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TOWARD RESTORATIVE JUSTICE IN AFRICA: A REVIEW OF SELECTED RESTORATIVE PRACTICES

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ABSTRACT

The protracted and endemic armed conflict and violence in Africa has undermined its democratic gains and sustainable development. However, application of restorative justice mechanisms (such as the Truth and Reconciliation Commissions, and the Rwanda Gaccaca) have significantly, unraveled some of the common sources of conflict in Africa which include intergenerational forms of exclusion and marginalization, poverty, structural inequality, and insecurity. Findings from these restorative mechanisms show that very many people and groups benefit from the intractable conflicts in Africa; and so it is learnt that, reducing the opportunities, attractiveness and profitability of conflict is important if violent conflict must be prevented in Africa. Using literature evidence and ethno-methodology, this paper advances endogenous/indigenous, and Afrocentric principles and practices that are relevant to the global restorative justice principles and practices because, as far as the knowledge of Dispute Resolution, and/ or restorative justice is concerned, Africans with their long knowledge and culture of communitarianism has got a lot to share with the West as much as they have got to learn from the West. This paper argues that while the international community has a better understanding of the elements of successful peacekeeping operations in Africa, it needs sufficient local knowledge of what should be done to consolidate peace in Africa and how best to go about achieving it, hence selected Afrocentric evidence are presented for international learning.

Keywords: Restorative justice, African justice, traditional justice, local justice

1. INTRODUCTION

Western traditions of justice emphasize establishing individual guilt and punishment through physical and material penalties and prison sentences. Here, in practice, limited attention is paid to healing, truth telling and the re-integration of the offender in the community. Hence restorative justice philosophy argues that justice should pursue a 'positive peace' that is legitimate and lasting, which can then serve as a solid foundation for sustainable development, rather than a 'negative peace' that merely aims to achieve an absence of violent conflict. Similarly, the African traditional approaches to reconciliation and justice are commonly inclusive, and involve the identification of root causes and solutions through meetings involving family and community members from both sides in a dispute. Although it is important not to romanticize the efficacy of African forms of dispute resolution, Omale (2012) argues that the role of religion and community elders in Africa is however crucial, as are the use of rituals/ symbolic reconciliation ceremonies and interpretation of myths to bring conflicts to an end. Thereafter, decisions are made to repair and compensate for loss of life and property, and cattle, sheep or a goat may be sacrificed to cleanse the evil spirits of conflict.

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Although there is no uniform African perspective (because of "within group" culture dynamics), some common traditional approaches; however, need to be understood. Such traditional approaches have long been practiced, even in the absence and presence of modern justice systems, and influence the perspectives of local people concerning issues of justice and peace.

So it is important to be aware and sensitive to local perspectives as they may clash with Western legal perspectives; and it is important that they can co-exist. Hence to understand the context of this discourse, the values and beliefs, fears and suspicions, interests and needs; relationships and networks between Western and African perspectives of justice need to be fully explored. This paper thus advances endogenous/indigenous, and Afrocentric principles and practices that are relevant to restorative justice principles and practices because, as far as the knowledge of Alternative Dispute Resolution, and/ or restorative justice is concerned, Africans with their long knowledge and culture of communitarianism has got a lot to share with the West as much as they have got to learn from the West.

It is also important to be realistic about community-based reconciliation as well as international prosecutions (like the ICC). Both have opportunities as well as limitations. Hence the new norms of international justice encapsulated in the principle of a responsibility to protect (R2P) and institutions such as the International Criminal Court (ICC) to end impunity has on some occasions received dissent voices in Africa stemming from the perception of threats to sovereignty and indigenous restorative traditions, the intrusiveness of international legality on weak states, and the fear of the selective application and implementation of these principles. This is all despite the fact that Africa represents a majority of signatory states to the Rome Statute of the ICC and three of the four cases before the ICC were referred to it by three African states. The contention over contemporary implementation of international justice initiatives in Africa therefore must not be construed as blanket opposition to justice but rather as recognition that imposing justice while ignoring legitimate African concerns may be detrimental to justice and peacebuilding.

Hence restorative justice which is a well understood concept has evolved to balance this legal pluralism. Skelton and Batley (2008:37) argue that internationally, restorative justice theory and practice have been substantially documented, and it has withstood critical analysis. There has been a movement amongst even those that would be expected to be its harshest critics, just deserts theorists, to engage in a good faith attempt to reconcile the competing paradigms. In Africa, (particularly in South Africa, and the Belgore Model in Nigeria) restorative justice has moved from the margins of discourse to take its place as a subject of serious academic and policy debate in the criminal justice system. It has also featured in a promising jurisprudence that is emerging from the country's courts.

2. PURPOSE/OBJECTIVE

This paper explains how certain local justice initiatives and traditions in practice, promote the application of restorative justice principles across Africa. It offers an afrocentric view on how to promote the aim of a crime-free society for harmonious living for the offender and victim. Hence Skelton and Batley (2008) urge criminal justice practitioners and researchers in Africa to engage in the discovery of realistic community centered restorative models for community cohesion and restoration.

In Africa therefore, reconciliation and restoration, as a process is aimed at helping communities, victims and offenders to overcome grief, anger, animosity and mistrust, and achieve healing. Restoration is seen as the key to renewing and strengthening social relations and the foundation for durable peace, security, truth-telling, justice, reparations, memorials, remembrances, the absence of discriminatory practices, acknowledgment, remorse and forgiveness; which are commonly regarded as essential prerequisites for true restoration and reconciliation. But the emphasis upon each of these threads can vary immensely, depending upon the national contexts and the outcomes of the conflict.

Indeed, it has been argued, by Skelton and Batley (2008) and the African Union (2013) that one of the biggest obstacles to such cooperation is that, because of the violence of the past, their relations are based on antagonism, distrust, disrespect and, quite possibly, hurt and hatred, so there is a pressing need to address that negative relationship**.** Addressing the negative relationship will not be possible without reconciliation. My research experience on the continent of Africa shows the continued relevance of restorative traditional forms of accountability and reconciliation (see Omale, 2009, 2012). These approaches permeate everyday life in the continent, and increasing resort to them shows the attraction they continue to hold for many African citizens. Accordingly, in reviewing national context and history of African forms of dispute resolution, the African Union (AU) urges Member States to seriously consider the integration of restorative traditional forms of justice and reconciliation into their formal instruments and mechanisms of justice, accountability and dispute resolution. It is strongly believed by many Africans that rebuilding communities

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and community resources and integrating those who have caused harm back into the community, as well as giving hope and opportunity to those who have been harmed contribute to increased cohesion, security, peace and development. It is on this basis that the African Panel of the Wise constituted by the AU has strongly advocated the creation of opportunities for the use of traditional restorative mechanisms of reconciliation and/or justice, to the extent that they are compatible with national laws and relevant international instruments.

3. CASE STUDIES OF RESTORATIVE JUSTICE PRACTICES IN AFRICA

There are strong advocacy for restorative justice across Africa; because restorative justice is culturally relative to African restorative traditions; however, peripheral practices exist; owing to the resistance of some criminal lawyers who benefits from the received English Law practice. Some prominent case studies of restorative justice practices across Africa include:

3.1 Belgore Model/Citizens' Rights and Mediation Centres in Nigeria

Pilot programmes on Citizens' Rights and Mediation (Court Annex Alternative Dispute Resolution Programmes); and the Belgore Model of justice advocated and spearheaded by late Barrister Kelvin Nwosu have existed in Nigeria since 2002. The pilot programmes are more prominent in the South than in the North; where local dispute resolution mechanisms in rural communities are heavily relied upon.

Conventional courts in Nigeria since 2002 have devised a means of "front loading" (Omale 2012) cases by the office of the Public Prosecution to determine cases with 'substantive evidence' that could go through conventional prosecution, and those that could be dispensed with quickly at the Citizens' Rights and Mediation Centres. Cases referred to the Citizens' Rights and Mediation Centres are handled without the involvement of criminal lawyers. But if the cases are not amicably resolved, they could be returned to the conventional courts for hearing. While the essence of this project is to decongest the courts of minor cases and reduce workloads for judges; outcomes of the project are likely to be relevant to the future direction of restorative justice practice and research in Nigeria.

Similarly, the National Dialogue convened by former President Goodluck Jonathan on 1st October 2013 (whose report is undergoing review), could lead to a national restorative justice project (if properly considered). Because, for sometimes now, Nigerians have been clamoring for a Sovereign National Conference where they could argue for the need to restructure the 'rule of law by allowing the justice of the people' to bubble up to 'reshape the justice of the law' so that 'the justice of law could be more legitimately constrained to the justice of the people' (see Omale 2012:202). This argument has been ongoing since a vast majority of Nigerians consider the conventional law as the "Rulers' Law" and not the "People's Law".

3.2 The south africa experience

In State vs Joyce Maluleke and Others (Case No. cc 83/04) in the High Court of RB (Transvaal Provincial Division) dated 13/06/06, the particular circumstances of this case created the opportunity to introduce the principles of restorative justice into the sentencing process. Bertelsmann, the Judge of the HIGH COURT passed his judgment and sentence in line with the afrocentric principle of justice. The judgment which was widely cited in South Africa (see *S v Maluleke* 2008 (1) SACR (T); Skelton and Batley, 2008:41) read as follows:

The accused, who was accused No 1 during the trial, was convicted in the High Court of the Northern Circuit of the Transvaal Provincial Division, sitting at Lephalele, of murder. She had been charged together with several other accused. The victim was a young person who broke into her house in a small village in the Limpopo Province. The other accused were acquitted (see Skelton and Batley, 2008:41).

The accused had caused the death of the deceased by participating actively, together with her husband, in a sustained assault upon the deceased after he had been apprehended in her home into which he had broken with the apparent intent to commit theft.

Her husband, who was originally charged with her, died before the start of the trial. The accused lives in a small, close - knit community. The deceased was in fact part of her extended family and well known to her (also see Skelton and Batley, 2008:41).

The sentencing of the accused presented particular problems. On the one hand, she is guilty of a very serious offence, the result of a sustained and brutal attack upon a youthful transgressor who was trussed up before the assault started and could neither defend nor

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protect himself. On the other hand, the accused has four minor children who are dependent on her. She is unemployed, and her only income is a child grant.

She is a widow and does not receive a pension because her husband was under suspension from the police at the time of his demise.

The accused is a first offender. There is no suggestion that there exists any danger of the crime being repeated, nor is there any indication that the accused is a person normally given to violent conduct. There was evidence that she regretted and still regrets the death of the victim. She therefore is clearly not a person against whom society needs to be protected.

In spite of these considerations, the crime of murder in criminal law calls for a severe sentence. This does not mean that incarceration is the only option. Community service coupled with suitable conditions has been imposed upon accused who were convicted of the intentional taking of another's life before, eg ***S v Potgieter*** 1994 (1) SACR 61 (A).

During evidence in mitigation, the defence investigated the question whether the accused had, prior to the trial, complied with the traditional custom of her community of apologizing for the taking of the deceased's life by sending an elder member or members of her family to the family of the deceased.

The judge hastens to add that no expert evidence was given in regard to this traditional custom, but the fact of its existence was not challenged by the prosecution. On the contrary, it was accepted that the traditional custom prevailing in the accused's community demanded that, in the event of an unlawful killing of a member of the community, the family of the perpetrator send a senior representative to the family of the deceased to apologize and to attempt to mend the relationship between the families disturbed by the death of the deceased.

Normally, a non-traditional court applying traditional law cannot take judicial cognizance of such law but requires expert evidence in order to determine its existence. In this particular instance, however, the custom was common cause. When the accused was asked whether she had complied with this custom, she answered in the negative.

As far as this Court is aware, the failure to comply with this custom would normally be regarded as adding insult to injury by the family of the victim. The state and the defence approached the issue on the same basis during the trial.

The state called the victim's mother to inform the court of the hurt and loss that the deceased's family had suffered. In cross examination, counsel for the defence enquired from her whether she would be prepared to receive a senior representative from the accused's family in order to attempt to restore the broken relationship between the families.

The Court would not have sent the accused to jail in the light of the strong mitigating factors that were present in this instance, even without the possibility of introducing an observance of custom into the sentencing and rehabilitation process. The deceased's mother answered in the affirmative, adding "***But she must tell me why she killed my child."*** This answer enabled the Court to involve the community in the sentencing and rehabilitation process.

The Court sentenced the accused to 8 (eight) years imprisonment, all of which was suspended for a period of 3 (three) years on condition that, the accused apologized according to custom to the mother of the deceased and her family within a month after the sentence have been imposed.

The Court would not have sent the accused to jail in the light of the strong mitigating factors that were present in this instance, even without the possibility of introducing an observance of custom into the sentencing and rehabilitation process

But once this opportunity presented itself, a suitable sentence could be imposed that also created an opportunity to begin to heal the wounds that the commission of the crime caused to the family of the deceased and to the community at large. As it happened, the accused and the deceased's mother started talking to each other before the Court had formally adjourned.

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3.3 The zimbabwe experience

Restorative justice has also received wide attention in Zimbabwe as in South Africa (see Skelton and Batley, 2008:41). For instance, in ***State v Shilubane 2005[JOL 15671(T)], S v Shilubane*** **2008 (1) SACR 295** (T) the learned judge Bosielo in his judgment stated as follows: "The accused herein stole 7 fowls from the complainant which according to his admissions, he cooked. Self - evidently the loss of the complainant amounts to R216.00 (about $20 USD) which is the value of the seven fowls reflected on the charge sheet. I have little doubt in my mind that, in line with new philosophy of restorative justice, that the complainant would have been more pleased to receive compensation for his loss. An order of compensation coupled with a suspended sentence would, in my view, have satisfied the basic triad and the primary purposes of punishment…" (JOL 15671(T) 2005, Skelton and Batley (2008:41).

Judge Bosielo also argues that unless presiding officers become innovative and proactive in opting for other alternative sentences to direct imprisonment, we will not be able to solve the problem of overcrowding in our prisons and restoring relationship in our communities. In as much as it is critical for the maintenance of law and order that criminals be punished for their crimes, it is important that the presiding officer impose sentences which are humane and balanced. There is abundant empirical evidence that retributive justice has failed to stem the ever-increasing wave of crime. Judge Bosielo argues that in his opinion, it is counter-productive if not self-defeating; "to expose an accused like the one, *in casu*, to the corrosive and brutalizing effect of prison life for such a trifling offence. The price which civil society stands to pay in the end by having him emerge out of prison a hardened criminal, far outweighs the advantages to be gained by sending him to jail…" (JOL 15671(T) 2005

3.4 Neighborhood Restoration Project in South Africa

In this project, (20%), of cases referred were those where the parties were neighbours of different races. Although many of the neighbours were indeed living on separate plots adjacent to one another, many of the disputes also arose between parties living on the same plot of land. According to Dissel (2002) the high number of neighborhood disputes in her study is indicative of the conditions under which people in the selected areas live (Alexandra and Dobsonville). This is particularly so in other overcrowded neighborhoods in Africa and elsewhere where conditions are cramped and people often compete over the same limited resources, such as access to washing lines or water. It is therefore not surprising that 'petty' irritations could become enormous issues for confrontation.

So in one case Dissel (2002) reports that, the victim and offender argued over the right to hang washing on the line in the yard that they shared. The offender assaulted the victim and injured her hand. The victim wanted direct compensation, but the offender was unable to pay. As one component of the resolution, the offender agreed to do the victim's washing while her hand recovered from the injury. As a result of the restorative justice process and the agreement, the relationship between the parties was harmoniously restored and they no longer see themselves as different.

So positive application of the restorative justice principle (*Ubuntu*) in race relation could demystifies the notion of "Otherness" and connect the disconnected; just as Gene Griessman advise that we should 'believe that diversity is a part of the natural order of things... as natural as the trillion shapes and shades of flowers of spring or the leaves of autumn. Believe that diversity brings new solutions to an ever-changing environment, and that sameness is not only uninteresting but limiting. [Because], to deny diversity is to deny life...with all its richness and manifold opportunities'. Thus, Gene Griessman affirmed his 'citizenship in a world of diversity, and with it the responsibility to... [Be] tolerant. Live and let live. Understand that those who cause no harm should not be feared, ridiculed, or harm...even if they are different. [But] look for the best in others [and] to rise above prejudice and hatred' (paraphrased from Umbreit and Coates, 2000:16).

It is on this premise that Africans across tribes (despite the 'within-group' culture dynamics) believe in the *Ubuntu* dictum-'I am because you are'; and 'You are because I am'. So in African cultures, no matter how sensitive conflict may be, forgiveness and apology are envisaged in the spirit of ***Ubuntu***, because to forgive is not about altruism. It is the best form of self-interest because what dehumanises one inexorably dehumanises the other; and forgiveness gives people resilience, enabling them to survive and emerge still human despite all efforts to dehumanise them (Desmond Tutu, 1999 cited in Dissel, 2002).

Africans' beliefs in this doctrine is not a sign of weakness but dependent on their knowledge of the core African philosophy of Thoughts: cosmology-African 'worldview' of conflict, crime, and reconciliation; axiology-African 'values' of restoration; ontology-African 'nature' and conception of personhoods; and epistemology-'source of knowledge' for Africans (see Jenkins, 2006; Omale, 2009; 2012).

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3.5 Baraza Peace Court in the Democratic Republic of Congo (DRC)

According to Anatase (2007*) "Baraza ya wazee*" is a Swahili word meaning ('gathering or forum for the elders'). It is a community-led justice courts that provide successful resolution to conflicts through participatory processes of dialogue and reconciliation**.** With Baraza, emerging conflicts are quickly identified and addressed, whilst the establishment of trust and collaboration between different parties creates an environment less conducive to intimidation and violence. Anatase (2007) notes that Baraza in DRC is a system trying to fight the corruption in the police, magistrates, impunity, favoritism, and law of the stronger and rich, because at the Baraza court, everybody is equal and the community eye is open to ensure the equality and fairness of judgments.

Anatase (2007) notes that the Barazas are made up of four different groups of people who meet on a weekly basis: a democratically elected main committee (five people), a youth group (about ten people), a women's group (about ten people) and remaining Baraza members of the community including civilians and ex-combatants.

Traditional wisdom is relied upon initially, but once principal roles have been established, trainings in mediation and conflict resolution skills are provided by an NGO.

The women's groups have recently developed separate "female peace courts", in which issues felt to be private, such as marital rape, can be discussed openly without a male presence. The majority of conflicts addressed here are successfully resolved, but when a resolution is not reached the case is then taken to the main Baraza peace court.

Although each process is different the cases follow a similar pattern. When a conflict arises in the village it is brought by members of the community to one of the two peace court committees (main and female-only). At the peace court each party is given time to tell his story. Following this the committee then meets in private for fact-finding investigations and deliberation, the result of which is then relayed back to the accuser(s) and defendant(s). This can include private apology, public apology, work, payment, etc. When all parties agree with the decision of the judges, the community organizes a reconciliation ceremony, in which the agreed resolution between the parties is publicly declared.

If one party has disagreed, time is given to digest the decision, following which the freedom of appeal is always given. However, once the peace court committee has given its decision, it is viewed as the community decision and one which is unbreakable. If it is not ultimately accepted, it can then proceed to the government magistrate where an NGO lawyer will represent the party at the local tribunal.

The emphasis in the Baraza peace courts is to address conflicts before they become violent, not only in the direct prevention of violence but also so that non-punitive measures are more widely accepted in the reconciliation process. In the cases where violence has already been inflicted and truth telling, confession, remorse and the asking of forgiveness have been expressed; it is compensation which will most likely be demanded, possibly in the form of public apology, money or work (Poole, 2013).

4. CONCLUSION

Although there are no easy answers and quick fixes to sometimes intergenerational hatred and dispute in Africa, this paper however argues that people and communities working together can. Hence, this author agrees with Wadada and Andrea (2011) that understanding peace and conflict in Africa is trans-dimensional, and therefore we should apply what they call "Trans-dimensional Knowledge Management Model" (approaching issues from multiple perspectives). Desmond Tutu (2003: iii) also notes that, 'there is no handy roadmap for reconciliation and restoration in divided societies.' There is no shortcut or simple prescription for healing the wounds and divisions of a society in the aftermath of sustained violence. And creating trust and understanding between former enemies is a supremely difficult challenge. It is, however, an essential one to address in the process of building a lasting peace. So examining the painful past, acknowledging it and understanding it, and above all transcending it together restoratively, is the best way to guarantee that it does not – and cannot – happen again.

So restorative justice practices in Africa and around the world is not merely advocating a state of meliorism (the belief that the world will gets better; that humans can improve the world); it is however, premised on the fact that there will be no harmony in victims' voices unless we all sing. This is imperative because, for any justice system to try to suppress victims' voices or human tendencies for social relationship and reconciliation would be pointless. Hence Gaston Bachelard, a French philosopher (1884-1962) alludes to the danger of preventing human dialogue when he says "what is the source of our suffering? It lies in the fact that we hesitate to speak. Our first suffering was born in the moment when we accumulated silent things within us". So let our justice system encourages

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healing and reconciliation. Let us give restorative justice a chance, even if the changes that restorative justice brings to the conventional criminal justice system is sometimes unfamiliar and not always welcome by those in defensive solidarity of the retributive justice.

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