

**A GENEALOGICAL ANALYSIS OF THE CRIMINAL  
JUSTICE SYSTEM IN KENYA: REBIRTH OF  
RESTORATIVE JUSTICE FOR JUVENILES?**

**Thesis submitted for the degree of**

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## ABSTRACT

This thesis explores restorative justice practices as a modality of intervention in juvenile crime in Kenya. To analyse current restorative justice practices, the thesis adopts the Foucauldian concept of genealogy and examines the processes through which contemporary penal practices have become acceptable. The thesis links reforms in the juvenile justice system in Kenya to the process of legal globalization and highlights the role of the 'law and development' discourse in this process. Identifying pitfalls intrinsic to the Westernization of Kenyan law, the thesis engages in a postcolonial critique of law and development. Inspired by Foucault's analysis of power/knowledge, which postcolonial theory heavily relies on, the thesis examines the conditions that make the Westernization of Kenyan law possible.

In particular, the thesis analyzes the conditions that have made certain penal practices acceptable. Using data collected through original empirical research and existing literature on the Kenyan justice system, the thesis examines these penal practices. The research reveals that there have been attempts to incorporate restorative justice practices in the formal juvenile justice system. However, the system underutilizes these practices in favour of conventional court-based penal practices. On the other hand, restorative justice values are embraced in informal forums. Arguing that restorative justice values are compatible with the cultural ethos of communities in Kenya, this thesis examines why restorative justice practices in the formal juvenile justice system remain underutilized. The thesis identifies imprisonment as the predominant modality of punishment in Kenya and analyzes how restorative justice fits in within this context.

Analyzing the current underutilization of restorative justice, the thesis highlights the failure to tailor legal structures to fit the contextual realities as a major drawback to the Westernization of Kenyan law. Inspired by postcolonial theory, the thesis underscores the need for local solutions to structural challenges besetting the legal system. It further emphasizes the need for a careful analysis of the compatibility of global penal trends with the contextual realities of a country still beset by the aftermath of colonialism.

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## **LIST OF ABBREVIATIONS**

ANPPCAN	African Network for the Prevention Against Child Abuse and Neglect
CDM	Catholic Diocese of Machakos
CKRC	Constitution of Kenya Review Commission
CPKJD	County and Protectorate of Kenya Judicial Department
CRC	Convention on the Rights of the Child
DC	District Commissioner
GJLOS	Governance, Justice, Law and Order Sector Reform Programme
KHRC	Kenya Human Rights Commission
LRF	Legal Resources Foundation
NCCS	National Committee of the Community Services
OHCHR	Office of the High Commissioner on Human Rights
OMCT	Organization Mondiale Contre la Torture. (World Organization Against Torture)
OSAC	Overseas Security Advisory Council
PC	Provincial Commissioner
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAFEI	United Nations Asia and Far East Institute for the Prevention of Crime
UNHRC	United Nations Human Rights Commission
UNODC	United Nations Office on Drugs and Crime

## CHAPTER ONE

### INTRODUCTION

#### 1 Overview

Juvenile justice has historically taken a peripheral place within the criminal justice system in Kenya. Prior to the enactment of the Children Act of 2001, the criminal justice system lacked a well structured, distinct system specifically addressing the treatment of juvenile offenders. Initiatives taken by diverse stakeholders promoted the incorporation of juvenile justice into the reform agenda of the criminal justice system (UNAFEI, 2001:7).<sup>1</sup> Subsequently, with the enactment of the Children Act of 2001, the children's court was established and guidelines on dealing with juvenile offenders were laid out. In addition, discretionary powers have now been granted to police officers to divert juvenile cases from the normal procedure leading to a court hearing. Guidelines to this diversion program give police officers the option to resort to restorative justice processes in dealing with juveniles (ANPPCAN, 2006:25). This thesis examines the operation of restorative justice practices as interventions to juvenile crime in Kenya.

Although this thesis focuses on the juvenile justice system, an examination of the overall legal structure of the Kenyan criminal justice system is fundamental. Owing to the historical fusion of adult and juvenile programs in Kenya, the criminal justice system as a whole largely reflects the underlying values of the juvenile justice system.

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<sup>1</sup> The Children Act of 2001 established the following institutions: the National Council for Children's Services to co-ordinate child welfare activities; the Department of Children's Services to oversee the day to day dispensing of justice to juveniles; Children's Courts with jurisdiction to hear juvenile cases.

Moreover, the establishment of the children's court, as will be discussed in detail in chapter six, has not changed the existing ideologies in the criminal justice system.

In Kenya, imprisonment characterises the outcome of a large number of cases that are subjected to the criminal process (LRF, 2005:9; Muhoro, 2000:325).<sup>2</sup> Sentencing trends reflect the system's over reliance on imprisonment. Discussing these trends Wanjala and Mpaka assert that "imprisonment is an automatic form of punishment in certain cases" without regard to the circumstances of a case (1997:136).<sup>3</sup> In addition to convicted prisoners, prisons hold large numbers of offenders on remand pending the conclusion of their trials. As a result, overcrowding in prisons has been a major issue of concern to date. The capacity of prisons in Kenya is gravely overstretched.<sup>4</sup> Blatant examples are the Nairobi Industrial Area Remand Home and Nakuru Main Prison which on average in June 2006 held 4805 prisoners and 1741 prisoners for a capacity of 1000 and 800 respectively.<sup>5</sup> This scenario is replicated in the congestion of juvenile remand homes. For instance the Nakuru juvenile remand home accommodates on average 71 juveniles for a capacity of 40.<sup>6</sup> On the other hand, borstal institutions are not congested but juveniles are released from the institution after sitting exams for their skills training as a matter of course to create room for other juveniles.<sup>7</sup>

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<sup>2</sup> However there have been recent attempts to promote probation as a sentencing option. The circumstances and factors revolving around this are discussed in chapter five of this thesis.

<sup>3</sup> Although this observation was made over a decade ago, this remains the position to date as illustrated in this thesis.

<sup>4</sup> The inadequacy of prison utilities is evident. For example, a spot check on a number of prison blocks at the Nairobi Industrial Area Remand Home during the researcher's fieldwork survey, revealed disturbing sleeping arrangements. The ratios of inmates to the number of mattresses were as follows: 102 inmates: 29 mattresses; 126 inmates: 34 mattresses; 130 inmates: 40 mattresses; 130 inmates: 30 mattresses; 112 inmates: 44 mattresses.

<sup>5</sup> Statistics were obtained during fieldwork in these prison facilities in June 2006.

<sup>6</sup> Data collected from the Nakuru juvenile home in June 2007.

<sup>7</sup> The process through which juveniles are released from the borstal institution is discussed in chapter six.

A high rate of recidivism casts doubt on the effectiveness of a system that has been reliant on imprisonment in the treatment of offenders.<sup>8</sup> Concern has been raised over the criminal justice system's inability to contain crime within reasonable limits in Kenya (Gimode, 2001:313). Moreover insecurity in the country has had grave consequences such as impeding development (Saferworld, 2004:1). It is within this context that reforms focusing on juvenile justice have been introduced.

With the issues raised cutting across the criminal justice system in Kenya as a whole why does this research focus on restorative justice practices in the juvenile justice system? The first reason is based on the fact that there have been specific attempts to incorporate restorative justice practices to the formal juvenile justice system. However there have not been contemporaneous efforts in relation to adult offenders. For this reason, a focus on restorative justice practices as crime interventions calls attention to the juvenile justice system. The second pertinent reason hinges upon the visionary bedrock of restorative justice. The focal point of restorative justice is "restoration of the victim, restoration of the offender to a law-abiding life, restoration of the damage caused by crime to the community" (Marshall, 1999:7).

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<sup>8</sup> Statistics from the Nakuru Main Prisons reflects this high recidivism rates. For example admission of offenders statistics in May and June 2006 were respectively as follows:

Star Class Offenders (recidivists): 198  
Ordinary Offenders (first time): 101

Star Class Offenders (recidivists): 196  
Ordinary Offenders (first time): 74

An error margin is noted as information is obtained from the convicts on arrival at the prison and on occasions the officers do recognise a convict who has been there before. Some convicts do not disclose that they are recidivists and the prison department does not have a centralised database of convicts.

Although the principal goal of restorative justice is not reducing reoffending, restoration of the offender to a law abiding life suggests the possibility of orientating the offender away from a criminal life (Hayes, 2007:427). This offers a possible explanation for the implementation of more restorative justice forums for juvenile offenders as compared with adult offenders. Penal practices aimed at reducing reoffending have a higher probability of success in the case of juveniles than adult offenders. Adult offenders, particularly recidivists, are usually hardened by crime and efforts to reform them are challenging, if at all possible (Karanja, 2006, Interview 3<sup>rd</sup> July; Waigiri, 2006, Interview 28<sup>th</sup> June). Recognizing this challenge, traditional communities in Kenya held the responsibility of bringing up children with utmost regard.<sup>9</sup> It was argued that the formative years of a human being determined how he or she turned out as an adult and it was very difficult to then change an adult's character. The Kikuyu adage '*ni hinya kurunga muti mukuru*' reiterates the challenge that lies in attempting to reform adults.<sup>10</sup>

Resonating with the ethos of the communities in Kenya and linking them to the intrinsic values of restorative justice, this research therefore focuses on the juvenile justice system. While conducting fieldwork research in Kenya, an issue of concern noted was that a large number of adult offenders started off as juvenile offenders. This emphasizes the impact of the treatment of juvenile offenders on the overall goals of the

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<sup>9</sup> Kamba elders emphasised that this understanding imposed an inherent responsibility on the community to correct a child when he or she committed a mistake. Thus, the role of disciplining and counselling children extended from the parents to the community. This explains why a Kamba elder who found a child misbehaving had the right to punish the child (Interviews, Nzioka, Mulusya, Kalonzo 2<sup>nd</sup> August 2006).

<sup>10</sup> Kikuyu adage: 'it is hard to straighten an old tree' (Author's translation). Prison officers interviewed in Kenya remarked that attempts to rehabilitate adult offenders have a low success rate (Karanja, 2006, Interview 3<sup>rd</sup> July; Waigiri, 2006, Interview 28<sup>th</sup> June).

criminal justice system. In light of this, this thesis embarks on a genealogical analysis that examines the past, present and future of restorative justice for juveniles in Kenya.

## **2 Aims and Objectives**

The author had previously conducted documentary research examining the underlying ideology of the criminal justice system in Kenya (Kinyanjui, 2005). One of the conclusions made from the research was that rehabilitative ideology did not occupy a central role in the formal justice system. However, during the research, the researcher noted that some restorative options were being introduced in the formal juvenile justice system in Kenya. In spite of these efforts, no legislation had been passed to expressly recognise these restorative options which were made available through the diversion programme. At the same time, literature discussing the diversion programme seemed to focus on the programme as a strategy to prevent children in need of care from being taken through the criminal process.

Whilst restorative justice for juveniles is not expressly enshrined within the formal criminal justice in Kenya it finds expression in the day to day treatment of juveniles in informal forums. Moreover, some officers in the formal system, such as probation officers, incorporate restorative processes over and above their official mandate. The research examined whether the informal recourse to practices that are inherently restorative had anything to do with cultural values held by the communities in Kenya. That notwithstanding, the restorative options introduced in the formal juvenile justice system remain underutilized. The informal system on the other hand is the preserve of

those wishing to avoid the formal system and hence very few juvenile offenders benefit from these restorative justice practices.

The research was thus conducted with the following objectives in mind, which acted as guidelines, allowing the themes to gradually develop from the data rather than testing a rigidly formulated hypothesis.<sup>11</sup>

1. To examine the primary penal practice in the formal criminal justice system in Kenya. This objective relates to adult offenders as well, to the extent that this reflects the underlying value system of the entire criminal justice system.<sup>12</sup> Further, to investigate why particular modes of offender treatment are employed and whether these interventions are effective.
2. To examine the processes which have shaped the criminal justice system in Kenya in its current form.
3. To examine the use of restorative justice practices in dealing with juvenile offenders in Kenya and to assess the extent to which restorative justice values inform policy relating to the juvenile justice system in Kenya.
4. To establish the extent of the influence of traditional values on the current criminal justice system in Kenya and the implications this has for the future of restorative justice for juveniles in Kenya.

As pointed out above, the idea of conducting in-depth research on the criminal justice system in Kenya originated from a concern that retributive practices continue to

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<sup>11</sup> For a detailed discussion on grounded research that allows themes to emerge from data collected see Strauss and Corbin (1998:12).

<sup>12</sup>Analysing systems in the light of *practices* in Foucault's terms goes beyond the classifications given in various institutions (1991c:75). Thus analysing the practice of imprisonment sheds light on prisons and other institutions such as borstal institutions set out to achieve a similar objective.

dominate the system in spite of their ineffectiveness in responding to crime. The thesis was further inspired by the researcher's previous experiences as a volunteer lawyer offering pro bono legal advice to prisoners in Kenya. These experiences raised concern about the challenges besetting the criminal justice system such as the desperate overcrowding in prisons, high recidivism rates and alarming crime rates in Kenya. On the other hand, the researcher's interactions with the prisoners also gave her a new perspective of crime which challenged her inclination towards retributive justice, having been a victim of a violent robbery. Also, at this time the Children Act was passed which established a children's court to deal with juvenile matters. Along with these reforms came the diversion project that provided an opportunity for players in the juvenile justice system to engage the juveniles in restorative justice programs. Against the backdrop of the ineffectiveness of the modalities of intervention embraced by the Kenyan criminal justice system, the potential of restorative justice practices as a different form of intervention was worth exploring. This thesis therefore sought to examine the restorative justice practices being introduced in the formal juvenile justice system in Kenya.

The enumerated objectives set out above are discussed below in turn to highlight what the research set out to achieve as well as the important contributions made by this thesis.

## **2.1 Examination of Penal Practices in the Current Criminal Justice System in Kenya**

The thesis examines the penal practices and identifies the dominant modality of intervention in the criminal justice system in Kenya. Although, as noted above, this thesis seeks to explore the potential of restorative justice in dealing with juvenile crime in Kenya, chapter five analyzes the practices within the criminal justice as a whole for two main reasons. Firstly the thesis argues that practices are rendered acceptable by underlying conditions and rationalities operating in a system (Foucault, 1991c:79; 1977a:55). To unearth the conditions and rationalities impacting the operation of restorative justice, the practices utilized in the justice system as a response to crime are analyzed. Premised on the fact that the underlying values in the system run across the various practices, this extensive analysis seeks to unearth the existing values supporting or undermining restorative justice. Based on the empirical research conducted, the thesis concludes that incarceration remains the dominant penal practice and restorative justice practices have not been fully embraced in the formal justice system. The different penal practices are therefore analyzed to unearth the conditions and rationalities that render them more acceptable in comparison to restorative justice practices. This extensive analysis of these penal practices provides an important backdrop against which the compatibility and potential of restorative justice practices can be analyzed.

The thesis provides strong empirical findings which draw a clear picture of the criminal justice system in Kenya. It further offers an in-depth analysis of the operation of penal practices against the socio-economic background in Kenya. Obtaining data from

different sources within the various facets of the justice system, the research, firstly describes how penal practices are carried out and illustrates what exactly is done. Secondly, the thesis in chapter five analyzes to what end these penal practices are carried out and to what extent they achieve these objectives. It further engages with the conditions and rationalities that have rendered these penal practices acceptable thus explaining why certain penal practices are opted for as opposed to others. In particular, the thesis explains why the practice of incarceration remains the dominant modality of intervention. As discussed in chapter two, the thesis adopts the Foucauldian concept of genealogies and examines the processes through which contemporary penal practices in Kenya have been shaped. It thus lays bare how penal practices, and especially the practice of incarceration, have been objectified thus seen as the ‘self evident’, obvious or natural response to criminals. Chapter five thus illustrates how this objectification of imprisonment as a penal practice curtails the operation of other penal practices. Unearthing the operation of penal practices in Kenya and the interpretations of penal practices by stakeholders in the criminal justice system, the thesis discusses the important empirical findings which are pertinent for an understanding of the criminal justice system in Kenya.

## **2.2 Processes Shaping the Criminal Justice System in Kenya**

Discussing the penal practices in Kenya, the thesis further probes the conditions that render penal practices acceptable over others and analyzes the processes through which these practices are embraced. As noted, the thesis thus engages in a genealogical analysis that traces how contemporary penal practices have been shaped over time. The objective of the genealogy is taking a closer look into past for a better understanding of

the current practices. As Foucault argues, effective histories focus on the past in search of explanations of the present rather than seeing the past as a contingent of the present (1977a:31). Thus the past is only examined in this thesis to the extent that it sheds light on the present and helps us answer present questions. As chapter six illustrates, the restorative justice practices being introduced in the formal juvenile justice system are underutilized and remain on the fringes of the formal criminal justice system. On the other hand, restorative justice practices are embraced in informal forums and as the thesis illustrates, restorative justice values are compatible with cultural ethos of communities in Kenya. In chapter four, the thesis argues that restorative justice practices are not foreign to communities in Kenya. The thesis therefore asks: why are restorative justice practices in the formal justice system underutilized and why does a penalty of detention persist? Why does the formal justice system fail to reflect the cultural ethos of the communities in Kenya which embrace restorative justice? A genealogical analysis answers these questions by outlining the processes that have led to the operation of contemporary penal practices.

Answering the question why this penalty of detention persists and why the culturally acceptable restorative justice practices are underutilized, the thesis highlights how the colonial process displaced traditional practices which were considered primitive. Moreover, premium was placed on Western legal systems and this has continued to be the case to date. The thesis links the recent reforms in the juvenile justice system in Kenya to the process of legal globalization and highlights the role of the 'law and development' discourse in this process. Further, the thesis identifies pitfalls intrinsic to the Westernization of Kenyan law, and engages in a postcolonial critique of the law and development discourse. Inspired by Foucault's analysis of power/knowledge, which

postcolonial theory heavily relies on, the thesis examines the conditions that make the Westernization of Kenyan law possible. The thesis demonstrates the operation of the global hegemony of the Western power/knowledge dispositifs and how this has impacted on legal processes in Kenya.

Analyzing the current underutilization of restorative justice, the thesis highlights the failure to tailor legal structures to fit the contextual realities as a major drawback to the Westernization of Kenyan law. The thesis does not merely make a claim that the recent attempts to incorporate restorative justice practices are linked to legal globalization. Based on empirical data, the thesis discusses the limitations of replicating Western restorative justice processes without modelling them to suit the contextual realities. It suggests that if these practices are to achieve the objectives of restorative justice and if they are to be considered as a fully fledged modality of intervention to juvenile crime, the structure and mode of the practices should be home-grown. There must be concerted efforts to identify how exactly these practices can deal with contextual challenges. The thesis, for example, illustrates in chapter six how the economic backgrounds of majority of the juveniles excludes them from being considered for the restorative justice processes.

The thesis further employs the concept of genealogies as a political strategy. As Hoy notes, genealogies can be used to make visible a “possibility of change” from things that have been objectified and considered self evident or ‘natural’ (Hoy, 2004:64). Stripping down the objectivities of the present and processes that have led to these objectifications, genealogies rupture the existence of the ‘natural’ or the ‘universal’ or

the 'self-evident' (Foucault, 1984:46).<sup>13</sup> In effect, this denial of the 'self evident' opens up the possibility of a different system of thought, hence a crucial point of critique. In the same vein, the genealogical analysis in this thesis illuminates on the objectification of the practice of imprisonment and argues that this penal practice is not self-evident; it does not have to be the obvious response to criminal behaviour. By so doing, the thesis opens up the possibility of restorative justice practices as potential penal practices.

### **2.3 Restorative Justice Practices in the Formal Juvenile Justice System in Kenya**

As noted, this research was prompted by an interest in the attempts to incorporate restorative justice practices to the formal juvenile justice system in a context in which the criminal justice system is largely retributive. This thesis provides in-depth empirical findings on the operation of restorative justice practices which have been recently introduced in the formal juvenile justice system in Kenya. Chapter six of this thesis sets out the restorative justice options that have been made available through the juvenile diversion program. It further takes a closer look at how these restorative practices are carried out in practice. In addition, it places these restorative justice practices within the context of the entire juvenile justice system as a reflection of the overall criminal justice system in Kenya. The thesis provides empirical data which distinguishes the introduction of restorative justice programmes from what happens in practice. These options remain insignificant in dealing with juveniles who have committed crimes since they are in most cases resorted to in cases where the juveniles are in need of care.

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<sup>13</sup> See for example 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 (1977a).

The empirical data provides strong evidence that compatibility with cultural practices that are restorative does not on its own guarantee the embracing of restorative justice in the formal justice system. Moreover failure to tailor restorative justice practices to address the contextual challenges limits the potential of restorative justice in responding to juvenile crime. Chapter six challenges the diversion programme in Kenya, which mirrors Western models of restorative justice, for its failure to develop home-grown solutions to the limitations faced. As a case study, the analysis of the empirical data on the operation of restorative justice options in the juvenile justice system exemplifies the challenges to replication of Western models of justice.

The thesis argues that the restorative justice options are being used as a sieving process for juvenile offenders who should not ideally be taken through the criminal process. Thus, as part of the continuum in the criminal justice system, the scope of these restorative justice processes is narrowed and the potential of restorative justice as a fully fledged response to crime is curtailed. Chapter six records empirical findings which suggest in addition to tailor-made processes alive to the contextual realities, there is need for clear guidelines and accountability mechanisms to govern restorative justice programmes. This discussion is done in the context of the genealogical analysis which illustrates how the colonial process led to a justice system that was built upon Western legal values which place a premium on accountability as a pillar of justice.

This research therefore provides significant data which draws a clear picture of the: penal practices in the juvenile justice system and the extent to which restorative values play a role; the restorative justice processes available in the juvenile justice system; the

scope of these restorative justice processes and the challenges/limitations in the operation of these restorative justice processes. Thus, the analysis of the empirical data sheds light on the current operation of restorative justice for juveniles in Kenya and signposts what this means in terms of its future prospects.

#### **2.4 Traditional Restorative Practices and their Significance to Contemporary Penal Practices**

Empirical data reveals that there are informal justice processes embrace restorative justice values. Seemingly incompatible with the limited operation of restorative justice processes in the formal justice system, the thesis examines what sustains the informal restorative processes. Empirical research of traditional communities in Kenya confirms that restorative justice was not a foreign concept in those communities. Thus, a peek into the past illuminates a cultural heritage which embraces restorative values thus making the informal restorative processes possible.

The empirical research on traditional communities in Kenya is a significant contribution to the understanding of the operation of restorative justice alongside social practices that exhibited retributive tendencies. Data collected reveals that restorative values were perpetuated by the importance placed on the need to sustain the cohesion of the community, a fact which on the other hand justified the punishment on individuals who threatened this unity. The focus on restoring relationships and fostering unity in these communities exemplify values championed by contemporary restorative justice proponents who advocate for dealing ‘with the harm caused’<sup>14</sup>.

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<sup>14</sup> See chapter three for a detailed discussion on the restorative justice in contemporary justice systems.

However the research highlights instances in which retributive practices were justified as opposed to restoring the offender back into community. Chapter four further analyzes how such retributive practices were compatible with restorative values governing the community. This analysis gives an insight into current debates as to whether restorative justice is an alternative paradigm that cannot operate to complement modern justice systems that are considered largely retributive.

The research on restorative justice in traditional communities in Kenya further exemplifies the argument that penal practices are either render acceptable or unacceptable by underlying conditions or rationalities in the society. Chapter four illustrates how strong community ties were sustained by an economy of truth at play which in turn made restorative justice possible. This analysis provides a stark contrast to modern communities thus providing a better understanding of contemporary restorative justice programs. Analyzing the underlying conditions and rationalities explains why restorative justice remains on the fringes of modern criminal justice systems, as a response to minor crimes particularly those committed by juveniles.

Empirical data confirming the embracing of restorative responses to wrongdoing in traditional communities in Kenya, further buttresses the political project of the genealogical analysis. As noted above, challenging the ‘self evidence’ of dominant penal practices sets up a possibility of rendering other practices acceptable. Data on restorative processes within traditional communities in Kenya challenges the ‘self-evidence’ attributed to the practice of incarceration.

In sum, the extensive research on traditional communities and the processes that have shaped the criminal justice system illuminates on the current penal practices in Kenya. More specifically, it offers an explanation as to why restorative justice practices in the formal juvenile justice system in Kenya remain underutilized in spite of being compatible of the cultural heritage of communities in Kenya. As a case study, the analysis of the attempts to incorporate restorative justice processes to the formal justice system exemplifies the significance of Western influence on developments in the legal system as opposed to local initiatives. The underutilization of these restorative processes and/or the failure to operate as intended illustrates the pitfalls to Westernization of Kenyan law.

### **3 Data Collection**

The research objectives and theoretical framework employed in this research makes empirical research fundamental.<sup>15</sup> As Strauss and Corbin remark, the nature of the research objectives dictates the research methods (1998:11). A key objective of this thesis was to identify the underlying conditions that make certain penal practices acceptable over others. It was therefore necessary to analyze how stakeholders interpret penal practices. Qualitative research was thus identified as a suitable method. The significance of qualitative research is the opportunity to interact with research subjects allowing them to express the underlying values in their world which may not otherwise be obvious to an outsider. It provides “access to the meanings people attribute to their experiences and social worlds” (Miller and Glassner, 2004:126). Hence, it creates an opportunity to grasp the depth of meanings held by the subjects and how these impact their daily interactions. This makes it possible for researchers to

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<sup>15</sup> In defining empirical research Simon explains that it “includes only knowledge obtained from data resulting from first hand observations, either by you or someone else. Re-examination of data collected by others...is empirical research of course.” (1969:6).

come up with holistic analyses that capture the complex interlink between players and issues in a context (Miles and Huberman, 1994:10).<sup>16</sup>

Section 3.1 discusses the actual research methods employed, the benefits derived from these methods as well as their inherent weaknesses and how these were addressed in the research design.

### **3.1 Research Methods**

To effectively explore the research questions, a triangulated research strategy was adopted. Data was collected through interviews, observation and documentary research. The advantage of triangulation, in this case employing multiple research methods to study the object, is that it surmounts the intrinsic weaknesses of the different methods used to collect data (Denzin, 1989:234). Thus where interviews were conducted, for example, observation and documentary research enabled the researcher to cross check the validity of data collected from interviewees whose responses may have been influenced by various personal factors. In addition to triangulation of the research methods, data sources were also triangulated (Denzin, 1989:237). As well as providing a cross-checking mechanism for the data collected, using different data sources provided the researcher with comprehensive data. This was particularly useful where gaps were identified in data collected from a single source. Data on sentencing trends, for example, was obtained from prison records, probation records and court records. In this case data sources triangulation was crucial, especially because authorities at the

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<sup>16</sup> For example, during interviews, some research subjects would make statements that would create linkages between issues or between different players in the system.

Nairobi high court gave restrictions on the mode and extent of data collection. With this restriction, full access to prisons and probation services provided comprehensive data.

Fieldwork research was carried in two phases: From June 2006 to September 2006 and June 2007 to September 2007. The second phase of the research was necessitated by two reasons. Firstly there was a need to clarify issues arising from the first phase of research. The second reason was in relation to the restorative options being made available through the diversion programme in the formal juvenile justice system. As this is a recent programme, the second phase was to examine whether some of the issues identified were changing over time. In particular, it had been observed during the first phase that these restorative options were limited in scope. The second phase of the research therefore sought to examine whether this was changing with time or remained the same.<sup>17</sup>

In the following sections, the different research methods and the actual data collection process are discussed in detail.

### **3.1.1 Interviews Conducted**

This thesis being a genealogical analysis, the focus of the research was on the current criminal justice system and the traditional justice systems in Kenya. The research subjects fell into in three main categories. Firstly tribal elders were interviewed to gather information on traditional justice systems. The second set of interviews focused on officers in the formal justice system who included magistrates, probation officers,

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<sup>17</sup> See Denzin for a detailed discussion on the different forms of triangulation. He illustrates how data collection over different spans of time could provide a triangulation of the data (1989:237).

children's officers and police officers. Thirdly both adult and juvenile offenders were interviewed. Although this thesis does not make a claim to representativeness, the interviews conducted provided sufficient data to draw a number of conclusions.

In the course of the 2005/2006 summer term (June – September 2006) research was carried out in:

- Nairobi: Nairobi Industrial Area Remand, Nairobi Law Courts and Probation Headquarters.
- Nakuru: Nakuru Main Prison, Nakuru Children's Court, Nakuru Courts Registry, Nakuru Central Police Station, Nakuru Central Chief's Office, Kabazi Chief's Office, Provincial Children Services Office and the District Probation Office. A meeting with a Kikuyu elder who was originally from Murang'a was held in Nakuru.
- Machakos: Meetings with Kamba elders were held at Machakos town and Kagundo.
- Meru: Meeting with a *Njuri Nceke* elder at Meru town.

In this first phase the following research subjects were interviewed: judicial officers ( $n=3$ ), children's officers ( $n=2$ ), probation officers ( $n=4$ ), prison officers ( $n=8$ ) and police officers (children department) ( $n=1$ ), area chiefs ( $n=2$ ), tribal elders ( $n=8$ ), juvenile offenders ( $n=4$ ), adult offenders ( $n=6$ ), Rift-valley Law Society official ( $n=1$ ), Kenya Law Reform Commissioners ( $n=3$ ).

The second phase of the fieldwork research was carried out during the 2006/2007 summer term (June - September 2007) in:

- Nairobi: Kilimani Police Station and children department at the Police Headquarters.
- Nakuru: Nakuru Main Prison, Nakuru Juvenile Remand Home and Nakuru Central Police Station.
- Meru: Premises of the Spiritual leader (*Mugwe*) of the *Njuri Nceke*.
- Mombasa: Shimo la Tewa Borstal Institution.

The following research subjects were interviewed in the second phase of the research: Prison (borstal) officers ( $n=3$ ), police officers (children department) ( $n=3$ ), Rift-valley Law Society official ( $n=1$ ), Menengai Social Hall Diversion Program official ( $n=1$ ), Mwangaza Rehabilitation Centre official ( $n=1$ ), Meru elder ( $n=1$ ), juveniles on remand at Nakuru Main Prison ( $n=15$ ).

A major challenge in the fieldwork research was the wide scope of diverse subjects to be interviewed. Thus, the researcher had a tight schedule throughout the fieldwork period. However, an advantage that the researcher had was that having previously worked as a lawyer in Kenya, she did not require a lot of time to settle in the research locations.<sup>18</sup> Moreover, most research preparations such as obtaining access to research subjects and tentative schedules were done through correspondence before the researcher travelled to Kenya. It should be noted that owing to the widespread locations of research subjects, some of the subjects indulged the researcher and agreed to meet at central locations. For example, some of the Kamba elders met the researcher at Machakos town. The researcher also used group interviewing as a mode of data collection from some of the Kamba elders and the Kenya Law Reform

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<sup>18</sup> The researcher had previously worked in a law firm in Kenya and as a volunteer with an organization that provided legal aid in rural Kenya and to accused persons held in custody.

commissioners. Apart from the practical advantage of this strategy, group interviewing allowed the respondents to express multiple interpretations on issues (Denzin, 1989:111). Hence, the researcher was able to validate the data based on the consensus amongst the respondents.

Although most of the interviews conducted were in-depth, some of the interviews were brief and were conducted to obtain specific information. In particular, the fifteen juveniles on remand at the Nakuru Main prison in 2007 had a brief individual session with the researcher for the purpose of determining their backgrounds. This information was then cross-referenced against prison records and the information from the paralegal who is attached to this prison to provide legal aid.

Prior to the fieldwork research, interview questions had been prepared for the different categories of research subjects.<sup>19</sup> These however served only as a guide in the interviews, as the different circumstances of each research subject dictated the mode of interview. The interviews were unstructured to allow the respondents to bring up unexpected but useful data (Becker and Geer, 1982:239). Moreover, further questions in some cases came up in the course of the interviews as the subjects raised other issues (Burgess, 1982:107). Having adopted a grounded approach allowing themes to emerge in the process, the researcher picked up the issues raised and asked further questions.

Some of the interviews were conducted in Swahili and some in English at the convenience of the respondents. In Kenya, many conversations oscillate between different languages. Hence in some interviews both English and Swahili were used. In

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<sup>19</sup> Useful guidelines on preparing for fieldwork research were obtained from the following texts: Bell, (1999); Miles, M. and Huberman, M. (1994); Silverman, D. (2005).

Machakos, during some of the Kamba tribal elders' interviews, a Kamba – Swahili interpreter was used.<sup>20</sup>

### **3.1.1.1 Interview Questions**

Interview questions for the judicial officers targeted information on the different modes of offender treatment in the criminal justice system in Kenya and considerations determining the mode invoked in individual cases. Further the questions sought views on the possibility of invoking other alternative means of dealing with offenders, particularly those with aspects of restorative justice.

Discussions with prison officers, police officers, probation officers and children's officers dealt with their roles in the system, the objectives of their services and the extent to which their programs were effective. The questions focused on juveniles and the extent to which restorative practices were incorporated in the services offered by these research subjects.

Similarly, interviews with area chiefs were geared to ascertaining the role they played in settling disputes, particularly those involving juveniles and having a criminal aspect. The questions also focused on the key differences in how they dealt with cases as compared to the formal courts.

Tribal elders' interviews centred on traditional methods of dealing with offenders, particularly juveniles, and how this differed from the current formal criminal justice

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<sup>20</sup> The interpreter was approved of by the research subjects.

systems. The interviews also raised the dominant values embedded in traditional social structures including the justice systems and the extent to which these remained in place in modern Kenya. Selection criterion of the ethnic groups in which research was carried out was based on the following considerations. The Meru community was selected because of its elaborate justice system referred to as *Njuri Nceke*. In addition, information on *Njuri Nceke* is well documented as the community ensured that this information is passed on through generations. Moreover the *Njuri Nceke* remains an organized council of elders to date. Similarly, the Kamba community has over generations guarded its cultural values. Even with the ebb of modernity, the Kamba community is known for its awareness of its cultural values. The Kikuyu community on the other hand is the largest community in Kenya and information on its culture is readily available. There being a wide range of detailed documentary records on the Kikuyu, it was possible to obtain comprehensive information and research on the Kikuyu was mainly documentary.

Officials of the Rift Valley Law Society were interviewed in light of the juvenile justice program set up by the Society in Nakuru. Questions targeted the objectives of the program and the extent to which extra legal practices contributed to the overall performance of the juvenile justice system in Kenya. During the research period, the Kenya Law Reform Commissioners were going through the Children Act of 2001 with a view to revising it. The Commissioners were thus interviewed on the major review issues they were deliberating particularly in respect to juvenile offenders. Further the interview questions focused on the possibility of restorative justice practices being incorporated in the revised Children Act of 2001.

Discussions with juvenile offenders revolved around circumstances leading to their offending and the level of community involvement in their lives once brought into the criminal justice system. Also raised were issues of agency, examining whether juveniles felt a sense of responsibility over their actions. A similar set of issues were canvassed with adult offenders but more specifically the question of recidivism linked to ineffective handling as juvenile offenders was discussed.

### **3.1.1.2 Dynamics of Relations in Interviews**

The effectiveness of qualitative research and especially interviews is sometimes challenged on the basis that the interviewer/interviewee interaction takes place in a controlled context hence curtailing the possibility of obtaining a true picture of the research subjects' world. However social researchers argue that interviews still do play a fundamental role as a source of data (Miller and Glassner, 2004:126). Another concern relates to the possibility of a researcher being seen as an outsider hence steering the research subjects away from either not giving any information at all or misleading the researcher (Miller and Glassner, 2004:128). However, sometimes differences such as gender, class, and race may work positively to engage the research subjects in a meaningful relationship with the researcher, hence more fruitful research. For example, in this research, the gender difference may have played a part in fostering a willingness in male prisoners to share their experiences. On the other hand, the researcher remained aware that that very fact may have had an impact on the value of the information given.<sup>21</sup> The researcher therefore cross checked the information gathered from prisoners through interviewing paralegals and prison officers who

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<sup>21</sup> See Burgess who emphasizes that the researcher must remain aware of their actions and the actions of the respondents (1982:1).

interacted with these prisoners on a daily basis. As the researcher interviewed tribal elders, she was cognizant of the fact that the age difference had a positive impact. The tribal elders who viewed her as their ‘child’ in the African context, openly shared on the research topic. Similarly, as a PhD student in a relatively powerless role, the respondents appeared at ease and not threatened by the research. This enabled the researcher to create meaningful relationships, thus providing a good environment for conducting the research.

Adhering to standard ethical practice in qualitative research, the purpose of the research was explained to the respondents who were asked to give information voluntarily. Subjects were made aware of the fact that the interviews were confidential and pseudonyms would be used in the thesis to maintain confidentiality. The pseudonyms were allocated on the basis of the ethnic backgrounds of the respondents. These were used for all of the respondents apart from Dr. Gaita Baikiao II, the spiritual leader (*Mugwe*) of the Meru elders, who authorized reference to his name to authenticate the information gathered on the Meru court of elders.

### **3.1.1.3 Data Recording**

Data collected was recorded through note taking. This method of data recording was necessitated by the respondents’ hesitation to tape recording and the fact that the researcher was keen to provide an informal environment in which the subjects would respond.<sup>22</sup> Moreover tape recording is not allowed in institutions such as prisons and

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<sup>22</sup> See for example Simon who advises that in deciding what methods to use in empirical research, the researcher should consider the method that “will surmount the obstacles most efficiently and effectively” (1969:186). See also Whyte who discusses the disadvantages of the formality created through tape recording (1982:118).

borstal institutions. Thus the researcher opted to take notes during the interviews. Although the researcher was aware of the fact that note taking would deny her the opportunity to pay full attention to the physical cues given by the respondents, it was crucial to take notes during the interviews to ensure that some information was not forgotten or misquoted (Whyte, 1982:118). In addition, aware of the disadvantage of note taking in comparison to tape recording, the researcher tried to write out as much information as possible from the interviews. However to remain engaged with the respondents, the interviews were recorded as spoken by the informants without any analysis. Having conducted interviews during the day, the researcher made electronic copies of the interviews and made analytical field notes during the evenings.

### **3.1.2 Observation**

Data was also collected through direct observation. This involved visits to the Nairobi Industrial Area Remand Home, Nakuru Main Prison, Nakuru Juvenile Remand Home, Shimo la Tewa Borstal Institution in Mombasa, Nakuru Children Court, Nakuru Probation Office, Nakuru Probation Girls Hostel, Nakuru Children Services Office, Nakuru Chief's Office. Apart from the remand homes and prisons, observations in all other institutions were made during sessions determining the fate and progress of offenders. In the Nakuru Children Court, the sessions were standard juvenile criminal cases hearings.

The Nakuru Probation Office sessions involved probationers' routine meetings with the probation officers. On some occasions, this involved accompanying probation officers as they made home visits. Similarly, the sessions at the Children Services were routine

meetings between the Children Officers, juveniles and their parents. Juveniles' home visits were also made together with the Children Officers. During these visits the researcher observed how the officers related with the juveniles and their families. The researcher also took note of the how the forums sought to deal with the issues.

Sessions at the Chief's office were similar to court hearings except for the fact that they were informal. During the different sessions with the different officers, the researcher observed the nature of interactions between the officers and the parties with a stake in the matters. It was noted that these interactions were largely informal and the nature of the meetings was determined by the different circumstances.

In the prisons and the borstal institution, the schedule entailed daily attendance at the institutions for a period of two weeks where the researcher observed the daily activities. The Legal Resources Foundation Paralegal Program, an organisation the researcher had previously volunteered with, facilitated the research in prisons. The paralegals are stationed in prisons and with the assistance of a liaison prison officer they attend to individual prisoners. They also organise forums through which basic court processes are explained to prisoners. The Legal Resources Foundation Paralegal Program facilitated close observation for this research. The consistent presence in these prison facilities also enabled the researcher to create a rapport with the convicts and prison officers which encouraged these research subjects to openly share information.

While designing the project, the researcher had intended to be a non participant observer at the prisons. However, the researcher ended up being involved in the legal aid programme at the Nairobi Industrial Area Remand Home. Similarly, during the

visits to the probation officers' and children officers' premises, the researcher ended up being involved in some of the pertinent discussions. Developing a relationship of trust enabled the researcher to surmount the weakness associated with observation as a research method owing to its impact on how respondents behave when being observed. Although participatory observation enabled the researcher to create an environment where the respondents were at ease, the researcher however remained cautious of losing objectivity as an 'insider'.

Unlike interviews where the researcher had an opportunity to make notes during the sessions, notes on issues observed were made after the sessions.

### **3.2 Gaining Access to Research Subjects**

In accordance with research requirements in Kenya, a research permit was obtained from the Ministry of Education, Science and Technology.<sup>23</sup> Authorization letters were then obtained from the Commissioner of Prisons in Kenya and the Director of Children Services.<sup>24</sup> To interview judicial officers at the High Court in Nairobi the researcher liaised with the Public Relations Officer for directions on authorized interviews.

In addition to interviews conducted and observation of day to day activities, the researcher engaged in documentary research as discussed below.

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<sup>23</sup> See Appendix 4.

<sup>24</sup> See Appendices 5 and 6.

### **3.3 Documentary Research**

Documentary research was conducted to obtain existing documented information that is relevant to this thesis. This component of research entailed use of library materials such as books, journals, news articles, reports, policy documents and legal documents which included both international and domestic documents. To obtain historical information, a wide range of resources were accessed at the Kenya National Archives and the Oxford University Bodleian Library. These archival materials ranged from documents detailing pre-colonial social structures to the colonial government policy documents. Archival documents such as internal communication amongst government officials in the colonial government were important as they reflected the governing values in that particular system of government.

## **4 Theoretical Framework**

Juxtaposing restorative justice values to an inclination in favour of imprisonment readily raises issues of incompatibility. On the other hand, a look at the cultural practices of communities in Kenya suggests that restorative values are far from being foreign to their cultural values. Indeed restorative justice formed a part and parcel of traditional justice systems. Crucial modifications of the criminal justice system during colonial times displaced these values from the formal system created. Two and a half decades later, restorative justice finds expression informally whereby it is practiced by parties wishing to avoid the formal system. In certain instances for example chiefs, who are civil servants appointed under the Chiefs Act, have acted as facilitators. Within the formal system, restorative justice practices remain a discretionary tool

randomly utilised by the minority among the key players in the criminal justice system. With particular reference to the formal juvenile justice system, the recently introduced diversion programme gives police officers discretion to use restorative justice practices. However, as will be discussed in detail in chapter six, this discretion remains underutilized.

Therefore analyzing traditional methods of restorative justice enables us to appreciate the dynamics of restorative justice as currently practiced in Kenya as well as to examine its future. Adopting a Foucauldian method, this thesis engages in a genealogical analysis of the criminal justice system in Kenya which serves as the axis for examining restorative justice for juveniles. As discussed in detail in chapter two, a genealogy in Foucault's terms differs from a mere historical account. Rather than seeing the past in terms of the present, a genealogy engages with the past to shed more light on the present. In particular, a genealogical analysis enables us to see the objectifications of the present (Veyne, 1996:158-159). Therefore a genealogical analysis of the criminal justice in Kenya is embarked upon to explain the processes that have led to the objectification of specific penal practices. Through engaging with these processes, current restorative justice practices as interventions targeting juvenile crime are better understood.

In a criminal justice system that is largely marked by imprisonment as the dominant penal practice, the attempts to incorporate restorative justice practices within the formal juvenile justice system may seem out of place. Examining the genesis of these attempts the thesis argues that the criminal justice system in Kenya continues to be influenced by global penal developments. It highlights the role of discourses in enabling legal

globalization. Criticizing the discourse of law and development in particular, the thesis adopts a Foucauldian explanation of how truth producing discourses facilitate relations of power (Foucault, 2004:24). In this case, Western systems are termed superior and adopting these systems is considered to amount to ‘development’ (Trubek, 1972:10).<sup>25</sup> The thesis thus engages with post colonial theory as a counter discourse challenging the law and development discourse.<sup>26</sup>

## **5. Scope of the Thesis and Definition of Terms**

The use of the term ‘restorative justice’ invites a definitional debate. As a concept, it has developed diverse modes of application. This rich and vast application makes it challenging to provide a universal definition.<sup>27</sup> The most widely used definition, however, is the one proposed by Marshall: “Restorative justice is a process 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” (1999:5).<sup>28</sup>

Zehr provides a definition that is similar in terms to Marshall’s:

Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address

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<sup>25</sup> See also Chibundu who discusses the influence of Western legal systems on developing countries (1997:185).

<sup>26</sup> Jefferess et al discuss postcolonialism in detail as an important tool in critiquing asymmetrical power relations established through colonialism (2006:2). See also Thiong’o for a discussion on postcolonial critiques by African writers (1986).

<sup>27</sup> The source and extent of confusion in defining restorative justice is discussed at length by various authors. Zehr and Toews for example attribute this confusion to factors such as ‘our personal life experiences, our cultures and worldviews, the audience to whom we are speaking, our experiences as practitioners or academics, our understandings of victimization and offending, our experiences with a particular application...’ (2004:1). A large number of authors express difficulty in defining restorative justice and its scope; see Cunneen (2004), Johnstone (2002), McCold (2004), Walgrave (2003).

<sup>28</sup> This definition was adopted in a Delphi Process conducted in 1996 (McCold, 1999:5). See also Braithwaite (2000:115).

harms, needs, and obligations, in order to heal and put things as right as possible (2002:37).

This broad definition extends beyond the restrictive approach to restorative justice which revolves around two players; the offender and the victim. Whereas the victims and offenders are the direct stakeholders, restorative justice processes have extended their tentacles to involve the community as an indirect stakeholder. Therefore, this research analyzes restorative justice processes for juveniles in Kenya from this extensive perception.<sup>29</sup> The implication of this starting point is that the scope of the thesis extends from conciliatory settings between the offender and the victim to include other restorative community based programs for juvenile offenders. As Marshall notes, restorative justice “is not any particular practice but a *set of principles* which may orientate the general practice of any agency or group in relation to crime” (emphasis added) (1999:5).<sup>30</sup>

The term juvenile is used in this thesis to refer to children. Section 2 of the Children Act of 2001 defines children as human beings under the age of eighteen years.<sup>31</sup> Whereas the principles examined here may be useful to young persons of between the age of nineteen years and twenty one years, the age of eighteen is used as the benchmark as it delineates the age scale in the criminal justice system in Kenya.

In this thesis, the term formal criminal justice system refers to the state based criminal justice institutions and procedures (Wojkoska, 2006:9). These include the Judiciary, the

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<sup>29</sup> A detailed and in-depth analysis of restorative justice theory is discussed in chapter three of this thesis.

<sup>30</sup> This research focuses on ‘*practices*’ in Foucault’s terms. Thus it analyzes the practices that hinge on restorative justice.

<sup>31</sup> Also Article 1 of the UN Convention on the Rights of the Child provides that ‘a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier’.

Police Service, the Prison Service, the Probation Service and the Department of Children Services. Informal criminal justice systems on the other hand refer to other interventions that do not fall within this scope such as resolutions facilitated by chiefs.

A major premise of this thesis is challenging the influence of legal globalization on the legal framework in Kenya. The term ‘legal globalization’ is used in this thesis to depict the processes through which “the changes in the state law of a given country are influenced by formal or informal international pressures by other states, international agencies or other transnational actors” (Santos, 2002:194).

In terms of geographical scope, the focus of this research is the criminal justice system in Kenya. Section six sets out the structure of the thesis.

## **6. Outline of the Thesis**

Chapter two lays out an analysis of Foucauldian concepts as the theoretical foundation of the methodology employed in this thesis. Central to this research is Foucault’s engagement with relations of power which sets the basis of subsequent discussions of key penal practices in Kenya.<sup>32</sup> Linked to these Foucauldian concepts, this chapter engages with postcolonial theory and critiques the discourse of law and development.

Adopting a Foucauldian focus on ‘practices’ as opposed to institutions, chapter three embarks on a theoretical analysis of restorative justice practices and situates these in

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<sup>32</sup> Foucault draws a parallel between the history of penal law and the history of human sciences and suggests that they do not coincidentally affect each other. Hence a researcher ought to focus on “whether there is not some common matrix or whether they do not both derive from a single process of ‘epistemological –juridical’ formation; i.e. make the technology of power the very principle both of the humanization of the penal system and the knowledge of man” (1975:23).

the context of penal strategies. The concept of restorative justice has been the subject of a vast range of discussions and critiques; this chapter looks at the surrounding ideas, values and debates.

Chapter four details restorative justice as a central concept within traditional communities in pre-colonial Kenya. The Meru, Kikuyu and Kamba communities in Kenya are analysed. This chapter highlights restorative justice as a practice that was compatible with the socio-economic and political structures of the community. It illustrates the fact that the centrality of restorative justice in the traditional communities' response to crime was in tandem with the governing rationalities at that point in time. This chapter then discusses how restorative justice as an intervention targeting crime was displaced by what are now termed as conventional responses to crime. Focusing on the role of colonialism in the introduction of a state based formal criminal justice system, the chapter also unearths the 'new' rationalities that matched the formal system.

The discussion in chapter four is crucial at two levels. Firstly, it sets out an exposition of restorative justice practices within traditional communities in Kenya as a strategy of governing conduct as conceptualised in chapter three. Secondly, it serves as a fundamental basis for understanding the current dynamics of restorative justice as a response to juvenile crime in Kenya. Thus the genealogy is conducted to shed more light on the current operation of restorative justice.

The first part of the title to this thesis is a question: Rebirth of restorative justice? Chapter five responds to this question. It demonstrates that the practice of

imprisonment remains the dominant penal practice and unearths the conditions that have made this practice acceptable. Thus, it illustrates that the attempt to incorporate restorative justice programmes in the juvenile justice system in Kenya is not a re-embracing of restorative justice values which were central within 'African' culture.<sup>33</sup> An analysis of the criminal justice system reveals a penalty of detention at play as evidenced by sentencing trends that are in favour of imprisonment. Moreover the criminal justice system still hinges on the Western structure put in place during the colonial era. There have been, however, recent attempts to promote the use of Probation Orders and Community Service Orders but these have not been a rupture of the penalty of detention underpinning the criminal justice system. On the contrary, as illustrated in chapter five, this can be linked to the pressure on Kenya to deal with overcrowding of prisons which falls short of international human rights standards.

The shift which moved restorative justice from being a central principle in pre-colonial Kenya to a less significant one in modern Kenya is discussed in the light of the theoretical framework laid out in chapter two. Adopting a Foucauldian approach to analysing practices, the shift in penal practices is situated within the changing political, social- cultural situation from pre-colonial to modern Kenya. Due to the significant role of colonialism in shaping the justice system in Kenya, postcolonial theory as set out in chapter two is employed as a tool of analysis. By engaging with postcolonial theory

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<sup>33</sup> The use of the term 'African culture' could be problematic. This is mainly because there is a vast range of diverse communities in Africa who not only speak different languages but also differ in customs. However certain values have been argued to be shared by a large number of communities especially in their traditional state. One such value is a spirit of community which ties individuals to their communities. For example the concept of *Ubuntu* in South Africa is premised on this. In Kenya, the first President, Jomo Kenyatta embraced this spirit of community in nation building and propagated the strategy of helping one another towards economic development; commonly referred to as the spirit of *harambee* (Kenyatta, 1968:294; Odinga, 1967:238). Similarly, in Tanzania, President Nyerere's policies were based on this community spirit, which he referred to as *undugu*. It is this aspect of community ties and coherence that the term 'African culture' as used in this thesis refers to. For a detailed study on specifically restorative justice and African traditional systems see Skelton (2007:469). See also chapter four for a detailed discussion on this.

the genealogy of restorative justice is harnessed to unearth how certain truths have come to be objectified and how these truths impacted on the operation of restorative justice in the distinct eras in Kenya. Further, the role of discourses in processes through which these ‘truths’ have been objectified is identified. Specifically, chapter two sets out the discourse of law and development as propagating the proposition that Western forms of justice were superior as a ‘truth’ and how this was actualised in colonized states. Unpacking these ‘supposed truths’ further sheds light on the current attempts to incorporate restorative justice processes in the formal justice system in spite of the historical displacement of traditional restorative justice values.

In light of the discussion in chapter five, chapter six specifically analyzes restorative justice practices as an intervention targeting juvenile crime in Kenya. It illustrates that whilst restorative justice for juveniles is not expressly recognised through legislation, it finds expression in the day-to-day treatment of juveniles both in the state-based and non-state forums in Kenya. However, within the formal criminal justice system, the practice is under-utilized and is only resorted to as a response to minor crimes. The genealogy of restorative justice set out in chapter four is employed to unearth the underlying rationalities and conditions that have delineated the place of restorative justice in modern Kenya.

In terms of logistics, restorative justice programs require certain frameworks to be in place. Chapter six raises doubt as to whether these are in place within the criminal justice system in Kenya. It is suggested that rather than attempting to transplant global trends of restorative justice, there is need to tailor make programs that are in tandem with its societal fabric.

Drawing from this genealogical analysis, chapter seven concludes by critiquing the systems of thought at play that determine the penal practices in Kenya. This concluding chapter critiques the objectification of the practice of imprisonment and argues against the notion of a 'self evident' penal practice. The chapter also challenges the objectification of Western legal systems which inform global penal practices. Through critiquing systems of thought and practices that have been objectified, the possibility of change is presented (Hoy, 2004:63). It is argued that penal practices ought to be determined and structured by the contextual realities and not necessarily by keeping abreast with global trends.

## CHAPTER TWO

### THEORETICAL FRAMEWORK FOR THE ANALYSIS OF THE CRIMINAL JUSTICE SYSTEM IN KENYA.

*'Power and knowledge directly imply one another' (Foucault, 1977a:27)*

#### 1 Introduction

The justice system in Kenya at independence was modelled on the structure established during the colonial era (Clifford, 1974:186; Dissel, 2001:1; Ghai and McAuslan, 1970: 359; Joireman, 2006:201; KHRC, 2008). To date this system continues to be influenced by developments in the West.<sup>34</sup> In respect to the criminal justice system, certain penal policies, laws and programmes in Kenya have been restructured to keep abreast with global developments.<sup>35</sup> The attempt to incorporate restorative justice interventions to the formal juvenile justice system in Kenya, for example, is in tandem with approaches that have increasingly been recommended by International bodies as well as Western countries.<sup>36</sup> As noted in chapter one, although restorative justice values may be compatible with the dominant cultural values in Kenya, the introduction of restorative

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<sup>34</sup> See Baxi's analysis of modern law as a Western concept that has been transplanted to other contexts (2000:4).

<sup>35</sup> For example the Sexual Offences Act enacted in 2006 and the Children Act enacted in 2001 sought to incorporate such global trends.

<sup>36</sup> In making reference to International bodies, this thesis in particular focuses on the United Nations regime.

justice responses in the formal juvenile justice system is not a ‘rebirth’ of values embraced by traditional communities in Kenya. This thesis examines the extent to which the introduction of restorative justice interventions to juvenile crime is a result of the global hegemony of Western power/knowledge dispositifs. It further discusses how this ‘transplanting’ presents contextual challenges that limit the potential of restorative justice as a response to crime that is indeed compatible with cultural values in Kenya.

Firstly, this chapter examines law and development as one of the discourses through which the superiority of Western legal systems has been produced as a ‘truth’, hence making possible the transplanting of Western legal structures in ‘developing’ countries such as Kenya.<sup>37</sup> To this end, the law and development discourse is challenged for what is termed as a ‘neo colonialist’ agenda that reduces advancement of legal systems in developing countries to having structures resembling Western legal systems (Chibundu, 1997:185; Baxi, 2000:13). The thesis highlights the failure to tailor legal structures to fit the contextual realities as a major pitfall to Westernization of Kenyan law. Arguing for the need for local solutions to challenges in the legal system and restructuring of carefully selected, transplanted legal ideas to suit the needs in Kenya, the thesis raises pertinent questions. A major question raised is in regard to the premise of the law and development discourse that sets the Western legal systems on a pedestal. It thus examines the basis on which the law and development discourse is advanced.

Raising these questions draws our attention to the grounding of the law and development discourse on imperial binaries, thus rendering discussions within post

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<sup>37</sup> See Foucault’s discussion on how truth producing discourses facilitate relations of power (1997:24).

colonial theory pertinent to this thesis.<sup>38</sup> The relevance of postcolonial theory lies particularly in its attempt to draw a genealogical account that illuminates the current asymmetrical relationship between the West and postcolonial states. The second part of this chapter engages postcolonial theory in challenging the hegemony advanced by law and development. Using this theoretical framework, law and development as a discourse is analyzed in the context of broader intervening factors and particularly relating to relations of power between the West and developing countries. Discussing the core themes floated by key postcolonial theorists, section two highlights the relevance of postcolonial theory.

A lot of postcolonial theory relies heavily on Foucault and highlights the symbiotic relationship between discourse and the overall power relations in operation. Inspired by postcolonial theory and adopting a Foucauldian approach, the thesis raises key questions: What power relations have shaped the criminal justice system in Kenya? Which discourses have facilitated the operation of these relations? More specifically in this research, what has led to the current attempts to incorporate restorative justice interventions into the formal juvenile justice system? What factors limit the utilization of these interventions in spite of underlying cultural values that are compatible with restorative justice? Answers to these questions demand analyses that transcend juridical

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<sup>38</sup> On law and development as a construct of imperial binaries see Trubek (1972:11). This imperial binarism is founded on the hegemonic relationship between the West and the Third World. The construction of the West as superior and the Third World as the 'Other' makes it possible for Western values and systems to be considered 'universal' and necessary for 'development'. Hence Western socio-economic and legal structures are transplanted to the Third World as a way of 'developing' these developing countries. Indeed 'development' is couched in terms of the processes that Western countries underwent (Mendelson, 1970:223). Postcolonial theory, which forms part of this thesis' theoretical framework, therefore challenges this hegemonic West/Third World relation by engaging with colonialism as one of the processes that made this hegemony possible (Ahluwalia, 2001:6, 91). Similarly, this thesis examines how imperial binaries impacted on the structure of the Kenya justice system at independence and to what extent the current system is influenced by penal trends in the West. See also Baxi's detailed analysis of Western legal systems as a colonial heritage of postcolonial states (2000).

structures and institutions. Thus Foucault's emphasis on analyzing *practices* in themselves as opposed to focusing on the juridical structures and institutions becomes relevant and pertinent to this thesis. Adopting a Foucauldian method, this thesis looks at restorative justice practices in Kenya and the conditions that dictate their operation. To illuminate these conditions further, the practice of imprisonment is analyzed. Imprisonment is the predominant modality of punishment in Kenya; in Foucault's terms, a 'penalty of detention' gives the current system in Kenya its specificity (1977a: 277). This thesis therefore examines the place of restorative justice in Kenya where a 'penalty of detention' is predominant.

Cognizant of the historical events that have impacted on the current criminal justice in Kenya, as set out in light of postcolonial theory, Foucault's concept of *genealogies* is also rendered central to this thesis. Thus this thesis embarks on a *genealogical* analysis of restorative justice to shed more light on its current operation.

Section three of this chapter therefore sets out key Foucauldian concepts: *practices*, *rationalities* and *genealogies* which form the overall framework of analysis in this thesis.

## **2 Law and Development: A Case for Legal Globalization?**

The law and development discourse can be traced back to a movement in the 60's and 70's comprising of American legal scholars and practitioners who sought to assist developing countries to establish legal systems resembling those in the West (Chua,

1998:11; Trubek, 2003:2).<sup>39</sup> This was premised upon the correlation drawn between development and the legal system. Firstly, it was contended that the evolutionary process of a country would ultimately lead to the establishment of a legal system that would be a replica to legal systems in the West (Tamanaha, 1995:473). Secondly, emphasis was placed on the role of law in the development process. Thus, to facilitate development, there was a need to transform the existing legal systems to resemble those in the West (Trubek, 1972:6). This, it was hoped, would bring about social change that would streamline practices to become compatible with development processes (Chibundu, 1997:169). The consensus within this discourse was that a prerequisite for development was the existence of modern law to govern social life.

The objective of law and development programs therefore, was to foster transplantation of Western legal systems to underdeveloped countries. In addition to advocating for legal reform, law and development proponents targeted legal educational institutions. The rationale was that reform in legal education would influence legal elites and this would trickle down to all other areas of law (Trubek, 2003:4). Though appearing obvious on the face of it, the definitive elements of this discourse can only be understood from an initial grasp of the concept of development. Escobar's analysis of 'development' as a discourse offers a good starting point. Likening his analysis to that of Said's *Orientalism*, he asserts:

To see development as a historically produced discourse entails an examination of why countries started to see themselves as underdeveloped... how 'to develop' became a fundamental problem for them, and how, finally, they embarked upon the task of 'un-underdeveloping' themselves by subjecting their societies to increasingly systematic, detailed and comprehensive interventions (1995: 6).

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<sup>39</sup> See also Chibundu (1997:171); Rose (1998:106)

The concept of ‘development’ is coined in Western terms. In an early paper at the heart of the law and development project, Trubek equates development as “gradual evolution in the direction of the advanced, industrial nations of the West” (1972:10). As a discourse, it operates to polarize the ‘developed’ countries on the one hand and the ‘Third world’ countries, which are considered to be underdeveloped, on the other hand.<sup>40</sup> Developed Western countries are therefore considered best placed to promote development in the ‘developing’ countries owing to their experience. This conception therefore legitimized the analyses of American legal scholars and practitioners on legal systems in developing countries. The intervening diagnosis was the urgent need to transplant Western legal systems to these developing countries. Although the discourse of law and development was a preserve of American legal scholars during these early stages, it relayed asymmetric power relations similar to previous colonial relations. Just like colonizing states from the West, the proponents of law and development were legitimized by their purported possession of ‘knowledge’ which not only equipped them to make analyses but also to conclude what was best for these developing countries.

This early law and development discourse was however short lived and by the mid 70’s it was highly criticized (Rose, 1998:105). Critics of the discourse dismissed it on the basis of being “ethnocentric and naïve”, hence ignoring the social realities in the developing countries which made legal transplantation challenging (Chua, 1998:11). Trubek who had himself previously been a proponent, later criticized law and development planners, who believed that “something called modern law, not

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<sup>40</sup> See, for example, Mudimbe on Africa as a ‘construct’ of Western discourses (1988, xi).

surprisingly found in their own legal institutions...was the higher evolutionary stage towards which all systems were moving..." (2003:7).<sup>41</sup>

What the liberal legalist model of law in developing countries seemed to achieve was the enforcement of court-centred formal legal systems (Trubek and Galanter, 1974: 1078). However, it became evident that the presumption of the evolutionary progress of law alongside development was not being realized in practice. Hence, not only was the discourse being criticized but also funding agencies that had facilitated the law reform projects began to pull off. This, according to some, marked the 'death of law and development' (Trubek, 2003:8).

This 'death' notwithstanding, the renaissance of law and development was soon witnessed and it continues to inform law reform in less developed countries. As discussed in section 2.1 below, the 'new' law and development discourse, like its predecessor, is premised on the 'existence' of a hierarchical structure of legal systems. One of its agendas, therefore, is the transformation of the 'inferior' legal systems to match the developed Western legal systems to cope with the global demands. Based on its relevance to the current legal system in Kenya, this thesis embarks on a critique of this 'new' law and development discourse. Inspired by *postcolonialism*, section 3.4 critiques this discourse as perpetuating a binary social construct, which, like colonialism, conveys the superiority of the West, hence justifying it as a pace setter for the less developed countries. Secondly, it illustrates how the 'new' law and development discourse impacts on the legal system in Kenya whilst overlooking social realities like its predecessor.

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<sup>41</sup> See also Trubek and Galanter (1974:10 64).

## 2.1 The ‘New’ Law and Development Discourse

A pertinent tenet of the ‘new’ law and development discourse is that it inscribed itself in the ‘new world order’. Unlike colonial imperialism through which the sovereignty of individual states was extended to other countries in a process that delineated fixed boundaries, neo-imperialism operates in a new global order which Hardt and Negri describe as “a new form of sovereignty comprised of a series of national and supranational organisms united under a simple logic of rule” (2000:xii).<sup>42</sup> The international community of nations now extends its tentacles to influence global policies. This framework of relations, in particular, facilitates and legitimizes legal globalization thus tacitly supporting the new law and development project. Unlike the ‘old’ law and development discourse led by American legal scholars and practitioners, the ‘new’ law and development discourse gains impetus from the international legal regime.

Though premised on similar asymmetric basis of legal globalization like its predecessor, the new law and development discourse took up some remedial strategies. The law and development discourse in the 60s and 70s was predicated upon the assumption that ‘development’ would also lead to democracy and protection of human rights in less developed countries. However, it was soon witnessed that this was not

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<sup>42</sup> Hardt and Negri advance the concept of ‘*Empire*’ as a global order that permeates beyond fixed boundaries and inscribes itself within the processes of globalization (2000:xiv-xv). Although Hardt and Negri focus on how “a simple logic of rule” constructs a global order in a specific sense, a particular aspect of their work is relevant to the arguments in this chapter. Their illustration of a global domination by a logic of rule lends support to the argument here that individual states are now brought under a global order that impacts their national affairs (Hardt and Negri, 2000:xii). Moreover, their acknowledgement of the Eurocentric origin of logics of rule lend support to the contention here that the concept of ‘universality’ hinges on Western conceptions (Hardt and Negri, 2000:xvi).

necessarily the case. Economic development in some of these countries for example, resulted in neither upholding of human rights nor raising the standards of democracy. The new law and development was therefore repackaged in the “rule of law” strategy, which sought to propagate, on the one hand, human rights as an independent objective, though a fundamental aspect of the entire discourse (Trubek, 2003:11). On the other hand, law reform to meet the market demands of the international economic order formed a separate but interconnected objective (Chibundu, 1997:184). Both these facets of the new law and development discourse circumscribe identical power structures prescribed by the ‘old’ law and development discourse. Whereas the law and development discourse is most associated with advocating universal laws impacting on the economic realm, its influence on all spheres of law cannot be ignored. The correlation between the economic agenda and the law as a whole makes this discourse pertinent to this thesis.

A major premise of this discourse is an instrumentalist conception of law as a major driving force in economic growth. This has to be understood in the light of the emphasis on “free markets, increase in exports, privatization and foreign investments as keys to growth” (Trubek, 2003:12). Not surprisingly, these are Western economic models, which can only function effectively within Western style legal regimes. Thus it becomes imperative for less developed countries to embark on law reform to facilitate the operation of these economic strategies. At the end of the spectrum lies the tacit reality: that the international economic plane is not a level-playing field and hence the whole concept of free market merely perpetuates asymmetrical economic relations between the West and less developed countries. Chibundu asserts:

The purported relationship of law to development is, however, no more than surmise. Stripped to its essence, it is a culturally determined argument for policies likely to encourage participation by investors from Western Europe and North America in the economies of Southern countries (1997:184).

In what sense, therefore, does this facet extend beyond economic based rules to impact on the law generally? Firstly it speaks to the ‘mythic’ nature of universal rules, which runs across all spheres of law and determines domestic law.<sup>43</sup> Thus the International legal regime is reduced to a system through which ‘Western’ laws are made international.<sup>44</sup> This ‘universalization’ of Western law informs Fitzpatrick’s argument on the mythic nature of law. He contends that “modern secular law takes identity in the rejection of transcendence.... law can no longer be elevated explicitly in terms such as those of divine or natural law...”(1992:10). This being the case, how then can the ‘essence’ attached to Western law be explained? Casting doubt on the view that there is no essence in modern law Fitzpatrick remarks that “with the creation of modern European identity in Enlightenment the world was reduced to European terms and those terms were equated with universality” (1992: 65).

From this construction of Enlightenment, Occidental law then “evolved as a unitary, universal object” (Fitzpatrick, 1992:107). Herein lies the crux of Fitzpatrick’s argument: if the ‘essence of modern law is that it has no essence,’ the universality of Occidental law can only be understood in mythic terms. The clamor for universalist rules can thus be critiqued on this basis. Consolidating legal rules in Western terms is therefore nothing more than an affirmation of a ‘man made’ construct that suggests a hierarchy of legal systems. Butler contends that “what is named as universal is the

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<sup>43</sup> See Hardt and Negri (2000: 17).

<sup>44</sup> See for example Santos who argues that the universality of human rights is based on a Western conception (2002:269).

parochial property of the dominant culture, and that ‘universalizability’ is indissociable from imperial expansion” (2000:15).

Embedded within this ‘concept’ of universality of laws, is the second facet of the law and development discourse, which is directly linked to this analysis of the justice system in Kenya. Law and development is linked to the human rights discourse and owing to its extensive scope, it extends to a wide range of laws. Couched in universalist terms, human rights- based laws are incorporated in international legal instruments, which impose obligations on countries. Like the economic-based ‘universal rules’, human rights-based ‘universal rules’ are a reiteration of Western laws (Muncie, 2005:47).<sup>45</sup> Human rights-based rules should not be seen in isolation from the economic-oriented laws discussed above. Part of the fundamental rights and freedoms set out in the human rights instruments are rights which seek to facilitate the economic development strategies described above. For example, anti discrimination laws, as well as rights facilitating ownership and transfer of property, are prescribed as prerequisites for development.

A crucial point of linkage between development in the ‘third world’ and human rights is further premised on the role of international aid to developing countries. Striving to ‘develop’, the ‘third world’ faces economic challenges. These are however circumvented by resorting to international aid regimes as well as European countries for aid. Not surprisingly, conditions for aid often relate to implementation of human rights obligations. In dire need of aid, less developed countries therefore strive to

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<sup>45</sup> See also Fitzpatrick and Smith for a further analysis on the ‘universality’ of human rights which are premised on a Western practice. (1999:6).

embrace these human rights standards.<sup>46</sup> At a different level, the law and development discourse operates to legitimize the role of international organizations which operate on the ground to bolster the implementation of international laws.

The juvenile justice system and indeed the entire criminal justice system in Kenya have been impacted at these different levels. More specifically the reforms made in the juvenile justice system have been in observance of international standards and the international organizations have played a crucial role. In regard to restorative justice practices as an option in the treatment of juveniles, these have been set out in International instruments and in Kenya these have been pioneered by international organizations.

Another central but less analyzed aspect of the law and development discourse relates to comparative legal studies. Comparative law provides a forum through which foreign legal regimes are presented as an alternative to the local legal regime especially when portrayed as a ‘success story’ in the country of ‘export’. The support of local lawyers gives leverage to comparative legal studies. However, like ‘universal rules’ propagated through the international legal regimes, comparative legal scholars in the third world, seem to operate, almost unconsciously, from a point of ‘inferiority’.<sup>47</sup> Hence there is an almost obvious preference for Western legal strategies, which find their way into reform suggestions for the justice systems in the less developed countries.<sup>48</sup> In a seminar organized by UNAFEI on the juvenile justice system in Kenya, a senior

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<sup>46</sup> See Muncie who discusses how third world countries strive for ‘acceptance into world monetary systems (2005:46)

<sup>47</sup> See, for example, Said’s analysis of *latent orientalism* through which there is an almost unconscious perpetuation of orientalist ideas (1978:206).

<sup>48</sup> For a detailed analysis see Baxi (2000:13).

representative from the Attorney General's chambers remarked that "the Kenyan Juvenile Justice System is at infancy stage, not well developed and there is urgent need to improve it by learning and borrowing from Japan" (UNAFEI, 2001:9).<sup>49</sup>

In practice, transplantation of law from other contexts continues to be embraced as a solution to challenges in the justice system. Chibundu thus observes:

No sophisticated lawyer subscribes to the vulgar view of law as a commodity easily transplanted... Yet, the view that legal institutions can, with some modest tinkering, be beneficially and effectively exported from advanced industrial societies to developing countries, **continues to exert substantial influence in practice** (emphasis added) (1997:185).

Of what impact is this influence on the criminal justice system in Kenya currently and in the future? Drawing from postcolonial theory, section two examines the conditions under which Western legal regimes have been rendered 'superior' and 'universal' over others.<sup>50</sup> Challenging the discourse of law and development, postcolonial theory is drawn upon as a stimulus for analyses of the criminal justice system that focus on local solutions. With specific reference to restorative justice interventions for juveniles in Kenya, pertinent questions thus become: Are restorative justice programmes suited to the Kenyan context? What unique contextual challenges are faced in implementing restorative justice programmes? Can restorative justice programmes be tailor-made to suit the unique cultural and socio-economic circumstances in Kenya?

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<sup>49</sup> Although Japan is not a Western country in the historical/literal sense of the term, it is deemed 'developed' and is indeed incorporated in institutions such as the G8 that bring together Western countries. The G8, for example, describes itself as involving 'the Heads of Governments of the major economic powers' and its role is to 'bring together the key like-minded players from Asia, Europe and North America' (G8, 2005).

<sup>50</sup> Fitzpatrick and Smith note that law plays a crucial role in the "West's relation to the "other"" hence its relevance to postcolonialism which seeks to disrupt this relation (1999:4).

### 3 Postcolonialism

#### 3.1 Definition and Scope

The emergence and application of postcolonial studies in diverse disciplines and contexts presents a challenge to any attempt to construct postcolonial theory as a unified body of thought (Gandhi, 1998:3; Ahluwalia, 2001:1).<sup>51</sup> However, the major tenets and premises of postcolonial theory are agreed upon by postcolonial writers. Ahluwalia summarizes the postcolonial theory project thus:

By seeking to disrupt imperial binaries, post-colonial theory investigates the interstitial space arising out of the postcolonial condition, which raises the possibility of ambivalent and hybrid subjectivity (2001:92).<sup>52</sup>

A preliminary and fundamental point on the usage of the prefix ‘post’ is made by Abrahamsen who clarifies that:

While the ‘post’ in postcolonialism signifies the end of colonialism and imperialism as *direct* domination, it does not imply *after* imperialism as a global system of hegemonic power ...it is therefore not to be understood as a clearly dividing temporal *post*, but rather as an indication of continuity (2003: 195).<sup>53</sup>

Postcolonialism can be described as a discourse through which the continued hegemonic relationship between the West and formerly colonized countries is

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<sup>51</sup> Recent publications make the same observation. See for example the discussion by Jefferess et al (2006:3)

<sup>52</sup> Gandhi further elaborates on vocabulary used in postcolonial theory: “The theory may be named ‘postcolonialism’ and the condition it addresses is best conveyed through the notion of ‘postcoloniality’” (1998:4)

<sup>53</sup> Similarly Gandhi observes that the fact of independence does not result in the end of colonialism (1998:7).

examined.<sup>54</sup> Although the focus of postcolonialism is on the temporal aftermath of *direct* colonial domination, it embarks on a genealogy of this hegemonic relationship for a better understanding of the present (Abrahamsen, 2003:196). This chapter engages with postcolonial theory to examine how the West continues to influence policies in independent Kenya and especially within the justice system. By challenging the discourse of law and development it further examines the implications of this influence particularly in terms of the effectiveness of such ‘borrowed policies’ in the Kenyan system.

Section 3.2 sets out the central themes in postcolonial theory through a discussion of the major proponents. These major themes are then contextualized within the focus of this thesis.

### **3.2 Early Postcolonialism: *Negritude* and *Self Estrangement***

The *Negritude* movement is considered as an important starting point for the criticism of the hegemony of the West. Cesaire, who alongside Senghor is credited as being a major proponent, defines *Negritude* as “the awareness of being black, the simple acknowledgement of a fact which implies the acceptance of it, a taking charge of one’s destiny as a black man, of one’s history and culture” (cited in Gilbert et al, 1997:7).

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<sup>54</sup> For further definitions see, for example Ahluwalia who describes postcolonialism as a “counter – discourse that seeks to disrupt hegemony of the modern west” and as a “problematization of cultural interactions between the colonized and colonizers” (2001:6, 91). Fitzpatrick explains that postcolonialism is “a disruption or fracturing of the West” (1999: 2). On the other hand, Gilbert et al note that the term *postcolonialism* remains an elusive term as “it designates at one and the same time a chronological moment, a political movement, and an intellectual activity...” (1997:1). However this term is used in this thesis to refer to the ‘intellectual activity’, ‘the counter–discourse’ against the hegemonic relations between the West and colonized countries. The idea of counter-conduct, counter-practice is very Foucauldian. See Foucault’s assertion that discourse can be “a point of resistance and a starting point for an opposing strategy” (1979:101).

Négritude was premised on the rediscovery of the black man as a black man and not as one reinvented by the white man. It thus sought to counter the “estrangement of the self”, which was a result of colonization (Gilbert et al, 1997:7). This self estrangement was seen as a negative force which made the black man internalize his ‘perceived’ inferiority to the white man. Hence, the result of colonization was that the African states judged themselves in the ‘eyes of the white man’. The significance of negritude to contemporary postcolonialism is premised on this. Postcolonialism remains a criticism of formerly colonized countries in the South, which though now independent, continue to analyze themselves based on the analyses of the West (Gilbert et al, 1997:11).

Fanon, a key contributor to postcolonialism, developed this concept of ‘self estrangement’ further to illustrate the effects of colonial subjugation. Departing from the preoccupation of the fact of ‘blackness’ which informed Négritude, Fanon states that his starting point is the discovery that:

The issue is not one of ‘black man’ rather the crucial need to view humanity as ‘all embracing’ and being accommodating to the very existence of others...to us the man who adores the Negro is as ‘sick’ as the man who abominates him (1986:10).

According to Fanon, ‘self estrangement’ of the black man resulted in the black man’s endeavour to become like the white man. For example, a black man arriving in France would strive to master the French language and mannerisms. This, he explains, is the result of the colonized idolizing what the colonizer represented: knowledge and development (1986:18-23). Therefore the black man is not analyzed on the basis of his

‘own entity’ but in comparison to the colonizer who is seen as superior. Thus, for example, the black man’s culture and customs are dismissed for being found wanting on the scale of the “white man’s civilization” (1986:110). It is this binarism that Fanon’s thesis seeks to question; he challenges the purported superiority of the colonizer whose ‘civilization’ conjures the ‘universally accepted’. Similarly Said, whom Gandhi refers to as the “catalyst and reference point of postcolonial theory” bases his critique of *Orientalism* on the binarism between the Orient and Occident as discussed below (1998:64).<sup>55</sup>

### **3.3 ‘Orientalism’**

Edward Said’s thesis on *Orientalism* is largely premised upon a Foucauldian interpretation of power and knowledge. Therefore, to appreciate Said’s take on postcolonialism, this section begins with an exposition on Foucault’s concept of power and knowledge.

#### **3.3.1 Foucault on Power and Knowledge**

As a philosopher, Foucault is acclaimed for his radical conception of power that moves away from the classical juridical theory of power (Foucault, 2000:59; 2004:13; 2006: 40-41).<sup>56</sup> The integral aspect of power in Foucault’s terms is that power is a “relationship of force”; power circulates and functions in a “network of relations” (1997:15, 29). In his words, “power is exercised rather than possessed” (1977a: 26;

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<sup>55</sup>Young for example refers to Said, Bhabha and Gayatri as the ‘holy trinity’ of postcolonial critics (cited in Gilbert et al, 1997:27). Abrahamsen refers to Said as the ‘locus classicus of postcolonialism’ (2003:199).

<sup>56</sup>Fontana and Bertani situating Foucault’s lectures note that although Foucault never set out to write a book purely on the subject of power, it dominated his diverse analyses (2004:274).

1979:94). This takes on a different course from the traditional understanding of power as that which is appropriated by a few, in juridical terms, the state, and which in turn enables them to dominate others. The classical application of the concept of power was therefore limited to politico-juridical structures (Foucault, 1979:82, 85). In *History of Sexuality*, Foucault articulates his departure from the classical understanding of Power “as a group of institutions and mechanisms that ensure the subservience of the citizens of a given state...” (1979:92). Instead, he asserts that “power must be understood as the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization...” (1979:92-93).

Hence he concludes that “in order to conduct a concrete analysis of power relations, one would have to abandon the juridical notion of sovereignty” (2000:59). By recognizing power as that which circulates in networks of relation, the ‘concept of power’ becomes applicable to a wide realm of analyses owing to the plurality of such networks of relation (Foucault, 1979:92). This explains the application of this Foucauldian understanding of power by authors in diverse, unrelated disciplines.<sup>57</sup> Indeed Foucault himself adopted this notion of power in multifarious analyses.<sup>58</sup>

Within this network of relations, Foucault asserts and illustrates, power can only be exercised when a “certain economy of discourses of truth” is operational (2004:24). Thus power reproduces subjects through which it passes but certain rationalities have to

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<sup>57</sup> For example Said in *Orientalism* relies on Foucault’s concept of power (1978:3). Others include Garland on the *Culture of Control* (2001); Rarieya on *Environmental Change, Food Security and Development in Kenya* (2005); Fitzpatrick on *the Mythology of Modern Law* (1992); Escobar on *Encountering Development* (1995).

<sup>58</sup> Foucault’s work on power and knowledge includes analyses on *Penal Theories and Institutions; The Punitive Society; Psychiatric Power; The Abnormals; Security, Territory and Population ; The Birth of Biopolitics*. For a summary of these analyses see the first volume of the *Essential Works of Foucault 1954-1984* (Foucault, 2000).

be in existence to facilitate the reproduction of these subjects (Foucault, 1982:208). This “economy of discourses of truth” connotes the point of interaction between power and knowledge (Foucault, 2004:24).

Central to this power/truth correlation is that power and discourses of truth operate hand in hand as Foucault asserts that “...there are not on the one hand inert discourses, and on the other hand, an all powerful subject which manipulates them...; but that discoursing subjects form a part of the discursive field” (1991b:58). The power/discourse relationship is a symbiotic one; both truth-producing discourses and relations of power have a function within a discursive field (Foucault 1991b:58; 1977a:27)<sup>59</sup>. Foucault maintains that

No knowledge is formed without a system of communication, registration, accumulation and displacement that is itself a form of power...No power, on the other hand is exercised without the extraction, appropriation, distribution or restraint of a knowledge (2000:17).

In analyzing practices as exercises of power, therefore, one ought to unearth the discourses within which such practices exist. Seeing the co-relation between power and truth-producing discourses, Foucault’s analyses thus sought to expose “the fact and conditions of the manifest appearance of discourses” (1991b:60). In fact, Foucault’s analyses largely focus on discourses that produce certain rationalities and logics hence rendering certain practices objective. To set out this power/discourse link one is therefore asking: What is said? Which statements are conserved over time and which

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<sup>59</sup> For a detailed study on Foucault’s understanding of the interconnection between knowledge and power see Dreyfus and Rabinow (1982:114). In an interview on *Politics and the Study of Discourse* Foucault explains that the “discursive field, at a specific moment, is the law of the difference between what one could say correctly at one period (under the rules of grammar and logic) and what is actually said” (1991b:63).

ones disappear?<sup>60</sup> Further, whose preserve is the discourse; whose interests does the discourse serve? “How is the relationship institutionalized between the discourse, speakers and its destined audience?” (Foucault 1991b:59)<sup>61</sup>

In his book on *Orientalism*, Said similarly asks these questions in respect to the relationship between the Orient and the Occident. The next section considers Said’s adoption of Foucault’s understanding of power/knowledge in his analysis of *Orientalism*. It further highlights Said’s contribution to postcolonialism and also to what extent postcolonialism is relevant to contemporary issues.

### **3.3.2 A Foucauldian Analysis of *Orientalism***

Departing from the assumption that both the Orient and Occident are not merely “inert facts of nature” Said critically analyses *Orientalism* as a discourse (1978:4). He describes *Orientalism* as “a style of thought based upon an ontological and epistemological distinction made between the ‘Orient’ and most of the time ‘the Occident’” (1978: 2). He therefore embarks on:

Unearthing the internal consistency of Orientalism and its ideas about the Orient... thus understanding that the relationship between the Occident and the Orient is a relationship of power of domination of varying degrees of a complex hegemony (1978:5).

He illustrates how ‘ideas’ about the Orient were developed and sustained. Adopting a Foucauldian approach to his analysis, he maps out how certain ‘truths’ about the Orient have been objectified and in particular that the Orient stood inferior to the Occident

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<sup>60</sup> This is what Foucault refers to as the “limits of *conservation* of the sayable” (1991b:59).

<sup>61</sup> Foucault refers to this as “the limits and forms of *appropriation*” (1991b:60).

(1978:40). This identification of the processes through which certain ‘truths’ have come to be seen as objective is a central methodological feature of Foucault’s analyses. A point of caution is that this exercise should not be equated to a process in search of the ‘reality’. For Foucault, ‘truths’ are not fixed realities; instead, certain things are objectified and represented as truths.<sup>62</sup> Hence Said, in a true Foucauldian sense, focuses on the ‘objectification’ process of ‘truths’ about the Orient. Moreover he makes the observation that non-political positioning of knowledge is not synonymous to the representation of truth in reality; that in fact whether ‘pure’ or ‘political’, discourse is a site in which certain things are produced as ‘truths’. Porter, analyzing *Orientalism* suggests that Said contradicts himself by creating a correlation between ‘true knowledge’ and ‘non-political positioning’ (1994:151). However, Said’s work should not be interpreted to mean that ‘truth’ should be equated to non-political stances as he unequivocally states:

‘What I am interested in doing now is suggesting how the general liberal consensus that ‘true’ knowledge is fundamentally non-political (and conversely that overtly political knowledge is not ‘true’ knowledge) obscures the highly if obscurely organized political circumstances obtaining when knowledge is produced’ (1978:10).

Said therefore does not set out to show what the ‘truth’ as opposed to what ‘truth’ is represented by *Orientalism*. He shows *Orientalism* as a discourse that is part of a process that objectifies ‘truth’ as seen in the eyes of the West.

Porter further takes issue with Said for basing his work on Foucault’s concept of discourse but contradicting the central premises of Foucault’s work. He argues that

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<sup>62</sup> See Veyne’s exposition of Foucauldian methodology as a process of *historicization* which seeks to illuminate on how certain things have been objectified (1997:159).

unlike Foucault who postulates “epistemological breaks between different periods”, Said draws a picture of “the unified character of Western discourse on the Orient over some two millennia” (1994:152). Although Foucault throughout sustains interest on discontinuities in between events, he clarifies that this should not be mistaken to be a ‘grand theory’ that these discontinuities must systematically appear. He asserts:

I am attempting to show that discontinuity is not a monotonous and unthinkable void between events, which one must hasten to fill with the plenitude of cause or by the nimble bottle-imp of the mind...but that it is a play of specific transformations, each one different from the next... (1991b:58).

More specifically on discourses, Foucault engages himself with questions on “**the law of existence of statements, that which rendered them possible...**the limits and forms of conservation: which utterances are destined to disappear without trace? (Emphasis added) (1991b:59).

In *Orientalism* Said describes these “the limits and forms of conservation”. There is no doubt the dynamics of the colonial and post-colonial relationship between the Orient and the Occident are different. However certain ‘utterances’ have been conserved through the different periods, that is, the Occident is superior to the Orient, which forms Said’s thesis. He engages in a genealogy to show how a ‘form of rationality’ came to be inscribed in the system. It is not an exercise in search of a constant but is an exercise that seeks to show how ‘the superiority of the Occident’ came to be objectified as the truth.

Similarly, the genealogical analysis of restorative justice for juveniles in this thesis is not an attempt to invoke ‘a historical constant’ running through colonial Kenya to post

colonial Kenya. Indeed the hegemonic relationship between Kenya and the West is fundamentally different from the direct rule of Kenya by the British. The dynamics have changed, but the superiority of the West is still perpetuated through legal, cultural and economic globalization. This thesis seeks to describe how this ‘utterance’ that privileges the West is put in circulation and conserved within the different periods in time.

In following Foucault and portraying the Orient as a ‘discursive construct’, Said is further put to task by Gilbert et al for being ambiguous whether “Orientalism is the cause, or consequence, of imperialism” (1997:20). This criticism levelled against Said can be countered through a re-engagement with arguments that form the basis of Foucault’s work. Foucault distances himself from methodologies that attempt to reduce analyses to exercises in search of causes and effects. He contends that engaging in such an analysis searches for consistencies hence pre-structuring the conclusion. The danger of this is that a researcher, focusing on the causal-effect analysis, is likely to overlook the actual practices. In fact Foucault illustrates, for example, that analyses of power and discourse reveal their co-existence in an episteme as opposed to discourse simply being an effect of power (1977a:27). Thus although power relations engender the objects ‘spoken’ about by discourses and to some extent sustain the discourses, it is the discourses that produce certain truths that are fundamental for operation of these power relations (Dreyfus and Rabinow, 1982:64). Illustrating this, Veyne explains the non-existence of ‘natural objects’ and instead ‘objects’ develop alongside practices (1997:160). Practices on the other hand operate with corresponding discourses which reproduce objects and represent them as ‘natural objects’. In the same vein, Said

describes *Orientalism* as a discourse developed alongside imperialism, both being a part of the discursive field.

Foucault explains his interest in discourses and how this relates to the contexts in which they are produced. He states:

...I do not question discourses about their silently intended meanings but about the fact and the conditions of their manifest appearance...not about the sense preserved within them like a perpetual origin but about the field where they coexist, reside and disappear (1991b: 60).

Similarly Said analyzes *Orientalism* in the context of the power relations between the Occident and the Orient. Appreciating *Orientalism* as a central discourse within a vast network of hegemonic relations between the Orient and the Occident, Said examines a diverse range of fields of knowledge. Therefore his analysis ranges from an examination of 'scholarly works, works of literature, political tracts, journalistic texts, travel books, religious to philological studies' (1978:23). Just like Foucault who focuses on analyses of diverse regimes of knowledge within an episteme in his study on knowledge and power, Said's depiction of *Orientalism* gains cogency from his interaction with diverse fields of knowledge which converges at central themes.<sup>63</sup> The rationale behind this form of inter disciplinary analysis is that it transcends institutional barriers and illuminates the interconnectedness of complex social mechanisms hence evidencing power relations in their diagrammatic form.<sup>64</sup>

In the same way, in an analysis of the criminal justice in Kenya, engaging with other realms of knowledge provides an interdisciplinary illustration of how certain

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<sup>63</sup> Foucault for example examines the practice of imprisonment, the history of madness, the history of sexuality (1977a; 1979; 2006)

<sup>64</sup> See Foucault's discussion of the practice of imprisonment as a diagram (1977a).

rationalities were inscribed in colonial Kenya and how they continue to be sustained. For example, religion in Kenya was the vehicle through which cultural practices amongst traditional communities were demonized.<sup>65</sup> At the same time, the formal colonial school system encouraged the use of English language in place of indigenous languages, which were considered inferior.<sup>66</sup> Professor Wangari Maathai asserts that the education system in Kenya trivialized ‘anything African’. Thus being educated meant speaking in English and she recounts: “as we became fluent in English, we were also shifting in other ways – moving from a life of traditional dancing, singing and storytelling to one of books, study, prayers and the occasional game of netball” (2006:60).

Concurrently the justice system in Kenya adopted a Western form of justice in place of traditional mechanisms, which were considered ‘primitive’. Examining these diverse fields of knowledge unearths how the entire systems of government in Kenya were utilized to perpetuate rationalities based on the Western perception of things. This thesis seeks to depict how these rationalities within different fields of knowledge were sustained in independent Kenya and how the much sought after ‘development’ is still coined in Western terms. Ntarangwi, for example, in his analysis of the education system in Kenya notes that as development continues to be weighted against Western values, the education system moves further away from incorporating local solutions that are best suited to this context (2003:213). Similarly, Langat, examining the English curriculum in schools in Kenya, observes that this curriculum is still a ‘mimicry’ of the

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<sup>65</sup> In an informal discussion the researcher had with some elderly members of the Anglican Church in Kenya they described how becoming a Christian in colonial times meant denouncing all traditional cultural practices, which were considered evil. These included mundane practices such as traditional forms of dancing, dressing etc. This is depicted in the words of a Christian song in Kikuyu: ‘...*Matu tugituma muiritu mwenda Jesu ndeda njuiri njikie*’, which described how female Christian converts did away with traditional hair braiding and practices.

<sup>66</sup> Fanon describes how mastery of French made a Martinician be considered less primitive (1986: 18).

British curriculum and continues to rely heavily on Western literature (2005:14). Reiterating these views, Mazrui highlights the need for Kenyan universities to be ‘culturally close’ to Kenyan societies especially because “African university systems are colonial in origin and disproportionately European in traditions”. He contends that African universities are among the major instruments and vehicles of cultural Westernization on the continent (2003:141).

Akin to Said’s exposition of *Orientalism*, this thesis highlights the legacy of colonialism in Kenya, which continues to inform the adoption and implementation of policies. In other words, the prefix ‘post’ in referring to ‘postcolonial Kenya’ remains a temporal description of the close of direct rule by the British but not the end of hegemonic relations with the West. Section 3.4 discusses the practical usefulness of this kind of postcolonial analysis.

### **3.4 Contemporary Application of Postcolonial Theory: A Critique of Law and Development Discourse**

The work of early postcolonial theorists, such as Said, is of course dated and has been subject to criticism over the years. Is there, then, a place for this theory in contemporary analyses or has it served its course? Jefferess et al. are of the view that postcolonial theory is indeed still relevant and that despite divergent opinions on the theory, critics agree that:

Postcolonialism is far from irrelevant to twenty-first century political goals and struggles, and that, on the contrary, its conceptual tools and analytic framework can and should be harnessed in the interests of critiquing the colonial past and contemporary world order (2006:2).

Though its key texts date back to the 1970s, postcolonial theory still provides a useful axis for the analysis of current conditions in postcolonial states.<sup>67</sup> This is illustrated by contemporary studies that adopt postcolonial theory. For example *subaltern studies* which engage with the contemporary rendition of the historiography of South Asia hinge on postcolonial theory.<sup>68</sup> The founding author of these studies, Ranajit Guha, pointed out that these studies sought to critique the interpretation of the historiography of South Asia that was dominated by “colonial-elitism and bourgeois-nationalist elitism” (1982:1). Though founded in 1982, *subaltern studies* have continued to inform contemporary thought (Chaturverdi, 2000: xiv).<sup>69</sup>

A major criticism levelled against postcolonialism has been that it is too theoretical to be of any practical use. Abrahamsen notes that it has often been dismissed as being “pure theory”, and that it shows no engagement with the “world out there” (2003:191).<sup>70</sup> On the contrary, various proponents of postcolonialism ground postcolonial theory within social experiences. Said, for example, in advocating for

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<sup>67</sup> See for example Fitzpatrick and Smith’s *Laws of the Postcolonial* which consists of postcolonial analyses on contemporary issues (1999).

<sup>68</sup> In the first volume of *subaltern studies* Guha explains that the term *subaltern* adopted in its dictionary meaning, ‘of inferior rank’, is used to represent ‘the general attribute of subordination in South Asian society’ (1982:vii). The articles in the *subaltern studies* series provide contextual accounts of different issues in South Asia with the intention of deconstructing ‘elitist’ constructions of the South Asia historiography. For example in *Chandra’s Death* contained in the fifth volume of *subaltern studies*, Guha deconstructs the interpretations of modern law that label a ‘death into a crime’ and the deceased’s mother and sister as murderers without taking into account the circumstances surrounding the death. In this article Guha points out the ‘law as a state’s emissary’ constructs the account of the ‘crime’ before the ‘historian’ could give an account of the ‘death’. The law in this case fails to take into account the patriarchal forces within which the accused women act and as such fails to emancipate them from domination as it represents a different ‘kind of politics’ (Guha, 1987:142).

<sup>69</sup> See Ludden’s edition on contemporary developments within *subaltern studies* (2002).

<sup>70</sup> See also Ahluwalia (2001:17).

“worldliness of the text” emphasizes the need for the critic to move beyond the theoretical and engage with the ‘world’ he speaks about.<sup>71</sup> Even his earliest work on the ‘Orient’ as a ‘fact of human production’ he analyzes the discourse of *Orientalism* in the context of social realities (1997:126). Other more recent proponents such as Ahluwalia have followed suit. Deploying postcolonial theory, Ahluwalia illuminates how African states have been constituted in history and engages with the political on the way forward for these states (2001:18). Elsewhere Abuya analyses refugee law in Kenya in the lens of postcolonial theory and highlights the need for local solutions to deal with the “refugee crisis” (Abuya, 2006:193).<sup>72</sup>

In practical terms, postcolonialism provides a framework of analysis which enables us to comprehend the present better. Uncovering the past colonial processes which constituted colonized states as inferior to the West, is an ‘*anamnesis*’, that facilitates an understanding of modern-day hegemony (Gandhi, 1998:8).<sup>73</sup> In similar terms, Bhabha asserts that ‘remembering of the past’ is necessary; “it is a putting together of the dismembered past to make sense of the trauma of the present” (1994:63).<sup>74</sup> Without taking note of how ‘rationalities’ that present ‘developing countries’ as inferior to the West have been inscribed and sustained, the process of ‘decolonization’ remains an illusion. In effect therefore non-Western knowledge would remain subjugated as Western knowledge continues to be embraced as ‘universal’. This being the case, systems in developing countries will continue to be dictated by the trends in the West without taking heed to localized solutions best suited for the contexts.

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<sup>71</sup> See Ahluwalia for a detailed discussion on Said’s concept of ‘worldliness’ (2001:17).

<sup>72</sup> As discussed above, Ntarangwi (2003:211) and Langat (2005:1) engage postcolonial theory to unearth some of the challenges in the education system in Kenya.

<sup>73</sup> Gandhi references the use of the term, *anamnesis* to Lyotard who applies it in explaining what is meant by the ‘postmodern’ (Gandhi, 1998:8; Lyotard, 1992:93)

<sup>74</sup> See also Gandhi (1998:45); Ahluwalia (2001:5); Abrahamsen (2003:195).

A second dismissal of postcolonial theory is based on the allegation that it homogenizes colonial experiences in spite of disparities between different contexts (Gandhi, 1998:168). This criticism however fails to appreciate postcolonialism as a counter discourse which provides a point of resistance against hegemonic relations between the West and postcolonial states. Postcolonial theory must be seen as a tool of analysis that provides a framework to challenge imperial binaries which have diverse impacts in different contexts. Both early and recent proponents of postcolonial theory ground their analyses on social realities in specific contexts with one common aim: to uncover how the colonial experience constituted those particular contexts and how that impacts their present and their future. Thus the common denominator is that colonial experiences did and continue to impact on ‘the colonized’ however dissimilar this impact is in different contexts. It is this common denominator that is construed as a ‘homogenizing’ exercise. In response to this criticism Ahluwalia concludes that “although there are distinct differences between the colonies, as well as a particular colony, what is clear is that the processes of colonization fundamentally have altered and affected their future course of history” (2001:7).

Distancing itself from engagement of postcolonial theory as a discourse where different colonial experiences may be fitted into a homogenous mould, this thesis is a grounded analysis that is addressed to the reality of the colonial experience in Kenya. It specifically focuses on the impact of colonialism on the criminal justice system in a bid to comprehend contemporary global forces that currently dictate policies in the system.

A further criticism directed towards postcolonialism and particularly Said's postulation is predicated upon disavowal of the concept of binaries that places the colonized on the one hand versus the colonizer on the other.<sup>75</sup> The argument is that analyzing postcolonial contexts through the lens of a binary construct re-inscribes the very forms of domination criticized. Bhabha's work is for example viewed as a departure from Said's position as it argues that the colonizer and colonized do not necessarily exist in "fixed and unitary terms which are set at once absolutely distinct and necessarily in conflict" (Gilbert et al., 1997:32).<sup>76</sup>

In his later work, Said however clarifies his premise on binarism and how it relates to

*Orientalism*:

...this is however, neither to say that the division between the Orient and Occident is unchanging nor is it to say that it is simply fictional. It is to say – emphatically – that as with aspects of what Vico calls the world of nations, the Orient and the Occident are facts produced by human beings and as such must be studied as integral components of the social and not the divine or natural world (1997:126).

In fact this particular 'weakness' identified in Said's work is what gives *Orientalism* leverage. Contemporary relations between Europe and Asia cannot be comprehended without an initial understanding of the 'inferiority' of the Orient in comparison to the Occident as a social construct. A clear picture is drawn by Ahluwalia who explains that it is only through identifying the "binary logic of imperialism" that we are able to understand "the way in which Western thought in general sees the world" (2001:92). Thus, as opposed to the suggestion that postcolonialism perpetuates the binary construct, it seeks to "disrupt these imperial binaries" (Ahluwalia, 2001:92).

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<sup>75</sup> See for example Ahluwalia who discusses this purported reinscription of domination in the light of an assumed convergence between postcolonialism and poststructuralism (2001:1).

<sup>76</sup> See also Bhabha (1994:72).

Similarly, current asymmetrical relations between Kenya and the West can only be properly understood by first understanding how Kenya has been constructed throughout history. Only then can we attempt to answer questions such as: How can the privileging of Western ideas decades after independence be explained? Does this not echo a binary construct that perpetuates this asymmetrical relationship? An understanding of the strategies adopted by the counter-discourse challenges the suggestion that an analysis founded on this binarism does nothing more than perpetuate this asymmetrical relationship. To what end does Said, for example, adopt the very social construction that he attacks in his discussion on *Orientalism*? In analyzing the Orient, this binary construct comes out clearly as facilitating a hegemonic relationship with the Occident; it is through this binarism that certain truths have been objectified. As opposed to perpetuating this binarism, Said depicts the implications of this structure.

The strength in a Foucauldian approach, which Said adopts, is that analyses acknowledge that certain 'truths' are objectified. Whereas these truths may not be the reality, they are objectified through certain processes, which are deemed necessary for a researcher to identify. In the context of the colonizer and colonized, the superior/inferior construct is objectified as the truth. Hence a researcher acknowledging this social construction and identifying the social processes, through which this 'truth' was objectified, is by no means perpetuating this truth; instead he or she exposes the binary structure as a creation of the processes which he or she identifies, as opposed to underscoring what the reality is. By exposing the processes a researcher suggests that the reality could be different from what the processes represent the 'truth' to be. On the

other hand, the result of this exercise examining the objectification of a particular ‘truth’ may be the production of another ‘truth’ functioning as an objective.

In the Kenyan context, as opposed to merely attributing the privileging of Western ideas to the hegemonic relationship between the ‘West’ and the ‘other’, this thesis criticizes the embracing of unquestioned supposedly ‘objective’ progressive ideas. With specific reference to global penal trends, certain penal practices are seen as progressive. These practices are then incorporated through the legal globalization process. Although comparative lawyers may argue that borrowing ideas from other jurisdictions may be beneficial, the nature of the relationship between ‘developed’ and ‘developing’ countries raises questions of choice versus subtle imposition.<sup>77</sup> For example as Said talks of ‘latent *Orientalism*’ he illustrates a level of unconscious epitomizing of Western ideas (1978:206). In this light, the question thus raised is whether there has been a conscious consideration of whether ‘progressive’ penal practices are compatible with the conditions in Kenya or whether this is another ‘latent’ embracing of global trends.

These insights find bearing in the correlation Foucault makes between power and knowledge, a linkage that is central to postcolonial theory. Africa’s over-reliance on the West for ideas can be best understood as a binary social construct as discussed in this chapter. In the guise of being ‘advanced’ and at the same time knowledgeable about Africa, hence in a position to determine what is best for Africa, the transplantation of ‘global’ ideas to Africa by the West is justified. Owing to historical

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<sup>77</sup> Sir Basil Markesinis in a lecture delivered at the University of Leicester argued that “the task of the comparative lawyer is to probe everything and keep the best” (2005). This connotes a conscious effort to not only identify what is ‘best’ but also what is ‘suitable’. Although what is ‘best’ is contestable, the value of this assertion is that the issue of suitability to a particular context is fundamental.

processes, particularly colonization, the rationalities privileging Western thought are at play in the African contexts hence making possible the local adoption of Western ideas. Related to this, as Bhabha's *Location of Culture* illustrates, the agency of the 'Other' in propagating the dominant culture cannot be ignored (1994:44). In the context of developing countries, there is a desire to 'develop' hence the need to embrace Western ideas that are equated to development. Thus on the one hand there are discourses privileging Western thought and on the other hand there is a quest to be as developed as the West which necessitates the adoption of Western ideas.

The superiority of Western thought is supposedly justified by the knowledge possessed by the West of the 'Other' contexts. Said's *Orientalism* for example discusses the attitude of the West who asserted their knowledge of Egypt and their conclusion that "Egypt requires...British occupation" (1978:34). An interesting observation as one engages with postcolonialism is that the West continues to have 'knowledge' of Africa since the colonial era to date, hence legitimately providing solutions. Therefore the law and development discourse is premised on the knowledge possessed by the West which justifies transplanting of ideas to the developing countries and is made possible by the fact that this premise is also held locally (Chibundu, 1997:183). A good illustration is the 'packaging' of restorative justice as a compatible mode of justice in Africa (UNODC, 2006:30). Its authority is buttressed with knowledge of the history of African communities: that since their traditional modes of justice were restorative, contemporary modes of restorative justice would be compatible in these contexts. Yet,

previously, the West, indicating what was best for Africa, advocated for systems based on the Western criminal justice model, which discounted traditional forms of justice.<sup>78</sup>

It must be noted, however, that the conceptualization of a hierarchical structure of legal regimes in the international scene is not an end in itself and is not the closing point of this thesis. It is argued in this thesis that law reform and implementation of policies in the criminal justice system in Kenya must first be historicized to understand the actual dynamics of operation. Focusing on restorative justice for juveniles in Kenya, a genealogical analysis is embarked on to provide a better understanding of the current practices. Discussing restorative practices in the formal justice system, such as diversion programmes, the thesis analyzes the drawbacks to these practices. A major concern noted at the outset is that, in spite of the consensus that restorative justice is compatible with 'African' values, and in spite of wide application of informal restorative practices, the restorative options in the formal system remain underutilized. In connection to this, the need for localized strategies that take into account contextual realities is identified.<sup>79</sup> Thiong'o for example argues that Africa must embark on strategies that incorporate African perspectives and are alive to local realities (1986:94).

In light of the theoretical basis discussed in this chapter, section three sets out the specific framework of analysis adapted for this thesis.

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<sup>78</sup> See Foucault's work on Psychiatric power. He indicates that the doctor's internal grasp of the madness through smoking hashish gives him additional power (2006:281). Having experienced some 'form of madness' by being high on hashish the psychiatrist could say, "This is madness, for, as a normal individual, I myself can really understand the movement by which this phenomenon occurs" (2006:281). Thus the psychiatrist's diagnosis is legitimized by his 'knowledge' and understanding of madness.

<sup>79</sup> Muncie who analyzes the impact of legal globalization calls for specific contextual analyses. He asserts: "what is clearly required is an analysis of how global pressures work themselves out differentially in individual jurisdictions" (2005:58).

#### **4. Restorative Justice in Kenya: A Framework of Analysis**

##### **4.1 Restorative Justice Practices**

In this chapter, postcolonial theory has been adopted to challenge the law and development discourse. Essentially, postcolonialism advances the need to contextualize analyses and to embark on solutions that are tailor made for the local situations. Inspired by postcolonialism this thesis therefore embarks on an analysis of restorative justice for juveniles in Kenya that is informed by the local as opposed to the international. This endeavour alerts us to Foucault's preoccupation with analyzing *practices* in themselves as opposed to focusing on institutional structures in which these practices are carried out. The essence of focusing on the *practices*, in Foucault's terms, lies in avoiding analyses conducted in the lens of certain existing rationalities. A point of nexus can be drawn between this Foucauldian concept of analyzing *practices* on the one hand and postcolonial theory on the other hand. Foucault calls for analyses of *practices* as they are carried out as opposed to seeing them in the lens of what has been constructed as the *truth*. In the same vein, postcolonialism deconstructs what has been produced as 'truth' within the context of the asymmetrical relations between the West and post colonial states.

This thesis therefore, deconstructs the notion that Western legal concepts are superior as represented in the law and development discourse. Arguing that restorative justice practices are not necessarily a form of legal advancement in Kenya owing to its current application in Western countries, this thesis seeks to situate restorative justice practices within contextual realities in Kenya.

The categorical adoption of Foucault's concept of *practices* in this thesis would lead to the question: In what terms is a Foucauldian analysis of *practices* different from any other analysis? This section interprets Foucault's understanding of *practices* and elaborates its significance on this thesis.

A preliminary but fundamental question is the appropriateness of adopting Foucault, a Western thinker, within postcolonial arguments in this thesis which challenge Western influence on policies in Kenya. The response to this concern lies in the distinct concepts in Foucault's work that have been discussed in this section and throughout the thesis. His departure from 'universalizing' systems and his distinct methodology that advocates for a focus on contexts as singularities justifies the application of his concepts to the Kenyan context. In other words, he is an anti-essentialist who embraces grounded analyses that place their focus on contexts as singularities. This therefore echoes the fundamental premise of this thesis which casts doubt on the legitimacy of essentialist analyses. Embracing the caution that theory must not assume a prescriptive role, Foucault's emphasis on contextual peculiarities avoids this pitfall right at the outset. Indeed, so prominent was his aversion to 'grand theorization' that he constantly 'reread and revisited' his previous work based on his later findings (Fontana and Bertani, 2004:275). A crucial feature of Foucault's work is his caution against analyses that tend to engage in prescriptive processes. Instead, he illustrates the usefulness of descriptive analyses that illuminate discontinuities which may otherwise be overlooked by discourses that represent things as a unity. This caution thus provides a key methodological basis for this thesis which casts the gaze away from prescriptive discourses such as law and development which is challenged here.

In his texts, Foucault emphasized that the focus of his analyses was the *practices* themselves (2007:116).<sup>80</sup> Researching the practice of imprisonment, for example, he articulates that:

...the target of analysis wasn't 'institutions', 'theories' or 'ideology', but practices... the hypothesis being that these types of practices are not just governed by institutions, prescribed ideologies, guided by pragmatic circumstances ... but possess up to a point their own specific regularities, logic, strategy, self evidence and reason (1991c:75)<sup>81</sup>.

The analysis of *practices* in Foucauldian terms thus connotes analyzing 'programmes of conduct' that set out courses of action, as well as rules regarding the carrying out of such actions and the explanations given for such actions (1991c:75). Thus Foucault, for example, analyzes the practice of imprisonment as opposed to prison as an institution. In doing so he demonstrates how imprisonment as a "way of doing things" became acceptable and how it became a central and obvious feature of the penal system (1991c:75; 1977a:131). Such an exercise involves breaking down the 'practices' in order to grasp the conditions that make them acceptable at a particular period; glancing at "what is done, what is said, what rules are given and what explanations are given" (1991c:75). The basic premise of this is that there are certain limits of conservation that are set by existing conditions.<sup>82</sup> Thus practices will only stand the test of time if certain conditions which render them acceptable, exist.

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<sup>80</sup> See for example his book *Discipline and Punish* in which he analyses the practice of imprisonment in detail (1977a). See also his analysis on the practices related to determination of madness and the treatment of the 'mad' (2006).

<sup>81</sup> In his lectures compiled in *Society Must be Defended*, Foucault emphasizes that analyses should be oriented on 'material operations' (1997:34).

<sup>82</sup> For example, Foucault explains that public executions in France existed for a long time because of the political conditions at the time: uprisings had become a common occurrence, there was impending civil war and hence the need for the King to publicly assert his power (1977a:36, 55).

Foucault's preoccupation with *practices* is premised on his exposition of power being rooted within social relations. Hence he suggests that the analyses of *practices*, which in essence are analyses of what people actually do, are best placed to describe power relations. On the other hand, an analysis of these relations in terms of institutions, for example, would be problematic as institutions are governed by already established rationalities which would only predetermine such analyses (Dreyfus and Rabinow, 1982:222).

Veyne explains that Foucault's concept of practices is not an "unknown new agency" but rather it is an "effort to see people's practices as *they really are*" (1996:156). Phrased succinctly, Veyne suggests, Foucault would seem to say to historians:

You may continue to explain history as you have always done. But be careful: if you peel away the banalities, you will notice that there is more to explain than you thought; there are crooked contours that you haven't spotted (1996:156).

Is it then just a question of preciseness in practical terms? Seeing practices as "*they really are*" and as "*what people do*", can only be a reality when consciousness is raised to appreciate the objectivizations of determined practices (Veyne, 1997:153). The converse is true: looking at things in the lens of these objectifications allows us to see them only to the extent of their objectification and hence we cannot see them otherwise.<sup>83</sup> Herein lies the potency of Foucault's argument. Casting our focus from 'natural objects' we then seek to identify what has been objectified and the process by which this has been done. Nothing bears the indelible mark of 'self-evident'; instead,

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<sup>83</sup> Deleuze for example in answering the question 'what is a dispositif' based on Foucault's analyses, explains that social apparatuses manipulate the operation of light thus directing the 'visible and invisible' as well as establishing 'objects' (1992:160)

determinations of this kind are laid bare allowing us to see things in terms of what people do rather than what people obviously do.

An explicit illustration of an ‘obvious, self-evident’ assumption that produces an obvious conclusion to a situation is Veyne’s discussion on the demise of Roman gladiatorship during the Christian emperors’ reign. The obvious conclusion to this state of affairs was that gladiatorship was abhorred by Christian teachings and could not thus survive in this reign. However, setting out the actual sequence of events ‘as they really occurred’ Veyne leads us to the conclusion that the real explanation for the “suppression of gladiatorship lies in political power rather than in humanitarianism or in religion” (1997:149). In the same way, this thesis therefore attempts to engage in an exercise that sheds light and casts doubt on the ‘obvious’ explanations for restorative practices for juveniles in Kenya.<sup>84</sup> Instead it seeks to bring to light determinations within the justice system that impact on the policies adopted.

One of the practical uses of Foucault’s conception of *practice* is that it enables us to see practices as complex social mechanisms that are interconnected to other practices that may exist in entirely different disciplines. For example, in analyzing penal practices such as imprisonment one is able to link them to other parallel practices such as schooling thus giving cogency to analyses (Foucault, 1991c:77). In *Discipline and Punish* Foucault locates prison in the context of parallel institutions in which ‘discipline’ is objectified, hence exemplifying the dynamics involved in the practice of imprisonment (1977a:169). Chapters four, five and six of this thesis illustrate how

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<sup>84</sup> Foucault uses the term ‘rarefaction’ to refer to the process by which one looks at things as ordinary as opposed to ‘natural objects’ and hence sees the minute deviation from the ‘constants’ constructed through the objectification of certain things. See Veyne’s article which details out what this process entails (1997:158-159).

penal practices in Kenya replicated practices in other spheres of society during the pre-colonial, colonial and post colonial periods. A good illustration is the sharing of values that impact on policies in diverse disciplines in modern day Kenya. For example, alongside abolishing of corporal punishment in schools in Kenya, there are restorative practices being introduced in the juvenile justice system in place of punitive measures.

As conditions supporting these practices are analyzed, the influence of the West on policies and practices in Kenya is laid bare. Couched within ‘truth producing’ discourses, Western ideas are favoured and adopted in diverse disciplines in Kenya. In analyses situated in different spheres in Kenya the influence of international legal instruments and bodies features prominently across the board. Thus Kenyan writers in diverse disciplines challenge discourses privileging Western ideas. Abuya, for example, in his analysis of the refugee regime in Kenya highlights the challenge of transplanting ‘foreign’ international systems to Kenya (2006:193). On the other hand Rarieya, an environmentalist, notes how international bodies have impacted on environmental policies and food security in Kenya (2005:1). In other words, certain practices have been rendered acceptable in Kenya in the clamour to adopt Western ideas, hence keeping abreast with global ‘developments’ in diverse spheres.

Although this chapter has so far pointed at conditions directly linked to international influence on the criminal justice policies in Kenya, a focus on restorative practices and the practice of imprisonment no doubt reveal local conditions at play. Seeing these

practices as social relations through which power is exercised, the analyses lay bare how certain subjects are reproduced and separated from others.<sup>85</sup>

Overall, this thesis therefore seeks to unearth the conditions that have led to the attempts to incorporate restorative justice into the formal juvenile justice system. On the other hand, it seeks to analyze the conditions that limit the potential of such restorative justice interventions. To unearth these conditions further, the practice of imprisonment, which is the dominant criminal intervention in Kenya, is also analyzed. For a clear understanding of practices as they are presently carried out, an analysis of the past is pertinent. Section 4.2 explains the usefulness of a genealogical analysis in Foucauldian terms and how this has been adopted in this thesis.

## **4.2 A Genealogical Analysis**

The initial question to answer with respect to the methodology employed in this research is: to what end would a genealogical analysis be conducted? Of what use, if any, is a peek into the past in an analysis of the present?<sup>86</sup> This section explains, firstly, what a genealogy is in Foucault's terms. Secondly, the objective to be achieved by engaging in a Foucauldian genealogical method, rather than a more traditional historical approach, is set out.

At a contextual level, an analysis of the current operation of restorative justice practices in Kenya raises pertinent questions. Firstly, what has led to the attempts to introduce

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<sup>85</sup> Foucault's discussion on this subject is recorded in detail in his *Afterword* in Dreyfus and Rabinow's book (1982:208).

<sup>86</sup> Elsewhere, authors such as Abuya argue that historical studies are crucial in seeking solutions to contemporary issues. In addressing challenges faced by the refugee system, for example, he engages in a genealogical analysis that provides a better understanding of the current system (2007).

restorative justice programmes for juveniles in a criminal justice system that is largely inclined to imprisonment as the major response to crime? Secondly, why are the restorative responses introduced in the formal juvenile system underutilized whereas restorative practices are embraced in the informal system? The answers to these questions beg for an analysis that engages with the processes that have led to the current situation. One of the key issues as noted above is of course Western influence on the penal policies in Kenya. The nature and extent of this influence can only be understood by engaging with historical processes that have shaped the relations between the West and developing countries like Kenya. Thus, by embracing postcolonialism, this thesis deconstructs viewpoints that have been propagated as *truth* over the years. To effectively engage in this deconstruction process, a genealogical analysis becomes paramount. Hence this research adopts a Foucauldian method, engaging in a genealogical analysis of the criminal justice system in Kenya which serves as the axis for discussion on restorative justice for juveniles.

A genealogical method in Foucauldian terms differs from a mere historical account, a distinction that is fundamental in this research. The crucial distinction is that Foucault's genealogies are not "*objective histories of the present* but rather histories of *the objectification of the present*" (emphasis added) (Voruz, 2005:156). Tracing the practice of restorative justice to pre-colonial times to its present informal use amounts to an 'objective history of the present'. This thesis seeks to go beyond such an exercise.

Foucault's genealogies, which he sometimes refers to as 'effective histories', differ from the traditional understanding of histories in two main aspects. Firstly, a distinct tenet of genealogies in Foucault's terms is the purpose for which genealogies are

conducted. The distinctiveness of 'effective histories' can only be grasped by first understanding the modus operandi of classical history. Traditional history concerns itself with tracing out events as they unfolded over time. Foucault's genealogies on the other hand are interested in the past in as much as it illuminates the present. As Foucault explains, effective history

reverses the surreptitious practice of historians, their pretension to examine things furthest from themselves, the grovelling manner in which they approach this promising distance...Effective history studies what is closest, but in an abrupt dispossession, so as to seize it at a distance... (1977b:156).

Moreover, genealogies in his terms are not merely "a micro- analysis of the processes that shape 'the present'" as Voruz notes in her critique of Garland's genealogical analysis of the culture of control (2005:155). The crux in Foucault's genealogies is that they analyze how present practices have been objectified (Veyne, 1996:158-159). This is the cutting edge in genealogies: to qualify as effective histories they engage in an analysis of the processes that have led to the 'objectification' of certain things. Voruz aptly summarizes genealogies in Foucault's terms as 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*" (emphasis added) (2005:165).

In view of restorative ethos in many traditional justice systems' in Kenya, a nexus between current efforts to institutionalize restorative methods of dealing with juveniles and 'African' culture could be readily drawn. The history of restorative justice from traditional systems to the current judicial system in Kenya would thus easily be

traced.<sup>87</sup> In other words it is tempting to think that restorative justice in the current juvenile justice system is a matter of course, considering the existence of restorative values within traditional systems in Kenya. This kind of pitfall explains Foucault's advice that practices should be analyzed as "*events* not as institutional facts or ideological effects" (1991c:76). Giving the example of imprisonment, he suggests that it was deemed "self evident" that the response to crime ought to have been incarceration; there were intervening conditions and processes that made imprisonment the dominant crime intervention at a particular time (1991c:76). What Foucault seems to suggest, then, is that analyses ought to proceed from a "breach of self-evidence". This breach of self evidence, he argues, is only possible through regarding practices as 'events', a process he refers to as *eventalization* (1991c:76)

*Eventalizing* restorative justice for juveniles in Kenya would thus mean breaching the self evident linkage between restorative values in traditional societies in Kenya and the attempt to incorporate restorative programmes in the formal system. This eventalization process lays bare incoherency of this 'story' linking traditional restorative values and the modern criminal justice system in Kenya. Thus questions arise: why was there a sudden demise of restorative methods in the justice system at independence? Whilst the formal system was averse to restorative methods how would one explain the 'extra-judicial' exercise of restorative practices, even within certain departments in the justice system? Why is there a current emphasis towards formally institutionalizing restorative justice for juveniles? How can we account for the reluctance in the application of the formal restorative methods if we claim that there exists restorative ethos within Kenyan cultural values? To adequately address these questions, the conditions that make

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<sup>87</sup> For example Garland genealogy of the culture of control forms a coherent piece, but is subjected to criticism for departing from the true sense of Foucault's genealogies (Voruz, 2005:158-160).

practices acceptable at one period of time as opposed to another have to be analyzed. This illustrates a practical application and utility of Foucault's concept of genealogies which extend beyond a mere historical account.

The second key tenet of Foucault's genealogies is that they depart from being systematic chronologies that seek to appear unified. Instead, they fragment what was regarded as 'unified' and identify the deviations from the 'constants'. On the other hand, the classical role of 'traditional histories' was to depict events in a neat, systematic fashion the effect of which is setting out 'constants' in society. These constants, though deducted from particular contexts, then form the basis of analysis of other contexts which are assumed to follow the same trends. Foucault thus asserts: "Effective' history differs from traditional history in being without constants. Nothing in man- not even his body is sufficiently stable to serve as the basis for self-recognition or for understanding other men" (1977b:153).<sup>88</sup>

Discourses such as law and development', for example, depict 'traditional histories' which set out anthropological traits that are universal and obvious.<sup>89</sup> Setting out the processes through which countries go through towards development, the discourse on law and development presupposes a nexus between legal structures and development (Chibundu, 1997:219). Therefore as countries develop, they are expected to embrace certain legal principles over others. In the criminal justice system, for example, brutal, punitive penal measures such as execution of offenders would be banished as countries

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<sup>88</sup> For a detailed analysis on the role of the genealogist in Foucauldian terms see Dreyfus and Rabinow (1982:110).

<sup>89</sup> See section two, pg. 41 which discusses the discourse on law and development in detail.

develop.<sup>90</sup> However the invoking of such a historical constant renders analyses liable to predeterminations hence undermining an understanding of actual realities. Genealogies for Foucault lack a positivistic attribute; they are, so to speak, antisciences (1997:9). He thus advocates for genealogies that engage in ‘eventalization’ which means “rediscovering the connection, encounters, supports, blockages, plays of forces, strategies and so on which at a given moment, establish what subsequently counts as being self-evident, universal and necessary” (1991c:76).

In effect a genealogy should defy a basic narration of history and instead should historicize practices. By historicizing, the research diverts its concentration from the ‘coherence of the story’, as if occurring in a systematic sequence, to analyzing things as ordinary rather than pre-structured. This process, referred to as ‘*rarefaction*’ in Foucault’s terms, involves bringing to light determinations that numb our consciousness from recognizing objectivizations (Veyne, 1997:159). In analyzing restorative justice for juveniles in Kenya, therefore, this thesis distances itself from the likely assumption that restorative practices are simply being introduced in the system because they are compatible to underlying values in the Kenyan context. Chapter six illustrates the impact of legal globalization and the initiatives of international bodies in influencing practices within the justice system. This exercise thus lays bare the “support, plays of forces and strategies”<sup>91</sup> that have made restorative practices acceptable at this point in time and have advocated for their recognition within the formal criminal justice system. Moreover, this goes to the root cause of the challenges being faced with the attempt to introduce restorative practices within the formal justice

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<sup>90</sup> The death penalty is repeatedly referred to as an inhuman and brutal mode of punishment. See for example Schabas (1997:5).

<sup>91</sup> As Foucault describes it (1991c:76)

system. This is particularly crucial for the Kenyan context where little emphasis has been placed on empirical research in the development of penal policies.<sup>92</sup>

The concept of historicizing, as opposed to traditional histories, is given leverage by Foucault's notion of *practices* which has been discussed above. His research on prisons, for example, sheds light on the practice of imprisonment

and the conditions which make it acceptable at a given moment; the hypothesis being that these types of practice are not just governed by institutions, prescribed ideologies, guided by pragmatic circumstances – whatever role these elements may actually play but possess up to a point their own specific regularities, logic, strategy, self evidence and 'reason' (1991c:75).

Thus the task of a researcher is not reduced to a detailed analysis of a practice in terms of what it is constituted of, but also unearthing the conditions that facilitate the practice and make it thrive. Perpetuation of these practices requires a production of rationalities which fosters embracing of these practices. Consequently, this research seeks to identify the conditions which over time have facilitated the over utilization of imprisonment whilst sidelining restorative justice values from the formal criminal justice system. To effectively perform this task, the research is premised on a denial of the existence of 'natural objects'; the practice of imprisonment over restorative justice methods has evolved over time to be the principal component of the penal system thus objectified as the natural, obvious response to offenders (Foucault, 1991c:75). Veyne, reiterating Foucault's detachment from self evidence emphasizes the danger of making obvious assumptions and suggests that "we must stop focusing our gaze on natural

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<sup>92</sup> Coldham for example notes that this is the trend in most African states (2000:218).

objects in order to notice a certain practice, a very specifically dated one that objectified those objects in a respect that is as dated as the practice itself” (1997:150).

Central to Foucault’s genealogical method is the appreciation of the role played by discourses in furthering objectivities.<sup>93</sup> In a pragmatic sense, discourses are used in expressing the truth as developed in an *episteme*.<sup>94</sup> The term ‘truth’ connotes realms which determine what is acceptable and germane as opposed to statements expressing truism (Foucault, 1991c:79). Discourses operate as part of the episteme and not as external tools momentarily engaged to buttress the functions of the subjects (Foucault, 1991b:58). The role of discourses operating within the discursive field in postcolonial contexts cannot be gainsaid. Discourses during colonial realm labelled traditional practices as primitive hence displacing traditional criminal justice systems with a Western formal framework.<sup>95</sup> Utilizing the power of ‘truth’, these discourses continue to influence postcolonial contexts. Kenya, for example has retained the structure of the criminal justice system as established by the colonial government.

An analysis of the Kenyan context further exemplifies the situation of discourses within the episteme. The epitomizing of a ‘Western’ form of criminal justice was a part and parcel of the hegemony of colonization. Similarly other concepts such as the use of language to facilitate the hegemony played a role. The colonizers’ language was equated to civilization (Fanon, 1986:18). English has thus been the language used in courts in Kenya since its establishment in spite of a large number of accused persons

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<sup>93</sup> See for example Bhabha’s *Location of Culture* where he explains that his analysis of colonial discourse is to discover the “processes of subjectification” made possible “through stereotypical discourse” (1994:67).

<sup>94</sup> “the episteme is not a sort of grand underlying theory, it is a space of dispersion, it is an open and doubtless indefinitely describable field of relationships” (Foucault, 1991b:55).

<sup>95</sup> Bhabha argues that the objective of colonial discourse is to construct the colonized people as a backward race hence justifying the civilization project of colonialism (1994:70)

who do not speak English. As noted, the law and development discourse has been instrumental in shaping the trends taken by criminal justice systems in post colonial contexts. Reproducing the truth expressed through discourses during colonization, Western countries are labelled pacesetters for legal systems. Kenya and other developing countries have thus been caught up within the ‘law and development’ paradigm. This discourse is embedded within the hegemonic relationship between developed and developing countries.

The buck does not stop at Foucault’s preoccupation with observing things as they are and earmarking discontinuities. His genealogical method invokes a new dimension that utilizes history for political purposes. Elucidating the strategy underlying his genealogical method he states that “to recognize a discontinuity is never anything more than to register a problem that needs to be solved” (1991c:76)

Genealogies are thus conducted to perform the political task of identifying the conditions that facilitate determinations represented as ‘the truth’ within practices. This strategy thus dismantles the unified structure which produces self evident truths; the result of the *rarefaction* is exposing *truth* as a handmaiden of the “forms of hegemony within which it operates” (Voruz, 2005:157). Without unearthing the conditions that have perpetuated over utilization of imprisonment, an analysis of the potential of restorative justice for juveniles in Kenya would amount to a futile endeavour. Hence this research is akin to a *rarefaction* of the criminal justice system in Kenya illuminating on what is seen as the *truth* and what processes led to the establishment of this *truth*. It is this process which in turn lays a pragmatic platform for

a discussion on restorative justice and responds to the key introductory question on the usefulness of the genealogical method adapted in this thesis.

Having set out the overall theoretical framework for this thesis, chapter three engages with the key theoretical concepts relating to restorative justice more specifically. Chapter three hinges on the discussion in this chapter at two main levels. Firstly, adapting a Foucauldian method, the focus is on the *practice* of restorative justice rather than the juridical institutions in which it is carried out. Secondly restorative justice is examined in the context of power relations and attendant discourses.

## CHAPTER THREE

### RESTORATIVE JUSTICE: THEORIES, VALUES AND CRITIQUES

*“Proponents of restorative justice see themselves as in the business of revolutionizing our society’s response to wrong doing” (Johnstone, 2007:607).*

#### 1 Introduction

Restorative justice is no longer considered a ‘foreign’ or an insignificant concept within debates focusing on responses to crime.<sup>96</sup> Indeed the term ‘restorative justice’ has found its way into contemporary criminal justice vocabulary alongside central concepts such as retribution and rehabilitation. As Johnstone remarks, its proponents have presented it as a revolutionary alternative to conventional responses to crime (2002:88; 2007:598).<sup>97</sup> However, other proponents have contended that restorative justice is not an alternative paradigm. Instead, they illustrate, it operates as a complementary paradigm that enriches existing discourses in the realm of criminal justice (Duff, 2003b:43; O’Mahony and Doak, 2004:484). Perhaps a preliminary but fundamental question that would address these contradictory views is: what exactly is restorative justice? To answer this question, this chapter draws from the diverse works of proponents and critics of restorative justice. The end result of this exercise is the conclusion that a consensus on what restorative justice is, is yet to be reached. This

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<sup>96</sup> Writers such as O’Mahony and Doak (2004:484); Graef (2001:9); Braithwaite (2002:11); Roche (2003:1) attest to this. Johnstone and Van Ness note that unlike a couple of years ago, “today one seldom encounters people involved in the administration of or study of criminal justice who are not familiar with the term” (2007c:6).

<sup>97</sup> See also Shapland (2006:523); Braithwaite (2003:1).

definition deadlock offers some explanation as to the issuance of contradicting visionary statements made by restorative justice flag bearers.

Adopting a Foucauldian approach to analyze restorative justice, this chapter seeks to expose what restorative justice is set out to be on the one hand and how it actually operates on the other hand.<sup>98</sup> The resulting contention expressed in this chapter is that whether presented as an alternative paradigm or a complementary paradigm, restorative justice in practice operates as a strategy of governing conduct that is consistent with underlying rationalities. Paradoxically, as will be seen, the divergent restorative justice visions betray its actual operative relationship with the entire justice system. Thus the radical revolutionary vision of certain restorative justice proponents is put to task. Characteristic of practices in society, certain conditions and indeed rationalities have facilitated the ‘comeback’ of restorative justice.<sup>99</sup> This section engages with these conditions and rationalities.

Section 3.1 sets out the debates surrounding the definition and delineation of the core values of restorative justice. Section 3.2 further discusses whether restorative justice and criminal justice are competing or complementary facets. In this section, the role of restorative justice as a technology of power alongside other practices in the criminal justice system is highlighted.

An explanation is due as to why an analysis focusing on Kenya is made within the framework of a Western conception of restorative justice. This is particularly necessary

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<sup>98</sup> A detailed account of Foucauldian concepts applied in this thesis is set out in chapter two.

<sup>99</sup> The term ‘comeback’ is used cautiously because although there is consensus that restorative justice is a concept that existed in different traditional societies, there are marked differences in how it operates in modern societies. For a detailed study see Johnstone (2002:36, 55).

in the light of chapter two which critiques the transplanting of Western discourses to foreign contexts. The obvious reason is that as a colonial heritage, the criminal justice system in Kenya is modelled on Western values and conceptions. This replication of Western models of justice continues to date as Kenya seeks to keep abreast with global penal developments. Restorative justice processes now being introduced within the formal justice system in Kenya are based on the Western concepts of restorative justice. It is thus in order to engage with ‘a Western’ conception of restorative justice since the criminal justice programmes and particularly the juvenile programmes are modelled on it. It is the case, then, that a critique of restorative justice in Western terms is applicable to a critique of restorative justice in contemporary Kenya. However the thesis remains nuanced with contextual differences. These are highlighted in chapter six, which looks at specific restorative processes in Kenya.

## **2 Restorative Justice: Core Values and Objectives**

McCold laments that “restorative justice has come to mean all things to all people” (2000:358).<sup>100</sup> His contention is not unfounded and various proponents as well as critics express similar sentiments.<sup>101</sup> For example Johnstone and Van Ness assert that “the term ‘restorative justice’ appears to have no single clear and established meaning, but instead is used in a range of different ways” (2007c:6).<sup>102</sup> Dignan in a *Report On Restorative Justice Options For Northern Ireland* thus raises a concern that restorative justice may end up becoming an “*Alice in Wonderland* concept, in which it is made to

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<sup>100</sup> See also Marshall (1999:30).

<sup>101</sup> For example see Zehr and Toews (2004:1); Becroft (2005:7); Johnstone and Van Ness (2007c:6).

<sup>102</sup> See also Weitekamp (2002:322).

mean whatever particular groups or individuals intend it to mean, irrespective of its defining characteristics” (2000:7).<sup>103</sup>

Attempts have however been made to come up with a standard definition.<sup>104</sup> In 1997, the Working Party on Restorative Justice Alliance of NGOs on Crime Prevention and Criminal Justice after a Delphi Process adopted the definition proposed by Marshall (McCold, 1998)<sup>105</sup>: “Restorative justice is a process 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” (Marshall (1999:5).

Of the many definitions available, this is the most widely adopted hence justifying Marshall’s reference to it as “a commonly accepted definition used internationally” (1999:5).<sup>106</sup> However, having at least a widely acceptable definition does not, unfortunately, streamline the inconsistencies within restorative justice both in theory and in practice. A major concern is that Marshall’s definition alongside others remains vague and fails to provide adequate guidance in response to fundamental issues within restorative justice that beg clarity.<sup>107</sup> Duff suggests that certain crucial questions remain unanswered in spite of standard definitions. Major questions, he asserts, relate to:

the significance of the ‘offence’ or ‘conflict’ and about what can count as successfully ‘dealing with’ the ‘aftermath’ or ‘implications’ of the offence, or

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<sup>103</sup> The report was written with the help of Lowey.

<sup>104</sup> The United Nations Handbook on Restorative Justice Programmes which seeks to ‘synthesize’ the vast range of information on theory and practice defines restorative justice as “a process for resolving crime by focusing on redressing the harm done to the victims, holding offenders accountable for their actions and, often also, engaging the community in the resolution of that conflict” (UNODC, 2006:6).

<sup>105</sup> See also Braithwaite (2000:115).

<sup>106</sup> For example Shapland et al point out that they and the UK Home Office adopt this definition (2006:506). See also Braithwaite (2002:11). Van Ness remarks that Marshall’s definition is “increasingly used” (2003:167).

<sup>107</sup> See for example Zehr’s definition (2002: 37).

‘resolving’ the conflict...what kind of ‘restoration’ is made necessary by criminal wrongdoing...(2003a:383).<sup>108</sup>

The impact of this definitional ambiguity is evident in practice. Diverse processes including but not limited to victim – offender mediation, conferencing, sentencing circles, community service, youth offender panels, diversion programmes, some indigenous justice forums, reparative probation and community panels are classified as restorative justice.<sup>109</sup> On the other hand, some proponents categorically limit the scope of restorative justice. Dignan for example refutes that Community Service Orders fall within the ambit of restorative justice on the basis that they exclude “certain key protagonists in the process” (2007:269).<sup>110</sup> In the midst of all these contentions, what then is the yardstick that determines what qualifies as restorative justice? Are all alternatives to conventional responses to crime exhibiting restorative traits classified as restorative justice? Has restorative justice come to “mean all things to all people” as McCold suggests? (2000:358).

Although restorative justice remains an ambiguous concept as suggested here, there are certain core values that characterize processes that are suggested to fall within the restorative justice ambit. For instance, although Probation Orders may possess restorative characteristics they are not, in their pure sense, considered to be restorative justice. However they may amount to restorative justice if certain additional elements are incorporated such as mediation. From the foregoing, a conclusion could be reached that though restorative justice is ill defined, there are key values and central themes that

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<sup>108</sup> See also Braithwaite (2002:11).

<sup>109</sup> See for example the UN *Handbook on Restorative Justice Programmes* (UNODC, 2006:14-31). See also [www.restorativejustice.org](http://www.restorativejustice.org) where community service is listed as one of the programmes identified with restorative justice.

<sup>110</sup> On the contrary, Walgrave views community service as being ‘part of an ethico-juridical tendency, which can be described as restorative justice’ (2003:256).

are given more attention by restorative processes as compared to conventional justice programs. It is suggested here that in fact these key values and central themes all revolve around the goal of 'restoration' notwithstanding the vagueness surrounding this term. Albeit being the central concept, major incoherencies within restorative justice also revolve around this goal. Questions such as who is being restored, who actually should be restored, what should be restored, how do we gauge restoration, why is restoration important, are raised. Various proponents have risen to the occasion and have attempted to shed light on this but consensus is far from being reached. In response to such questions, Johnstone for example outlines a major theme being the need for the victim to be restored and restorative justice does this by assisting to "heal the wounds of crime suffered by the victim"(2002: 13). 'Restoration' is depicted as an overall result. The restoration of the victim is however not 'inversely related' to that of the offender (2002:12, 19).

Johnstone and Van Ness in a recent edition have synthesized the huge debates within restorative justice over the years and have come up with a list of ingredients definitive of restorative justice (2007c:7). This publication seems to be a follow up of Johnstone's earlier contention that though restorative justice is a deeply contested concept "there are some common themes which epitomize restorative justice thought" (2002:11). The 2007 edition enumerates six definitive ingredients as<sup>111</sup>:

- Some relatively informal process which aims to involve victim, offenders and others closely connected to them or to the crime in discussion of matters such as what happened, what harm has resulted and what should be done to repair that harm and perhaps to prevent further wrongdoing or conflict.

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<sup>111</sup> These are reproduced here verbatim as they are central to the discussion in this section.

- There will be an emphasis on empowering ordinary people whose lives are affected by a crime or other wrongful act.
- Some effort will be made by decision makers or those facilitating decision making processes to promote a response which is geared less towards stigmatizing and punishing the wrongdoer and more towards...making amends for the harm that they have caused in a manner which directly benefits those harmed as a first step towards their reintegration into the community of law abiding citizens.
- Decision makers or those facilitating decision making will be concerned to ensure that the decision making process and its outcome will be guided by certain principles or value which, in contemporary society, are widely regarded as desirable in any interaction between people, such as: respect should be shown for others; violence and coercion are to be avoided if possible and minimized if not; and inclusion is to be preferred to exclusion.
- Decision makers or those facilitating decision-making will devote significant attention to the injury done to the victims and to the needs that result from that, and to tangible ways in which those needs can be addressed.
- There will be some emphasis on strengthening or repairing relationships between people and using the power of healthy relationships to resolve difficult situations” (2007:7).

Johnstone and Van Ness conclude that these ingredients serve as a yardstick in determining whether a process can be “credibly described as restorative justice” (2007c:7). They note that an intervention possessing all these ingredients no doubt amounts to restorative justice. However, as it is in most cases, interventions will only embody a couple of these ingredients which yields subjective interpretations as to whether they can be classified as restorative justice (2007:7-8). This conclusion, like other ‘definitions’, gives leeway to subjectivity which opens the Pandora’s box of restorative justice that means different things to different people.

The *UN Handbook on Restorative Justice Programmes* sets out objectives of restorative justice, which strikingly overlap with the ingredients set out by Johnstone and Van Ness (UNODC, 2006:9-11).<sup>112</sup> Like the ingredients outlined by Johnstone and

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<sup>112</sup> The four key restorative values set out by Roche i.e. personalism, participation, reparation and reintegration encapsulate the ingredients discussed by Johnstone and Van Ness (2003:26). See also Van Ness, Morris and Maxwell (2001:5-6; 2002:3); Graef (2001:18).

Van Ness, the objectives are set out in inclusive as opposed to exclusive terms. Restorative justice processes are thus stated to “essentially contain” certain elements (UNODC, 2006:9). Whereas preciseness in definition of restorative justice is considered to be still in progress and yet to be reached, it is contended here that it is not a question of the evolutionary stage of restorative justice but is rather a betrayal of the actual dynamics of the concept. Shapland et al. describing the nature of restorative justice remark that “it is now an accepted truism to say that restorative justice is an ‘umbrella concept’, sheltering beneath its spokes a variety of practices...” (2006:506).

Johnstone and Van Ness conclude that future work on restorative justice should focus on “a deeper appreciation of the concept” as opposed to reconciling the different conceptions of restorative justice (2007c:19). What justifies this call to overlook the tensions within restorative justice and instead focus on embracing the ‘richness of the concept’? (Johnstone and Van Ness, 2007c:19). It is contended here that restorative justice is hinged on principles of singularity, which appreciate the unique set of circumstances in different situations. Indeed for the specific goal of ‘restoration’ to be achieved, interventions have to be tailor made to suit the situation they seek to deal with.<sup>113</sup> Hence an attempt to standardize restorative justice into a system that is a reserve of specific interventions attacks the very essence of the concept.

Nevertheless, it is useful to exemplify how an attempt to resolve specific tensions would attack the very fibre of restorative justice. Section 2.1 below discusses the major tensions in turn.

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<sup>113</sup> The term restoration is relative. What exactly amounts to restoration is deeply contested. See for example Duff (2003b:44).

## 2.1 Procedural Restorative Justice or Substantive Restorative Justice?

As a major component of justice, procedure is considered to be a handmaiden of substance. Indeed the role of procedural requirements in facilitating substantive justice is a trite legal principle.<sup>114</sup> The rationale is that there is a likelihood of minimizing substantive injustice when procedural safeguards have been adhered to. Hence procedural standards not only ensure that justice is seen to be done, but are instrumental in ensuring that justice is done. Within restorative justice, there have been divergent views on whether there exists certain procedural standards, which not only guarantee the achievement of restorative goals but also are also definitive on whether an intervention could be classified as restorative justice. One group of proponents places emphasis on the contact between the victim, offender and other stakeholders in a bid to deal with the aftermath of the crime.<sup>115</sup> McCold for example notes that “restorative justice processes, in their purest form, involve victims and their offenders in face-to-face meetings” (2001:41).

Proponents who prescribe to this conception of restorative justice thus define it on the basis of the procedural concerns. Taking McCold’s statement above, for example, an intervention that brings the victim and the offender in contact to deal with the harm that resulted from the crime is no doubt classified as restorative justice. Johnstone and Van Ness refer to this as the *encounter conception* of restorative justice, which not only

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<sup>114</sup> This principle permeates through the diverse facets of law. For example it is a fundamental requirement to follow procedural rules in the treatment of offenders. Article 11 of the Universal Declaration of Human Rights sets out procedural standards for the treatment of offenders. Similarly, procedural safeguards characterize a major component of the civil justice systems. In fact old English maxims attest to the fact that procedure, like substance is equally important. For example the principle that a claimant could lose his claim if he delayed unreasonably is in essence a procedural safeguard (Martin, 2005:749).

<sup>115</sup> See for example Daly (2003:220), UNODC (2006:6).

emphasizes the contact between the offender and the victim but also the informality of the process (2007c:9). Hence conventional courtroom processes are highly undesired. It is this *encounter conception* that perceives restorative justice as a radical intervention revolutionizing conventional interventions. Like the ancient correlation between procedure and substance, the *encounter conception* is premised upon the restorative potential of processes that directly involve the stakeholders. Some of the benefits associated with this direct involvement of stakeholders include “rehabilitation, deterrence, reinforcement of norms and an increased sense of security for the victim” (Johnstone and Van Ness, 2007c:10).

As is the case with the divergences on the overall concept of restorative justice, the *encounter conception* is not devoid of controversy. A pertinent question that arises relates to the determination of what is meant by the term stakeholders. The point of departure in responding to this issue is focusing on the fundamental understanding of the nature of crime within restorative justice. Crime is conceived on the basis of the resultant harm (Van Ness, Morris and Maxwell, 2001:3). This harm not only affects the victim and the offender but also bears community needs that must be responded to. Hence the stakeholders extend beyond the victim and offender to incorporate the community in dealing with the harm resulting from the crime (Van Ness, Morris and Maxwell, 2001:3; McCold, 2004:160). In Pavlich’s words “the concept of “community” occupies a central place in restorative approaches to conflict and crime” (2004:173).

The term community is multifaceted (Schiff, 2007:235). It may be based on either the geographical proximity or the individuals having relational ties with the offender and

the victim (McCold, 2004:155; Pavlich, 2004:173). However, in practice, different restorative processes seem to select the most appropriate ‘community’ to be incorporated in that particular context. In a study conducted by O’Mahony and Doak in Ballymena, Northern Ireland, for example, a restorative ‘retail theft initiative’ incorporated a panel of volunteer retailers in the area (2004:488). Such a process exemplifies a focus on the geographical community. In informal restorative interventions in Kenya, such as forums facilitated by chiefs, relatives of juvenile offenders are involved in dealing with the offence, hence focusing on the community of care. Referring to the two sets of ‘communities’ as micro communities and macro communities, McCold notes that each community presents distinct needs, thus presenting a tension in the articulated goals of restorative justice. He contends that:

From the micro community perspective, the primary goal is to repair the harm...other outcomes such as reduced re-offending, are side benefits, not goals... From a macro community perspective, the goal is to repair the aggregate effect of crime and limit the potential threat posed to society by the offender’s future behaviour (2004:158).

Moreover, he notes, from a micro community perspective, the process is fundamental and questions such as who is involved are central (2004:159). Therefore attempting to respond to the needs of the micro community satisfies the requirements of the *encounter conception* of restorative justice discussed above. On the other hand, from a macro community perspective, the ends of the process are what count. Thus it may not be mandatory for the victim to be present, for example, if it is possible to repair the harm otherwise (McCold, 2004:159). McCold suggests that these divergent conceptions of restorative justice can be reconciled by formulating a “needs based theory” of restorative justice, which focuses on “the means, that is, the restorative processes

utilized” (2004:156). He contends that by doing so, both the needs of the micro community and the macro community can be met.

Although this strategy of meeting both the needs of the micro and macro communities is coherent it overlooks the inherent ‘inclusive’ nature of restorative justice. As a strategy of governing conduct and relations, restorative justice seeks to empower the stakeholders on the premise that it provides the most suitable response to crime that deals with the harm. Thus stakeholders are involved in a process that is seemingly alive to the unique circumstances in each case.<sup>116</sup> Therefore the involvement of either the micro or macro community is more an issue of intervening factors characterizing a particular situation. Whereas the two are not entirely mutually exclusive, more often than not there are particular considerations that prioritize the needs of either ‘community’. In other words, the unique circumstances determine the process as opposed to the overall goals of restorative justice as McCold suggests (2004:156). Therefore, although it may be desirable to meet the needs of both the micro and macro community needs in his terms, the factors at play in different contexts may make this challenging. Good examples are where victims are unwilling to get involved or the offender’s community of care is not significant in their lives. In such cases, restorative processes may still be worth considering if there exists a macro community that is keen on such processes. In the example given above of the restorative justice program in Ballymena, ‘surrogate victims’ drawn from a panel of volunteer retailers make the programs possible even in the absence of the actual victim (O’Mahony and Doak, 2004:488)

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<sup>116</sup> This rationality operating within restorative justice is discussed in detail in the next section.

The 'inclusive' nature of restorative justice being suggested here is an emphasis on the fact that restorative values may overshadow the process; the goal of restoration calls for flexibility in the interventions used. This reiterates the contention already made in this section that the divergent views on restorative justice actually thrive in the nature of restorative justice. Reconciling what is meant by 'community' with what should 'community' actually mean, for example, is not necessarily a progressive concern for restorative justice. In fact it could be suggested that realizing restorative goals actually embraces divergences. An attempt to synchronize restorative processes to have precise specifications goes against the very core of restorative justice. Indeed restorative justice is seen as a democratic process that takes cognizance of diverse circumstances, operating on a case-by-case basis.

In line with the foregoing, certain proponents do emphasize that although the conception of restorative justice as guaranteed by specific processes that involve stakeholders is important, equally pertinent is the underlying conception of restorative justice as a value system (Braithwaite, 2002:12). In evaluating whether interventions are restorative justice, Morris and Maxwell suggest that the question should be: "are the values underpinning the particular model chosen, and the processes, outcomes and objectives achieved, restorative?" (2001:267)

This conception of restorative justice encapsulates the overall goal of restorative justice. It extends beyond specified processes to principles that can govern interventions dealing with crime (Marshall, 1999:20).<sup>117</sup> In these terms, it becomes

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<sup>117</sup> Napoleon sees the broader goal of restorative justice as facilitating 'positive social change' (2004:42).

justifiable to suggest that restorative justice can be incorporated within the existing criminal justice systems at any stage of the criminal process.<sup>118</sup>

Paradoxically, these divergent views operate side by side within restorative justice. Whereas consistency may be a desirable attribute within a discourse, restorative justice seems to be founded on these divergences. An attempt to suggest that restorative justice is predicated upon certain processes would be an attack on the fundamental value system of restorative justice, which lays its focus on the restorative ends. These restorative ends require structuring of the processes depending on the individual circumstances hence extending beyond fixed processes. On the other hand, delineating procedural standards is crucial within restorative justice as it guarantees the involvement of stakeholders. Undoubtedly this is a core aspect that marks a major distinction between restorative justice and conventional criminal justice systems.

This paradoxical nature may explain further questions about restorative justice. Section 2.2 below answers one such question: is restorative justice a complementary or an alternative paradigm to conventional criminal justice processes?

## **2.2 Restorative Justice: A Complementary or Alternative Paradigm?**

Restorative responses to conflict are not a recent invention of modern society. Various traditional societies incorporated restorative values in dealing with crime (Walgrave,

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<sup>118</sup> See for example Graef who elaborates how restorative justice can be implemented at the community stage i.e. treating certain incidents as community crimes as opposed to crimes; at pre- prosecution stage; at the court stage i.e. pre-conviction, post-conviction, during the sentence and after completion of the sentence (2001:50-51).

2003:266; Johnstone, 2002:36).<sup>119</sup> However, the concept of restorative justice was sidelined with the development of modern criminal justice systems. From the mid-1970s, restorative justice began carving its way back into criminal justice systems as experiments of restorative processes were carried out (Johnstone, 2002:11).<sup>120</sup> It was being reintroduced as a new paradigm, a radical alternative to the criminal justice system (Johnstone, 2002:88).<sup>121</sup> This radical agenda, Braithwaite notes “is not simply a way of reforming the criminal justice system, it is a way of transforming the entire legal system...Its vision is of holistic change in the way we do justice in the world” (2003:1).

How, then, is restorative justice different from the conventional interventions which makes it a proposed radical transformation of the criminal justice system? Proponents identify a range of differences that portray restorative justice as essentially an alternative paradigm.<sup>122</sup> The next section discusses two major differences, which in fact encapsulate the range of differences highlighted by proponents.

### **2.2.1 Restoration versus Retribution**

In this section, Foucault’s concept of *governmentality* is employed to illustrate how restorative justice is situated in direct contrast to conventional interventions to crime, yet as part and parcel of modern justice systems. *Governmentality* denotes the

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<sup>119</sup> Although a lot of traditional societies responded to conflict restoratively, not all interventions were restorative. Indeed some responses were punitive (Cunneen, 2007:114).

<sup>120</sup> For a detailed study on the history of restorative justice in modern justice systems, see Wright (1991). See also McCold (2004:155); Van Ness, Morris and Maxwell (2001:4); Zedner (2002:444).

<sup>121</sup> See also Van Ness (2003:157); Shapland (2003:195).

<sup>122</sup> Shapland for example discusses differences between restorative justice and the conventional criminal justice systems. She however suggests that this does not make restorative justice incompatible with the criminal justice system. But as it is, restorative justice has not set out its boundaries properly and it may be difficult to determine how it should operate with the criminal justice system (2003:201-210,213).

“strategic field of power relations” in which government is constituted (Foucault, 2005:252; Senellart, 2007:389). *Government* in this case being “the right disposition of things” towards a “convenient end” and the things to be governed are “men, but men in their relations, their links...men in their relation to that other kind of things, customs, habits, ways of acting and thinking...” (Foucault, 1991a:93; 2007:96). Thus government is in fact applying tactics to achieve certain ends. Foucault suggests that one such tactic could be application of laws but that is just an example (1991a:95; 2007:99). Alongside these tactics applied, there are corresponding rationalities in operation (Foucault, 2007:108). *Governmentality* is thus, in Foucault’s words, the

“... tendency, the line of force...that has constantly led towards the pre-eminence over all other types of power-sovereignty, discipline and so on- of the type that we can call ‘government’ and which has led to the development of a series of governmental apparatuses (appareils) on the one hand and on the other the development of a series of knowledges (saviors)” (2007:108).

Pavlich explains further that “mentalities of governance entail specific political rationalities; as logics of how to rule, they define such matters as what is governed, who is governed, who does the governing and what governing itself properly entails” (2005:10)

Applying this concept of *governmentality*, it is possible to identify the rationalities centralizing retribution within the criminal justice system as opposed to restoration which is embraced within the paradigm of restorative justice. Modern criminal justice systems are to a large extent marked by retributive values. Embedded within the just desert theory, retributive values are embraced on the premise that punishment, which is proportionate to the crime committed, is necessary and justified (Ashworth, 2002:1077). Sanctions to crime are therefore pre-prescribed and consequently

sentences are meted out in proportion to the nature and degree of the crime committed. This answers the question ‘what is governed/object of governance’ within this rationality. Modern criminal justice systems focus on the ‘crime’ and seek to determine guilt to ascertain whether a person should be punished or not (Pavlich, 2005:11). Retribution as a pillar of justice is then seen to foster deterrence; the hypothesis being that individual conduct is governed by an appreciation of the repercussions of wrongdoing. Retributive justice is further based on the nature of crime as a wrong against society as a whole. As opposed to civil wrongs, crime is considered an attack on the moral fibre of society. It is thus frowned upon and calls for punishment since left unchecked it would lead to disintegration of society.<sup>123</sup> Appropriate governing is thus seen as determining guilt and meting out proportionate punishment to the offender, which in turn has a deterrent effect (Pavlich, 2005:13).

Restorative justice proponents on the other hand call for a shift from seeing crime through a ‘retributive lens’ (Zehr, 2005:178). In contrast to retributive values, which are grounded on the concept of punishment, restorative justice focuses on repairing the harm caused by the crime (Van Ness, Morris and Maxwell, 2001:3; Walgrave, 2001:33). Thus in restorative justice what is governed is the harm caused by the crime (Pavlich, 2005:11). Using sentencing as an example to illustrate the distinction between restorative justice and punitive values Walgrave remarks that, “contrary to punitive justice, the content of the sanction is not pre-determined but is dependent on the needs and rights for restoration within the victim, the community and society” (2001:32).

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<sup>123</sup> See Daems on a discussion of punishment and social control (2004).

The concept of restoration is normally associated with a non-punitive, 'soft' response to crime. It must be noted, however, restorative justice is not devoid of punitive outcomes. It has been suggested that restorative justice is "not, in fact, a soft option" (Walgrave, 2001:17). The fundamental difference is that punishment only exists within restorative justice as a possible outcome as opposed to being a goal. On the other hand, punishment is a deliberate, pre-determined response to crime in justice systems embodying retributive principles. Although it is acknowledged that punishment is a possible outcome in restorative justice processes, there have been debates whether the burdens imposed on offenders in these processes actually amount to punishment. Restorative programmes are personal and in most cases, restoration of the victim calls for some form of reparation, which imposes a burden on the offender (Duff, 2003a:389).<sup>124</sup> For example, a restorative process that may be concluded by having the offender compensate the victim or committing the offender to community service may come across as a punishment. Can a conclusion be made, therefore, that by imposing burdens on the offender, restorative justice, like retributive justice is punitive?

Walgrave suggests that the 'litmus test' of punishment lies upon the question of intention. He maintains that for a burden or obligation to be classified as a punishment it must have been deliberately set out to make the offender suffer (2001:23). Using taxes as an illustration, he suggests that though paying taxes imposes a burden on the citizens, they do not amount to punishment since they are not meted out to make the citizens suffer. The determination of whether an intervention is a punishment or not depends on the intention of the 'punisher' as opposed to how burdensome it is on the 'punished' (2001:20-21). Therefore, although restorative processes may result in

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<sup>124</sup> See also Johnstone (2007:603).

burdensome obligations on the wrongdoer, they may not be considered to be punitive, as they do not intend to punish the offender.

On the other hand, Duff suggests that in fact adequate reparation must impose a burden. Giving the example of a verbal apology, or a financial obligation that is small compared to an offender's economic means, he contends that an obligation that "costs too little cannot suffice" as a reparation (2003a:388, 389). His argument is hinged on the fact that the goal of restoration goes beyond material reparation; it calls for moral reparation as well (2003a: 389). This contention could however undermine a core value of restorative justice. The process of stakeholders coming together to deal with the aftermath of crime is geared towards facilitating restoration. As noted, for restorative ends to be met, issues are resolved based on the unique circumstances of each case. For example, in a case where a victim feels that the monetary compensation suffices, whatever the amount, restorative justice would demand that that the victim's decision be upheld. Indeed restorative justice empowers the stakeholders, hence 'outsiders' would be unjustified to suggest what would amount to adequate reparation. This conclusion therefore lends support to Walgrave's suggestion that punishment of offenders is not an objective of restorative justice.

Considering that obligations imposed by restorative justice may in fact be burdensome and may seem to achieve the objectives of punishment such as censure, some proponents suggest that the need to make a choice between punishment and restoration should not arise (Johnstone, 2007:605). Is the distinction between restorative justice and punishment, then, unimportant? The contention that restorative justice is a radical alternative from conventional interventions largely hinges on this distinction.

Proponents of restorative justice who see it as revolutionary value system emphasize that restorative justice is not an alternative punishment; it is not a punishment at all. Seeing restorative justice as an alternative punishment, it is suggested, may limit the restorative potential of restorative justice, as it would force restorative sanctions to adhere to standards of punitiveness. Walgrave underscores the fact that in restorative justice processes, punishment is only a possible outcome and not a goal (2001:30).

This distinction he explains is crucial as it

...constitutes the positive socio-ethical value of restorative justice...it opens greater opportunities for more socially constructive responses to crime, leading to more restoration for the victim, more social peace and safety for the community and more integrative opportunities for the offender (2001:30).

This exemplifies the contention made in the previous section regarding the flexibility of restorative processes in adapting to different circumstances. Classifying restorative justice as just another form of punishment would seem to divert the focus from restoration to adhering to standards of just deserts. Hence proponents remain keen to emphasize this distinction to maintain the unique attributes of restorative justice, which makes it an alternative to conventional interventions.

This distinction between restoration and retribution forms the basis of other differences highlighted between restorative justice and conventional responses within criminal justice systems. For example, proponents assert that restorative justice is future oriented, in that it seeks to heal the damage caused, whereas conventional interventions tend to focus on what the offender has done and how he or she ought to be punished. Such interventions as, for example, a probation order may do very little in terms of meeting the needs of the victim. The arguments thus raised revolve around the issues

discussed in the retribution versus restoration debate. One such issue relates to the role of the state on the one hand and the role of stakeholders on the other hand as discussed below.

### **2.2.2 State Oriented Criminal Justice Systems versus Stakeholder Empowerment**

Modern criminal justice systems centralize the role of the state in responding to crimes. This role is made obvious by the fact that parties to a criminal case are the state and the accused person. The effect of this state centred criminal justice system has been to override the interests of other stakeholders. Not only is the victim sidelined but also the role of the offender in dealing with the aftermath of the offence is limited to establishing a defence. With the growing influence of the international human rights regime, however, there have been attempts to incorporate the interests of the victims. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power directs that the interests of the victim should be taken in consideration.<sup>125</sup> Certain jurisdictions have attempted to incorporate these values in the criminal process. For example in the UK, the Code for Crown Prosecutions directs that “prosecutors should always take into account the consequences for the victim of the decision whether or not to prosecute, and any views expressed by the victim or the victim’s family” (2004: Para 5.12.)

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<sup>125</sup> Article 6(b) thereof provides that the justice system should ‘ Allow the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system’. See also Article 8 and 12.

Although this provision calls on the prosecutors to take into account the victim's interests, their conduct is discretionary and they are not obligated to follow the victim's wishes.<sup>126</sup> In contrast restorative justice makes the victim's interests central (UNODC, 2006:9). Not only are the victim's interests to be taken into consideration, but also restorative processes facilitate the direct involvement of the stakeholders. Shapland thus concludes that restorative justice "initiatives are trying to embody civil justice procedures rather than criminal justice procedures" (2003:202).<sup>127</sup> This empowerment of stakeholders is a fundamental distinction between conventional criminal justice interventions and restorative justice. The restorative justice model therefore calls for informal processes that involve the stakeholders (Van Ness, Morris and Maxwell, 2001:4). The answer to the question "who is governed?" within restorative justice processes would thus be: "victims, offenders, their families and representatives from the community" (Pavlich, 2005:11). This is in direct contrast to conventional criminal justice processes, which govern the offender. Restorative justice is therefore considered an alternative paradigm based on the importance attached to the full involvement of parties in resolving the issues.

This distinction is linked to the contrast between restorative and retributive goals. The goal of restoration requires the direct involvement of the stakeholders. On the other hand, restricted contact with the stakeholders, as is the case with the modern criminal justice system is incompatible with this goal (Johnstone, 2002:15). To restore the victim for example it is important to facilitate his or her involvement. Similarly, limiting the involvement of the offender to establishing a defence does very little

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<sup>126</sup>See Paragraph 2.1 of the Crown Prosecution Service Statement on The Treatment of Victims and Witnesses.

<sup>127</sup> See also O'Mahony and Doak (2004:484).

towards his or her restoration. Restorative justice therefore presents an alternative value system that would require an overhaul of the criminal justice system.

Nevertheless, other proponents and critics suggest that restorative justice is not an alternative paradigm.<sup>128</sup> Rather, it provides restorative values complementary to the criminal justice system. Section 3 analyses this contention and its implications for the operation of restorative justice.

### **3 The Place of Restorative Justice Within the Criminal Justice System**

The UN *Handbook on Restorative Justice* expressly underscores the fact that “restorative justice programmes complement rather than replace the existing criminal justice system” (2006:13). Although restorative justice is advocated for as an alternative to conventional interventions within the criminal justice system, in practice it is utilized as a complementary practice that enriches the operating system. Moreover some of its theoretical underpinnings paradoxically replicate the foundations of the existing criminal justice systems. On the one hand restorative justice is seen as criticizing the conventional interventions and presents itself as an alternative and on the other hand it inscribes itself within the very system it attacks. In sum it shares a lot of structural inclinations and layout with the conventional approaches (Johnstone, 2007: 598).

In describing the features of restorative justice programmes, the UN *Handbook on Restorative Justice* captures the dual and perhaps contradictory nature of restorative

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<sup>128</sup> See Zehr’s arguments on whether restorative justice is an alternative paradigm (2005:180).

justice. It firstly alludes to restorative justice as a “viable alternative in many cases to the formal criminal justice system”. In contrast it highlights that restorative justice is “an approach that can be used in conjunction with traditional criminal justice processes and sanctions” (UNODC, 2006:7). Pavlich aptly terms this as the “*imitor paradox*” of restorative justice, which he asserts:

Entails an unexpected tension that allows restorative justice to exist as a seemingly singular, internally consistent entity even though it is simultaneously committed to two opposing foundations: namely, as a substitute for and imitator of criminal justice concepts and institutions (2005:14).

The contradictory facets of restorative justice “as a substitute for and imitator of criminal justice concepts and institutions” are best illustrated by focusing on the *mentalities* both in restorative justice and the conventional criminal justice system. A fundamental *mentality* of restorative justice is that what is governed is the harm caused by the crime. This is of course set in opposition to the criminal justice system wherein notions of crime are governed as opposed to the harm. Paradoxically restorative justice conceptualizes the harm caused on the concept of crime as defined by the criminal justice system (Pavlich, 2005:34). It would be expected that restorative justice, as a radical alternative to the criminal justice system, would conceptualize the aspect of crime in terms compatible with its objectives. In effect, by inscribing itself to the already determined concept of crime, restorative justice limits its potential of revolutionizing responses to wrongdoing. The aspect of harm is thus restricted to wrongdoing that is prescribed by the criminal justice system as a crime (Pavlich, 2005:35).

Another example of the operation of this *imitor paradox* surfaces in the concept of restoration. Restoration requires healing of the harm caused by crime which is prescribed by criminal law. The harm caused is therefore viewed in the lens of the criminal justice systems, which sets out the crime. Moreover, the question ‘who is the victim’ to be ‘restored’ is answered in accordance with the existing classifications in the criminal justice system. Restorative justice therefore identifies victims based on the constructions of the conventional criminal justice system (Pavlich 2005:52). Similarly restorative justice inscribes itself within the political logic of the criminal justice system, which sees the offender as an ‘*individual perpetrator*’ and hence renders the offender individually responsible for the harm. The *imitor paradox* lies in the fact that although the goal of restoration requires the incorporation of the community as stakeholders, restorative justice still emphasizes the individual responsibility of the offender as already established by the criminal justice system (Pavlich, 2005:74). Therefore restorative justice continues to be packaged as an alternative to the criminal justice system but remains parasitic to the established concepts within the system. Pavlich thus contends:

Without clear alternative formulations of what crime is, how it is to be defined, and indeed which agents are to do the defining, restorative governmentalities assume a default position of resting on criminal justice’s adversarial produced definitions of crime and offender (2005:76).

To understand the resilience of this *imitor paradox* restorative justice has to be analyzed in the context of the contemporary rationalities influencing responses to crime. Restorative justice as a strategy of governing conduct fits in within the overall goals of the contemporary criminal justice system. Although it is set out as an alternative to the criminal justice system, it instead inscribes itself within the system

and plays a role in furthering the overall goals of the system. In the UK context for example, a Home Office report compiled by Marshall underscores the fact that:

The principles of restorative justice are also compatible with general government social-policy objectives – namely, encouraging community involvement, personal responsibility, partnership and consultation...it is compatible with an emphasis on what works (1999:20).<sup>129</sup>

Though specifically referring to the UK context, this statement bears upon Foucault's emphasis that penal mechanisms ought to be situated within social structures and be analyzed as 'political tactics' (1977a:23). Once situated within social structures, penal mechanisms are seen as operating within a particular regime of rationalities (1991c:79). Restorative justice as penal tactic is compatible with certain rationalities that have become central within contemporary penal mechanisms. Analyzing governmentality in terms of techniques and tactics for the 'conduct of conduct', the goal of control has become central in contemporary penal institutions (Feeley and Simon, 1996:368).<sup>130</sup> Departing from grand goals such as rehabilitation within earlier penal practices, contemporary practices are more focused on the slogan 'what works'. A rationality that seems to be at play is the focus on setting of goals that are not only achievable but are also cost effective and efficient. Referring to this rationality as *managerialism*, Muncie draws a correlation between penal tactics and political tactics which seem to be driven by the 'what works' objective (2006:775). One such penal tactic that is central to the goal of control is identifying and managing risk groups (Feeley and Simon, 1996:370). This tactic inscribes itself within the concept of risk.<sup>131</sup> On risk –focused security, Shearing explains that:

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<sup>129</sup> See also Muncie (2006:777)

<sup>130</sup> For a detailed account on the concept of control in contemporary justice systems see Garland (2001).

<sup>131</sup> For a detailed study on the general concept of risk see Beck (1992) and O'Malley (2004).

We live in a risk society in which risk technologies have acquired a new priority...Instead of going ahead, doing things, and then coping with the problems this might create, when they arise, we now seek to anticipate problems and avoid them...(2001:207).

With this risk logic, the criminal justice system is now keen to identify risk groups and manage them as a way of dealing with crime. This managerial aspect of the criminal justice system operates by categorizing offenders from low risk to high risk. Hence the treatment of offenders is determined by their level of risk. Moreover being able to identify risk groups enables the system to target certain groups that are predisposed to crime even before they engage in wrongdoing (Muncie, 2006:781). The Kenyan government, for example, would be seen to have been operating within this mentality when it rounded up homeless children from the streets to educational facilities. On the other hand it has in recent times targeted members of the outlawed Mungiki sect who have been identified as a danger to the community.<sup>132</sup>

On the face of it, restorative justice does not seem to fit in within these rationalities. However an analysis of restorative justice in practice betrays its role in what appears to be a continuum in the management of offenders. In spite of being a concept in discussion within the criminal justice system since the 1970s, restorative justice has remained on the fringes of criminal justice systems. More specifically, it remains an intervention to petty offences (Johnstone, 2007:605). For example research done by O'Mahony and Doak in Ballymena, Northern Ireland revealed that the restorative justice programmes were mainly used for minor thefts (2004:488).<sup>133</sup> Similarly in Kenya, juvenile cases allowed to the diversion programme are generally petty cases (Bonareri, 2007, Interview 28<sup>th</sup> June).

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<sup>132</sup> The Mungiki sect consists of mainly young people from the Kikuyu community who have been linked to acts of violence in Kenya. For an account of Mungiki's activities see Phombeah (2003b).

<sup>133</sup> See also Johnstone (2002:167).

Limiting of restorative justice processes to minor offences has also been as a result of the fact that these processes operate within the criminal justice system and they are utilized at the discretion of state agents (Shapland, 2005:203). For example, the diversion programme for juvenile offenders in Kenya is run by the police. Restorative justice processes are thus fundamentally a sifting process for low risk offenders (Muncie, 2006:779-780). It therefore fits in the continuum by responding to low risk offenders who possibly can be 'normalized'. Another role of restorative justice in practice has been net widening to target low risk offenders who ideally should not be put into contact with the criminal justice system, but who might end up as criminals if not targeted (Muncie, 2006:777).

Generally, restorative justice is compatible with certain rationalities that have characterized modern societies. Inscribed within rationalities underlying the human rights regime which emphasize the empowering of individuals, restorative processes have developed as a tactic of involving citizens in the 'governing of things'. As already noted, restorative justice seems to respond to human rights concerns on the alienation of the victim. The entire restorative justice processes seek to empower the stakeholders who extend beyond the offender and victim to the community. By empowering these stakeholders, they are more likely to come up with responses that would effectively deal with the harm caused by the crime. Although restorative justice proponents indicate that rehabilitation and deterrence are not the major objectives of restorative justice, some note that it is desirable because of its potential for a holistic response to crime (O'Mahony and Doak, 2004:498). With specific response to juveniles, restorative processes not only facilitate the holding of young offenders

responsible but also involve the community to take care of their welfare.<sup>134</sup> This illustrates Foucault's concept of indirect government of people's conduct (1991a:100). As a tactic, restorative justice empowers the people to respond to crime themselves and hence govern the conduct of others.

Restorative justice should be analyzed as a strategy operating to govern the relations of people. Whether considered as a soft approach by some and as a punishment by others, it fits within the criminal justice system and performs specific roles. Moreover restorative justice operates on the basis of corresponding rationalities characterizing social apparatuses. Thus, although in theory questions as to whether restorative justice is an alternative to or a complementary paradigm to the criminal justice system may be important, what determines the actual operation of and indeed the future of restorative justice are the underlying rationalities in the system. Chapter four illustrates the operation of restorative justice in traditional communities in Kenya and how the underlying conditions made restorative practices possible. To shed light on the current practices, the chapter further explains the processes through which other penal practices were embraced over restorative justice practices.

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<sup>134</sup> See Johnstone, 2002:166).

## CHAPTER FOUR

### GENEALOGY OF THE CRIMINAL JUSTICE SYSTEM IN KENYA

*'Natukae na Undugu' (Kenya's National Anthem)\**

#### 1 Introduction

A key methodological concept discussed in chapter two is the Foucauldian understanding of genealogies. Adopting this Foucauldian concept, and in light of the theoretical analysis of restorative justice undertaken in chapter three, this chapter engages in a genealogical analysis of restorative justice practices within Kenya. Although Foucault is a Western thinker who articulates the question of power/knowledge/subjectivity in the West through genealogical analyses, his methodological approach provides a useful tool of analysis that can be adopted in other contexts. As discussed in detail in chapter two Foucault distances himself from advancing a universal theory for analyzing society (Foucault, 1991c:85). Instead, he proposes analyses that focus on the actual practices and the conditions that make them acceptable in a particular context. To understand current day practices, Foucault uses genealogies to explain how these practices were rendered acceptable in a given context. This specificity in analyses that departs from a universal deduction is what makes

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\* The English version of the national anthem of Kenya translates these words: 'may we live in unity'. The Swahili word *undugu* connotes 'brotherliness'.

Foucault's methodological approach relevant in other contexts. Hence this thesis focuses on contemporary penal practices in Kenya and uses a genealogical method to explain these practices.

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 with precision. Moreover, this thesis 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 therefore been adopted here cautiously. Firstly, the phrase traditional 'criminal justice system' is used in this thesis with caution since the communities researched on did not have a distinct criminal justice system. Wrongs committed, both criminal and civil, in modern law terms, were dealt with by 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 thesis regards these traditional interventions as restorative justice practices.

At the mention of an intention to embark on a genealogy tracing the transition from traditional systems to the current formal criminal justice system in Kenya, the researcher readily invited divergent views from both scholars and non scholars. The

first issue raised was in regard to the choice of methodology. To what end was the genealogy conducted? As will be demonstrated in this chapter, the genealogy conducted is really a focus on the present rather than the past. Historical events are only of interest to the extent they illuminate the present. Chapter two of this thesis highlights that this is the crux of Foucault's genealogies. Justifying his historical analysis of the practice of imprisonment, Foucault explains that such an exercise provides a better understanding of the current practices. Thus effective histories focus on the past in search of explanations of the present rather than seeing the past as a contingent of the present (1977a:31). As a political strategy, genealogies present a "possibility of change" from the objectifications of the present (Hoy, 2004:64). Engaging with the historical events that have led to these objectifications, genealogies critique the existence of the 'natural' or the 'universal' or the 'self-evident' (Foucault, 1984:46).<sup>135</sup> 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 illustrated in Chapter two, the genealogical analysis in this thesis is not a mere history of the criminal justice system in Kenya. The objective of this exercise is an analysis of the conditions that have rendered certain practices in response to crime acceptable, hence shaping the criminal justice system. Such an exercise is not only useful for a sound analysis of the current system but is also mandatory when signposting the future. Restorative justice practices currently at play in Kenya are thus best understood by having an insight on how penal practices have been presented as 'objective'. With this in mind, the future of restorative justice for juveniles can then be explored.

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<sup>135</sup> See for example 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 (1977a).

The second issue that was brought to the researcher's attention is the nature and orientation of 'African' traditional criminal justice systems. In a conference in which the researcher presented an outline of her intended research, a concern was raised that traditional systems were inherently retaliatory, examples being given of instances where offenders were killed by the community.<sup>136</sup> A genealogy of the criminal justice system in Kenya was thus more likely to stumble on a retaliatory, punitive community progressing to less retaliatory methods of dealing with offenders. The suggestion that restorative justice values existed in the traditional communities was more or less being challenged right at the outset.

Indeed criticisms have also been raised against restorative justice proponents who seem to romanticize traditional justice systems which they suggest were dictated by restorative values (Cunneen, 2007:116; Johnstone, 2002:37). 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" (2002:5). Daly, referring to this statement as "an extraordinary claim" concludes that in fact Braithwaite and other restorative justice proponents do no less than create a myth around restorative justice. By suggesting that human beings were historically inclined to restorative justice, she argues, these proponents seek to legitimate restorative justice which was "taken over by state sponsored retributive justice" (2002:62).

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<sup>136</sup> This was during the graduate conference at the University of Leicester on 28<sup>th</sup> March 2006.

Further, some critics cast doubt whether traditional justice systems were actually fully restorative (Cunneen, 2007:115).<sup>137</sup> Similarly, when the researcher sought to discuss ‘restorative justice practices’ found in traditional communities in Kenya it was pointed out that primitive African traditional societies were savage.<sup>138</sup> However, engaging with this preconceived notion of traditional justice systems being savage raises crucial questions. What then was the genesis of restorative justice practices within the current informal criminal justice systems in Kenya such as mediation facilitated by chiefs? How could we explain the application of restorative justice measures by officers such as probation officers over and above their statutory mandate? Answers to these questions required a keen analysis of these informal restorative justice practices. An observation of the legal institutional framework could not satisfactorily provide the answers. This is particularly so because the restorative practices more often than not seemed to be actions done over and above the stipulated roles of the officials in Kenya. The search for answers to these questions led the researcher to defy the self evident denial of the existence of restorative values in traditional communities. This thesis therefore looks at actual practices in traditional communities and describes ‘what was actually done’.

Adopting a Foucauldian method which demands a denial of the notion of ‘self evidence’, this thesis analyzes practices as they are actually carried out. Rather than basing analyses on institutional frameworks, and on the basis of pre-set structures of analyzing such institutions, analyses in Foucauldian terms instead focus on actual

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<sup>137</sup> See, for example Johnstone’s analysis of different kinds of practices in response to crime in traditional communities (2002:38-39).

<sup>138</sup> This was pointed out during the graduate conference at the University of Leicester on 28<sup>th</sup> March 2006. See Elliot who described the African mind as ‘far nearer the animal world than is that of the European...’ (1905:92). He further remarked that the African man’s ‘indifference to his own sufferings is closely connected with indifference to the sufferings of other people’ (1905:99). See also Killingray’s analysis (2003:98)

practices, as what people actually do. In the same vein, this thesis sets out a genealogy of restorative justice practices from pre-colonial Kenya to the current criminal justice system.<sup>139</sup> Restorative justice practices in the current justice system in Kenya, as analyzed in chapter five and six of this thesis, are two pronged. On one hand, there are restorative justice practices that are informally resorted to by officials in the justice system or by members of the community who avoid the formal criminal justice system (Kibet, 2006, Interview 13 July; Thokore, 2006, Interview 18 July). On the other hand, there are restorative justice practices for juveniles that are being formally utilized in the criminal justice system.

This chapter analyzes actual restorative justice practices within traditional communities. In Foucauldian terms, therefore, this thesis analyzes restorative justice practices as an event as opposed to an ideological notion or a self evident institutional actuality (Foucault, 1991c:76). Thus, this analysis of restorative justice practices focuses on what is actually done and what conditions enable these processes.

As practices within traditional communities in Kenya are examined in this chapter, a response to the question whether traditional justice systems were restorative unfolds in the affirmative. A preliminary but fundamental issue relates to the definition of restorative justice. As discussed in chapter three, the most widely used 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” (Marshall 1999:5).<sup>140</sup> Traditional penal practices, which may be considered unconventional in modern justice systems, but which incorporate the

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<sup>139</sup> The scope of this research is limited to the immediate pre colonial phase.

<sup>140</sup> See also Braithwaite (2000:115).

underscored principles in this definition, are therefore classified as restorative justice processes. The research conducted on traditional communities in Kenya revealed the existence of restorative values. Indeed, postcolonial practices in Africa seeking to incorporate traditional values have suggested that restorative justice values were not foreign to traditional African communities. The most commonly referred to is the spirit of *ubuntu* which was embraced in the Truth and Reconciliation Commission in South Africa.<sup>141</sup> The spirit of *ubuntu* which connotes ‘solidarity’, and ‘humanity to others’ fosters restorative justice with the aim of sustaining community cohesiveness (Skelton, 2007: 470).<sup>142</sup> *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’ (Mokgoro cited in Boraine, 2000:362).

A correlation could be drawn between this philosophy of *ubuntu* and cultural beliefs in other African societies. Other communities refer to this ‘spirit of humanity’ in different words. 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* is used and 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.<sup>143</sup> In particular, the word ‘*undugu*’ connotes brotherliness. Mafeje notes that the word *ubuntu* cannot be precisely translated into the

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<sup>141</sup> For 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 (2000:362, 425-6).

<sup>142</sup> The application of the spirit of *ubuntu* extends beyond justice systems. For example Rwelamira et al. apply this concept to promote ‘group solidarity’ amongst different stakeholders in the public building sector (1999:335). 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* (Duggan and Cville, 1976:172).

<sup>143</sup> The English version of the national anthem translates these Swahili words thus: ‘May we dwell in unity, peace and liberty’.

English language (2000:67). Similarly the words “may we dwell in unity” 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 will be seen in the discussion of traditional justice systems in Kenya, this ethos promoted practices that were restorative. However, the research conducted in this thesis reveals that although restorative justice was a central concept within traditional communities in Kenya, some penal practices were retributive. This lends support to Cunneen’s contention that not all traditional sanctions are restorative (2007:115).

Sight must not be lost, however, of the reason behind analyzing traditional justice systems in Kenya. The objective is in contrast to restorative justice proponents who are criticized for using a ‘history’ of restorative justice to legitimize restorative practices in modern legal system (Daly, 2002:62). As discussed in detail in chapter two, the genealogy of restorative justice for juveniles in Kenya is embarked on to shed light on the conditions that have rendered it acceptable at certain periods of time. The focus of the analysis is therefore the conditions of existence underlying penal practices (Foucault, 1991c:75) Hence an attempt is made to answer the following questions: what conditions made restorative justice acceptable in traditional communities? At what point did penal practices veer off from restorative justice and what conditions made restorative justice unacceptable? As these questions are answered, light is shed on the current restorative justice practices for juveniles in Kenya. Throughout this analysis, one must bear in mind the tension present in the application of restorative justice practices in Kenya. On the one hand, restorative practices are ‘informally’ utilized in the community as well as incorporated by some officers in the criminal justice system over and above their mandate. On the other hand alternative

interventions that are officially made available in the juvenile justice system are underutilized. The genealogy, which is ‘a history of the present’, is thus conducted in an attempt to shed light on this tension.

Using data collected through empirical and documentary research, section two of this chapter analyzes restorative justice practices within traditional communities and identifies what conditions rendered the practices acceptable in that context.

This genealogy of restorative justice practices in Kenya reveals that the onset of colonial reign shifted restorative justice values to the periphery of the criminal justice system. Section three in particular analyzes the conditions present during the colonial reign that rendered other practices in response to crime more acceptable over restorative justice practices.

## **2 Revisiting Traditional Criminal Justice Systems in Kenya**

This section examines penal practices within three communities in Kenya namely, Kikuyu, Kamba and Meru.<sup>144</sup> Kenya has forty two main tribal communities hence a claim of representativeness is not made in this analysis of the three communities (Government of Kenya, 2008). However, literature on other communities reveals similarities in procedures and values underlying the traditional responses to wrongdoing.<sup>145</sup> Moreover research findings presented during the constitutional review process in Kenya in 2002 revealed similarities in the traditional legal systems which

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<sup>144</sup> For a list of the communities of the Republic of Kenya see CKRC (2002).

<sup>145</sup> For example the Nandi, who lived in the Rift Valley province in Kenya, incorporated restorative processes in their justice system that sought to preserve the community (Snell, 1954:56-78; Huntingford, 1953:99). Similarly the Agriyama, who lived in the Coast province in Kenya, responded to wrongdoing through principles of restitution and reconciliation (Champion, 1967:18).

were run by councils of elders (CKRC, 2002). Through an in-depth analysis of the three communities, it was possible to come to a conclusion that restorative justice values were not alien in pre colonial Kenya.

## **2.1 The Kamba Justice System**

The justice system was situated within and indeed formed part and parcel of the Kamba overall social structure. Therefore, 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 (Foucault, 1977a:23). This is because practices operate within a given “economy of discourses of truth” which must be identified to understand the operation of these practices (Foucault, 2004:24). To identify the underlying discourses of truth these practices have to be situated within the overall context in which they operate (Foucault, 1977a:24). This analysis of the Kamba penal practices was therefore conducted in the context of overall social mechanisms.

Data for this analysis was obtained through interviewing Kamba elders and also through documentary research of archived literature on the Kamba community.<sup>146</sup> The interviews conducted sought to meet this objective of contextualizing the penal practices within the overall community structure. Interview questions were largely open-ended and the traditional leaders were given room to incorporate other information relevant to the community’s response to behaviour that would be regarded

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<sup>146</sup> Details of the fieldwork research are contained in chapter one.

criminal in modern law. In sharp contrast to modern justice systems which focus on the ‘guilt’ of the accused person as laid out in the law, the key determination in the Kamba justice system was whether a person had committed ‘a wrong’.<sup>147</sup> However, this thesis concerns itself with conduct that would be considered criminal in modern law. Therefore this analysis focuses on the Kamba community’s intervention to conduct that is largely criminalized in modern legal systems.

An analysis of the structure of the penal mechanisms of the traditional Kamba community reveals the ‘knowledge’ at play within the community. This section unearths the rationalities underlying the community that facilitated practices geared towards the controlling of individual conduct. Stripping down Kamba penal mechanisms to what they ‘really were’ demands a deliberate attempt to focus on the minute details of the practices in the justice system. Moreover this exercise is only possible through an initial unlearning of the ‘self – evident’. Whenever the researcher mentioned the intended research of the Kamba ‘criminal justice system’ the response in most cases was that: ‘the ‘*King’ole*’ was an interesting system to research on’!<sup>148</sup> The mention of the Kamba criminal justice system was synonymous to mentioning the ‘*King’ole*’. The *King’ole*, which was the highest level of the justice system in indigenous Kamba, was well known for its harsh judgment (Penwill, 1951:88). Its mandate was ultimate: to sentence an offender to execution (Musyoka, 2006, Interview 1 August).

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<sup>147</sup> In addition to the determination of guilt in criminal processes, contemporary criminal justice systems are increasingly concerned about the ‘dangerousness’ of individuals and/or whether they are ‘high risk’ or ‘low risk’. See Feeley and Simon (1996:370); Shearing (2001:207); Muncie (2006:777). For a more detailed analysis of the concept of risk see Beck (1992) and O’Malley (2004).

<sup>148</sup> A large number of these people were middle aged who did not have in depth knowledge about traditional systems but had a vague idea of the operation of *King’ole*. The *King’ole* is one of the justice institutions in traditional Kamba and is discussed in detail in this chapter.

Foucault points out the pitfall in ‘institutional centric’ analyses: casting our focus on the *King’ole* as an institution would divert the attention from the actual practices in the Kamba justice system (2007:116). An in-depth examination of the Kamba community reveals that the criminal justice system had other facets quite distinct from the seemingly conclusive description of the justice system drawn from the operations of the *King’ole*. A key feature emerging from this examination is the interlock between penal interventions and the structure of the Kamba social organization. Indeed the justice system operated within the confines of this social framework.

The Kamba justice system made use of the inescapable social ties that made the individual a part of the community, hence dictating individual behaviour. The socio-legal structure of the Kamba community illustrates the operation of power in terms of strategies and tactics.<sup>149</sup> Social practices as well as the justice system governed individual conduct. Individuals acted in accordance with the social norms for them not to lose the benefits that accrued from being a part of the community. The essence of life was the complex web of societal interactions and one existed as part of the community rather than as an individual. Restorative justice, as will be discussed in detail was thus 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. As seen in the analysis in this chapter certain rationalities at play in the community were central in the perpetuation of these community ties.

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<sup>149</sup> For a detailed analysis of power operating within a field of intelligibility in the “form of strategies and tactics”, see Foucault’s discussion on the Christian pastorate (2007:215-216). See also Davidson’s introduction to *Society Must Be Defended* which gives an overview of Foucault’s analysis on relations of power operating in a strategic intelligibility (Foucault, 2004:xxi).

### 2.1.2 Responses to Juvenile Wrongdoing in the Kamba Community

During an interview Nzioka, one of the Kamba elders, expressed shock when the researcher enquired about the system that dealt with juvenile crime in the Kamba community (2006, Interview 2 August).<sup>150</sup> Alleging that the concept of a ‘system’ earmarked to specifically deal with juvenile wrongdoing was alien to the Kamba community, he argued that the standards of discipline set for juveniles were very high. In the Kamba community, one was considered an adult once he or she had undergone the rites of passage into adulthood. Both boys and girls were circumcised at about the age of seven but it is during the second initiation ceremony which took place at about the age of fifteen or sixteen years that a person graduated to adulthood.<sup>151</sup> During this second initiation ceremony the initiates went through an educational program that prepared them for adulthood (CDM, 2008; Mbiti, 1969:123; Mbiti, 1985:96).

The community effectively controlled the behaviour of juveniles as a matter of course. Exemplary standards of discipline were maintained such that trivial faults such as failing to audibly respond to a father’s call warranted a punishment. The Kamba people understood from an early age that they were dependent on the community for progression to the next stage in life. Illustrating this, Kalonzo explained that for a young man to get a wife, for example, he was expected to have maintained very high standards of discipline (2006, Interview 2 August). Obviously, the judges of these standards were the adults who would either speak well of the young man or discourage any prospective bride. Moreover disciplining children was a role played by all the

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<sup>150</sup> Mulusya, Nzioka and Kalonzo chose to be interviewed together.

<sup>151</sup> The age at which the second initiation rite was performed varied depending of factors such as whether a person acted with maturity and was considered ready for marriage. It was therefore sometimes performed as early as twelve years of age (CDM, 2008).

adults and not just the child's parents. Through these adult-children relations, control of juveniles was thus exercised in day-to-day interactions. The extent of this control was demonstrated by the rules set out on how juveniles were expected to behave when relating with adults. For example, young people conversing would be expected to stand aside and wait for an adult to pass. Similarly, young people were expected to wait for the adult to initiate greetings (Mulusya, 2006, Interview 2 August). On consulting a Kamba lady on how the researcher was expected to behave in the company of elderly Kamba men during the interviews, the researcher was cautioned that greetings should be initiated by elders and not vice versa (Nthamba, 2006, Interview 31 July). Having grown up in Kenya, the researcher was well aware of the emphasis laid on 'rules' of conduct when relating to elderly people.

On the 'few' occasions when juveniles committed offences in the Kamba community, the process of dealing with them involved their families. If the offence was committed against another family member, then the immediate family would deal with the child and determine what would be the most appropriate form of punishment. The most common form of punishment was *kata ka ndu* which was basically inflicting pain at body joints, for example making the offender clench a fist and inflicting pain at finger joints. This would in certain instances be symbolically used. Administering *kata ka ndu* on fingers could be used to symbolize disabling an offender who uses his hands to steal. Another form of punishment included tying the wrongdoer to a tree and lighting a fire nearby (Kalonzo, 2006, Interview 2 August).

The scenario was different where the juvenile committed an offence against a member of another clan.<sup>152</sup> In this case the clan elders from the offender's clan would engage in a debate with the elders from the victim's clan to agree on an appropriate compensation. The compensation, which in most cases was in the form of livestock, was paid by the offender's clan. The juvenile offender was made to understand the gravity of the loss occasioned for his or her clan as a result of his or her wrongdoing; for example the clan having to pay four goats whereas the juvenile stole only one. The juvenile would also be punished and at this point repentance was expected of her or him. Moreover the clan would analyze itself to see whether it had played any role in encouraging the child to engage in criminal behaviour (Mulusya, 2006, Interview 2 August). The importance of this self-searching lay in the need to maintain a good reputation for the clan. Clans were labelled according to the general behaviour of individuals and those labelled 'bad' were singled out in social arrangements such as providing prospective spouses and engaging in joint activities. This aspect of the community's responsibility for the 'offender's' behaviour is not however a central feature in contemporary forms of restorative justice (Cunneen, 2007:114).

The entire process of responding to wrongdoing has to be seen in light of the community's strategies to control individual conduct. Compensation was paid by the clan and the juvenile's future was dependent on his or her relationship with the community. Thus his or her relationship with the community dictated future prospects.

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<sup>152</sup> In the Kamba community, the next basic unit after the nuclear family is the clan. The clan consists of members of an extended family. A clan in the traditional setting had elders who sorted out issues and disputes within the clan. The heads of families made up the elders court in the clan (Kalonzo, Interview, 2<sup>nd</sup> August 2006). After the clan, came the *utui* which consisted of several clans living in a geographically compact unit. The *utui* had elders overseeing its affairs and was the basic unit of Kamba government (Penwill, 1951:122).

Such a young person would be deterred from crime primarily by the fact that he or she lost fundamental social benefits by acting contrary to societal demands.

Parallel to the control exercised through the justice system was the extensive control on daily conduct. The level of control permeated down to day-to-day decisions made by young persons.<sup>153</sup> Nzioka illustrated for example the interesting policy on taking alcohol. Drinking traditional beer was restricted to adults. A father's consent had to be given for the initiation to 'beer drinking'. This consent was symbolized by the father spitting into some beer as a sign he blessed the beer for his son (2006, Interview 2 August).

This web of relations extended between clans. Inter-clan ties were held with the utmost regard. Clans depended on each other for survival; for basic provision of necessities in life. Moreover, these clans together formed a tribe and the strength of a tribe against other warring tribes was dependent on the clan ties. As a result, the negotiations to deliberate on the crime committed by a juvenile had an ultimate aim of restoring cordial relations between the clans. An interesting concept is that leniency in compensation was almost always extended in the hope that if the victim's clan were on the defensive in the future, then the same treatment would be guaranteed (Nzioka, 2006, Interview 2 August; Mulusya, 2006, Interview 2 August; Kalonzo, 2006, Interview 2 August).

The community's response to wrongs committed by both juveniles and adults was premised upon the endeavour to sustain good relations within the community.

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<sup>153</sup> For example there were express rules determining when a young person was allowed to engage in sexual activities (Nzioka, Interview, 2<sup>nd</sup> August 2006).

Restorative processes were therefore embarked on to preserve the community. As seen in the next section, the ‘criminal’ process for adults was largely similar to the juvenile process. In fact, the Kamba community did not have a justice system specifically allocated to juveniles as seen in modern-day criminal justice systems. The elders in the community that would adjudicate in a matter involving a juvenile would be the same ones that dealt with adults. It will be noted, however, that certain processes in the justice system such as oath-taking were limited to cases involving adults.

### **2.1.3 Responses to Offences Committed by Adults in the Kamba Community**

The process of dealing with adult offenders was based on a hierarchical structure that had marked out 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 on the matter.<sup>154</sup> 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 who would represent the facts to the clan elders. At the family/ clan level, the offender, in all instances would be asked to compensate the victim for the loss and in certain instances would be punished as well. Common forms of punishment included having sisal juice being poured all over one’s body which caused unbearable itchiness. Alternatively the offender’s hands and feet would be tied. The offender would then be made to sleep in open ground and the offender’s best cow would be feasted upon the next day. If remorseful, the offender

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<sup>154</sup> The clan elders’ court comprised of family heads from the families making up the clan.

would then be released. If not, a form of punishment was agreed upon (Mulusya, 2006, Interview 2 August).

In an inter clan matter, where the offender and the victim belonged to different clans, there was an elaborate procedure to be followed. If the victim and offender were from the *Amuti* and *Atangwa* clans for example, *Amuti* and *Atangwa* clan elders would come together. Then spokespersons to represent each clan would be selected to facilitate the hearing of evidence from both sides.

Rules of evidence in these elders' court differed from contemporary standards. Hearsay evidence was allowed, a principle that was concordant with the societal norms through which the community was controlled. Truth was a central value in the community and it was believed that anyone who spoke falsely would be immediately cursed. The community's belief in the spirit world was translated in every day life. For example, for an individual to survive after inviting such a curse through lying, he or she would have to go through a cleansing process. Individuals therefore generally spoke truthfully out of fear, hence the admission of hearsay evidence (Musyoka, 2006, Interview 1 August).<sup>155</sup>

In cases where the matter could not be concluded conclusively based on the evidence given, an oath referred to as *kithitu* was administered. The practice of this oath gained acceptance and recognition from the community's deep belief in the spirit world. This *kithitu* oath was administered to either the offender or the complainant in a matter, though in most cases it is the offender who took the oath. The decision as to who

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<sup>155</sup> Penwill also records that the principle of hearsay evidence was alien to the Kamba community (1951:56)

would take the oath was made by the elders. Actual administration of the oath involved procuring a fetish believed to be powerful and the party taking the oath would swear on it (Nzioka, 2006, Interview 2<sup>nd</sup> August). It was believed that if one swore falsely on a *kithitu* then within a set period calamity would befall him or her or in other cases his or her close relatives. If the person who swore on the *kithitu* or his or her immediate relatives died within the set period then the effects of the oath were said to have begun. This was the genesis of multiple deaths in that family which could only be stopped by a cleansing process. Moreover, in the case of offenders, this was a clear indication of wrongdoing and a sentence would then be meted out (Mulusya, 2006, Interview 2 August). Evidently, this belief in the spirit world facilitated the control of individual conduct by the community.<sup>156</sup> Hence in most cases a person having committed an offence would admit guilt to avoid the disastrous implications of the *kithitu*.

Once the facts of the case were ascertained either at the trial stage or through administration of the *kithitu* oath, the elders 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 out compensation scale for different offences (Musyoka, 2006, Interview 1 August).<sup>157</sup> Essentially restorative, the emphasis on compensation was geared towards

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<sup>156</sup> Interestingly, while conducting a legal aid programme at Matuu in 2004, several attendants mentioned to the researcher that they would resort to the *kithitu* since they could not have legal redress. Whereas some cultural practices are no longer practiced in modern Kenya, several beliefs still remain deeply ingrained amongst various communities.

<sup>157</sup> For example, Kamba communities living in Kitui and Machakos set out the compensation scale as follows:

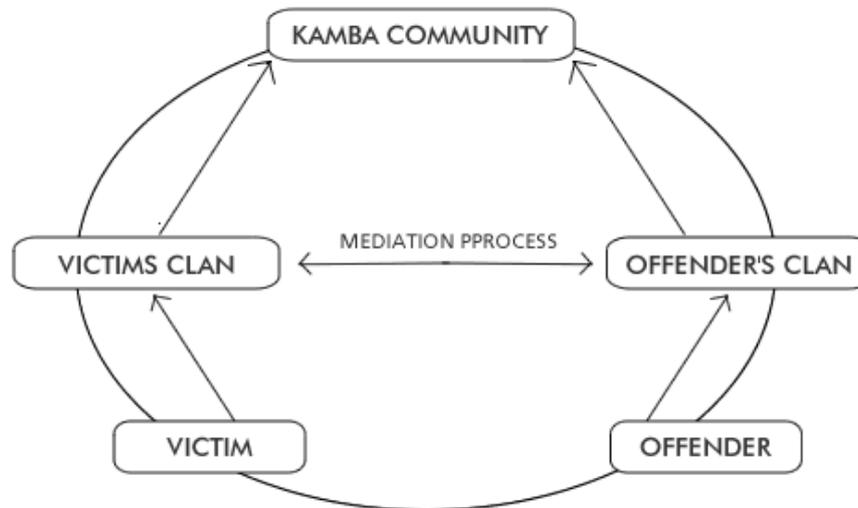
- Assault breaking a hand accidentally: one ram would be slaughtered as a sacrifice.

catering for the needs of the victim as well as promoting reconciliation within the community. Even murder cases, which now warrant death penalty, were resolved through compensation in the Kamba community. Kamba law prescribed the blood price payable depending on the sex of the deceased (Penwill, 1951:81).

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 (Musyoka, 2006, Interview 1 August). Figure 4-1 below is an illustration of the justice system as a mechanism to sustain community cohesion.

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- 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 (Penwill, 1951:85). Musyoka described this scale in similar terms to Penwill's documentation (Interview, 1<sup>st</sup> August 2006).

## THE KAMBA JUSTICE SYSTEM



The parties with a stake in the matter i.e the victim, the offender and their respective clans were involved in dealing with the aftermath of the wrongdoing. Being a part of the larger Kamba community, the mediation process was geared towards preserving the unity of the Kamba community.

**Figure 4-1**

On the other hand, the community executed some offenders, a practice which on the face of it portrayed the community as punitive and brutal. The execution was ordered by the powerful elder's court, *King'ole*, and was carried out in the form of a spectacle, hence the widespread misconceived generalization of the Kamba justice system as being brutal.<sup>158</sup> As noted, in contrast to the current criminal law in Kenya, the offence of murder did not warrant execution in the Kamba community. The major offence that warranted execution was the offence of engaging in witchcraft (Mulusya, 2006, Interview, 2 August). On the face of it, criminalization of witchcraft seems inconsistent with the community's deep beliefs in the spirit world.<sup>159</sup> On the other

<sup>158</sup> The *King'ole* consisted of male elders. Women did not serve in the elders' court but had their own forum, *Ngolano*. This grouping did not play any administrative role but played a crucial role in maintaining discipline in the community. They would for example use songs to taunt people who were not living in accordance with societal norms. A person mentioned in the songs, worked very hard to clear his or her reputation (Nzioka, 2006, Interview 2<sup>nd</sup> August).

<sup>159</sup> The Kamba community is well known for its deep beliefs in the spirit world to date.

hand, it is this objectification of the spirit world as reality that attributed power to witchcraft hence viewed in the light of its potential harm. Witchcraft as criminalized, related to the use of spiritual power to occasion harm to others. The nature of harm arising from witchcraft caused concern particularly because it was beyond the control of the community and its effect was fatal (Nzioka, 2006, Interview 2 August). As opposed to other crimes such as assault which could be stopped through physical restraint, the effects of witchcraft could only be stopped through engaging the spirit world. Consequences of witchcraft therefore posed a challenge as they could not be easily manipulated. Thus whereas spiritual practices conducted for the benefit of the community such as appeasing spirits for rain were allowed, witchcraft done to occasion harm on others was criminalized. A witch, referred to as *mwoi*, practicing witchcraft to destroy others was considered a threat to the fabric of society, hence highly dangerous, and could not be tolerated.<sup>160</sup>

Individual practice of witchcraft could be understood as a ‘counter conduct’ in Foucauldian terms (Foucault, 2007:204). Analyzing pastoral power, which was in essence a ‘conduct of souls’, Foucault illustrates how various forms of resistance developed against the pastorate. Referring to this resistance as ‘counter conduct’ Foucault argues that it may take different forms (2007:204). Witchcraft in the Kamba community appears as a form of resistance against the governance of individual conduct. Witchcraft gave individuals access to ‘spiritual power’ which tended to discredit the community power. This spiritual power would thus weaken the community ties which essentially were used to govern individuals. In response to this ‘counter conduct’ the community shunned witchcraft and alienated anyone involved in

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<sup>160</sup> *Mwoi* is the Kamba term for a witch.

the practice. Mwikali, an elderly lady affirmed this fear and distaste of a witch who was referred to as a *mwoi*:

A *mwoi* is the worst person in the community. As a young gal, I knew a *mwoi* called Nthemba who bewitched her own son to become blind. A *mwoi* is so powerful, in certain instances they would not die even when the people tried to beat them to death (2006, Interview 1 August).

The treatment of witches as offenders depicted a political aspect. A parallel could be drawn with Foucault's description of the spectacle of the scaffold. The execution in this case was made public to reaffirm power over people in contempt of authority by violating the law (1977a:48). The Kamba community on the other hand executed witches due to the potentially insurmountable power which was inconsistent with the community's entrenched control. Apart from witches, habitual thieves who repeatedly committed serious thefts were sometimes executed (Penwill, 1951:89). This was mainly because of their incorrigibility and the nature of theft as viewed in the Kamba community. Just like witchcraft, theft has to be analyzed in the light of the Kamba community's staunch spiritual beliefs. Theft was an uncommon crime, primarily because individuals ordinarily took out charms to harm anyone who laid a finger on their property (Musyoka, 2006, Interview 1 August). As such habitual thieves were considered dangerous as they committed an 'uncommon' crime and were not threatened by possible effects of charms taken against them.

The actual execution, as facilitated by the *King'ole*, was a display of values embedded within the Kamba community. In cases where the *King'ole* was satisfied that the offender ought to be executed, it summoned the men to attend a clandestine meeting. At the meeting a close senior relative of the offender to be executed was called forth

and informed that the offender was to be executed. The relative was required to give consent for the execution by throwing an arrow to the ground (Nzioka, 2006, Interview 2 August). This particular arrow thrown by the relative would be the first one thrown at the offender.<sup>161</sup> A correlation can be made between this ritual and restorative values within the community. The requirement of the public show of consent from the offender's family is imbued with restorative overtones. Firstly, the offender is involved, by proxy, in the process. Secondly, expressing consent suggests embracing the sentence as just.

#### **2.1.4 Restorative Justice Practices and the King'ole: Conflicting Practices in the Kamba Justice System?**

Taking note of the minute deviations from the preconception which equated the Kamba justice system with the brutal practices of the *King'ole* provides crucial axes for discussion. Three main conclusions can be drawn from this analysis. Firstly, as the interviews revealed, restorative justice values played a central role in the justice system amongst the Kamba. Secondly, in spite of the embracing of restorative justice values, the brutal practices of the *King'ole* were still acceptable as part of the justice system. However, as illustrated, the activities of the *King'ole* were but one facet of the justice system and in fact the operation of the *King'ole* was limited to specific situations. Thirdly, the close community ties made controlling the conduct of individuals possible.

Although appearing to address distinct issues, these conclusions are intertwined. The link between them becomes evident as one closely analyzes restorative justice practices

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<sup>161</sup> Methods of execution included use of arrows, stoning or hanging. This was usually done as a public spectacle. See for example the illustration given by Penwill (1951:89-91)

as well as practices of the *King'ole*. Restorative justice practices and the practices of the *King'ole* were technologies of power used to control the conduct of the members of this community. These practices were rendered acceptable by what we would term as 'conditions of existence'. Most prominent within the Kamba community and indeed other traditional communities in Kenya was the communal living sustained by close ties amongst the members. This fact to a large extent made restorative justice practices and the practices of the *King'ole* acceptable in the community as members felt obligated to play a role to sustain the unity of the community.

Indeed certain rationalities operating within this community legitimated the obligation of individuals towards sustaining coherence of the community. A major belief amongst the Kamba that had been objectified as 'truth' over time was in regard to the fundamentality of the community as a unified unit. An individual's existence thus depended on this coherence of the community; an individual absolutely depended on the community for survival. As a result individuals felt obligated to adhere to the rules in a bid to guarantee their place in the community. Moreover when individuals erred, they felt obligated to engage in processes that would restore good relations amongst the members, hence the centrality of restorative justice practices. With specific reference to juveniles, this spirit of 'brotherliness' placed a responsibility on the community in shaping the lives of children. This explained why disciplining a juvenile was the role of the adults in the community and not just his or her parents' role. Moreover, the whole process of dealing with a wrong committed by a juvenile not only sought to address harms caused by the wrong but also provided an opportunity for the community to reassess itself. Therefore although offenders were punished as well, the entire process was more geared towards restoration.

In contrast, if the Kamba people epitomized unity and coherence of the community, why were the brutal, alienating practices of the *King'ole* acceptable? Looking at the nature of offences dealt with by the *King'ole* and the actual execution of wrongdoers sheds light on this. The practices of the *King'ole* betray a further rationality at play in the Kamba community. It has been noted that the *King'ole* ordered executions mainly as a response to witchcraft or as a punishment for habitual thieves. This harsh punishment in the case of witchcraft was acceptable in light of the relationship between the Kamba community and the spirit world. The reality and supremacy of the spirit world had been objectified as a truth in the Kamba community. Moreover, the spirit world could be manipulated for either positive or ill objectives. Having in mind that community coherence was fundamental amongst the Kamba, a witchdoctor's potential to utilize spiritual power was a threat to this coherence. Similarly a habitual thief seemed to disregard the very essence of communal living. Already pardoned and restored back to society, re-offending suggested that the habitual thief placed personal interests first before the community values. The seemingly incompatible practices of the *King'ole* on the one hand and restorative justice practices on the other hand thus operated as part of the overall system.

## **2.2 The Kikuyu Justice System**

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

Like the Kamba community, the Kikuyu community did not have a distinct juvenile justice system (Mwangi, 2006, Interview 15 July). Therefore, an analysis of the entire criminal justice is undertaken. The 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 pointers of this correlation, highlighted in this analysis, 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.

### 2.2.1. Responses to Wrongdoing as a Facet of the Socio-Political Structure of the Kikuyu Community

Inhabiting the fertile central province in Kenya, the main economic activity engaged in by the Kikuyu community was agriculture. As such, the land tenure system was an important organizational structure in this community. Kenyatta argues that the Kikuyu community regarded land as sacrosanct. He asserts:

As agriculturalists, the Gikuyu people depend entirely on land. It supplies them with the material needs of life, through which spiritual and mental contentment is achieved. Communion with the ancestral spirits is perpetuated through contact with the soil in which the ancestors of the tribe lay buried... Thus the earth is the most sacred thing above all that dwell in or on it. Among the Gikuyu the soil is especially honoured and an everlasting oath is to swear by the earth (Kenyatta, 1938:21).<sup>162</sup>

The Kikuyu system of government was in turn conveniently built around the basic unit of land ownership. Land was communally owned by the extended family referred to as *mbari*. Nuclear families built individual homesteads spread out over this stretch of land, which was referred to as *githaka* (Mwangi, 2006, Interview 15 July). Hence the extended family was closely knit together not only because of blood ties but also because of this communal land ownership.<sup>163</sup> Moreover, the proximity of the homesteads to each other facilitated consistent social interactions. The nature of farming as the economic mainstay of the Kikuyu further strengthened the social ties within the extended families. Farming activities such as weeding and harvesting were carried out jointly. This was done systematically where members of this grouping

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<sup>162</sup> The terms *Gikuyu* and *Kikuyu* are used interchangeably.

<sup>163</sup> 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 (1938:23-30) and Muriuki (1974:75).

worked together rotating from a member's portion to another until they completed all the portions.<sup>164</sup> Individuals thus 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 (Mwangi, 2006, Interview 15 July). As such the *mbari* was part and parcel of the individual's life in all senses.

Operating in this schema, the justice system reflected the core value system of the *mbari*. Within this extended family grouping, there was an established council of elders referred to as *kiama kia mbari*.<sup>165</sup> This elders' court was mandated to oversee social issues as well as act as the judicial body (Mwangi, 2006, Interview 15 July). Consisting of the male heads of the families forming the *mbari*, this council of elders only adjudicated cases in which both the victim and the offender belonged to the *mbari*. The set out practice was that an elder was required to disqualify himself from sitting in a case in which he had a direct or indirect interest (Muriuki, 1974:129). Whereas this requirement would seem to be in the spirit of contemporary standards of an impartial judicial body, one is struck by the evident ties between the council of elders and the litigants. It should be noted that the members of the *mbari* are 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 remote and inconsequential; the judicial officers and the litigants were blood relatives with an interest in land which bound them. All the members of the elders' court would always have an interest in the matter: adjudicating over 'their blood relatives' and to

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<sup>164</sup> 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 for example Kenyatta (1938:24-32).

<sup>165</sup> The term *kiama* is translated to mean 'council' hence the phrase *kiama kia mbari* means the 'extended family council'.

facilitate equilibrium in the community which was crucial for a community that conducted its socio-economic activities jointly.

The question of an 'impartial' judicial body as underscored by modern justice systems, was not 'ignorantly' absent from this community. The structure of the criminal justice system was very much 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 therefore 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.<sup>166</sup> An individual had strong ties to the community that controlled every aspect of his or her life; he or she was no doubt obliged to live up to its expectation. 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.

On the other hand, where the offender and victim did not belong to the same extended family, there were specific elders' courts other than the extended family (*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* (Lambert, 1956:2).<sup>167</sup> The *mwaki* had a council of elders referred to as *kiama kia mwaki*, which

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<sup>166</sup> 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 (1938:226) and Leakey (1977:998).

<sup>167</sup> Lambert refers to the *mwaki* as a 'neighbourhood' in contemporary terms (1956:2). This 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, the

adjudicated over matters amongst its occupants. This council of elders consisted of elders representing the extended families to which the litigants belonged (Leakey, 1977:1002). Essentially it was a merger of a few elders from each *mbari* council of elders. Thus, just like the extended family (*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 jointly. 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. Thus 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 fruits (1974:116).

Over and above the ties necessitated by survival needs, the cohesion of the Kikuyu community was cemented by a 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.<sup>168</sup> As such the entire Kikuyu community was deemed to be one big family (Mwangi, 2006, Interview 15 July). Muriuki argues that this belief had little impact on day to day activities and its significance was when need arose to promote unity within

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*mbari* owned large areas of land. Leakey’s use of the term ‘territorial unit’ perhaps gives a clearer picture of the *mwaki* (1977:1002).

<sup>168</sup> The Kikuyu community is generally said to have nine clans (Kenyatta, 1938:5-6). However there are divergent views stretching the number of clans to thirteen. For example see Muriuki (1974: 113).

the community, for example when fighting against external forces (1974:113). However the centrality of this sense of belonging in the community cannot be ignored. Muriuki for example attributes togetherness in the community to the age set system referred to as the *mariika* system. The age sets consisted of people initiated at the same time in the community. Members of an age set considered each others as comrades as close as blood brothers (1974:119). Underlying the age set arrangement was the belief of the members of the Kikuyu community being members of one big family. Therefore the age sets had been strategically created to organize the role of the members of the community for the benefit of the whole community, the whole family. Being the educational forums of the Kikuyu community, age sets were taught the culture and values of the Kikuyu community and were prepared for specific functions such as warriors protecting the community (Muriuki, 1974:119).

This social structure of the Kikuyu community, depicted as one big family, sheds light on the operation of the territorial council of elders (*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 (Lambert, 1956:110). Figure 4-2 below illustrates the jurisdiction of the different councils of elders.

## THE KIKUYU JUSTICE SYSTEM

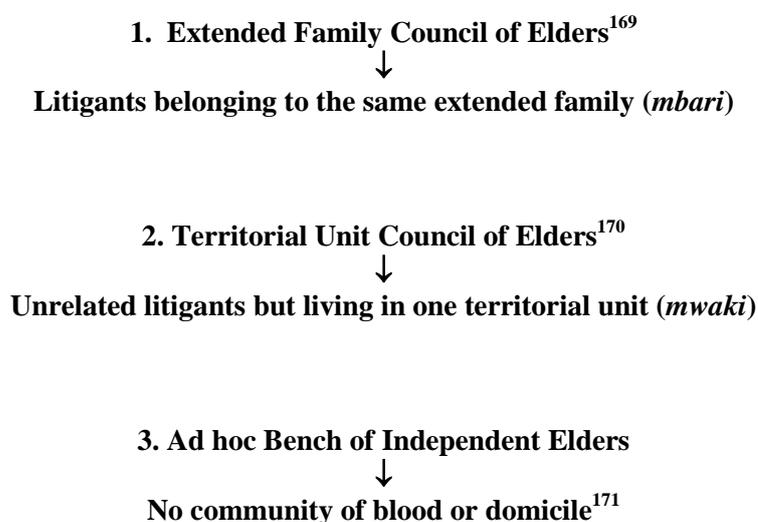


Figure 4-2

Indeed the common factor in all the different councils of elders was that they were all part of the socio-political framework. The justice system was therefore part and parcel of the overall social structure as discussed below.

### 2.2.2 ‘Agreement and Peace in the Community’: The Justice System as a Restorative Mechanism

As already illustrated, there existed different councils of elders with jurisdiction to adjudicate over matters depending on the relationship between the litigants. The different councils of elders however applied the same set of principles and procedures in practice. Core values of the Kikuyu community were applied across the different councils. This section highlights the correlation between the composition of the

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<sup>169</sup> *Kiama kia mbari*

<sup>170</sup> *Kiama kia mwaki*

<sup>171</sup> 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*.

councils and the realizing of the objectives of the justice system and the Kikuyu community as a whole.

The phrase ‘agreement and peace in the community’ used in the title above was part of the introductory prayer uttered by the elders of an extended family at the beginning of proceedings. Kenyatta describing the introductory proceedings states that the leader of the elders court, uttered a prayer in the following words:

“Athuri, ugai nyomba eroiguana” (i.e. “Elders, say let there be agreement and peace in the family group”). The elders answered in chorus: “Nyomba eroiguana, thaai thathayai Ngai thaai” (i.e. “Let there be peace in the family group, beseech Ngai, peace be with us”) (1938:215).

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, having a council of elders who were part of the litigant’s 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 extended family council of elders (*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 (Kenyatta, 1938:214-215,226). Similarly, a fee was paid by the litigants to the territorial unit council of elders (*kiama kia mwaki*) and had a similar objective. The fee 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 (Lambert, 1956:108).

Whereas on the face of it these elaborate practices appear as simply habitual 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*.<sup>172</sup> 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 one of them, the victim's relatives invaded the murderers homestead (Mwangi, 2006, Interview 15 July). To assert themselves as a family group capable of standing up for its own, they would proceed to kill the murderer or one of his kinsfolk hence settling the matter (Kenyatta, 1938:227). This ancient practice was later modified by the Kikuyu community and its procedure provided a framework for the modified practice. 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, *king'ore kia muhiriga*, which invited the murderer's family for a symbolic battle. During this age, there was no actual fighting and the kikuyu were now guided by the saying, '*tutingihe hiti keru*'<sup>173</sup> which meant that the death of the deceased does not require another death. The elders of the two groups would stand in between

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<sup>172</sup> The family of Mumbi

<sup>173</sup> This Kikuyu saying, 'we wouldn't give the hyenas twice' meant that a murder was no longer dealt with through another murder (Lambert, 1956:117).

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 (Lambert, 1956:117).

The justice system therefore sought to restore the relationship between the litigants and 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. Whether premeditated or inadvertently, an offender was still required to compensate the victim based on the fact that the victim had suffered harm either way (Kenyatta, 1938:226-227). A standard scale of compensation was outlined and once it was determined that the offender committed an offence against a victim, the requirements of the scale were effected.<sup>174</sup> 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 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 (Lambert, 1956:113). More specifically, when a juvenile committed an offence, his or her family took responsibility and offered the requisite compensation. However, such a juvenile was punished by his or her family as a deterrent from committing further crimes (Mwangi, 2006, Interview 15 July).

The justice system could thus 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-

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<sup>174</sup> For example, 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 (Leakey, 1977:1013-1034).

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 were the judicial officers a part and parcel of the litigants' lives, but the system facilitated the participation of the litigants' relatives. Moreover, social groupings such as the age sets influenced the lives of its members through strict regimes of control. Members of age sets were therefore compelled not to dishonour their age set through offending.

Enforcement of judgments further highlighted the level of control of the community over individuals. The words of the elders cursing defaulters affirm the force behind adhering to judgments. To a person disobeying the council's judgment the elders would chant: "...let curses be upon him who disobeys kiama's decision; let curses lie upon his homestead and his fields" (Kenyatta, 1938:215).

The significance of being cursed by the elders and by extension the community cannot be overstated. Evidently the quality of life of individuals was largely dependent on his or her place in the community. Hence a person who was at peace with the community enjoyed the full benefits of being a part of the community. Indeed survival demanded that one maintained a good relationship with the community. A person cursed by the elders could not lead a fulfilled life. The words of the elders quoted above, for example, touched on the very essence of the Kikuyu community: their fields. With the importance attached to the fields, community members took such curses very seriously, hence necessitating performance of the elders' judgment in a matter.

In addition to curses, defaulters would face excommunication and were referred to as *hinga*.<sup>175</sup> This meant that community members would refuse to associate with her or him in any way. In a communal society this was challenging and affected the quality of life of an individual. On occasions the excommunication was ceremonially done in public. This ceremony was a public declaration that the defaulter would not enjoy any benefits that accrued by virtue of being part of the community. For example he or she would not get communal assistance in his or her fields or he or she could not have audience in the council of elders, hence would have no channel to present his or her grievances (Lambert, 1956:128). It was therefore in the best interest of an offender to make good the compensation which facilitated his or her restoration back in the community.

The Kikuyu justice system on the whole devoted itself to restoration: restoring the victim, restoring the offender and restoring the community. Through compensation, the victim received some healing through the acknowledgement of the harm done to her or him and justice being done. The offender on the other hand was restored through the acceptance of the compensation he or she offered in place of imminent revenge against her or him. By extension, the restoration of both the victim and offender facilitated the restoration of community relations. Both the victim's and the offender's families could subsequently relate peacefully as the matter was laid to rest amicably. In a society that was largely communal, maintenance of peace and equilibrium was crucial. It was thus justifiable to excommunicate an individual who was an impediment to this objective. With clarity of purpose the community members furthered the objectives of the justice system. Apart from the public excommunication, the ostracizing of compensation

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<sup>175</sup> Outcast (author's translation).

defaulters was carried out at an individual level where members of the community shunned the defaulter. Discipline in this case was carried out through the offender's network of relations.<sup>176</sup> There is therefore a clear link between the justice system and the social structure. Indeed the responses to wrongdoing were dictated by the socio-cultural factors at play within the Kikuyu community. In particular, this analysis unearths these conditions in the community that rendered restorative practices acceptable. The Kikuyu community's social structure and its economic mainstay favoured practices that preserved communal living.

As Foucault notes in many of his texts<sup>177</sup>, what is produced as a truth in a particular context plays a role in dictating what practices are rendered acceptable. Within the Kikuyu community, one can see a link between certain beliefs that were produced as truths and the practices that were embraced. There were two key concepts produced as truths that rendered restorative practices acceptable amongst the Kikuyu. Firstly, the belief that land was sacrosanct 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 that accrued from the land. Not only was the land communally owned but also 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.

As noted in the analysis of the Kamba justice system, restorative justice practices were embraced in the Kikuyu community owing to conditions which rendered these practices

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<sup>176</sup> See for example Foucault's analysis of relations as a component of power (1977a:26)

<sup>177</sup> For a detailed analysis on the function of 'truth producing' discourses see for example the following texts by Foucault (1991b:58; 1977a:27; 2004:24)

acceptable. In addition, as in the Kamba community, certain truths facilitated the existence of restorative justice practices.

### 2.3 The Meru Justice System

This section analyzes the Meru justice system and sets out how this system controlled the conduct of individuals. Restorative justice practices for example are depicted as strategies that furthered the objectives of sustaining cohesion in the community as well as controlling individual conduct.

The traditional Meru community had an elaborate structure of government. This government mainly comprised of a sovereign referred to as the *mukiama* and a council of elders referred to as *Njuri Nceke* (Murangiri, 2006, Interview 3<sup>rd</sup> August).<sup>178</sup> As will be seen in the following analysis, the *mukiama* largely played a ceremonial role while the *Njuri Nceke* on the other hand carried out a large proportion of the actual administration of the community. This central role of the *Njuri Nceke* in maintaining harmony and dispensing justice explains the attention given to it in this analysis. Being a powerful unit, the influence of the *Njuri Nceke* continues to be felt to date. For example, there have been frequent news articles stating the position of the *Njuri Nceke* on contemporary issues.<sup>179</sup> To date, the position of the *mugwe*, who is the spiritual leader of the *Njuri Nceke*, continues to be occupied. The current *Mugwe* is Dr. Gaita

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<sup>178</sup>The word *njuri* means ‘council’ and the word *nceke* means ‘thin’. The phrase *Njuri Nceke* thus means an ‘elect council’ (Rimita, 1988:51).

<sup>179</sup>For example an article by Kainga on the Daily nation reported on the uproar of the *Njuri Nceke* over the use of certain agro chemicals being used in Meru District (2005:1). Similarly members of parliament belonging to the Meru community have been are subjected to public scrutiny by the *Njuri Nceke*. Where their conduct is found wanting, the *Njuri Nceke* calls for cleansing rituals. See for example the article written by Obonyo which sets out the relations between members of parliament and the *Njuri Nceke* (2006:1). Although its direct influence on the Meru community is limited in modern times, the *Njuri Nceke* still provides guidance to the people. For example they have been organizing programmes for High School children to attend during school holidays (M’Rinyiru quoted in Kang’ong’oi, 2005:4).

Baikiao II who took up leadership as a young man in 1955. He 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 (2007, Interview 28 August). Moreover, their identity was preserved for posterity through the naming a street in Meru town *Njuri Nceke*. As if emphasizing the council's presence, there is a monument with images of the *Njuri Nceke* alongside those of the first two presidents of Kenya (Kang'ong'oi, 2005:5).

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*. Also discussed in this part is the emergence of other institutions such as the age sets which had a role to play alongside the *Njuri Nceke* in the justice system. This exercise seeks to unearth the core value system in the community that dictated the socio-political structure. In light of this value system the second part of this section analyzes how this structure impacted on the justice system at a practical level. Whereas this thesis is addressed to the 'criminal justice system', with specific attention to juveniles, the social fabric of the community makes it impossible to conduct an isolated analysis. As will be seen throughout this section, 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 distinction between judicial processes and other social practices. The *Njuri Nceke* for example dealt with social issues such conducting wedding ceremonies as well as resolving 'criminal' matters such as murder (Rimita, 1988:63). 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.

### 2.3.1 The Emergence of the *Njuri Nceke* and other Social Institutions

In modern day, the *Njuri Nceke* has been referred to as the Meru parliament. Retired Justice Rimita for example refers to the different sets of people constituting the *Njuri Nceke* over time as the ‘parliaments’ (1988:62). Moreover he points out the similarity between *Njuri Nceke* and the modern day jury system. He notes that the evident similarity in the pronunciation of the term ‘*njuri*’ and modern day ‘jury’ is striking (1988:14).<sup>180</sup> Unlike the Kikuyu and Kamba communities which had councils of elders that operated in a rather ‘ad hoc’ mode, the *Njuri Nceke* operated in a more permanent mode. For example, as already seen, within the Kikuyu community there were different councils of elders at distinct levels that adjudicated over matters. This was not the case in the Meru community. The *Njuri Nceke* was the automatic arbitrator. It is this sovereignty and obvious recognition of the *Njuri Nceke* that bears similarity to modern day institutions. However, the danger in analyzing historical processes in the light of modern structures is that one is likely to concentrate on rationalities present in the modern structures. As a result one fails to see operations unique to the historical frameworks, hence Foucault’s caution against this form of analysis which focuses on history in modern day terms (1977a:31). Indeed the fact that Retired Justice Rimita highlights that the *Njuri Nceke* acted both as a law making body and as an arbitrator evidences the challenge in analyzing it in the light of modern day institutions. It was neither a parliament nor a jury. The history of its emergence reveals its uniqueness both in its aims and its actual operation.

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<sup>180</sup> Kang’ong’oi reiterates this sentiment and points out that the ‘n’ is silent when pronouncing ‘*njuri*’ which makes the *njuri* similar to the modern day jury in name and functions (2005). Some writers spell *njuri nceke* as *njuri ncheke*. See for example Rimita (1988).

The *Njuri Nceke* and other socio-political institutions in the Meru community emerged as a result of the need to instil discipline in the community as well as to have a strong force against external attacks (Murangiri, 2006, Interview 3 August). According to the Meru community, they had to fight against other communities namely the Mwoko and the Maasai, when they settled at Nyambene Hills in Meru District (Baikiao II, 2007, Interview 28 August). As a result, the community realized the importance of having a capable force against external forces. Moreover, soon after resettling in Meru district, which they called *nkubiu* which meant ‘our new home’, a famine occurred in the land.

The dire need of food led to high levels of indiscipline such as scrambling for food and even cases of cannibalism. During this period, cases of indiscipline in the community went out of hand, thus raising concern to the sovereign, the *mukiama*. Together with some Meru elders, the *mukiama* decided to seek ideas from their neighbours, the Maasai (Rimita, 1988:23). An emissary, called Bechau was thus sent to the Maasai community to find out their strategies on discipline. To disseminate Bechau’s findings, groups based on age and gender were thus created as institutions of learning. Through these groups strategies to instil discipline were implemented. To complete the ‘discipline’ project *njuri*, the council of elders, was formed to govern the community.

The age sets and the *Njuri Nceke* worked alongside each other in maintaining the discipline and balance in the community. In fact, the *Njuri Nceke* in itself was an age grouping as it was composed of male subjects who were firstly elders by virtue of their age and secondly had gone through the requisite ritual into the group. Thus to clearly see the rationale and actual operation of the *Njuri Nceke*, progression into the age sets is first detailed. As already mentioned, the age sets were structured on age and sex.

This thesis, however, will concentrate on the male groups primarily for two reasons. Firstly that a discussion of the justice system inevitably focuses on the *Njuri Nceke*, which is a male group. An analysis of the male groups and how they culminated to the initiation into the *Njuri Nceke* is therefore relevant. Secondly, the structure of the female groups and the core values disseminated to them largely resembled those of their male counterparts. It therefore suffices to detail one of the groups to highlight the key values.<sup>181</sup>

The first male group, named *kaminchu*, was for the young boys aged between seven and twelve years. The boys, on attaining the age of seven, were initiated into this group and were briefed on rules they had to follow. These rules varied from sexual restrictions to basic rules on respecting community members. Among these rules was the requirement to be loyal to the group and to regard other members in the group as brothers (Rimita, 1988:26-27). The next group into which the boys were initiated into was named *kiburu*. It consisted of boys aged between thirteen and sixteen and its aim was to prepare the boys for circumcision. Just like the initial group, the boys were given rules on how to behave. From this group, the boys were circumcised, a practice which symbolized that a boy had become a man. At this stage the initiate was yet again given a list of rules on how the community expected him to behave. The significance of the circumcision process is that it facilitated adherence to the community values. Initiates were made to believe that there was a certain conduct befitting to circumcised people. As such the community moulded the initiates' future behaviour (Baikiao II, 2007, Interview 28 August). Moreover, the community took advantage of the vulnerability of initiates to control irresponsible behaviour such as fornication. During

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<sup>181</sup> For an elaborate discussion on female groups see Rimita's exposition (1988:30-33).

this time, initiates were threatened that their healing process was dependent on a clear conscience. They were thus required to confess all their 'sins' which included their sexual exploits. This acted as a deterrent to illicit sexual behaviour as women knew they would be shamed during the circumcision ceremony (Rimita, 1988:35).

Once circumcised, males became eligible to take an oath named *lamala* (Rimita, 1988:45). This oath was of great significance. It was an oath taken to affirm allegiance to the community and to defend its honour. Moreover, one taking the oath undertook the responsibility to bear upon himself the security of women and children in the community. Taking this oath made a man eligible to join the *Njuri Nceke*, the council of elders. After taking this oath for 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.<sup>182</sup> The key value passed on to the initiates related to unity of the community and their role in maintaining it. Rimita highlights that

the 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 (1988:48).

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*.<sup>183</sup> At this stage the initiate performed menial roles of *Njuri Nceke* such as

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<sup>182</sup> The fee at this stage was a he-goat (Rimita, 1988:47).

<sup>183</sup> Just like the Kamba community, discussed above, the Meru community held strong beliefs in the spirit world.

executing judgments (Rimita, 1988:49). In the next stage of the oath, the initiate was called upon to confess whether he had previously committed incest, theft or murder (Rimita, 1988:49). If guilty he was required to pay a penalty and moved to the last stage of the initiation. This final 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 fulfil this may God kill me and all my descendants (Rimita, 1988:50).

To this, the *mukiama* responded with a question to the initiate: “do 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” (Rimita, 1988:50).

An obvious impact of initiation into the different group levels was that individuals developed a strong sense of belonging to the community. This process further created mindsets that centralized community needs and placed individual needs second. Thus, 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’. It is within this core value that the justice system operated on. As seen in the next part, this had significant implications for the dynamics of the ‘justice system’.

### **2.3.2 Restorative Justice amongst the Meru: Community Involvement in Dealing with Wrongdoing**

As noted, a key feature of the Meru government was that it was structured around social groupings. These social groupings were not only effective educational institutions but they also played a considerable role in administering justice. Through these group forums, members of the community were made aware of community rules of conduct. The rules were diverse and ranged from social issues such as respecting older members of the community to day to day relational issues. Breaking any of these rules amounted to a ‘crime’ in the sense that such conduct was unacceptable and warranted punishment. Although there may be a convergence on certain conduct which is universally criminalized in contemporary systems, the concept of ‘crime’ in this community was extensive, making a vast range of conduct punishable (Baikiao II, 2007, Interview 28 August).

In the same way that the groupings served as the base for dissemination of the rules, they also served as a base for administering justice. When a member of a group broke a rule expressly laid out for the members of a group then the group took liberty to deal with the member. The rationale was that when a member broke a rule he erred against the whole group and deserved to be cut off from the group. By erring, such a member was said to have dishonoured the group. The group reaffirmed its honour by punishing the transgressor and at the same time the punishment served as a redemptive act that restored the offender back into the group. For example, in the young boys’ group, the members of the group would stand in two rows facing each other and the transgressor was made to walk in the middle of the rows. The members, who would be holding

sticks, would hit him as he walked past (Rimita, 1988:27). The groups therefore provided useful platforms for controlling individuals. It was in the community's best interest that the groups moulded their members to conform to the set out standards in a bid to sustain a strong Meru community (Baikiao II, 2007, Interview 28 August).

The *Njuri Nceke* on the other hand adjudicated over cases where there was harm occasioned against a victim who then sought justice against the offender. The *Njuri Nceke* adjudicated over both civil and criminal cases. As already pointed out this distinction is not as obvious as it is in modern systems (Rimita 1988:74). The ultimate aim in settling cases in the Meru community was promoting reconciliation which was seen as a prerequisite to having a strong community (Baikiao II, 2007, Interview 28 August). Therefore in minor cases, parties were required to discuss the case and reconcile on reaching a settlement. However if they disagreed then the *Njuri Nceke* was approached to adjudicate over 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.<sup>184</sup> 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 (Rimita, 1988:68). 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" (Baikiao II, 2007, Interview 28 August). The fact that the actual composition of *Njuri Nceke* members

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<sup>184</sup> It was detailed at the beginning of this section that the members of the *Njuri Nceke* were all the elders who had undertaken the requisite initiation procedures into this institution.

sitting in any single case differed from the next was inconsequential. All the council members had been rigorously indoctrinated on what the core community objectives were.

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 (Murangiri, 2006, Interview 3 August). Similar to the practice of the Kamba and Kikuyu communities, the outcome of a guilty verdict by the *Njuri Nceke* was normally payment of compensation to the victim.<sup>185</sup> In contrast to the modern day concept of ‘guilt’, the aim of the proceedings in the Meru community was to determine whether an accused person committed a wrong. This was based on the understanding that whether the accused had a guilty intent or not, the victim suffered harm. 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 such cases, the victim family, would in certain instances request that the compensation be in the form of a cow and a girl from the accused’s family (Rimita, 1988:77). Whereas the possibility of restoring the victim to the original state is impossible in this case, what is evident is that

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<sup>185</sup> The community had a set out compensation scale for different offences (Murangiri, 2006, Interview 3 August). For example for personal injuries the compensation required was as follows:

- Eye – a heifer, bull and a goat
- Ear - a heifer, bull and a goat
- Arm – 2 heifers, 2 bulls and a goats
- Front teeth – a heifer each, and other teeth a bull each (Rimita, 1988:77)

this justice system strived to bring some form of restoration to the victim.<sup>186</sup> Moreover, the compensation as a sign of acknowledgement of the wrongdoing done to the victim is restorative in itself; a sense of belonging was reaffirmed to the victim whose welfare was taken into consideration. On the other hand, 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.

In this context in which the community embraced a communal way of life, restorative justice values were compatible with the overall social operation. Indeed the restorative practices were in no way an isolated strategy of the justice system; they not only reflected the social values but were also part and parcel of the social fabric.

#### **2.4 Restorative Justice as a Form of Government in Traditional Communities in Kenya**

Research on the Kikuyu, Kamba and Meru communities reveals the embracing of restorative practices in responding to wrongdoing. In these communities, both the wrongdoer and the wronged party as well as their extended families were involved in dealing with the harms caused by the wrong committed. The outcome of these processes was in most cases restorative: the wrongdoer and his or her extended family compensated the wronged party and his or her extended family. In these cases

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<sup>186</sup> Perrin and Veitch for example analyze 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 (1998:229). However, it appears that the communities discussed in this thesis had developed a system that fully embraced compensation as a restorative mechanism.

therefore, both procedural and substantive restorative justice could be seen to be achieved to some extent.<sup>187</sup> Although this thesis focused on the three communities it is worth noting that almost all other communities in Kenya had similar justice systems governed by councils of elders. A report compiled during the Constitutional Review process in 2002, a forum which involved delegates from all parts of Kenya, attested to the similarities in traditional justice systems (CKRC, 2002). However it is noted that in certain instances, harsh punishments were meted out to the wrongdoer. Nevertheless, in all cases, the wrongdoer, the wronged party and their families were involved in the process. The justice systems were evidently founded upon procedural restorative justice.

Within these traditional communities, restorative justice is seen as a strategy for controlling the conduct of individuals. The involvement of the families of the wrongdoer and wronged party reaffirmed the communal ties. In the knowledge 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. Moreover, 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 reveals its wider objectives in these communities.<sup>188</sup> Hence this analysis sought to unearth the rationalities within which the traditional communities controlled

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<sup>187</sup> Chapter three discusses the arguments around procedural versus substantive restorative justice in detail.

<sup>188</sup> Some modern proponents of restorative justice mainly focus on the involvement of all the parties with a stake in the matter. See McCold (2001:41); Marshall (1999:5); Braithwaite (2000:115).

the conduct of their members. Restorative justice is seen as operating within these rationalities, hence operating as a strategy to achieve the overall goals of preserving community unity (Pavlich, 2005:10).

Section three below sets out the impact of colonization on the justice system in Kenya which until then was organized autonomously by each tribal community. The colonial era introduced a new form of governmentality which impacted on restorative justice practices.

### **3 Transition from Indigenous Justice Systems to Colonial Administration of Justice**

The British rule in Kenya began in 1895 and ended in 1963 when Kenya gained her independence (Ghai and McAuslan, 1970:3). In Kenya's history books, this colonial era is marked as an important phase as it shaped the tenor of independent Kenya. Having been declared a protectorate in 1895, an administrative framework headed by a Commissioner, was established to effect British rule. This framework was clearly demarcated into two facets: administrative arrangements catering for the non-Africans living within the protectorate and on the other hand those that catered for the African natives (Ghai and McAuslan, 1970:357). These facets were distinct and the administrative policies affecting the non-African subjects were remarkably different from those affecting the African natives. This structure marked the first phase of the colonial rule that continued for the most part of the colonial era as discussed in section 3.1. Section 3.2 then discusses the harmonization of the administrative structure towards the end of the colonial rule and its impact on independent Kenya.

### 3.1 Phase I: The Two-Tier Justice System

The distinction between arrangements catering for British subjects versus African natives was notably evident in the judicial system.<sup>189</sup> This was particularly so because at this early stage of the British rule, disputes amongst British subjects were heard by administrative officers whereas their jurisdiction over Africans was only limited to certain areas. The colonial judicial machinery did not concern itself with the Africans not living in the areas marked ‘European’; traditional justice systems were allowed to operate in the African Reserves at this stage. This distinction between British subjects’ and natives’ legal machinery was made more evident by the East Africa Order in Council 1897 which established Her Majesty’s Court for East Africa with jurisdiction over British subjects and foreigners. On the other hand, the Native Court was established to cater for the Africans. This court was further divided into colonial and indigenous. The former comprised of administrative officers exercising magistrates’ powers over select African natives, guided by the Indian Penal and Procedure Code. However, there was a key guideline on the application of these codes (Anderson, 1991:189; Ghai and McAuslan, 1970:133). Section 20 of the East Africa Native Courts Amendment Ordinance of 1902 provided that the Colonial Native Court was to be “guided by native law as far as it is applicable and is not repugnant to justice and morality”.

However, the Colonial Native Court was reluctant to apply native law, particularly in criminal cases. During an interview Mulusya, a Kamba tribal elder, lamented that the

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<sup>189</sup> In the first instance, the colonial justice system is discussed in its entirety as a basis for the subsequent discussion of the criminal justice system.

colonial government had usurped the exclusive judicial powers of the Kamba elders. Moreover he argued that the Colonial Native Court did not pay due regard to the elaborate Kamba laws. He commented that:

At first, the colonial judicial officers would call upon us to explain what the Kamba law was regarding cases that did not involve bodily harm between the litigants. Where there was a question of bodily harm, they were not interested in knowing what the Kamba law position was. Later on, they stopped calling us altogether; I think they decided to disregard Kamba law (2006, Interview 2 August).

Native Indigenous courts, on the other hand, were the native tribal courts headed by local chiefs and elders (Ghai and McAuslan, 1970:129-131). Section 5 of the Native Tribunals Ordinance gave jurisdiction to these courts to adjudicate cases in which all the parties were natives. In effect, this arrangement meant that administration of justice amongst native Africans to a large extent lay in the hands of native local leaders during the early stages of colonization.

Akin to the structure of the judicial system, the police department at this point in time had two major departments. On the one hand, the 'Kenya Police' was responsible for policing areas that were earmarked as European areas.<sup>190</sup> Their mandate extended to dealing with the few Africans resident in these areas as well. On the other hand, the 'Tribal Police' maintained order in the African Reserves. The Tribal Police, who were entirely African recruits, were answerable to the administrative officers in these areas namely the Provincial/District Commissioners and District Officers (Anderson, 1991:186).

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<sup>190</sup> For a detailed study on the Kenya Police see Foran (1962).

With specific regard to juvenile justice, the colonial government did not have a separate system to deal with juveniles. This may however be explained as a resultant feature of the colonial two-tier system. The starting point is that native juveniles, in the custody of their families, remained in the African reserves. As noted, within the African reserves the indigenous justice system continued to operate in the name of Indigenous Native Courts. Thus the treatment of native juvenile offenders in effect continued in similar terms as during pre-colonial period. Moreover, communities continued to be closely knit, thus exercising control over juveniles and dictating their behaviour. In an interview with indigenous Kamba leaders, they commented that declining control over children was a very recent phenomenon in their community; the community still dictated behaviour of children even in newly independent Kenya (Kalonzo, 2006, Interview 2 August; Mulusya, 2006, Interview 2 August; Nzioka, 2006, Interview 2 August).

### **3.1.1 Government and the Two Tier System**

The British subjects/native Africans dichotomy throughout the different arms of the justice system was not merely a resultant feature of convenience for the colonial regime (Killingray, 2003:99). This section examines the objective of this two tier justice system and how this impacted on the penal practices adopted.

The core objectives of colonization provide a crucial starting point for an analysis of systems within a colonial regime. ‘Civilization of native peoples’ has been cited as a central objective of western countries that colonized this region (Roberts, 1937:10; The Electors Union of Kenya, 1946:21). The civilization project is perceived to have

engineered replacement of indigenous social structures, labelled primitive, with formal Western frameworks. African customary law, for example, was considered primitive whilst English law was regarded as superior (Killingray, 2003:98). The ‘repugnancy clause’ as set out in section 20 of the East Africa Native Courts Amendment Ordinance of 1902 suggested that certain laws governing traditional communities were repugnant to justice and morality. Therefore the Colonial Native Court had to ensure that applicable native customary laws were not repugnant to ‘natural justice’ (Nilhil, 1949). That notwithstanding, the British colonialists in Kenya seemed to perpetuate indigenous systems through the two tier judicial framework as opposed to imposing a foreign judicial system.

This seemingly inconsistent divergence from the ‘civilization project’ illustrates the usefulness of “lightening the weight of causality”, in Foucault’s terms (1991c:77). In breach of the self evident and expected displacement of indigenous systems at the onset of colonialism, a careful examination of the practices reveals that the two tier system was actually compatible with the objectives of colonial rule. A historical constant that can be identified right at the outset is that, generally speaking, colonial processes had the objective of displacing indigenous systems through the imposition of foreign systems.<sup>191</sup> The two tier justice system therefore seemed a deviation to this historical constant and it raises pertinent issues for discussion. For what reason did the British administration allow the operation of indigenous systems at the beginning of the colonial era in spite of the obvious perception that indigenous practices were

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<sup>191</sup> For example, see Read who argues that the imposition of colonial legal systems minimized the ‘Africanization’ of the law in African countries (1964:164).

primitive?<sup>192</sup> By no means does this suggest that there was an undermining of the ‘civilization project’ but rather highlights an operative strategy of power worth exploring.

Situated within the overall colonial regime, the framework of the colonial justice system reflects the rationalities operating in the entire system. Undoubtedly, the colonial regime was an establishment of power which sought to control the colonized peoples. As part and parcel of this regime, the justice system played a role in furthering these objectives. The fact that indigenous justice systems continued to run at these initial stages of the colonial rule was not an approval of indigenous laws but a strategy to harness control. It was paramount for the colonial regime to gain full control of the colonized peoples with the least resistance. The strategy of indirect rule was embraced to achieve these objectives. Administration of justice by fellow natives was bound to be more acceptable.

The crucial distinction between the pre-colonial indigenous justice systems and justice systems at the dawn of colonialism was the new structure of control introduced in the latter. During colonial times, the constitution of the Indigenous Native court as well as the Tribal Police operating in the African Reserves, was determined by the colonial government. The colonial administration had the mandate to authorize chiefs and the local elders entitled to adjudicate over matters (Ghai and McAuslan, 1970:131). During these early stages of the colonial reign, the impact of colonial authority was more manifest in the relations than the structure of judicial institutions. On the face of it, the natives still operated their indigenous justice systems but in reality the colonial regime

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<sup>192</sup> See for example the case of *R v. Malakwen Arap Kogo* K.L.R XV 115 where Justice Thomas remarked that they were “dealing with uncivilized people” to which the Attorney General responded by reiterating that they were “dealing with backward people”.

controlled the operation of the justice system. The British administration used this political strategy to exercise control over the native Africans but with minimal resistance. On the other hand, the imminent need to control the reaction of the native Africans further illustrates an impending resistance evident in this relationship of force.<sup>193</sup> The two-tier justice system also depicted the operating governmentality at these initial stages of the colonial era. A priority of the colonial government was to not only establish institutions of governance but also to be able to govern the conduct of natives. In practical terms, indirect rule made it possible for the colonial government to rule the entire population. Moreover, the culture and customary law of the natives was so far removed from English law and there was need to gradually introduce English principles (Killingray, 2003:99).

Apart from the influence of an indirect rule policy, the colonial justice system was further dictated by other socio-economic forces. At the onset of colonial rule in Kenya, the colonial government went to great lengths to pave the way for the realization of its economic objectives. As part of this agenda, the Crown Lands (Amendment) Ordinance of 1938, for example, demarcated the fertile Highlands as exclusively European areas (Ghai and McAuslan, 1970:84-85). By the same token, it was evident that the justice system strategically set out to protect these interests. Focusing on the criminal justice system, the two-tier justice framework reveals the salient objectives of the system. Firstly, the policing strategy, as discussed below, directed its efforts towards protecting the interests of the Europeans living in the protectorate. Secondly, the criminal justice system was initially preoccupied with maintenance of order in the territory as opposed to developing lasting penal policies.

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<sup>193</sup> This scenario reiterates the view that for power to exist there must be some form of resistance (Foucault, 2004:15).

In the 1920s, the security within urban centres and on settler farms was beefed up through measures such as the introduction of police night patrols. This policy was an implementation of policies developed as a result of issues politicized by the settler community. For example the rising number of stock theft from settler farms and burglaries in the homes of white settlers raised concern (Griffith, 1959:17).<sup>194</sup> It had been determined that animals stolen from settler farms were driven to Native Reserves. This posed a problem because the Kenya Police did not have jurisdiction over Native Reserves and there was an indication that the Tribal Police did not always apprehend such stock thieves. The Stock and Produce Theft Ordinance of 1913 thus mandated the District Commissioners to impose heavy fines on apprehended thieves and further to impose collective fines to community member who did not assist in the tracking down of the animals (Anderson, 1991:188). Interestingly, the District Commissioners who doubled up as an administrative and judicial officers were also in charge of the Tribal Police within the Native Reserves. There was therefore pressure on these administrative officers to enforce penal laws depending on the political climate. These penal measures coupled with the emphasis on police patrol on settler farms reiterated the view expressed in this section: the priority of the criminal justice system was protecting the interests of the colonial government and British subjects that had settled in Kenya.

A correlation could be drawn between the modes of offender treatment resorted to and the crimes that were targeted through specific policing. In addition a further correlation could be drawn to certain forms of conduct that were criminalized. A good example is vagrancy laws which criminalized unauthorized travelling of African natives from one

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<sup>194</sup> See for example Coryndon on native policy resolutions. Resolution No.17 indicated that stock and produce theft by natives was an issue of concern (1924:9).

part of the country to another; failure to carry identification documents amounted to a crime. The objective of vagrancy laws was to sustain control over the African natives in accordance with the policies of the colonial government. Similarly, sentences were to act as a deterrent thus controlling the behaviour of native criminals. Corporal punishment for example was widely used to the extent that magistrates had to be constantly reminded to restrict its use to criminals who had committed brutal offences.<sup>195</sup> However, this caution continued to be ignored and magistrates' returns showed that flogging was still meted out in cases involving trivial offences (Ghai and McAuslan, 1970:140). Moreover reports conclusively revealed much more severe punishments in the colony as compared to England (CPKJD, 1935:15).

Apart from corporal punishment, imprisonment and detention were common (CPKJD, 1935:15). The sentence meted out was largely dependent on the crime committed in the light of public interest attached to that particular crime. Stock theft, for example, attracted severe sentences (Ghai and McAuslan 1970:141). In the case of *R v. Malakwen*, the accused was sentenced to two years imprisonment with hard labour for having stolen a goat and its kid.<sup>196</sup> The presiding judicial officer remarked that "the Nandi are given to stock theft and a heavy punishment was necessary to act as a real deterrent to others contemplating the offence". One has to bear in mind the context in which stock theft was dealt with. The criminal justice system sought to protect the economic interests of foreign settlers. Whereas in the case above, Malakwen stole from a fellow native, it was crucial for the magistrate to impose a severe sentence to deter stock thieves generally. Stock theft was a concern for the foreign settlers and had therefore to be discouraged at all courts.

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<sup>195</sup> This was in respect to native cases heard in the Native Court presided over by administrative officers.

<sup>196</sup> Kenya Law Reports XV 115

The colonial judicial department viewed imprisonment as an important tool primarily because of its deterrent effect. In the *Hints for Magistrates*, magistrates were advised:

I would, while discussing imprisonment, like to warn magistrates new to the county not to be led away by the fallacy that natives do not mind imprisonment but rather like the liberal food and alleged easy life in jail. A native feels keenly the loss of his liberty and those pleasures to which he is accustomed... (CPKJD, 1935:15).

The practice of imprisonment was further rendered desirable by political events. It became a useful tool for curtailing the activities of natives resisting colonial rule. For example in the 1950's a large number of an organized group of natives in Central Province referred to as *mau mau* were imprisoned (Clayton, 1985:153). The over-reliance on imprisonment soon became an issue firstly, because of the alarmingly rising prison population, and, secondly, because of the evident rise in recidivism rates. Players within the criminal justice system began debating whether imprisonment was a deterrent or was actually a training ground for further crime (Anderson, 1991:197). That debate notwithstanding, not much was seen to change in terms of imprisonment policy between this period and 1963, when Kenya got her independence.<sup>197</sup>

In the second phase of colonial rule, there were attempts to harmonize the justice system to a system that applied in similar terms to everyone as discussed in the next section.

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<sup>197</sup> As will be seen in subsequent chapters, this issue of over utilization of imprisonment is still an issue of concern in independent Kenya just as it was during the colonial era.

### **3.2 Phase II: Harmonization of the Justice System**

During the last few years of colonial rule, attempts were made to have a harmonized justice system that did not oscillate between colonial systems of justice and indigenous systems of justice. As already highlighted, indigenous laws were regarded as primitive hence the insertion of the repugnancy clause in section 20 of the East Africa Native Courts Amendment Ordinance of 1902. Inevitably, the justice system was finally structured to reflect the English principles of justice (Ghai and McAuslan, 1970:172). Although the whole era of colonialism greatly influenced the shape of systems in independent Kenya, it is these last years of the era that shaped the tenor of the current judicial system in Kenya. The African courts were transferred from the general administrative ambit and were placed under the judiciary. This meant that flexibility in dealing with native Africans was now being curtailed in favour of a strict judicial system based on English principles of law. The timing of these changes coincided with the consensus that colonial Kenya had developed to a status worthy of being an independent state.

The attainment of independence meant that Kenya was now in a position to develop systems that were deemed 'African' and which would best be suited in that context. This was however not the case as systems present in colonial Kenya were adapted in independent Kenya. The justice system in particular officially transplanted English principles of law without due regard to local values of justice. With particular reference to criminal law, Section 3 (2) of the Judicature Act of 1967 excluded the guidance of African customary law in criminal cases. The result of this process was that the

criminal justice system mirrored English principles of criminal law (Read, 1964:164). Thus interventions to crime laid out in the Penal Code of 1970 did not incorporate practices that had marked justice systems in traditional communities in Kenya. Embracing English principles of criminal law, the parties involved in the criminal process were limited to the state and the defendant. In addition, the role of the adjudicating body, in this case the court, was reduced to determination of guilt and sentencing. This was markedly different from the traditional adjudicators who in addition to determining facts in a case provided a forum for the parties to address the harms caused by the wrongdoing.

The disregard of traditional practices and values in the establishment of the justice system in independent Kenya would appear inconsistent with the resistance waged against the colonial rulers in Kenya. In the struggle for independence some groups of Natives in Kenya such as the *mau mau* revolted against practices that had English connotations such as Christianity and Mission schools (Foran, 1962:177). The expectation would therefore have been that the attainment of Independence would have provided a platform for the incorporation of 'African' values. However, the adoption of an English criminal justice system and indeed other institutions sheds light on what had been achieved through the colonial process. During the colonial period the superiority of Western systems on the one hand and the inferiority of traditional systems on the other hand were produced as truths. As pointed out in chapter two, education and religion, for example, had been used as forums through which these 'truths' were propagated.<sup>198</sup> With specific reference to the criminal justice system, practices established by the colonial government had been rendered acceptable. Hence even

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<sup>198</sup> See chapter two, page 53.

after attainment of independence, these practices were embraced over traditional interventions to crime.

Over forty years after independence, the criminal justice system in Kenya is still founded on Western principles as opposed to values that guided justice systems in traditional communities. As will be discussed in detail in chapters five and six, restorative justice values in particular have not guided the current formal criminal justice system. Noting that this justice system was a transplant from a Western legal system, these chapters analyze the current penal practices in the system and the conditions that have continued to render them acceptable.

## CHAPTER FIVE

### AN ANALYSIS OF THE CURRENT CRIMINAL JUSTICE SYSTEM IN KENYA

*'Independent Africa has yet to begin devising in earnest an indigenous policy for the treatment of offenders and there is as yet no real evidence of a 'new look' at African penal systems in the light of local conditions, traditions and possibilities' (Clifford, 1974:186)*

#### 1 Introduction

Chapter four analyzed the justice systems within traditional communities and how the colonial process eventually displaced these systems with a formal justice system founded on Western principles of law. It is argued that with the establishment of the formal justice system, restorative justice values which guided practices in the traditional communities in Kenya were disregarded. This chapter completes the genealogical analysis that was introduced in chapter four. In particular, this chapter analyzes the criminal justice system from independence to date. As highlighted, the focus of this thesis is on restorative justice for juveniles in Kenya. However, this chapter analyzes the practices within the criminal justice as a whole for two main reasons. Firstly this thesis argues that practices are rendered acceptable by underlying conditions and rationalities operating in a system (Foucault, 1991c:79; 1977a:55). To effectively explore the conditions and rationalities impacting the operation of restorative justice, this chapter analyzes the practices utilized in the justice system as a response to crime. It must be borne in mind that generally other practices, particularly incarceration, are embraced over restorative justice practices. Premised on the fact that the underlying values in the system run across the various practices, this extensive

analysis seeks to unearth the existing values supporting or undermining restorative justice. Therefore it is pertinent to analyze these practices to unearth the conditions and rationalities that render them more acceptable in comparison to restorative justice practices.

Related to this argument, the second reason for analyzing the criminal justice system as a whole relates to the fact that the juvenile justice system is interconnected to this system. Before the coming into force of the Children Act in 2002, both adult and juvenile offenders were dealt with by a harmonized criminal justice system. It is argued that although the Children Act of 2001 sought to establish a distinct system, the juvenile justice system mirrors the practices embraced within the overall criminal justice system. The conditions and rationalities identified in the criminal justice system are seen at play in the juvenile justice system. The implications of this are evident in the procedure and practice of restorative interventions available in the juvenile justice system which are discussed in Chapter six. Moreover, to date, the process of establishing a completely distinct juvenile justice system is still in progress. Therefore examining restorative justice practices for juveniles solely would not provide a comprehensive analysis of the conditions and rationalities underpinning the juvenile justice system.

Developing the argument advanced in chapter four, this thesis highlights that the legal structure transplanted to Kenya during the colonial era has been retained to date. Hence the words quoted in the epigraph, which Clifford uttered soon after Kenya obtained its independence, still remain true several decades later (1974:186). Moreover changes in the criminal justice system have been largely inspired by penal developments in the

West as opposed to local realities. For example, during an interview, a senior probation officer remarked that the stakeholders were liaising with foreign agencies to effect changes in Kenya (Odhiambo, 2006, Interview 6 July). It has been argued that the superiority attached to Western ideas is to a large extent a consequence of colonialism. It is acknowledged in this thesis that there are other ‘conditions of possibility’ of the current criminal justice system in Kenya such as economic development and issues of governance (Daily Nation, 2008; Achieng, 2006, Interview 14 June). However as discussed in detail in chapter four, the practice of imprisonment was particularly rendered acceptable with the embracing of a Western structure of the criminal justice system. Similarly, as will be discussed in chapter six, the recent attempts to incorporate restorative justice practices in the formal juvenile justice system have been a response to global developments in juvenile justice. As such, this thesis focuses on how the global hegemony of Western power/knowledge dispositifs has impacted the criminal justice system in Kenya.

This chapter examines the embracing of court sanctioned responses to crime, and particularly imprisonment, as a product of ‘truths’ produced through the colonial process in Kenya. Section two outlines and analyzes the different court sanctioned practices dealing with convicted adult offenders. This section also examines whether restorative justice is incorporated during the court process and subsequently in the sentences meted out. Section three analyzes the role of Chiefs in dealing with offenders as an out of court mechanism with restorative potential.<sup>199</sup>

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<sup>199</sup> Chiefs are administrative officers appointed under the Chiefs’ Act of 1998.

## 2 Court Sanctioned Practices of Dealing with Offenders

### 2.1 The Trial Process

In criminal trials, the mandate of the court is to pass judgment on the guilt of the accused person.<sup>200</sup> On a guilty verdict, the court then proceeds to make an order as to how the ‘offender’ is to be dealt with. These trite procedures tend to suggest that the role of the criminal court is merely to obtain a verdict as to guilt of the accused and subsequently mete out the sentence.<sup>201</sup> This explains why the courtroom trial process is not in most cases the focus of texts on restorative justice.<sup>202</sup> Section 176 of the Criminal Procedure Code of 1987, however, provides an opportunity for courts in Kenya to exercise a restorative role. It provides that:

In all the cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to a felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court and may thereupon order the proceedings to be stayed or terminated.<sup>203</sup>

On the application of this section a senior resident magistrate remarked:

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<sup>200</sup> Under Section 210 of the Criminal Procedure Code of 1987 if at the close of the evidence in support of the charge the court is of the opinion that the accused has no case to answer, the accused is acquitted at this stage. Otherwise the court either acquits or convicts an accused person at the close of trial according to Section 215 of the Criminal Procedure Code of 1987.

<sup>201</sup> Johnstone for example argues that this role of the court is crucial in maintaining the rights of an accused person until he is proven guilty. Conversely proponents of restorative justice emphasize the end result: restoration (2002:30).

<sup>202</sup> Shapland et al for example argue that restorative justice dictates that the parties themselves i.e. the offender and the victim direct the course of justice as oppose to the court system in which the judge is in control. Their view is that the influence of the judge interferes with the restorative effect (2006:510).

<sup>203</sup> Case law has affirmed that this section cannot be applied in cases in which the offence amounts to a felony. See, for example *Ceretta Medardo v. Republic* [2004] KLR.

This section promotes reconciliation and could be a basis for restorative justice. However, it is rarely used due to its fluidity. The use of the word ‘may’ makes it discretionary. Whereas this section gives flexibility to judicial officers to promote reconciliation, there is no proper structure for this flexibility (Achieng, 2006, Interview 14 June).

Discretionary provisions in law usually set the platform for the realization of the objectives and the concerns of the day. They provide a basis for considering the circumstances at hand and subsequently making the ‘most suitable’ orders. The term ‘most suitable’ is of course weighted on the immanent objectives of the system. Hence judicial shyness from this provision that has been in place since 1983 betrays the values which the system is pegged upon. In a system founded on restorative justice, this judicial discretion would be fully utilized as a basis for decisions. The underutilization of this discretionary power suggests that the justice system in Kenya does not hinge on restorative justice. Supporting this contention, embracing the practice of incarceration, which is short of restorative initiatives, suggests that other objectives dictate the justice system.<sup>204</sup> This resonates with Foucault’s standpoint that existing mechanisms are utilized as strategies towards a specific end (2004:33).

The upshot of this is that the existence of restorative mechanisms does not guarantee their application unless rationalities supporting these practices are in operation. The ‘dormant’ restorative provisions of section 176 of the Criminal Procedure Code of 1987 could therefore become central in the context of other rationalities informing the system. The structure of the current juvenile justice system provides an illustration of this contention. Prior to the coming into force of the Children Act in 2002, guidelines on the treatment of juveniles were laid out in the Children and Young Persons Act of

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<sup>204</sup> See, for example, Wanjala and Mpaka’s view that “imprisonment is an automatic form of punishment in certain cases” (1997:136).

1964. Similar to the Children Act of 2001, the Children and Young Persons Act of 1964 sought to have due regard to the unique needs of juveniles. It therefore envisaged special Juvenile Courts to hear juvenile cases. However, regardless of the intentions of the Children and Young Persons Act of 1964 the existence of children's court has only become a reality during the regime of the Children Act of 2001.<sup>205</sup>

From these two scenarios, one under the Children and Young Persons Act of 1964 and the other under the Children Act of 2001, a pertinent question could be raised as to the reason behind this distinction. The context in which the Children Act of 2001 came into operation sheds some insight on this. International pressure on the realization of human rights was evident and on 30<sup>th</sup> July 1990, Kenya ratified the United Nations Convention on the Rights of the Child and made a commitment to develop a National Plan of Action for children. Subsequently, Kenya had to act in accordance with its obligations, which included gradually implementing the provisions of international treaties. Lobbying efforts for the domestication of this ratified treaty, amongst other human rights treaties, were made by the NGO community in Kenya, particularly those dealing with child related issues.<sup>206</sup> For example, in 1997, Amnesty International lobbied extensively for the Kenyan government to amend laws to streamline them in accordance with international human rights documents. Part of their lobbying strategy involved calling on the international community as well as Kenyan citizens to increase the pressure on the Kenyan government to comply with the human rights treaties it had ratified (1997:11-14). Whereas other factors may have played a part in the

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<sup>205</sup> Some parts of the country are yet to have special children's courts but where they have been established they have been seen to promote the interests and welfare of children. Even in areas that do not have special children's courts, the courts adjudicating over juvenile cases are required to adhere to the rules set out in the Children Act of 2001.

<sup>206</sup> Kenya has a large NGO community. See a listing of a number of child related NGOs in Kenya compiled by the Child Rights Information Network available on [www.crin.org](http://www.crin.org).

developments within the juvenile justice system, it is evident that the need to meet its obligations under the international human rights regime informed the actions of the Kenya government. This position exemplifies the claim that the international conventions and rules have played a role in legal globalization (Muncie, 2005:46). The conditions facilitating the current operation of the Children's court are thus evident.

However, the conditions underlying the criminal justice system as a whole do not render restorative justice practices acceptable. Hence, the restorative potential of section 176 of the Criminal Procedure Code of 1987 remains inconsequential.

## **2.2 Court Orders on Conviction**

The range of orders that can be made by a court on the conviction of offenders are laid out in the Penal Code of 1985. Section 24 provides that:

Punishments that may be inflicted by a court are:

- (a) Death;
- (b) Imprisonment;
- (c) Detention under the Detention Camps Act;
- (d) Corporal Punishment;
- (e) Fine;
- (f) Forfeiture;
- (g) Payment of compensation;
- (h) Finding security to keep the peace and be of good behaviour;
- (i) Any other punishment provided by the penal code or any other Act.

Within the mandate section 24(i) of the Penal Code of 1985, the Probation of Offenders Act of 1981 provides that where an offender has been convicted of an offence triable by a subordinate court, the court may make a probation order in place of custodial sentence. In addition, section 3 of the Community Service Orders Act of 1998 entitles

the court to commit an offender convicted of an offence punishable with imprisonment for a term not exceeding three years, to perform community service.

The reference to the court orders as ‘punishments’ by section 24 of the Penal Code of 1985 suggests a punitive ethos within the mechanism dealing with offenders. Indeed the retaining of the death penalty to date seems to affirm this position. However, this chapter looks beyond the word ‘punishments’ and focuses on the actual operation of the orders for a proper analysis of the practices. Section 24 of the Penal Code of 1985 serves as a general sentencing guideline and the actual sentences to be meted out to the offenders are laid out in the provisions relating to the specific offences committed.

Compensation orders as recognized by section 24(g) bear a restorative potential; hence they are of interest to this thesis. As pointed out in chapter four, compensation was a central feature of the traditional settlement of all cases, including ‘criminal’ cases. The utility of this order lies in its attempt to bring some form of restoration for the victim as well. Indeed, of all the options laid out in section 24 of the Penal Code of 1985 the compensation order is the only intervention that focuses on the victim directly. In spite of this and the fact that compensation sits comfortably with community values, the courts rarely give this order (Achieng, 2006, Interview 14 June). Whereas the courts are presented with these diverse sentencing options, a large number of cases result in incarceration (Wanjala and Mpaka, 1997:136). However, there has been an increasing rate of probation and Community Service Orders in recent years.<sup>207</sup> This chapter

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<sup>207</sup> This trend shall be discussed in detail in Section 2.2.

discusses in turn the practice of imprisonment, Probation Orders and Community Service Orders.<sup>208</sup>

### **2.2.1 Custodial sentences**

The congestion of prison facilities in Kenya raises concern regarding the over utilization of custodial sentences, particularly in cases where the courts have the option of meting out non-custodial sentences (LRF, 2005:9; Muhoro, 2000:325). As indicated in chapter one, the growth of the prison population in Kenya is alarming and the prison facilities have been stretched to the limit.<sup>209</sup> Without ignoring the impact of the national population growth on the prison population, congestion in prison facilities has been largely attributed to the preference of custodial sentences as compared to non-custodial sentences. Extensive research conducted by Legal Resources Foundation in 2005, in collaboration with both governmental and non governmental organizations indicates that 25% of the prisoners had been committed to sentences of three years and less (2005:36). Table 5-1 below illustrates this.

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<sup>208</sup> The other orders are mentioned alongside these main orders as well as in the final section that summarizes this chapter.

<sup>209</sup> For example the Nairobi Industrial Area Remand Home and Nakuru Main Prisons in June 2006 held, on average, 4805 prisoners and 1741 prisoners against a capacity of 1000 and 800 respectively. Data obtained from these prison facilities during fieldwork.

**NUMBER OF INMATES SERVING 3 YEARS OR LESS IN PRISONS**

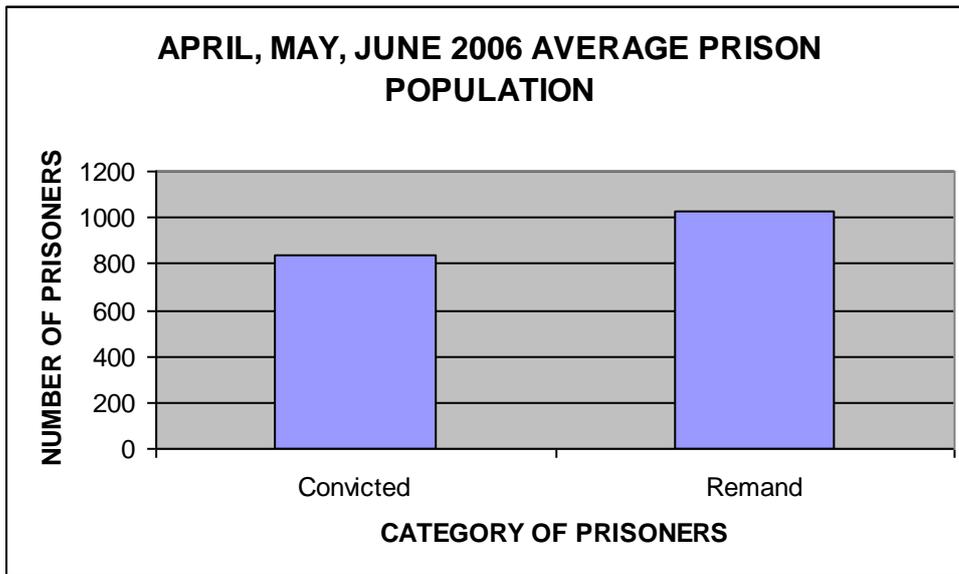
	<u>Number of inmates serving less than 3 years</u>		<u>% of inmates serving less than 3 years to total prison population.</u>	
	<b><u>2003</u></b>	<b><u>2004</u></b>	<b><u>2003</u></b>	<b><u>2004</u></b>
<u>Men</u>	<u>89760</u>	<u>86270</u>	<u>25.20%</u>	<u>20.2%</u>
<u>Women</u>	<u>10406</u>	<u>11320</u>	<u>2.9%</u>	<u>2.7%</u>
<u>Minors</u>	<u>1497</u>	<u>1361</u>	<u>0.004%</u>	<u>0.003%</u>
<b><u>Total</u></b>	<b><u>101663</u></b>	<b><u>98951</u></b>	<b><u>28.1%</u></b>	<b><u>22.9%</u></b>

**Table 5-1**

In effect these are prisoners amenable to non- custodial sentences. These statistics confirm that non-custodial sentences were not being utilized to the maximum.

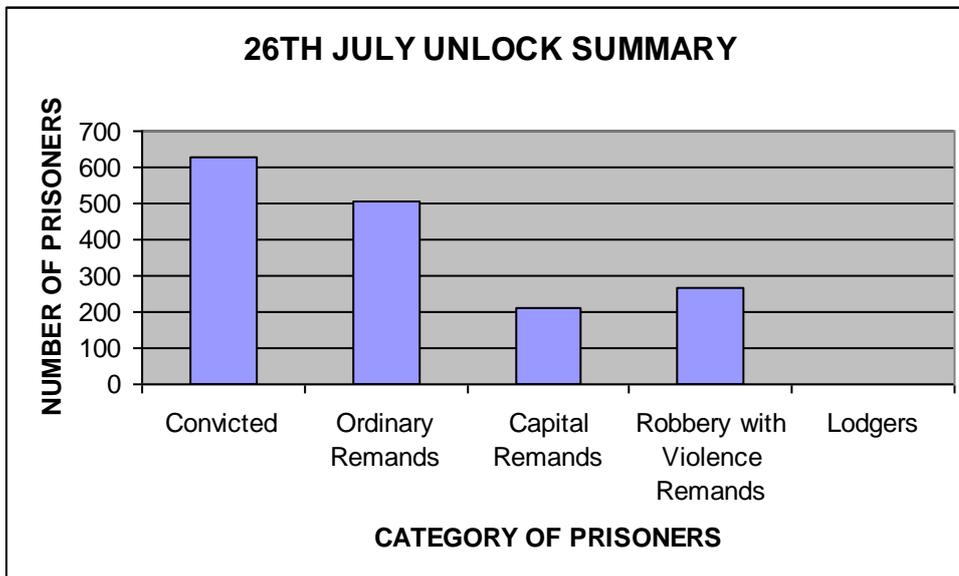
On the other hand, the high number of accused persons on remand pending conclusion of trial raises concern. Table 5-2 compares the number of convicted prisoners to remanded prisoners over a couple of months in Nakuru Main Prison. Table 5-3 shows a sample day summary of a more specific categorization of offenders in the same prison.

**COMPARISON BETWEEN CONVICTED PRISONERS AND REMANDED PRISONERS AT NAKURU MAIN PRISON**



**Table 5-2**

**SAMPLE DAY SUMMARY OF PRISONERS AT NAKURU MAIN PRISON IN 2006**



**Table 5-3<sup>210</sup>**

<sup>210</sup> Data obtained from the Nakuru Main Prisons Documentation office in July 2006.

From the statistics above, the issue of accused persons on remand becomes pertinent in this discussion. This high number of remanded persons in prison facilities suggests that an attempt to concentrate on ‘imprisonment’ in terms of convicted prisoners would curtail a proper analysis of the practice of imprisonment. The crucial starting point is that one must first rid oneself from an understanding of remand as ‘temporary’ custody in the literal sense of the term. Research reveals that accused persons on remand in ‘prison’ facilities in Kenya may be in custody for extended periods. For example, during the researcher’s survey, a spot check of prison blocks at the Nairobi Industrial Area Remand revealed that some offenders had been on remand for periods ranging between two and three years.<sup>211</sup>

For all intents and purposes this could be construed as ‘prison sentences’. Yet, there is a marked distinction as to the life of an accused person on remand from that of a convicted offender, despite their being in the same facility. This fact is of particular relevance to this thesis since ‘remand’ is in effect mere restriction of movement. Unlike convicted inmates, remanded persons are incorporated in neither the work regime or training programmes available in the prison facilities. The next section discusses the two categories of persons in confinement and unearths rationalities that guide the criminal justice system as a whole.

#### **2.2.1.1 Convicted Inmates**

Once convicted, offenders are engaged in the full prison regime, which involves assignment to labour activities. These labour activities are geared towards instilling a

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<sup>211</sup> 27<sup>th</sup> June 2006.

sense of discipline in the convicts and thus bringing about behavioural change. Within the Kenya Prisons Service there are departments geared towards imparting skills such as tailoring, masonry, carpentry which would provide the offender with some source of income once released from prison (Odera, 2006, Interview 3 July).<sup>212</sup> Prison institutions operate on the premise that disciplining offenders through routines and allocated labour results in the normalization of offenders into law-abiding citizens. Table 5.4 below, for shows the schedule of Nakuru Main Prison.

#### **NAKURU MAIN PRISON ACTIVITY SCHEDULE**

<b>TIME</b>	<b>ACTIVITY</b>
7.00 a.m.	Breakfast
8.00 a.m. – 11.00 a.m.	Labour (Industry and Out of prison work)
11.00 a.m. – 13.00 p.m.	Lunch
13.00p.m. – 15.30p.m.	Labour (Industry)
16.00p.m. – 18.00p.m	Dinner

**Table 5-4**

The rationale behind the emphasis on routine is that by subjecting the body to confinement and to set routines, an individual gradually becomes disciplined. This disciplining of the body becomes the first step in normalizing an individual. Routine adherence to set rules has the impact of producing docile bodies which can then be controlled in accordance to the demands of society (Foucault, 1977a:136). The immediate psychological response of offenders once confined in prison affirms this contention. Senior Macharia argues that it is this psychological state of mind that

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<sup>212</sup>The training departments are: carpentry, metal work, upholstery, floriculture, horticulture, electrical and mechanical (Ongeri, 2006, Interview 26 July).

maintains the safety of unarmed prison officers who are largely outnumbered by the large prison population (2006, Interview 19 June). For example, in the Nairobi Industrial Area Remand Home an average of 4805 prisoners is manned by 50 prison officers on average at any single shift.<sup>213</sup> During fieldwork, concerns were raised over the security of such officers, particularly due to the lack of necessary surveillance technology that would monitor the whereabouts of officers on duty.

Apart from security concerns arising from understaffing, it is difficult to pay attention to the individual needs of the offenders who greatly outnumber the officers. At the same time the preoccupation with actual physical control of offenders through labour routines and a 'military like' control by prison officers raises doubt as to the long-term transformation of offenders. It can be argued that given this set of circumstances restoration of offenders into law-abiding citizens can hardly be done. While it is stated that rehabilitation and reformation of offenders is one of the core functions of the Kenya Prison Service, the circumstances within the prisons do not reflect this objective.

However, some prison officers argue that the Prisons Service is still committed to rehabilitate offenders and the welfare officers play a crucial role in identifying special offender needs (Odera, 2006, Interview 3 July). With a few trained social workers within penal institutions, counselling services are offered to interested offenders. This is, however, random and only a few prisoners benefit from these services (Ongeri, 2006, Interview 26 July). A crucial point raised by the majority of the prison officers interviewed was the irony of a military –type training of prison officers as preparation for engaging in rehabilitative tasks (Macharia, 2006, Interview 19 June; Karanja, 2006,

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<sup>213</sup> Statistics obtained from the administrative office of the prison.

Interview 3 July; Njihia, 2006, Interview 26 July). Corporal Karanja for example illustrated this irony through recounting incidents of his training. In a rehabilitation training session, he narrated, the trainer would focus on the brutality of offenders hence the need for aggressiveness in dealing with them (2006, Interview 3 July).

The statement indicating the reform objectives of the Prison Services published on the Governance Justice Law and Order Sector website summarizes the current status of the penal institutions.<sup>214</sup> It is stated that:

The Kenya Prison Service seeks to move away from just being a holding facility for offenders into a more dynamic institution that leads in reforming people who are under its charge to become better citizens and hence less likely to revert back to criminal activities (2006).

Whereas a disciplinary way of life may invoke obedience from the convicts, the long term ‘normalization’ of the offender is not guaranteed. Affirming this argument, repeat offenders interviewed at the Nairobi Industrial Area Remand Home expressed their dissension from the claim that imprisonment reforms offenders. Onyango, for example, an adult offender who started engaging in criminal activities at the age of fourteen concluded that “imprisonment merely hardens prisoners. Once hardened, they commit more crimes on being released from prison” (2006, Interview 28 June).<sup>215</sup> Njuguna, another repeat offender explained: “prison conditions are hard and sometimes deterrent. However I must admit that after the first arrest, the second arrest and subsequent incarceration are not too traumatic” (2006, Interview 27 June).

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<sup>214</sup> Governance Justice Law and Order Sector (hereinafter referred to as GJLOS) is a department within the Ministry of Justice and Constitutional Affairs having the mandate to spearhead reform in justice related institutions in Kenya.

<sup>215</sup> See Barasa and Kilalo (2006); Odero (2006) and Kagema (2006) for illustrations on how prisons in Kenya harden criminals. See also Daily Nation for an editorial drawing a link between imprisonment and recidivism in Kenya (2005).

An exclusive media report on two dangerous offenders in Kenya, illustrated the impact of prison in the ‘graduation’ of minor offenders to hardcore criminals. Mwangi, one of the two offenders, narrated the impact of a wrongful conviction and subsequent imprisonment which directed the course of their lives. He recounted, “In Kamiti Maximum Security Prison, we met many seasoned criminals...on completion of the jail term, we joined a group of ex-convicts who introduced us to the trade. We have never looked back...” (Kagama, 2006:2).

As detailed in chapter one, recidivism rates amongst ex-convicts are very high.<sup>216</sup> What is evident is that the GJLOS description of Kenya Prisons as ‘a holding facility’ is not far from the reality (2003). This description is particularly accurate when discussing a special category of convicts: the capital convicts. These are the offenders found guilty of having committed aggravated robbery or murder under sections 296/2 and 202 of the Penal Code of 1985 respectively. However in practice, none of the offenders are executed. These offenders are confined with no work allocated to them.<sup>217</sup> Onger, a prison officer at Nakuru Main Prison remarked that:

Ideally condemned inmates are supposed to be in Kamiti (Naivasha). However due to factors such as health conditions, pending appeal cases, other pending cases some convicted capital offenders remain in Nakuru prison. They do not do any work. They just stay in doors. There are about 300 capital offenders here (2006, Interview 26 July).

Amongst the two crimes that attract the death penalty, that is, murder and aggravated robbery, it is worth mentioning the dynamics of aggravated robbery. An analysis of the

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<sup>216</sup> See chapter one, pg 12.

<sup>217</sup> Rule 103(1) of the Prison Rules, Prison Act of 1977 provides that:

Notwithstanding any other rule, a prisoner under sentence of death shall not be required to work.

sentence meted out to accused persons convicted of aggravated robbery reflects rationalities within the criminal justice system. Section 296 of the Penal Code of 1985 provides that:

- (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years together with corporal punishment not exceeding twenty-eight strokes.
- (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

Further section 297(2) prescribes a death penalty for attempted aggravated robbery. These provisions, drafted in the widest sense, have resulted in a high number of charges under this section. A critical analysis of the provisions in section 296(2) suggests that the facts of the offence need not exhibit violence. It suffices to prove that an offender was in the company of others. The implication of this is that the death penalty is meted out to offenders who should have been sentenced to serve time in prison. Moreover, judicial opinion has made it clear that these provisions attract a mandatory death penalty. In the case of *Johanna Ndung'u & Others v. Republic*,<sup>218</sup> the court of appeal emphasized that if the proved facts show that 'robbery with violence' under sec 296 (2) has been committed then the trial magistrate is obliged to convict and impose the death penalty. In view of this, the law is seen to identify the categories of offenders who deserve total banishment from society. Whereas in the case of murder, this may be justified in terms of the obvious gravity of the offence, this is not the case for the provisions of section 296(2) of the Penal Code of 1985 which does not always relate to

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<sup>218</sup> Court of Appeal Criminal Appeal No. 116 of 1995 (Unreported).

grave actions. The interesting turn of events is that once convicted, these ‘dangerous criminals’ are then confined for life and do not engage in any work.

The prison as an institution is thus seen as being deterrent in the literal sense: removing the offenders physically from society to prevent them from committing crimes. Hence, a cycle of conduct is created where offenders are isolated from the public, released on completion of the sentence and isolated again when they commit further crimes. As the offenders go through the motions of this cycle, they graduate to more grave crimes. At the end of the cycle, when they commit capital offences, they are isolated for life. It must be noted that the prison institution does not operate in isolation towards the achievement of its own objectives. Operating within the general schema of society, the prison institution is utilized in accordance with the general societal ethos at any given time. In this case, the general economic socio-political system identifies who or what classes of people endanger society. The prison institution is in turn used to keep these people away. More precisely, if they are normalized within the course of confinement, they are accepted back into society, but if not, they find their way back to prison. The role of prison is thus reduced to keeping these ‘dangerous people’ under check, as described by Murray who states that “if the question is ‘How can we restrain known, convicted criminals from murdering, raping, assaulting, burglarizing and thieving?’ Prison is by far the most effective answer short of the death penalty” (1997:20).

This view finds support from the existing prison conditions in Kenya. During a survey of prisons in Nairobi and Nakuru the researcher noted that prison conditions were still very disturbing, in spite of the government’s recent reform initiatives. No doubt reforms such as the provision of proper uniforms to convicted offenders are

commendable but the general conditions remain wanting. The sleeping arrangements for example are appalling. As indicated in chapter one, from a spot check of ten blocks, for an average of 120 offenders the average number of single sized mattresses was 33.<sup>219</sup> Hence, about three offenders would share a small mattress most of which were in a bad state. By the same token the feeding program is a degrading exercise. Without making mention of the quality of the food, the serving process is itself wanting. Prisoners queue neck to neck as the food is served in a split second and, to avoid spilling of one's portion, they move quickly pushing each other. The sight of a mass movement of ill clothed offenders for food is nothing but degrading.<sup>220</sup> Whilst some of the prison conditions may be discussed in light of lack of resources and the general economic status of the country, degrading routines find no such justification. They shed light on the use of prison for a certain category of people in society. It is not out of place to come across members of society who think offenders are being given too much regard in modern times. For example a prison officer commenting on the new reforms stated, "I am of the view that prisoners are now given too much leeway, too many privileges. They even have a shop within the prison where they purchase items they want" (Macharia, 2006, Interview 19 June)

Another prison officer suggested that the reforms in prisons have been inconsequential and should instead target the prison officers who ran prison. He remarked:

Reforms such as provision of televisions are not crucial; other things should have been addressed first. The prison officers for example should have been targeted, as they are the ones who facilitate the realizing of prison objectives.

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<sup>219</sup> Fieldwork survey June 2006.

<sup>220</sup> Prison uniforms are only given to those who are convicted and are serving their terms. Accused persons on remand are not given uniforms.

The working and living conditions are terrible. For example the housing is poor and the provision of uniforms is inadequate. They are not motivated to do their job (Waigiri, 2006, Interview 28 June).

Section 183 of the Penal Code of 1985 is a stark example of the role played by the prison institution. It lays out certain categories of people who “shall be deemed to be a *rogue and vagabond*” hence “guilty of a misdemeanour and are liable for the first offence to *imprisonment for three months and for every subsequent offence to imprisonment for one year*”(emphasis added). Amongst the categories targeted by this provision are those people suspected of being thieves and have no visible means of subsistence, as well as those attempting to procure contributions under false pretences. In effect, the system identifies a group of people likely to commit crime based on their economic circumstances and keeps them away from actually committing crime. Ironically, three months imprisonment is seen as a solution for a person who does not have a means of subsistence and is likely to commit a crime.

This lends support to the argument that the prison institution has actually been used as ‘holding facility’. It would be idealistic to imagine that such a ‘rogue/vagabond’ would reform during the three months imprisonment. The most likely outcome is that, due to continuing economic challenges, the ex convict remains predisposed to a life of crime. On committing a further crime, the ‘rogue/vagabond’ is then arrested again and kept away for a longer period, this being a subsequent arrest. Having joined the ‘prison cycle’ through associating with hardcore criminals, an offender may then graduate to commission of grave crimes. This exemplifies Foucault’s analysis that “power passes through individuals it has created” (2004:30). The prison institution in Kenya is therefore seen as part and parcel of the entire system that reproduces subjects, such as

‘rogues’, and proceeds to govern them. More importantly, the reason for this process is clear: society must be protected from these dangerous individuals.

### **2.2.1.2 Remand Prisoners**

As indicated above, there is a large number of persons remanded in prison awaiting the conclusion of their trials. Of interest to this analysis are the long periods, of up to four years, served on remand. The effect of this confinement on the accused persons, who in certain instances are acquitted, is worth looking into. On the face of it, the prison institution can be absolved from its responsibility in this injustice by the role of the courts. It could be argued that the length of time one is remanded lies entirely in the hands of the court. However, such a rash conclusion may hinder a clear appreciation of the implications of serving of this ‘term’. In his analyses of penal mechanisms, Foucault indicates the usefulness of “regarding punishment as a political tactic not simply as consequences of legislation or as indicators of social structures” (1974:23). Thus, while intervening factors such as overwhelming workloads in the judicial service cannot be ignored, a closer look at this scenario elucidates the underlying conditions that support this system.

Rule 86(1) of the Prisons Rules laid out in the Prison Act of 1977 provides that “every convicted criminal prisoner shall be required to engage in useful work...” This provision exempts accused persons on remand from the mandatory engagement in ‘useful work’. Under section 44 of the Prisons Act of 1977, prisoners on remand are only required to keep their cells, clothes and utensils clean. Based on the principle that one is innocent until proven guilty, the remanded persons are therefore not fully

engaged in the prison regime. The prison authorities, under Rule 102 (2) of the Prisons Rules have discretion to provide employment to such remand prisoners given at their own request, in which they receive payment. Lamenting that having a high number of remanded persons who do not engage in work causes a strain on prison resources, as well as facilitating idleness, Senior Macharia, a prison officer raised a concern that “while on remand, accused persons do not work. It is indeed an economic loss for the government” (2006, Interview 19 June).

The point to note is that for remand prisoners, the prison institution acts as a ‘holding facility’ in the literal sense of the term; it confines accused persons until the court makes a declaration of whether they should be allowed back into society or be incarcerated to serve a jail term. Cognizant of the long periods in which such individuals remain in remand and also in the light of their unproven guilt, two issues can be raised. The first issue relates to the impact of facilitating the interaction of persons who remain idle during remand.<sup>221</sup> Indeed, this idleness may create opportunities to forge new alliances for future crimes as well as encourage some innocent ones to join a life of crime. With regard to offenders who are convicted, the term served on remand is computed against the sentence meted out. In effect, this means that such offenders served part of their sentence as remand prisoners. In other words, as remanded persons they are not duly engaged in the prison regime. This turn of events buttresses the fact that the focus of the practice of imprisonment is not the individual offender; it focuses on the broad objectives that relate to the safety of the society.

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<sup>221</sup> Rule 102, Prisons Act of 1977 provides that unconvicted prisoners may be permitted to associate together.

The second issue of concern that relates to these extended remand terms are the underlying factors that support this system that may, though a contradiction in terms, be referred to as pre-judgment sentence. Once again this is not merely an effect of legislation or the judicial structure effect. In Foucault's terms, it reflects penal mechanisms as complex social functions (1974:23). Apart from the capital offences, all the other offences are bailable at the discretion of the court. However, in many instances, offenders are unable to meet the bail terms, which reflects their economic status.<sup>222</sup> This fact leads the discussion, again, to the categories of people reproduced and dealt with by the justice system as a reflection of overall societal values. The impression created by the system is that accused persons in the criminal justice system who are economically challenged, as evidenced by their inability to meet bail terms, are most likely criminals and the unjustified remand term is not an injustice. It is a process of protecting society from criminals in the intervening period between arrest and conviction. There have been recommendations that bail terms should be amended to be affordable to a majority of citizens but the laxity of implementation of these terms suggests a system that labels 'guilty before proven innocent'.

### **2.2.1.3 Incarceration as a Complex Social Function**

In an analysis of penal systems in Africa, Clifford concludes that "recourse to imprisonment in Africa is not so much a desire to punish an offender, as it is a reflection of the failure so far as to devise suitable alternatives" (1974:190).<sup>223</sup> This

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<sup>222</sup> A research conducted by Legal Resources Foundations highlights that a large number of accused persons are economically challenged (2005:9). This research was conducted through a project which is a collaboration between government institutions (prisons, judiciary, and police) and the civil society.

<sup>223</sup> There have been minimal changes in the main criminal justice system since independence to date hence the relevance of this statement made in 1974. For example, in addition to the penal options set out in section of the Penal Code of 1970 the framework for probation has been in place since independence.

thesis, however, argues that the extensive utilization of imprisonment has got little to do with the options available for offender treatment. Instead, it is the underlying conditions and rationalities that render imprisonment acceptable. In terms of governmentality, the analysis in this chapter illuminates the strategies used to govern offenders and the rationalities underpinning the criminal justice system in Kenya.

When described in terms of governing the conduct of certain classes of offenders in order to protect society, as done in this chapter, the analysis of imprisonment seems over simplified. In fact, it comes out as a radical description that is ignorant of other elements, such as the rehabilitative agenda of prisons. Prison officers interviewed during fieldwork indicated right at the outset that the role of prison was to rehabilitate offenders (Macharia, 2006, Interview 19 June; Karanja, 2006, Interview 3 July; Njihia, 2006, Interview 26 July). Yet it was evident from these interviews the actualization of rehabilitative strategies was not a reality. Thus a crucial question is raised in this genealogical analysis: why does rehabilitative ideology take centre stage in prison analyses if the interests and the outcome of imprisonment are clear? In other words, what is the point of consensus between this seemingly mass control of offenders that is not individualized on the one hand, and the dominating discourses on the rehabilitative role of prison on the other hand?

Elucidating the nature of genealogies in Foucauldian terms, Voruz describes the role of a genealogist as an attempt to:

Draft a 'history' of this series of interpretations: to demonstrate the very character of interpretations as interpretations no doubt, but, even more significantly, to show how interpretations have come to be seen as true (2005:165).

Embarking on a genealogical analysis, this thesis sought to answer this question by shedding light on what has facilitated the production of ‘truth’, which claims its authority in interpreting ‘what is’. A crucial starting point relates to the tendency of analyses to focus on institutions rather than focusing on practices. The result of this is failure to capture deviations from the expected and ‘obvious’ conclusions associated with such institutions. Prison as an institution has not been an exception.

The context in Kenya offers an interesting genealogical picture. An impact of colonization was the dissemination of certain views regarding colonial institutions to the natives. Major colonial institutions such as, the schools, the churches and hospitals had the objective of making a person ‘better’; a process which would be regarded as normalization to what was regarded as ‘proper’ in the eyes of the British colonizers. The schools made natives literate hence more ‘knowledgeable’ than their illiterate counterparts; the result of going to church was becoming purposeful, disciplined and ‘morally upright’. The transformation of natives who attended such institutions was obvious. The educated natives got better jobs, just like the natives who became Christians benefited from programs ran by the churches. These institutions were therefore similar in their mode of operation and, by transcending through all spheres in life, the result was a general positive outlook to the ‘colonizers’ ways’.<sup>224</sup> Hence the natives’ perception of the operation of different institutions during the colonial era was influenced by the asymmetrical interaction with the colonizers, which placed Western ideas on a pedestal.<sup>225</sup>

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<sup>224</sup> See Fanon who describes the transformation of an African man who ends up idolizing what the west represents (1986:23).

<sup>225</sup> For a detailed analysis on the impact of colonization on natives, particularly with regard to discarding languages see Thiong’o (1986).

Similarly, the prison institution was regarded as an institution that attempted to make offenders better people. The classic scenario associated with prison is that prisoners were trained in various skills that equipped them to earn a living on release. The rehabilitative connotation of prison was subsequently passed on. Yet, right from the colonial era, prison served as a point of controlling people who threatened the equilibrium of society (Clifford, 1974:189). The fact that colonial prison may have exercised rehabilitative strategies may not be discounted altogether. However, the outright use of prison to deter native leaders who were influencing others against the colonial government suggests that prison was used for purposes similar to modern Kenya. The imprisonment of *mau mau* veterans,<sup>226</sup> for example, was to curtail their activities, just like members of sects<sup>227</sup> in modern Kenya are imprisoned to deter their activities (Clayton, 1985:153).

This understanding of imprisonment as a control mechanism further explains the perception of prison as a rehabilitative institution in spite of practices inconsistent with this. Whereas rehabilitative objectives seem to lie at one end of the spectrum and the actual practice of imprisonment in Kenya at the other extreme, there is a point of convergence. On the face of it there seems to be no point of convergence between rehabilitation and punitive mechanisms in the criminal justice system. However, a further analysis leads to a different conclusion. Illustrated in this chapter is how imprisonment is used as control mechanism, governing the conduct of offenders through confinement. Similarly rehabilitative strategies are control mechanisms that seek to govern the conduct of individuals. Through rehabilitation, offenders are

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<sup>226</sup> This was an organization within the Kikuyu tribe that revolted against the colonial government.

<sup>227</sup> For example, the Mungiki sect, which consists of Kikuyu traditionalists, has been linked to the commission of violent crime.

‘normalized’ to a state that is acceptable to society. In both extremes, rehabilitation versus incapacitation, the core theme is subjecting the offenders to a rein for the benefit of the community. Devoid of critical analysis as done above, imprisonment is presumed to be synonymous with rehabilitation. This assumption is based on the notion that offenders are released from prison when the criminal justice system views them fit to interact with community members. The test as to fitness is objective: serving the jail term. Thus an analysis of power seeks to elucidate how this interpretation of imprisonment as rehabilitative is given the authority of truth in spite of realities that are inconsistent with this.

Although imprisonment is by far the most resorted to criminal intervention, probation and Community Service Orders are also meted out in some cases. The next section analyzes these orders in the light of issues raised in this section.

### **2.2.2 Non – custodial Sentences: Probation and Community Service Orders**

The Probation Department supervises both probation and Community Service Orders. Both adult and juvenile offenders given either probation or Community Service Orders become the responsibility of the department; probation officers do not specialize in supervising one offender category to the exclusion of the other. Under sections 4 and 5 of the Probation of Offenders Act of 1981, probation officers are required to supervise convicts for periods not less than six months and not exceeding three years. Supervision is carried out through home visits or, more often than not, through sessions carried out in the probation officers’ offices. These sessions are either done with the individual probationer or in groups consisting of several probationers. Service

guidelines for Probation Orders focus on the offender. The *Probation and After-care Services Department National Standards Manual* sums up the supervision plan in two main steps: Firstly, to identify the underlying factors leading to re-offending and secondly, design a suitable plan to dealing with these issues (1994:13). The end which this plan is geared towards is encapsulated in the mission statement of the Probation Department: “To offer appropriate services to community based offenders in order to make them socially stable and law abiding” (2006:1).

The obvious focus on the offender is reiterated in the list of functions of the Probation Department laid out in the *Customer Service Charter* (2006). However, a community dimension is mentioned. The role of the Probation Department is summed up to be: “resettle reintegrate and reconcile offenders with their communities and enabling them to participate in development activities”.

The reconciliation envisaged in this case, however, appears to be preoccupied with facilitating the reintegration of the offender in the community. It thus deviates from the embracing of victims’ needs which is a central component of contemporary restorative justice discourses.<sup>228</sup> As discussed in chapter three, a distinction is made between restorative justice and rehabilitation of the offender (Johnstone and Van Ness, 2007c:7-8). While rehabilitation may be an outcome of restorative justice practices, rehabilitative processes do not necessarily amount to restorative justice. Restorative justice focuses on repairing the harms resulting from the offence (Van Ness, Morris and Maxwell, 2001:3). The effect of the offence not only impacts upon the victim but the offender as well. One of the effects of crime is that the relations between the offender

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<sup>228</sup> See for example Johnstone (2002) and Shapland et al (2006).

and the community are harmed. Restorative justice also seeks to restore the offender back into the community. It is this aspect of restorative justice that is associated with rehabilitative processes. However, it should be noted that in cases where offences committed do not involve direct victims, restorative justice processes may resemble rehabilitative processes focusing on the offender.

Restorative justice practices have not been properly institutionalized within the probation program. An elaborate framework laying clear guidelines and standards to facilitate a clear recognition of restorative justice in the system is yet to be developed. Restorative processes are largely left to personal initiatives of the probation officers. For example, Gachihi, a senior probation officer explained that “to facilitate reconciliation, the Probation Department tries to organize discussion with victims but this depends on personal initiative” (2006, Interview 11 July).

Similar sentiments are shared by Kibet, a probation officer who stated:

As probation officers we try to facilitate reconciliation between the offender and the victim, which is a very fulfilling exercise. Particularly in petty offences and assault cases where reconciliation is not achieved, we feel that the matter has not been resolved. Our view is that in that case the offence could be repeated as there still are ill feelings not dealt with. However this is a matter of personal initiative on the part of the officer (2006, Interview 13 July).

As an observer the researcher sat through supervision sessions in which some offenders recounted the steps they had made towards reconciliation with the victim, as a follow-up of their previous sessions.<sup>229</sup> Similarly, the officers support reconciliation of the offender and their own communities. What has sustained these processes in the absence

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<sup>229</sup> Non-participant observation was conducted at the Nakuru Probation Department in July 2006.

of a proper procedural mandate facilitating restorative processes? Probation officers interviewed drew a correlation between their actions and their cultural values (Odhiambo, 2006, Interview 6 July; Gachihi, 2006, Interview 11 July; Kibet, 2006, Interview 13 July; Muthoni, 2006, Interview 20 July). They, for example, reveal that they perceive the foundation of probation services to be the family and the community. Odhiambo asserted:

Without the family the Probation Department is virtually non-existent. Whereas it has been suggested that the family structure is disintegrating, this process is still slow in this context as compared to the west. Our cultures and social systems are still strong (2006, Interview 6<sup>th</sup> July).

Gachihi, another probation officer, supported this view and noted that “there is high family support, which makes supervision of offenders on probation possible. The societal ties, the school structure and the provincial administration are fundamental” (2006, Interview 11<sup>th</sup> July).

Whereas these optimistic views on societal ties may seem merely idealistic, particularly in a context in which modernity is gradually being embraced, there is evidence that suggests otherwise. The relevance of cultural values in modern Kenya was put to the test during the lengthy constitution review process in 2002. Based on views collected from citizens all over the country, the draft constitution expressed in no uncertain terms that community values were still relevant in modern Kenya. Section 26(1) of the zero draft declares:

This Constitution recognizes culture as the foundation of the nation... and the bedrock on which all spheres of individual and collective lives and in particular-

- a) affirms the values and principles of the unwritten constitutions of all the communities of Kenya, their past traditions, present struggles and future aspirations;

Specifically addressing the relevance of traditional practices having a bearing on the conduct of individuals, Section 31(f) of the zero draft states that the State shall “promote and enhance the traditional system of governance, discipline, respect and integrity through age sets, age groups and traditional associations or clans”.

The role of the extended family, and by extension the community, in an individual’s life is still evident. Indeed, social ceremonies amplify the existing community ties.<sup>230</sup> Although there is a lot of Western influence in the mode in which such occasions are conducted, cultural processes epitomizing the community are still embraced. It should however be noted that economic conditions have played a role in perpetuating community ties. The lack of a welfare scheme necessitates community ties which provide support to the economically challenged in the community. These existing community ties explain the attitude of the probation officers, who through personal initiatives, facilitate restorative processes.<sup>231</sup>

An overview of restorative processes within the Probation Services Department reveals that these are loosely structured. There are certain contexts, however, where the department is keen to engage in restorative processes in a bid to check the double punishment of offenders. Communities such as the Maasai and other pastoral communities still have very strong ties between them. As a result, even after going

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<sup>230</sup> Examples of such social ceremonies are traditional marriage negotiations and funerals.

<sup>231</sup> The nature of community ties also impacts on the criminal justice system, particularly when dealing with juveniles. For example, in cases where children brought to court in need of care and protection, i.e. when they are found living on the streets, courts have to deal with community dynamics realizing that in most instances juveniles are left in the care of relatives due to economic reasons.

through the criminal justice system, the offender still has to deal with the issue of being accepted back into the community. Odhiambo, a senior probation officer illustrates:

While working with the Maasai, I realized that even when one is taken through the criminal justice system, the community still proceeded to engage in restorative activities to allow the offender back into the community. In such cases the Probation Department uses the community in the process to achieve the department's objectives as well as the community's (Odhiambo, 2006, Interview 6 July).

Within such communities that have maintained very strong community ties, the issue of double 'punishment' becomes a pertinent concern. However, this practical scenario indicates the plausibility of developing restorative processes within the criminal justice system that take into consideration the cultural demands. Where the restorative practices are left to the devices of the indigenous structures, the offender inevitably faces a second 'trial' alongside the mainstream practices.

Having discussed probation-based restorative practices as processes dependent on the personal initiative of probation officers, it is important to contextualize this within the entire criminal justice system. As has been contended in this section, the instances in which restorative practices are invoked depend entirely on the discretion of probation officers. The courts, however, determine the number of cases actually handled by the Probation Department. As illustrated, over the years courts have been reluctant to mete out non-custodial sentences. Recently, however, there has been a steady rise in the number of non-custodial sentences. Tables 5-5 and 5-6 below map out the growth of the probation population.

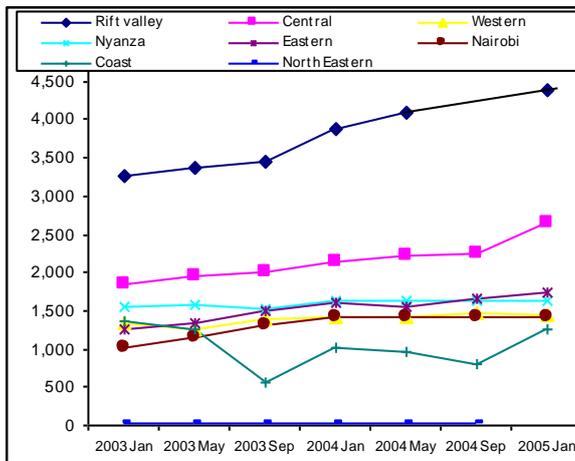
## PROVINCIAL PROBATION GROSS TOTAL REPORT

Province	Jan-03	May-03	Sep-03	Jan-04	May-04	Sep-04	Jan-05
Rift valley	3,272	3,380	3,453	3,869	4,092	Data not available	4,373
Central	1,835	1,941	2,016	2,144	2,208	2,253	2,641
Western	1,325	1,257	1,378	1,424	1,429	1,481	1,457
Nyanza	1,561	1,567	1,516	1,640	1,627	1,640	1,627
Eastern	1,269	1,339	1,494	1,593	1,561	1,666	1,751
Nairobi	1,027	1,163	1,320	1,415	1,427	1,417	1,417
Coast	1,364	1,245	574	1,004	956	797	1,259
North Eastern	35	15	34	29	30	29	Data not available
<b>Total</b>	<b>11,688</b>	<b>11,907</b>	<b>11,785</b>	<b>13,118</b>	<b>13,330</b>	<b>9,283</b>	<b>14,525</b>

Table 5-5<sup>232</sup>

<sup>232</sup> Statistics obtained from the Kenya Legal Resource Foundation.

## GROWTH OF PROBATION IN KENYA (2003-2005)



**Table 5-6**

In the absence of operational changes in the carrying out of Probation Orders, this steady increase begs an explanation. This should not be readily interpreted as a radical change in principle from a preference for incarceration to a system embracing values underlying non-custodial sentences. Conclusions to the contrary can be made from the indications made as to the motivation for this turn of events. While announcing the release of a batch of prisoners on presidential amnesty, the Minister for Home Affairs was quoted lamenting that congestion and poor jail conditions were the major challenges faced by the Prisons Department (Barasa and Kilalo, 2006; Odero 2006). In the same vein the Chief Justice ordered judicial officers to mete out non-custodial sentences to petty offenders to ease the congestion in prison (Barasa and Kilalo, 2006). Preceding events to these policy directions must be taken note of. The Kenyan government has been under intense pressure from both within the country and from the international community to deal with prison conditions, which are considered to be

human rights violations.<sup>233</sup> The response to this was seeking alternatives to imprisonment. Probation Orders are thus being opted for in a bid to deal with the congestion crisis in prisons, as opposed to because of the restorative potential within such sentences. Affirming this contention, Kenya's representative to the UN Commission on Human Rights in 2004 highlighted that non-custodial sentences were instrumental in addressing the issue of congestion of prisons in Kenya (UNHRC, 2004:16).

In practical terms, recourse to Probation Orders without adjustments of the Probation Department will undermine restorative efforts in the long run. The Probation Department faces the challenge of inadequate human resources. In 2006, the Department had 269 employees to deal with 14,000 offenders under probation, 19,000 under community service order and 800 in need of care (Odhiambo, 2006, Interview 6 July). With increased workload, the probation officers may be discouraged from initiating restorative processes, which are time consuming; the overwhelming workload may demand that they concentrate on the basic minimum of probation practices. It could therefore be argued that if the criminal justice system were embracing the restorative potential of the probation terms, increase in the human resources within the Department would have accompanied the change in sentencing trends.

Contrary to Probation Orders, whose restorative potential is dependent on the individual officer, Community Service Orders are described in the practice guidelines manual as restorative (Probation Department, 1999:3). Taking the standpoint that the victim is a member of the community, engaging the offender in activities benefiting the

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<sup>233</sup> This kind of pressure continues to date. See, for example, these reports on Kenya: Phombeah (2003a); US Department of State (2005).

community benefits the victim as well. On the introduction of Community Service Orders in Kenya in 1999, the National Committee of the Community Services<sup>234</sup> subsequently published practice guidelines for the stakeholders. In this document, Community Service is said to “represent a shift from more traditional methods of dealing with crime and the offender towards a more restorative form of justice that takes into account the interests of both the society and the victim” (1999:3).

Moreover:

The need to repair the harm done following the commission of an offence and the need for reparation to victims of crime remains an important goal of our criminal justice system. Such a restorative approach is in keeping with our traditional approach to crime and the sentence is likely to be very popular with the public if correctly implemented (1999:7).

Community service is thus considered to provide the offender an opportunity to make reparations for his wrongdoing by engaging in work that benefits the society.<sup>235</sup> The practice guidelines make it clear that Community Service Orders are particularly beneficial to first and youthful offenders (NCCS, 1999:3). These orders are restricted to offences punishable with imprisonment for a term not exceeding three years.<sup>236</sup> In accordance with the restorative ethos, the court is required to involve the victim in the sentencing process. Hence, the court should take into account any suggestion made by the victim as to the institution in which the offender should be committed to serve the order (NCCS, 1999:7). The materializing of the objectives of Community Service Orders is dependent on the community as volunteers in the scheme supervise the offenders. The heads of these volunteer institutions undertake the responsibility to

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<sup>234</sup> Cited hereafter as NCCS.

<sup>235</sup> Section 3(2) (b) of the Community Service Order Act of 1998 sets out the categories of work considered to be ‘public work’.

<sup>236</sup> *Supra* section 3(1).

supervise the offender and the Probation Services Department does the overall supervision of the institutions periodically.

In addition to the work done by the offenders, the volunteer supervisors are required to incorporate counselling of the offender, with the aim of rehabilitation. Towards this end, magistrates are required to convene supervisors' meetings to equip them with the necessary counselling skills (NCCS, 1999:13). However, counselling is not done as a matter of course and is only given if it is deemed necessary. The practice guidelines make it clear that it is not mandatory for an institution to provide counselling but this is recommended where possible. If counselling is deemed necessary and the volunteer institution is not in a position to offer it, then the Probation Department Services should be asked to "try to arrange counselling for the offender" (NCCS, 1999:28). This suggests that counselling is not mandatory and the test as to whether it is deemed necessary is subjective.

Whereas the Community Service Orders are said to be in keeping with the traditional communities' approach to crime, from the foregoing, conclusions to the contrary can be made. Being incorporated within the court process, the victim is passive all through the trial. The victim's role is limited to identifying the nature of the institution the offender should work in. The Community Service Orders are only restorative to the extent that the offender engages in work that benefits the community the victim is part of. This is a far cry from the traditional model of restorative justice in which parties with a stake in the matter are actively involved. Moreover, the indigenous restorative processes and their communities centralized 'restoration' in the true sense of the term. Through the whole process, as discussed in chapter four, it was for example envisaged that the

offender would be restored to a law-abiding member of the community. While it has been suggested that community service would have such effects, the actual practice suggests otherwise. It comes across as an emphasis on the work done, as opposed to the restoration of the offender to be law-abiding, hence, largely an alternative punishment to imprisonment. The practice guidelines, for example, indicate that “the performance of community service cannot by itself serve to rehabilitate the offender. There is need for community service to be complimented with counselling” (NCCS, 1999:13).

In spite of this unambiguous position highlighting the inadequacy of community work in the absence of rehabilitative processes, in practice, emphasis is placed on the work done. As illustrated above, the provision of counselling services is fluid. On the other hand, supervisors are given detailed guidelines that relate to the offender’s performance of the tasks. Far from being a reflection of traditional restorative practices, community service in Kenya can only be said to be restorative in terms of its symbolic reparation. In other words, the victim is a part of the larger community in which he or she lives and thus symbolically benefits from reparations to the community through public services (McCold, 2004:159). Although the extent to which community service realizes restorative objectives in practice is not well defined, its restorative potential cannot be overstated. However, similar to Probation Orders, the courts have over the years been reluctant to utilize Community Service Orders in place of imprisonment. Figure 6-1 above showed the high numbers of inmates serving terms of three years and less hence eligible for probation and Community Service Orders.<sup>237</sup> Courts have consequently been called upon to utilize probation and Community Service Orders to ease congestion

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<sup>237</sup> See page 207.

in prisons as contended above. The restorative objectives of these orders have thus remained at the periphery within the structure of the criminal justice system. Even where there have been attempts to institutionalize restorative processes as in the case of community service, restorative objectives have remained secondary without proper supporting structures.

### **2.2.3 Informal Justice Forums: ‘Chiefs’ Courts’**

The term ‘Chiefs’ Courts’ is used cautiously and merely as a descriptive term of an arbitrators’ role played by chiefs as opposed to actual courts established in law. Moreover, the analysis of the role of chiefs in criminal matters is ‘problematic’ as the law does not give them jurisdiction to act as arbitrators in criminal cases. The role of chiefs and assistant chiefs as provided in section 6 of the Chiefs Act of 1998 is to maintain order in the areas in respect of which they are appointed . Further, section 8 of the Chiefs Act of 1998 states that within their mandate to maintain order, chiefs are required to prevent the commission of offences when plans to commit offences are brought to their attention. Section 8(3) of the Chiefs Act of 1998 provides that on receiving information that a crime has been committed within the local limits of his or her jurisdiction, a chief is mandated to cause arrest of the offender and thereafter organize for the offender to be taken to court. The role of the chiefs in criminal matters is therefore to facilitate the apprehension of offenders and subsequently ensure that they are tried in a court of law. However, in practice, chiefs deal with both criminal and civil matters (Wamanji, 2006: 2).<sup>238</sup> Whilst the number of criminal cases heard by chiefs are few, compared to those heard in the formal courts, the role of chiefs as

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<sup>238</sup> During fieldwork the researcher sat in a chief’s office to observe his daily activities.

arbitrators in criminal cases is pertinent in this discourse for two main reasons. Firstly, the procedure followed by chiefs resembles a conference and is hinged on restorative justice principles. Chief Wanjau, emphasizing the restorative approach taken states:

A lot of people chose to utilize my office for resolving of cases because the approach taken by this office is reconciliatory. In addition to the services offered we give guidance and counselling. On the other hand, the police are seen to be harsh and rarely look at all the issues in a case; the police just concentrate on the legal aspects of the crime committed (2006, Interview 19 July).

Sharing similar sentiments, Chief Thokore affirms:

Some people opt to report cases, even criminal, to us rather than to the police because we are the ones on the ground and there is community goodwill towards reconciliation. People, including victims, are willing to discuss issues towards reconciliation (2006, Interview 18 July).

This thesis' interest in the role of chiefs is further based on their involvement in juvenile issues. These issues range from welfare issues to criminal offences committed by juveniles. To understand fully the operation of chiefs it must be noted that chiefs' offices are strategically located where people reside, that is, within easy reach, hence Chief Thokore's assertion that they "are the ones on the ground" (2006, Interview 18 July). As such, chiefs are part of the community allocated to them. They are therefore consulted on a vast range of issues, being the immediate contact people have with the authorities. This dual purpose mantle, a force of authority yet an easily accessible member of community, explains the nature of cases handled by chiefs. For example, juveniles who begin exhibiting truant and criminal tendencies may be reported to chiefs in a bid to put a stop to these tendencies before they graduate to the commission of grave crimes. The chief's office thus provides a crucial forum that has the force of

authority necessary to handle these juveniles without engaging them with the formal criminal justice system that may predispose them to further crime. The chief's authority is particularly felt in rural areas. Informality of the chiefs' offices facilitates the discussion of other causal factors that may need attention as well as looking out for the interests of the victim. For example, in certain instances, some juvenile criminal tendencies are encouraged by parents, hence the need to oblige such parents to take responsibility (Thokore, 2006, Interview 18 July).

The operations of chiefs as arbitrators is discretionary, mainly because this role is not prescribed by law but arises in the performance of their mandate to maintain law and order. However, the procedure followed by chiefs as arbitrators strikingly resembles the traditional methods of dispute resolution. In the absence of procedural guidelines for this arbitrator's role, Chief Wanjau indicated that "the chief's office is akin to a small claims court. The key resource required is knowledge on how to resolve cases" (2006, Interview 19 July).

Section 7 of the Chiefs Act of 1998 provides that a chief may employ any person or persons to help him carry out his duties. The impact of this provision is that chiefs engage the services of people capable of assisting her or him to act judiciously. In practice, persons so engaged are elders in the community, hence the resemblance of the 'chiefs' court' to traditional councils of elders. The researcher observed the settling of disputes in a chief's office which involved, firstly, the presentation of the facts by both sides to the chief and his elderly counterpart.<sup>239</sup> The chief and the elder then deliberated, in the absence of the parties, the judgment to be passed. All through the

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<sup>239</sup> Fieldwork conducted in July 2006.

deliberations, the underlying question was how reconciliation could be best achieved. As a result, the judgment given in these cases had an aspect of reconciliation for the parties. A striking position taken by the chief and the elder is that in cases that may have had repercussions for other family and or community members, summons are issued to obtain the attendance of such other parties. In the case of juveniles, the forum is attended by the juvenile offender, his or her family as well as the victim and his or her family and is geared “towards reconciliation” (Wanjau, 2006, Interview 19 July). Where the chief rules that the victim ought to be compensated, the offending juvenile’s family is required to pay this compensation (Thokore, 2006, Interview 18 July).

While dialogue is the key component in dispute resolution facilitated by chiefs, the normalization of offenders remains at the heart of the forum. Inevitably, in striving to ‘maintain law and order’ the chiefs are keen to prevent reoffending and normalize offenders to law-abiding citizens. Chief Thokore, for example, indicates that their ‘normalizing role’ is made possible by the authority they possess. With particular reference to juveniles he states:

We are an authority that children can look up to and fear. Therefore, there are instances when parents bring problematic children to us so that we can deal with the issue. In the case of truant children we reason with them and instruct them to go back to school (2006, Interview 18 July).

As an observer the researcher noted that the chief’s forum, akin to traditional councils of elders, emphasized the need for normalization and reconciliation in accordance with community expectations. For example, in one of the cases the researcher observed, a young woman had insulted her employer, who was also a sister-in-law, at their business premises thus committing an offence under section 95 of the Penal Code of 1985.

Adjudicating over the case, Chief Wanjau emphasized the community expectations of such relationships. He repeatedly emphasized how “their dead father/father-in-law would have expected them to relate” (2006, 19 July).<sup>240</sup> It is therefore interesting to note that whereas the interests of the parties are taken into consideration in these forums, resolution in terms of societal expectations/values is crucial.

The current form and operations of the chiefs’ offices can best be explained through engaging with history. Established in 1937, the chief’s office was a colonial strategy to harness indirect rule. As discussed in detail in chapter four, the stratified structure of the justice system during the colonial era was part and parcel of the overall strategy of colonial administration to obtain absolute control over the natives with the least resistance. As part of this system, the chief’s office was established to represent a visible authority of the colonial regime but was run by natives. It was presumed that they were part of the community and could therefore penetrate it more effectively. Moreover, the natives appointed to this office were respected elders in the community as a symbol of the overall colonial authority. As a result, chiefs were very influential in the community and were revered. During a survey in Machakos town, as the researcher interacted with locals, they narrated the insurmountable authority of chiefs during the colonial era. For example, a famous chief was described as being powerful to the extent of dictating what people wore (Musyoka, 2006, Interview 1 August). However, in spite of this authority, they still remained part of the community and were best placed to deal with issues in the community. Decades later, the chiefs are not as powerful as they were but are still considered as an authority amongst the people and hence their role as arbitrators. Moreover, the informality of the processes in chiefs’

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<sup>240</sup> Fieldwork conducted in July 2006.

offices becomes particularly attractive to people who are either related or live within close proximity, thus wishing to maintain their ties. Also, as indicated above, it provides an important forum for juveniles exhibiting initial criminal tendencies hence in the eyes of the community, deserving a second chance and ripe for restoration. The role of chiefs as facilitators of restorative justice is however ill-defined and is randomly resorted to. In fact, in theory, the arbitration role of chiefs is not an acknowledged facet of the criminal justice system.

### **3 Conclusion: Overview of the Criminal Justice System in Kenya**

As illustrated in this chapter, a penalty of detention is at the heart of the criminal justice system in Kenya. In the first instance, the operation of the system is linked to the preservation of penal mechanisms that were a colonial heritage. In addition, through a more detailed analysis, this thesis argues that imprisonment has been utilized as a strategy towards specific ends. The prison institution is used to govern the conduct of identified categories of individuals. Probation and Community Service Orders are seen as part of this continuum of governing offenders. As noted, these orders have been sparingly used and as part of the classification process, only certain categories of offenders receive these orders. This is in spite of the recognition that the orders are compatible with traditional values (NCCS, 1999:7). It is also noted that the slight increase in the usage of these orders was not a shift in the rationalities underlying the criminal justice system. Instead, this has been as a response to the issue of overpopulation in prisons and the need to adhere to international prison standards (GJLOS, 2003).

In spite of conditions rendering imprisonment acceptable over restorative justice practices, certain probation officers are seen incorporating restorative justice practices over and above their mandate. Moreover, certain parties have engaged the services of chiefs to adjudicate over their cases. As noted, processes in chiefs' offices largely adhere to the procedural demands of restorative justice. This thesis therefore argues that cultural values embracing restorative ethos are still embraced by communities in Kenya. However, these traditional values that are restorative were not incorporated in the formal criminal justice system which was a transplantation of the British legal system. Thus, restorative justice remains at the periphery of the justice system. In light of this chapter six analyzes the attempts to incorporate restorative justice in the formal juvenile justice system in Kenya. Situating the juvenile justice system within the overall justice system as discussed in this chapter, chapter six demonstrates how the underutilization of restorative justice practices operates as part and parcel of the penal strategies.

## CHAPTER SIX

### RESTORATIVE JUSTICE FOR JUVENILES: AN ANALYSIS OF THE JUVENILE JUSTICE SYSTEM IN KENYA

*'The Kenyan juvenile justice system is at infancy stage, not well developed and there is urgent need to improve it by learning and borrowing ... (Kidulla, 2001)\**

#### 1 Introduction

This chapter analyzes the recent attempts to incorporate restorative justice practices in the juvenile justice system in Kenya. In light of the genealogy mapped out in chapter four, this chapter examines whether these practices are influenced by restorative values held by communities in Kenya. It is argued that, on the contrary, the introduction of restorative justice practices in the juvenile justice system is as a result of legal globalization. This chapter begins by examining the impact of legal globalization on the juvenile justice system in Kenya. This discussion is premised on the theoretical framework that was set out in chapter two. Contending that the discourse of law and development has played a role in this process of legal globalization, this chapter adapts postcolonial theory as a counter discourse.<sup>241</sup>

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\* M/s Kidulla, the then Director of Public Prosecution expressed this concern at a seminar organized by the United Nations Asia and Far East Institute of the Prevention of Crime and Treatment of Offenders (UNAFEI), the Kenya Judicial Training Committee and the Government of Kenya (UNAFEI, 2001). Although the seminar was mainly a consultative programme between Kenya and Japan, this statement illustrates the general background leading to the reformation of the juvenile justice system in Kenya.

<sup>241</sup> For a detailed study on legal globalization see Muncie (2005). Chapter two discusses the discourse of Law and Development in detail.

Section two examines the procedure and practice of restorative justice as an intervention in juvenile crime. In particular it is noted that restorative justice as an option in dealing with juvenile offenders is underutilized. This presents a conflict with arguments made in previous chapters asserting that restorative justice lies comfortably with values underlying ‘African culture’. In response to this, this chapter expands on the discussion in chapter four which focuses on the historical establishment of the formal justice system in Kenya. Section three draws an overview of the juvenile justice system as a whole to shed light on the operation of restorative justice.

### **1.1 The Impact of Legal Globalization on the Juvenile Justice System**

The term ‘juvenile justice system’ connotes a system that addresses itself not only to dealing impartially but also exercising due regard to the special circumstances unique to juveniles. With the rising global emphasis on human rights, juvenile justice is increasingly discussed in the light of international standards for juvenile treatment. Thus, international legal documents such as the United Nations Convention on the Rights of the Child<sup>242</sup> and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)<sup>243</sup> have become crucial yardsticks in analyzing juvenile justice systems. The justification for this reliance lies in the instruments’ international acceptability and their purported role in spelling out the parameters of juvenile justice. The preamble of the CRC, for example, states,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and

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<sup>242</sup> Cited hereafter as ‘the CRC’.

<sup>243</sup> Cited hereafter as ‘the Beijing Rules’.

inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...

This preamble emphasizes that the pursuit of justice is inseparable from the realizing of individual rights ‘of all the members of the human family’. In tandem with this, the juvenile justice system in Kenya operates within and is evaluated in the light of this human rights discourse. Based on this global focus on international conventions and rules<sup>244</sup>, analyses of the juvenile justice system in Kenya have focused on compliance with international instruments. Hence restorative justice interventions such as the diversion project in Kenya are analyzed in light of international instruments.<sup>245</sup> Wamukobe for example, advocating for the diversion project, emphasizes that diversion “has been prescribed as an ideal practice in the UN Standard Minimum Rules for the Administration of Juvenile Justice” (2006:2).

This exemplifies the role of international instruments in legal globalization. Human rights standards tend to monopolize domestic law (Muncie, 2005:46). A major critique against the human rights discourse is that it inscribes itself within the concept of universality; universality in this case being linked to Western concepts of human rights (Santos, 2002:269). The influence of international legal standards has been evident in the juvenile justice system in Kenya. Committed to complying with the international standards, Kenya enacted the Children Act of 2001. This Act expressly outlined the roles of key supporting institutions such as the Children Courts and the Department of Children Services in the Ministry of Home Affairs.<sup>246</sup> Indeed the Department of

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<sup>244</sup> Muncie illustrates the role of International conventions and rules in the globalization of legal principles in juvenile justice systems (2005:45).

<sup>245</sup> The diversion project in Kenya seeks to streamline the dealing with juvenile offenders, particularly first offenders, out of the formal criminal justice system. This project shall be discussed in detail in this chapter.

<sup>246</sup> See Part V and VI of the Children Act of 2001.

Children Services states that its overall objective is “to ensure that children’s rights and welfare as prescribed in the Children Act are protected and safeguarded” (2005:3). Similarly, the preamble of the Children Act of 2001 indicates that one of its objectives is to “give effect to the principles of the United Nations Convention on the Rights of the Child and for connected purposes”.

A pitfall can however be identified in basing analyses on the question of compliance to international legal standards. Compliance with international legal instruments could for example be assessed in terms of the establishment of given institutions. Such an exercise curtails the possibility of unearthing minute details pertinent to a proper analysis. Having a standard pre-structured course through which researchers can conduct research and base their findings could result in analyses that do not represent the actual position. This is because such analyses tend to focus on how the different contexts fit within a particular framework.

As a precaution against this pitfall, Foucault, for example, calls upon researchers to regard genealogies as ‘antisciences’ (2004:9). He explains that unlike science, which seeks to set out an accurate finding applicable in all other similar situations, genealogies concentrate on the particular context without seeking to fit the facts into a ‘jigsaw puzzle’. Therefore, when conducting a genealogy one has to avoid taking on board ‘a grand theory’ that effectually steers the analysis in a particular course. Caution must thus be exercised to ensure that analyses are not reduced to an exercise in search of historical constants to explain the ‘present’ in a particular context. For example, analyses in developing countries tend to use compliance to international standards, as the yardstick for development. Bearing in mind that these international standards are

based on Western concepts, the developing countries are thus placed on the 'path of development' which developed countries already followed (Tamanaha, 1995:473). Foucault on the other hand suggests that analyses should fix the gaze on the actual practices in the particular context. In so doing, a researcher is able to identify deviations from the norm, if any, and thus come up with a proper analysis.

In light of this and as pointed out in chapter two, this thesis concentrates on the practices in the Kenyan context in the absence of a 'grand theory' directing the outcome of the analysis. Rather than analyzing to what extent the Kenyan juvenile system has complied with international standards and specifically relating to restorative justice, this thesis focuses on the actual practices of offender treatment. Although Kenya has embarked on institutional changes complying with international juvenile justice standards, this chapter examines actual practices in the system. More specifically, section two analyzes the establishment of the diversion programme.

## **2 Juvenile Diversion Programmes as Restorative Justice Mechanisms**

The principle of diversion in dealing with juvenile offenders underscores the need to remove children from formal criminal justice proceedings. Adopted by a resolution of the UN General Assembly, the Beijing Rules direct that the police, the prosecution or other agencies dealing with juveniles be empowered to deal with juvenile cases without recourse to formal hearings.<sup>247</sup> This principle is premised on the need to prevent the negative impact of formal proceedings on juveniles.<sup>248</sup> Ideally diversion should be embarked on before formal proceedings commence but diversion could take place

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<sup>247</sup> Rule 11. These rules have been incorporated in the CRC and hence are binding. See Article 40 of the CRC.

<sup>248</sup> See the Commentary on Rule 11 of the Beijing Rules.

within formal proceedings at the behest of the judicial officer.<sup>249</sup> For example the court may refer a juvenile to a community-based programme rather than proceed with the court proceedings.

Diversion is largely concerned with the best interests of the juvenile such as minimizing the trauma associated with court processes, conviction and sentence. Moreover, the Beijing Rules incorporate principles of restorative justice. The Rules for example recommend community-based diversion programmes and settlement through restitution to the victim.<sup>250</sup> This initiative is buttressed by the UN Guidelines for Action on Children in the Criminal Justice System which advocate for the informal resolution of disputes whenever appropriate.

The diversion programme in Kenya is an offshoot of these international ideals. Prior to the enactment of the Children Act of 2001, a number of agencies with a stake in the juvenile justice system in Kenya did reviews of the system's compliance with international standards (Department of Children Services, 2005:1).<sup>251</sup> In response to some of the concerns raised, Save the Children (UK) spearheaded a programme to divert juveniles from the formal criminal justice system. The National Diversion Core Team, which is comprised of the Department of Children Services, the Police Department, Save the Children (Sweden) and the Children's Legal Action Network (CLAN), was established to coordinate this project at the national level. Pilot diversion projects were then set up in police stations in Nairobi, Nakuru and Kisumu. Similar

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<sup>249</sup> Para 3, Commentary on Rule 11, Beijing Rules.

<sup>250</sup> Para 5, Commentary on Rule 11, Beijing Rules.

<sup>251</sup> These agencies include: Children's Legal Network (CLAN), the African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN) - Kenya, Save the Children (UK) and Human Rights Watch.

projects were then established in Gucha Naivasha, Kakamega, Busia and Siaya (Wamukobe, 2006:3).

This background into the introduction of the diversion programme illustrates how restorative justice has found its way into the juvenile justice system in Kenya through the process of legal globalization. Thus, the legal system in Kenya has now ‘embraced’ the concept of diversion as a restorative justice mechanism in spite of having previously disregarded traditional restorative justice practices, which were then considered primitive. Thiong’o notes that the perception is a relational notion dependent on the relationship between the ‘perceiver’ and the ‘perceived’ (1986:88). Restorative justice practices are now rendered acceptable in the Kenyan context in light of the fact that they are now embraced globally. Inspired by postcolonialism, chapter two discussed the impact of colonialism which inscribed the superiority of Western ideas (Jefferess et al, 2006:2). Moreover it was argued that contemporary discourses such as law and development have continued to perpetuate this superiority attached to Western ideas (Muncie, 2005:47). It is in the context of these rationalities that the diversion programme that provides the platform for restorative justice was established.

The discourse of law and development operates alongside economic aid to developing countries. Western countries, for example, fund the implementation of legal programmes in developing countries (Trubek, 2003:8). In similar terms, the implementation of the diversion programme in Kenya was largely facilitated through foreign aid. International organizations such as Save the Children Sweden and Save the Children UK were instrumental in organizing training programmes for stakeholders (Mumina, 2007, Interview 18 July). Section 2.1 and 2.2 analyze the procedure and

practice of the diversion programme. These sections particularly highlight the challenges faced when interventions are not ‘home-grown’ strategies.

## **2.1 Procedure and Practice of the Juvenile Diversion Program in Kenya**

It must be noted at the outset that the diversion program does not have force of law in Kenya (ANPPCAN, 2006:24). This practice was not enshrined in the Children Act of 2001, which lays out the criminal procedure relating to juveniles. Its operation is therefore guided by policy documents for stakeholders in the juvenile justice system. The *Handbook on Child Rights and Child Protection for Police Officers in Kenya*, for example, provides guidelines on diversion (ANPPCAN, 2006). Although diversion is a broad concept that does not necessarily amount to restorative justice, it provides a framework through which restorative justice mechanisms can operate. The handbook for police officers dealing with children incorporates restorative aspects of the practice. Police officers are, for example, given the option to facilitate:

...restitution of the aggrieved party; mediation between the child and aggrieved party; reconciliation between the aggrieved party and the child; referral of the child to a community-based agency that deals with the rehabilitation of the child (ANPPCAN, 2006:25).

It is noted that the handbook for police officers in Kenya does not make use of the term ‘restorative justice’. However, the options provided in the diversion process are components of restorative justice. As discussed in chapter three, the definition and scope of restorative justice is still contended (McCold, 2000:358).<sup>252</sup> Nevertheless, it is argued that there are certain common themes and values that act as parameters which

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<sup>252</sup> See also Johnstone and Van Ness (2007c:6); Zehr and Toews (2004:1); Becroft (2005:7); Dignan (2000:7).

determine whether interventions amount to restorative justice (Johnstone and Van Ness, 2007c:7). The options mentioned above that are available in the juvenile diversion process are thus considered to be restorative justice interventions on the basis that they incorporate these themes and values.

An analysis of restorative justice interventions for juveniles in Kenya also raises issues that underscore key debates within restorative justice. As will be illustrated in section 2.2, the diversion processes are mainly opted for in cases where juveniles have been arrested for status offences such as loitering or where juveniles have been neglected and hence in need of protection. Based on the nature of status offences, not all cases have direct victims. Therefore the classic conception which focuses on the process of bringing the offender and victim together would remove a considerable number of these diversion programmes from the ambit of restorative justice.<sup>253</sup> However, these processes fit within the definition of restorative justice as being “the process through which parties with a stake collectively resolve how to deal with the aftermath of an offence” (Marshall, 1999:5). Diversion programmes are structured to incorporate community based interventions and, even in the absence of a direct victim, “parties with a stake” are involved in the process. In addition to this procedural aspect of restorative justice, the process of diversion is geared towards achieving substantive restorative justice in two major ways. Firstly, diversion seeks to restore juveniles to being law-abiding members of the community and seeks to ensure the safety of juveniles in the community. Apart from rehabilitating the offender, the diversion process provides an opportunity through which community members are involved. In cases where the juvenile is guilty of having committed status offences, or is in need of

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<sup>253</sup> See, for example, McCold on this conception of restorative justice (2001:41).

protection for having been neglected, then his or her parents or guardians are placed under scrutiny. Secondly, by rehabilitating the juveniles and/or ensuring that the community members related to the juveniles take responsibility, crime rates are put in check. This is particularly so because children guilty of status offences and neglected children are generally more predisposed to crime.

In practice, the diversion process is initiated by police officers dealing with juveniles. At the police stations, Child Protection Units<sup>254</sup> were set up to deal with juveniles brought to the station. During fieldwork in July 2006 and June 2007, the researcher did a survey of the CPU at Nakuru Central police station and Nairobi Kilimani police station. Juveniles arrested are ‘diverted’ from the general police procedures and are handled by officers assigned to deal with children’s cases. These officers are not uniformed and are stationed in designated areas in the stations where they handle the juveniles. The underlying objective of the CPU is to create a friendly atmosphere in which juveniles can be interrogated. At this stage, the officers consider the juvenile’s eligibility for further diversion rather than being charged and taken to court. In the absence of legislation that sets out detailed guidelines on diversion, the decision-making process is discretionary. Echoing rule 11.3 of the Beijing Rules, the handbook for police officers dealing with juveniles, however, sets out two preconditions for the process of diversion to be set in motion. Firstly, the parents or the guardians of the juveniles must consent to the process. Secondly, the juvenile must admit that he or she committed the offence (ANPPCAN, 2006:25). In effect, therefore, the diversion process is limited to juveniles who acknowledge fault (Maroun and Grasso, 2006:34).

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<sup>254</sup> Hereafter referred to as CPU.

On identifying a case suitable for diversion, the police officer is supposed to liaise with a children's officer from the Department of Children Services and any other relevant social worker in deciding how to deal with the juvenile (ANPPCAN, 2006:25). In addition to the restorative options listed above, a juvenile could be cautioned or placed under the supervision of a children's officer or probation officer. Alternatively, the juvenile or his parents could be bonded for good behaviour (ANPPCAN, 2006:25). The Department of Children Services seeks to incorporate restorative justice mechanisms when handling juveniles placed under their supervision (Onyango, 2006, Interview 27 July). This involves, for example, attempts to reconcile the juvenile with his or her community as well as holding discussions with the victims. The involvement of victims is frequently dealt with at the community level. For example where certain juvenile offenders have been notorious in a particular community, the area chief or community leaders may represent the victims in the area. In certain instances, the actual victims become involved and engage in deliberations on settling out of court matters involving juvenile offenders. Onyango, a senior children's officer explains:

Victim involvement in criminal cases is voluntary. In some cases, victims are agreeable to settling out of court through dialogue with the juvenile offender and his family. For example in one of the recent cases, a child stole from a teacher who agreed to dialogue with the child and his family to give the child a second chance. Some victims however are not agreeable to an out of court settlement (2006, Interview 27 July).

A fundamental role in diversion programmes is played by community-based support systems. For example the local authorities in Nakuru and Kisumu provide resources such as community based social halls and workers to support the programmes. Similarly other agencies such as Nakuru Mwangaza Rehabilitation Centre, Street Children Programme of Nakuru (SCANN), Nairobi Goal Reception Centre and Kisumu

Lion's club have supported the diversion programme (Martin and Williams, 2005:76). These agencies play a restorative role that is mainly focused on the restoration of the offender to a law-abiding citizen. For example, the Nakuru Mwangaza Rehabilitation Centre, which is an initiative of the Catholic Church, provides counselling services as well as remedial educational programmes for street children or children in conflict with the law (Gathoni, 2007, Interview 29 July).

In Nakuru, commendable community based support has been received from the Rift Valley Law Society.<sup>255</sup> Members of the legal profession in this province are co-ordinated to provide pro bono services to juveniles in conflict with the law. Moreover the society has employed a full-time lawyer to liaise with police stations and the children's court in the area in monitoring the handling of juvenile cases. This hands-on approach is geared towards ensuring that the best options available for individual juveniles are opted for. In practice this impacts on children in need of care and protection who are readily identified by the legal officer and recommended for diversion. Emphasizing the centrality of community values in the running of this involvement of the Rift Valley Law Society, Odera, a key official in the Society illustrates:

The key motivating factors for advocates is the need to give back to society and the inherent need to assist children; the motivating factor is definitely benevolence. This has a lot to do with community values. It is the lawyers who volunteer that have made the project successful. Moreover, the wider community has definitely been very supportive (2006, Interview 27 July).

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<sup>255</sup> The Rift Valley Law Society brings together members of the legal profession practicing within the Rift Valley Province, one of the eight provinces in Kenya.

Similarly, Wangare, a police officer in a CPU emphasized the influence of a sense of community in dealing with juveniles. Explaining the guiding values, she remarked: “in our role as children officers, we are governed to a large extent by community values, which are fundamental in our African culture. We perceive these children as our own” (2006, Interview 11 July).

These sentiments held by the Rift Valley Law Society official and police officer suggest that certain values which are compatible with restorative justice ideals are held within the Kenyan community. Section 2.2, however, analyzes the diversion programme in practice and argues it remains a peripheral intervention in the criminal justice system, in spite of the supposedly held community values.

## **2.2 Scope of the Diversion Process in Practice**

In addition to ensuring that the juvenile’s parents or guardians consent to the diversionary process and that the juvenile has admitted having committed the offence, police officers are advised to resort to diversion in cases involving “minor offences such as minor theft, common assault, malicious damage to property, loitering; or status offences such as truancy, smoking, associating with bad company, sniffing glue, using drugs” (ANPPCAN, 2006:24).

Under section 119(1) of the Children Act of 2001, juveniles committing ‘status offences’ are categorized as being in ‘need of care and protection’. In practice, it is this category of juvenile offenders that are taken through the diversion process. Hence the operation of diversion as a restorative justice mechanism is limited to those offenders

who would ordinarily not be charged. A police officer stationed at a children's desk explained that diversion is mainly used for children in need of care and protection (Bonareri, 2007, Interview 28 June).

It should be borne in mind that in practice, there is an attempt to draw a distinction between 'children in need of care and protection' and 'child offenders'. In a manual describing the roles of different stakeholders, police officers are urged to differentiate between the two (ANPPCAN, 2001:5). Children in need of care and protection are mainly neglected children and are generally considered to be best suited for diversionary measures (Martin and Williams, 2005:74). However, as noted above, under section 119(1) of the Children Act of 2001, the category of children in need of care and protection includes juveniles who have committed certain classes of offences.<sup>256</sup> That notwithstanding, in practice, the literal meaning of children in need of care and protection is adopted in many cases as opposed to the meaning given in section 119(1) of the Children Act of 2001. Hence diversion processes mainly tend to be resorted to in the case of neglected juveniles (Bonareri, 2007, Interview 28 June).

This restricted scope of the diversion programme limits the restorative potential of the programme. Moreover, police officers in Kenya are generally reluctant to use diversionary processes (Maroun and Grasso, 2006:34). The commentary on rule 11.2 of the Beijing Rules directs that diversion need not be limited to petty offences and could be used for a wide range of offenders. However, statistics from the children department at the Police Headquarters in Kenya reveal that diversion is underutilized. Table 6.1 below shows a comparison between the number of children in the juvenile

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<sup>256</sup> For example drug related offences. See Abdool, Gathecha and Ongolo for a detailed report on juvenile involvement in drug abuse in Kenya (2006).

justice system and the number of cases in which diversion processes were instituted from March 2007 to May 2007. Table 6.2 sets out national monthly returns for children cases from October 2006 to May 2007. Although these statistics do not indicate the actual sort of cases diverted, police officers interviewed in different police stations indicated that diversion was mostly used in cases involving children in need of care and protection (Wangare, 2006, Interview 11 July; Bonareri, 2007, Interview 28 June; Nyambura, 2007, Interview 9 July).

**COMPARISON BETWEEN CHILDREN ARRESTED AND CASES DIVERTED  
(MARCH 2007 TO MAY 2007)**

PROVINCE	CHILDREN IN CONFLICT AND IN CONTACT WITH THE LAW	DIVERSION
NAIROBI	166	28
NYANZA	30	11
CENTRAL	112	6
COAST	42	6
NORTH EASTERN	9	0
EASTERN	103	19
RIFT VALLEY	86	15
WESTERN	91	6

Table 6.1.<sup>257</sup>

**SAMPLE MONTHLY NATIONAL RETURNS RECORDED AT THE POLICE  
HEADQUARTERS, CHILDREN DEPARTMENT (2007)**

CASE	OCT	NOV	DEC	JAN*	FEB*	MAR	APR	MAY
CHILDREN IN CONFLICT WITH THE LAW <sup>∞</sup>	106	88	87	56	47	91	94	110
CHILDREN IN CONTACT WITH THE LAW	152	131	97	98	86	76	96	77
DIVERSION	54	54	81	55	27	28	30	34

\*Data from some provinces was incomplete

<sup>∞</sup>Children in conflict with the law are those arrested on committing offences while children in contact with the law are those literally in need of protection.

Table 6.2.

<sup>257</sup> Data obtained from the children department, Police Headquarters.

The reluctance of police officers to apply diversionary measures seems inconsistent with the view that restorative justice values underpin the social fabric in Kenya. Moreover, police officers interviewed pointed out that when dealing with children they are guided by a sense of community. Children are not merely viewed as offenders but as the responsibility of the community (Wangare, 2006, Interview 11 July; Bonareri, 2007, Interview 28 June; Nyambura, 2007, Interview 9 July). One would therefore expect officers to opt for diversionary measures which go beyond ascertaining guilt and sentencing the juveniles. The contrary is, however, the case. This discord is made more apparent at an attempt to analyze the exercise of discretionary police powers to divert cases on the one hand and community based initiatives to deal with delinquency on the other hand. While these formally recognized diversionary processes are rarely invoked for juvenile offenders, restorative justice practices are readily applied in other forums. Probation officers for example are seen initiating restorative processes over and above the formal requirements of their services. Similarly, aggrieved parties in certain cases choose to have matters adjudicated over by Chiefs who in essence facilitate a mediation process.<sup>258</sup>

A genealogical analysis of the criminal justice system in Kenya sheds some light on this question.<sup>259</sup> Apart from creating a bias to a justice system that was a replica of those in the West, part of the colonial legacy in Kenya was the establishment of a stringent criminal justice system whose procedure and substantive law were all laid out in statute.<sup>260</sup> The impact of this framework is a closed approach in operations within the criminal justice system. Different agencies within the criminal justice system are

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<sup>258</sup> Chapter five discusses the informal forums of restorative justice in detail.

<sup>259</sup> See Foucault on the utility of studying the history of the present (1975:31).

<sup>260</sup> Substantive criminal law is set out in the Penal Code of 1970, whereas the procedure is governed by the Criminal Procedure Code of 1983. Section 72 of the Constitution of Kenya also sets out the requisite components of fair trial.

associated with specific roles. Within this formal system that seeks to maintain consistency in its operations, the police, for example, are expected to arrest, charge and prosecute. However, players within the system may provide services supplementary to their 'obvious roles', but this is only done as an additional service. For example, probation officers and children's officers occasionally invoke restorative mechanisms. This is nevertheless done within the parameters of Probation Orders, which are given by the courts rather than an alternative response to crime. In the context of police discretionary powers to divert cases, these powers seem to present an alternative framework from the established formal system that they are conversant with. To them their role is to facilitate justice through instituting formal proceedings in court. In this sense, diverting offenders is perceived to be incompatible with the expectations of the established formal system of justice.

This view is also held by some victims. In some instances, victims pressurize the police to charge offenders. Police Officer Wangare, for example, pointed out that the police are sometimes forced to charge offenders to ensure that justice is seen to be done in the eyes of the victims (2006, Interview 11 July). Pavlich expresses similar views which attach some form of sacrosanct authority to formal courts. He explains that

For centuries, justice...bears the scales of impartiality in one hand and a sword of power in the other, evoking this allegorical message: justice is possible when a neutral judge calculates a fair balance of accounts to arrive at decisions backed by the force of a sovereign power (2005:1)

The insistence of some victims for offenders to be charged again questions the assertion that restorative values are still held within the community in the spirit of 'African values'. As is the case with the police officers, citizens also esteem the formal court

system as the repository of justice. In essence, however, it is the certainty and/or consistency associated with the formal court system that propels a preference for court-based processes. On the other hand, the diversion programme, which is still in its embryonic stages, does not have the full force of law in the absence of specific legislation laying guidelines as to its operations. This is particularly fundamental in this postcolonial context that places a premium on structures precisely established by legislation.

The background to the establishment of the diversion program reveals that the introduction of restorative justice practices as part of the formal juvenile justice system is not a rebirth of indigenous communities' values. The diversion programme is the quintessence of legal globalization; yet another form of international influence on the legal framework in a developing country. This program and any other such attempts face the challenge of finding a footing alongside and/or within the existing justice system. As it were, compatibility of internationally-engineered restorative reforms with community values is not enough to challenge the rigid, exclusive formal criminal justice system.

To underscore these rationalities operating in the juvenile justice system which have limited the operation of restorative justice practices, section three draws an overview of the juvenile justice system in Kenya. In particular it analyzes the practices that dominate the juvenile justice system and the conditions that render them acceptable.

### **3 Overview of the Juvenile Justice System in Kenya**

The coming into force of the Children Act of 2001 laid out specific parameters in dealing with juvenile offenders. The practices within the juvenile justice system are therefore analyzed in the context of this Act. Section 73 of the Children Act of 2001 establishes Children Courts with jurisdiction to hear civil and criminal cases involving children. However under section 184, the Children Courts are restricted from adjudicating over murder cases or where a juvenile is charged together with adults. It must be noted as well that not all parts of Kenya have established Children Courts. Section 185(5) of the Children Act of 2001 however provides that all courts other than Children Courts are bound by the provisions of that Act when dealing with juvenile offenders.

Section 188 of the Children Act of 2001 provides that the court shall have a setting that is friendly to a child offender. The impression created by this provision is that the treatment of child offenders goes beyond mere punitive aims. Recognizing the role of parents in the conduct of juveniles, for example, Rule 8 of the Child Offenders Rules in the Children Act of 2001 provides that the juvenile's parent or guardian should be summoned unless the court is satisfied that it would be unreasonable to do so. As an observer in a children's court in Nakuru, the researcher noted that the court proceedings were markedly different from the standard adult criminal proceedings.<sup>261</sup> The court made deliberate attempts to promote restorative actions. In vagrancy cases, for example, in which juveniles repeatedly ran from home to live on the streets, the magistrate engaged the juveniles and their parents/guardians in deciding the way

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<sup>261</sup> Empirical research conducted in June 2006.

forward. While personal initiative on the part of this particular magistrate was clear, the flexibility in dealing with juveniles as set out in the Children Act of 2001 is evident. In particular, section 191(1) (l) in that Act provides that in addition to the specified ways of dealing with a convicted juvenile the court may respond “in any other lawful manner”. This provision legitimizes a wide range of sanctions including restorative justice practices.

In general, the Children Act of 2001 seeks to draw a distinction between the juvenile justice system and the criminal justice system dealing with adult offenders. It sets out specific rules and terminology that relate to juvenile offenders. In terms of sentencing, for example, under sections 190 and 191(2) of the Children Act of 2001 juveniles are exempt from the death penalty and corporal punishment. Secondly, the use of the term “sentence” as laid out in section 25 of the Penal Code of 1985 is outlawed; Section 189 of the Children Act of 2001 provides that a “sentence” shall be referred to as an “order upon a finding of guilt”. Thirdly, section 190 of the Children Act of 2001 provides that juveniles are exempt from imprisonment. This provision signposts an institutional categorization of adults and juveniles. Juveniles are said to be committed either to a rehabilitation school or a borstal institution whereas adults are said to be imprisoned.

Rehabilitation schools and borstal institutions are largely disciplinary educational institutions. In borstal institutions, emphasis is placed on the skills training programmes for the juveniles (Nzimbi, 2007, Interview 25 July). At Shimo la Tewa, one of the two borstal institutions in Kenya, training is offered in masonry, tailoring, metalwork and carpentry.<sup>262</sup> The institution also runs a primary school delivering curriculum for

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<sup>262</sup> Non-participant observation carried out from 23<sup>rd</sup> July 2007 to 3<sup>rd</sup> August 2007.

Standard Seven and Eight after which students sit the Kenya Certificate for Primary Education. Njiru, an officer at Shimo La Tewa borstal institution, stated that the institution is guided by the motto '*Education is the Key to Success*', which is inscribed at the entrance gate of the institution (2007, Interview 24 July). This is in tandem with the provisions of the Borstal Institution Act of 1991. Section 5 of this Act provides that an offender aged between fifteen and eighteen years is to be committed to a borstal institution for three years if the court is convinced that "it is expedient for his reformation that he should undergo a period of training in a borstal institution".

Borstal institutions are thus associated with training activities geared towards reformation of the offenders. During research at the Shimo la Tewa borstal institution, the researcher noted that the juveniles refer to the officers in charge as *mwalimu*, which is the Swahili word for 'teacher'.<sup>263</sup> This depicts the perception that the borstal facility is an educational institution. However an analysis based on this institutional framework would not provide an accurate picture of the practice of confining convicted juveniles in institutions.<sup>264</sup>

Diverting the focus from this institutional structure, a parallel could be drawn between the confinement of juveniles and the imprisonment of adult offenders. Indeed an analysis of the actual practice of confinement of juveniles mirrors the underlying value system dictating the criminal justice system in Kenya. The interconnection between the confinement of juveniles and the incarceration of adult offenders is evident in the deployment of personnel dealing with both classes of offenders. Officers running the borstal institutions are actually prison officers employed under the Prisons Act of 1977

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<sup>263</sup> *Supra*, note 5.

<sup>264</sup> See Foucault's distinction between analyzing practices as opposed to institutions (Foucault, 1991c: 75).

(Njiru, 2007, Interview 24 July). The training carried out is for prison officers generally after which officers are posted to either prisons or borstal institutions. As discussed in detail in chapter five, the training of prison officers does not capitalize on the rehabilitative functions (Karanja, 2006, Interview 3 July). Although there have been recent efforts by non-governmental organizations to train ‘prison officers’ posted to juvenile institutions, this has only targeted a few officers (Nzimbi, 2007, Interview 25 July). Moreover inter transfers are made between prisons and juvenile institutions. Therefore strategic training of officers working in borstal institutions remains inadequate. The orientation of ‘prison officers’ seem incompatible with the depiction of the juvenile confinement institutions as educational facilities. However it reveals the rationalities underlying the entire criminal justice system operating in the juvenile justice system as well.

A continuum can also be drawn from the handling of juveniles to the treatment of adult offenders. Whereas the fundamental principle in dealing with juveniles is in favour of non-custodial sentences, this should not be construed as the existence of a value system underlying the juvenile justice system in Kenya that is distinct from the overall criminal justice system. A judicial officer in a Children’s Court indicated that “committing juveniles to borstal institutions is a measure of last resort after the family involved is totally unable to deal with the juvenile” (Murugi, 2006, Interview 11 July). This position is in line with the principles set out in Article 37(b) of the Convention on the Rights of the Child. The impact of this principle is to weed out and deter juveniles who seem to have been hardened and taken to crime. Exhibiting similar trends as prison, juvenile confinement institutions are utilized to bolster control over problematic

juveniles.<sup>265</sup> This trend could be traced back to the colonial era in which these institutions were used to deal with problematic youths. The Kabete Approved School<sup>266</sup>, the first juvenile institution in colonial Kenya was built in 1910 to deal with young persons arrested for not having an identity card, the *kipande* (Department of Children Services, 2005: 1).

Section 55(1) of the Children Act of 2001 empowers the Director of Children's Services to extend the committal in a rehabilitation school of a juvenile who continues to be difficult. Alternatively, if the juvenile attains the age of sixteen years while still in the rehabilitation school, the Director may order that the juvenile be sent to a borstal institution. Similarly, section 42 of the Borstal Institutions Act<sup>267</sup> makes it possible to commit an offender from a borstal institution to a term in prison if such an offender is of a character that renders such a detention no longer expedient. Under section 29(1) of the same Act, a juvenile is subjected to supervision conditions for such periods deemed necessary on release from the borstal institution. Where a juvenile does not adhere to instructions given to him during the supervision he can be recalled to the borstal institution.<sup>268</sup> In practice, this supervision is carried out by the Probation Services Department as part of their after-care programme. Odhiambo, a probation officer explains the impact of this further supervision of juveniles on release from the borstal institution. He states that

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<sup>265</sup> There are three borstal institutions in the country:

- Kamiti Youth Corrective Training Centre (Kiambu District, Central Province)
- Shikusa (Kakamega District, Western Province)
- Shimo La Tewa (Mombasa District, Coast Province).

In total there are twelve Rehabilitation Schools. Currently there is no borstal institution catering for female juvenile offenders.

<sup>267</sup> Cap 92, Laws of Kenya.

<sup>268</sup> *Supra*, section 29(2).

In practice, the rationale behind this scheme is that borstal institutions often release the juvenile offenders to create space in the institutions. The challenge the probation officers face is that the juveniles have a bad attitude on this supervision because they feel that it is a double punishment i.e. they feel they have already served their term and do not understand why they are still supervised (2006, Interview 6 July).

A category of ‘difficult’ juvenile offenders who are deemed in need of longer periods of confinement or in need of a different form of confinement is thus created. A parallel could be drawn with the class of adults that the criminal justice system keeps away from the community, as in chapter five.

Juvenile confinement is, however, best understood through an analysis of the background of the juveniles, the factors guiding the court’s decision and the nature of the crimes committed. Out of the 115 cases listed on the January 2007 to June 2007 Shimo la Tewa borstal institution admission book, 80 of the juveniles came from clearly poor backgrounds.<sup>269</sup> The majority of the remaining cases suggested economic hardships but did not clearly indicate the level of hardship. As figure 5-3 illustrates, a large percentage of juvenile crime is economic-related.

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<sup>269</sup> Data obtained from the documentation office at the Shimo la Tewa Borstal Institution, 23<sup>rd</sup> July 2007.

## CRIME PROFILES AT SHIMO LA TEWA BORSTAL INSTITUTION

OFFENCES	2005(JAN-DEC)	2006 (JAN-DEC)	2007(JAN-JULY)
Housebreaking/burglary& related offences	101	103	65
Defilement/Indecent assault	14	26	21
Nuisance	3	7	3
Unnatural offences	3	5	2
Being in possession of cannabis/being found at a place where people smoke cannabis	16	12	12
Touting	1	2	
Malicious damage to property		3	
Possession of traditional liquor		1	
Child in need of care and protection		1	
Gambling	3	2	
A child with difficult character			2
Murder	1		
Assault	5		
Disobeying chief's order	3		

**Figure 5-3**

Pre-sentencing probation reports, which are kept in the juveniles' files at the borstal institution, seemed to base their recommendations on two major considerations. Firstly, the general character of the juvenile, and particularly whether they could effectively be managed through non-custodial orders, is considered. Secondly, the probation officers analyze the juvenile's home environment and whether this was likely to contribute to re-offending. Consequently, the juveniles sent to the borstal institutions are those inclined to commit further crimes and those whose backgrounds were not conducive to rehabilitation.

The juveniles, who are trained in particular skills, are released on serving one and a half years at the borstal institution. During fieldwork the researcher attended a board meeting which deliberates on the release of juveniles. In this board meeting the key points in the decision-making were whether a juvenile had served their term in the borstal institution and whether he had sat the national exams on skill training. Bearing in mind the category of offenders recommended to the borstal institution, the rehabilitative functions of these institutions can be questioned. After one and a half years these juveniles return to the home environment that contributed to their offending. Moreover the skills learnt in the borstal institution become inconsequential owing to the lack of funds to set up profit making activities. Thus a cycle is created and the released juveniles end up reoffending (Njiru, 2007, Interview 24 July).

Caught up in this cycle of crime such juveniles end up being adult offenders. The logical explanation is that confinement of juvenile offenders fosters relations that facilitate recidivism. Moreover, having been orientated to a life of crime from a tender age, such offenders are likely to commit serious offences by the time they are adults, thus attracting long sentences. A classic example of this trend, Njeru, a convict serving time for robbery laments,

I started off as a petty shoplifter and was sent to an approved school. On completing my first term I ran away from home and took off to the streets with a friend who I met at approved school. I was arrested again and committed to Likoni Approved School and later on to Shikusa Borstal Institution (2006, Interview 27 June).

Similarly, Njuguna, remanded on murder charges, indicated that friends made in custody have a major role to play in future crimes. Having first been arrested at the age

of seventeen for being a vagabond, he explained that his subsequent crimes were influenced by friends met in custody (2006, Interview 27 June).

The handling of juveniles on remand, just like in the case of adults, illuminates the dynamics of the criminal justice system. Whereas the law is emphatic that juveniles must not be remanded together with adult offenders<sup>270</sup>, the reverse is true in practice. Lady Justice Koome on the opening of the Children's Court in Nakuru reiterated that "it is not fair to mix children with hardcore criminals in the same cells as this is likely to harden them instead of rehabilitating them" (Anyango, 2006:1)

In situations where juveniles are remanded in adult institutions, the requirement is that they must be confined in a part of the institution reserved for juveniles. However, in practice, this rule is not strictly observed. Juveniles on remand are able to associate with adult offenders. Prison Officer Kimani describes the situation:

We have a juvenile section that houses juveniles exclusively. However, some juveniles are occasionally found in the adult blocks. This is always at the request of the juveniles e.g. a juvenile may feel safer being with his co-accused who may be an adult. If a juvenile has an adult relative in the same institution, they opt to stay in the relative's block (2006, Interview 27 June).

This scenario casts doubt on the assertion that the penal institutions are keen to rehabilitate offenders. Taking into account the apparent adult offenders' influence on juveniles, such practices are likely to breed recidivism. On the other hand, such practices suggest that the categorization of adult and juvenile offenders is merely superficial; apprehended persons, whether adults or juveniles, are held in the institutions to protect the community. The focus is thus diverted from the individual

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<sup>270</sup> Rule 6 (1 & 2), Rule 10(2) of the Child Offenders Rules, Children Act of 2001.

offenders to the operational management of the penal institutions. In other words, the penal institutions effectively perform the task of confining offenders and other objectives such as being rehabilitative are merely incidental.

Analyzing practices as opposed to institutions further illustrates that the structure of distinct adult and juvenile institutions in effect is not an entire differentiation of practices carried out in the institutions. Indeed the fact that the words ‘imprisonment’ and ‘sentence’ are banished when referring to juveniles does not fundamentally distinguish the incarceration of juveniles from that of adults. Situated within the genealogy of the criminal justice system in Kenya, an analysis of custodial terms for juveniles raises questions regarding the community’s divergence from a seemingly restorative indigenous system. In light of these conclusions, recent initiatives to introduce formal restorative interventions to juvenile crime are put in context. It is argued that these initiatives have not been an attempt to ‘Africanize’ the juvenile justice system but rather have been as a result of continued global influence on the justice system. As a consequence of these conditions under which restorative responses have been introduced, certain challenges have been met. Chapter seven sums up these challenges and argues that local solutions to these issues must be sought.

## CHAPTER SEVEN

### CONCLUSIONS

*“...to recognize a discontinuity is never anything more than to register a problem that needs to be solved” (Foucault, 1991c: 76)*

#### **1 Overview**

This research was prompted by unanswered questions regarding the recent attempts to incorporate restorative justice interventions in the formal juvenile justice system in Kenya. The thesis set off by examining whether this was a ‘rebirth’ of restorative justice in the Kenyan context. As illustrated in chapter four, restorative justice was not a foreign concept to traditional communities in Kenya. However the current practice of restorative justice interventions in the juvenile justice system does not reflect the fact that restorative justice is compatible with the cultural heritage of communities in Kenya. This thesis therefore examined why these interventions remained at the periphery of the criminal justice system in Kenya.

For a better understanding as to why there were attempts to incorporate these restorative interventions into the formal system and how they actually operated in practice, the following questions were raised: How does the criminal justice system in Kenya respond to crime? How does the system deal with offenders? What were the aims and objectives of the criminal justice system? These questions turned the attention to the practice of incarceration which is the dominant penal practice in the criminal justice system in Kenya. Therefore, to understand the objectives and

operation of the justice system it was fundamental to analyze the practice of incarceration. Through an analysis of who is imprisoned and to what end imprisonment is utilized, the conditions under which this practice was rendered acceptable are identified. This understanding of the system makes it possible to understand the place of restorative justice as a response to crime.

The genealogical analysis of the criminal justice system in Kenya sheds light on the objectivities of the present.<sup>271</sup> In particular, the thesis argues that the practice of incarceration has been objectified as a 'self evident' response to crime.<sup>272</sup> The analysis therefore sought to illustrate the process through which this practice was objectified. Firstly, the thesis describes how the colonial process through truth-producing discourses shaped the justice system in Kenya. Through these colonial discourses a premium was placed on Western ideas and, in this case, Western forms of criminal intervention were embraced.<sup>273</sup> Traditional responses to crime, some of which were restorative, were thus displaced. Secondly, chapter five examines the practice of incarceration as a strategy that seeks to conduct the behaviour of certain categories of persons. It is therefore argued that it is not 'self evident' that offenders are confined in institutions (Foucault, 1991c:76). Instead there are rationalities operating in the system that render the practice of incarceration acceptable as a criminal intervention. On the other hand, restorative justice programmes have been introduced in this context in spite of the objectivization of the practice of incarceration. Bearing in mind that values underpinning restorative justice appear in contrast to those underpinning the practice of incarceration, the thesis examined these recent attempts to formalize restorative justice

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<sup>271</sup> See, for example, Voruz's account on the function of genealogies in Foucauldian terms (2005: 166, 170).

<sup>272</sup> Foucault's analysis of the practice of imprisonment illustrates how this practice is rendered an indispensable part of the criminal justice system (1991c:75).

<sup>273</sup> For a seminal analysis of colonial influence see Fanon (1986: 110).

practices. Chapter two links these reforms in the juvenile justice system to the process of legal globalization and illustrates how international law has impacted on the justice system in Kenya.

Although restorative justice values are compatible with cultural values, these restorative options introduced in the juvenile justice system remain underutilized. As opposed to being a rupture of the underlying rationalities operating within the juvenile justice system, these restorative justice programmes operate as part and parcel of the contemporary Kenyan governmentality. As a sieving process, these restorative programmes distinguish juvenile offenders who should go through the formal court system with a likelihood of being confined from those whose conduct can be governed without the court process. As discussed in chapter six, the beneficiaries of the diversion programme are mainly children literally in need of care and protection and hence predisposed to criminal behaviour as opposed to juveniles already engaging in crime. Restorative justice as an intervention addressing juvenile crime therefore becomes part and parcel of the existing strategies and tactics of the criminal justice system.

The thesis argues that the practice of incarceration reproduces subjects which the system controls through confinement (Foucault, 1977a:301). On the other hand, restorative justice programmes in the juvenile justice system play a role in identifying these subjects and governing others who do not fall in this category (Muncie, 2006:781). It is therefore argued that restorative justice is similarly being used as a strategy that seeks to govern juveniles predisposed to crime but whose home environment is conducive for governing their conduct. The restorative justice forums

are therefore used to strengthen parental control and accountability in a bid to govern the conduct of these juveniles.

To what end then is this analysis done? Of what practical use is this thesis to the Kenyan context? Foucault suggests that:

Critique doesn't have to be the premise of a deduction which concludes: this then is what needs to be done. It should be an instrument for those who fight, those who resist and refuse what is. Its use should be in processes of conflict and confrontation, essays in refusal. It doesn't have to lay down the law for the law (1991c:84).

This sums up the radical nature of Foucault's analyses which sought to break off the objectivities of the present as well as shed light on how 'subjects' are reproduced within the operating rationalities. Foucault therefore disassociates himself with proposals that would seem to reinforce these objectivities. Thus Voruz, for example, criticizes Garland's *The Culture of Control* for not being a 'truly Foucauldian reading' in that it reasserts the very rationalities it critiques (2005:170). Adopting Foucault, this thesis unearthed the objectivization of the practice of imprisonment in Kenya and how subjects have been reproduced by the system. However, the thesis intended to do more than just "register the problem" (Foucault, 1991c:76). Having identified the objectivities of the present, it goes on to provoke questions within the operating rationalities. Therefore, as opposed to directing what needs to be done, the thesis concludes by raising practical implications of the practice of imprisonment and restorative justice practices based on the rationalities at play in the system. This should not, however, be construed as reasserting the rationalities that have been critiqued in this thesis. On the contrary, the practical issues highlighted suggest that even in the

context of these rationalities, the penal practices in Kenya do not effectively realise the objectives of the criminal justice system.

## **2 Application of the Research to the Criminal Justice System in Kenya**

As illustrated, rationalities within the criminal justice system in Kenya render imprisonment as the formal, self evident response to crime that ensures control over criminals. On the other hand restorative justice practices remain informal pre-offending control mechanisms or interventions dealing with minor crime that would not otherwise attract custodial sentences. Does imprisonment, however, effectively control crime? If imprisonment is not self evident and does not have to be the obvious response to crime, as argued in this thesis, is there more potential for restorative justice practices?

The answer to the first question is in the negative: not only has imprisonment been ineffective in controlling criminals but it has also contributed to rates of recidivism. Chapter five illustrates that overcrowding in prisons is an issue of concern and the impact of recidivism cannot be overstated (GJLOS, 2003; LRF, 2005:9; Muhoro, 2000: 325; UNHRC, 2004:16). The empirical research conducted in 2006 and 2007 revealed how certain hardcore criminals in Kenya started off as petty juvenile offenders. Moreover, insecurity in Kenya has been alarming and highlights the ineffectiveness of criminal interventions (OSAC, 2008). Therefore, even within the operating contemporary Kenyan governmentality, imprisonment has not effectively met the objective of controlling criminal behaviour. On the other hand, proponents of restorative justice argue that it has the potential to address these issues of concern. They contend that, although it cannot be said with certainty that restorative justice practices

reduce re-offending, these practices nonetheless do not encourage recidivism (Walgrave, 2003:262). Based on similar arguments, the diversion programmes in Kenya, for example, have been advocated to avoid contact of juveniles with other criminals, thus curbing re offending. In addition, diversion could contribute to decongestion of juvenile holding facilities (ANPPCAN, 2006:24). Hence, it is suggested that restorative justice may work towards the realization of the objectives of the criminal justice system.

This thesis, however, illustrated reasons why restorative justice mechanisms remained at the periphery of the juvenile justice system in Kenya. Although it is not the intention of this thesis to justify restorative justice or reinforce the underlying rationalities, it is concluded that the following issues have to be taken into account if restorative mechanisms are intended to play a greater role.

### **3 Localizing Restorative Justice Practices in Kenya**

It has been argued in this thesis that the restorative justice practices in the juvenile justice system in Kenya cannot be said to be local solutions to the challenges facing the criminal justice system. Thus, formalizing diversion programmes does not in itself guarantee that they are resorted to when dealing with juveniles. As illustrated in chapter six, a large number of juvenile offenders are from poor and difficult backgrounds, hence cannot benefit from the current framework of restorative justice forums.<sup>274</sup> If the scope of restorative justice is to be widened to include such juveniles, then there is a need to address economic related concerns. It must be borne in mind

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<sup>274</sup> Data obtained from Shimo la Tewa Borstal in July 2007 and the juvenile remand section in Nakuru Main Prison in July 2006 revealed that a large number of juveniles held in these institutions were from indigent backgrounds.

that there are community values and mechanisms in the Kenyan context that could be extended to the juvenile justice system. The Rift Valley Law Society Juvenile Justice Programme is an example of how the community can be mobilized to address challenges in the justice system. There is, therefore, a need to analyze the unique challenges in the Kenyan context and to identify available community resources that can be utilized to deal with these challenges. Rather than enquiring what the global trends are, the justice system ought to identify the specific needs of the system and how best these can be met. Foucault remarks that “‘what is to be done’ ought not to be determined from above by reformers...but by a long work of ...reflections, trials, different analyses” (1991c:84).

Any reforms in the juvenile justice system in Kenya, therefore, ought to be the result of reflections within the context and solutions ought to be generated locally in the light of the contextual realities.<sup>275</sup> Restorative justice forums, without having networks to support indigent juveniles, would thus remain the preserve of a few juveniles and hence, the status quo would endure. The system, therefore, ought to identify structures within the community that could be utilized to deal with the challenges that limit the supposed potential of restorative justice.

Another issue of concern relates to the legitimacy associated with formal structures created by statute. As noted, the colonial process placed a premium on formal justice systems set out by law. Hence, for restorative justice practices to be termed as acceptable, legitimate responses to criminal behaviour, there is a need to legislate their operation. Without the force of law, the scope of restorative justice is limited to cases

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<sup>275</sup> See for example Abuya who contends that Africa tends to seek solutions from the West as opposed to generating local solutions (2004:247).

that do not warrant formal court proceedings. In effect, for restorative justice mechanisms to be rendered acceptable formal interventions targeting crime, its scope and practice ought to be set out in law. The analysis of the diversion programme in Kenya revealed that the wide discretion given to police officers without express legislation contributes to the narrow scope of these interventions. However, as noted in chapter five in respect to section 176 of the Criminal Procedure Code of 1987, which allows judicial officers to facilitate reconciliation and amicable settlement in certain cases, legislation on its own does not guarantee a wider application of specific forms of interventions. That notwithstanding, if underlying conditions favour restorative justice practices, then the force of law would legitimise them and render them more acceptable in the formal justice system. Moreover, legal provisions provide guidelines of practice and set a standard which individual conduct must adhere to. Having been backed up by law, restorative justice could be harnessed to complement penal practices in the justice system. In connection with this, consistency and accountability are key features of modern justice systems (Roche, 2003:3). Therefore, these restorative justice programmes require accountability mechanisms to meet expected standards of criminal justice systems. Without such accountability mechanisms, there lies a danger of restorative justice mechanisms resulting in injustices and/or being sidelined from the justice system.

Empirical research on the diversion programme in Kenya revealed that policing culture played a big role in limiting the scope of restorative justice. Police officers are trained to play their role in ensuring that offenders are apprehended and charged. Engaging them in restorative justice forums therefore appears to be beyond the ambit of their duties. Police officers involved in the diversion programme who were interviewed

implied that this programme is meant for children in need of care and protection as opposed to juveniles who had committed crimes. In addition, this being a relatively new programme, there is an evident need for the harmonization of these practices countrywide. Therefore, if the scope of restorative justice is to be widened there is a need to intensify training for police officers involved. Such training should sensitize them to the nature of restorative justice as a criminal intervention which is not necessarily a soft option unlike how it is normally perceived.<sup>276</sup>

Although the focus of the research was Kenya, the emphasis on addressing contextual challenges by developing local solutions is a lesson that could be relevant in other contexts. Moreover, the research on restorative justice practices in Kenya highlights pertinent focus points for the theory and practice of restorative justice particularly as it relates to the criminal justice system. It has been argued that restorative justice is not necessarily a ‘soft option’ to crime but that it is instead a different strategy of governing that empowers the offender, the victim and the community to deal with the aftermath of crime. The thesis also argued that the practice of incarceration has been objectified as the obvious response to crime but this does not have to be the case. Restorative justice practices, for example, could be utilized in dealing with criminals.

As argued in chapter three, however, the objective of restoration requires an individualized, case by case approach in resolving issues. This does not auger well with the standards of consistency and accountability that characterise criminal justice systems founded on a Western model. Although this thesis critiques the law and development discourse for fostering Western legal ideologies universally, the thesis

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<sup>276</sup> See for example the discussions by Walgrave (2001:17); Roche (2003:1) and Duff (2003a:389) which argue that restorative justice imposes burdens and hence is not necessarily a ‘soft option’.

acknowledges that the Kenyan justice system is founded on these Western legal concepts. As such, the restorative justice processes introduced through the diversion programme are incompatible with the current structure of the criminal justice structure. Therefore if restorative justice processes are intended to effectively operate within the formal criminal justice system, there is need for further research and analysis as to how standards of consistency and accountability can be met in these processes. Thus, questions such as what the indicators of repairing of harms are and what amounts to justice in restorative forums ought to be examined. Braithwaite, for example suggests that restorative justice programs should be assessed based on the extent to which they 'deliver restorative values' (2002:13). However, this guideline reiterates the vague language used in restorative justice texts and fails to give clarity to the existing ambiguity. Without resolving the question of consistency and accountability, the attempt to mainstream restorative justice into the formal criminal justice system remains problematic.

The future scope and practice of restorative justice in formal criminal justice systems nevertheless lies with the underlying rationalities which determine what is rendered acceptable. If embraced as an acceptable intervention targeting crime in the future, however, the issues raised in this chapter must be addressed for restorative justice practices to effectively operate within the formal criminal justice system. As emphasized throughout the thesis, restorative justice practices as penal mechanisms must resonate with the contextual realities. In particular, to effectively utilize restorative justice, the juvenile justice system in Kenya must search for local ideas on processes that take into account the local challenges. Moreover, to deal with the alarming concern over juvenile crime, some lessons could be learnt from restorative

justice values present in traditional communities. A key feature of these traditional forms of restorative justice that is absent in contemporary forms of restorative justice relates to the responsibility of the community. In the light of the socio economic issues linked to juvenile crime highlighted in this thesis, restorative justice processes could provide a forum through which the community could be put to task over its contribution to increased juvenile crime. The potential of restorative justice to address juvenile crime in Kenya, however, can only be realised through a concerted engagement with the local realities.

## **APPENDICES**

### **Appendix One Part A**

#### **Structure of Interview with Tribal Elders**

- What was the general framework of the ‘criminal justice system’ in traditional communities?
- Who was in charge of dispensing justice?
- Who was involved in dispute resolution? Were the ‘victims’ and ‘offenders’ involved? Were their respective communities involved?
- If they were involved, what was the rationale behind involving them?
- What was the most common form of punishment? Was punishment effective?
- How were juvenile ‘offenders’ treated?
- How would you compare this with the current treatment of juvenile ‘offenders’? How would you explain the transition from the indigenous system to the current system? Was it a gradual transition?
- How was this new system received? Did you perceive it to be incompatible with the cultural orientation of the people?
- What are some of the traditional principles do you feel were crucial and beneficial to the ‘criminal justice system’?

## Appendix One Part B

### List of Interviews with Tribal Elders

INTERVIEW PARTICIPANT NUMBER	PARTICIPANT'S ORIGIN	NAME*	DATE OF INTERVIEW	ROLE
TEA 1	Murang'a	Mwangi (P)	15 <sup>th</sup> July 2006	Kikuyu Elder
TEB 1	Machakos	Nthamba (P)	31 <sup>st</sup> July 2006	Kamba woman
TEB 2	Machakos	Musyoka(P)	1st Aug 2006	Kamba Elder/Senior Chief
TEB 3	Kang'undo	Mwikali (P)	1st Aug 2006	Kamba Elder
TEB 4	Machakos	Nzioka (P)	2 <sup>nd</sup> Aug 2006	Kamba Elder/Chief
TEB 5	Mtito	Mulusya (P)	2 <sup>nd</sup> Aug 2006	Kamba Elder
TEB 6	Kitui	Kalonzo (P)	2 <sup>nd</sup> Aug 2006	Kamba Elder
TEC 1	Meru	Murangiri (P)	3 <sup>rd</sup> Aug 2006	Meru Elder
TEC 2	Meru	Dr. Gaita Baikiao (N)	28 <sup>th</sup> Aug 2007	Mugwe of the <i>Njuri Nceke</i>
*P : Pseudonym *N: Real Name				

## **Appendix Two Part A**

### **Structure of Interview with Officers in the Judicial System in Kenya**

#### **1 General Questions for Officers**

- What is your role in the criminal justice system?
- What is your opinion on incarceration of juveniles? Is it an effective mode of treatment of offenders? What would you suggest as a better alternative?
- What is the involvement of juveniles' families in the whole criminal process?
- There is a commendable project pioneered by the Law Society of Kenya and the Juvenile Court on juvenile justice. What is this project premised upon? What are its objectives?
- What is the history of the Department of Children Services? What necessitated the current structure of the Department of Children Services, who were the movers?
- Some roles of the Department of Children Services are intertwined with the Probation Department. Who takes up the supervisory role of juvenile offenders?
- What does this supervision entail? Do you invoke reconciliatory processes? What guides you on this?
- Restorative justice was a key component of traditional communities. What is your view on application of restorative justice methods in modern times? Is it compatible with the system?

## 2 Specific Questions for the Police Officers

- What is the broad objective of the criminal justice system?
- Is formal charging the almost obvious response to a suspect or are there other considerations? What considerations do you take into account?
- What are the alternatives to formal charging? How frequently are these alternatives invoked in regard to:
  - a) Adult offenders
  - b) Juveniles
- Is your response based on determined practices or is there an element of discretion?
- Are there changes in policy or practice that have come to your attention during your service as a police officer (for example tough policies against offenders) that limit your discretion?
- What are some of the most prevalent crimes committed by juveniles? Are these usually serious crimes or relatively petty offences?
- When did the diversion programme begin? Is it assigned to specific officers? Were these officers trained? Who facilitated the training/the introduction of this project?
- What are the objectives of the diversion programme?
- What category of juveniles is considered for diversion? Are there procedural guidelines on this?
- How frequently are juveniles diverted? How many cases were diverted in 2006/2007?
- Who is involved in the diversion process? What is entailed in the process?
- What are the challenges faced with in this project? What are the economic/time/resource implications for this project?

### **3 Specific Questions for Chiefs**

- Are criminal cases reported to you? Do you have a statutory mandate to preside over criminal cases?
- What is the nature of these cases normally? Petty offences? Is there a higher percentage of juvenile cases referred to you in comparison to adults?
- Who is involved in these cases; is it just the victims and offenders or do they involve third parties such as their families?
- Having in mind that there is a set out formal system to deal with such cases, why do parties in these instances choose your services over the criminal justice system?
- What is the most common outcome in these cases?
- What framework do you work with in reconciliatory processes? Do you have a guideline that sets out how you are to carry out your work?
- What are the recording requirements of all the cases that come to your office?

## Appendix Two Part B

### List of Interviews with Officers in the Justice System

<b>INTERVIEW PARTICIPANT NUMBER</b>	<b>LOCATION</b>	<b>NAME*</b>	<b>DATE OF INTERVIEW</b>	<b>ROLE</b>
C1	Nakuru	Wanjau(P)	19 <sup>th</sup> July 2006	Chief
C2	Kabazi	Thokore(P)	18 <sup>th</sup> July 2006	Chief
CO1	Nakuru	Onyango(P)	27 <sup>th</sup> July 2006	Senior Children's Officer
CO2	Nakuru	Wanjiru(P)	12 <sup>th</sup> July 2006	Senior Children's Officer
JO1	Nairobi	Achieng(P)	14 <sup>th</sup> June 2006	Senior Resident Magistrate
JO2	Nairobi	Ojwang (P)	14 <sup>th</sup> June 2006	Senior Resident Magistrate
JO3	Nakuru	Murugi(P)	11 <sup>th</sup> July 2006	Senior Resident Magistrate
LO1	Nakuru	Odera(P)	27 <sup>th</sup> July 2006	Council Member Rift Valley Law Society Juvenile Programme
LO2	Nakuru	Oduor(P)	26 <sup>th</sup> June 2007	Officer Menengai Social Hall Programme
LO2	Nakuru	Moraa(P)	2 <sup>nd</sup> July 2007	Officer Rift Valley Law Society Juvenile Programme
LO3	Nakuru	Gathoni(P)	29 <sup>th</sup> July 2007	Officer Mwangaza Rehabilitation Centre
POA1	Nairobi	Odhiambo(P)	6 <sup>th</sup> July 2006	Senior Probation Officer
POA2	Nakuru	Gachihi (P)	11 <sup>th</sup> July 2006	Senior Probation Officer
POA3	Nakuru	Kibet(P)	13 <sup>th</sup> July 2006	Probation Officer
POA4	Nakuru	Muthoni(P)	20 <sup>th</sup> July 2006	Probation Officer
POAC1	Nakuru	Wangare(P)	11 <sup>th</sup> July 2006	Police Officer Children's Desk
POAC2	Nakuru	Bonareri(P)	28 <sup>th</sup> June 2007	Police Officer Children's Desk
POAC3	Nairobi	Nyambura(P)	9 <sup>th</sup> July 2007	Police Officer

				Children's Desk
POAC4	Nairobi	Mumina (P)	18 <sup>th</sup> July 2007	Senior Police Officer, Children Desk
PO1	Nairobi	Macharia(P)	19 <sup>th</sup> June 2006	Senior Prison Officer
PO2	Nairobi	Onyango(P)	19 <sup>th</sup> June 2006	Prison Officer
PO3	Nairobi	Kimani(P)	27 <sup>th</sup> June 2006	Prison Officer
PO4	Nairobi	Waigiri(P)	28 <sup>th</sup> June 2006	Prison Officer
PO5	Nairobi	Karanja(P)	3 <sup>rd</sup> July 2006	Prison Officer
PO6	Nairobi	Odera(P)	3 <sup>rd</sup> July 2006	Prison Officer
PO7	Nakuru	Njihia(P)	26 <sup>th</sup> July 2006	Senior Prison Officer
PO8	Nakuru	Ongeri (P)	26 <sup>th</sup> July 2006	Prison Officer
PO9	Mombasa	Njiru(P)	24 <sup>th</sup> July 2007	Borstal Institution Officer
PO10	Mombasa	Nzimbi(P)	25 <sup>th</sup> July 2007	Borstal Institution Officer
PO11	Mombasa	Njamwitha (P)	25 <sup>th</sup> July 2007	Borstal Institution Officer
RC1	Nairobi	Kerubo (P)	31 <sup>st</sup> August 2006	Law Reform Commissioner
RC2	Nairobi	Manyoni (P)	31 <sup>st</sup> August 2006	Law Reform Commissioner
RC3	Nairobi	Kabue (P)	31 <sup>st</sup> August 2006	Law Reform Commissioner
*P : Pseudonym *N: Real Name				

## **Appendix Three Part A**

### **Structure of Interview with Offenders**

- What is the first offence that you committed? How old were you?
- Were you arrested for this offence; were you imprisoned for this offence?
- How long was your sentence? Describe your experience in prison for the first time?
- What happened after being released from prison? How many times did you re-offend? Was your experience in prison any different from the first time you were imprisoned?
- What do you think is the objective of imprisonment? Do you think its objective can be achieved in any other way? Do you think that your treatment as a first offender had a bearing on subsequent offences?
- What is your view of prison generally?
- What has been the involvement of your family? Do you feel that your actions especially as a juvenile had an impact on your family? Do you feel that you are individually responsible for your actions?
- What is your feeling about the victims of your offences? Are you remorseful or merely indifferent? Would you at any stage have been willing to reconcile with the victim?

### Appendix Three Part B

#### List of Interviews with Adult Offenders (AO) and Juvenile Offenders (JO)

<b>INTERVIEW PARTICIPANT NUMBER</b>	<b>LOCATION</b>	<b>NAME</b>	<b>DATE OF INTERVIEW</b>
AO1	Nairobi	Gakure(P)	19th June 2006
AO2	Nairobi	Opiyo(P)	21 <sup>st</sup> June 2006
AO3	Nairobi	Ngatho(P)	27 <sup>th</sup> June 2006
AO4	Nairobi	Njuguna(P)	27 <sup>th</sup> June 2006
AO5	Nairobi	Njeru(P)	27 <sup>th</sup> June 2006
AO6	Nairobi	Onyango(P)	28 <sup>th</sup> June 2006
JO1	Nairobi	Mutiso(P)	19 <sup>th</sup> June 2006
JO2	Nairobi	Abdul (P)	20 <sup>th</sup> June 2006
JO3	Nairobi	Wafula(P)	20 <sup>th</sup> June 2006
JO4	Nakuru	Kiragu (P)	26 <sup>th</sup> July 2006

\* On 2<sup>nd</sup> July 2007, the fifteen juveniles on remand at the Nakuru Main Prisons were interviewed briefly on their backgrounds. These sessions were not in depth interviews.

Appendix Four

Research Permit

Page 2

THIS IS TO CERTIFY THAT:

~~MR/MRS/MS/MISS~~ SARAH  
 MURINGA KINYANJUI

of (Address) UNIVERSITY OF LEICESTER  
 UNITED KINGDOM

has been permitted to conduct research in \_\_\_\_\_

\_\_\_\_\_ Location,  
 NAIROBI & NAKURU District,  
 NAIROBI & RIFT VALLEY Province,  
 on the topic REBIRTH OF REHABILITATIVE/  
 IDEOLOGY: A GENEALOGICAL ANALYSIS  
 OF RESTORATIVE JUSTICE FOR  
 JUVENILES IN KENYA

for a period ending 30TH SEPTEMBER 2008

Page 3

Research Permit No. MUS&T 13/001/36E/237  
 Date of issue 19.2.2008  
 Fee received SHS. 1000.00



M. O. OUDIEKI  
 Permanent Secretary  
 Ministry of Education  
 Science and Technology

## Appendix Five

### Letter of Authorization from the Director of Children Services

**OFFICE OF THE VICE PRESIDENT AND MINISTRY OF HOME AFFAIRS**

Telegrams: "APPROVED", Nairobi  
Telephone: Nairobi 228411  
E-mail: childk@nhmnet.co.ke  
Telefax: Nairobi 2+9827



**CHILDREN'S DEPARTMENT  
HEADQUARTERS  
JOGOO HOUSE "A"  
P.O. BOX 46205  
NAIROBI**

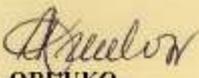
**CDEN/7/15/88** **8<sup>th</sup> May, 2007**

The Manager  
Gethaturu Rehabilitation School.  
Nakuru Children Remand Home  
Shimo La Tewa  
Y.C.T Kamiti.

**RE: AUTHORITY TO CONDUCT FIELD RESEARCH**

The bearer of this letter Sarah Muringa Kinyanjui is a student of University of Leicester Faculty of law. As part of course requirement, she is expected to conduct a research in various institutions that are part of the juvenile justice system in Kenya from June – September 2007.

In this regard, authority to carry out her research in your institution has been granted. You are requested to facilitate and supervise her work. The student is expected to abide by the rules and policies governing your institution.

  
**L. ORUKO**  
**FOR: DIRECTOR CHILDREN SERVICES**

C.C  
Sarah Muringa Kinyanjui.

## Appendix Six

### Letter of Authorization from the Commissioner of Prisons

OFFICE OF THE VICE PRESIDENT AND MINISTRY OF HOME AFFAIRS

KENYA PRISONS SERVICE

Telegrams: "COMPRISSONS" Nairobi  
Telephone: +254 02 2722900 6  
E-mail: Compriisons@ya.100.com  
When replying please quote:

36/1VOL.IX/92

Ref. No. ....  
and Date .....



PRISONS HEADQUARTERS  
P.O. BOX 30175-00100  
NAIROBI

Date..... 5<sup>th</sup> April 2006

Sarah Muringa Kinyanjui  
Faculty of Law  
University of Leicester  
University road  
Leicester  
LE1 7RH,  
UK

#### **REF: RESEARCH AUTHORIZATION**

Reference is made to your letter dated 3<sup>rd</sup> April 2006 on the above named subject.

This is to inform you that the Commissioner of Prisons has approved your request to conduct your research at Industrial Area Remand Prison and Nakuru Main Prison. Please note that we do not have Juvenile and Remand Homes under our department.

You will be required to submit a copy of your report to this office on completion of the exercise.

By a copy of this letter, the Officer in Charge Nairobi Remand & Allocation and Nakuru Main Prison are requested to accord you the necessary assistance.

  
**JANE KIRII (SP) R&S**  
**FOR: COMMISSIONER OF PRISONS**

**c.c.**  
The Officer In Charge  
Nairobi Remand & Allocation Prison  
P.O Box 18554  
**NAIROBI**

The Officer in Charge  
Nakuru Main Prison  
P.O Box 14  
**NAKURU**

The Provincial Prisons Commander  
Nairobi Area  
P.O. Box 18364  
**NAIROBI**

The Provincial Prisons Commander  
Rift Valley province  
P.O. Box 651  
**NAKURU**

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