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Restorative Justice in Traditional Pre-Colonial 'Criminal Justice Systems' in Kenya

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RESTORATIVE JUSTICE IN TRADITIONAL PRE-COLONIAL "CRIMINAL JUSTICE SYSTEMS" IN KENYA

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ABSTRACT

Traditional African communities are often said to have embraced restorative values in resolving conflicts and responding to wrongdoing. Through empirical research and analysis of secondary data on the pre-colonial traditional Kamba, Kikuyu and Meru communities in Kenya, this article illustrates how penal practices in these communities embraced restorative justice as understood today. This genealogy of restorative justice in these communities demonstrates the potential of restorative justice as an intervention in crime and its role in meeting overall community goals. By doing so, the genealogy challenges the objectification of retributive justice in modern criminal justice systems, which renders retributive practices as an obvious or self-evident response to crime. The in-depth analysis of restorative justice in the three traditional communities further demonstrates how the penal practices resonated with the underlying cultural values hence effectively responding to crime before the inception of the formal criminal justice system in Kenya.

INTRODUCTION

Restorative justice practices are increasingly being incorporated within contemporary criminal justice systems. It is argued that restorative justice values underpinned traditional criminal justice systems. Braithwaite, for example, asserts that "restorative justice has been the dominant model of criminal justice throughout most of human history for perhaps the entire world's peoples."[1] Traditional African communities are cited as having embraced restorative justice.[2] This article tells the story of restorative justice practices within the Kamba, Kikuyu and Meru traditional communities. The article illustrates how these restorative justice practices resonated with the cultural and economic values. It thus illustrates the conditions that rendered restorative justice acceptable in those communities.

As opposed to simply a historical account, the story told is a genealogy of restorative justice in the Foucauldian sense. The crux in Foucault's genealogies is that they analyze

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[1] JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 5 (2002); *accord* Kathleen Daly, *Restorative Justice: The Real Story*, 4(1) PUNISHMENT AND SOC'Y 62 (2002) *available at* http://pun.sagepub.com/cgi/content/abstract/4/1/55 (critiquing proponents who seek to legitimize restorative justice by highlighting ancient restorative practices).

[2] *See* A. Skelton, *Regional Views: Africa*, *in* HANDBOOK OF RESTORATIVE JUSTICE 468-69 (G. Johnstone & D. Van Ness eds., 2007) (illustrating Skelton's overview of the connection made between African traditional justice and restorative justice).

how practices have been objectified.[3] Thus genealogies engage in an analysis of the processes that have led to the "objectification" of certain things. As Voruz notes, a genealogy in Foucault's terms is an exercise that shows "how interpretations have come to be seen as true . . . a genealogy is not a description of things as they actually are, it is a 'history' of how things have come to be seen as objective."[4] Therefore, this genealogy of restorative justice practices analyzes how restorative justice was objectified and rendered acceptable in the Kenyan communities examined.

Over and above documenting such historical practices, genealogies further illuminate the present. Deconstructing how restorative justice was objectified in those traditional communities helps us understand issues surrounding contemporary application of restorative justice. For example, it illuminates why restorative justice is limited in scope compared to traditional communities. On the other hand, as a political strategy, genealogies present a "possibility of change" from the objectifications of the present.[5] Engaging with the historical events that have led to these objectifications, genealogies critique the existence of the natural, the universal or the self-evident.[6] In effect, this denial of the self-evident opens up the possibility of a different system of thought, hence a crucial point of critique, as opposed to presenting restorative justice as the obvious, self-evident human response to wrongdoing. This analysis presents it as a possible modality of intervention to wrongdoing. In effect, the analysis further challenges the objectification of retributive practices in modern penal systems and poses the potential contribution of restorative justice.

RESTORATIVE PRACTICES IN TRADITIONAL CRIMINAL JUSTICE SYSTEMS IN KENYA

The most widely cited definition of restorative justice encompasses processes "whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications in the future."[7] Traditional penal practices which incorporate the underscored principles in this definition are therefore classified as restorative justice processes in this article. The research conducted on traditional communities in Kenya revealed the existence of restorative values. Indeed, post-colonial practices in Africa seeking to incorporate traditional values have suggested that restorative justice values were not foreign to traditional African communities. The most commonly cited is the spirit of *ubuntu* which was embraced in the Truth and

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[3] *See* Paul Veyne, *Foucault Revolutionizes History*, *in* FOUCAULT AND HIS INTERLOCUTORS 158-59 (Arnold I. Davidson ed., 1997).

[4] Veronique Voruz, *The Politics of the Culture of Control: Undoing Genealogy*, 34(1) ECON. & SOC'Y 165 (Feb. 2005).

[5] *See* DAVID COUZENS HOY, CRITICAL RESISTANCE: FROM POSTSTRUCTURALISM TO POST-CRITIQUE 64 (2004).

[6] *See* MICHEL FOUCAULT, THE FOUCAULT READER 46 (P. Rabinow ed., 1984) (for an example of how Foucault engages in a genealogical analysis of the practice of imprisonment to critique how this practice has been constituted as the obvious, self-evident treatment of offenders).

[7] TONY F. MARSHALL, RESTORATIVE JUSTICE: AN OVERVIEW (1999), *available at* http://www.homeoffice.gov.uk/rds/pdfs/occ-resjus.pdf. *See also* John Braithwaite, *Survey Article: Repentance Rituals and Restorative Justice*, 8 J. OF POL. PHILOSOPHY 115, at 115 (2000).

Reconciliation Commission in South Africa.[8] The spirit of *ubuntu*, which connotes solidarity and humanity to others fosters restorative justice with the aim of sustaining community cohesiveness.[9] *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."[10]

A correlation could be drawn between this philosophy of *ubuntu* and cultural beliefs in other African societies. Other communities refer to the "spirit of humanity" in different words.[11] For example, Swahili speaking African communities such as Kenya, refer to this ethos of humanity as *utu*. Amongst the Kikuyu community in Kenya the word *umundu* it alludes to 'humane' inclinations inherent in human beings. The words of the national anthem of Kenya, "*natukae na undugu amani na uhuru,"* express this spirit of humanity and cohesiveness.[12] In particular, the word *undugu* connotes brotherliness. The words "may we dwell in unity, peace and liberty" in the English version of Kenya's national anthem do not precisely capture the spirit of brotherliness described in the Swahili phrase "*natukae na undugu*." As illustrated in this discussion of traditional justice systems in Kenya, this ethos promoted practices that were restorative. However, it is noted that, although restorative justice was a central concept within traditional communities in Kenya, some of the penal practices in the communities were retributive. This lends support to Cunneen's contention that not all traditional sanctions are restorative.[13] Nevertheless, this article focuses on the restorative practices in the pre-colonial traditional communities in Kenya.

This article examines penal practices within three communities in Kenya namely, Kikuyu, Kamba and Meru.[14] It is argued that restorative justice values were not alien in pre-colonial Kenya based on interviews with tribal elders and through archived literature on the communities.

A limitation on the terminology used to describe the traditional justice systems must be acknowledged at the outset. Modern day terms may fail to depict traditional systems

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[8] ALEX BORAINE, A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION 425-26 (2000) (providing a detailed study on the application of the philosophy of *ubuntu* in the Truth and Reconciliation Commission in South Africa, see Boraine's account of the reconciliation process).

[9] Ann Skelton, *Regional Views: Africa*, *in* HANDBOOK OF RESTORATIVE JUSTICE 470 (G. Johnstone & D. Van Ness eds., 2007).

[10] Mokgoro *cited in* BORAINE, *supra* note 8, at 362.

[11] In Tanzania, the term *ujamaa* is used to describe the community ties that extend beyond the immediate family. Tanzania's first president, Mwalimu Julius Nyerere's socialist agenda was hinged on this concept of *ujamaa*. WILLIAM REDMAN DUGGAN & JOHN R. CIVILLE, TANZANIA AND NYERERE: A STUDY OF UJAMAA AND NATIONHOOD 172 (1976).

[12] The English version of the national anthem translates these Swahili words as, "May we dwell in unity, peace and liberty."

[13] Chris Cunneen, *Reviving Restorative Justice Traditions?, in* HANDBOOK OF RESTORATIVE JUSTICE 113, 115 (G. Johnstone & D. Van Ness eds., 2007).

[14] The Constitution of Kenya Review Commission compiled a list of communities in the Republic of Kenya in 2002 (unpublished but on file with author). For a complete list of communities of the Republic of Kenya with notes on their origins, *see* WANGUHU NG'ANG'A, KENYA'S ETHNIC COMMUNITIES: FOUNDATION OF THE NATION (2006).

with precision. This article acknowledges a further semantic limitation in the attempt to translate terms from native languages to English. Aware of these limitations, terms associated with modern legal systems have been adopted here cautiously. Firstly, the phrase traditional "criminal justice system" is used in this article with caution since the communities did not have a distinct criminal justice system. Wrongs committed, both criminal and civil, in modern law terms, were dealt with in a harmonized justice system. However, the term "criminal justice system" is adopted here to refer to the communities' intervention with conduct that is considered criminal in modern law. Secondly, it is noted that the terms "offenders" and "victims" are modern legal terms. For ease of reference, they are used here to refer to the wrongdoers and the parties wronged against in traditional communities. Thirdly, it is also noted that "restorative justice" is a modern term. However, certain practices within traditional communities incorporated components of restorative justice as understood today. Thus, this article regards these traditional interventions as restorative justice practices.

This article does not exhaust practices in the traditional communities' justice systems; practices described in this article are examples of restorative processes within the communities.

THE KAMBA JUSTICE SYSTEM

The justice system was situated within the Kamba overall social structure. A proper analysis of the penal interventions in this community demands a focus on the practices in the justice system within the context of the entire social setting of the Kamba community. As Foucault notes, penal mechanisms should not be analyzed in isolation from other social-political tactics.[15] This is because practices operate within a given "economy of discourses of truth" which must be identified to understand the operation of these practices.[16] To identify the underlying discourses of truth these practices have to be situated within the overall context in which they operate.[17] This analysis of the Kamba penal practices was therefore conducted in the context of overall social mechanisms.

The Kamba justice system hinged on the inescapable social ties that made the individual a part of the community, hence dictating individual behaviour. Social practices as well as the justice system governed individual conduct. Individuals acted in accordance with the social norms to maintain the benefits that accrued from being a part of the community. The essence of life was a complex web of societal interactions and one existed as part of the community rather than as an individual. Restorative justice was therefore fundamental. Relationships had to be maintained as they formed the foundation of the community. A clear picture of this grid is seen as one deconstructs the criminal justice system alongside community ties.

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[15] MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 23 (Alan Sheridan trans., 1979) (1977).
[16] MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLEGE DE FRANCE, 1975-1976 24 (David Macey trans., 2003) (1997).
[17] FOUCAULT, *supra* note 15, at 24.

RESTORATIVE RESPONSES TO WRONGDOING IN THE KAMBA COMMUNITY

The process of dealing with offenders was based on a hierarchical structure that had procedural guidelines. For offences committed within a family the matter was heard and determined by the family head. However, if a family head was unable to resolve a matter he would call upon the clan elders to adjudicate the matter.[18] Similarly, if the offender and the victim belonged to the same clan, the council of elders in that clan would adjudicate the matter. Both the offender and the victim would have a spokesperson from his or her family to represent the facts to the clan elders. In an inter-clan matter, where the offender and the victim belonged to different clans, elders from the different clans would come together. Spokespersons to represent each clan would then be selected to facilitate the hearing of evidence from both sides.[19]

Once the facts of the case were ascertained, the elders deliberated and meted out the sentence. The concept of guilt, in contemporary criminal law terms, was immaterial in the Kamba legal system. The intentions of the offender were not considered and once wrongdoing was ascertained the offender was required to pay compensation according to the elders' directions. Compensation was a standard practice for almost all cases and there was a set compensation scale for different offences.[20] Essentially restorative, the emphasis on compensation was geared towards catering for the needs of the victim as well as promoting reconciliation within the community. Even murder cases, which now attract a mandatory death penalty in Kenya,[21] were resolved through compensation in the Kamba community. Kamba law prescribed the blood price payable depending on the sex of the deceased.[22] The term blood price refers to the compensation a killer was required

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[18] The clan elders' court was comprised of family heads from the families making up the clan.

[19] Interview with Musyoka in Machakos, Kenya (Aug. 1, 2006) (on file with author). Interview with Nzioka in Machakos, Kenya (Aug. 2, 2006) (on file with author). Interview with Mulusya in Machakos, Kenya (Aug. 2, 2006) (on file with author).

[20] *Id*. For example, compensation scales for **Kamba** communities living in Kitui and Machakos were as follows:

- Assault breaking a hand accidentally: one ram would be slaughtered as a sacrifice.

In **Kitui,** maiming

- One finger: one cow
- One hand: one cow and one bull
- One ear: one cow and one bull
- One eye: one cow and one bull
- One leg: one cow and one bull

In **Machakos,** maiming

- One toe/finger: one cow
- One hand: three cows
- One ear: one cow
- One eye: one cow
- One leg: three cows

D.J. PENWILL, KAMBA CUSTOMARY LAW; NOTES TAKEN IN THE MACHAKOS DISTRICT OF KENYA COLONY 85 (1951). Musyoka described this scale in similar terms to Penwill's documentation. Interview with Musyoka in Machakos, Kenya (Aug. 1, 2006) (on file with author).

[21] Penal Code, Cap. 63 § 204 (Kenya), *available at* http://www.kenyalaw.org/kenyalaw/klr_app/frames.php (last visited Feb. 22, 2010).

[22] PENWILL, *supra* note 20, at 81-82.

to pay to the victim's kin. It literally meant compensating the victim's kind for the "blood shed."

The determination of guilt in the Kamba community was synonymous to ascertaining facts. Whereas the system had adversarial connotations allowing both the victim and the offender to put forward their case, sharp disparities can be raised if compared to contemporary adversarial systems. The Kamba adversarial system was not reduced to a contest of which party best articulated its position. It was preoccupied with determining the truth as the first step towards restoring relations. The victim needed to be compensated and the offender had to take responsibility for his or her actions as well as have the opportunity to be reconciled with the victim. As illustrated above, family/clan relations were maintained reverently. The clan members therefore assisted the offender in paying the compensation award to the victim since the offence of an individual had repercussions on the whole clan.[23] Figure 1-1 below is an illustration of the justice system as a mechanism to sustain community cohesion.

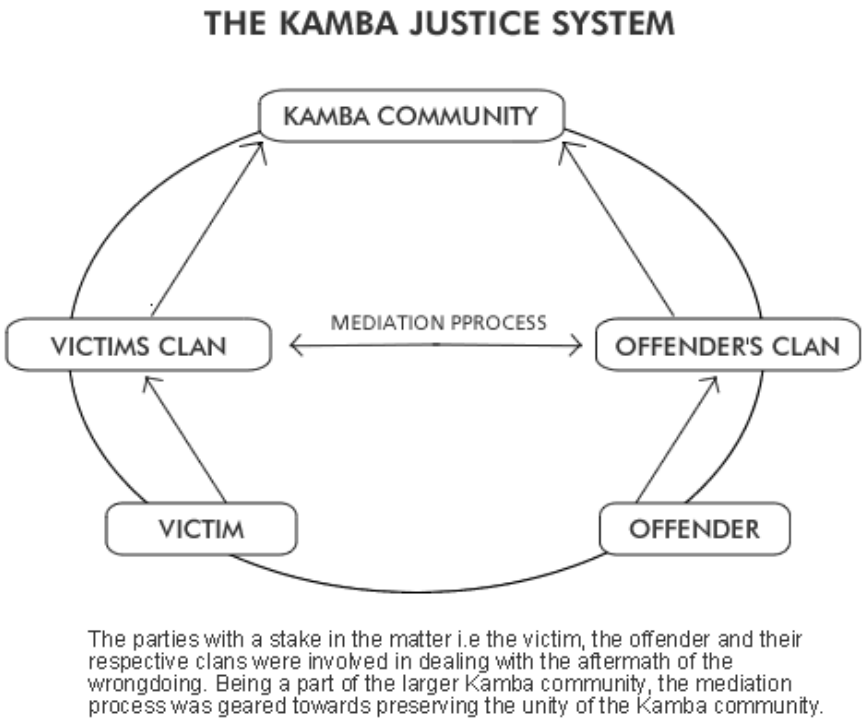

Figure 1-1

THE KIKUYU JUSTICE SYSTEM

The justice system within the Kikuyu community replicated its socio-economic structure. An in-depth analysis of this response to wrongdoing reveals its link to the social, political and economic structures of the community. Restorative justice values were placed at the

[23] Interview with Musyoka in Machakos, Kenya (Aug. 1, 2006) (on file with author).

heart of this justice system. However, the restorative objectives and the implementation of these objectives were dictated by the entire socio-political structure of the community.

This justice system was utilized to maintain equilibrium in the community. Thus, whereas criminal proceedings addressed the issues between the offender and the victim, the underlying objective of the system was to settle conflict and rid itself of any destabilizing elements in the community. To clearly illustrate the restorative justice mechanisms in this community, the interconnection between the economic practices, the social structure and the political government is examined. This section analyzes the extent to which the justice system was influenced by the socio-political organization. One of the key points of this correlation is the multiplicity of roles of the Kikuyu elders who served as the social, political and judicial officers. The first part of this section shows how the economic set up is linked to the socio-political structure and how this in turn dictates the functional framework of the justice system. Justifying this exercise, the discussion is based on the premise that the structure and actual practice of the criminal justice system can only be properly understood within its social context. More specifically, the objectives of the justice system emanated from the value system within the socio-economic structure of the Kikuyu community. To illustrate this, the second part of this section analyzes the objectives of the justice system in light of the procedure as well as the nature of settlement reached.

RESTORATIVE PRACTICES IN THE KIKUYU COMMUNITY

As agriculturalists, the Kikuyu community regarded land as divine.[24] The Kikuyu system of government was built around land ownership. Land was communally owned by the extended family referred to as the *mbari*. Hence the *mbari* were closely knit together because of blood ties and communal land ownership.[25] Moreover, the proximity of the homesteads to each other facilitated consistent social interactions. Farming as the economic mainstay of the Kikuyu further strengthened the social ties within the *mbari*. Farming activities such as weeding and harvesting were carried out jointly. This was done systematically where members of the *mbari* worked together rotating from a member's portion to another until they completed all the portions.[26] Individuals relied on each other to meet their economic objectives. Interlinked to this economic framework was the social structure. The entire *mbari* was involved in activities one would otherwise deem personal such as marriage negotiations on behalf of individual members.[27] As such, the *mbari* was a part of the individual's life in all senses.

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[24] JOMO KENYATTA, FACING MOUNT KENYA 21 (Heinemann Educ. Books Ltd. 1979) (1938).

[25] The term "communal ownership" is used very cautiously. Communal ownership in the Kikuyu community meant that the extended family group was entitled to the use of a given portion of land. This did not mean, however, that all the members individually held exclusive rights to the land. The complexity of this ownership raises discrepancies in the diverse views given by various writers. *See* KENYATTA, *supra* note 24, at 23-30; *see also* GODFREY MURIUKI, A HISTORY OF THE KIKUYU, 1500-1900 75 (1974).

[26] Though referring to 'individual portions' it has to be noted that these individuals did not own the allocated portions of land. These portions were allocated to them for subsistence and not as an exclusive form of land ownership. *See, e.g.*, KENYATTA, *supra* note 24, at 24-32.

[27] Interview with Mwangi in Nakuru, Kenya (July 15, 2006) (on file with author).

Operating in this schema, the justice system reflected the core value system of the *mbari*. Within the *mbari* grouping, there was an established council of elders referred to as *kiama kia mbari*.[28] This elders court was mandated to oversee social issues as well as to act as the judicial body. Consisting of the male heads of the extended families, the *kiama kia mbari* only adjudicated cases in which both the victim and the offender belonged to the same *mbari*. The set practice was that an elder was required to disqualify himself from sitting for a case in which he had a direct or indirect interest.[29] Although this requirement would seem to echo the ideals of modern justice systems, the elders' non-interest in the litigants' matters was not common. There were evident ties between the council of elders and the litigants. It should be borne in mind the members of the *mbari* were blood relatives with a common interest in the land, which was their main source of livelihood. Thus the requirement for an elder to disqualify himself if he had a direct or indirect interest was unlikely; the judicial officers and the litigants were blood relatives with an interest in land which bound them. All the members of the elders' court always had an interest in the matter since adjudicating over their blood relatives facilitated equilibrium in the community, which was crucial for a community that conducted its socio-economic activities jointly.

The structure of the criminal justice system was in accordance with the social framework. It was an extension of a mechanism through which the conduct of individuals was governed. This was achieved through a framework that interconnected the members of the community and the social structure. Litigants appeared before the elders who were their blood relatives and leaders in all other community affairs; the judicial process was not detached from the other social structures.[30] An individual had strong ties to the community that controlled every aspect of his or her life and was obliged to live up to the community's expectations. This could be explained by the fact that not only did the community determine the outcome of all social happenings but individuals also needed the community to survive.

Where the offender and victim did not belong to the same extended family, there were elders' courts other than the *mbari* court to adjudicate the matter. Just like the extended family elders court, these other elders courts were organized around the land tenure system. A group of extended families neighbouring each other formed a political unit referred to as *mwaki*.[31] The *mwaki* had a council of elders referred to as *kiama kia mwaki*. This council consisted of elders representing the extended families to which the litigants belonged.[32] Essentially it was a merger of a few elders from each *mbari* council

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[28] The term *kiama* is translated to mean "council." Hence the phrase *kiama kia mbari* means the "extended family council" (author's own translation).

[29] MURIUKI, *supra* note 25, at 129.

[30] Although this research restricts itself to the criminal justice system, it is worth noting that a similar procedure was followed for both civil and criminal proceedings. *See* KENYATTA, *supra* note 24; L.S.B. LEAKEY, THE SOUTHERN KIKUYU BEFORE 1903, 998 (Jean Ensminger & G.S.B. Beecher eds., 1977).

[31] H.E. LAMBERT, KIKUYU SOCIAL AND POLITICAL INSTITUTIONS 2 (1956) (referring to the *mwaki* as a "neighbourhood" in contemporary terms). This source provides a good depiction of *mwaki* as an organized unit. However, the term "neighbourhood" must be read cautiously as the *mwaki* covered an expansive area of land. This is because each extended family owned large areas of land. Leakey's use of the term "territorial unit" perhaps gives a clearer picture of the *mwaki*. LEAKEY, *supra* note 30, at 1002.

[32] LEAKEY, *supra* note 30, at 1002.

of elders. Thus, just like the *mbari* elders' council, the elders in the territorial council (*mwaki*) had ties with the litigants. The social-legal interlink is therefore evident at this level as well. Moreover, due to the territorial proximity between the occupants of a *mwaki*, there was a deep sense of community owing to the inevitable cultural rituals that had to be performed collectively. Yet again the economic mainstay of the community determined the focus of the rituals. As agriculturalists, it was in their best interest to do everything possible to ensure a good harvest. A myriad of rituals were conducted within a *mwaki* to this end. Muriuki outlines these rituals to include:

> …prayers that were deemed necessary for general welfare of the community at various times, for instance sacrifices for rain in times of drought, or the libations poured at the beginning of the planting season and at the harvesting of first fruit.[33]

Over and above the ties necessitated by survival needs, the cohesion of the Kikuyu community was cemented by a shared belief as to their origin. They believed that they were all descendants of the tribal founders, Gikuyu and Mumbi, who had nine daughters. The names given to these nine daughters represented the nine clans of the Kikuyu community.[34] As such the entire Kikuyu community was deemed to be one big family.[35] Muriuki argues that this belief had little impact on day-to-day activities and its significance was when need arose to promote unity within the community, for example, when fighting against external forces.[36] However, the centrality of this sense of belonging in the community cannot be ignored.

This social structure of the Kikuyu community, depicted as one big family, sheds light on the operation of the *kiama kia mwaki*. Whereas the litigants may not have been blood relatives, in effect both the council and the litigants had a sense of brotherliness; there was an underlying need to maintain the unity. A similar sense of oneness was evident in an *ad hoc* bench created to adjudicate over litigants who were not blood relatives and did not belong to the same territorial unit. The *ad hoc* bench was composed of elders selected by each litigant normally through the advice of elders in his family.[37] In sum, as illustrated in Figure 1-2, the Kikuyu community had three councils of elders. Figure 1-2 illustrates the jurisdiction of the different councils of elders.

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[33] MURIUKI, *supra* note 25, at 116.
[34] KENYATTA, *supra* note 24, at 5 (stating the Kikuyu community is generally said to have nine clans); *but see* MURIUKI, *supra* note 25, at 113 (stating there are divergent views stretching the number of clans to 13).
[35] Interview with Mwangi, *supra* note 27.
[36] MURIUKI, *supra* note 25, at 113.
[37] *See* LAMBERT, *supra* note 31, at 108.

THE KIKUYU JUSTICE SYSTEM

1. Extended Family Council of Elders[38]
↓
Litigants belonging to the same extended family (*mbari*)

2. Territorial Unit Council of Elders[39]
↓
Unrelated litigants but living in one territorial unit (*mwaki*)

3. Ad hoc Bench of Independent Elders
↓
No community of blood or domicile[40]

Figure 1-2

Indeed the common factor in all the different councils of elders was that they were all part of the socio-political framework. These councils of elders applied the same set of principles and procedures in practice. Core values of the Kikuyu community were applied across the different councils.

Kenyatta, describing the introductory proceedings, states that the leader of the elders court, uttered a prayer in the following words:

> "Athuri, ugai nyomba eroiguana" (ie: "Elders, say let there be agreement and peace in the family group"). The elders answered in chorus: "Nyomba eroiguana, thaai thathayai Ngai thaai" (ie: "Let there be peace in the family group, beseech Ngai, peace be with us").[41]

These introductory words reflect the objective of the council of elders: to promote peace and maintain equilibrium. The framework of the judicial system, as already outlined, was in sync with realizing this objective. Evidently, elders who were part of the litigants' lives and had a stake in the outcome of the arbitration projected the judgments towards a particular end. Presiding over the proceedings, the councils of elders acted with the particular aim of restoration for the benefit of the litigants and for the entire community, which they were a part of. The mode of instituting proceedings further shed light on the bedrock of the justice system. In the *kiama kia mbari* for example, the offended party would brew beer for the elders as a sign of instituting an action to be adjudicated upon amicably.[42] Similarly, a fee was paid by the litigants to the *kiama kia mwaki*. The fee

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[38] *Id.* at 108, 110.
[39] *Id.*
[40] Emphasis is made of the fact that, in spite of not being blood relatives, the Kikuyu community believed that they were all relatives by virtue of being the children of *Gikuyu* and *Mumbi* (author's own observation).
[41] KENYATTA, *supra* note 24, at 215.
[42] *Id.* at 214-15, 226.

was normally provision of an animal such as a goat, which was slaughtered and eaten by the elders. Eating together was an expression of the intention of the elders to adjudicate the matter amicably and their commitment towards the unity of the community.[43]

On the face of it these elaborate practices appear as simply habitual but they signified the governing principles. What comes out clearly is the underlying notion that the justice process was much more than just arbitrating over the litigants' claims; there was much more at stake than just the relationship between the litigants. The cutting edge of this position was the fact that a litigant did not stand in isolation, he was a part of his immediate family and by extension the entire Kikuyu community, *mbari ya Mumbi*.[44] The relationship between the litigants therefore impacted on their immediate families and the entire community. The procedure in dealing with homicide cases, for example, clearly depicts the relationship between the individual and his relatives. With the aim of expressing their anger for the killing of a relative, the victim's relatives invaded the murderers' homestead. To assert themselves as a family group capable of standing on its own, they would proceed to kill the murderer or one of his kinsfolk to settle the matter.[45] This ancient practice was later modified by the Kikuyu community. Just like in the ancient Kikuyu community, the deceased's family would invade the fields belonging to the murderer's relatives and would proceed to cut down plants. This invasion was referred to as a family's call, referred to as the *king'ore kia muhiriga,* which invited the murderer's family for a symbolic battle. During the period immediately before the colonial period, there was no actual fighting as the Kikuyu were guided by the saying, *tutingihe hiti keri*,[46] which means that the death of the deceased does not require another death. The elders of the two groups would stand in between the warring groups and seek an explanation for the fighting. Having heard the facts the elders would then reassure the groups that they would convene a council to adjudicate the matter.[47]

The justice system therefore sought to restore the relationship between the litigants and to promote peace within the community. To achieve this, the offender was required to compensate the victim. The determination of guilt in contemporary terms was alien to the Kikuyu community. Irrespective of whether the harm was premeditated or inadvertent, an offender was still required to compensate the victim based on the fact that the victim had suffered harm either way.[48] A standard scale of compensation was outlined and once it was determined that the offender committed an offence against a victim, the scale was applied.[49] Compensation of the victim was a sign of the offender taking responsibility for his or her actions and hence facilitated his or her reinstatement in society. The offender was assisted by his or her relatives to compensate the offender

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[43] LAMBERT, *supra* note 31, at 108.
[44] "The family of Mumbi," (author's own translation).
[45] KENYATTA, *supra* note 24, at 227.
[46] The Kikuyu saying, "we wouldn't give the hyenas twice," meant that a murder was no longer dealt with through another murder. LAMBERT, *supra* note 31, at 116.
[47] *Id.* at 117.
[48] KENYATTA, *supra* note 24, at 226-27.
[49] *See, e.g.*, LEAKEY, *supra* note 30, at 1013-34 (stating that the fine for the murder of a male was one hundred goats and sheep payable to the deceased's family. For the murder of a female, the fine was 30 goats and sheep payable to the deceased's family. The fine for breaking another person's leg was 50 goats).

again based on the understanding that a person was a part of his or her family and where he or she erred, his or her whole family erred.[50]

The justice system could be seen as an extension of the society's control over individual conduct. Individual members of the community were obliged to adhere to the demands of society as a mechanism of survival. This was because the socio-economic structure dictated a communal way of living which forced individuals to live according to the rules set out by the community. Similarly, when individuals erred, threatening the peace and equilibrium in the community, the judicial system placed them in a position that reiterated their dependence on the community. Not only did the system make the judicial officers a part of the litigants' lives, but the system also facilitated the participation of the litigants' relatives. Social groupings such as the age-groups exercised strict control over the conduct of their members. Members were therefore compelled to honor their age-groups by complying with the community's expectations. Restorative responses to crime were thus invoked to sustain this community cohesion.

THE MERU JUSTICE SYSTEM

The traditional Meru community was governed by a sovereign together with a council of elders. The sovereign, who was referred to as *mukiama*, largely played a ceremonial role. On the other hand, the council of elders, referred to as the *Njuri Nceke*, carried out a large proportion of the actual administration of the community.[51] This central role of the *Njuri Nceke* in maintaining harmony and dispensing justice explains the attention given to it in this analysis. The *Njuri Nceke* still exists although their role has been curtailed by state-based justice institutions.[52] Today, the position of the *Mugwe*, who is the spiritual leader of the *Njuri Nceke*, continues to be occupied. The current *Mugwe*, Dr. Gaita Baikiao II, asserts that although the operation of the *Njuri Nceke* was curtailed by the establishment of the state government in Kenya, it still continues to be in existence as an organized group of elders.[53]

Just like the Kamba community, discussed above, the Meru community held strong beliefs in the spirit world. Background information surrounding the sovereignty of the *Njuri Nceke* offers insight into the Meru justice system. The first part of this section details the composition of and initiation procedures into the *Njuri Nceke*. As illustrated here, the justice system in the Meru community was integrated with other social processes. Indeed the term "justice system" is used cautiously as there was no clear cut

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[50] *See* LAMBERT, *supra* note 31, at 113-14.

[51] *See* DAVID MAITAI RIMITA, THE NCHURI NCHEKE OF MERU 50-51 (1988) (stating that the word *njuri* means "council" and the word *nceke* means "thin." The phrase *Njuri Nceke* thus means a "select council").

[52] Members of parliament belonging to the Meru community have been and continue to be subject to public scrutiny by the *Njuri Nceke*. Where their conduct is unacceptable, the *Njuri Nceke* calls for cleansing rituals. *See* Oscar Obonyo, *As the Going Gets Tough, Politicians Run to Tribal Chiefs*, DAILY NATION, Oct. 29, 2006, at 1 (setting out the relations between members of parliament and the *Njuri Nceke*). Although its direct influence on the Meru community is limited in modern times, the *Njuri Nceke* still provides guidance to the people. *See* M'Rinyiru quoted in Bertha Kang'ong'oi, *Visit to Holy House of the Meru Elders*, DAILY NATION, June 20, 2005, at 4 (where the *Njuri Nceke* has organized programs for high school children to attend during school holidays).

[53] Interview with Dr. Gaita Baikiao II in Meru, Kenya (Aug. 28, 2007) (on file with author).

distinction between judicial processes and other social practices. The *Njuri Nceke* for example dealt with social issues such as conducting wedding ceremonies as well as resolving criminal matters such as murder.[54] However for the purposes of this analysis the term justice system is used to refer to the processes through which justice was dispensed as well as the people involved in these processes.

The *Njuri Nceke* was composed of male subjects who were elders by virtue of their age and had gone through formal initiation into this council of elders. Age groups and the *Njuri Nceke* worked alongside each other in maintaining the discipline and balance in the community.

To be eligible to join the *Njuri Nceke*, an elder was required to take an oath named *lamala*.[55] This oath was of great significance. It was an oath taken to affirm allegiance to the community and to defend its honour. One taking the oath undertook the responsibility to bear upon himself the security of women and children in the community. After taking this oath, elders aspiring to belong to *Njuri Nceke* had to go through three further stages of initiation. On paying the fee for the first stage, the aspirants were educated on the history of the Meru and on the core values on which the community was built.[56] The key value passed on to the initiates related to unity of the community and their role in maintaining it. Rimita highlights that:

> [T]he candidates were told that the Ameru were a small tribe and unless it was well organized it would perish within a few years. Above all they had to live on a land where justice prevailed. The strong, the weak, the rich and the poor had to be protected. Justice had to be equal for all. . . each man had to take part because one man cannot succeed.[57]

After this training, the elders knelt down and took another solemn oath as they drank a ceremonial drink. The closing words of the oath were particularly significant as they were to the effect that the initiate declared a curse on himself if he disobeyed rules of *Njuri*. The final initiation stage was officiated by the sovereign, the *mukiama*. The initiate was required to publicly recite:

> I have placed all my affairs in the hands of God, and in the hands of Njuri, and I am now going to live as the Njuri pleases, I will never live outside the Rules of Njuri. If I fail to fulfill this, may God kill me and all my descendants.

To this, the *mukiama* responded with a question to the initiate: "[D]o you agree that we bury you if you don't respect these oaths and if you disclose them to non members?" The initiate then answered: "Yes, because, Ameru are greater than I am."[58]

An obvious impact of initiation into the different stages towards becoming a member of *Njuri Nceke* was that individuals developed a strong sense of belonging to the

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[54] RIMITA, *supra* note 51, at 63, 76.
[55] *Id.* at 45.
[56] The fee at this stage was a he-goat. *Id.*
[57] *Id.* at 48.
[58] *Id.* at 50.

community. This process further created mindsets that centralized community needs and placed individual needs second. Having gone through the rigorous initiation processes, members of the *Njuri Nceke* had definitely reached a point of reckoning that the community was "greater than they were." This core value had significant implications on the dynamics of the "justice system." This meant that the overarching aim of the justice system was to sustain unity in the community.

RESTORATIVE PRACTICES IN THE MERU JUSTICE SYSTEM

The *Njuri Nceke* adjudicated cases where there was harm occasioned against a victim who then sought justice against the offender. The ultimate aim in settling cases in the Meru community was promoting reconciliation which was seen as a prerequisite to having a strong community.[59] Therefore in minor cases, parties were required to discuss the case and reconcile on reaching a settlement. However, if they disagreed, the *Njuri Nceke* was approached to adjudicate the matter. The practice was that once a date was set for hearing the matter, then all the members of *Njuri Nceke* were duly informed and called upon to attend.[60] It was not mandatory for all the members of the *Njuri Nceke* to attend and all that was required was a reasonable attendance for the dispute to be heard.[61] In effect, the *Njuri Nceke* was akin to a pool of judicial officers who were routinely called upon to adjudicate over matters. The significance of the *Njuri Nceke* in the administration of justice lay in the challenge posed to the elders during initiation to promote cohesion within the community. The outcome of all cases adjudicated upon by *Njuri Nceke* was always geared towards promoting unity in the community as depicted in their motto: "Unity, Mercy and Truth".[62]

On the day set for hearing the matter the *Njuri Nceke* and the litigants congregated at a designated location. The victim set out the facts of his claim and the accused person was given an opportunity to present his side of the story.[63] The aim of the "hearing" was to determine whether an accused person committed a wrong. A wrong was found to have been committed where the victim suffered harm, regardless of whether the accused had a guilty intent. Similar to the Kamba and Kikuyu communities, the outcome of a hearing was normally payment of compensation to the victim.[64] Coupled with orders for victim compensation, this principle underscored the centrality of restorative justice in the community. Through compensation, justice was seen to be done to the victim. As much as possible, the practice of compensation sought to restore the victim. A good example was in homicide cases in which the deceased was a young girl. In certain instances, the victim's family requested that the compensation be in the form of a cow and a girl from

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[59] Interview with Dr. Gaita Baikiao II, *supra* note 53.
[60] *See generally* RIMITA, *supra* note 51 (explaining that the members of the *Njuri Nceke* were all the elders who had undertaken the requisite initiation procedures into this institution).
[61] *Id*. at 68.
[62] Interview with Dr. Gaita Baikiao II, *supra* note 53.
[63] *Id*.
[64] *Id*. (explaining that the community had a set out compensation scale for different offenses). *See, e.g.*, RIMITA, *supra* note 51, at 77 (the following compensation was required for personal injuries: "Eye – a heifer, bull and a goat; Ear – a heifer, bull and a goat; Arm – 2 heifers, 2 bulls and a goat; Front teeth – a heifer each tooth, and other teeth a bull each.").

the accused's family.[65] Whereas the possibility of restoring the victim to the original state is impossible in this case, what is evident is that this justice system strived to bring some form of restoration to the victim.[66] Moreover, the compensation as acknowledgement of the wrongdoing done to the victim is restorative in and of itself; a sense of belonging was reaffirmed for the victim whose welfare was taken into consideration. At the same time, the offender was given an opportunity to make good his wrong by compensating the victim. This gave him an opportunity to be restored back into the community. Restoration of community relations was important to offenders bearing in mind that they were part of a community that idealized community ties.

RESTORATIVE JUSTICE AS A STRATEGY OF GOVERNING CONDUCT

As Foucault notes in many of his texts,[67] truths produced in a particular context plays a role in dictating what practices are rendered acceptable. Within the Kikuyu community, for example, there is a link between certain beliefs that were produced as truths and the practices that were embraced. For example, there were two key concepts produced as truths that rendered restorative practices acceptable amongst the Kikuyu. Firstly, the belief that land was divine had been produced as a truth. Secondly, the intrinsic cohesion of the community for survival was a central truth. The individuals were dependent upon the community to derive the benefits from the land. Not only was the land communally owned but farming, the main economic activity, demanded communal working. Therefore restorative justice practices which promoted unity in the community were not only acceptable but also fundamental in maintaining the socio-economic equilibrium.

CONCLUSION

Within these traditional communities, restorative justice is seen as a strategy for governing the conduct of individuals. The involvement of the families of the wrongdoer and wronged party reaffirmed the communal ties. Having in mind that individual conduct had repercussions for one's kin, individuals bore the responsibility to act properly. Therefore this social structure, which was based on communal living, facilitated the operation of restorative justice. As seen in the analysis of the three communities, the centrality of community unity was objectified as a truth. Together with other rationalities, this truth rendered restorative justice an acceptable practice that played a role in preserving community unity. Although restorative justice is seen as placing a premium on the involvement of all the parties, analyzing it in terms of government

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[65] RIMITA, *supra* note 51, at 68.

[66] *See generally* Colin Perrin & Scott Veitch, *The Promise of Reconciliation*, 4 L. TEXT CULTURE 1, 225, 229 (1998) (analyzing the question of compensation as a component of reconciliation. Acknowledging the claim that compensation "helps' in reconciliation, they highlight the 'inadequacy' of compensation. The positive attributes of compensation can only be impacted if this inadequacy is first acknowledged). However, it appears that the communities discussed in this article had developed a system that fully embraced compensation as a restorative mechanism).

[67] For a detailed analysis on the function of "truth producing" discourses, see Michel Foucault, *Politics and the Study of Discourse, in* THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 58 (Graham Burchell et al. eds., 1991); FOUCAULT, *supra* note 15, at 27-28 (on how power shapes knowledge); FOUCAULT, *supra* note 16, at 24-25 (on the importance of the relationship between truth and power).

reveals its wider objectives in these communities.[68] Restorative justice hence operates as a strategy to achieve the overall goals of preserving community unity.[69]

The fact that restorative practices resonated with cultural values in these traditional communities not only rendered them acceptable but also rendered them effective strategies of governing conduct. These cultural values and the socio-economic networks made restorative practices applicable to most forms of crimes. In comparison, weaker social ties contribute to the limited scope of restorative justice in modern contexts. However restorative practices are gradually being embraced, particularly in response to juvenile crime. An insight that can be drawn from these traditional communities is the harmonious operation of restorative practices and the established socio-economic processes. The effectiveness of restorative justice practices demands developing programs that are compatible with the community values and the existing socio-economic structures.

By illustrating the operation of restorative justice in these communities this article challenges the centrality of retributive values in modern criminal justice systems. Restorative justice is presented as a potential modality of intervention in crime and diverts the focus from retributive values which underpin contemporary justice systems.[70]

[68] Some modern proponents of restorative justice mainly focus on the involvement of all the parties with a stake in the matter. *See* Paul McCold, *Primary Restorative Justice Practices, in* RESTORATIVE JUST. FOR JUV. 41 (Allison Morris & Gabrielle Maxwell eds., Hart Pub. 2001); MARSHALL, *supra* note 7, at 5; Braithwaite, *supra* note 7.

[69] *See* GEORGE PAVLICH, GOVERNING PARADOXES OF RESTORATIVE JUSTICE 10-11 (2005) (on restorative justice resonating with communities' objectives).

[70] *See* Daly, *supra* note 1, at 62 (the author argues that telling the story of restorative justice presents an alternative response to crime).