Policy Guidelines*, 2016, 47.

¹¹⁶ Barton C, 'Empowerment and Retribution in Criminal and Restorative Justice' 2.

¹¹⁷ Scott D and Flynn N, *Prisons and Punishment: The Essentials*, 21.

¹¹⁸ Zehr H and Gohar A, *The Little Book of Restorative Justice*, Good Books, 11.

These elements of restorative justice have been said to be the chief weakness of the criminal justice system and the greatest strength of restorative justice movement.¹¹⁹

Pertaining to the understanding of what crime is, crime is seen as a more comprehensive conduct than law breaking or deviant behaviour. Crime is understood as an action that causes harm that is perpetrated by one individual towards another individual.¹²⁰ The approach of restorative justice stems primarily from this understanding of crime as harm. Harm in this sense represents a violation of people and of interpersonal relationships.¹²¹ Crime is thus a disruption of the relationship between the victim, offender and community. Crime should then be regarded as violations that need to be given back to the rightful owners in order to enable them repair the harm as much as possible and heal the victim and the community.¹²² Justice cannot therefore be achieved by simply punishing offenders but should strive to repair the harm that crime causes. Additionally, the most affected by crime should become actively involved in the resolution and restoration process.

As regards the response to crime, since crime is understood as harm, this in turn creates obligations.¹²³ The central obligation necessitates repairing the harm done. Obligations are as a result concerned with the needs of those affected most by the crime namely the offender, victim and community.¹²⁴ Understanding these needs is the advent of the restorative justice movement and is foundational to the restorative justice system. The needs of the offender, the victim and the community shall be dealt with below.

For the offender, the need of the offender to understand why they are being punished is vital to the restorative justice process.¹²⁵ Consequently, the need for offender accountability is significant as this encourages offenders to understand the consequences of their actions in order to understand the impact of their behaviour and the harm caused to the victim and the community.¹²⁶ Accountability involves facing up to what one has done and taking steps to put things right.

¹¹⁹ Barton C, 'Empowerment and Retribution in Criminal and Restorative Justice' 1.

¹²⁰ Bazemore G, 'Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration', 769.

¹²¹ Nesser JJ, 'Restorative Justice as a Reaction to Crime: Development and Conceptualization' 5.

¹²² Wenzel M, Okimoto TG, Feather NT, Platow MJ, 'Retributive and Restorative Justice' 376.

¹²³ Zehr H and Gohar A, *The Little Book of Restorative Justice*, 17.

¹²⁴ Zehr H and Gohar A, *The Little Book of Restorative Justice*, 23.

¹²⁵ Nesser JJ, 'Restorative Justice as a Reaction to Crime: Development and Conceptualization' 6.

¹²⁶ Nesser JJ, 'Restorative Justice as a Reaction to Crime: Development and Conceptualization' 6.

Offender accountability will allow the offender repair the harm done to the victim and the community. As a result, accountability will lead to healing for the offender as well as for the victim and the community, reintegration of the offender into the community and the prevention of recidivist behaviour when the offender is offered opportunities to enhance personal competencies.¹²⁷ Another need for the offender is the boosting and support for the reintegration into the community.¹²⁸ This is possible when the offender is accountable for his actions which will lead to him repairing the harm caused and hence a successful re-entry into the community. The offender also needs to be given an opportunity to transform and requires assistance and treatment for the problems associated with his capacity to avoid crime as well as the opportunity to develop and enhance skills.¹²⁹

Victim needs arise and are legitimized in the restorative justice system owing to the understanding of crime. First, victims need information on the offence, why it happened and what has happened since the offence was committed.¹³⁰ This may require direct or indirect access to offenders. This will help victims understand why the offender did what they did and come to terms with what happened. Second, victims need a chance to tell their story, talk about their pain and feelings towards the offender. They require a system that hears the victim in order to communicate to the offender the impact of the harm caused.¹³¹ This is an important element for healing for the victim as it is therapeutic as the victim comes to terms with the trauma of the crime. Third, the victims also call for empowerment in the justice process. Owing to the fact that the victims have the most to gain or lose from the success or failure of the justice process, they should be involved such that they are able to meet their needs, achieve closure and ensure that the matter has been dealt with fairly and ultimately justice has been done.¹³² Fourth, the victims need restitution by offenders

¹²⁷ Umbreit MS, Vos B, Coates RB and Lightfoot E, 'Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls' 561.

¹²⁸ Zehr H and Gohar A, *The Little Book of Restorative Justice*, 15.

¹²⁹ Bazemore G, 'Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration', 772.

¹³⁰ Zehr H and Gohar A, *The Little Book of Restorative Justice*, 13.

¹³¹ Nesser JJ, 'Restorative Justice as a Reaction to Crime: Development and Conceptualization' 7.

¹³² Barton C, 'Empowerment and Retribution in Criminal and Restorative Justice' 16.

where the offender tries to make right the harm even if not completely.¹³³ This is significant in order to give closure to the victims and help them move on with their lives.

Communities are other stakeholders in a crime that are impacted by crime. The participation of communities in the process helps to work towards repairing harm and also strengthens the community at the same time. The community needs to be given attention to their concerns as victims through their empowerment. Community empowerment is noteworthy as it enables the community to say what they consider to be right or wrong, fair or unfair and express disappointment and anger in socially acceptable ways.¹³⁴ The community also has a need for being part of the resolution or in formulating an agreement.¹³⁵ This facilitates a satisfactory agreement for the community as they will consider themselves as owners of the resolution and are likely to be committed to honouring it. Communities also want assurances that the offender will not repeat the same as well as the requirement that offenders and the community at large will take preventative action to ensure that the harm caused does not happen again to any member of the community.¹³⁶ Since the offender and the victim are community members, the community is more likely to know the finer details of the need of the needs of the offender and the victim and so requires encouragement to take on their obligations (such as reconciliation and restoration) towards the victim, offender and the community at large for the welfare of the community.

The definition of restorative justice is thus derived from the understanding of crime and response to crime from the perspective of the restorative justice movement. Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense to collectively identify and address harms, obligations and needs in order to heal and put things as right as possible.¹³⁷

¹³³ Bazemore G, 'Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration', 771.

¹³⁴ Barton C, 'Empowerment and Retribution in Criminal and Restorative Justice', 17.

¹³⁵ Barton C, 'Empowerment and Retribution in Criminal and Restorative Justice', 17

¹³⁶ Bazemore G, 'Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration', 771.

¹³⁷ Zehr H and Gohar A, *The Little Book of Restorative Justice*, 40.

Social Reintegration

The rehabilitation of offenders and their successful reintegration into the community are among the basic objectives of the criminal justice system. Additionally, no crime prevention strategy is complete without effective measures to address the problem of recidivism.¹³⁸ With this in mind, when offenders are incarcerated, the period of imprisonment must be used constructively to ensure that as far as possible, upon the return of the offender into the community, they are not only willing but also able to lead a law-abiding life.¹³⁹

The willingness of the offender is dealt with through rehabilitation programmes that aim to bring about change in some aspect of the offender that is believed to contribute to the offender's criminality.¹⁴⁰ Rehabilitation efforts include providing education and promoting vocational skills, providing psychological and social support by involving professionals, medical treatment, individual and group counselling and spiritual development. The focus of rehabilitation more often than not ignores psychosocial aspects which are necessary for reintegration.¹⁴¹ Moreover, the approach of rehabilitation views a prisoner as having malfunctioned thus in need of reformation. The theory of rehabilitation has also been viewed as flawed as it overlooks the normality of crime in society. Crime may be understood as a normal response to the facts and conditions of the society.¹⁴² Additionally, there has been research that has concluded that with few and isolated exceptions, rehabilitative efforts have had no appreciable effect on recidivism.¹⁴³

The ability of the offender to lead a law abiding life is for the most part beyond the reach of the offender. This becomes the object of social reintegration. The main challenge for prisoners is how they will readapt life into the community after their release. It is evident that most offenders face significant social adaptation issues which include but are not limited to: family and community stigmatization, ostracism, rebuilding individual and social capital and absence of social support

¹³⁸ UNODC, *Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders*, 1.

¹³⁹ UNODC, *Custodial and Non-Custodial Measures: Social Reintegration*, 1.

¹⁴⁰ Dissel A, 'Rehabilitation and Reintegration in African Prisons' available at www.hsreprpress.ac.za accessed on 17th June 2016, 156.

¹⁴¹ Lipton D and Martinson R, *The Effectiveness of Correctional Treatment: A Survey of Correctional Treatment Evaluations*, Praeger, New York, 1975.

¹⁴² Dissel A, 'Rehabilitation and Reintegration in African Prisons' 157.

¹⁴³ Dissel A, 'Rehabilitation and Reintegration in African Prisons' 157.

networks.¹⁴⁴ These issues need to be addressed so that offenders do not become caught up in a cycle of failed social reintegration, reoffending, reconviction and social rejection.

Social reintegration refers to programmes and initiatives designed to help offenders successfully reintegrate into the community post incarceration. These programmes can be classified into:¹⁴⁵

1. Programmes offering support within the institutional setting itself, in advance of the offender's release, to help offenders resolve issues, address risk factors associated with their criminal behaviour, acquire the necessary skills to function well in society, and prepare themselves for re-entry into the community;
2. Community-based programmes, often called "aftercare" programmes, to facilitate the social integration of the offenders after their release from an institution. Many of the latter programmes include both some form of community supervision as well as assistance.

Social reintegration thus plays a role in providing offenders with assistance they need so that they may lead law-abiding lives and avoid reoffending.

As social reintegration involves reintegration into the community after incarceration that isolates prisoners from the community, the role of the family and friends as well as the community as a whole is pivotal to the success of social reintegration. For the community to understand its role in social reintegration, families, friends and communities need to be sensitized in preparation for the reintegration of the offender in society and promote contact between them and the offender. Their role ignites a relationship between them and the offender which provides emotional support, support in adjustment to changes that have taken place during the period of incarceration, positive reinforcement and motivation for law-abiding behaviour as well as a source for reconnection to the wider community.¹⁴⁶ For this reason, the empowerment of the community ensures that offenders can be reintegrated since offenders can rely on their relationships with family, friends and the community to achieve their goals and to prevent them from re-offending.

¹⁴⁴ UNODC, *Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders*, 5.

¹⁴⁵ Hai NY and Dandurand Y, 'The Social Re-integration of Offenders', 26.

¹⁴⁶ Quaker Council for European Affairs (QCEA), *The Social Reintegration of Ex-Prisoners in Council of Europe Member States*, 86.

Successful social reintegration will require an understanding of the risk and resilience factors of the offender, the needs of the offender as well as the responsivity of the offender to reintegration programmes.¹⁴⁷ This results in social reintegration that is not only based on merely the acceptance of the offender back into the community but also reintegration that is tailored to ensure that the community can take steps to ensure the offender leads a law-abiding life in the long term. Risk factors are factors that place the offenders at risk and prevent them from functioning normally in society.¹⁴⁸ They may be internal or external. Resiliency factors on the other hand protect the offender and provide the offender with the strength and spirit to enable them lead a law-abiding life.¹⁴⁹ They can also be internal or external. Both risk and resiliency factors need to be identified so that reintegration can focus on promoting resiliency factors while keeping an eye on the risk factors. The needs of the offender post-incarceration such as employment and basic needs such as food, clothing and shelter should also be considered. This will ensure that avenues for providing for these needs are undertaken by the offender through a web of support. The responsivity of the offender to the programme is also important since successful reintegration is dependent on a willing offender.¹⁵⁰ If they do not wish to be reintegrated, the programme will fail. We can see from the above that once social reintegration is successful, the offender has the capability to be reintegrated into other spheres of life such as economic life. This is for the reason that such reintegration provides support, positive reinforcement and motivation for the offender which will reflect in other spheres of life.

Conclusion

Restorative justice has a role to play in social reintegration. Some of the elements required for a successful social reintegration such as resilience factors for the offender can only be realised through a restorative justice system. Restorative justice uniquely advocates for reparation which necessitates offender accountability for the harm done and gives a platform for the victim to communicate what is required to put right the wrong and repair the harm done. Further, restorative justice campaigns for the empowerment of offenders, victims and the community which in turn

¹⁴⁷ Hai NY and Dandurand Y, 'The Social Re-integration of Offenders', 26-27.

¹⁴⁸ Hai NY and Dandurand Y, 'The Social Re-integration of Offenders' 26.

¹⁴⁹ Hai NY and Dandurand Y, 'The Social Re-integration of Offenders' 27.

¹⁵⁰ Workman K, 'How Should We Reintegrate Prisoners?' Rethinking Crime and Punishment, 4.

will enable successful reintegration. These stakeholders in crime are able to work through the conflict, resolve it and reintegrate the offender and restore the equilibrium in the community.

Restorative justice has potential for providing footing to social reintegration by counteracting the isolating effects of incarceration. Restorative Justice promotes contact between the offender and the victim as well as the community which in turn is fundamental in the social reintegration process. Restorative Justice is seen to jumpstart the social reintegration process. Restorative Justice therefore offers the best strategy for successful reintegration and crime prevention and reduction of recidivism.

CHAPTER FOUR

RESTORATIVE JUSTICE AND SOCIAL REINTEGRATION IN KENYA

Introduction

Restorative justice provides groundwork for any successful social reintegration. Restorative justice should thus be a part of Kenya's criminal justice system in order to promote social reintegration of offenders post-incarceration. It is therefore important to investigate whether there is a framework for the use of restorative justice in Kenya. Consequently, whether there are any restorative justice models in Kenya being employed for the value of social reintegration and analyse whether these models are able to achieve successful social reintegration.

The Constitution of Kenya states that in the exercise of judicial authority, the use of alternative dispute resolution mechanisms shall be encouraged.¹⁵¹ The Sentencing Policy Guidelines include inclusiveness of the victim and the offender among their guiding principles.¹⁵² Furthermore, restorative justice is cited as an objective for sentencing since it addressed the needs brought up in criminal proceedings.¹⁵³ The United Nations Standard Minimum Rules for the Treatment of Prisoners offers guiding principles for the treatment of prisoners under sentence.¹⁵⁴ These rules emphasize the need for steps to be taken before the completion of the prison sentence to ensure that the prisoner can return to life in society.¹⁵⁵ Additionally, the rules advocate for the involvement of the community in the social reintegration process by working closely with other institutions.¹⁵⁶ The Basic Principles on the Use of Restorative Justice in Criminal Matters recognise the use of restorative justice at any stage of the criminal justice system.¹⁵⁷ Member states are also tasked with the duty to establish the guidelines and standards to govern the use of restorative justice systems.¹⁵⁸

¹⁵¹ Article 159(2)(c), *Constitution of Kenya*.

¹⁵² The Judiciary, *Sentencing Policy Guidelines*, 12.

¹⁵³ The Judiciary, *Sentencing Policy Guidelines*, 15.

¹⁵⁴ *United Nations Standard Minimum Rules for the Treatment of Prisoners*, 31 July 1957, 9-10.

¹⁵⁵ Article 60(2), *United Nations Standard Minimum Rules for the Treatment of Prisoners*.

¹⁵⁶ Article 61, *United Nations Standard Minimum Rules for the Treatment of Prisoners*.

¹⁵⁷ Article 6, *ECOSOC Basic Principles on the use of Restorative Justice in Criminal Matters*, Resolution 2002/12.

¹⁵⁸ Article 12, *ECOSOC Basic Principles on the use of Restorative Justice in Criminal Matters*.

Restorative justice and social reintegration efforts should be employed during the period of incarceration to ensure that upon the return of the offenders to the community, the offenders are willing and able to lead a law abiding-life post-incarceration. This chapter will therefore assess whether the Kenya Prisons Service provide for restorative justice processes for offenders. Also, since social reintegration is also the aim of other types of punishment such as probation, this chapter will delve into the role of the Probations and Aftercare Service to see whether they employ restorative justice in their programmes.

The Kenya Prisons Service

Prisons in Kenya have evolved through many phases since their establishment during the colonial regime. The 2001 prison reforms in particular had an impact on promoting the involvement of the public through the open door policy. Consequently, it has led to increased contact between the offenders and their families through remote parenting and prison open days. The open door policy advocates for stakeholder participation in the improvement of the prison condition, human rights, legal reforms as well as rehabilitative and reintegrative measures.¹⁵⁹ Through the open door policy, efforts such as remote parenting have been actualized. Remote parenting is a practice whereby a day is set aside for children to meet their parents who are in prison. This is important since it promotes contact between the offender and their children and in turn streamlines the reintegration process of the offender post-incarceration as regards their family.

The open door policy which has also led to prison open days also satisfies the same objective and has an impact on the reintegration process. Remote parenting and prison open days are however not enough to ensure successful reintegration into the community and cannot be said to fully embody Restorative justice systems.

The use of restorative justice cannot however be said to be non-existent in Kenyan prisons. Currently, both governmental and non-governmental institutions are making great strides in promoting restorative justice programmes. This is evident from the restorative justice model that has been developed and employed by the Lang'ata Women's Prison discussed below.

¹⁵⁹ Onyango JO, 'The Paradox of Prison Reforms' 2 *International Journal of Research in Social Sciences*, 2013, 45.

The Lang'ata Women's Prison Restorative Justice Model¹⁶⁰

This model has been used in the Lang'ata Women's Prison in Kenya to promote forgiveness and reconciliation with the families and the victims of inmates during the period of incarceration. The project was initiated by the welfare office at the Lang'ata Women's Prison. The welfare office is concerned with providing counselling services to the inmates among other things. The office received requests from the inmates during the counselling process of their desire to reconcile with their families and friends as well as other persons whom the inmate is not in good terms with. This sprouted the Forgiveness and Reconciliation Programme at the prison to facilitate the needs of the inmates. The pilot event was launched on 9th September 2016 and involved 65 inmates.

The participants in the model other than the inmates were mainly the family members and friends of the inmates who were in some cases the direct victims of the offence but more often than not, they were the indirect victims of the offence. The participants in the model were determined by the inmate who would communicate to the welfare office who they wanted to attend and participate in the programme. The welfare office was therefore tasked with the duty to call the inmates' family and friends to request them to attend and participate in the programme.

The procedure involved in the model comprised of individual and group counselling sessions of the inmates prior to the event to help them understand the process of the programme and the aims of the programme and how to address concerns. On the day of the event when the families and friends of the inmates arrived, they were also counselled to orient them and provide them with an introduction to the programme and its process, how to address concerns and how to handle the inmates. The inmates were then allowed contact with their families and friends and with the assistance of professional counsellors, they were able to communicate their concerns, have them addressed and reconcile with each other.

The results of the programme were positive. Out of the sixty five inmates that were involved in the process, 90% went through the programme successfully. For these inmates, reconciliation was able to be achieved. The inmates were able to interact with their families and friends and address the issues that had led to strife between them. This paved the way for forgiveness and reconciliation

¹⁶⁰ Interview with Mrs. Kirito, Counsellor, Lang'ata Women's Prison Welfare Office on 21 December 2016.

to take place. As a result of this, there has been increased contact between the inmates and their respective families and friends. The inmates have been able to call them and their families and friends have been visiting them in the prisons. The inmates have received support from them and are confident that the support will continue post-incarceration. Besides this, the welfare office has been keeping up with and doing follow-ups with the families and friends of the inmates to ensure that the inmates continue receiving support from their families.

Further, there is hope for the inmates who had undergone the process and were not able to reach a favourable outcome. The welfare office aims to have another event soon to encourage forgiveness and reconciliation for those who did not achieve it during the first event and also to include other inmates who were not involved in the first event. The second event as of the date of the interview would involve only 32 inmates, which is a decline.

The welfare office at the prison and the prison administration as a whole has undergone several challenges in jumpstarting the programme and in hosting the event. First, the office has had the challenge of getting the families and friends of the offenders to attend the event. The welfare office has had to convince them of the importance of reconciliation which has been a difficult task owing to the lack of sensitization of the community towards understanding the needs of offenders and their role in the social reintegration of offenders. Second, the absence of support from the government especially financial support to offset planning expenses has led to the prison not being able to plan and accommodate as many inmates as possible in this process owing to the fact that the programme was a prison initiative which received no government funding and therefore the prison has had to offset the costs themselves.

Third, the prison has a shortage of professionals who are experts in psychology and counselling which results in a limited capacity to facilitate forgiveness and reconciliation during the event. During the pilot event, a group of ten inmates along with their friends and families were assigned to one counsellor. Due to time constraints, the quality of the session may not have been sufficient for all the participants to raise their concerns and have them addressed. A wider pool of professionals is thus required to streamline the process. Fourth, the financial constraints of the families and friends was also a setback for the programme. This is because the inmates' families and friends may be willing to attend however they do not have the financial means to do so and

therefore the reconciliation process is inhibited. Some of the inmates who were scheduled to participate in the pilot event could not do so primarily for this reason.

The Probation and Aftercare Service

The Probation and Aftercare Service is a Government Department under the Ministry of Interior and Coordination of National Government and the sole government administrator of probation orders, community service orders as well as aftercare services. The department derives its mandate from the Constitution of Kenya, the Probation of Offenders Act, the Community Service Orders Act, the Prison Act as well as other government policies related to probation work and national development.¹⁶¹ The department plays its role in the criminal justice system in areas such as information for the dispensation of justice, supervision, rehabilitation, reintegration and settlement of offenders.¹⁶² The department also operates probation hostels where offenders serving probation orders can stay temporarily since their homes and the environments are not conducive for effective rehabilitation, reintegration and resettlement. These hostels provide individual and group counselling, formal education and vocational training.¹⁶³

The Probation and Aftercare Service is relevant to this topic since its main objective is the rehabilitation, reintegration, resettlement and supervision of the offenders who are sentenced to probation and even more offenders who are sentenced to probation with a provision as to residence which means that they will reside in the probation hostels. Since probation will alienate the offender from the community, the objective of reintegration is paramount.

The Probation and Aftercare Service also provides for a probation officer programme. A probation officer is, in this case, appointed by the government to carry out the rehabilitation, reintegration and supervision of the offender in probation stations and is based within the same area as the offender and is in relatively more contact with the offender.¹⁶⁴

¹⁶¹ <http://www.probation.go.ke/> on 27 December 2016.

¹⁶² <http://www.probation.go.ke/> on 27 December 2016.

¹⁶³ Obondi CAO, 'Effective Resettlement of Offenders by Strengthening 'Community Reintegration Factors': Kenya's Experience', 61.

¹⁶⁴ Obondi CAO, 'Effective Resettlement of Offenders by Strengthening 'Community Reintegration Factors': Kenya's Experience', 62.

The Probation and Aftercare Service recognizes and work towards building a strong bond with the community as the success of their mandates and core functions of supervision, reintegration and resettlement are only possible where there is community empowerment.¹⁶⁵ Community participation enables the probation office pursue its objectives of administration of justice.

The reintegration of offenders in the Probation and Aftercare Service has suffered owing to the lack of a clear set of policy and guidelines as the department does not operate under a clear legal framework but derives its mandate from different legal and policy instruments. This in turn has resulted in poor delivery plus poor offender management.¹⁶⁶ Moreover, the probation offices lack adequate resources to enable them execute their programmes effectively.¹⁶⁷ In addition to this, the attitude and the capacity of staff determines the success of reintegration measures. Where the staff is resistant to accommodating new approaches to reintegration, the process may become slow or defective.¹⁶⁸ Furthermore, the negative or punitive attitude of the community hampers the establishment of effective social structures. Where the community is not sensitized towards reintegration and empowered to participate in these efforts, it is difficult for the probation officer to carry out successful social reintegration of the offender.¹⁶⁹ Consequently this leads to another problem of offenders becoming permanent residents of the probation hostels as they have nowhere to go which then increase the operational costs of the probation office which further exacerbates the problem of lack of resources. There is also insufficient probation and aftercare centres in the communities to carry out the objective of community sensitization, reintegration and resettlement.

Analysis

The Kenyan Legal framework advocates for the use of restorative justice in the criminal justice system particularly in the exercise of judicial authority and the sentencing process. Owing to this, restorative justice can also be used in the reintegration process. The Standard Minimum Rules as

¹⁶⁵ <http://www.probation.go.ke/> on 27 December 2016.

¹⁶⁶ Obondi CAO, 'Effective Resettlement of Offenders by Strengthening 'Community Reintegration Factors': Kenya's Experience', 62.

¹⁶⁷ Onyango I, 'Overview of the Kenyan Criminal Justice System', UNAFEI 153rd International Senior Seminar Participants' Papers, 151.

¹⁶⁸ Obondi CAO, 'Effective Resettlement of Offenders by Strengthening 'Community Reintegration Factors': Kenya's Experience', 62

¹⁶⁹ Overview of the Community System Correction in Kenya, available at http://www.unafei.or.jp/english/pdf/ap2014/Overview_of_CommunityCorrections_Kenya_E.pdf accessed on 27 December 2016.

well as the Principles on the use of Restorative Justice also apply due to the fact that Kenya is a member of the United Nations. These rules should be the guiding principles of a restorative justice framework in Kenya.

It is clear that the Kenya Prisons Service as well as the Probation and Aftercare Service generally do not employ restorative justice programmes despite its value for the success of reintegration, resettlement and supervision of offenders post-incarceration. Even where there are elements of the system in these state departments, there are no comprehensive frameworks that fully embody restorative justice. A comprehensive restorative justice model will increase the odds of successful reintegration, resettlement as well as supervision of the offenders post-incarceration owing to the fact that restorative justice embodies the needs of social reintegration and supervision of the offenders.

The open door policy provides a basis for the inclusion of restorative justice into prisoner welfare systems. However, the government has not come up with policy frameworks and guidelines for the incorporation of restorative justice in the state departments. This results in most efforts in these state department being a local initiative such as the Lang'ata Women's Prison or being initiated by non-governmental organizations. Where the programmes are state department initiatives, it becomes more difficult for these departments to access funding since the project is not government backed. Additionally, the issue of lack of resources in the Probation and Aftercare Service also inhibits the department from undertaking any restorative justice programmes on its own. Where the programmes are initiated by non-governmental institutions, the institutions may not be able to apply these programmes in all prisons in Kenya owing to financial constraints as well as other logistics and therefore focus on a small number of prisons. The government is therefore the best suited to spearhead the project and develop policy frameworks and guidelines for the use of restorative justice in prisons and implement them in a uniform manner to ensure that all offenders in Kenya are benefitting from the process.

There are also gaps in the criminal justice system in Kenya caused by factors that are oppositional to an effective restorative justice system. These gaps need to be addressed in order that the use of restorative justice for the social reintegration of offenders is possible. These factors include: First, the punitive attitudes toward offenders in the criminal justice system. Second, the lack of skills

among the prison officers and probation officers to offer appropriate rehabilitation, reintegration and resettlement of offenders. Third, the absence of structures for collaboration and cooperation with other primary stakeholders involved in the criminal justice system. Fourth, lack of supportive community organizations which leads to the stigmatization of the offenders and hinders reintegration. These factors need to be addressed so that the gaps in the criminal justice system can be sealed and restorative justice initiatives have good footing.

Conclusion

The Kenya Prisons and the Probation and Aftercare Service do not generally employ restorative justice programmes in their institutions. Additionally, these institutions do not have a comprehensive restorative justice framework to enable them to carry out restorative justice successfully for all offenders during their period of incarceration. Besides this, there is lack of funding from the government to enable these state departments incorporate restorative justice programmes. It is clear from this analysis that the Kenya has not incorporated restorative justice programmes.

The integration of restorative justice programmes in Kenya should be hinged on the government. The government is best suited to develop a restorative justice system that would ensure successful reintegration of offenders in Kenya. In addition to this, the government is able to fund these programmes in the various prisons and probation centres in Kenya.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

Recommendations

Owing to the value of restorative justice for the social reintegration of offenders and the value of reintegration of offenders for the state, the government should spearhead the application of restorative justice programs in the Kenya Prisons Service and the Probation and Aftercare Service. The Constitution and the Sentencing Policy Guidelines provide a starting point for this. The government should therefore come up with guidelines and standards, with legislative authority incorporating restorative justice in the reintegration process. With this in mind:

1. The creation of a framework to govern the use of restorative justice.

This framework will govern the use of restorative justice in the reintegration of offenders and will address: the administration of restorative justice programs, the rules of conduct in the operation of restorative justice programs, the qualifications, training and assessment of the facilitators of these programs and the conditions for the referral of a case to this program.¹⁷⁰ Consequently, to ensure fairness in these process, procedural safeguards should also be implemented.¹⁷¹ Parties should be fully informed of their rights, the procedures involved in the process and the expected outcome of the process as well as consequences of the process of any.¹⁷² None of the parties should be coerced to participate in the process and the process itself should be confidential and not infringe on the rights of the parties involved.¹⁷³ The facilitators of the process should be impartial and respect the dignity of the parties involved. Facilitators should also ensure that the parties act with respect towards each other.¹⁷⁴

2. Community awareness.

¹⁷⁰ Article 12, *ECOSOC Basic Principles on the use of Restorative Justice in Criminal Matters*.

¹⁷¹ Article 13, *ECOSOC Basic Principles on the use of Restorative Justice in Criminal Matters*.

¹⁷² Article 13(b), *ECOSOC Basic Principles on the use of Restorative Justice in Criminal Matters*.

¹⁷³ Article 14, *ECOSOC Basic Principles on the use of Restorative Justice in Criminal Matters*.

¹⁷⁴ Article 18, *ECOSOC Basic Principles on the use of Restorative Justice in Criminal Matters*.

The involvement of the community should be enlisted wherever possible. Communities should work in conjunction with the facilitators and should be part of the process of reintegration.¹⁷⁵ Community awareness and sensitization should be addressed in the guidelines. Communities need to be made aware of the needs of the offender once the offender is released and has to return to the community. The receptiveness of the community is crucial and the process therefore needs to take this into account to ensure success.

3. Consultation.

Consultation between the administrators of the restorative justice programs and the criminal justice authorities is pertinent to the effectiveness of this process.¹⁷⁶ A common understanding and sharing of information will streamline the process. Administrators should have a good working relationship with particularly the detention institutions in order to be able to carry out its mandate.

Conclusion

This study elucidates on the criminal justice system in Kenya and in particular the post-incarceration reintegration of offenders in Kenya. Owing to the retributive nature of the criminal justice system and punishment being effected mainly by incarceration, social reintegration comes into play. Reintegration facilitates the offender's re-entry into the community post-incarceration. To guarantee the successful reintegration of offender back into the community, this paper suggests the use of restorative justice.

The investigation into restorative justice and its value for social reintegration will help in solving the problem faced by the offenders, which is, the inability to lead life as a law abiding citizen post-incarceration. This inability is attributed to the fact that the offender faces significant social adaptation issues post-incarceration which may lead to a relapse into crime or recidivism.

This study relies on a theoretical framework that focuses on the concept of justice. The definition of justice is pertinent to the provision of a legal basis for restorative justice. This study relies on

¹⁷⁵ Article 61, *United Nations Standard Minimum Rules for the Treatment of Prisoners*.

¹⁷⁶ Article 21, *ECOSOC Basic Principles on the use of Restorative Justice in Criminal Matters*.

Aristotle's theory of justice which defines justice as a social virtue as it is exhibited in dealing with others. This is relevant for restorative justice as it seeks to address the needs of the victim, offender and the community in relation to a crime and seeks to obtain justice for all. Aristotle's principle of equality is also pertinent in restorative justice as the offender is treated as any other member of the community and as such restorative justice aims to restore the offender in the community. John Rawls theory of justice as fairness is also assessed in this chapter. The principles of justice which determine a fair resolution of conflicts in society are: equality in the assignment of basic rights and duties and in the case of any social or economic inequalities, they are to be arranged such that they are to the benefit of everyone. Restorative justice is concerned with the roles of the offenders, the victim and the community once a crime is committed. Furthermore, Restorative justice seeks to address the social inequalities that offenders face post-incarceration and consequently promote the social reintegration of offenders. The African philosophy of Ubuntu is hinged on the themes of humanity and reconciliation as well as humanistic values such as dignity, compassion, group solidarity and respect. Its themes and humanistic values are values that are enshrined under restorative justice and form the basis for the use of restorative justice in Kenya.

This study pits restorative justice against retributive justice under the notions of the understanding of crime and the response to crime. This is because how crime is understood will affect the response to the crime. Restorative justice is unique owing to the fact that it focuses on the needs and roles of the primary stakeholders in a crime. By addressing these needs, restorative justice provides a system of justice that is effective in its response to crime. Social reintegration is also explicated in this study. The interplay between the risk and resilience factors plus the responsibility of the offender to reintegration play a significant role in reintegration. In addition to this, the role of social reintegration is explained. This study asserts that restorative justice offers the best strategy for the social reintegration of offenders in Kenya.

The legal framework in Kenya for the application of restorative justice is also examined. In addition to this, the use of restorative justice in social reintegration in Kenya is scrutinized by assessing the Kenya Prison Service and the Probation and Aftercare Service. The findings from the investigation indicate that there are hardly any restorative justice programs in application in the above institutions for the purpose of ensuring the social reintegration of offenders. Government involvement in providing a framework for the application of these programs as well as providing

funding is lacking. This study asserts that the government is best suited to undertake restorative justice programs in Kenya and should do so owing to the value of restorative justice in the social reintegration of offenders.

The study has thus responded to the statement of the problem. The inability of the offender to lead life as a law abiding citizen is remedied by the application of restorative justice programmes during the period of incarceration as well as community sensitization and awareness.

The objectives of this research have also been met. The study evaluated restorative justice as opposed to retributive justice in terms of the understanding of crime and the response to crime under both justice systems. The study assessed the needs of social reintegration and came to the conclusion that restorative justice is the best strategy for the social reintegration of offenders. The study then came to the conclusion that restorative justice programmes have not been incorporated in the social reintegration programmes in Kenya. This study recommends that the government spearhead the process of reintegration of offenders

This hypothesis of the study has also been confirmed. Restorative justice has been seen to have a role to play in the social reintegration of offenders. Resilience factors required for a successful reintegration can be realised through restorative justice. Furthermore, Restorative justice counteracts the isolating effecting of incarceration by promoting contact between the offender and the victim. This streamlines the reintegration process.

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