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Back to the Past:

The (Re)Integration of Restorative Justice into the Nigerian Criminal Justice System

A Thesis Presented for the degree of Doctor of Philosophy in Law

at the School of Law

University of Durham

Adeniyi Olayemi Olayode LLM (London)

2016

ABSTRACT

Recently in Nigeria, calls have been made from stakeholders in the criminal justice system for change, with particular focus on reforms in the methods via which offenders are punished and rehabilitated. These calls have been made, mainly for two reasons. Firstly, the current sanctions in place, the most popular being the curtailment of the liberty of offenders via imprisonment, has failed to deter convicted and prospective offenders. This has contributed to high crime rates with recidivism recorded in high numbers. Secondly, the system fails to address the damages suffered by victims and the community at large. Therefore, there is a need to reform the current penal system so that it not only ensures that appropriate sanctions are issued, but also encourages participation by victims and the community in resolving issues arising from the crime.

One possible avenue for reform that this thesis considers is a concept known as Restorative Justice (RJ). This is because of the perceived similarities between RJ and pre-colonial restorative practices in Nigeria. Before the arrival of the British colonialists in the 19th century, the main objective of the pre-colonial justice systems was to restore social safety with little or no recourse to the use of extreme punishments like imprisonment or the death penalty. This thesis examines the aforementioned pre-colonial justice systems as well as the circumstances that led to their substitution with the British colonial justice system, including the use of imprisonment as the primary method of punishment. It proceeds to analyse the RJ concept and establishes that it does share similar principles and history with its pre-colonial counterpart and can therefore act as a 21st century alternative. Based on these findings, this thesis argues for the integration of RJ into the Nigerian Criminal Justice system, including its penal system and concludes with recommendations for its implementation.

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List of Abbreviations

Administration of Criminal Justice Act	ACJA
Administration of Criminal Justice Law	ACJL
Adult and Remedial Education Programmes	AREP
All Nigeria Law Report	ANLR
Alternative Dispute Resolution	ADR
Awaiting Trial Inmates	AWI's
Chapter	Cap.
Constitution of the Federal Republic of Nigeria, 1999	CFRN
Core Quality Standards	CQS
Crime Survey for England and Wales	CSEW
Criminal Procedure Act	CPA
Criminal Procedure Code	CPC
Crown Prosecution Service	CPS
Economic and Financial Crimes Commission	EFCC
Edition	edn
European Court of Human Rights	ECHR
Federal Bureau of Investigation	FBI
Laws of the Federation of Nigeria	LFN

National Association for Youth Justice	NAYJ
National Bureau of Statistics	NBS
Nigerian Drug Law Enforcement Agency	NDLEA
Nigerian Institute of Advanced Legal Studies	NIALS
Nigerian Prisons Service	NPS
Non-Governmental Organisations	NGO's
Overseas Security Advisory Council	OSAC
Prisoners' Rehabilitation and Welfare Action	PRAWA
Resolve to Stop the Violence Project	RSVP
Restorative Justice Council	RJC
Restorative Justice	RJ
United Nations Committee on the Rights of the Child	UNCRC
United Nations Economic and Social Council	ECOSOC
United Nations Office on Drugs and Crime	UNODC
United Nations	UN
United States	US
Victim Offender Mediation	VOM
Victim Offender Reconciliation	VOR

Declarations

I confirm that the thesis conforms to the prescribed word length for the degree for which I am submitting it for examination. I also confirm that no part of this thesis has been previously submitted for the award of a degree in the University of Durham or in any other University. This thesis is based solely upon the author's research.

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Dedication

This thesis is dedicated to all victims and prison inmates who have both suffered respective criminal injustices throughout Nigeria's history…

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Child Justice Act 75 of 2008 (South Africa)

Code for Crown Prosecutors (England and Wales)

Constitution (Suspension and Modification) Decree No 1 of 1984 (Nigeria)

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Constitution of the Federal Republic of Nigeria, 1999

Council of Europe Committee of Ministers Recommendation, *Mediation in Penal Matters* (No. R (99) 19 of 15 September, 1999)

Crimes (Restorative Justice) Act 2004 (Australia)

Criminal Code Act, Cap C38 Laws of the Federation of Nigeria. 2004

Criminal Code Ordinance No 15 of 1916 (Nigeria)

Criminal Procedure Act, Cap C41 Laws of the Federation of Nigeria 2004

Criminal Procedure Code Act, Cap 491 Laws of the Federation of Nigeria 2004

Crown Prosecution Service Core Quality Standards (England and Wales)

Customary Courts (Amendments) Ordinances, 1951 (Western Nigeria)

Emancipation Order, 1874 (Gold Coast colony)

English Crime and Courts Act 2013

English Crime and Courts Act 2013

English Crime and Courts Act, 2013

English Crime and Disorder Act, 1998

English Criminal Damages Act 1971

English Criminal Justice Act, 2013

English Criminal Justice and Immigration Act, 2008

English Criminal Justice and Immigration Act, 2008.

English Forfeiture Act 1870

English Malicious Damage Act 1861

English Offender Management Act of 2007

English Penal Code, 1959

English Penitentiary Act of 1779

English Prison (Amendment) Rules 2008 (Nigeria)

English Prison Act of 1877

English Prison Act of 1898

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Native Courts Ordinance No 8 of 1914 (Nigeria)

Native Courts Ordinance, 1914 (Nigeria)

Native Courts Ordinances 1933 (Nigeria)

Native Courts Proclamation, 1900 (Nigeria)

Nigerian Prison Bill (2008)

Nigerian Prisons Act, No. 9 (formerly decree No.9) of 1972

Nigerian Prisons Ordinance No. 42 of 1960.

Nigerian Prisons Service Commission (Establishment, etc.) Bill (2006)

Ordeal Witch-craft and Juju Proclamation, 1903 (Southern Nigeria)

Ordeal Witch-craft and Juju Proclamation, 1908 (Northern Nigeria)

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Ordinance No.7 of 1914; later Cap 4 of the Compilation Laws of Nigeria, 1923

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UN Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1)

UN Doc. E/5988 (1977)

UN Standard Minimum Rules for the Treatment of Prisoners

United Nations (UN) Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1)

United Nations Economic and Social Council (ECOSOC), *United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (Res. 2000/14, E/2002/INF/2/Add.2)

Universal Declaration on Human Rights 1948

CHAPTER ONE

INTRODUCTION

1.1 Introduction to the Thesis: Aims and Objectives

The use of imprisonment as the primary response to crime is common in all jurisdictions over the world. The last century witnessed vast masses of people incarcerated and this contributed to an increase in the number of prisons built.[1] Various jurisdictions replaced former modes of punishment like the death penalty and corporal punishment, with custodial sentence.[2] However, despite the initial intentions to introduce 'a more humane' form of punishment, as well as the perceived popularity associated with its continued use since its introduction in jurisdictions all over the world, questions still persists concerning its efficacy.

Further questions arise when one considers the development of the justice system in some societies and discover the non-existence or limited use of imprisonment as method of punishing offenders. Instead, such societies attached greater importance to reconciling offenders with their victims as well as the general community and their successful re-integration when they complete their sentences. These questions raise further interest when one also considers that amongst these societies, there are instances where imprisonment was introduced by a foreign country as part of a new justice system and as a tool of control under a system of dominance. As a result, the restorative aspects of the indigenous judicial systems were lost and replaced with a system that focuses primarily on the punishment of the

[1] Various scholars referred to the 20th century as *'the century of concentration camps'*; see Frank Dikotter, 'Introduction: The Prison in the World' in Frank Dikotter and Ian Brown (eds) *Cultures of Confinement: A History of the Prison in Africa, Asia and Latin America* (New York: Cornell University Press, 2007) 1.
[2] Frank Dikotter (n 1) 1.

offender and gives little or no regard to the needs of those impacted by the crime, particularly the victim.

This thesis wishes to explore this phenomenon and it will be using Nigeria as a case study. The country is an example of such a society that primarily exercised non-custodial penal practices in its justice system, which was replaced with imprisonment during British colonial rule from the late 19th century.

The thesis will examine the circumstances in Nigeria's legal history that led to the replacement of the aforementioned indigenous response to crime with the prison system. It will then proceed to analyse the impact this change has had on the country's justice system during the years of colonial rule to the present era. If at the end of this evaluation, the thesis reaches a conclusion that this replacement had a negative impact on the country's justice system, this thesis will attempt to put forward an alternative approach in the manner via which the justice system could respond to crime. However, this thesis will not be calling for a total abolition of the prison system but instead for the integration of restorative practices similar to those that existed in Nigeria before colonial rule. These restorative practices would not be limited to the prison system but could be applied at any stage of the criminal justice process. This thesis will be proposing the argument that by achieving a balance between the two concepts, the country could develop a justice system similar to the one that existed in pre-colonial Nigeria. This system will optimistically produce better outcomes in reducing recidivism and as a result, a corresponding decrease in crime rates.

A good starting point for this research is to consider the question 'Should the Nigerian prison system, under its current structure, be the primary response to crime?' To address this key research question, an examination of the system's structure and management will be conducted, including its development from the colonial to the post-

independent era as well as legislation governing its operations and objectives. In addition, the current challenges facing the prison system in performing its role in the criminal justice process in Nigeria will also be examined. Finally, statistics on crime and incarceration rates will also be analysed to determine if indeed the prison is sufficiently acting as deterrent to the occurrence of crime and therefore retain its role as the primary response to crime.

1.2 History of Nigeria

Before examining the status of the prison system in Nigeria, a brief examination of Nigeria's history may assist in understanding the circumstances that led to its establishment as the primary method of punishment and its continued development, if any. This brief examination will focus primarily on events that led to the creation of the country to provide some historical background, particularly for any reader who may not acquainted with Nigerian history. The next chapter will look into more detail Nigerian's legal history, through the pre-colonial, colonial and post-colonial eras to chart the historical development of the country's criminal justice system.

Nigeria, before its formation, existed as a collection of various 'kingdoms, emirates and communities'.[3] There were and still are in existence numerous ethnic groups, with Yoruba, Igbo, Hausa and Fulani groups accounting for over 70% of the population.[4] Nigeria has two main religions, Islam and Christianity, in addition to various types of traditional religions.[5]

The entire region was colonized by the British, following the Berlin Conference between 1884 and 1885, where European countries divided the African continent into

[3] MA Ajomo and I Okagbue (eds), *Human Rights and the Administration of Criminal Justice in Nigeria* (Research Series No. 1, Lagos: Nigerian Institute of Advanced Legal Studies (NIALS) 1991) 19.
[4] Random House, 'Nigeria' in Random House *Atlas of the World* (Random House, 2003); MA Ajomo and I Okagbue (n 3) 18.
[5] MA Ajomo and I Okagbue (n 3) 18.

sections for the purpose of the exploitation of resources via colonial domination.[6] Nigeria fell under British jurisdiction and this gave them a monopoly over the entire region.[7].

Using the policy of *'Indirect Rule'*, Lord Lugard administered the colony via the local rulers and chiefs.[8] As with other British colonies that now make the Commonwealth, the colonial government used the 'peace, order and good government' (POGG) clause to legitimize its position and enforce this policy over the indigenous population.[9] Using these powers, the colonial government created the Colony and Protectorate of Southern Nigeria, including the Lagos Colony in 1906. These colonies were administered together with their Northern counterpart, even though they existed separately from 1906 to 1914.[10] In 1914, the regions were merged into a single colony, with Lord Lugard appointed as its Governor-general.[11] This decision to amalgamate numerous ethnic groups, without the consent of the various peoples and due regard to the ethnic, religious and linguistic differences, will later

[6] The continent was divided vertically during the Berlin conference to permit European nations to have easy access to the coastal regions; see Viviane Saleh-Hanna, 'Penal Coloniality' in V Saleh-Hanna (ed) *Colonial Systems of Control: Criminal Justice in Nigeria* (University of Ottawa Press 2008) 22 - 24.

[7] Viviane Saleh-Hanna, 'Penal Coloniality' (n 6) 27. It should be mentioned that an argument could be made that the allocation of the various regions was done without taking into consideration the 'existing social structures, political economies and ethnic societies' that were already in existence for centuries. This is why, for example, you could find Yoruba tribes in parts of Benin and some Hausa tribes in Niger; see Viviane Saleh-Hanna, 'Penal Coloniality' (n 6) 22 – 23.

[8] This method was adopted in other British colonies in Africa; see E Loew, 'Nigeria' in JS Olson and R Shadle (eds) *Historical Dictionary of the British Empire K-Z* (Westport, CT: Greenwood Press, 1996) 812 - 813; Viviane Saleh-Hanna, 'Penal Coloniality' (n 6) 28; D Killingray, 'Punishment to fit the crime? Penal Policy and Practice in British Colonial Africa' in F Dikotter and I Brown (eds) *Cultures of Confinement: A History of the Prison in Africa, Asia and Latin America* (New York: Cornell University Press, 2007) 99.

[9] The POGG clause served a dual purpose of furthering British imperialism (whether direct or indirect rule over its colonies) as well conferring on itself self-ruling powers in various parts of the British Empire; see HO Yusuf, *Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government* (Oxon: Routledge, 2014) 6. See also C Tomlins, 'Necessities of State: Police, Sovereignty and the Constitution' (2008) 20(1) Journal of Policy History 47, 48 – 51; R Garran, Commentaries of the Constitution on the Commonwealth of Australia (Robert and Angus, Sydney, 1901) 49 – 50. The POGG was first introduced in 1872 as part of an Order in Council, which conferred power on the British Consul over British subjects in the territories in the Niger Delta. See HO Yusuf, *Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government* (n 9) 129; BO Nwabueze, *A Constitutional History of Nigeria* (London: C Hurst and Co, 1982) 6; T Falola and MM Heaton, *A History of Nigeria* (Cambridge: Cambridge University Press, 2008) 94 – 95.

[10] E Loew (n 8) 812 – 813; V Saleh-Hanna, 'Penal Coloniality' (n 6) 28

[11] Flora Shaw in 1898 coined up the name 'Nigeria', with its root from the 'River Niger' (she later married Lord Lugard and became Lady Lugard). See E Loew (n 8) 812 – 813; V Saleh-Hanna, 'Penal Coloniality' (n 6) 28; PO Nwankwo, *Criminal Justice in the Pre-colonial, Colonial and Post-colonial Eras: An application of the Colonial Model to changes in the Severity of Punishment in Nigerian Law* (Maryland: University Press of America, 2010) 25.

be referred by one of the country's prominent politicians, Ahmadu Bello, as the 'mistake of 1914'.[12]

Between 1946 and 1960, there was increasing pressures from local politicians and the general population for independence. This resulted in the establishment of the federal principle in the 1954 Constitution as well as the reduction of the powers of the Governor-General.[13] Furthermore, the Constitutional conferences in 1957 and 1958 in London set the stage for Nigeria's independence on 1st October, 1960, making it the 16th African state to gain independence from colonial rule.[14]

The post-independent democratic experience was soon short lived with the first of several military juntas overthrowing the democratic government in January, 1966.[15] This led to General JTU Aguiyi-Ironsi, an Igbo officer from the eastern part of the country, seizing power and becoming Nigeria's first military head of state.[16] Military rule soon became a significant feature of Nigeria's political history, with different military governments ruling the country for almost 30 years of Nigeria's 56-year-old post-independence history. The last military government of General Abdulsalami Abubakar

[12] Other prominent politicians of that era like Tafawa Balewa and Obafemi Awolowo also shared similar views; see M Siollun, *Oil, Politics and Violence: Nigeria's Military Coup Culture (1966 - 1976)* (New York: Algora Publishing, 2009) 12.

[13] E Loew (n 8) 813; V Saleh-Hanna, 'Penal Coloniality' (n 6) 28. The vast majority of the Nigerian political elite, as well as British administrators, had arrived at the conclusion that the adoption of a federal system was the best step towards 'minimising the tribal, educational, social, economic and religious differences' that were in existence. See JO Akande, 'Constitutional Developments' in TA Aguda (ed) *The Challenge of the Nigerian Nation: An Examination of the Legal Development 1960 – 1985* (Lagos: Nigerian Institute of Advanced Legal Studies, 1985) 2; MA Ajomo and I Okagbue (n 3) 20.

[14] E Loew (n 8) 813; V Saleh-Hanna, 'Penal Coloniality' (n 6) 29; MA Ajomo and I Okagbue (n 3) 21.

[15] A *military coup* is the violent or non-violent overthrow of an existing political regime. Military coups and military rule have been described as an 'emergency aberration' which soon became a significant part of Nigeria's political history; see M Siollun (n 12) 11. One of the major characteristics of military rule is suspension of certain sections of the constitution and the enactment of Decrees (National) and Edicts (State) which the courts have no jurisdiction over; see the Constitution (Suspension and Modification) Decree, No. 1of 1966, s 1(1); MA Ajomo and I Okagbue (n 3) 21.

[16] This coup was organized by mostly Igbo officers, under the leadership of Majors Emmanuel Ifeajuna and Chukwuma Kaduna Nzeogwu and was marked by the murders of key civilian leaders, including Abubakar Tafawa Balewa and Ahmadu Bello, who were both from the northern region; see M Siollun (n 12) 97 – 102.

handed power to Olusegun Obasanjo and since then, Nigeria has had four democratic elected presidents, with Muhammad Buhari as its current president.[17]

The next section will now proceed to examine the Nigerian prison system that was introduced during colonial rule as well as its subsequent use, particularly during the years after independence. The laws regulating the prison system as well its statutory functions will also be analysed.

1.3 The Nigerian Prison System: Introduction and use after Independence

Part of the fallout of British colonization in Nigeria was the gradual replacement of various customs, beliefs and traditions with a system and culture that was foreign to the local residents. Some of the most significant changes of primary concern to this research were those made to the legal structure, particularly to the criminal justice system with the introduction of English common law.

Before colonial rule, there were in existence indigenous justice systems that ensured that certain standards of behaviour were upheld and prescribed punishments when there were occurrences of non-compliance.[18] In order to achieve this objective, these respective justice systems believed in the use of restorative practices, particularly at the sentencing stages for the purpose of healing and restoring relationships. The community leaders, whose responsibility was to ensure societal equilibrium, championed these approaches as they were of the opinion that communal harmony could only be restored via the reconciliation of parties involved in the dispute.[19] As part of the reconciliation process, the offender usually paid some form of compensation to victim in addition to rendering an apology and

[17] MA Ajomo and I Okagbue (n 3) 22; Archonotogy.org, *Nigeria: Heads of State: 1963 to 2016* <http://www.archontology.org/nations/nigeria/00_1963_td_s.php> accessed on 22 April, 2016.
[18] CO Okonkwo and ME Naish, *Okonkwo and Naish on Criminal Law in Nigeria* (2nd end, London: Sweet & Maxwell, 1980) 4.
[19] PO Nwankwo (n 11) 130 - 131.

acknowledging responsibility for their actions.[20] Incarceration was rarely used as method of punishment as the judicial structures in these societies did not advocate for such punitive measures.[21] Details of the pre-colonial judicial system, particularly their sentencing and punishment procedures, will be discussed in depth in the next chapter.

However, soon after their arrival, the British colonialists were of the opinion that the indigenous justice system, including their restorative practices and sanctions, were not in accordance with modern judicial practice and humanitarian ideas.[22] For example, in some regions of the country, the accused was subjected to a *trial by ordeal* involving the infliction of an unpleasant experience to determine the accused's guilt or innocence.[23] Various commentaries from early European writers also describes the people in the south of the African Sahara as 'savages' which gives the impression that there were no legal structures in existence in those communities.[24] These commentaries further argue that even if there in existence, they were inadequate and fell short of the standards of justice as defined by the British colonialists. Furthermore, various scholars like Maine, Durkheim and Donnelly argue that pre-colonial Africa societies had no concept of human rights, which they argue are invention of Western societies and that the laws in pre-colonial African societies were 'repressive'.[25]

[20] Extreme punishments like death, being sold into slavery and exile were usually reserved for the most serious sentences like witchcraft; see PO Nwankwo (n 11) 130 - 131; David Killingray (n 8) 101 - 102

[21] PO Nwankwo (n 11) 130 - 131; Florence Bernault, 'The Politics of Enclosure in Colonial and Post-Colonial Africa' in F Bernault (ed) *A History of Prison and Confinement in Africa* (Portsmouth: Heinemann, 2003) 56.

[22] David Killingray (n 8) 102.

[23] Frederick Lugard, *Political Memoranda, - Revision of Instructions to Political officers on Subjects Chiefly Political and Administrative, 1913 – 1918* (1st edn 1906, 2nd edn 1919, 3 edn reprinted in London: Frank and Cass, 1970) 97 - 98, Part III, para 30.

[24] GT Basden, *Niger Ibos: A Description of the Primitive Life, Customs and Animistic Beliefs of the Ibo People of Nigeria* (2nd edn., New York: Barnes and Noble, 1966); cited in E Onyeozili and O Ebbe, 'Social Control in Precolonial Igboland in Nigeria' (2012) 6 African Journal of Criminology and Justice Studies 29, 30.

[25] H Maine, 'From Status to Contract' in V Aubert (ed) *Sociology of Law* (Reprint Edition, Penguin, 1969); E Durkheim, *The Division of Labour in Society* (Translated by G. Simpson, Toronto: Collier-Macmillan, 1966); J Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6(4) Human Rights Quarterly 400 – 419; all cited in OO Elechi, 'Human Rights and the African Indigenous Justice System' (Paper presented at the 18th

The Colonial office in London wanted to ensure that that the penal policy and practice in all their colonies were 'consistent and humane' and reflected English principles of 'equity and impartiality'.[26] Therefore, the English criminal legal system was introduced, and apart from the colony Lagos State, operated simultaneously with the customary criminal law (under principle of Indirect Rule)[27] until the adoption of single criminal code. This code was first established in Northern Nigeria before it was extended to the entire country in 1916.[28] Even thereafter, indigenous criminal law still applied in native courts but extreme native criminal penalties for dealing with offenders, for example being sentenced to be sold as slaves, were abolished. This was because they were considered repugnant to natural justice and humanity.[29] In addition, the use of several corporal punishments like caning and whipping was restricted.[30]

Nigeria also proceeded to adopt the adversarial court system, similar to that in operation in Britain. In criminal trials, evidence supported with arguments from opposing sides, are presented before a Judge who determines the guilt or otherwise of the accused based on the said evidence.[31] The accused is presumed to be innocent until proven guilty and the burden of proof rests on the prosecution to prove guilt beyond a reasonable doubt.[32]

International Conference of the International Society for the Reform of Criminal Law, 8 – 12 August, 2004, Montreal Quebec, Canada) 7 – 8.

[26] D Killingray (n 8) 98 - 100.

[27] MA Ajomo and I Okagbue (n 3) 177; David Killingray (n 8) 99.

[28] MA Ajomo and I Okagbue (n 3) 177; David Killingray (n 8) 99. This created a form of legal pluralism where 'English criminal was overlaid on pre-existing legal institutions in colonised societies'; see S Larcom, 'Accounting for Legal Pluralism: The Impact of Pre-Colonial Institutions on Crime' (2013) 6(1) Law and Development Review 1, 4.

[29] Frederick Lugard (n 23). See also Annual Colonial Reports, Northern Nigeria (1900 – 1911) 92 - 93; Native Courts Proclamation 1900, s 9(N); Native Courts Ordinance 1914, s 9; Ordeal, Witchcraft and Juju Proclamation 1903 (South), 1908 (North); all cited in A Milner, *Nigerian Penal System* (London: Sweet and Maxwell, 1972) 22.

[30] A Milner, 'Sentencing Patterns in Nigeria' in A Milner (ed), *African Peal Systems* (London: Routledge & Kegan Paul Ltd, 1969) 264.

[31] Nigerian Institute of Advanced Legal Studies (NIALS), 'Communique on the Roundtable on the Adversary System: A Failed Process?' (2011) <http://www.nials-nigeria.org/round_tables/Adverserialsystem.pdf> accessed on 17 May, 2013.

[32] SI Onimajesin, 'Criminal Justice System in Nigeria: An Appraisal' in RO Lasisi and JO Fayeye (eds) *Leading Issues in General Studies: Humanities and Social Sciences* (General Studies Division, University of Ilorin, Ilorin, Nigeria 2009) 195 or

If an accused is found guilty, he could be punished via various methods. One of such punishments, which were introduced by the British colonialists, involved curtailing the liberty of the individual for a specific period … *imprisonment.*[33]

Following independence, reforms in the prison system in Nigeria were implemented to reflect its British counterpart, with the then Nigeria government deciding that the best approach is to institutionalize the existing ordinances.[34] This led to the enactment of the Prisons Ordinance No.41 of 1960, which contained the same provisions as its predecessors as well as new provisions creating new offences with respect to prison security.[35] The country continued to have two prison systems (the State and Native Authority prisons) until 1966 when the Federal Military government took over the management of the Native Authority prisons. This was because of the recommendations in the Gobir Report on Prison Unification and its enactment in the Prisons Control Act, No. 9 of 1966.[36] The unification led to the gradual withdrawal of British officers who had continued to manage the prisons after Independence and the establishment of the Nigerian Prisons Service (NPS) who took

<http://www.unilorin.edu.ng/publications/onimajesinsi/Criminal%20Justice%20System%20In%20Nigera-%20An%20Appraisal.pdf> accessed on 20 May, 2013.

[33] Imprisonment has been used for the punishment of criminal offenders since the late 19th century, with the first prison built in 1872 at Broad Street, Lagos. The enactment of the Prison Ordinance of 1876 led to the expansion of the prison system to other parts of the country, with more prisons being built in 1910; see MA Ajomo and I Okagbue (n 3) 175 - 176; D Killingray (n 8) 100; V Saleh-Hanna and C Ume, 'An Evolution of the Penal System: Criminal Justice in Nigeria' in V Saleh-Hanna (ed), *Colonial Systems of Control: Criminal Justice in Nigeria* (University of Ottawa Press 2008) 57 - 58. Other forms of punishments including the death penalty, fines and caning were in existence but for the purpose of this thesis, the primary focus will be on imprisonment. Imprisonment has now become the primary method of punishment under the Nigerian criminal justice system, with 63,142 inmates currently held in 241 prisons throughout the country; see Nigerian Prisons Service, 'Statistical Information' <http://www.prisons.gov.ng/about/statistical-info.php> accessed 20 June 2016.

[34] V Saleh-Hanna and C Ume, 'An Evolution of the Penal System: Criminal Justice in Nigeria' (n 33) 60. Customary criminal was later no longer in use after the case of *Aoko v. Fagbemi* (1960) 1 All Nigerian Law Report 400 which stipulates that all criminal offences must be defined as well as the prescribed punishment written in law as provided for in Section 36(12) of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended).

[35] Sections 8 - 12 of the Prisons Ordinance No. 42 of 1960.

[36] AC Odinkalu and OL Ehonwa, *Behind the Wall: A Report on Prison Conditions in Nigeria and the Nigerian Prison system* (Surulere, Lagos: Civil Liberties Organisations, 1991) 132; AM Jefferson, 'Prison Officer Training and Practice in Nigeria' (2007) 9(3) Punishment and Society 253 - 269, 257. Viviane Saleh-Hanna and Chukwuma Ume, 'An Evolution of the Penal System: Criminal Justice in Nigeria' (n 33) 60.

over their management from 1st April, 1968.[37] British experts on penal reforms were engaged to give advice to the newly created institution and assist in supervising the re-organization of the existing prion services.[38]

However, due to the Nigerian civil war, the NPS did not have full management of all prisons in the country.[39] It was only after the Prisons Act, No. 9 (formerly decree No.9) of 1972, following the National Conference on the prison system[40] and the publication of Federal Government White Paper,[41] repealed the 1966 Prisons Act that the NPS had full control.

The Prisons Act of 1972 was later amended by the Prisons Act of 1990[42] and subsequently by the Prisons Act 2004[43], with the core sections retained with very little amendments.[44] The next section shall proceed to analyse the operations and objectives of the prisons. As there were no significant changes in the Prison Ordinances of 1960 and 1966, our examination will commence from the Prisons Act of 1972 to the Prisons Act of 2004 looking specifically at the provisions that relate with rehabilitation and treatment of the offenders.

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[37] IM Jarma, 'The Evolution, Management and Development of the Nigerian Prison Service in the Colonial and Post Independent Era' (Paper presented at the workshop on Nigeria Prison System: Issues and Ideas for Reform in Abuja, Nigeria, 1998); AM Jefferson (n 36); Viviane Saleh-Hanna and Chukwuma Ume, 'An Evolution of the Penal System: Criminal Justice in Nigeria' (n 33) 60.

[38] AM Jefferson (n 36).

[39] IW Orakwe, 'The Origin of Prisons in Nigeria' (Nigerian Prison Services) <http://www.prisons.gov.ng/history_of_nps > last accessed on 7 September, 2016.

[40] Professor TO Elias, the former Federal Attorney-General and Commissioner for Justice chaired the aforementioned Conference.

[41] *A Statement of Federal Government's Policy on the Re-organisation of the Prison Service and the Integration of the Federal, Local Government and Native Administration Prisons* called for further reforms in Nigerian prisons, including decongestion of the prison population.

[42] Cap. 366 Laws of the Federation of Nigeria (LFN) 1990.

[43] Cap. P29 LFN 2004.

[44] For example, under the 1972 Prisons Act, the head of the NPS was referred as the 'Comptroller-General' while under the 1990 and 2004 versions, he is referred as the 'Director'. However, in the NPS website, the head of the service is referred to as the 'Controller-General'. See Nigerian Prisons Service, 'The Admin Structure' <http://www.prisons.gov.ng/admin_structure> last accessed on 9 May, 2015.

1.3.1. What is a Prison and who is a Prisoner?

The Prisons Acts of 1972, 1990 and 2004 did not provide a clear definition of what a prison is. Sections 19 of all three Acts define a prison as *'a prison declared under this Act'*. Section 19 also provides that a prisoner *'means any person lawfully committed to custody'*. The lack of a clear precise definition in both cases creates ambiguity on what the prison is, its purpose and function as well as who qualifies to be imprisoned. This contributes to the challenges facing the prison system, particularly the problem of overcrowding with respect to inmates who are awaiting trial.[45]

1.3.2 The Functions of the Nigerian Prison

The aforementioned Prison Acts did not also stipulate the functions of the prisons or how these functions were to be implemented.[46] It only provided in their opening provisos that the Act is to provide comprehensive provisions for the administration of the prisons. These Acts were also silent on how prisoners were to be reformed, rehabilitated and re-integrated into the society.[47] The Acts did specify the conditions under which prisoners were to live in the Subsidiary Legislation section (Prisons Regulations) of the respective Acts.[48] However, apart from the fact that these provisions are yet to be amended since 1972 and are therefore unable to address current challenges and meet with international standards, the main problem has been the lack of enforcement and this has contributed to the challenges

[45] The reason why these inmates are awaiting trial is that they are yet to be charged, as investigations to determine their alleged culpability in the alleged crime are still being conducted by the police. Furthermore, there are multiple of other authorities like the Drug Law Enforcement Agency (NDLEA), Economic and Financial Crimes Commission (EFCC) and state security forces like 'Operation Sweep' in Lagos who take advantage of the powers to arrest and detain suspects for long periods of time without charge; see Prisoners' Rehabilitation and Welfare Action (PRAWA), *Overcrowding in Nigerian Prisons* (Penal Reform Education Series Issue 8, 1999) 2. This phenomenon is referred to as the 'holding charge principle' which had legal support from the courts, including the Supreme Court; see *Lufadeju v. Johnson* (2007) 8 NWLR (Pt 1037) 535. Presently, Awaiting Trial Inmates (AWI's) constitute almost 70% of the entire prison population in Nigeria (39, 577); see Nigerian Prisons Service, 'Statistical Information' (n 33).

[46] AM Jefferson (n 36) 257 - 258.

[47] ibid.

[48] Prisons Act, No. 9 (formerly decree No.9) of 1972; Cap. 366 LFN 1990; Cap. P29 L.F.N. 2004

in the prison system. Therefore, the above analysis of the sections of the Acts could arguably lead to the conclusion that the prisons are to serve no other purpose than a 'custodial hub' for offenders. This argument gains more credence with a lack of clear stipulations on how inmates are to be reformed and rehabilitated during their sentences as well plans for their re-integration into the society upon their completion.

Although the Prison Acts do not stipulate what the functions of the prisons are, the Nigerian Prison Services (NPS) in their website stated that their functions include:[49]

1) Taking into lawful custody all those certified to be so kept by courts of competent jurisdiction;
2) Producing suspects in courts as and when due;
3) Identifying the causes of their anti-social dispositions;
4) Setting in motion mechanisms for their treatment and training for eventual reintegration into society as normal law abiding citizens on discharge; and
5) Administering Prisons Farms and Industries for this purpose and in the process generate revenue for the government.

These functions can also be found in the official prison publications like the Nigerian Prisons Services Annual Report, 2000[50] as well as publications by charity organizations like

[49] Nigerian Prison Services, 'About the Service – Mission, Vision and Function' <http://www.prisons.gov.ng/mission_vision> last accessed on 7 September, 2016; Viviane Saleh-Hanna and Chukwuma Ume, 'An Evolution of the Penal System: Criminal Justice in Nigeria' (n 33) 62 - 63. Under Decree 9 of 1972, the NPS was established to carry these responsibilities within the Nigerian prison system. The Welfare Division of the Health and Social Welfare Directorate of the NPS plays a key role in the performance of these functions, as they are responsible for the reform and rehabilitation of prisoners as well as their re-integration into society upon conclusion of their sentences. They employ various mechanisms including counselling as well as adult and remedial education programmes (AREP). The After-Care Services programme assist discharged inmates to return to life outside the prison walls through the provision of post-discharge supervision and patronage; see Nigerian Prisons Service, 'Health and Social Welfare Directorate' <http://www.prisons.gov.ng/health_social_welfare> accessed 7 September, 2016.

[50] Nigerian Prisons Service (NPS) *Annual Report* (Nigeria: Prisons Department, 2000).

Prisoners' Rehabilitation and Welfare Action (PRAWA)[51] who work closely with the NPS.[52] Both the NPS and PRAWA have contributed to the training of prison officials to ensure they are aware of how these functions assist with the rehabilitation, reformation and re-integration of prisoners. The duties of prison officers are specified in the Staff Duties Manual of the Nigerian Prisons Service and are to be performed whilst respecting prisoners' human rights.[53]

Despite of the above mentioned goals of the NPS and the training received by prison officials to carry out them out, there are continued reports of the poor conditions under which prisoners are kept. Amnesty International conducted a report on the living conditions of prisoners of selected Nigerian prisons in 2008.[54] Apart from problems of overcrowding, other issues include poor sanitation, lack of food and medicines and denial of access to families and friends that fall short of UN Standards.[55]

Several working groups and committees have been commissioned to look into these problems and the respective governments had promised on several occasions to implement their findings. These include the *Inter-Ministerial Summit on the State of Remand Inmates in Nigeria's Prisons (2005)* (Inter-Ministerial Summit) who reviewed the earlier prison congestion findings by the *National Working Group on Prison Reform and Decongestion (2005)* (National Working Group). The National Working Group reviewed 144 prisons and

[51] PRAWA, *Facts about Nigerian Prison System* (PRAWA Penal Education Reform Series (6), 1999). PRAWA is a Non-Governmental Organisation that believes in the 'importance of an effective, just, humane and accessible justice system which recognizes support and rehabilitation to offenders, victims and the community'. They also lobby for the reform of the prison system via various mechanisms, including the enactment of relevant legislation that provides for proper treatment, rehabilitation and re-integration of offenders and organizing training seminars for those associated with the criminal justice system – PRAWA, 'Beliefs and Achievements' <http://www.prawa.org/beliefs-and-achievements/>; 'Mission, Vision and Values' http://www.prawa.org/mission-vision-and-values/ > accessed on 18 June, 2016.
[52] AM Jefferson (n 36) 258
[53] AC Odinkalu and OL Ehonwa (n 36) 135; AM Jefferson (n 36) 262.
[54] Amnesty International, *Nigeria: Prisoners' Rights are Systematically Flouted* (London: Amnesty International Publications, 2008)
[55] Amnesty International (n 54) 1.

discovered that 65% of the 40,000 to 45,000 incarcerated inmates, in the previous 10 years, were awaiting trial.[56] Based on this report, the Inter-Ministerial Summit made several recommendations including that the Federal Government should respond to the issue of the large number of inmates awaiting trial and pay more attention to the rehabilitation of prisoners. They also recommended that a Chief Inspector of Prisons and Board of Visitors be appointed to check periodically on the conditions of Nigerian prisons.[57]

The following year, the *Presidential Committee on Prison Reform and Rehabilitation* (Presidential Committee) was established to investigate similar issues on prison congestion.[58] Apart from recommending the improvement of the conditions of service, for both prison and police officials, the Committee recommended that the problems of prison congestion and the large numbers of inmates awaiting trials should be addressed.[59]

Unfortunately, many of the recommendations are yet to be implemented and despite several promises by the government to decongest the prisons, there has been no confirmation on whether these promises were fulfilled.[60]

[56] *Report of the National Working Group on Prison Reforms and Decongestion* (February 2005). The National Working Group stated in 2005 that the number of inmates awaiting trial was the main cause of overcrowding in urban prisons. The prison audit gives the following background on the inmates awaiting trial: 75 percent of the prisoners awaiting trial are in custody for indictable offences, such as armed robbery or robbery; 26.4 per cent of them have legal representation from Legal Aid Council or NGOs; 3.7 per cent remain in prison because their files have been lost; 7.8 per cent are in detention because there was no prosecution witness or because the investigating police officer had been transferred; 17 per cent are held because investigations into their cases have not been completed; 40 per cent are held on a holding charge. See Amnesty International (n 54) 3, 50.

[57] Following these recommendations, the Minister of Justice stated in October 2005 that the Federal Executive Council was considering the appointment of an independent Chief Inspector of Prisons. See *The Response of the Federal Ministry of Justice to the Problem of Awaiting Trial Persons in Nigeria's Prisons* (House of Representatives Dialogue on the state of awaiting trial persons in Nigerian prisons, 13 October 2005).

[58] New Nigerian, 'Prison Reform: Panel's recommendations will be implemented – Obasanjo' *New Nigerian* (15 November 2006).

[59] Amnesty International (n 54) 3 - 4.

[60] Amnesty International (n 54) 4.

1.4. Does the Prison system work?

From the above discussions on the Nigerian prison system, one questions how realistic it is to expect that prisoners can be reformed, rehabilitated and re-integrated back into society. This question become more pertinent when one also considers the inhumane conditions under which prisoners are imprisoned.

Apart from the above discussed issues, there have been other contentions as to the appropriateness or otherwise of the use of imprisonment as the primary method of punishment. Firstly, there is a serious debate on whether imprisonment has successfully acted as a deterrent. An analysis of crime statistics from the National Bureau of Statistics (NBS) will assist in addressing this issue. In a wide range of crimes including murder, robbery, arson and trafficking, the NBS reports that between 2013 and 2014, the total number of persons imprisoned were 158,896 and 138,842 respectively.[61] These numbers are quite high, especially when you consider that prison capacity for 2013 was 47,646 and for 2014 was 49, 825, with both less than half than the total number of persons imprisoned.[62]

Another interesting section of the report was the recidivism rates, with a total number of 47,384 and 41,544 recorded cases of inmates who have been convicted between once and seven times or more, in 2013 and 2014 respectively.[63] This means that almost 30% of inmates in 2013 and 36% in 2014 have had at least more than one previous conviction.[64]

[61] These numbers are inclusive of inmates that have been convicted and those who are awaiting trial. The report also includes statistics until the second quarter for 2015 with a total number of 45,762 persons incarcerated; see National Bureau of Statistics, *Crime Statistics: Nigerian Prisons* (National Bureau of Statistics, April 2016) Table 2.

[62] In 2015, the prison capacity was 50, 153; see National Bureau of Statistics (n 61) Table 1.

[63] The highest category in 2013 were those who had one previous conviction (19061) whilst in 2014, the highest category was those who had two previous convictions (15,061); National Bureau of Statistics (n 61) Table 3.

[64] As of the second quarter of 2015, the total number of inmates who had one more than one previous conviction was 11,930, which is over 26% of the entire number of persons imprisoned.

Unfortunately, this thesis has been unable to locate any further information on recidivism rates beyond the second quarter of 2015.

As mentioned earlier, there are currently 63,142 inmates in Nigerian prisons, which have a total capacity of 50,153.[65] Although one may argue that this could be considered a substantial decrease in the number of persons imprisoned, an opposing argument could be made that the recorded occurrences of crimes in the country are still in high end of the spectrum.[66] Furthermore, when one compares this with the inadequate prison capacity and the nature of the conditions under which prisoners live, coupled with the costs in managing these prisons, this raises valid questions on the effectiveness of the prisons as a method of punishment. These issues will be discussed at length subsequently in this thesis.

An additional contentious issue with the use of imprisonment (and arguably with the entire criminal justice system) is how it assists those affected by the crime. In addressing this question, this research argues that it is pertinent to consider and identify those who are 'affected by the crime'. Should it be just the State and the offender that are the principal parties or should this phrase extend to other parties, namely the victims, the families (of both the victims and the offenders) as well as the community? If the consensus is that the latter group are also relevant to criminal justice process, this raises the question on whether the present system in its current format addresses their concerns. If the answer is in the negative, what modifications need to be considered, particularly when one considers the present manner via which Nigerian prisons are managed.

Finally, another challenge with the use of imprisonment is the social stigma imposed by the society on the offender, which in most cases, if not all, is extended to the offender's

[65] Nigerian Prisons Service, 'Statistical Information' (n 33).
[66] Furthermore, these were the statistic as of 31st March 2016. There is a probability that these numbers could increase by the end of the year, similar to those recorded in 2013 and 2014.

family.[67] Scholars have further argued that having a criminal record also closes the avenue in various areas including employment, marriage and having a family and these forms of social ostracism are incompatible with societal principles and do not aid the development of the of the Nigerian society.[68] Another consequence of the aforementioned stigmatization is that a number of offenders will resort to associating with fellow ex-prison inmates for support and means of earning a living, which may lead to them re-offending. This not only contributes to recidivism rates and correlating increase in crime, but also, the offender may be trapped in a perpetuating cycle where they may spend a majority of their existence within prison walls.[69] Evidence of this is clear in the recidivist statistics for Nigerian prisons discussed earlier.

With above questions and issues associated with the primary use of the prison system, it is pertinent that a study be conducted to evaluate the entire structure. One of the key objectives of this study is to propose recommendations that will lead to a much needed revamp of the prison system, as it is now a significant feature of the Nigerian criminal justice process. This thesis intends to conduct such a study and one of the key areas for investigation

[67] A Adeyemi, 'Alternatives to Imprisonment in Nigeria: Problems and Prospects' (National Conference on Alternatives to Imprisonment in Nigeria, Abuja, 2000); C Ume, 'Alternatives to Imprisonment: Community Service Orders in Africa' in V Saleh-Hanna (ed), *Colonial Systems of Control: Criminal Justice in Nigeria* (University of Ottawa Press 2008) 384.

[68] A Adeyemi (n 67); C Ume (n 67). Families whose members have been convicted of offences that carry the death penalty, particularly armed robbery, have also endured similar experiences of social stigma from the larger society. Dambazau cited the experience of the mother of Lawrence Anini who was executed in 1987. The mother was interviewed after his death and she claimed she and the rest of the family had suffered a great deal, from both the police and the public at large, and that the actions of her son had ruined the family name. For example, she claimed she was imprisoned for 6 months and was tortured. Another example was the experience of the children of Sub-Lieutenant Oyazimo, who was convicted on 24th April, 1971. They claimed they suffered social stigma as result of crimes that they believed their father never committed. Further to the argument that the death penalty does not act as deterrence, Dambazau highlights a statement made by inmates at Kirikiri Prison, Lagos who were convicted of armed robbery. One inmate stated that those who actually committed such crimes are well aware of the death penalty and were prepared to kill any possible witnesses. Another inmate re-affirmed this and stated that the death penalty actually led to the brutal robberies in Nigeria because of the armed robbers' belief that the best way to avoid the death penalty was to kill any potential witness who could identify them; see AB Dambazau, *Law and Criminality in Nigeria: An Analytical Discourse* (University Press Plc. 1994) 128 - 131.

[69] J Braithwaite, 'Restorative Justice and a Better Future' in E McLaughlin and others (eds), *Restorative Justice: Critical Issues* (London: SAGE in association with The Open University, 2003) 55 - 56.

is the sentencing and punishment methods that were in existence before the arrival of the British colonialists. The purpose of this investigation is to discover how offenders were treated during the Nigerian pre-colonial era; whether or not a prison system, similar to the one introduced during colonialism, was a used; and if not, whether such practices where sufficiently appropriate with dealing with offenders when compared with the prison system.

If a successful argument could be made that these pre-colonial punishment methods should have been taken into consideration by the British colonialists, this thesis intends to suggest recommendations on how the ethos guiding them could be synthesized into the present prison system. In pursuit of this aim, the thesis intends to propose Restorative Justice (RJ) as a modern day equivalent of the Nigerian pre-colonial restorative practices, following an analysis of its core principles and a comparison with the pre-colonial practices. This thesis also intends to put forward strategies for its successful adoption, in not only the prison system but also in other stages of the Nigerian Criminal Justice process. In addition, this thesis intends to cite examples of good practice in other jurisdictions where they have been implemented successfully.

1.5 Overview of the Thesis

To understand the how the prison system was introduced into Nigeria and the motivation behind its introduction, the second chapter will first conduct an examination of the sentencing and punishment practices in pre-colonial Nigeria. It will then proceed to compare them with the colonial and post-colonial counterparts. The purpose of this comparison is to determine whether the procedure and sanctions under the pre-colonial judicial system were ‘unfair and unequitable’ and therefore, justify the introduction of imprisonment as viable alternative by the British colonialists. If the findings lead to the conclusion that the introduction of the prison system was not justified and at the minimum,

there were aspects of Nigeria's pre-colonial judicial system that could have been integrated into the colonial prison system, the thesis will proceed to analyse an alternative with RJ as a probable solution.

The third chapter will examine the various definitions of RJ as proposed by various proponents, practitioners and scholars, with the primary objective of identifying its key principles. This analysis should provide insight on whether these same principles also existed in the pre-colonial judicial systems in Nigeria. This will lend more credence to the position to be proposed by this thesis that RJ can function in Nigeria because a similar system was in existence and operational before the arrival of the British colonialists. Therefore, RJ can function as a form of 'modern day equivalent' to the pre-colonial judicial systems. This will be followed with discussions on RJ's historical origins as well its development over the centuries in the fourth chapter. The purpose of this study is to analyse how early societies, similar to those that existed in pre-colonial Nigeria, departed from a RJ based judicial system to the present day criminal justice process. The study will also examine the circumstances that led to the gradual re-emergence of RJ in various jurisdictions for purpose of learning how they re-integrated it into their present criminal justice systems

Chapter five will conduct an examination of different modern day RJ schemes in various jurisdictions, with the specific purpose of highlighting how RJ can operate at various stages of the criminal justice process; pre-trial, trial and post-conviction. Statistics on the impacts of these schemes on re-offending rates as well as the response from key participants will also be analysed.

The sixth chapter will consider extensively the reforms necessary for prisoners' rehabilitation as well as the wider Nigerian penal system to enable RJ to operate effectively. It will first address the arguments against the integration of RJ prisons by both prison and

RJ advocates who are of the opinion that the prison system and RJ are two opposing concepts and that they cannot co-exist within the same structure. The purpose is to provide opposing views to each of these positions and to put forward the position that a 'balance' between them is what is required for an efficient penal system. The chapter will then proceed to examine in detail the current penal policy in Nigeria, highlighting the problematic and outdated areas that have contributed to the current challenges in the prison system that were discussed earlier in this chapter.

The chapter will conclude by proposing measures towards changing not only the prison structures but also, the general attitude of the aims and objectives of the prisons from both professionals associated with its administration and the public. For example, this chapter will examine the laws relating to the rehabilitation of prisoners in Nigeria and propose modifications to such laws that will assist with not only their rehabilitation but also their re-integration into the society when they complete their sentences. It will take into consideration suggestions from penal reformists, practitioners and non-governmental organisations that have campaigned extensively for reforms in the system.

Finally, chapter seven will summarise the objectives set out in the essay and re-establish the urgent need for reforms and the significant role that RJ can play in the transformation of the Nigerian Criminal Justice system. This is in line with the primary objective of the thesis, which is to propose a RJ policy that would encourage its use at various stages of the criminal justice process. This includes considering the use of RJ as a diversionary process with particular regards to cases involving minor offences or young offenders. The chapter will also discuss the enabling environment required for such policy to operate successfully.

CHAPTER TWO

THE HISTORY AND DEVELOPMENT OF PENAL METHODS UNDER THE NIGERIAN JUSTICE SYSTEM

2.1 Introduction

The question as to whether Restorative Justice (RJ) is suited for integration into the Nigerian prison system necessarily entails some discussion of the current penal structure in Nigeria. The discussion will involve an expedition into the historical background of the criminal justice system, analysing its evolution over the years, with particular emphasis on the prison system. For the purpose of this analysis, Nigeria's criminal justice history will be divided into three eras: *Pre-colonial* (Pre 1861), *Colonial* (1861 – 1960) and *Post-colonial* (1960 to date).

The focus will be on how criminal actions were addressed by the criminal justice systems in these respective eras, including the method of punishments and the types of treatment meted to offenders. In addition, the analysis will consider if any compensation was made available to the victims in any of the aforementioned eras. Some of the issues that will be addressed in this chapter will include the motivation behind the introduction of the prison system by the British colonialists and whether such motivation was justified. Consideration will also be given to the impact this decision had on the indigenous population. If the conclusion is reached that the introduction of the prison system during the colonial era had a negative impact on the indigenous justice system, further investigation will be conducted on the reasons for its continued use after independence.

2.2 History of Criminal Law in Nigeria – A Brief Overview

2.2.1 Criminal Legal Systems in Pre-Colonial Nigeria

It was mentioned in the previous chapter that before colonization, there were in existence indigenous justice systems that regulated standards of behaviour for the native population and where there was non-compliance, sanctions where prescribed accordingly.[1] These justice systems varied, from the numerous relatively simple systems of social norms in the South of Nigeria to the systematised and sophisticated Sharia law in most of the North regions of Nigeria.[2] It was through these customary and Islamic criminal laws that the indigenous communities were able to ensure the compliance of its members with the 'ethical values of the society'.[3] Violations of the societal ethics, customs and traditions were generally regarded as *abominations*. Examples of such behaviours include murder, theft and rape. The most serious of abominations were those involving witchcraft, which were considered the most heinous of offences as it involved the manipulation of 'spiritual forces' against a fellow community member.[4]

Matters were heard by village councils made up of village chiefs and senior elders within the community. These councils acted in both judicial and administrative capacities and the chiefs, who had the required knowledge of the customs of the people, acted in a supervisory capacity. The chiefs made decisions on matters, both civil and criminal, brought

[1] See Chapter 1, s 1.3; CO Okonkwo and ME Naish, *Okonkwo and Naish on Criminal Law in Nigeria* (2nd edn, London: Sweet & Maxwell, 1980) 4.
[2] ibid. Some *pagan* communities in the North had retained in varying degrees their own criminal laws or blended them with Sharia law.
[3] MA Ajomo and I Okagbue (eds), *Human Rights and the Administration of Criminal Justice in Nigeria* (Research Series No. 1, Lagos: Nigerian Institute of Advanced Legal Studies (NIALS), 1991) 24; F Umeh, *The Courts and Administration of Land in Nigeria* (Enugu: Fourth Dimension, 1989) 39 – 40. However, unlike the Islamic law that operated primarily in the northern region, customary laws were unwritten, varying from one community to the other and based on the respective ethical values of each community; see the case of *Owoyin v Owoyin* [1961] 1 All Nigerian Law Report (ANLR) 304, 308. See also MA Ajomo and I Okagbue (n 3) 24 - 25; F Umeh (n 3).
[4] The definition of an 'abomination' differed from one community to another; see V Saleh-Hanna and C Ume, 'An Evolution of the Penal System: Criminal Justice in Nigeria' in V Saleh-Hanna (ed), *Colonial Systems of Control: Criminal Justice in Nigeria* (University of Ottawa Press 2008) 55.

before them after consulting with their council of advisers.[5] Furthermore, there were no formal court structures before the arrival of the British colonialists. The various courts that operated during the pre-colonial era in Nigeria included the Family Court, the Chief's Court and Juju Priest Court.[6]

One unique feature that was common within these various justice systems in pre-colonial Nigeria was a primary objective of ensuring peace within their respective communities and maintaining the social balance.[7] In order to achieve this objective, these respective justice systems believed in the application of restorative practices, particularly at the sentencing stages for the purpose of healing and restoring relationships. As discussed in the first chapter, this objective was championed by the respective community leaders in the various regions of the country.[8] According to Nwankwo, [9]

> 'Chiefs, the council of elders and elders in the family saw themselves essentially as peacemakers, called upon to reconcile divergent interests in both civil disputes and criminal cases, and also as preservers of the physical existence or spiritual well-being of the whole society when this was threatened'.

The responsibility for ensuring that community members complied with these societal regulations, norms and values laid primarily with the families of those involved in the crime as well as the community.[10] For example, in Igbo communities, each family unit

[5] PO Nwankwo, *Criminal Justice in the Pre-colonial, Colonial and Post-colonial Eras: An application of the Colonial Model to changes in the Severity of Punishment in Nigerian Law* (Maryland: University Press of America, 2010) 131 - 132.
[6] ibid, 132 - 135.
[7] O Adewoye, *The Judicial System in Southern Nigeria: 1854-1954* (Atlantic Highlands, New Jersey: Humanities Press Inc. 1977) 4; PO Nwankwo (n 5) 130.
[8] See Chapter 1, s 1.3.
[9] PO Nwankwo (n 5) 130 - 131.
[10] V Saleh-Hanna and C Ume (n 4) 57.

was responsible for maintaining law and order within their respective communities.[11] The family had 'original jurisdiction' for minor offences, similar to a magistrate court, with the father making the final decision, on any deviant behaviour. When a complaint was brought against an erring family member, the father in conjunction with other senior members of the family, address the complaint. Where the family member admits guilt or the guilt has been clearly established, punishment will be prescribed against the offender. Such punishment would have been agreed by the senior members of the family with the victim and sanctioned by the member's father. For example, for minor offences like petty theft, apart from publicly apologising to the victim, the offender could be ordered to work in the victim's farm for a number of days.[12]

Therefore, the family was responsible for primarily exercising social control in these pre-colonial societies as they not only ensured compliance but also were liable where a member had been found guilty of contravening any laws.[13] In these societies, offenders were usually left in the care of their families when a penalty was imposed. It was their duty, with the assistance of the community, to ensure that the offender complies with all the conditions of their punishment, which may include the payment of compensation.[14] This was in line with the restorative ethos of their justice systems, as these procedures will assist in

[11] In the Afikpo communities in now Abia State, this is referred to as the Family Forum; see OO Elechi, 'Doing Justice without the State: The Afikpo (Ehugbo) Nigeria Model of Conflict Resolution' (1996) 20(2) International Journal of Comparative and Applied Criminal Justice 337 - 355, 351.
[12] OO Elechi, 'Doing Justice without the State: The Afikpo (Ehugbo) Nigeria Model of Conflict Resolution' (n 11) 351; E Onyeozili & O Ebbe, 'Social Control in Precolonial Igboland in Nigeria' (2012) 6 African Journal of Criminology and Justice Studies 29, 36 - 37.
[13] F Bernault, 'The Politics of Enclosure in Colonial and Post-Colonial Africa' in F Bernault (ed) *A History of Prison and Confinement in Africa* (Portsmouth: Heinemann, 2003) 5; V Saleh-Hanna and C Ume (n 4) 57.
[14] A Adeyemi, 'Alternatives to Imprisonment in Nigeria: Problems and Prospects' (National Conference on Alternatives to Imprisonment in Nigeria, Abuja, 2000); C Ume, 'Alternatives to Imprisonment: Community Service Orders in Africa' in V Saleh-Hanna (ed), *Colonial Systems of Control: Criminal Justice in Nigeria* (University of Ottawa Press 2008) 384.

reconciling the parties involved as well as the successful re-integration of the offender into the community upon completion of the prescribed punishment.[15]

However, in matters involving serious offences like murder or rape, the families of the affected parties as well as the community were also involved in the judicial process to determine the innocence or guilt of the accused.[16] In addition, they also played a role in stipulating the conditions of the sentence imposed against the offender where guilt had been established.[17] In both instances, the decisions reached were based on the customs and traditions of the community. They were mostly unwritten and expressed in proverbs that were 'latent in the minds of the people and in the minds of the ruling elites'.[18]. The natives relied on their individual and collective memories to ascertain the controlling legal authority on an issue. The integrity and honesty of the community members enabled this system to operate and therefore, having no written laws was not a major handicap in ascertaining which law and procedure to apply.[19] Sentences were decided during a form of general assembly where the families of the parties and the communities were given the opportunity to propose possible sentences with an agreed sanction reached at the end of the process.[20]

A similar situation also existed then in Northern Nigeria under Islamic law, with similar claims put forward that restorative principles are enshrined in its criminal jurisprudence.[21] These include respect for the dignity of the individuals involved in the

[15] ibid.
[16] N Okereafoezeke, 'Africa's Native versus Foreign Control Systems: A Critical Analysis' (Paper presented at the Tenth Annual Pan-African Conference, California State University, Sacramento, 2001) 24.
[17] This expansive membership could be compared with the High Court in terms of judicial hierarchy.
[18] It is argued that despite the fact that these laws were not written, they were better acknowledged and observed by the indigenous population than the written codes of both the colonial and post-colonial eras; PO Nwankwo (n 5) 131.
[19] N Okereafoezeke (n 16) 24.
[20] C Achebe, *Home and Exile* (New York: Oxford University Press 2000) 15.
[21] *Qisas* (or honour) crimes is a category of crimes under Islamic jurisprudence where under Sharia law, the victim or their heirs is permitted to exact equal retaliation against the offender where the victim is either murdered or suffers physical injury as well in cases where property is damaged. See T Wasti, *The Application of Islamic Criminal Law in Pakistan: Sharia in Practice* (1st edition, Brill, 2009) 12 - 13; MS El-Awa, *Punishment in Islamic Law: A Comparative Study* (Indianapolis: American Trust Publications, 1982) 71 cited in SC Hascall, 'Restorative

crime as well as creation of opportunities for healing and rehabilitation.[22] In addition, the community or *ummah* played a major role in the justice process under Islamic law, similar to the situation that existed in the eastern region of the country. Under Islamic law, both the state and the community are considered as separate entities. Although the state has a responsibility in ensuring a just and peaceful society under Islamic criminal law, primary responsibility lies with the community and therefore is central to the administration of justice under the Quran.[23] Under the law of *Qisas*, the victim also plays a major role in the decision process, including the instigation of the prosecution of the accused as well as the type of sentence that could be imposed.[24]

A number of indigenous communities also had strong belief in the spirits of their ancestors and they were seen as part of the community.[25] It was believed by the community members that the spirits were interested in the solidarity of the community, the keeping of the peace and the administration of justice.[26] The chief, titleholders and the elders in the community who administered the law were viewed as the 'representatives' of the ancestors and they believed that they were under their constant watch. It was because of these beliefs that parties to the disputes, when the matters were before the court, did not commit perjury,

Justice in Islam: Should Qisas be considered a form of Restorative Justice?' (2011) 4(1) Berkley Journal of Middle Eastern and Islamic Law 35 - 78, 36. The major difference between the law of Qisas and other modern RJ practices is that the former permits the victims of crime to demand the use of corporal punishment and even the death penalty; see SC Hascall (n 21) 38.

[22] MH Kamali, *Shariah Law: An Introduction* (Oneworld Publications, 2008) 126, 201, 291; SC Hascall (n 18) 36, 49 – 51. Human dignity (or respect of persons) is 'the outcome of a just society and just law' and mutual respect is 'a vital theme of justice in Sharia'. The reason for the importance of dignity in the judicial process is because man is viewed as God's greatest creation and His representative on Earth and therefore, all persons must be treated with equal respect; see A Doi, *Shariah: The Islamic Law* (Ta-Ha Publishers Limited, 2008) 30 – 34; N Sanad, *The Theory of Crime and Criminal Responsibility in Islamic Law: Sharia* (Chicago: Office of International Criminal Justice, University of Illinois, 1991) 35; both cited in SC Hascall (n 21) 49 – 51.

[23] AA Qadri, *Justice in Historical Islam* (Lahore: Sh Muhammad Ashraf Kashmiri Bazar, 1968) 2; R Bhala, *Understanding Islamic Law (Sharia)* (LexisNexis, 2011) 1171 – 1172; both cited in SC Hascall (n 21) 49 – 52.

[24] SC Hascall (n 21) 37.

[25] GE Parrinder, *African Tradition Religion* (3rd edn, London: Shedon Press 1965) 6.

[26] Nwankwo (n 5) 172. It was believed that the law had the support of the ancestors; see O Adewoye (n 7) 7.

as they believed that the 'gods or ancestors' were watching over proceedings and this assisted to regulate behaviour.[27]

2.2.2 The Introduction of the English Criminal Legal System during Colonial Rule

Upon the arrival of the British and before the colonization of the regions now known as Nigeria, British merchants traded with their West Africans counterparts along the Creek River.[28] Issues were raised subsequently in instances where British traders could not enforce the payment of their goods against some local traders. Upon conclusion of negotiations with the indigenous leaders with the agreements reached signed into treaties, the British government introduced a judicial system to adjudicate over such complaints.[29] A British consulate was appointed as a resident agent to regulate lawful trade between British merchants and local traders at the ports including Benin and Bonny.[30] This was the first stage of the introduction of a court system similar to the one that operated in Britain.[31] However, clear instructions were given to the Consuls that the criminal jurisdiction of the courts of the British trading companies was limited to British subjects and did not extend to the indigenous population.[32]

This situation soon changed with the formal extension of British control beyond the colony of Lagos to other regions from June 1885.[33] Criminal jurisdiction was further

[27] PO Nwankwo (n 5) 172. However, in criminal matters where it was difficult to ascertain whether the accused is guilty or not, the 'supernatural beings' will ascertain the truth through the use of 'ordeals'. The basis for the use of ordeals is the strong belief of the community members that these 'supernatural beings' will ensure that truth will be uncovered. The accused and the accuser will be subjected to the ordeal and the innocent party is the one who survived it; see O Adewoye (n 7) 7 – 8.
[28] PO Nwankwo (n 5) 23.
[29] ibid.
[30] TO Elias, *The Nigerian Legal System* (London: Routledge Kegan Paul Ltd, 1963) cited in PO Nwankwo (n 5) 135. It first was applied in the colony of Lagos after it was annexed to the UK following its cessation and later extended to other parts of the country. In both instances, a modified version of both English common law and statues of general application were applied to fit local circumstances; see AG Karibi-Whyte, *History and Sources of Nigerian Criminal Law* (Ibadan: Spectrum Law Publishing, 1993) 59.
[31] PO Nwankwo (n 5) 135.
[32] WMN Geary, *Nigeria Under British Rule* (London: Methuen & Co. 1927) 90; AG Karibi-Whyte (n 30) 60.
[33] *London Gazette* (5 June, 1885) 2581; Herslett, *Map of Nigeria by Treaty*, 445; AG Karibi-Whyte (n 30) 61 – 62.

conferred to persons under Her Majesty's protection. These include Africans who subjected themselves to British jurisdiction and African subjects of a native king or chief who via treaty consent to be subjected to British jurisdiction.[34] In 1889, the African Order-in-Council gave supervisory jurisdiction to the Consuls to ensure that they do not interfere with indigenous government affairs except to 'prevent injustice and check abuses'.[35]

With the amalgamation of the Northern and the Southern Protectorates with the colony of Lagos in 1914, the Provincial Courts Ordinance was enacted which made the common law, where practicable, the applicable law in Nigeria.[36] Although this provision was later repealed, it was subsequently re-enacted by the Protectorate Courts Ordinance of 1933.[37] At this time, Nigeria was operating a dual legal criminal system (indigenous and English law) which formed part of the *Indirect Rule* policy promulgated by Lord Lugard.[38] This policy allowed customary criminal law to be applied through the local Native courts with the condition that the punishment awarded did not involve 'mutilation or torture, nor was it repugnant to natural justice and humanity'.[39] The colonialists continued to keep close watch on the proceedings in the local courts and the sanctions issued. This led to some customary criminal penalties being abolished, for example mutilation and torture, as well

[34] *London Gazette* (5 June, 1885) 1617 and the 1917 repealing the order of 1872; AG Karibi-Whyte (n 30) 62. The 1887 Proclamation established the government of National African Company (now called the Royal Niger Company) which governed the territories in the basin of the Niger; see *London Gazette* (18 October, 1887) 5597.
[35] Order-in-Council, 1889, London Gazette 1889, 5557; AG Karibi-Whyte (n 30) 63 - 65.
[36] Ordinance No.7 of 1914; later Cap 4 of the Compilation Laws of Nigeria, 1923.
[37] Ordinance No.45 of 1933.
[38] Apart from the Colony of Lagos where the English common law was introduced in 1863, customary criminal law was still enforced in other regions. However, certain ordinances were enacted to deal with particular offences, for example, like slave dealing and witchcraft, for example, the Native Courts Ordinance 1914, No 8; see CO Okonkwo and ME Naish (n 1) 4; AG Karibi-Whyte (n 30) 88; MO Ajomo and I Okagbue (n 3) 25; PO Nwankwo (n 5) 177.
[39] Ordinance No. 44 of 1933, s 10; MA Ajomo and I Okagbue (n 3) 133-134; GJ Weimann, *Islamic Criminal Law in Northern Nigeria – Politics, Religion, Judicial Practice* (Amsterdam: Amsterdam University Press, 2010) 18; see also R Peters, *Islamic Criminal Law in Nigeria* (Ibadan: Spectrum Books, 2003) 5 – 12.

making trial by ordeal illegal and abolishing the exile of offenders via selling them off as slaves.[40]

With the establishment of a centralised government, the British administration felt that there was a need to establish a clearly worded, concise and unified set of criminal principles to be applied in British Courts throughout the colony.[41] This is because customary criminal laws were unwritten and vary from one community to the other. This creates 'uncertainty', as an accused may not be aware that actions committed were in violation of the customs and traditions of that particular community. Therefore, having a uniformed code assisted the colonialists' objective of ensuring that the justice system in their colonies operated under the same principles of rule of law, as conducted in their home country.[42]

In 1904, the administration of Lord Lugard had initially introduced via proclamation a criminal code in Northern Nigeria for the purpose of consolidating and amending the criminal law.[43] This was extended to the entire country in 1916 after the unification of the regions into a single nation.[44] The Code was initially drafted to replace the English common law of crimes, but was never enacted into law by Parliament.[45] Instead, it was used in British colonies and because of the reasonable success in its application, the Nigerian Criminal

[40] See the terms imposed by Lord Lugard in Kano and Sokoto in *Annual Colonial Reports, Northern Nigeria, 1900-1911*, 92-3, 164; the Native Courts Proclamation, 1900, s 9 for Northern Nigeria and Native Courts Ordinance, 1914, s 9 in Southern Nigeria; Ordeal, Witchcraft and Juju Proclamation, 1903 (Southern Nigeria) and 1908 (Northern Nigeria); Slave-dealing Ordinance, 1874 (Gold Coast colony); Emancipation Order, 1874 (Gold Coast colony); Slavery Proclamation, 1901 (Northern Nigeria); Slave-dealing Proclamation, 1901 (Southern Nigeria); and the Slavery Abolition Ordinance, 1916. These were cited in A Milner, 'Sentencing Patterns in Nigeria' in A Milner (ed), *African Peal Systems* (London: Routledge & Kegan Paul, 1969) 263 - 264; PO Nwankwo (n 5) 177; E Onyeozili & O Ebbe (n 12) 39.

[41] CO Okonkwo and ME Naish (n 1) 4; MO Ajomo and I Okagbue (n 3) 25.

[42] Some of the other principles, as discussed in the first chapter, include equity and impartiality as well as natural justice and humanity. See Chapter 1, s 1.3; Frederick Lugard, *Political Memoranda, - Revision of Instructions to Political officers on Subjects Chiefly Political and Administrative, 1913 – 1918* (1st edn 1906, 2nd edn 1919, 3 edn reprinted in London: Frank and Cass, 1970) 97 - 98, Part III, para 30.

[43] The Native Courts Ordinance 1914, No 8; CO Okonkwo and ME Naish (n 1) 4; MO Ajomo and I Okagbue (n 3) 25.

[44] See Criminal Code Ordinance 1916, No. 15; CO Okonkwo and ME Naish (n 1) 5; MO Ajomo and I Okagbue (n 3) 25.

[45] MO Ajomo and I Okagbue (n 3) 25.

Code has since served as the model for similar codes introduced to other colonies in East and Central Africa.[46]

This proposed new code was however not initially accepted in all regions of the Nigerian colony, with various customary native courts still applying customary criminal law.[47] Furthermore, the Muslim population were uneasy with the application of the criminal code in the North, as it did not encapsulate their religious beliefs. A number of conflicts arose on the implementation of the Sharia law, between those from the Maliki School and those trained in English law who found many of the rules of Maliki law unacceptable. For example, whilst the Sharia courts did not recognise the defence of provocation in homicide cases, the English courts did.[48] There were also differences in the procedural and substantive laws of both laws. For example, under Maliki law, women were not permitted to testify in any criminal proceedings but could in English courts under the Criminal Procedure Act of 1945.[49]

This internal conflict between the dual systems continued despite the 1933 amendment to the criminal code, which sought to abolish a substantial part of customary criminal law. It was however interpreted, in view of both Section 4 of the Criminal Code Ordinance as amended and the Native Court Ordinances of 1933, that customary criminal

[46] G Williams, *Criminal Law: The General Part* (2nd edn, London, 1961) 583 - 586; CO Okonkwo and ME Naish (n 1) 5; MO Ajomo and I Okagbue (n 3) 25.
[47] However, customary laws that were repugnant to 'natural justice and humanity' were either abolished or modified by statute and subjected to the 'repugnancy doctrine'. See for example The Ordeal Witchcraft and Juju Proclamation, 1903 (Southern Nigeria) and 1908 (Northern Nigeria) which abolished trial by ordeal and slavery which was the manner via which customary criminal matters dealt with such matters then. See also Native Courts Ordinance 1914, No 8 and Slavery Abolition Ordinance, 1916; MO Ajomo and I Okagbue (n 3) 26.
[48] JND Anderson, 'Conflict of Laws in Northern Nigeria' (1957) 1(2) *Journal of African Law* 87 - 98, 87; (1959) 8 *International and Comparative Law Quarterly* 442. See also *Gubba v. Gwandu* (1947) 12 W.A.C.A. 141 and *Maizabo v. Sokoto N.A.* (1957) N.R.N.L.R. 133 (Federal Supreme Court (FSC)) which accepted the interpretation given by JND Anderson (n 48). They were all cited in CO Okonkwo and ME Naish (n 1) 5 - 6; MO Ajomo and I Okagbue (n 3) 25 - 26.
[49] MO Ajomo and I Okagbue (n 3) 26.

courts retained jurisdiction as long as they only imposed punishments that complied with the Criminal Code.[50]

In 1959, with Nigeria about to gain independence, it was agreed at the Independence Constitutional Conference that the jurisdiction of the customary criminal courts should be limited.[51] In addition, it was advocated, for Northern Nigeria, that an English based law was not suitable for a society that is predominantly Muslim.[52] A panel of jurists was set up by the government of the Northern region to look into this and they recommended the codification of a separate criminal law and procedure for the North. This led to the enactment of the Penal and Criminal Procedure Codes which came into effect on October 1st, 1960 with the Criminal Code ceasing to operate any longer in the North.[53] The enactment of these two codes led to the establishment of a dual code system that replaced the former dual system of customary and statutory criminal law.[54]

Nigeria presently operates a federal system of government, which allows both the federal and state governments to legislate criminal laws.[55] Certain matters are reserved for the federal government on the Exclusive Legislative list under the 1999 Constitution, for

[50] See Native Courts ordinances 1933, s 10(1) & (2); *Gubba v. Gwandu* (Supra); *Maizabo v. Sokoto Native Authority* (Supra); CO Okonkwo and ME Naish (n 1) 6 - 9; MO Ajomo and I Okagbue (n 3) 26 - 27.
[51] Amendment No.30 Order in Council, 1959. Paragraph 5(10) of the Nigerian Constitution, 1959 states that 'no person shall be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law'. This later became Section 22(10) of the 1960 Independence Constitution and is now Section 36(12) of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended); MO Ajomo and I Okagbue (n 3) 27. See also Section 2 of the Criminal Code Act, Cap C38 Laws of the Federation of Nigeria, 2004, which defines criminal offences as 'acts or omissions which render the person doing the act or making the omission liable to punishment under this Code'. See also the case of *Aoko v. Fagbemi* (1961) 1 All NLR 400.
[52] JND Anderson (n 48); MO Ajomo and I Okagbue (n 3) 27.
[53] MO Ajomo and I Okagbue (n 3) 27. The Penal Code was modelled after a similar code in Sudan, which is also primarily a Muslim community. The Sudanese Penal Code was based on the 1860 Indian Penal Code, which was drafted by Lord Macaulay, who used the common law of England and Scotland as its foundation. The Northern Penal Code was described as 'a compromise between the reformers and the traditionalist's. The Penal Code preserved certain traditional crimes like adultery and insulting the modesty of women, which helped win over the staunch Muslim traditionalists. See A Gledhill, *The Penal Codes of Northern Nigeria and Sudan* (London: Sweet & Maxwell, 1963) 16 - 18; CO Okonkwo and ME Naish (n 1) 9 - 10; MO Ajomo and I Okagbue (n 3) 28.
[54] Penal Code, 1959, s 2 (3) in the North; Customary Courts (Amendments) Ordinances, 1951, s 10A in Western Nigeria; CO Okonkwo and ME Naish (n 1) 9 - 10; MO Ajomo and I Okagbue (n 3) 28.
[55] The federal government is empowered by s 4(2) – (5) of the CFRN, 1999 (as amended) whist a state government by s 4(6) – (7).

example, currency and copyright, which the state governments cannot legislate. The Criminal Procedure Act (CPA) is a federal enactment, which applies to the southern States while the Criminal Procedure Code (CPC) was adopted by states in the north.[56]

Until recently, these two codes were responsible for the regulation of criminal law for the entire country for almost fifty-six years. However, in exercising their respective legislative powers, the federal government and Lagos state recently enacted statutes introducing a new criminal code. The Administration of Criminal Justice Act (ACJA), 2015 applies to courts in the Federal Capital Territory (FCT) as well as federal high courts in other parts of the nation.[57] This was after Lagos State enacted the most recent version of its own Administration of Criminal Justice Law (ACJL) in 2011.[58] Both statutes provided some much needed reforms to the CPA and CPC for the primary purpose of ensuring efficient management of the criminal justice system, which will lead to the speedy dispensation of justice.[59] The statutes also provide provisions that not only aim to protect the society from crime but also the rights of the suspect/defendant as well as the victim at all stages of the criminal justice process.[60]

Some of the provisions that are of relevance to this thesis are those that limit the amount of time via which a suspect could be remanded in prison. This is because the

[56] MO Ajomo and I Okagbue (n 3) 29.
[57] The Guardian, 'The Administration of Criminal Justice Act' *The Guardian* (Nigeria, 31 August, 2015) <http://guardian.ng/opinion/the-administration-of-criminal-justice-act-2015-1/> accessed 21 August, 2016. The Administration of the Criminal Justice Act is a merger of both the CPA and CPC, which provides a uniform Act that would apply in all Federal courts. See T Soniyi, 'CJN Urges Judges to Use Administration of Criminal Justice Act to Speed up Criminal Trials' *This Day* (Nigeria, 15 March, 2016) <http://www.thisdaylive.com/index.php/2016/03/15/cjn-urges-judges-to-use-administration-of-criminal-justice-act-to-speed-up-criminal-trials/> accessed on 22 August, 2016.
[58] British Council, 'Nigeria – Implementation of the Administration of Criminal Justice Law in Lagos' (13 May 2016) <https://www.britishcouncil.org.ng/about/press/implementation-administration-justice-law-lagos> accessed on 21 August, 2016.
[59] The Guardian, 'The Administration of Criminal Justice Act' (n 57); British Council (n 58).
[60] ibid. Some examples of these provisions are those ensuring that trials are dispensed in a speedy manner with trial dates running consecutively and with limited adjournments (ACJA 2015, s 396; T Soniyi (n 57)) and curbing the police officers who are not legally trained from prosecuting criminal matters (ACJA 2015, s 106).

arresting authorities must now provide justifiable reasons for the remand of a suspect where no charges have been filed and/or investigations are still pending.[61] In addition, these statutory provisions also provide for non-custodial sentences with the introduction of probation and community sentencing.[62] The aforementioned statutory provisions could potentially aid in reducing overcrowding in prisons, with the latter also assisting with the re-integration of the offender in the society upon completion of their sentence. It is however difficult to assess if these provisions have had a positive impact in reducing the number of persons remanded or imprisoned, as this thesis does not have access to incarceration figures beyond the second quarter of 2015.[63] This could be an area of future research to assess how far these statuory provisions have assisted in reducing overcrowding in Nigerian prisons and if not, what type of further amendments or actions are required. Other provisions of relevance provide for compensation to be paid to victim as well as the defendant if the charges filed were 'false, frivolous or vexatious'.[64]

From the above historical analysis, an argument could be made that the departure from customary criminal law to codified rules was a positive step in the right direction. Apart from the fact that it led to offenders being punished for crimes that were in writing, it also ensured that offenders were only found guilty of offences that were in accordance with natural justice, equity and good conscience and punished accordingly. However, as will be argued below, another consequence of this departure was the loss of the penal methods under the pre-colonial indigenous justice system. This thesis will argue that this system was based

[61] ACJA Act 2015, ss 293 - 299; ACJL, 2011, s 264.
[62] ACJA 2015, s 453 - 467; ACJL, 2011, s 341 – 348.
[63] See Chapter 1, s 1.4.
[64] ACJA 2015, ss 319 – 321, 323 - 326; ACJL, 2011, s 286 – 289. The enactment of these provisions could be perceived as a gradual return to the pre-colonial judicial ethos of considering the needs of parties involved in the incident.

on three tenets: *reconciliation, reparation and re-integration* rather than on just punishing the offender.

The next section will examine the authenticity of these propositions with an analysis of how these indigenous justice systems operated. It will later proceed to consider its gradual departure to the modern day justice systems. As mentioned earlier, the analysis will cover three time-periods: Pre-colonial, Colonial and Post-Colonial eras, with particular emphasis on the how offenders were sentenced and punished.

2.3 Sentencing and Punishment under the Pre-Colonial Era

In pre-colonial Nigerian communities, there existed 'strong bonds of moral solidarity engendered by religion' and violation of these moral bonds were grounds for inflicting punishment.[65] There was a general acceptance of what type of conduct was considered 'morally right' and this acceptance was what induced offenders to admit guilt. During this era, 'crimes were not merely violations of prohibitions or preventions made for rational social defense; rather, they were violations of the moral bonds that tied people together'.[66] In addition, crimes were viewed as 'acts which seriously violated indigenous people's collective conscience' and were 'violations of the fundamental moral code which was held sacred'.[67] It was the desire to uphold these fundamental values and sacred beliefs that contributed to crime being perceived as 'a grave moral significance and which necessitates a punitive response'.[68] For example, an offense like witchcraft, which aroused moral emotions and 'shocked' the good consciences of societal members, was punished via the death penalty. Other offences like murder and burglary could be punished via reparative

[65] The 'intensity, severity and certainty 'of the punishments issued assisted in strengthening the aforementioned social bonds that existed in pre-colonial Nigeria; PO Nwankwo (n 5) 168.
[66] PO Nwankwo (n 5) 168.
[67] ibid.
[68] E Durkheim, *The Division of Labour in Society* (Translated by G Simpson, New York: The Macmillan Company, 1933) 4; cited in PO Nwankwo (n 5) 168.

sanctions, a situation which differs from a number of Western societies with respect to the latter offences.[69]

The above conditions served as the basis for the punishment prescribed to those who broke the moral code in those indigenous societies. Punishment was viewed as an important process that enhanced social cohesion, religious rituals and family life.[70] As a result, 'peacekeeping and harmonious interpersonal relations' were important factors that were taken into consideration in the pre-colonial era during criminal trials. For example, when an offender was found liable for the offense of theft, they were punished primarily, not for the act itself, but because of the 'mistrust' they introduced into the community because of their actions.[71] Penalties issued during the pre-colonial era in Nigeria were done with the primary purpose of restoring the social equilibrium that had been disturbed by the crime.[72] Therefore, disputes were generally settled with little reference to the alleged rights and wrongs of the parties involved, but with the sole intention of restitution and restoring peace to the communities.[73]

An example of the type of sentence imposed in pre-colonial Nigerian communities may involve some form of reparation or act of vengeance that the victim was permitted to recoup against the offender.[74] For example, in the Igbo communities in pre-colonial eastern region of Nigeria, compensation was paid to the victim's family in cases of murder or manslaughter.[75] In the Northern communities under Islamic law, the victim could either request for the infliction of some form of corporal punishment or in the alternative, show

[69] PO Nwankwo (n 5) 168.
[70] PO Nwankwo (n 5) 169.
[71] O Adewoye (n 7) 4; PO Nwankwo (n 5) 170.
[72] TO Elias, *The Nature of African Customary Law* (Vol 14, London: Manchester University Press, 1956) 88 which was cited in PO Nwankwo (n 5) 170.
[73] AB Dambazau, *Law and Criminality in Nigeria: An Analytical Discourse* (University Press Plc. 1994) 111.
[74] F Bernault, 'The Politics of Enclosure in Colonial and Post-Colonial Africa' (n 13) 5.
[75] OO Elechi, 'The Igbo Indigenous Justice System' in V Saleh-Hanna (ed) *Colonial Systems of Control: Criminal Justice in Nigeri*a (University of Ottawa Press 2008) 408 - 413.

mercy and decide to forgive the offender.[76] With respect to the latter, the victim could either demand that no punishment should be imposed or the payment of compensation known as *diyya*.[77]

For any offender that refuses to comply with the conditions stipulated by the families of the parties involved in the crime and the community, the family may decide to disown them, therefore exonerating the family from any further embarrassment.[78] This is because these sanctions could be extended to family members and other close relatives as 'individualism' was and is still not a tenet of the Nigerian society.[79] An example of such a sanction is that the family may not be permitted to participate in communal activities until the offender complies with all the terms of the punishment.[80]

As mentioned earlier, apart from witchcraft, all other acts that would have been considered as offenses under English criminal law, were mostly resolved via the application of reparative sanctions. For example, murder, burglary and theft, were commonly resolved by payment of adequate compensation to the injured party. The payment of compensation was viewed as an important part of the restitution process which offenders must comply with as it forms part of the terms of their punishment.[81] For example, in some villages in Onitsha in present day Anambra state, offences like manslaughter and accidental death carried less severe sentences which could be compensated by the presentation of either a cow or a piece of loin cloth to the family of the deceased. However, in some other villages, a heavier compensation was required; for example, in Abboh (in present day Delta State), a

[76] 'Mercy' and 'Forgiveness' of the offender by the victim are encouraged and emphasized under Islamic criminal law, particularly for Qisas crimes; SC Hascall (n 21) 52.
[77] SC Hascall (n 21) 52.
[78] V Saleh-Hanna and C Ume (n 4) 57.
[79] ibid, 55 - 56.
[80] ibid, 55 – 57.
[81] TO Elias, *The Nature of African Customary Law* (1956, n 72); TO Elias, SN Nwabara and CO Akpamgbo (eds), *African Indigenous Laws* (Lagos: The Government Printer); O Adewoye (n 7) cited in PO Nwankwo (n 5) 171.

murderer was exiled for a period of 7 years and on expiration of the 7 year period, they can return from exile, provided the necessary sacrifices were made.[82]

Therefore, the maintenance of the societal equilibrium within the community was the key factor that was taken into consideration behind criminal sanctions issued in traditional Nigerian societies. The offender would be accepted back into the community once the necessary compensations or ritual sacrifices have been made. The completion of their punishment served as an indication that the offender had 'purged themselves' of their antisocial pattern of behaviour.[83]

In pre-colonial Nigeria, apart for the offence of witchcraft,[84] extreme punishments like banishment or execution were only reserved for repeat offenders who were guilty of violent crimes.[85] These had to sanctioned by not only the community but as well as the family of the offender.[86] Imprisonment was not considered a valid method of punishment for dealing with disputes in most Nigerian cultures, particularly in the eastern region. Apart from the deprivation of an individual's right to liberty,[87] such punishment would have brought shame and dishonour to the family name.[88] This is because those imprisoned would have been exposed to the public, as most societies did not possess enclosed prison structures.[89]

[82] TO Elias, *The Nature of African Customary Law* (1956, n 72); O Adewoye (n 7) 4 - 5. Nwankwo further cited the example in Chinua Achebe's *Things Fall Apart* were one of the main characters, Okonkwo, unintentionally killed one of his kinsmen. As punishment, Okonkwo was exiled for a 7-year period and upon his return, performed some sacrifices to Ani, the land of his grandfathers which he had defiled with the blood of a kinsman; see C Achebe, *Things Fall Apart* (London: Heinemann Educational Books Ltd., 1958) 86 – 87, 115, 121; PO Nwankwo (n 5) 171.
[83] PO Nwankwo (n 5) 171.
[84] The offence of witchcraft was punishable by death as it was considered to be the most serious of offences in pre-colonial Nigeria; see O Adewoye (n 7) 4; PO Nwankwo (n 5) 133.
[85] OO Elechi 'The Igbo Indigenous Justice System' (n 75).
[86] ibid.
[87] FK Ekechi, *Tradition and Transformation in Eastern Nigeria: A Socio-political History of Owerri and its Hinterland, 1902 - 1947* (Kent, OH: Kent State University Press, 1989) 148 – 149.
[88] V Saleh-Hanna and C Ume (n 4) 57.
[89] ibid.

The few communities that confined offenders in pre-colonial Nigeria were located in the northern and western sections of the country and these included the Ogboni House of the Yorubas in the west; the Fulani in the north and the Tiv in the middle belt. However, in most instances, reasonable attempts were made by the family members of the offender to have them released, usually via the payment of some form of reparation.[90]

As a case study, the next section will proceed to examine the judicial system in the pre-colonial Igbo community, with particular focus on their sentencing and punishment procedures as well as the roles of the various parties. The Igbo communities were selected as a case study, firstly because of the perceived similarities between the ideologies that formed the foundation of their justice system and modern RJ principles, which will be explored in depth in the next chapter. Another reason for the selection of only one region of the country as a case study is the limited space afforded for this in the thesis. A detailed exploration into pre-colonial sentencing practices of other regions of the country will be a subject of future research.

2.3.1 Sentencing and Punishment in the Pre-Colonial Igbo Communities

One scholar argues that the Igbos viewed crime as 'a conflict between community members' and that 'victims, offenders and the community (as primary stakeholders) are actively involved in the definition of harm and the crafting of solutions acceptable to all stakeholders'.[91]

[90] For example, in the traditional Hausa community in the northern region, even though the palace of the ruler had a prison that was used to imprison offenders, the relatives of the prisoners could pay compensation for the offence they committed and have them released. See *Northern Nigeria Annual Report* (1902) 29; B Awe, 'History of the Prison System in Nigeria' in TO Elias (ed) *The Prison System in Nigeria* (Lagos: University of Lagos, 1968) 4; AB Dambazau (n 73) 77; D Killingray, 'Punishment to fit the crime? Penal Policy and Practice in British Colonial Africa' in F Dikotter and I Brown (eds) *Cultures of Confinement: A History of the Prison in Africa, Asia and Latin America* (New York: Cornell University Press, 2007) 100; and V Saleh-Hanna and C Ume (n 4) 57.
[91] OO Elechi, 'The Igbo Indigenous Justice System' (n 75) 395.

The Igbo communities occupy the south-eastern part of the country and when they had first contact with the Europeans in the 1830's, they were estimated to have a population of 5 million people.[92] They have been described as having 'a *gemeinschaft*[93] structure and was a stateless patriarchal society'.[94] In the absence of a central authority, each family unit was responsible for maintaining law and order within the community. Igbo children were taught, from an early age, the acceptable mode of behaviour within the community as well as the importance of the need to respect their elders, honour and dignity.[95] As described earlier in this chapter, the family had 'original jurisdiction', with the father making the final decision, on any deviant behaviour.[96]

Igbo societies were acephalous in nature, that is, they operated via a decentralized government. The typical Igbo government structure consisted of the chief and council of elders at the centre; lineage groups, age grades, secret societies, priestly groups, etc., who acted as a town/village forum.[97] The system encouraged participation from individual members of the community and they were permitted to express dissent on any issues.[98] Gyeke and Motala also observe that other African traditional societies supported the

[92] E Onyeozili & O Ebbe (n 12) 30.
[93] Ferdinand Tonnies explained a *Gemeinschaft* structure to consist of individuals who have common *mores* (beliefs) about appropriate behaviour and responsibility to each other and the association at large. This is the exact opposite of those who live under a *Gesellschaft* structure where individuals' self-interest takes precedence over that of the association at large and these associations lack the same level of shared mores. See Ferdinand Tonnies, *Gemeinschaft und Gesellschaft* (Leipzig, 1887), translated into English as *Community and Society: (Gemeinschaft and Gesellschaft)* (Translated and edited by CP Loomis, Mineola, New York: Dover Publications, 2002) 5 - 6; cited in E Onyeozili & O Ebbe (n 12) 30; E Weitekamp, 'The History of Restorative Justice' in G Johnstone (ed) *A Restorative Justice Reader* (Cullompton, Devon: Willan Publishing 2003) 111, 113.
[94] R Horton, 'Stateless Societies in the History of West Africa' in JFA Ajayi and M Crowder (eds) *History of West Africa* (Vol. 1, New York: Columbia University Press, 1972); cited in E Onyeozili & O Ebbe (n 10) 30. E Onyeozili and O Ebbe also quoted Henderson who described the Igbo as *The King in every man* which meant that the Igbos had no kingship system as they did not believe in owing allegiance to a single authority; see RN Henderson, *The King in Everyman* (New Haven: Yale University Press, 1972) cited in E Onyeozili & O Ebbe (n 12) 30.
[95] E Onyeozili & O Ebbe (n 12) 35.
[96] ibid, 36 - 37.
[97] EO Awa, 'Igbo Political Culture' (The Igbo Socio-Political System: Papers presented at the 1985 Ahaiajoku Lecture Colloquium, Owerri: Ministry of Information, Culture, Youth and Sports, 1985) 38; E Onyeozili & O Ebbe (n 12) 31.
[98] EO Awa (n 97).

participation of all adults in the decision-making process, including communities that had kings and chiefs.[99] All decisions must be reached by consensus and in some cases, some decisions were deferred until all constituting members or groups of the community were properly represented.[100].

The Igbo communities have also been described as being very religious; with strong beliefs in re-incarnation, which they believed provided them another opportunity to realize their frustrated status goals.[101] This opportunity may be lost if they were found guilty of any act that are considered to be abominations, which will prevent them from migrating into the next life. They also believed that these ancestors played a role in their religious beliefs and their spirits were invoked in all requests to the gods and in all judicial matters.[102] These strong beliefs assisted their judicial system, as members of the communities were quite fearful of the consequences of breaking the laws or committing perjury, not only here on earth, but in the afterlife.

2.3.2 Principles of the Pre-Colonial Igbo Judicial System

The Igbos, like other African societies, had 'a well-developed, efficient and effective mechanism for maintaining law and order prior to colonialism', which was rooted in the 'traditions, cultures and customs of the Igbo people'.[103] Scholars argue that their justice system was built on the following principles: restoration, transformation and communitarianism. This thesis agrees with these descriptions, however using different

[99] K Gyeke, *African Cultural Values: An Introduction* (Accra, Ghana: Sankofa Publishing Company 1996) 153; Z Motala, 'Human Rights in Africa: A Cultural, Ideological, and Legal Examination' (1989) 12 Hastings International and Comparative Law Review 373 – 410. Both sources were cited in OO Elechi, 'Human Rights and the African Indigenous Justice System' (Paper presented at the 18th International Conference of the International Society for the Reform of Criminal Law, 8 – 12 August, 2004, Montreal Quebec, Canada) 13.
[100] K Gyeke (n 99) 153; GBN Ayittey, *Africa in Chaos* (New York: St. Martin's Press 1999) 86.
[101] E Onyeozili & O Ebbe (n 12) 31.
[102] ibid.
[103] OO Elechi, 'The Igbo Indigenous Justice System' (n 75) 397.

terms: *reconciliation, reparation and re-integration*. The main objective of the justice system, after the guilt of the offender had been established, was to 'restore social safety without resorting to punishment'.[104] Punishment was believed to undermine the goal of justice, which is primarily the restoration of social equilibrium and must only be used as a last resort after all other avenues have been explored.[105] According to Uchendu,[106]

> 'Igbo legal procedures aim essentially at readjusting social relations. Social justice is more important than the letter of the law... The resolution of a case does not have to include a definitive victory for one of the parties involved. Judgment among the Igbo ideally involves a compromise and consensus. They insist that a good judgment 'cuts into the flesh as well as the bone' of the matter under dispute. This implies a 'hostile' compromise in which there is neither victor nor vanquished; a reconciliation to the benefit of - or a loss to both parties'.

The following sub sections will now examine the application of these key principles in the pre-colonial Igbo judicial system and in the roles of the various participants in the judicial process.

2.3.2.1 Reconciliation

In order to achieve the above mentioned objective of restoring social safety with minimal punishment inflicted against the offender, the pre-colonial Igbo judicial system believed that an amicable reconciliation between all parties impacted by the incident was crucial. The first step in this reconciliatory process was safeguarding the rights of both

[104] ibid, 398.
[105] ibid.
[106] VC Uchendu, *The Igbo of Southeast Nigeria* (New York: Holt, Rinehart and Winston, 1965) 14; OO Elechi, 'Doing Justice without the State: The Afikpo (Ehugbo) Nigeria Model of Conflict Resolution' (n 11) 341.

litigants, an act which was believed to be deeply rooted in African cultural values.[107] These rights included access to a swift judicial system, which ensured remedies such as restitution and support (both material and emotional) were provided for.[108] Other rights included the sanctity of human life and dignity, which were believed to be an expression of the natural and moral rights of the individual.[109]

To ensure that these rights were protected, disputes were usually heard in open spaces with members of the community encouraged to not only attend but to participate in the process.[110] This guaranteed fairness and equity as members of the community were allowed to observe the proceedings and to freely express their opinions and proffer solutions that would assist in reconciling the disputing parties. Achebe captures this dynamic quite well, stating that,[111]

> 'In the worldview of the Igbo the individual is unique. How do they bring the competing claims of these two into some kind of resolution? Their answer is a popular assembly that is small enough for everybody who wishes to be present to do so and to 'speak his own mouth,' as they like to phrase it'.

During the reconciliatory process, the victim is the focal point, empowered with a voice that was used to explain the consequences of the offender's actions in a secured and respectful setting.[112] The victim was further assured of protection against future

[107] OO Elechi, 'The Igbo Indigenous Justice System' (n 75) 402.
[108] OO Elechi, 'Human Rights and the African Indigenous Justice System' (n 99) 2.
[109] K Gyeke (n 99); OO Elechi, 'The Igbo Indigenous Justice System' (n 75) 402. It must be noted that even though the rights of the individual were subject to that of the community, individual rights were protected and not compromised; see OO Elechi, 'The Igbo Indigenous Justice System' (n 23) 403.
[110] OO Elechi, 'Human Rights and the African Indigenous Justice System' (n 99) 13.
[111] C Achebe, *Home and Exile* (n 20) 15. See also C Achebe, *Things Fall Apart* (n 82) 62 - 66, which illustrates how disputes were handled under the pre-colonial Igbo judicial system.
[112] OO Elechi 'The Igbo Indigenous Justice System' (n 75) 403 – 404. The secured setting also encouraged the victims to freely express their emotions and the pain they suffered as a result of the offender's actions

victimization and this approach led to the validation of the victim's hurts and losses. The offender also played a major role in the reconciliation process, particularly in assisting with the definition of the harm and reaching an amicable resolution. After the offender had been presented with the consequences of their actions and the impact on those affected, the offender was given the opportunity to apologise to the victim and to the community.[113] This action not only symbolizes acknowledgement of the wrongful acts committed by the offender, it was also an important step towards reaching an amicable solution between the parties.

2.3.2.2 Reparation

The reconciliation between the affected parties did not just conclude with the issuance of an apology by the offender for the harm caused. In addition, the offender was encouraged to pay compensation as an expression of remorse for the harm caused.[114] The compensation, depending on the circumstances of the case, could be in the form of money or property. More importantly, it should attempt to restore the victim to the position they were before the commission of the offence.[115] The payment of compensation also constitutes part of the atonement by the offender to the victim and the community.[116] The community believed that restitution with the victim is vital because they were of the opinion that 'a victim whose needs are not addressed is a potential offender'.[117] It must be noted that

[113] ibid, 403 – 404.
[114] ibid, 404 – 405.
[115] ibid, 405. Elechi contends that the exact opposite is the case in the present criminal justice system where the offender pays compensation for their crimes to the state by serving time in prison or by paying fines; see OO Elechi 'The Igbo Indigenous Justice System' (n 75) 404.
[116] N Nsereko, 'Victims of Crime and their Rights' in TM Mushanga (ed) *Criminology in Africa* (Rome: United Nations Interregional Crime and Justice Research Institute 1992); OO Elechi 'The Igbo Indigenous Justice System' (n 75) 404 - 405.
[117] OO Elechi 'The Igbo Indigenous Justice System' (n 75) 405.

elders, who acted as mediators/facilitators, ensured that whatever compensation agreed was fair and equitable to both parties.[118]

Furthermore, to ensure societal equilibrium was maintained, sanctions may also be imposed against the offender to address the harm caused. This may include strict sanctions, such as the execution of the offender, but on the condition that such a sanction had to be agreed by the community, the victim and the offender's family for it to be enforced.[119]

Another key element of the process was that family members were also held accountable for the actions of their kin and were either chastised or made to appreciate where they failed as parents or family members.[120] An example of the family's shared responsibility was in a situation where the offender was unable to pay the compensation required, the family was required to assist the offender. However, it should be noted that the practice of holding the offender or their families responsible for the offender's actions was not to ostracize or sever the connections they have with the community. Instead, it was used to repair and reconcile the offender with the victim and the community at large.[121] The blame for the offender's actions was not only attributed to their families but to the community as well, since the responsibility for bringing up responsible and productive citizens was viewed as a shared responsibility between the family and the community.[122]

The table below provides various examples of the sanctions issued and reparations agreed under the Igbo judicial system, some of which are briefly illustrated in the table below:[123]

[118] ibid, 405.
[119] ibid, 407.
[120] ibid, 405.
[121] ibid, 405 - 406.
[122] ibid, 406.
[123] ibid, 408 – 413.

TABLE A

ILLUSTRATION OF PROCEDURES			
Type of Crime	Murder	Theft	Manslaughter
Resolution Procedure to be adopted	Mediation between the Victim's family and the Offender's family	Punishment is determined by the relevant authority which in most cases were the Council of Elders	Mediation between the Victim's family and the Offender's family
Possible Sanctions	Compensation to be paid to the Victim's family. However, in extreme cases, expulsion or the death penalty could be exercised but only if it is sanctioned by not only the community, but also, the family of the Offender.	The Offender is required to return the stolen goods or pay the value. However, if the Offender stole food and other commodities for sustenance, his actions will be acceptable so long as he does not intend to sell them.	Compensation to be paid to the Victim's family. The Offender may also be exiled for a period of years

2.3.2.3 Reintegration

The final stage of the judicial process is the re-integration of the offender after both sanctions and/or reparations had been agreed. This is also a key element of the judicial process which the community took a lead role by ensuring that the offender, during and upon completion of his sentence, is successfully re-introduced into the community. The significance attached to this stage of the judicial process was due to the belief that its success was essential for maintaining communal peace and harmony, which they believed was undermined due to the criminal incident.[124] The community's response in making sure that

[124] ibid, 406.

the offender's re-integration was successful was vital to ensuring that probability of re-offending was kept to the barest minimum.

In concluding this subsection, it is pertinent to mention the claims by some scholars that the aforementioned pre-colonial judicial principles and practices are still currently applied in some Igbo communities in eastern Nigeria. Onyeozili and Ebbe claim that several pre-colonial Igbo judicial practices that were used in rehabilitating offenders in criminal matters are still being used in several towns and villages.[125] As a result, very few criminal matters are referred to the post-colonial court system but are instead heard informally, particularly juvenile cases.[126] However, the litigants have the choice of ignoring or contesting the decision made by the council of elders and having the matter referred to the formal court system.[127]

Similar claims are also being submitted by Elechi who highlights the Afikpo (Ehugbo) model of conflict resolution which he claims is in operation in the Afikpo town in Abia State, Nigeria.[128] He is of the opinion that the reason why the system survived is the mistrust by Afikpo people of the current judicial system, which they believe 'fails to meet their judicial needs'.[129] Afikpo model consists of several tiers, including the Family Forum; the Matrilineal/Patrilineal Forum; the Age-Grade Forums; the Village Circles; and finally, the two traditional courts and the Chief in Council (made up of members of the traditional court).[130]

[125] E Onyeozili & O Ebbe (n 12) 39.
[126] ibid.
[127] ibid.
[128] OO Elechi, 'Doing Justice without the State: The Afikpo (Ehugbo) Nigeria Model of Conflict Resolution' (n 11) 342.
[129] ibid, 337, 343.
[130] ibid, 343.

Each tier handles a variety of matters, for example, land disputes and juvenile delinquency (Family and Matrilineal/Patrilineal Forum);[131] family disputes and petty theft (Age Grade Forums);[132] most criminal cases like theft and domestic disputes (Village Circles);[133] and both civil and criminal cases like assault (Traditional Courts/Council of Elders).[134] The modern courts hear cases involving serious offences like murder and armed robbery as well as any appeals from the traditional court systems.[135] It is also interesting to note that these traditional systems operate in conjunction with the modern court systems and under the same principles, with the state government supervising the procedures to ensure they comply with set standards.[136]

The thesis is of the opinion that further research needs to be conducted to seek out if other communities in other sectors of the country also retained their indigenous pre-colonial restorative practices and if they are similarly integrated into the state justice system as the Afikpo model in Abia State. The potential impact of this research to this thesis will be discussed at length in the final chapter.

2.4 Sentencing and Punishment under the Colonial Era

This thesis has already discussed how the British colonialists introduced the prison system as the primary method of punishment in the first chapter.[137] It was previously discussed in this chapter that the incarceration or confinement of offenders, as a method of punishment, was 'foreign' to most pre-colonial Nigerian communities. Even when used, it

[131] ibid, 351 - 352
[132] ibid, 352 – 353.
[133] ibid, 349 – 351.
[134] ibid, 345 – 348.
[135] Matters involving corruption or abuse of power within the traditional courts are heard within these courts; ibid, 345 - 346
[136] ibid, 345.
[137] See Chapter 1, s 1.3; MA Ajomo and I Okagbue (n 3) 175; Florence Bernault, 'The Politics of Enclosure in Colonial and Post-Colonial Africa' (n 13) 2; D Killingray (n 90) 100; V Saleh-Hanna and C Ume (n 4) 57.

was limited to securing community safety and was never considered a valid method of punishment for offenders.[138] For example, in Kano, it was used to confine the emir's political enemies rather than as method of punishment for common criminals.[139] In some other parts of the country, prisoners were detained by attaching them to a log or tree.[140] Imprisonment was totally exempted in the pre-colonial Igbo society in south-eastern Nigeria as it was considered a 'taboo' to have one's family member incarcerated since it would have brought humiliation and shame to the family name.[141]

The above discussion raises questions as to why the colonialists needed to replace the existing local penal system with a system of imprisonment that does not conform to the beliefs and traditions of the indigenous population. This question is more pertinent following the previous analysis of the already established pre-colonial criminal judicial systems, which possessed codes and practices accepted by these communities for determining the guilt or innocence of the accused. In addition and more importantly to this thesis, these judicial systems provided for outcomes orientated towards reconciliation between the victim and the guilty party.[142] This was to ensure that a troubled social equilibrium, caused by the wrongful act committed, was restored.[143] The next series of subsections will provide answers to these queries.

2.4.1 The Prison System in Pre-Independent Nigeria

[138] MA Ajomo and I Okagbue (n 3) 175; V Saleh-Hanna and C Ume (n 4) 57 - 58.
[139] *Northern Nigeria Annual Report* (1902) 29; D Killingray (n 90) 100.
[140] D Killingray (n 90) 100.
[141] TO Elias, 'Traditional Forms of Public Participation in Social Defence' (1996) 27 International Review of Criminal Policy 18 – 24; see also A Adeyemi (n 14); E Onyeozili & O Ebbe (n 12) 39.
[142] O Adewoye (n 7) 4 - 5, 108; AB Dambazau (n 73) 111; David Killingray (n 90) 100; PO Nwankwo (n 5) 168.
[143] O Adewoye (n 7) 4 - 5, 108.

This section will attempt to identify the motivation behind the introduction of the prison system by the British colonialists. The first step of this examination will involve an analysis of the status of the prison system in the home colony and how it developed by the time it was introduced into the Nigeria. This study will provide insight on why the prison system was held in such regard and transplanted with other aspects of the English criminal justice system. This thesis will then proceed to conduct a comparison between the Nigerian colonial prison system and indigenous punishment practices to identify the differences in operation and objectives. The aim of both studies is to assist in determining if the prison system was a better alternative, which may justify the motivation to substitute the indigenous penal systems with its colonial counterpart.

2.4.2 Status of the Prison System in England

At the time when the prison system was introduced into Nigeria, the modern English prison system had been in operation in England since the early 19th century. It was introduced by the Victorians, following the calls for an alternative method of sanctions, which will involve the 'separation of male and female inmates; young offenders from adults; work and education schemes; and the term of imprisonments as a sentencing decision and therefore, as a form of punishment'.[144] Before then, the prison functioned primarily as a custodial facility, for ensuring an accused's presence at their trial until some other form of punishment was imposed against them.[145] Some examples include execution, transportation or paying compensation.[146] It was also used to secure payment of any outstanding debts.[147] This penal system would later form part of the British colonial conquest as it was exported

[144] D Wilson, *Pain and Retribution: A History of British Prisons, 1066 to the Present* (London: Reaktion Books Ltd., 2014) 13.
[145] ibid.
[146] ibid.
[147] ibid.

into several British colonies, including Nigeria and eventually become the primary form of sanction for criminal offenders in these colonies to date.

The calls by various penal reformers for the abolition of these inhumane sanctions and the termination of the transportation of criminals to North America and Botany Bay, Australia[148] led to the authorities having to consider alternative methods of punishment.[149] They took into consideration recommendations made by penal reformers like Howard[150] and Bentham[151] that led to the establishment of the new prison system. Their ideas also provided innovations on how to improve the conditions under which prisoners were to be imprisoned. Other recommendations included plans on how these prisons were to be constructed as well as the creation of the Penitentiary system that led to the establishment of various prisons, including those at Milbank[152] and Pentonville.[153]

In addition, the authorities also took into consideration recommendations from committees like the Holford [154] and Gladstone [155] Committees with respect to the administration and reformation of the prison system. Finally, the enactment of several laws

[148] In 1776 and 1868 respectively.
[149] R McGowen, 'The Well-Ordered Prison: England, 1780 – 1865' in N Morris and DJ Rothman (eds) *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford; OUP, 1995) 89. 92-93; S McConville, *A History of English Prison Administration: Volume I 1750 – 1877* (London: Boston & Henley, 1981) 381–385.
[150] J Hostettler, *A History of Criminal Justice in England and Wales* (Waterside Press, 2009) 154.
[151] J Bentham, *Panopticon or The Inspection House: The Works of Jeremy Bentham* (Vol IV, Edinburgh: John Bowring, 1791) 37; J Hostettler (n 150) 161; see also R Evans, *The Fabrication of Virtue: English Prison Architecture, 1750 - 1840* (Cambridge, 1982) 199.
[152] J Hostettler (n 150) 162.
[153] J Hostettler (n 150) 163-164. The penitentiary system was admired by other jurisdictions, for example, in Latin America and China, with the first Qing envoys to Europe paying a visit to Pentonville Prison in the 1860's. See F Dikotter, 'Introduction: The Prison in the World' in F Dikotter and I Brown (eds) *Cultures of Confinement: A History of the Prison in Africa, Asia and Latin America* (New York: Cornell University Press, 2007) 3.
[154] K Soothill, 'Prison Histories and Competing Audiences, 1776 -166' in Y Jewkes (ed) *Handbook on Prisons* (Willan Publishing, 2007) 34.
[155] From the Gladstone Report cited in R Cross, *Punishment, Prison and the Public: An Assessment of Penal Reform in Twentieth Century England by an Armchair Penologist* (London: Stevens & Sons, 1971) 6; K Soothill (n 154) 41; D Wilson (n 144) 64.

like the Penitentiary Act 1779[156], the Prison Act of 1877[157] and the subsequent Prison Act of 1898[158] all contributed to the development of the modern prison system in England.

Apart from providing an alternative form of sanction through the confinement of the offender for a prescribed period that would act as deterrence, the penal reformers further argued that the prisons would provide a rehabilitation scheme. They claimed this scheme would assist with the reformation of the offender to prevent them from re-offending. The terms of the rehabilitation programmes in prisons were modified over the years. From Howard's initial proposals on reformation through strict discipline and punitive measures[159] to the deliberations on the use of the *separate or silent* systems, with the former selected to be used at Pentonville Penitentiary.[160] Furthermore, the Holford Committee initially banned the use of the treadmill and other corporal punishment[161] but these were subsequently re-

[156]The Penitentiary Act of 1779 prescribed the substitution of transportation with imprisonment; abolished public and violent punishments; and provided private punishments through disciplined work and religious instruction in solitary confinement; see R McGowen (n 149) 89; J Hostettler (n 150) 162; D Wilson (n 144) 47.

[157] The Prison Act of 1877 provided for the transfer of complete control of the prisons to the Secretary of State; the establishment of a Prison Commission whose role was to administer the prisons; and enforcement of a strict regime with the prisons being viewed as a place for a 'hard labour, hard fare and hard bed'. See K Soothill (n 154) 39; D Wilson (n 144) 63.

[158] The Prison Act of 1898 enforced several recommendations of the Gladstone Committee including changing focus on reducing recidivism rather than on punishment and deterrence; ending the 'separate' system and led to changes in the 'silent' rule in 1899; the establishment of a special training school for prison employees; providing after care facilities for prisoners; and the improvement of educational facilities in prison; see JE Thomas, *The English Prison Officer since 1850: A Study in Conflict* (London: Routledge & Kegan Paul, 1972) 141; K Soothill (n 154) 41- 42; D Wilson (n 144) 65.

[159] J Hostettler (n 150) 154, 161.

[160] The systems were the subject of a report published by William Crawford of the Society for the Improvement of Prison Discipline (SIPD) in 1834, which considered penal experiments being conducted then in America on the separate and silent disciple systems. The separate system was approved in a report by a House of Lords Committee in 1835 and was the guiding principle behind the establishment of a new prison at Pentonville in 1842. Prisoners were kept in solitary confinement, with hard labour and were compelled to go through religious instruction as part of their rehabilitation process. Crawford and Reverend Whitworth Russell were the primary lobbyists for the separate system in Pentonville; see R McGowen (n 149) 101. They preferred this system to the silent system for various reasons including the fact that latter relied on the discretion of the governor and it involved the infliction of physical punishment to ensure enforcement.

[161] Initial attempts by penal reformers like Howard to push forward the removal of corporal punishments when the prison system was introduced were met with opposition by those who not only believed in the maintenance of the status quo but also further advocated for conditions that are more stringent. These include the Reverend Sidney Smith who wanted to have all the looms in Preston Jail substituted with 'nothing but the treadmill' or in the alternative, make prisoners to do labour that is as 'monotonous, irksome and dull as possible' and not share in the profits. Sir Walter Scott also shared similar views in his journal, expressing his non-belief in the reformation of prisoners. He also saw no reason why the living conditions of prisoners should be at par as when they were outside it as the prison should be place of 'punishment'. See Joy Cameron, *Prisons and Punishment in Scotland:*

introduced by the Carnarvon Committee and enforced under the Du Cane's administration.[162] Finally, the Gladstone Report of 1895 and the enactment of the Prisons Act of 1898 led to the introduction of specific rules for the treatment for individual prisoners. These include the creation of a penal reformatory for young offenders to separate them from the influence of adult offenders, and the final prohibition of the treadmill and other similar devices.[163]

From the above, it could be argued that penal system was strictly under the control and supervision of the state. This control was exercised through a formal system against those who failed to comply with its laws. The prison system was designed to meet three criteria of punishment. These are *retribution* (the prisoner paid his debt to society for the offence committed by the conscription of most of his liberties, particularly freedom of movement, for a period of time); *deterrence* (to prevent the offender from committing future crimes as well preventing the commission of similar crimes by would-be offenders); and finally, *rehabilitation* (the prisoner undergoes a series of programmes to bring a desire effect of change in the behaviour the offender so that he does not re-offend).[164]

It should be mentioned that the terms of rehabilitation in these early penitentiaries did not include making any amends to the victims. The victims, the families of the both the victim and the offender as well as the community, played no role in the judicial process. Instead, their place has been substituted by the state whose relationship with the offender is based on the premise that the criminal actions are now viewed as a violation of the laws of the state rather than as a harm inflicted against the victim. Furthermore, prisoners were

From the Middle Ages to the Present (Edinburgh: Canongate, 1983) 49 - 50; J Hostettler (n 150) 162; D Wilson (n 144) 36.
[162] R McGowen (n 149) 104; K Soothill (n 154) 39 - 41; D Wilson (n 144) 63 - 65.
[163] R Cross (n 155); K Soothill (n 154) 40 - 41; D Wilson (n 144) 64 - 65.
[164] J Hostettler (n 150) 146.

encouraged to 'seek penitence' for the crimes they committed by asking for forgiveness from God for their 'sins'.[165] An argument could be made that offenders should not only seek forgiveness through a 'vertical relationship' with God, but with equal importance, seek forgiveness through a 'horizontal relationship' with their victims as well.

The next sub-section will now compare and contrast the Nigerian colonial prison system with the pre-colonial penal system. This discussion will elicit the differences in their operations as well the objectives that each system aimed to achieve. This comparison will assist this thesis in determining if the decision to substitute the indigenous penal system with its colonial counterpart was justified.

2.4.3 Comparisons between the Pre-Colonial Penal System and the Nigerian Colonial Prison System

It must be admitted that despite the differences in the approach of the two systems, they both share some common objectives; reducing re-offending and the rehabilitation of offenders. However, the major differences lay on who exercised control of the penal process, the primary methods of punishments used under both systems to achieve these objectives and the identification of the necessary parties.

Firstly, under the Nigerian pre-colonial justice system, the families in conjunction with the community, and not the state, were primarily responsible for exercising social control on its members. It was their duty to ensure that community members complied with the communal rules, customs and beliefs.[166] This included the stipulation of the conditions of the punishment to be imposed against any persons who contravenes the laws that regulate

[165] The word Penitentiary is derived from the word 'penitent' which means 'one who feels regret for one's sins, who is repentant and seeks forgiveness'; see D Wilson (n 144) 38.
[166] F Bernault, 'The Politics of Enclosure in Colonial and Post-Colonial Africa' (n 13) 5; V Saleh-Hanna and C Ume (n 4) 57.

behaviour within that community.[167] The priority objective of the punishments issued under its penal system was the restoration of relationships and communal harmony rather than inflicting some form of pain against the offender.[168]

With respect to its colonial counterpart, the colonial government had supervisory control and introduced a penal system that focused more on retribution (inflicting suffering and discomfort on the offender) rather than on restoration (repairing damaged relationships). In addition, whilst the parties, their family members and the community had a major role in the indigenous penal system, there was little or no participation from them under the colonial system. Furthermore, not only did the colonial government exercise primary control, it viewed itself as the primary stakeholder. The colonial state did not take into consideration the desires of the parties, their respective families and the community in determining the appropriate sanctions. This included their respective opportunities to explain with their own voice how the incident affected them, to apologize for the harm caused and putting forward a solution that will be acceptable to all.

Finally, the primary method of punishment under the colonial penal system was the curtailment of the liberty of offenders via their incarceration in a confined space. This form of punishment was foreign to most indigenous communities whose primary method of punishment involved the offender making reparations to the victim, usually by paying some form of compensation.

Now that we have established a background of the manner of operation and the priority objectives of both penal systems, this thesis will now proceed to the next stage of its analysis under this chapter. This is to address why the principles and methods of

[167] F Bernault, 'The Politics of Enclosure in Colonial and Post-Colonial Africa' (n 13) 5.
[168] A Adeyemi (n 14); C Ume (n 14) 384.

punishment under the pre-colonial indigenous justice system were not retained during the colonial era but were substituted entirely by the colonial prison system. The next section will attempt to analyse the motivation behind this decision as well as the impact it had on the local populace.

2.4.4 The Motivation behind the Introduction of Imprisonment in Nigeria and its Impact during the Colonial Era

This section intends to examine the reasoning behind the choice of imprisonment by the British colonialists as the primary method of punishment and how its introduction has affected the development of the prison system in Nigeria during the period of British colonial rule from 1861 to 1960.

It is contended that colonialism involves two key factors: the *conquest* of foreign national territory and the *oppression* of its citizens.[169] Another factor associated with colonialism is the *domination* of these citizens, the impact of which could still be felt in these colonies to date.[170] Finally, there is an *unequal distribution of power* between the parties in a colonial relationship, with one group attempting to impose its command on another, which it has defined as inferior.[171] With all these factors in mind, colonialism could be defined as a relationship, not between two nations that regard each other with mutual respect, but between a dominating country that attempts to impose its will on the subordinate country. This act is carried out with little or no regard of the long term political, social and economic consequences on the latter.

[169] F Frantz, *Toward the African Revolution* (Translated by Haakon Chevalier, New York: Monthly Review Press, 1964) 81.
[170] S Merry, 'Law and Colonialism' (1991) 25(4) Law Society Review 889 - 922, 890, 895.
[171] B Tamanaha, *A General Jurisprudence of Law and Society* (New York: Oxford University Press, 2001).

With specific relation to the criminal justice system, it has been suggested that colonisation entails the 'imposition of almost identical legal transplants on a diverse range of pre-colonial legal institutions'.[172] It was previously discussed how the colonization of Nigeria by the British led to a legal transplant of the English criminal legal system into the country.[173] To enforce this foreign regime on the local populace, the establishment of a paramilitary police force (to enforce the authority of the colonialists and ensure the collection of revenue) and a prison system (which was used to punish offenders who committed offences against this new regime), was required.[174] Once these measures were established, attention soon shifted to administration of law and order, with the establishment of the courts and the codification of penal policies and punishments.[175] The Colonial Office in London claimed that the reason for this was to that that the penal policy and practice in all their colonies were 'consistent and humane' and reflected English principles of 'equity and impartiality'.[176]

In both the first chapter and in previous sections of this chapter, this thesis highlighted how the English legal system (apart from in the colony of Lagos State) initially operated alongside the customary criminal law.[177] The introduction of the colonial legal

[172] S Larcom, 'Accounting for Legal Pluralism: The Impact of Pre-Colonial Institutions on Crime' (2013) 6(1) Law and Development Review 1.
[173] Ordinance No.7 of 1914; CO Okonkwo and ME Naish (n 1) 4; MA Ajomo and I Okagbue (n 3) 25.
[174] CE Ward, *Roydon Hall Magazine* (Norfolk, Easter Term 1912) 91. Colonial officers saw their role as 'bringing peace and order and the benefits of modern law to darkest Africa' and used these institutions to establish British authority; see D Killingray (n 90) 97.
[175] M Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press, 1996) 109.
[176] D Killingray (n 90) 98 - 100.
[177] See Chapter 1, ss 1.2 and 1.3; Lagos State was protected and governed directly by Britain after it was annexed as a British colony via the Lagos Treaty of Cession on 6th August, 1861. See ME Page, *Colonialism: An International Social, Cultural and Political Encyclopaedia* (ABC-CLIO, 2003) 425; T Falola and SJ Salm, *Nigerian Cities* (Africa Research and Publications, 2004) 225.

system, accompanied with the use of imprisonment, also led to the prohibition of inhumane punishments and restrictions on the use severe corporal punishments.[178]

Despite the reasons discussed above for the removal of some of the pre-colonial punishments that were inhumane and inequitable, [179] questions remain as to why imprisonment was considered to be the most appropriate substitute to be introduced into the colony.[180] This thesis acknowledges that an alternative method of sanctions was needed to replace the previously discussed cruel sanctions to deal with 'violent criminals, recidivists and also the criminally insane'.[181] A further case could be made that since the prison system was also the principal method of sanctioning offenders in United Kingdom, it would be logical to expect it to be similarly used in all its colonies. Therefore, one could understand why it was transplanted with all other aspects of the English criminal justice system. Finally, at the time when prison system was introduced into Nigeria, its popularity was at a high under the Du Cane's administration, with prisons being regarded as a tool of the state to enforce public policy on deterrence to reduce crime and recidivism.[182]

However, unlike in Nigeria, the prison system was initiated in England, as an alternative to extreme punishments. It had gone through several years of development, taking into consideration the various societal considerations, culture and norms of the English society. Therefore, the prison system had been, to some degree and extent, accepted

[178] Arguably, one of the most significant fallouts was the introduction of imprisonment as the primary method of punishment; see Chapter 1, s 1.3; A Milner, 'Sentencing Patterns in Nigeria' (n 40) 264. Initially, other forms of confinement were tested in African colonies including asylum, hospital wards, industrial work camps and corrective facilities for children. Even before the European colonialists had full control over their respective colonies, prisons were erected in European garrisons and administrative outposts; see F Bernault, 'The Shadow of Rule: Colonial Power and Modern Punishment in Africa' in Frank Dikotter and Ian Brown (eds) *Cultures of Confinement: A History of the Prison in Africa, Asia and Latin America* (New York: Cornell University Press, 2007) 3, 55

[179] D Killingray (n 90) 100.

[180] ibid.

[181] M Vaughan, 'Idioms of Madness: Zomba Lunatic Asylum, Nyasaland, in the Colonial Period' (1983) IX Journal of Southern African Studies 218 - 238; E Onyeozili & O Ebbe (n 12) 39.

[182] D Wilson (n 144) 63.

as part of the English criminal justice system. Conversely, as already mentioned, the opposite seems to have been the case in Nigeria and even in other sub-Saharan African countries. Prior to colonialization, the use of 'spatial confinement' as method of punishment was limited, as the judicial structures in these societies did not advocate for such punitive measures.[183] Apart from the stigma associated with being imprisoned or having a family member in prison[184], deprivation of a person's liberty is one of the most severe punishments that could be inflicted on any African. This was because they were accustomed to living a 'close, communal life'.[185] One London colonial officer made the following observation on this; [186]

> 'A man is taken from his village, from his family and kindred, from the only life he knows, and confined to a prison cell…The cell where he sleeps is provided with ventilation based on British ideas of fresh air. The result is often such that it would be more merciful to hang him at once. He pines the loss of freedom; the unaccustomed food and sleeping arrangement cause disease – and he dies. To all intents and purposes he had been sentenced to death as surely as if he had been sentenced to hanging'.

Unfortunately, these observations were not taken into consideration when the prison system was implemented. It seems the colonialists did not fully consider the imposition of

[183] F Bernault, 'The Shadow of Rule: Colonial Power and Modern Punishment in Africa' (n 178) 56.
[184] FK Ekechi, (n 87) 148.
[185] RFS Tanner, 'The East African Experience of Imprisonment' in A Milner (ed) *African Penal Systems* (London: Routledge & Kegan Paul, 1969) 293 - 315; GS Mwase, 'Outward and Inward of the Prison and Prisoners' in R Rotberg (ed) *Strike a Blow and Die* (Cambridge, Mass: Harvard University Press, 1967) 101 - 114.
[186] Public Record Office, Kew (PRO). CO 583/87/298355, Minutes by AJ Harding on Clifford to Milner, May 19, 1920; cited in FK Ekechi (n 87) 148 - 149.

a foreign punishment system, which encapsulated the culturally alien idea of depriving offenders of their liberty, would have on the indigenous populace.

A further problem with the introduction of prison system in Nigeria was with respect to the manner via which it operated when compared to the counterpart system in England.[187] Firstly, the management of the colonial penitentiary was greatly influenced by 'racial segregation and social distance' between the European colonialists and their African subjects. This accounted for the manner via which the prisons were managed and how indigenous prisoners were treated.[188] This existed even within the prison walls, with white prisoners kept in separate quarters and given preferential treatment.[189] A good number of these foreign prisoners were transferred back to Europe to face trial.[190]

Secondly, Nigerian detainees were conscribed to work on various colonial projects, which provided a source of valuable free labour for the colonial regime, which assisted in sustaining the economy of the colony.[191] Ekechi highlights the case in Owerri in south eastern Nigeria where many of the prisoners (young men who had refused compulsory labour) were held as captives and were forced into manual labour and sometimes kept in chains.[192] By 1919, these prisoners were kept under inhumane conditions such as overcrowding, poor nutrition and unsanitary conditions, which all contributed to several

[187] F Bernault, 'The Politics of Enclosure in Colonial and Post-Colonial Africa' (n 13) 3.
[188] D Killingray (n 90) 98; F Bernault, 'The Politics of Enclosure in Colonial and Post-Colonial Africa' (n 13) 3, F Bernault, 'The Shadow of Rule: Colonial Power and Modern Punishment in Africa' (n 178) 55.
[189] M Crowder, *The Flogging of Phineas McIntosh: A Tale of Colonial Folly and Injustice, Bechuanaland 1933* (New Haven, CT: Yale University Press, 1988); F Bernault, 'The Shadow of Rule: Colonial Power and Modern Punishment in Africa' (n 178) 73.
[190] ibid.
[191] F Bernault, 'The Politics of Enclosure in Colonial and Post-Colonial Africa' (n 13) 3. A further argument could be submitted that this operation assisted to protect British business interests in the region. See JA Arthur, 'Development of Penal Policy in British West Africa: Exploring the Colonial Dimension' (1991) 15(2) International Journal of Comparative and Applied Criminal Justice 187–206 cited in AM Jefferson, 'Prison Officer Training and Practice in Nigeria' (2007) 9(3) Punishment and Society 253 - 269, 257.
[192] FK Ekechi (n 87) 149-150. The situation was the same in other colonies in Africa as African detainees were considered a significant source of reliable and cheap labour. See D Williams, 'The Role of Prisons in Tanzania: A Historical Perspective' (1980) Crime and Social Justice 27 - 38.

prisoners falling ill and dying.[193] Other problems within the indigenous sections were further lack of segregation between genders as well as between minors and adults.[194] In addition, there was the continued use of corporal punishments like flogging and public exhibition, despite the reforms being experienced in Europe prohibiting these practices.[195]

Finally, there were no plans or policies on how to reform the inmates[196]and upon completion of their 'sentences' were still considered as 'objects of power' who were to be 'dominated' because they were perceived to be an 'inferior race'.[197] Since these colonial prisons were designed for enforcing colonial rule, hardly any consideration were given to the reformation/rehabilitation of these prisoners as well as improving the living conditions under which these prisoners were kept. This treatment differed from that experienced by their Western counterparts as those who completed their sentences were treated as 'equal citizens and legal subjects'.[198] This was mainly as result of the fact that even though several reforms were made in British penal policy, some of these reforms were either not reflected in the colonial legal codes and penal policies or were only incorporated several years after.[199]

[193] FK Ekechi (n 87) 149-150.
[194] F Bernault, 'The Shadow of Rule: Colonial Power and Modern Punishment in Africa' (n 178) 74.
[195] ibid.
[196] An argument could be submitted that the non-availability of a rehabilitation scheme for inmates could be a consequence of an absence of an overall effective administrative policy by the British colonialists when they acquired the region, in a manner which has been described as 'piecemeal, hesitant and planless'; see TO Elias, 'Introduction of British Rule: The Country and its Peoples' in GW Keeton (ed) *The British Commonwealth: The Development of its Laws and Constitutions* (Vol. 14, Nigeria, London: Stevens & Sons, 1967) 1 – 13 cited in AM Jefferson (n 191) 256; IW Orakwe, 'The Origin of Prisons in Nigeria' (Nigerian Prison Services) <http://www.prisons.gov.ng/history_of_nps > last accessed on 7 September, 2016.
[197] F Bernault, 'The Politics of Enclosure in Colonial and Post-Colonial Africa' (n 13) 3. This is in stark contrast to the operations of its counterparts in the home country as discussed in section 2.4.2 of this chapter as well as the indigenous reparative sanctions discussed in Section 2.3; see also TO Elias, 'Traditional Forms of Public Participation in Social Defence' (n 141) cited in AM Jefferson (n 191) 257.
[198] D Killingray (n 90) 99-10.
[199] When the prison system was introduced into Nigeria from 1861, it was based on the English prison system, which was centred on the philosophy of deterrence via a strict penal policy following the recommendations of the Carnarvon Committee of 1863 and its firm enforcement during the Du Cane administration of 1877 to 1895. The latter faced various criticisms from the press which led to an inquiry conducted by the Gladstone Committee which made several recommendations for the improvement of prison conditions, including implementing programmes that would prevent recidivism. These reforms assisted in the development of the prison system and moulding it into its current form. See R McGowen (n 149) 103 - 104; K Soothill (n 154) 39; D Wilson (n 144) 63; R Cross (n 155) 64.

For example, some reforms were introduced into the Nigerian colony by RE Dolan, a former Director of prisons between 1945 and 1955, but were only put into effect 40 years after they were introduced in England.[200] Another example can be seen in relation to the reforms that rendered the use of imprisonment as punishment for debt in Britain were not applied in the colonies until several years later after its enactment.[201]

Objections were raised against the use of imprisonment by the indigenous population and from prison medical officers in reports sent to London about its use. They cited the inhumane conditions of the prisons, including overcrowding, low food supplies and the unhygienic environment.[202] Despite these protests, the colonial office still maintained that it was a better alternative to the methods of punishment that were advocated by the indigenous communities. They were of the opinion that the indigenous penal sanctions were not in accordance with modern penal practice and humanitarian ideas.[203] However, it is submitted that the colonialists could have at least incorporated the positive aspects of indigenous penal practices, particularly its reconciliatory procedures, into the colonial prison system. This could have been an acceptable compromise, as it would have still dispersed the use of local inhumane punishments, with imprisonment probably reserved for serious offences like robbery and murder.

From the above, a theory could be adduced for the British colonialists' substitution of pre-colonial judicial system and their refusal to consider incorporating indigenous restorative elements into colonial prisons. Just as the practice of imprisonment as a system of punishment was foreign to the indigenous communities, a similar statement could be

[200] B Awe (n 90); MA Ajomo and I Okagbue (n 3) 178 - 179; F Bernault, 'The Politics of Enclosure in Colonial and Post-Colonial Africa' (n 13) 25; K Soothill (n 154) 42
[201] D Killingray (n 90) 102.
[202] FK Ekechi (n 87) 149 - 150.
[203] D Killingray (n 90) 102; F Bernault, 'The Politics of Enclosure in Colonial and Post-Colonial Africa' (n 13) 24.

made about how the British colonialists viewed some of these indigenous judicial practices. For example, the notion that a criminal incident involving theft could be resolved, not by imprisoning the offender as punishment for their crimes, but by reconciling the offender and the victim, was indeed 'alien' to the colonialists' ideals on punishment. The idea became more complex with the fact that the aforementioned resolution was reached with the assistance of the parties' respective families and their community, with the state taking a backseat. These ideals were in conflict with the principles that influenced their own penal system (particularly the principle of retribution) and were therefore discarded by Lord Lugard. When the British gained full control of the colony, Lugard directed that imprisonment should be imposed for offences like theft and abduction.[204]

Initially, these directions were met with opposition from some tribes, for example, the Igbo and Kagoro tribes, who did not consider imprisonment as an appropriate method of sanction before the arrival of the colonialists.[205] As a result, they refused to comply with Lord Lugard's directions.[206] Instead, they awarded compensation and compensatory fines instead of imprisonment until they were compelled to follow Lugard's directions.[207]

This thesis argues that the motivation behind the substitution of the pre-colonial penal systems with the English prison system was to some extent unjustified. Even though the introduction of the English criminal justice system led to the introduction of a codified system with a 'humane' system of punishment, this thesis argues that the main motivation was ownership of the exercise of social control. An example of this was the state taking over responsibility from the family and the community in determining the manner how disputes

[204] TO Elias, 'Traditional Forms of Public Participation in Social Defense' (n 141); A Adeyemi (n 14); C Ume (n 14) 384.
[205] ibid
[206] ibid.
[207] ibid.

(criminal as well as civil) are resolved between parties and the type of sanctions to be issued against those who are liable. This change was carried out despite opposition from the indigenous populace to the manner via which the foreign judicial system operated. The indigenes opposed the introduction of the prison system as well as the steady eradication of the reconciliatory and reparative indigenous punishments, which were a core part of the indigenous justice process.

In light of the above circumstances and with the country acquiring independence in 1960, one would expect the newly independent nation would have taken the opportunity to address the above mentioned issues. This including making changes to the justice system, specifically on the use of the colonial prisons and maybe introduce a more humane system that takes into consideration pre-colonial restorative practices. However, from earlier discussions in chapter one, there appears to be no change in the prison system as well the general response to crime in ensuring that the needs of those affected are taken into consideration. The following section will address the reasons for this via an examination of Nigerian penal system during the post-independent era.

2.5 Sentencing and Punishment under the Post-Colonial Era

After Nigeria gained its independence from the United Kingdom on the 1st October, 1960, both the criminal and penal codes have been amended several times to reflect both the values and customs of the Nigerian people.[208] This led to the country operating two different structures under its criminal justice system. The Criminal Code[209] in the South, which is

[208] RJ Simon and CA De Waal, *Prisons the World Over* (Lanham, MD: Lexington Books, 2009) 89.
[209] Laws of the Federation of Nigeria (LFN) 2004, Cap C. 38.

based on English common law and legal practice, and the Penal Code[210] in the North based on the local Maliki law and the Muslim system of law and justice.

However, as discussed in chapter one, similar amendments were not made to the penal system as the country not only retained the system of imprisonment but also adopted policies to ensure that they similarly reflect their British counterpart.[211] This was because the then Nigeria government deciding that the best approach was to institutionalize the existing ordinances.[212] This decision raises questions on why modifications were not proposed to incorporate into the penal system, the pre-colonial judicial principles of reconciliation, reparation and re-integration. In addition, these principles not only sought to account for the needs of the offender but also, the needs of the victim and the community. The next section will attempt to answer these questions.

2.5.1 Reasons for the Retention of the Prison System in the Post Independent Era

With all the problems associated with the prison system during colonial era, an argument could be made that the post-independent government could have been proactive. For example, it could have used its newly acquired law making powers to restructure the prison system, and ensured that this was followed up with necessary reforms. This argument becomes more pertinent when one considers the negative experiences of indigenous prisoners as they suffered in hands of colonial masters, some of which were highlighted

[210] LFN 2004, Cap P. 3
[211] See Chapter 1, ss 1.3 and 1.4
[212] V Saleh-Hanna and C Ume (n 4) 60. Customary criminal punishments were no longer prescribed after the case of *Aoko v Fagbemi* which stipulates that all criminal offences must be defined as well as the prescribed punishment written in law as provided for in Section 36(12) of 1999 Constitution. Gradually, other forms of punishments including the death penalty (Criminal Procedure Act (CPA) Cap C41 L.F.N. 2004, s 367 & Criminal Procedure Code Act (CPC) Cap 491 L.F.N. 2004, s 273; Robbery and Firearms (Special Provisions) Act, Cap. R11, L.F.N. 2004, ss 1(2) – (3); fines (CPA (n 212) s 289 & CPC (n 212) s 306); and caning (CPA (n 212) s 384 & CPC (n 212) s 308) were also introduced but the purpose of this chapter, our focus will be on imprisonment.

earlier. However, the decision was made by Nigerian government in 1966 to institutionalize the existing laws and retain the existing penal system.

Several reasons have been put forward for the continued use of the prison system as the primary sanction for offenders. Some argue that the former colonial masters used the prison system, as well as other imported institutions, to maintain economic control via trade agreements.[213] These institutions, particularly our criminal justice establishments, were used against those who opposed the capitalist economy created by the British that pit the poor and against the rich.[214] This argument seems to have some credence, when one considers that the British penal experts, invited to consult on the restructure of the Nigerian prison system after independence, failed to refer to provisions in the English Prisons Act 1952.[215] A conclusion could be reached that they wanted the prisons to operate under similar conditions as its colonial predecessor.

Although there may be some merits in this argument, it is contended that the main reason for the retention of the retributive nature of the Nigerian penal system, as well as the lack of reforms, was due to the lack of development in not only the country's penal law but also, the entire justice system. This thesis argues that several aspects of the criminal justice process are stuck in a form of 'time bubble'. As a result, the nation has been unable to make considerable progress from the system that existed in the colonial era. One of the most pertinent factors to this situation is the years spent under several military governments from 1966 to 1999.

This thesis argues that one of the major contributory factors to military rule in Nigeria was the forceful amalgamation of the various regions that now make up Nigeria in

[213] V Saleh-Hanna and C Ume (n 4) 60.
[214] ibid, 60 - 61.
[215] See also Chapter 1, s 1.3. This Act was far more comprehensive than its Nigerian counterpart was.

1914.[216] Furthermore, the use of 'divide and rule tactics', via Indirect Rule, led to the emergence of various regional leaders and ethnic based political groups.[217] This created suspicion and discord amongst the different citizens and ethnic groups, which prevented them from presenting a common front in protecting the interests of the country. This culminated to the uproar over the distribution of power between the North and South at the general conference in Ibadan in 1950 and this continued after the country gained independence in 1960.[218]

The resulting political crises weakened the recently created political and institutional structures and paved way for the military to take over with Nigeria witnessing its first coup d'état on January 15th, 1966.[219] This marked the beginning of several military juntas in Nigeria history, spanning almost three decades from 1966-1979 and 1983-1999.[220] What began as emergency aberration seemingly became a permanent feature of Nigerian politics.[221] It should be mentioned that this phenomenon was not unique to Nigeria as other British colonies also experienced military rule, for example, Ghana, Sierra Leone and Zimbabwe.[222]

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[216] M Usman 'International Political Economy of Nigerian Amalgamation since 1914' (2013) 9(29) European Scientific Journal 429 - 459 cited in SA Muse, 'Military Rule: Consequences on Public Participation in Nigeria' (2014) 2(3) Projournal of Humanities and Social Science 113 - 124, 114.

[217] ibid.

[218] There were instances of misrule, ineptitude and political crisis in the then Western Region, carried out by the ruling Northern People's Congress because of tribalism and corruption. See T Falola and MM Heaton, *A History of Nigeria* (London: Cambridge University Press, 2008).

[219] S Huntington, *Political Order in Changing Societies* (New Haven: Yale University Press, 1968); S Decalo, *Coups and Army Rule in Africa: Studies in Military Style* (New Haven: Yale University Press, 1976); AA Adegbola, *Nigeria People and Cultures* (Ibadan: Laurel Publication Company, 2012) 3 - 19; cited in SA Muse (n 216) 117.

[220] See Chapter 1, s 1.2.

[221]M Siollun, *Oil, Politics and Violence: Nigeria's Military Coup Culture (1966 - 1976)* (New York: Algora Publishing, 2009) 11. Nigeria has been observed to 'epitomise the military in government'; see J Hatchard, M Ndulo and P Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth – An East African Perspective* (Cambridge: Cambridge University Press, 2004) 242; HO Yusuf, *Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government* (Oxon: Routledge, 2014) 133.

[222] R Jackson and C Rosberg, 'Why Africa's Weak States Persist' (1982) 35 World Politics 1 - 24; cited in OJ George, OC Amujo and N Cornelius, 'Military Intervention in the Nigerian Politics and Its Impact on the Development of Managerial Elite: 1966-1979' (2012) 8(6) Canadian Social Science 45 - 53, 47.

One of the negative consequences of military incursions into Nigeria's political landscape was the illegal and illegitimate military intervention in Nigeria's democratic governance from 1966 via the use of violence or force.[223] This limited the ability of the public to participate in the political, economic and social affairs of the country.[224] This point is more germane when we consider the advancement America and countries in Europe have made in their democracy because of non-intervention by the military in their respective democratic cultures.[225]

Even after military rule ended in 1999, public participation continued to be limited as the alleged constant rigging of elections by the political elite had discouraged the general populace, as they felt disenfranchised.[226] In addition, there was a 'militarization' of the civil populace, with Nigerian citizens displaying characteristics normally associated with the

[223] See Chapter 1, s 1.2; PJ McGowan, 'African Military Coups d'état 1956-2001: Frequency, Trends and Distribution' (2003) 41(3) Journal of Modern African Studies 339-370; cited in SA Muse (n 216) 116. The POGG clause, referred to earlier in Chapter 1 and which became entrenched in the Nigeria's constitutional history even after Independence, was also used by the military juntas to legitimize their own position as well; HO Yusuf, *Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government* (n 221) 130, 133 – 136.

[224] See Chapter 1, s 1.2; PJ McGowan (n 223); cited in SA Muse (n 216) 116. Public participation involves the direct public participation of primary stakeholders in 'an ongoing and never ending processes and cycle through which stakeholders are able to influence and share control over development initiatives, decisions and resources which affects them; see World Bank, *World Bank Participation Source Book, Environmental Department Papers Participation Series* (Washington D.C., 1995) 3. This includes activities such as voting in elections, participating in party politics, the use of a free press, public campaigns, petitioning and lobbying decision makers at the national or local level. See also G Parry, G Moyser and N Day, Political Participation and Democracy in Britain (Cambridge: Cambridge University Press, 1992) 16; G Rowe and L Frewer, 'A Typology of Public Engagement Mechanism' (2005) 30(2) Science, Technology and Human Values 251 - 290; T Agboola, 'Urbanization, Physical Planning and Urban Development in West Africa' (A Paper Presented at World Planners Congress Agenda Setting Workshop, Abuja, 2005, Alpha Digital Press Limited, Abuja, Nigeria) 3 - 5. The POGG clause was used by various military juntas to impose authoritarian rule at the detriment of socio-economic and political development in the country, from which it is yet to recover to date; see HO Yusuf, *Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government* (n 221) 130, 133; I Elaigwu, 'Federalism under Civilian and Military Regimes' (1988) 18(1) Publius 173, 183

[225] PJ McGowan (n 223).

[226] AA Mazuri, 'The African Union and election –related conflicts in Africa: An Assessment and Recommendations' (2012) Journal of African Studies 41 - 60. Fortunately, we observed a change in attitudes in the recently concluded elections in March 2015, which witnessed the first exit of an incumbent president via democratic means. See also British Broadcasting Network (BBC), 'Nigeria Election: Muhammadu Buhari wins Presidency' *BBC* (London, 1 April, 2015) <http://www.bbc.co.uk/news/world-africa-32139858> accessed on 10 May 2015.

military.[227] This was quite popular amongst the political elite even after Nigeria regained democracy in 1999.[228] For example, President Olusegun Obasanjo deployed troops without the approval of the National Assembly and in violation of Sections 217(2) (c) of the 1999 Constitution in 2000 and 2001 to Odi in Bayelsa State and in 2001 to Zakim Biam in Benue State, which led to the massacre of innocent citizens.[229]

Another consequence of military rule in Nigeria was the suspension of parts the constitution and the promulgation of draconian decrees and edicts.[230] These decrees enable the various military governments to operate without due regard or respect for the rule of law.[231] Some of these laws were also applied retroactively for the purposes of punishing past acts.[232] These decrees rendered the courts powerless as they had no jurisdiction to determine the validity of any decree and in certain cases, were replaced by special military courts called tribunals.[233]

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[227] For example, unusual acts of aggression by those who in authority e.g. the Nigerian police, against Nigerian citizens

[228] This includes an 'active-combative posture' adopted by many of our political leaders rather than 'dialogue, negotiation and reconciliation'. See EO Frank and WI Ukpere, 'The Impact of Military Rule on Democracy in Nigeria' (2012) 33(3) Journal of Social Sciences 285-292, 285-286; IA Ayua and DJ Dakas, 'Federal Republic of Nigeria' in J Kincaid and GA Tarr (eds) *Constitutional Origins, Structure and Change in Federal Countries* (Montreal and Kingston: McGill University Press, 2005) 257; HO Yusuf, *Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government* (n 221) 139.

[229] In both instances, the National Assembly failed to call the President to order. See EO Frank and WI Ukpere (n 228) 288; IA Ayua and DJ Dakas (n 228) 257; HO Yusuf, 'Robes on Tight Ropes: The Judicialization of Politics in Nigeria' (2008) 8(2) Global Jurist 1, 13, 15 - 16; SJ Omotola, '"Garrison" Democracy in Nigeria: The 2007 General Elections and the Prospects of Democratic Consolidation' (2009) 47(2) Commonwealth and Comparative Politics 194, 201 – 202; HO Yusuf, *Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government* (n 221) 139.

[230] For example, in 1966, the Suspension and Modification Decree, 1966. See also AO Obilade, *The Nigerian Legal System* (Ibadan, Nigeria: Spectrum Law Publishing, 1996); SA Muse (n 216) 117.

[231] AO Obilade (n 230); SA Muse (n 216) 117; HO Yusuf, *Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government* (n 221) 133 – 136.

[232] An example was the case involving three young people who were punished with the death penalty for drug trafficking offences, which were committed before the decree under which they were found liable (Decree 20) was enacted; see Y Mohammed, 'The Buhari-Idiagbon Retroactive Decree 20 Executions' *Ndibe.org* (May 1985) <http://www.ndibe.org/2015/01/the-buhari-idiagbon-retroactive-decree.html> accessed 10 September, 2016.

[233] The decrees that withdrew the jurisdiction of the courts were known as *Ouster Clauses*. See AO Obilade (n 230); SA Muse (n 216) 117; HO Yusuf, *Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government* (n 221) 133 - 136. The first military decree, Decree No 1 of 1966, abolished the Parliament at the time with Section 3 of that Decree bestowing on the federal military government the power to make laws for the 'peace, order and good government of Nigeria or any part on any matter'; see also Constitution (Suspension and Modification) 1984, Decree No 1.

The impact of having the constitution suspended repeatedly, by successive military governments over the years and having laws made by few military officers in the military council or by a military administrator in the state is still being felt to date.[234] For example, there have been no significant amendments to several of Nigerian laws since the latter stages of colonial rule and the early years of Independence. The described situation does not encourage reforms or the development of the nation's legal infrastructure. The Prison Act is an example, as there have been no amendments to the core sections of the Prisons Act of 1972, despite the fact there were opportunities to amend the Act in 1990 and 2004. This point gains more credibility when one considers that the English Prison Act of 1952 has gone through several amendments since its inception.[235] This thesis argues that several years of military rule have created a form of 'legal apathy' in the legislative arm of government, which has led to low activity in the amendments and subsequent enactment of a number of legislations. This includes the earlier discussed Prison Bill of 2008, even though they are long overdue for reform.

The above discussion raises the key question as to the precise nature of the impact of military rule on the justice system in Nigeria. As already mentioned, the nature of these military governments was to rule via violence, fear and domination without due regard or respect for the rule of law.[236] The colonial masters, during the colonial era, displayed similar

[234] HO Yusuf, *Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government* (n 221) 130.

[235] For example, under the Section 47(1) of the Prison Act of 1952, the Secretary of State may make rules for 'the regulation and management of the prisons….and for the classification, treatment, employment, discipline and control of persons required to be detained therein'. The Prison Rules of 1999 (S.I. 199, No. 728) were enacted under this provision. An example of Rule that regulates the treatment of prisoners is Rule 54, which protects the rights of prisoners to defend any disciplinary charges in prison. A similar provision is not available in the Prison Acts in Nigeria (see Prison Regulations, ss 48 – 49 of the Nigerian Prisons Acts of 1972, 1990 and 2004). The Prison Rules of 199 have been amended several times, with the latest amendment in 2008 (Prison (Amendment) Rules 2008 No. 597). Another example is the Offender Management Act of 2007, ss 21 – 24 which updates and introduce changes to the Prison Act of 1952. These modifications assist to strengthen prison security arrangements and controls so as to prevent illegal activities within a prison e.g. the smuggling in and sale of narcotics or weapons;

[236] See Chapter 1, s 1.2; PJ McGowan (n 223) cited in SA Muse (n 216) 116; AO Obilade (n 230) cited in SA Muse (n 216) 117.

attributes against the indigenous populace. It leads to the conclusion that such a government will not view the prisons as place of reform or rehabilitation of offenders but as a military lockup/stockade for detaining those who violated any decrees or edicts. As a result, other issues like protecting the human rights of offenders, ensuring that they live under humane conditions and their reintegration into the society upon completion of their sentences were not a priority.

The above description of the manner via which the various military governments operated in Nigeria could lead to the conclusion that they used the prison system for the same purpose as the former colonial masters. Just as the imprisonment was introduced during the colonial period to ensure control and power were maintained, the military government retained the same system to exercise political control over its citizens and as a tool for suppressing any opposition. The use of the prisons for this purpose should not be surprising for Nigeria and other countries that share similar political histories. These histories consist of similar stories of domination and violence, first through colonial rule and shortly thereafter, through military rule. This thesis argues that it would be unreasonable to expect similar regards for the rule of law, the individual rights of the offender, etc. in its penal policy as observed in the West. Instead, the primary factors that were considered in the formulation of the penal polices of these countries were 'control' and 'power'.

A further argument could be made that this attitude was not limited to the justice system but also to the police force in both the colonial and post-colonial eras. This thesis contends that both the colonial masters and the post independent governments used the police to serve their respective 'personal, ethnic, community, or class interests'.[237] This has

[237] MA Ajomo and I Okagbue (n 3) 127; PO Nwankwo (n 5) 108.

'not only eroded the legitimacy of the police, but contributed to its inefficiency and ineffectiveness'.[238]

Finally, it must be mentioned that the prison systems in England and in most other Western societies were not created as result of imposition by a foreign power. In the contrary, they developed because of their societal need to develop a more humane means of punishing criminal offenders. This thesis submits, based on the above discussions, that the aforementioned motivation cannot be the same for the introduction of the prison system in Nigeria during the colonial era and its retention after Independence.

2.6 Conclusion

In conclusion, this thesis contends that the need to ensure political, economic and social dominance over the indigenous population greatly influenced the framing of the penal policies in the colonial and post-colonial eras. This was done to ensure that prisons were used as instruments of political control and economic exploitation rather than being used as means of controlling crime, ensuring social defence and the development and rehabilitation of offenders.[239] It is for this reason that aspects of the indigenous judicial systems, which were aimed at reparation and reconciliation between the parties involved, were not incorporated into the penal systems of both the colonial and post-colonial eras. This is because the aforementioned practices were not in accordance nor supported the aforementioned objective of domination over the country's citizens.

Following the above discussions and the challenges in the prison system discussed in chapter one, this thesis argues that it is time Nigeria considers an alternative response in the manner via which its justice system responds to crime and rehabilitate offenders. This

[238] ibid.
[239] PO Nwankwo (n 5) 177.

thesis wishes to propose a 'new' response, which has its foundation established on similar pre-colonial judicial principles that existed and functioned in Nigerian communities: *reconciliation, reparation and re-integration*. The question that follows is if the country wishes to consider the aforementioned alternative response, how can it and the principles at its core, be introduced into the modern day criminal justice process.

This thesis wishes to submit that there is a 21st century version of Nigeria's pre-colonial restorative practice that takes into consideration the similar values of reconciliation, reparation and reintegration. This concept is Restorative Justice (RJ) and will be discussed extensively in the next three chapters, including identification of the key principles, its history as well as tracing its evolutionary development in various jurisdictions. A two-part comparison in chapters three and four will also be conducted to assist in determining if indeed RJ could act as 21st century version of the Nigerian pre-colonial restorative practices.

CHAPTER THREE

RESTORATIVE JUSTICE: DEFINITIONS

3.1 Introduction

The term, 'Restorative Justice (RJ)' was first used by Albert Eglash in his article 'Beyond Restitution: Creative Restitution'.[1] Eglash suggested that there were three types of criminal justice: retributive justice based on punishment; distributive justice based therapeutic treatment of offenders; and restorative justice, based on restitution.[2] He claims that first two models focus on the actions of the offenders, denying victim participation in the judicial process and it requires merely passive participation by the offender. The third model, on the other hand, focuses on the harmful effects of the offenders' actions and actively involves victims and offenders in the process of reparation and rehabilitation.[3] According to Eglash, RJ provides, 'a deliberate opportunity for offender and victim to restore their relationship, along with a chance for the offender to come up with means to repair the harm done to the victim…'[4]

Presently, there is no universally accepted definition of the term 'Restorative Justice'. Johnstone and Van Ness argue that RJ has 'no single clear and established meaning'

[1] A Eglash, 'Beyond Restitution-Creative Restitution' in J Hudson and B Galaway (eds) *Criminal Justice: A Critical Assessment of Sanctions* (Lexington, MA: DC Health and Company, 1977) 92; DW Van Ness and KH Strong, *Restoring Justice: An Introduction to Restorative Justice* (5th edn, Abingdon, Oxon: Routledge Publishing Company, 2015) 23 - 24. Skelton discovered that the article was originally cited in a series that Eglash published between 1958 and 1959; AM Skelton, 'The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice' (DPhil thesis, University of Pretoria 2005). Skelton found that Eglash's source was Schrey, Walz and Whitehouse's 1955 book, *The Biblical Doctrine of Justice and Law* (London: SCM Press Ltd, 1955) 182 - 183. It was originally published in German and then translated and adapted into English.

[2] A Eglash 'Beyond Restitution-Creative Restitution' (n 1); DW Van Ness and KH Strong (n 1) 23; T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (2011) Internet Journal of Criminology 12 <http://www.internetjournalofcriminology.com/Gavrielides_Restorative_Practices_IJC_November_2011.pdf> accessed on 12 September, 2016.

[3] A Eglash, 'Beyond Restitution-Creative Restitution' (n 1); DW Van Ness and KH Strong (n 1) 23; T Gavrielides (n 2) 12.

[4] L Mirsky, *Family Group Conferencing Worldwide: Part 1 in a Series* (Restorative Practices E Forum, February 20, 2003) 2.

and that practitioners and scholars, have concluded that 'restorative justice means all things to all people'.[5] Zehr and Toews have contended that although the diversity of definitions and understanding has contributed to the richness in the restorative justice field, it has also been a source of confusion and even conflict.[6] This has led to some divisions amongst practitioners and theorists, who have held tightly to their own definitions and understanding of the concept. In addition, this has contributed to not only the creation of different camps who do not engage in dialogue with each other, but it also minimizes the impact these different perspectives bring to the table.[7] Bazemore and Schiff has described the passion by which different proponents try to assert their use of the concept as 'the only proper one' as 'the tone of a weird inter-faith squabble in an obscure religious sect'.[8] Therefore, a change of approach is required in order to move the discourse forward. This will be considered subsequently in this chapter as well as in chapter four, which looks at the history of RJ.

This chapter will examine the various definitions of RJ in order to analyse how this 'richness' contributes to the field, with particular focus on the identification of the stakeholders and the desired objectives. It will look at the various definitions of the concept, particularly the views of prominent commentators including Nils Christie, Randy Barnett, Howard Zehr and John Braithwaite. The purpose of this exercise is not to identify the most popular or the most acceptable definition but to analyse how these different definitions contribute to gaining a better understanding of the concept as well as its key elements.

[5] D Roche, 'The Evolving Definition of Restorative Justice' (2001) 4 Contemporary Justice Review 341-353, 342; G Johnstone and DW Van Ness, 'The Meaning of Restorative Justice' in Gerry Johnstone and DW Ness (eds) *Handbook of Restorative Justice* (Cullompton, Devon: Willan Publishing, 2007) 6; SC Hascall, 'Restorative Justice in Islam: Should Qisas be considered a form of Restorative Justice?' (2011) 4(1) Berkley Journal of Middle Eastern and Islamic Law 35 - 78, 39.

[6] H Zehr and B Toews, 'Part 1. Principles and Concepts of Restorative Justice' in H Zehr and B Toews (eds) *Critical Issues in Restorative Justice* (Cullompton, Devon: Willan, 2004) 1; K Daly, 'The Limits of Restorative Justice' in D Sullivan and L Tifft (eds) *Handbook of Restorative Justice* (Oxon: Routledge, 2008) 135.

[7] H Zehr and B Toews, 'Part 1. Principles and Concepts of Restorative Justice' (n 6) 1; K Daly, 'The Limits of Restorative Justice' (n 6) 135.

[8] G Bazemore and M Schiff, *Juvenile Justice Reform and Restorative Justice: Building Theory and Responsive Regulation* (Cullompton, Devon: Willan Publishing, 2004) 51; see also P McCold, 'Paradigm Muddle: The Threat to Restorative Justice posed by its Merger with Community Justice' 7 Contemporary Justice Review 13 – 35.

Finally, the analysis of the various definitions may also assist in identifying the common elements of RJ that agreed amongst its various proponents, which may in turn aid in reaching a conclusion on what are the principles and objectives of RJ in the absence of an agreed definition.

The findings from the above proposed research will assist in answering one of key research questions of this thesis which is can RJ act as a suitable modern day replacement of the pre-colonial restorative practices discussed in the second chapter. In addition, this chapter will then proceed to conduct a first of a two part-comparison between RJ and the Nigerian pre-colonial restorative practices to determine if they shared similar principles and procedures.

3.2 Definitions of Restorative Justice

Marshall defined RJ in 1996 as 'a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with aftermath of the offence and its implications for the future'.[9] He provided a further definition in 1998 where he states that RJ is 'a problem solving approach to crime which involves the parties themselves and the community generally, in an active relationship with statutory agencies'.[10]

For the purpose for this research, the definitions put forward by Marshall will be used as a working definition to attempt to determine what RJ is; identify the stakeholders that should be involved; and the objectives/desired outcomes that any Restorative process should aim to achieve. The reason for using Marshall's definition is that it is attributed to

[9] T Marshall, 'The Evolution of Restorative Justice in Britain' (1996) 4(4) European Journal on Criminal Policy and Research 37.
[10] T Marshall, 'Restorative Justice: An Overview' in G Johnstone (ed) *A Restorative Justice Reader* (Willan Publishing 2008) 28.

be the 'most acceptable working definition' of the concept, which the United Nations (UN) has adopted in formulating policies on RJ.[11] These definitions will be compared with those of early proponents like Christie, Barnett, Zehr and Braithwaite as well as recent academic writings, with the objective of identifying the common features, as well the differences in these definitions. This comparison of old and new definitions is significant as it demonstrates the common features that is agreed by RJ scholars and yet at the same time highlights the differences amongst the very same proponents which contributes to the conflict mentioned earlier.

According to Maxwell et al, Nils Christie first raised the idea that restorative approaches could be used to resolve issues between parties arising from a criminal incident amongst academic circles in 1977.[12] This was followed by Braithwaite's *Crime, Shame and Reintegration* and Zehr's *Changing Lenses*, publications that 'articulated and shaped the theory of RJ'.[13] This thesis will also consider the works of Barnett as Johnstone argues his theories have also inspired and shaped the concept, as we know it today.[14]

Christie views criminal incidents as 'Conflicts' which are the property of the parties directly involved. He uses the example of 'conflict-handling' in the Arusha province of Tanzania to show a different and arguably, preferable attitude towards conflicts.[15] This property, which should be viewed as a valuable commodity, has been 'stolen' by the State

[11] United Nations Office on Drugs and Crime (UNODC), *Handbook on Restorative Justice Programmes* (New York: United Nations, Criminal Justice Handbook series) 6; P McCold, 'The Recent History of Restorative Justice: Mediation, Circles, and Conferencing' in D Sullivan and L Tifft (eds) *Handbook of Restorative Justice* (Oxon: Routledge, 2008) 23; J Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002) 11.
[12] N Christie, 'Conflicts as Property' (1977) 17 British Journal of Criminology 1- 15; see also G Maxwell, A Morris and H Hayes, 'Conferencing and Restorative Justice' in D Sullivan and L Tifft (eds) *Handbook of Restorative Justice* (Routledge, 2008) 91.
[13] G Maxwell et al (n 12).
[14] G Johnstone, 'Introduction' in G Johnstone (ed) *A Restorative Justice Reader* (Willan Publishing 2008) 21.
[15] N Christie (n 12) 1 - 2.

and professionals (lawyers, judges, behaviour experts, etc.) in a justice system that does not encourage participation by the victim and the offender.[16]

Applying the above in today's context, the following example can be used to explain how Christie's theory could apply to criminal cases. Under the current system, when individuals break the law, they are viewed as having committed a crime against the state e.g. in Nigeria, the criminal charge will read the "The State v Offender C." and in England, "R v Offender D". However, apart from offences like treason and sedition, the victim of the offender's crime is not the state itself but an individual. The State cannot be 'murdered' or 'raped'; these types of crimes can only be performed against a person. Therefore, it could be argued that the charge, if Christie's theory was applied, could actually read "Victim A v Offender B".[17]

According to Mark Umbreit, [18]

> 'RJ provides an entirely different way of thinking about crime and victimization. Rather than the state being viewed as the primary victim in criminal acts and placing both victim and offenders in passive roles, as in the case in the prevailing retributive justice paradigm, restorative justice recognizes crime as first and foremost being directed against individual people. It assumes that those most affected by crime should have the opportunity to become actively involved in resolving the conflict'.

[16] N Christie (n 12) 1 - 4, 7 - 9.
[17] DJ Cornwell, *Criminal Punishment and Restorative Justice: Past, Present and Future Perspectives* (Winchester, UK: Waterside Press, 2006) 176; *Doing Justice Better: The Politics of Restorative Justice* (Hampshire, UK: Waterside Press, 2007) 56 – 57.
[18] M Umbreit, 'Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment' (1998) 1 Western Criminology Review 2.

Christie advocates for a return of these conflicts to the parties directly involved to decide how the conflict could be resolved, with the assistance of family members and members of the community. He advocates for a restructure of the current court system, dividing it into four stages.[19] The first stage will consist of the traditional court system, which will determine if any law has been violated and if so, is the accused guilty or liable.[20] If the accused is found guilty, the matter will be transferred to the second stage which is a victim-oriented court that focuses on the victim's needs and how they could be addressed, first by the offender, then by the local community and finally by the state.[21] The parties involved in the incident will be the centre focus with legal professionals facilitating/assisting and not taking over the process. Discussions could include additional issues, including those not addressed during the initial trail stage.[22] The victims will benefit from the opportunity to discuss how they have been affected by the harm and how they wish their concerns to be addressed. The offender will also benefit from having the opportunity to explain their actions, particularly to people whose opinions they hold in esteem and to seek forgiveness from the victim.[23]

The third stage will deal with the issuance of the appropriate sanction, which takes into consideration any agreements reached by the parties in the second stage.[24] The fourth and final stage with focus on the offender and consider what services could be put in place to aid them to not re-offend. This may include, for example, registering them in the

[19] N Christie (n 12) 10.
[20] N Christie (n 12) 10; M Umbreit, 'Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment' (n 18) 10 – 12.
[21] N Christie (n 12) 10.
[22] ibid.
[23] ibid. These may include members of the offender's family, schoolteachers, a Pastor/Imam or any other person that the offender respects. See the hypothetical example provided by Braithwaite in J Braithwaite, 'Restorative Justice and a Better Future' in E McLaughlin et al (eds), *Restorative Justice: Critical Issues* (London: SAGE in association with The Open University, 2003) 55.
[24] N Christie (n 12) 10.

appropriate drug rehabilitation programme to address their addiction, which was a major contributory factor that led them to commit the crime.[25]

Christie was not alone in his critique of the current criminal justice system with Barnett also advocating for a change in the current process in 1977.[26] He contends that despite several reforms used to improve the current system, they have not been successful and he questions the arguments put forward by retributivists that the use of punishment can be justified by reference to the utilitarian benefits it supposedly brings.[27] He highlights some of the problems with the current system, which include that it is very expensive to run; whether the rehabilitation programmes in prisons truly help the offenders not to re-offend; and whether the punishment prescribed has truly acted as a successful deterrent.[28]

The theory advocates for a change in focus of our image on crime, from *retributive* to *restitution*; where the crime is viewed as an offence against the victim and not the society; where the victim has suffered a loss and for there to be justice, the offender must make good the loss they have caused.[29] Barnet's theory seems to take a step further from where Christie has left off. He contends that apart from there being structures that enable the parties to determine how the conflict will be resolved, these structures should also provide a system where the payment of compensation is part of the resolution agreement reached by the parties.

Barnett identifies two types of restitution: *Punitive Restitution* and *Pure Restitution*. The distinction between the two is that under Punitive Restitution, as described by Schafer, the offender would be required to compensate the victim under a scheme that will require

[25] ibid, 10.
[26] R Barnett, 'Restitution: A New Paradigm of Criminal Justice' in G Johnstone (ed) *A Restorative Justice Reader* (Willan Publishing 2008) 46.
[27] ibid, 46 - 47, G Johnstone 'Introduction' (n 14) 22.
[28] R Barnett (n 26) 47 - 48.
[29] ibid, 49 - 50.

them to go through some form of 'unpleasantness' e.g. prison labour, with the income given to the victim as compensation or a loss of income for a number of days.[30] The offender will not be permitted to settle the compensation through a one off payment as some form of discomfort is required.[31] Barnett, however, did point out that by retaining the paradigm of punishment, this proposal faces the same challenges with the current justice system and could be considered as an attempt to 'salvage the old paradigm'.[32]

Under Pure Restitution, the focus is entirely on the offender paying compensation to the victim for the wrongful act.[33] It is not guided by the principles of 'deterrence, reformation, disablement or rehabilitation of the offender'. Although this thesis acknowledges that there are instances where the aforementioned principles might occur, they are only a by-product of the main goal – which is compensating the victim. For example, once the court confirms the guilt of the offender, they may permit the offender to pay the compensation immediately, if they are in a position to do so or in the alternative, order it to paid through future wages.[34] The offender is not compelled to go through much pain or discomfort so that they can pay off the compensation sum as soon as possible.[35]

It should be noted at this juncture that although both Christie and Barnett did not use the term 'RJ' or describe their theories as being restorative in nature, their work has been described by Johnstone as 'precursors' of RJ. They have provided a foundation for the

[30] S Schafer, *Compensation and Restitution to Victims of Crime* (2nd edn, Montclair, NJ: Patterson Smith 1970) 127.
[31] R Barnett (n 26) 50. See also the proposals by Herbert Spencer in H Spencer, 'Prison Ethics' (1907) 3 Essays: Scientific, Political and Speculative 152 - 191 and Matthew Rothbard (the double damages system which retains a punitive element) – MN Rothbard, *Libertarian Forum* (14(1), January 1972) 7 - 8. Both were referred by Barnett in R Barnett (n 26) 50.
[32] R Barnett (n 26) 50.
[33] ibid, 50.
[34] ibid, 50 51.
[35] ibid.

theories of commentators like Zehr and Braithwaite whose works have contributed immensely to the development and promotion of RJ.[36]

Zehr in his critique, points out that the current justice model fails to meet the needs of the both victims and offenders.[37] Like Barnett, he believes that the reason for this is the strict adherence to the state/punishment or retributive paradigm and calls for the adoption of new model, which focuses on meeting the needs of those directly involved/affected by the crime.[38] He argues that a solution lies in Western history in the former community justice system where disputes were resolved through negotiations, with the needs of the victim being the central focus and the outcome usually in the form of compensation.[39] Zehr also pointed out that that the community system was also similar to the 'covenant justice system' in biblical traditions in the Old Testament. He states that rather than the often mistaken view that the Old Testament was about vengeance (an eye, for an eye), it was about 'restitution, reconciliation and forgiveness'.[40] Citing Hans Boecker, he described how in the Old Testament, there was no police force or public prosecution or formal courts. Disputes were settled in the open communal places e.g. the market and at the city gates through negotiation, discussions with the primary objective at arriving at an amicable solution.[41]

In his book *Changing Lenses*, Zehr called for a change in the manner via which crime is viewed. He explains his position, using the analogy of a camera lens and how the choice of lens affects the manner via which an image is viewed.[42] He advocates for a change

[36] G Johnstone 'Introduction' (n 14) 24 - 26.
[37] H Zehr, 'Retributive Justice, Restorative Justice' in G Johnstone (ed) *A Restorative Justice Reader* (Willan Publishing 2008) 69.
[38] G Johnstone 'Introduction' (n 14) 24.
[39] H Zehr 'Retributive Justice, Restorative Justice' (n 37) 75 – 76.
[40] ibid, 77.
[41] See HJ Boecker, *Law and Administration of Justice in the Old Testament and Ancient East* (Augsburg: Publishing House, 1980) cited in H Zehr, 'Retributive Justice, Restorative Justice' (n 37) 78; the Old Testament concept of justice which involves making things right and living in peace and harmony with one another is called 'Shalom'.
[42] H Zehr, *Changing Lenses: A New Focus for Crime and Justice* (3rd edn, Scottdale, PA: Herald Press 2005) 178.

from a 'Retributive lens' which views crime as 'a violation of the state, defined by law-breaking and guilt'[43] to a 'RJ lens' which views crime as 'a violation of people and relationships'.[44] Zehr shares Christie's opinions that the criminal justice process should also consider addressing the needs of the parties to the crime as a priority, which will aid them in dealing with the impact of the event.

Zehr believes that the continued use of this 'Retributive lens' has contributed to the failure of the system, despite the various solutions and reforms proffered at the time to address this e.g. electronic monitoring and intensive supervision.[45] Therefore, a change of the lens will lead to a change in the assumptions we have about crime and justice.[46] In his opinion, the answer lies in looking at 'alternative ways of viewing both the problem and the solution' rather than looking at 'alternative punishments or alternatives to punishment'.[47] His work on the subject matter has contributed to changing our 'perception' of the criminal justice system as well as what objectives it should aim to achieve, which has contributed to the movement calling for new alternative responses to crime.

Braithwaite entered the debate much later than Zehr. He also criticised the criminal justice system, contending that rather than administering 'just, proportionate corrections that deter', the criminal justice system 'fails to either correct or deter and often, makes things

[43] ibid, 181.
[44] ibid, 181. Zehr further argues that even if the victim and offender had no previous relationship before the crime, the criminal incident has created a relationship that is usually hostile and needs to be resolved to avoid further negative impact on both parties; see H Zehr, *Changing Lenses: A New Focus for Crime and Justice* (n 42) 181 – 182.
[45] H Zehr, *Changing Lenses: A New Focus for Crime and Justice* (n 42) 179.
[46] ibid, 179.
[47] ibid, 179; Kay Harris states it is a matter of alternate values and not alternate technologies of punishment. See also M Kay Harris, 'Strategies, Values and the Emerging Generation of Alternatives to Incarceration' (1983-4) XII No 1 New York University Review of Law and Social Change 141-170 and M Kay Harris, 'Observations of a "Friend of the Court" on the Future of Probation and Parole' (1987) LI, No 4 Federal Probation 12 - 21.

worse'.[48] In his book *Crime, Shame and Reintegration*,[49] Braithwaite claims that societies that have the lowest crime rates are those that shame criminal conduct most effectively.[50] He believes that one of the reasons for the failure of the criminal justice system is that it encourages shaming that is 'disintegrative' rather than 'reintegrative'.[51]

Drawing from the works of developmental psychologists like Dienstbier [52], Braithwaite defined shaming as 'the all social processes of expressing disapproval which have the intention or effect of invoking remorse in the person being shamed and/or condemnation of others who become aware of the shaming'.[53] He proceeds to distinguish the two types of shaming. Whilst reintegrative shaming encourages reacceptance of offenders into community upon completion of the prescribed shaming process, disintegrative shaming (or stigmatization) 'divides the community by creating a class of outcasts'.[54] He is of the opinion that while stigmatization treats criminals as 'evil people who have done evil acts' which is disrespectful and humiliating, reintegrative shaming means 'disapproving of the evil of the deed while treating the person as essentially good' and '…..doing so in a way that is respecting of the person'.[55]

In addition, Braithwaite argues that the prison system encourages stigmatization of persons who have served prison sentences.[56] This may actually lead to an increase in crime rather than acting as a deterrent and the solution may not lie in increasing the number of

[48] J Braithwaite, 'Restorative Justice and a Better Future' in E McLaughlin, R Fergusson, G Hughes and L Westmarland (eds), *Restorative Justice: Critical Issues* (London: SAGE in association with The Open University, 2003) 55; G Johnstone 'Introduction' (n 14) 25.
[49] J Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989).
[50] J Braithwaite, 'Restorative Justice and a Better Future' (n 48) 55; G Johnstone 'Introduction' (n 14) 25.
[51] ibid.
[52] RA Dienstbier et al, 'An Emotion-Attribution Approach to Moral Behaviour: Interfacing Cognitive and Avoidance Theories of Moral Development' (1975) 82 Psychological Review 1299 – 1315.
[53] A Morris, 'Revisiting Reintegrating Shaming' (2001) 16 Criminology Aotearoa/New Zealand 10; see also J Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989) 57.
[54] J Braithwaite, 'Restorative Justice and a Better Future' (n 48) 55.
[55] ibid, 55 – 56.
[56] ibid, 56.

prisons.[57] He also put forward similar arguments that an increase in the number of police officers, in a system that systematically stigmatizes in the way they deal with citizens, may also lead to an increase in crime rates.[58]

Braithwaite also claimed that another reason for the failure of the criminal justice system is the 'lack of theoretical imagination among criminologists' in putting forward alternative solutions to address these failures. Instead, the arguments between criminologists who are in favour of either retribution on one hand and rehabilitation on the other have kept both sides at a stalemate.[59] He believes an amicable solution lies in a third model, 'RJ', which he describes as 'a slogan of a global social movement'.[60] As a result, he contends that the term 'restorative shaming' would be a better alternative as a name for his initial theory than 'reintegrative shaming'. This is because he is of the opinion that the 'label' attached to a concept that is being put forward as a possible instrument for social change is crucial for activists as it assists them in promoting that said concept.[61]

He went on to define RJ as, [62]

> '…. a process where all stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm. With crime, restorative justice is about the idea that because crime hurts, justice should heal. It follows that conversations with those who have been

[57] ibid.
[58] ibid.
[59] ibid 56.
[60] Braithwaite is of the opinion that a 'meaningful label' is crucial for activists as part a the 'constructive engagement with social movement politics' in order to produce change, specifically in the criminal justice system and having a balance between retribution and rehabilitation; see J Braithwaite, 'Restorative Justice and a Better Future' (n 48) 56.
[61] The change being sought is in the criminal justice system, specifically in the treatment of offenders by having a balance between retribution and rehabilitation; see J Braithwaite, 'Restorative Justice and a Better Future' (n 48) 56.
[62] J Braithwaite, 'Restorative Justice and De-Professionalization' (2004) 13(1) The Good Society 28.

hurt and with those who have afflicted the harm must be central to the process'.

The above definition highlights the following key elements. The term 'all stakeholders affected by the injustice' appears to extend the participants to a criminal case beyond the state and the offender. Secondly, the crime is viewed as a harm that needs to be repaired and that true justice is attained where there is healing. Finally, the victim and the offender are key parties to the justice process and they make decisions on how the harm can be addressed.[63]

In concluding this section, the above survey of the various definitions of RJ provide evidence of the various perceptions by different proponents of what RJ is, as highlighted in the introduction of this chapter. It is contended that rather than these different perceptions leading to disputes on how RJ should be defined, the diversity should be celebrated as they have provided diverse insights on the key components, a number of which are agreed by various RJ proponents. The next sub section will examine these key components in great depth to identify the commonalities in the various definitions. A critique of these definitions will also aid in highlighting the concerns raised by those who are sceptical of RJ and question its role in assisting the criminal justice process in reducing crime.

[63] The ability by the parties to make such decisions is referred to by Braithwaite as the 'republican element' of RJ. One of consequence is that it makes each RJ meeting unique as each offence and set of participants differ from one RJ meeting to another; see J Shapland, A Atkinson, H Atkinson, E Colledge, J Dignan, M Howes, J Johnstone, G Robinson and A Sorsby, 'Situating Restorative Justice within Criminal Justice' (2006) 10(4) Theoretical Criminology 505 – 532, 507.

3.3 Common Features and Concerns in the various Restorative Justice Definitions

In the absence of a universally accepted definition of RJ, identifying the key components that are mutually agreed by various RJ proponents will assist this thesis in gaining a better insight and understanding on how RJ can operate in the Nigerian criminal justice system. A clarification of the potential role RJ can act in reducing recidivism and how this could be achieved could address the apprehensions and queries raised by RJ cynics.

It should be mentioned that this analysis would also assist in the comparison that will be conducted subsequently in this chapter between RJ and the Nigerian pre-colonial restorative practices to determine if there are common attributes between the two practices. This will aid the overall aim of thesis in reaching a conclusion on whether RJ can function as a modern day equivalent of the aforementioned restorative practices.

From the above definitions, the following conclusions could be made about what are the key issues that need to be taken into consideration in operating RJ under a criminal justice system.

3.3.1 An Incident (usually involving a Crime) must have occurred

In both definitions, Marshall presupposes that an incident, involving the commission of an 'offence' or a 'crime' has occurred and that the purpose of the RJ process is to deal with the after effects of this incident. This is similar to the points raised by Christie who defined this incident as a 'conflict' while Braithwaite defined same as an 'injustice'.[64]

[64] N Christie (n 12) 1; J Braithwaite, 'Restorative Justice and De-Professionalization' (n 62).

Braithwaite further stated that the 'injustice' has led to a form of harm inflicted on one of the parties and the RJ process aims to 'heal the harm' caused by the said injustice.[65]

3.3.2 Identification of all Necessary Parties

Marshall in his initial definition identified the parties as 'those who have a stake in the process'.[66] The question that arises from this is what qualifies a party to be a stakeholder in any RJ process? Braithwaite described the stakeholders as 'those who have been hurt by the injustice' and 'those who afflicted the harm'.[67] While the latter clearly implies the offender, arguments could be submitted with respect to the former that this includes not only the victim but also the community. Both Marshall's and Braithwaite's definitions identified the stakeholders to include the victim, the offender and the community. Dorne's definition not only made similar identifications but also stated that the criminal incident creates an interrelationship between these parties. In addition, each party's views on the issues arising from this relationship, as well as decisions to resolve them, needs to be respected and taken into consideration.[68]

However, the aforementioned definitions did not clearly stipulate who the community are. This raises some questions, for example, is it the community of the victim or the offender or both, where both parties are not from the same community; or is it the community where the crime was committed, even where both parties are not members? In

[65] J Braithwaite, 'Restorative Justice and De-Professionalization' (n 62).
[66] T Marshall 'The Evolution of Restorative Justice in Britain' (n 9). Morris and Young provide a similar definition where they also identified the necessary parties as those who have a stake in a particular offense. See A Morris and W Young, 'Reforming Criminal Justice: The Potential of Restorative Justice' in H Strang and J Braithwaite (eds) *Restorative Justice: Philosophy to Practice* (Routledge, 2000) 15 where they stated the following: 'In a restorative justice process, the parties with a stake in a particular offense – victims, offenders and their 'communities of interest' – come together and, with the aid of a facilitator, resolve how to deal with the offence, its consequences and its implications for the future'. Generally, restorative justice offers a more informal and private process over which the parties most directly affected by the offence have more control'; also cited SC Hascall (n 5) 39.
[67] J Braithwaite, 'Restorative Justice and De-Professionalization' (n 62).
[68] Dorne defined RJ as 'a philosophy of justice emphasizing the importance and interrelations of offender, victim, community, and government in cases of crime and delinquency'; see CK Dorne, *Restorative Justice in the United States: An Introduction* (1st edition, Upper Saddle River, NJ: Pearson Prentice Hall, 2008) 3 – 4, 8 cited in SC Hascall (n 5) 39.

addition, is the term 'community' restricted to a geographical location or can other factors like race, religion or sexual orientation, be taken under consideration?[69] Due to the lack of clarity on who the community is/are, Ashworth, and others who follow his position, question the claim that RJ could lead to a 'restoration of the damaged relationship between the offender and the wider community'.[70]

Other scholars attempt to describe the term 'community' as 'a form of social network where individual lives converge through diverse media including work, neighbourhood, family, friends, leisure, religion or politics'.[71] Membership of a community is subjective and dependent on a sense of connectedness and interdependency, although there is dispute on what level of connectedness is required to give rise to a community.[72]

From the several general definitions of the term, a more specific meaning has emerged among certain restorative proponents. 'Micro communities' refers to 'a range of stakeholders connected with the circumstances surrounding the offence and may encourage, help and support those directly involved.'[73] These micro-communities may include schools, churches, youth organisations, family or friends.[74] This narrow meaning of community

[69] A Ashworth, 'Responsibilities, Rights and Restorative Justice' (2002) 42 British Journal of Criminology 578 - 595, 583; T Brooks, 'Punitive Restoration: Rehabilitating Restorative Justice' 59(3) Raisons Politiques 73 - 89.
[70] They argue that this claim 'remains shrouded in mystery'; see A Ashworth, *Sentencing and Criminal Justice* (5th edn, Cambridge: Cambridge University Press, 2010) 94; J Braithwaite, 'Setting Standards for Restorative Justice' (2002) 42 British Journal of Criminology 563; T Brooks, 'Punitive Restoration: Rehabilitating Restorative Justice' (n 69).
[71] D O'Mahony and J Doak, 'The Enigma of 'Community' and the Exigency of Engagement: Restorative Youth Conferencing in Northern Ireland' (2007) 4(3) British Journal of Community Justice 9 - 25, 13. See also J Braithwaite, *Crime, Shame and Reintegration* (n 49) 85; L Walgrave, 'Imposing Restoration Instead of Inflicting Pain' in A von Hirsh, J Roberts, A Bottoms, K Roach and M Schiff (eds) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms* (Oxford: Hart, 2003); A Crawford and T Clear, 'Community Justice: Transforming Communities through Restorative Justice' in G Bazemore and M Schiff (eds) *Restorative Community Justice: Repairing harm and transforming communities* (Cincinnati: Anderson Publications, 2001).
[72] D O'Mahony and J Doak (n 71) 13. See also R Weisberg, 'The Practice of Restorative Justice: Restorative Justice and the Danger of Community' (2003) Utah Law Review 343 - 374; E Frazer, *The Problems of Communitarian Politics: Unity and Conflict* (Oxford: Oxford University Press, 1999); SC Hascall (n 5) 39.
[73] D O'Mahony and J Doak (n 71) 14.
[74] P McCold, 'Towards a Holistic Vision of Restorative Juvenile Justice: A Reply to the Maximalist Model' (2000) 3(4) Contemporary Justice Review 357 - 414; J Braithwaite *Restorative Justice and Responsive Regulation* (n 11).

tends to be favoured by restorative justice proponents as it 'imports a degree of certitude and tangibility since specific individuals may be more readily identified....'[75]

However, some commentators have argued that attempting to find an agreed definition of the term should be avoided. This is because of the confusion that arises because of the various definitions which poses a risk of undermining the potential benefits of RJ and complicates the task of defining the role and duties of the community in the RJ process.[76]

3.3.3 The Role of the State in the Restorative Justice Process

A further question arises from the above discussion which is 'Does the community include statutory agencies? Marshall distinguishes the community from statutory agencies as a stakeholder in the process in his second definition.[77] This however contradicts Christie's opinion that the state and/or its agents should play no role in the process as the 'conflicts' are the property of the parties directly involved.

This thesis acknowledges the concerns raised by various RJ proponents on the role of the state in RJ. One of such concerns is that RJ may be 'forgotten or co-opted by the dominant system of crime control'.[78] If one considers attempts by the state in various jurisdictions to reform the criminal justice, including the introduction of the prison system as previously discussed in the second chapter, an argument could be submitted that the state does not a possess a good 'track record'.[79] This is despite the initial good intentions of

[75] D O'Mahony and J Doak (n 71) 14

[76] D O'Mahony and J Doak (n 71) 14. See also A Worrall, *Punishment in the Community: The Future of Criminal Justice* (London: Longman, 1997) 46; P McCold and B Watchel, 'Community is Not a Place: A New Look at Community Justice Initiatives' (Paper presented to the International Conference on Justice Without Violence: Views from Peacemaking Criminology and Restorative Justice, Albany, New York, June 5 - 7, 1997); M Schiff, 'Models, Challenges and the Promise of Restorative Conferencing Strategies' in A von Hirsh, J Roberts, A Bottoms, K Roach and M Schiff (eds) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms* (Oxford: Hart, 2003).

[77] T Marshall 'Restorative Justice: An Overview' (n 10). Dorne also similarly distinguishes the state (who he refers to as the 'government') as a separate stakeholder in the RJ process; see CK Dorne (n 68) 3 – 4.

[78] C Boyes-Watson, 'In the Belly of the Beast? Exploring the Dilemmas of State-Sponsored Restorative Justice' (1999) 2(3) Contemporary Justice Review 261 – 281, 262.

[79] Other examples include juvenile courts, probation and community corrections. See D Rothman, *Conscience and Convenience: The Asylum and its Alternatives in Progressive America* (Boston, MA: Little Brown, 1980) cited in C Boyes-Watson, 'What are the Implications of the Growing State Involvement in Restorative Justice?'

reformers whose efforts were derailed by unforeseen circumstances, which they had no control over.[80] In addition, some of the issues raised by RJ advocates that could potentially arise with state-sponsored RJ schemes include that they may pay lip service to victims and not fully include them in the decision making process.[81] Furthermore, the process, if improperly managed, may result in the victim re-living the horrors of the crime.[82] Finally, offenders may be coerced to participate in the process, which may compromise their right contest the allegations in a fair trial[83].[84]

However, there are arguably a number of potential benefits in having the state participate in RJ process. Firstly, the 'incompatibility' between government criminal justice institutions and RJ may generate a 'creative tension' that opens opportunities for reforms within these institutions.[85] The very persons who work within these institutions, who Boyes-Watson contends have been 'disillusioned and demoralized by its ineffectiveness and the harm it causes', could push these reforms forward.[86] The reforms should address three aspects in the structure of the criminal justice systems for RJ to function within the said system. These include the issue of 'ownership' of the criminal justice process, with it no longer in the sole custody of the state but rather under joint custody or collaborative

in H Zehr and B Toews (eds) *Critical Issues in Restorative Justice* (Cullompton, Devon: Willan Publishing, 2004) 215.

[80] C Boyes-Watson, 'In the Belly of the Beast? Exploring the Dilemmas of State-Sponsored Restorative Justice' (n 78) 262 – 262; 'What are the Implications of the Growing State Involvement in Restorative Justice?' (n 79) 215.

[81] H Reeves and K Mulley, 'The New Status of Victims in the UK: Threats and Opportunities' in A Crawford and J Goodey (eds), *Integrating a Victim Perspective within Criminal Justice Debates* (Aldershot: Ashgate, 2000).

[82] J Brown, 'The Use of Mediation to Resolve Criminal Cases: A Procedural Critique' (1994) 43 Emory Law Journal 1247 – 1309; M Achilles and H Zehr, 'Restorative Justice for Crime Victims: The Promise and Challenge' in G Bazemore and M Schiff (eds) *Restorative Community Justice: Repairing Harm and Transforming Communities* (Cincinnati, OH: Anderson Publishing, 2001).

[83] K Warner, 'The Rights of the Offender in Family Group Conferences' in C Alder and J Wundersitz (eds) *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* (Canberra, Australia: Australian Studies in Law, Crime and Justice, Australian Institute of Criminology, 1994); R Delgado, 'Goodbye to Hammurabi: Analysing the Atavistic Appeal of Restorative Justice' (2000) 52 Stanford Law Review 751 – 775.

[84] C Boyes-Watson, 'What are the Implications of the Growing State Involvement in Restorative Justice?' (n 79) 215 – 216.

[85] ibid, 216.

[86] ibid, 216.

ownership with other stakeholders, including community participants and volunteers.[87] In addition, it should encourage flexibility within the organizational structures of the criminal justice system to reduce the impersonal bureaucratic nature, which will enable criminal justice employees to be more understanding and sympathetic to the needs of all parties involved. Finally, the reforms should lead to an adjustment in the level of professionalism displayed by criminal justice employees to enable them to be empathetic to participants and the traumatic experience they are enduring because of the criminal act.[88]

Secondly, the state can provide a conducive environment for RJ to flourish via the enactment of legislation to enable RJ schemes and programmes to function effectively. A good example of country that has acted as an 'enabler' is New Zealand through the enactment of the Children, Young Persons and Their Families Act of 1989.[89] This Act introduces RJ principles into the criminal justice process in matters involving children and young persons.[90]

The United Nations has also endorsed the incorporation of RJ in the structures of criminal justice systems by states in their respective countries.[91] Following the Vienna Convention which called for the 'development of restorative, justice policies, procedures

[87] The state must be willing to accept that they are not the 'sole experts' in criminal justice and that there is room for delegation of control of some sectors of justice process to other stake holders, particularly to the community, volunteers and non-governmental organisations (NGO's) who may have some level of expertise not possessed by the state. For example, these other entities may be able to provide support to both victims and offenders in areas where the limited resources of the state may not be able to meet in areas of counselling, employment, therapy, etc.; see C Boyes-Watson, 'In the Belly of the Beast? Exploring the Dilemmas of State-Sponsored Restorative Justice' (n 78) 263 – 272.

[88] Boyes-Wilson termed these features as 'constraints': The Constraint of Sovereignty, the Constraint of Organization and Constraint of Professionalism; see C Boyes-Watson, 'What are the Implications of the Growing State Involvement in Restorative Justice?' (n 79) 216 – 223.

[89] V Jantzi, 'What is the Role of the State in Restorative Justice?' in H Zehr and B Toews (eds) *Critical Issues in Restorative Justice* (Cullompton, Devon: Willan Publishing, 2004) 191.

[90] These principles were based on the indigenous Maori Community justice process which has several elements similar to RJ (for example, the process was party centred with each party having a voice in the process); see H Zehr, *The Little Book of Restorative Justice* (Intercourse, PA: Good Books, 2002) cited in V Jantzi (n 89).

[91] United Nations Economic and Social Council (ECOSOC), *United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (E/2002/INF/2/Add.2, 54 – 59). Para 20 particularly encourages Member States to 'consider the formulation of national strategies and policies aimed at the development of restorative justice and at the promotion of a culture favourable to the use of restorative justice among law enforcement, judicial and social authorities, as well as local communities'.

and programmes that are respectful of the rights, needs and interests of victims, offenders, communities and all other parties', the United Nations Economic and Social Council in 2002 adopted the above cited resolution to further this cause.[92] This resolution called upon Member States to use the UN Basic Principles as a guide to encourage the use of RJ in the operation of their domestic juvenile criminal justice systems. The United Nations continue to be a strong advocate for the use of RJ in criminal matters. They consistently urge Member States 'to recognize the importance of further developing restorative justice policies, procedures and programmes that include alternatives to prosecution'.[93] This thesis recommends that the UN Basic Principles, as well as legislation from other jurisdictions, could be used as a template to formulate RJ policy and legislation for the application of RJ in not only Nigerian prisons but also the entire criminal justice process.

Thirdly, the state can also provide valuable resources (finances, personnel, etc.) for the day-to-day management and operation of various RJ programmes. This will assist in easing the burden of existing personnel in developing strategies for acquiring resources and instead, allows them to focus on how best they assist parties in reaching resolutions in criminal matters.[94]

This thesis submits that the state should have 'a watching brief' over the proceedings to ensure fairness and equity is maintained and that whatever agreement the parties conclude

[92] *Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century*, 10th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, 10-17 April 2000, A/CONF. 184/4/Rev. 3, para. 29.

[93] *Bangkok Declaration—Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice*, 11th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Bangkok, 18-25 April 2005, para. 32. See also United Nations Office on Drugs and Crime (UNODC), *Handbook on Restorative Justice programmes* (New York: United Nations, Criminal Justice Handbook series) 1 – 2. This position of the UN has been re-affirmed recently at the Thirteenth United Nations Congress on Crime Prevention and Criminal Justice 12th – 19th April, 2015 (Doha Declaration - A/CONF.222/L.6) paragraphs 5 (d) and (j).

[94] For example, in New Zealand, the entire Youth Justice system is funded by the state. Recently, the Justice Minister for New Zealand announced that there would be an increase in funding for the next four years to the sum of $16.2 million to assist RJ providers meets a growing demand for their services. This forms part of a $208.4 million budget for 2016. See H Bowen, 'Recent Restorative Justice Developments in New Zealand/Aotearoa' (Paper presented at the International Bar Association Conference 2002, Durban South Africa on October 23, 2002); V Jantzi (n 89) 193; New Zealand National Party, '$16.2 million boost for Restorative Justice' (29 June 2016) <https://national.org.nz/news/2016-06-29-16-2m-boost-for-restorative-justice> accessed 8 July, 2016.

can be legally enforced.[95] This will assist the state's objective of the maintenance of law and order through a just judicial system, which is not only concerned with prescribing the appropriate punishment to the offender but also catering for the welfare of the victim and the community.[96]

In addition, the state should have supervisory control over punishment and responses to offences, as their proper administration is part of their responsibilities to its citizens.[97] This would ensure security, consistency and respect for the rule of law and human rights.[98] Decisions on sentencing must be taken by independent and impartial tribunals, operating on principle and transparency, in accordance with a legal framework.[99] This thesis contends that there should also be access to legal advice for all parties before, during and after any RJ process in accordance with international law to ensure protection of parties' fundamental rights.[100]

From the above plethora of definitions, an observation could be made that the concept RJ carries different meanings for different theorists. However, there appears to be a common agreement on the objective of a RJ process. This is to assist all stakeholders involved in an incident in reaching an amicable resolution to repair the harm done or loss

[95] A Ashworth, 'Responsibilities, Rights and Restorative Justice' (n 69) 581; V Jantzi (n 89) 194 – 195.
[96] A Ashworth, 'Responsibilities, Rights and Restorative Justice' (n 69) 579; RA Duff, *Punishment, Communication and Community* (New York: Oxford University Press, 2000) 112, 114.
[97] The state has a 'contract' with their citizens to render these services in exchange for their obedience of state's laws; RA Duff (n 96) 112; A Ashworth, 'Is Restorative Justice the Way Forward?' (2001) 54 (1) Current Legal Problems 347 – 376, 357.
[98] A Ashworth, 'Is Restorative Justice the Way Forward?' (n 97) 357; 'Responsibilities, Rights and Restorative Justice' (n 69) 581-582; D Bayley, 'Security and Justice for All' in H Strang and J Braithwaite (eds) *Restorative and Civil Society* (Cambridge: Cambridge University Press, 2001) 211-221; A Skelton and C Frank, 'How Does Restorative Justice Address Human Rights and Due Process Issues? in H Zehr and B Toews (eds) *Critical Issues in Restorative Justice* (Cullompton, Devon: Willan, 2004) 203 – 210.
[99] A Ashworth, 'Is Restorative Justice the Way Forward?' (n 97) 363 – 364; A Ashworth, 'Responsibilities, Rights and Restorative Justice' (n 69) 581-582; D Bayley, 'Security and Justice for All' in H Strang and J Braithwaite (eds) *Restorative and Civil Society* (Cambridge: Cambridge University Press, 2001) 211-221; A Skelton and C Frank (n 98) 203 – 210.
[100] ECOSOC (n 90) Para 13.

suffered as result of the said incident and agreeing on how they can move forward. The next question that should flow from this is 'How can this objective be fulfilled?'

3.4 Aims and Objectives of Restorative Justice

RJ proponents argue that crime causes injuries to people as well as communities and RJ requires that those injuries need to be repaired for there to be justice and that parties involved must be permitted to participate in the process.[101] RJ advocates further contend that RJ provides a suitable platform where the victim, the offender and affected members of the community are involved in responding to the incident, with the state and legal professionals acting as facilitators. The process aims to achieve 'offender accountability, reparation to the victim and full participation by the victim, offender and community'.[102] Omale further argues that full participation by all parties is necessary for reaching the 'restorative outcome' of reparation and peace.[103]

Marshall puts forward a different position where he places emphasis on the principles rather than on the process. These principles include personal involvement of those mainly concerned, including their families and communities; seeing crime problems in their social context; a forward-looking (or preventive) problem solving orientation' and flexibility of practice (creativity).[104] For any RJ process to function and achieve its desired objective, it requires a set of guiding principles. Marshall proceeds to highlight several objectives of any restorative justice process. These include attending fully to victims' needs, which may be material, financial, emotional and social (including the needs of those who are personally close to the victim and may be similarly affected). Secondly, prevent re-

[101] DJ Omale, 'Restorative Justice as an Alternative Dispute Resolution Model: Opinions of Victims of Crime and Criminal Justice Professionals in Nigeria' (DPhil Thesis, De Montfort University 2009) 18.
[102] ibid, 18.
[103] ibid, 19.
[104] T Marshall, 'Restorative Justice: An Overview' (n 10) 28.

offending by reintegrating offenders into the community without fear of stigmatization[105] as this assists to prevent recidivism, which leads to high increase of crime rates. Finally, it assists with the recreation of a working community that supports the rehabilitation of offenders and victims and is active in preventing crime.[106]

This thesis is of the opinion that both camps are aiming to achieve the same goals and what is required is fusion of both ideals in order to establish a RJ system where there is no conflict between process and principles. This will assist in a country like Nigeria where there are several tribal groups, and that despite differences in culture, discussions in the second chapter established the argument that there are similarities in principles and process with respect to responses to crime during the pre-colonial era.

3.4.1 Restoration of the Parties

Marshall's definitions states that the purpose of the process is for the parties to 'deal with the aftermath caused by the offence and consider its implications on the futures of all those involved'.[107] Braithwaite states that the focus of these discussions is on 'restoring' all those involved in the process.[108] The question that then arises is what 'position' or 'state' are the parties being restored?

Braithwaite claims that RJ involves 'restoring victims, a more victim-centred criminal justice system, as well as restoring offenders and restoring the community'.[109] For the victim, this means restoring, for example, property destroyed or loss suffered because

[105] J Braithwaite, 'Restorative Justice and a Better Future' (n 48) 56.
[106] T Marshall, 'Restorative Justice: An Overview' (n 10) 29. Johnstone also highlighted similar objectives, including creating opportunities for the offender to repair the harm caused and to express repentance for their actions. Furthermore, it creates a process where the victim can be healed of the trauma suffered because of their experience. See G Johnstone, 'Introduction: Restorative Approaches to Criminal Justice' G Johnstone, *Restorative Justice: Texts, Sources and Contexts* (Cullompton, Devon: Willan Publishing, 2003) 3 - 4.
[107] T Marshall, 'The Evolution of Restorative Justice in Britain' (n 9)
[108] J Braithwaite, 'Restorative Justice and a Better Future' (n 48) 56.
[109] ibid.

of the incident; a sense of security, which may have been lost because of the incident; and the victim's dignity. For the offender, it involves a restoration of dignity (this involves dealing with the emotion of the shame they feel because of the harm they have caused by confronting it, admitting responsibility and rendering a sincere apology to the victim).[110] In addition, it also includes restoring a sense of security and empowerment, which will assist to prevent further reoffending.[111] Finally, for the community, restoring the community involves putting in place strong social support structures that will help restore both the victim and the offender, which have a ripple effect on their respective communities.[112]

3.4.2 Forms of Restoration

The various acts of restoration can be classified into two categories: material (which involves offering some physical payment, the most common example being monies paid to the victim) or symbolic (which involves some gesture, for example, like an apology). A possible item on the agenda in a RJ process is the offer of some form of compensation by the offender to the victim. Barnett claims that the advantages of a Restitutional system include the victim receiving compensation which will make the loss easier to bear; encouragement for victims to come forward and report crimes as they believe they will receive some compensation for their loss; assistance in the rehabilitation of the offender;[113] and it will result in savings for the taxpayers.

Despite the perceived advantages of a judicial system where victims receive compensation for the harm or loss suffered, there could be several challenges in its implementation. Firstly, focus seems to be on material compensation and not on reconciling

[110] T Scheff and S Retzinger, *Emotions and Violence: Shame and Rage in Destructive Conflicts* (Lexington: Lexington Books, 1991)
[111] J Braithwaite, 'Restorative Justice and a Better Future' (n 48) 57
[112] ibid.
[113] A Eglash, 'Creative Restitution: Some Suggestions for Prison Rehabilitation Programs' (1958) 40 American Journal of Correction 20.

the victim with the offender or repairing relationships. If this theory is not applied properly, there may be problems of victims making false or fortuitous claims in order to secure monies that they do not deserve. Safeguards must be in place to ensure that these claims are real. For example, having an independent panel or tribunal to determine the appropriate compensation that should be awarded to the victim.

Secondly, offenders may have the impression, particularly under the Pure Restitution paradigm discussed earlier, that they will be able to pay their way out of any wrongful action. One of the ideals of RJ is that offenders are held accountable for their actions and that they do not re-offend. This may be defeated if offenders believe they can 'buy their way out' of crime or if victims feel that justice can be sold at a price. This thesis argues that any compensation scheme that is in place should be strictly monitored by the state to ensure that it is not abused by any of the parties. For example, the offender should not be imposed with a financial burden that is not means-related.[114]

3.5 Limits on the Application of Restorative Justice

Christie's theory calls for a new court system in cases where after the accused has admitted guilt or his guilt has been established by the courts, the parties directly involved in the incident should be the primary focus and should have control of the conflict and how it is resolved. The professionals, like judges and lawyers, will only act in a facilitative capacity and not be involved in the determination of how the conflict is to be resolved, the sentence to be imposed nor in the reparation to be made to the victims.[115] Zehr similarly made calls for an alternative justice system involving the victim, the offender and the community negotiating for a solution which promotes repair, reconciliation and reassurance'.[116]

[114] A Ashworth, 'Responsibilities, Rights and Restorative Justice' (n 69) 591.
[115] N Christie (n 12) 10 - 12.
[116] H Zehr, *Changing Lenses: A New Focus for Crime and Justice* (n 42) 181.

The aforementioned theories appear to give a wide berth on the application of RJ to criminal matters, with no caveat or limitation on the type of matters that could be left for self-determination by those parties directly affected by the incident without the involvement from the state. This thesis agrees with the position that RJ has the potential in assisting parties involved in criminal incidents, including serious crimes like murder, sexual violence and armed robbery, in acquiring the 'justice' they are seeking for.[117] This type of justice goes beyond the conviction of an offender and their subsequent incarceration for a considerable period. Other aspects of such desired justice are, for example, the victim having the opportunity to express to the offender the impact of their actions and to seek answers on why the crime occurred. The offender in return is given the opportunity to acknowledge and take responsibility for their actions and offer an apology. In addition, where possible, some form of compensation could also be agreed between the parties.

The thesis further agrees, to some extent, with the position that RJ could be applied at any stage of the criminal justice process, whether it is at 'pre-sentence, as part of a sentence, and post-conviction'.[118] This provides the opportunity to any party to the incident to explore participating in an RJ process subject to their preparedness (physically, mentally

[117] After conducting a research on real cases involving gendered violence, Susan Miller commented that the potential for the application of RJ in such cases is 'vast'. See S Miller, *After the Crime: The Power of Restorative Justice Dialogues between Victims and Violent Offenders* (New York: New York University Press, 2011) 198; C McGlynn, 'Feminism, Rape and the Search for Justice' (2011) 31(4) Oxford Journal of Legal Studies 825 - 842, 825.

[118] J Shapland et al (n 63) 505; C McGlynn, N Westmarland and N Godden, ''I Just Wanted Him to Hear Me': Sexual Violence and the Possibilities of Restorative Justice' (2012) 39(2) Journal of Law and Society 213 – 240, 216. There are several documented cases of the successful application of RJ in cases involving serious offences. For example, in *After the Crime*, Susan Miller provides positive evidence of the use of RJ at post-conviction in 9 narratives involving serious cases including rape, murder and child abuse by Victims Voices Heard' (VVH); see S Miller (n 117). Another example is the Restore Programme in the US, which deals with acquaintance rape and sexual assault. See CQ Hopkins and M Koss, 'Incorporating Feminist Theory and Insights into a Restorative Justice Response to Sex Offenses' (2005) 11 Violence Against Women 693 - 723; both of these examples were cited in C McGlynn, 'Feminism, Rape and the Search for Justice' (n 117) 830. It can also be used outside the criminal court system, for example, where no police report has been filed as done by Project Restore in New Zealand. See S Julich, J Buttle, C Cummins and EV Freeborn, *Project Restore: An Exploratory Study of Restorative Justice and Sexual Violence* (Auckland University of Technology, 2010) 17, 26 cited in C McGlynn et al, ''I Just Wanted Him to Hear Me': Sexual Violence and the Possibilities of Restorative Justice' (n 118) 216.

and emotionally) and at their own convenience. This also assists to prevent coercion, as there will not be any time pressure or limitation for the RJ process to take place.

This approach has been adopted in various jurisdictions where RJ is used. For example in 2011 in England and Wales, the government put in motion plans to extend the use of RJ at various stages of the criminal justice system, with particular focus on low-level crime and youth offenders.[119] Currently, several legislation and guidelines have been enacted to encourage the use of RJ in the criminal justice system.[120] In addition, the government publishes a *RJ Action Plan for the Criminal Justice system*, which details the Ministry of Justice's (MOJ) plans for the continued development and delivery of quality victim-focused RJ schemes as well as creating awareness, understanding, and accessibility of RJ at all stages.[121] By having an expansive approach to RJ, it will assist in ensuring that no one is excluded from enjoying the potential benefits that RJ has to offer.[122]

However, this thesis is of the opinion that despite the potential of RJ to bring about much needed reforms in any criminal justice system, certain safeguards must be in place to ensure that its application is used with great care. General safeguards include ensuring that matters are presided by trained and experienced facilitators as well as informing parties beforehand of the structure and rules guiding the process, how it will proceed and the roles

[119] Ministry of Justice, *Breaking the Cycle - Government Response* (2011) 9; C McGlynn et al, ''I Just Wanted Him to Hear Me': Sexual Violence and the Possibilities of Restorative Justice' (n 118) 215.

[120] For example, Part 2 of Schedule 16 to the Crime and Courts Act 2013 inserts a new section 1ZA into the Powers of Criminal Courts (Sentencing) Act 2000 which provides that the courts can use their existing power to defer sentence post-conviction to allow for an RJ activity to take place by imposing an RJ requirement. In addition, Sections 7 and 8 of the Code for Crown Prosecutors provide guidance to Prosecutors on alternatives to prosecution for adults and youths, including conditional cautions. Furthermore, Standard 3 of the Crown Prosecution Service (CPS) Core Quality Standards (CQS) stipulates the use out-of-court disposals as alternatives to prosecution, where appropriate, to gain speedy reparation for victims and to rehabilitate or punish offenders. Finally, the Revised Victims Code, which came into force on 10 December 2013 and included RJ for the first time, with the intention of raising awareness of RJ amongst victims of crime. See Crown Prosecution Service, 'Using Restorative Processes in the Criminal Justice System' in *Restorative Justice* <http://www.cps.gov.uk/legal/p_to_r/restorative_justice/> accessed 11 July, 2016.

[121] The first of such plans was published in November, 20012 with the latest published in November, 2014; see Ministry of Justice, *Restorative Justice Action Plan for the Criminal Justice System for the period to March 2018* (2014) 4.

[122] C McGlynn, ''Feminism, Rape and the Search for Justice' (n 117) 831.

of each individual party. However, one of the most important issues that need to be taken into consideration is the suitability of RJ, especially in aforementioned cases involving the commission of serious offences. Using the example of cases of sexual violence, some of the concerns raised, particularly by feminist commentators, are that the use of RJ in such cases is a 'soft option' and will lead to a regression in legal and policy reforms achieved over several decades.[123] Furthermore, there are additional concerns that if not managed properly, the use of RJ in such cases may do more harm as it may lead to further trivialisation of violence against women, victimisation of the vulnerable and put at risk the safety of victim-survivors.[124]

Another pertinent issue in relation to the above mentioned point is that both theories by Christie and Zehr, do not take into consideration certain criminal matters where the type of sanction prescribed cannot be subject to any form negotiation by the parties. This may be due to, for example, the serious nature of the offence. Any outcome achieved at an RJ process must not only be proportionate but also, there must be no disparity with an outcome reached by a court if it had presided over the same matter.[125] For example, in a case involving an aggravated assault or death by dangerous driving, the parties cannot arrive at an agreement that would require the offender not to serve any time in prison nor to serve more than the maximum sentence prescribed for such offences. The parties may instead

[123] Sarah Curtis-Fawley and Kathleen Daly, 'Gendered Violence and Restorative Justice – the Views of Victim Advocates' (2005) 11 Violence Against Women 603-638, 624; C McGlynn, 'Feminism, Rape and the Search for Justice' (n 117) 828. As a result, some feminists view with great scepticism the application of RJ in cases of gendered violence; see James Ptacek, 'Resisting Co-optation – Three Feminist Challenges to Anti-violence Work' in James Ptacek (ed), *Restorative Justice and Violence Against Women* (Oxford: OUP 2010) 19.

[124] C McGlynn et al, ''I Just Wanted Him to Hear Me': Sexual Violence and the Possibilities of Restorative Justice' (n 118) 214. See also A. Cameron, `Stopping the Violence' (2006) 10 Theoretical Criminology 49, 59; R. Lewis et al, `Law's Progressive Potential: The Value of Engagement with the Law for Domestic Violence' (2001) 10 Social and Legal Studies 105, 123.

[125] A Ashworth, 'Is Restorative Justice the Way Forward?' (n 97) 364 – 365; K Warner, 'Family Group Conferences and the Rights of the Offender' in C Alder and J Wundersitz (eds) *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* (Canberra, Australia: Australian Institute of Criminology, 1994); A Skelton and C Frank (n 98) 205 - 206; A Skelton and M Sekhonyane, 'Human Rights and Restorative Justice' in G Johnstone and DW Van Ness (eds) *Handbook of Restorative Justice* (Devon: Willan Publishing, 2007) 583.

agree, at the end of an RJ process, that the offender could serve a reduced sentence, in conjunction with some form of reparative act, for example, payment of the victim's medical expenses.

A further argument in support of this position is that such punishments must be capable of acting as a sufficient deterrent to prevent both convicted and potential offenders from committing similar crimes in the future. If not, it may create a culture where potential offenders may continue to commit crimes if they believe they could negotiate their way from being imposed with any sanctions. These arguments are in tandem the earlier opinions raised against Barnett's Pure Restitution paradigm.[126]

This thesis therefore submits that in determining the measure of applicability of RJ, crime should be viewed through a 'Bi-focal' Lens consisting of a combination of both Restorative and Retributive Lenses, as opposed to a single Restorative Lens as opined by Zehr.[127] This will assist in determining the appropriate balanced response for criminal incidents, whether it is a combination of both approaches or the adoption of a single approach. Such determination should be done on a case-by-case basis. This approach will aid in addressing the concerns of critics who argue that the application of RJ will lead to the prescription of soft punishments for serious offences but at same time still give room for the consideration of the use of restorative options.

Another area where the application of RJ may be limited is in circumstances involving potential infringement to the rights of any of the participants.[128] For example,

[126] See s 3.2 of this chapter.

[127] 'The Bifocal is a lens split into two parts which provide a pair of spectacles two focusing points with a wide field of clear vision for both parts'; see Glasses Direct, 'Bifocal or Varifocal?' <https://www.glassesdirect.co.uk/blog/2010/12/08/bifocal-or-varifocal/> accessed 11 July, 2016; H Zehr, *Changing Lenses: A New Focus for Crime and Justice* (n 42) 179 – 181.

[128] A Ashworth, 'Is Restorative Justice the Way Forward?' (n 97) 363 – 364; A Skelton and C Frank (n 98) 203 - 207; A Skelton and M Sekhonyane (n 125) 581 – 585.

where an accused is denied a trial in order to contest any allegations made against them.[129] Another scenario is the use of RJ could lead to the violation of the rights of a victim when there might be risks to their personal safety whilst participating in the process.[130] A common risk for parties is where any may be coerced to participate or act in variance to their will or wishes, before and during the process. For example, where victims may be unduly influenced to forgive or the accused may be manipulated to confess and accept harsher terms that legal rights and rules would not ordinarily permit.[131] This breaches a vital tenet of RJ which is that parties must be willing to participate in the process freely and not under any form of compulsion.[132]

A third concern is that Zehr's theory focuses on solely on the private negotiations between the victim and the offender, particularly through mediation and does not consider the interests of the wider public.[133] This thesis contends that the concerns of the public, even though admittedly slightly less important than those of the parties directly involved, must be considered. This is because whatever agreement reached by the parties may have some form of ramifications on the entire criminal justice system and therefore cannot be carried out in isolation of the public and arguably, the state.[134] This will assist in addressing the concerns that RJ 'privatizes that which should be public, prevents precedents and rule

[129] Denying an accused a fair trial is a breach of rights enshrined in the Nigerian Constitution as well as international human right norms The Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended), Chapter IV, s 36; Universal Declaration on Human Rights (UDHR) 1948, Art. 10
[130] A Ashworth, 'Is Restorative Justice the Way Forward?' (n 97) 363 – 364; A Skelton and C Frank (n 98) 204; A Skelton and M Sekhonyane (n 125) 582.
[131] C Menkel-Meadow, 'Restorative Justice: What is it and does it work?' (2007) 3 Annual Review Law Society 161 – 187, 171; see also D Dolinko, 'Restorative Justice and the Justification of Punishment' (2003) Utah Law Review 319-342; R Delgado (n 83) 751-775.
[132] C Boyes-Watson, 'In the Belly of the Beast? Exploring the Dilemmas of State-Sponsored Restorative Justice' (n 78) 274 – 277; A Skelton and C Frank (n 98) 205; A Skelton and M Sekhonyane (n 125) 583.
[133] T Marshall, 'Restorative Justice: An Overview' (n 10) 40.
[134] RA Duff (n 96) 62.

generation for community norm development and hides its outcomes from measurement and evaluation'.[135]

Finally, Christie's theory calls for a restructure of the traditional court system to enable the transfer of ownership and control of the conflict to the parties directly affected. This thesis argues that there could be potential challenges in creating such a system. This includes the probable cost implications for restructuring the present system, for example, the hiring and training of new court officials as well as the building of new court facilities. Furthermore, there may be administrative as well as legal challenges that could arise with the creation of an additional victim-oriented court. For example, the offender may be required to respond to additional charges involving past incidences with the victim in question or other victims, which were not addressed at the initial first stage. This may arise because of the minimal participation of legal professionals like judges and lawyers at this stage who could have advised the parties of the potential illegality of such measures/discussions.[136] It may also result in a 'double jeopardy', with offenders having their matters heard more than once and without legal counsel, which violates their rights to a fair trial.[137]

This thesis therefore agrees with Marshall's position that RJ should be integrated into the current criminal justice system as 'a complementary process that improves the quality, effectiveness and efficiency of justice as a whole'.[138] All parties will be informed

[135] C Menkel-Meadow (n 131) 171; D Luban, 'Settlements and the Erosion of the Public Realm' (1995) 83 Georgetown Law J. 2619.
[136] Christie is of the view that the victim-oriented court will be a 'lay-oriented' court with less dependence on legal professionals, specialists and experts; N Christie (n 12) 11.
[137] A Skelton and C Frank (n 98) 206; A Skelton and M Sekhonyane (n 125) 584; CL Anderson, 'Double Jeopardy: The Modern Dilemma for Juvenile Justice' (2004) 152 (3) University of Pennsylvania Law Review 1181-1219, 1182, 1197. Braithwaite, aligning with Warner, however disagrees with the position that RJ could result in a double jeopardy as he was of the opinion that RJ could also fall into the same category as a retrial after a hung jury or an appeal of a sentence decision which are not considered as instances of double jeopardy; see K Warner, 'Family Group Conferences and the Rights of the Offender' (n 125); J Braithwaite, 'Restorative Justice: Theories and Worries' (123rd International Senior Seminar Visiting Expert Papers) 55 <http://www.unafei.or.jp/english/pdf/RS_No63/No63_10VE_Braithwaite2.pdf> accessed 14 July, 2017
[138] T Marshall 'Restorative Justice: An Overview' (n 10) 31.

of the option of RJ and that it is available at any stage of the criminal justice process. In addition, they will be informed that they have the support of the court in their attempt to reach an acceptable resolution. For example, parties will need the assistance and input of the courts to ensure that whatever agreement they conclude does not contravene any existing laws. These agreements could be entered as the judgment of the court with respect to only those crimes that the offender admits guilt. Therefore, this thesis supports Marshall's calls for 'a single system in which the community and formal agencies cooperate'.[139]

It must be emphasised at this point that these perceived limitations are not making a case that RJ has no role to play in the criminal justice process. Rather, they should be viewed as potential pitfalls that should be avoided in the process of establishing safeguards for the safe operation of RJ in any criminal justice system. Another advantage of this exercise is that gives all stakeholders involved a clear picture of not only what RJ is but also the type of matters that are suitable and the manner via which a RJ process could be initiated. This would aid all parties in managing expectations of the type outcomes that could reasonable be achieved at the end of the process. Furthermore, they will also assist in addressing the misconceptions put forward by RJ critics that have been discussed previously, which will hopefully reduce any fears or misgivings and aid in getting more parties to consider using RJ.

3.6 Can there ever be a universally acceptable definition of RJ?

Daly has considered this question at great length and has arrived at the conclusion that just as there is no definition of the term 'justice', the same situation applies to RJ.[140] She however argues that the inability to arrive at an agreement on the definition of RJ is not

[139] ibid. See also the Restorative Justice Pyramid which shows criminal justice working with other parties rather than it working independently and in isolation; ibid, 28.
[140] K Daly, 'The Limits of Restorative Justice' (n 6) 135.

fatal but instead, should be logically expected.[141] This is because just like justice, there can be no "fixed definition" because of its "unchanging nature" and therefore "it is beyond definition".[142]

This thesis agrees with this position and argues that the focus of RJ advocates should not be on finding a single definition that will be universally accepted. Even Marshall's first definition has been criticised by Bazemore and Walgrave, as being too broad (no reference to repairing harm, and thus providing no specific boundaries on the kinds of processes to be included).[143] Secondly, they further critique the aforementioned definition as also being too narrow (limiting the process to only face-to-face meeting between the parties with a stake in the particular offence and not including other procedures where the offender is not involved or even known to the system or the community).[144] Other critiques of Marshall's definition has also been put forward by Braithwaite who argues that it fails to specify who or what is to be restored and for not defining the core values of restorative justice. For example, it fails to take into consideration community participation, forgiveness and responsibility.[145]

This thesis submits that rather than disputing on what should be an acceptable definition of the concept, RJ proponents should rather embrace the variety as they contribute different perspectives and ideals.[146] Furthermore, Zehr and Toews encourage RJ practitioners and scholars to embrace this diversity as it brings dynamism to the field.[147]

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[141] ibid.
[142] B Hudson, *Justice in the Risk Society* (London, Sage Publications, 2003) 201; ibid.
[143] G Bazemore and L Walgrave, 'Restorative Juvenile Justice: In Search of Fundamentals and an Outline for Systemic Reform' in G Bazemore and L Walgrave (eds) *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (Criminal Justice Press, Monsey, New York USA, 1999) 45.
[144] ibid. They went on to define Restorative Justice as 'every action that is primarily oriented towards doing justice by repairing the harm that has been caused by a crime'.
[145] J Braithwaite, *Restorative Justice and Responsive Regulation* (n 11) 11.
[146] K Daly, 'The Limits of Restorative Justice' (n 6).
[147] H Zehr and B Toews, 'Part 1. Principles and Concepts of Restorative Justice' (n 6) 1; K Daly, 'The Limits of Restorative Justice' (n 6) 135; J Shapland, G Robinson and A Sorsby, *Restorative Justice in Practice: Evaluating What Works for Victims and Offenders* (Oxon: Routledge, 2011) 5

With a lack of consensus from jurists on a single definition of RJ, this thesis argues that proponents could aim to agree on a common set of principles guiding any Restorative Justice process. These common set of principles can be acquired from the various definitions and perspectives of RJ. For example, Menkel-Meadow describes these principles as 'the four R's of Restorative Justice: Restore, Reconcile, Repair and Re-integrate the offenders and the victims to each other and to their shared community'.[148]

Admittedly, finding a common set of principles will be no simple task but arguably easier than agreeing on a definition that all would accept. This is because there will be optimistically less confusion and conflict in an attempt to achieve this objective than the already guaranteed chaos in trying to arrive at a single definition.[149] In addition, this approach may create a forum where proponents could share their ideas based on their experiences and knowledge, as academics and practitioners, and learn from the strengths and weaknesses in each other's 'assumptions and understandings about restorative justice'.[150] This will assist different restorative schemes, even though operating different under rules and procedures, to arrive at a common result or at the minimum, aim for a common outcome, whether internationally or within a country like Nigeria, which is a multi-cultural society and has a federal system of government.[151]

The above analysis has highlighted the key principles of RJ as well as the factors that need to be taken in to consideration when initiating an RJ process. With this knowledge

[148] C Menkel-Meadow (n 131) 162.
[149] H Zehr and B Toews, 'Part 1. Principles and Concepts of Restorative Justice' (n 6) 1
[150] ibid, 1 – 2.
[151] ibid, 2. Work has been done by the UN and the Council of Europe on this regard with the Basic Principles on the use of restorative justice programmes in criminal matters, ECOSOC Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2 at 35 (2000) and the Council of Europe Committee of Ministers Recommendation, *Mediation on Penal Matters* (No. R (99) 19 of 15 September, 1999) concerning the use of mediation in penal matters respectively.

in hand, this thesis will now proceed to conduct a comparison between RJ and pre-colonial judicial systems.

3.7 Comparison of the Principles and Process between RJ and the Nigerian Pre-Colonial Judicial Systems

This thesis submits that a valid argument could be made that both RJ and the Nigerian pre-colonial judicial systems share several similarities in both principles and practices. Firstly, both view crime as violation of relationships between persons rather than a violation of the law of the state and the primary objective in both systems was to heal and restore the damaged relationships than punishing the offender.[152] Secondly, both systems share the same belief that criminal disputes could be resolved via having all the relevant parties discuss the impact of the incident on them and arrive on agreement on how they can heal the harm caused.[153] The respective processes share similar core principles that include assisting the parties reach some form of acceptable reconciliation, which may involve the offender making reparation to the victim.[154] Both systems also aim to assist with the re-integration of the offender into the community upon the conclusion of the prescribed punishment and reduce the risk of re-offending.[155]

Finally, both systems share similarities in the manner via which the systems operate. Control of the process is shared amongst all stakeholders, with the focus primarily on the victim.[156] Both also value the role of the communities in providing support to both the victim and the offender at every stage of the process, for example, putting forward suggestions for

[152] See Chapter 2, ss 2.2.1 and 2.3
[153] ibid.
[154] See Chapter 2, ss 2.2.1, 2.3 and 2.3.2.
[155] ibid. The principles of Reconciliation, Reparation and Re-integration in pre-colonial Nigeria judicial systems closely resemble the principles put forward by various Western proponents of RJ, for example Menkel-Meadow's four R's: Restore, Reconcile, Repair and Re-integrate; see C Menkel-Meadow (n 131) 162.
[156] See Chapter 2, ss 2.2.1 and 2.3.

the amicable resolution of the dispute.[157] Another common feature is the importance attached to ensuring the protection of the individual rights of all parties involved.[158]

However, despite the number of similarities between RJ and the Nigerian pre-colonial judicial system, there are still one or two differences. Arguably, the most significant difference is while RJ is considered as an alternative to the current criminal justice system in most Western societies, the indigenous pre-colonial judicial system was the only one in existence, which had both retributive and restorative elements. This thesis contends that one of the reasons for this is because in Western societies, justice is viewed separately through two paradigms, Retributive and Restorative. The direct opposite is the case under the Nigerian pre-colonial judicial systems where justice was jointly perceived via these two paradigms in order to ensure that a balanced punishment, consisting of both elements, was prescribed. The manner via which justice was viewed had a correlating impact on how restorative practices could apply in criminal cases. Therefore, whilst the application of RJ to criminal matters in the West is restricted by various factors as earlier discussed, there were hardly any limited restrictions to the application of the pre-colonial restorative practices to disputes arising from a criminal incident.

Another difference is under the Nigerian pre-colonial judicial system, the use of imprisonment was not considered as a valid method of punishments whilst harsh sanctions like execution and banishments were reserved for the most heinous offences.[159] However, in most Western societies and even presently in Nigeria, imprisonment is the punishment of first resort under their respective criminal jurisdictions.

[157] ibid.
[158] ibid.
[159] ibid.

3.8 Conclusion

From the above discussions, this thesis was able to acquire valuable insights on the fundamental components of RJ as well as the factors that need to be taken into consideration when initiating an RJ process. These discussions were quite relevant in answering one of the key research questions of this thesis which is could RJ act as 21st century equivalent of the pre-colonial restorative practices that existed in Nigeria. In light of the first part of the comparison that was conducted to evaluate whether these two systems share similarities with respect to principles and practices, this thesis wishes to submit the argument that the answer is in the affirmative.

However, the above series of discussions poses new questions on whether in Western societies, RJ was created as a response to the current criminal justice system or was there in existence, practices that were restorative in nature before the emergence of the current judicial system. Quite a number of commentators are in favour of the latter position with some contending that RJ has its roots in judicial practices that were established before the current criminal justice system. The next chapter will look at these claims and the critiques raised by those who oppose the use of history to justify the current RJ practice. This chapter will also conduct the second part of the comparative analysis between RJ and the Nigerian pre-colonial judicial system on whether they also share similar histories.

CHAPTER FOUR

RESTORATIVE JUSTICE: HISTORICAL DEVELOPMENT

4.1 Introduction

An examination of the literature on Restorative Justice (RJ) appears to show that a number of advocates refer to its 'history'. They claim that before the emergence of the modern criminal justice system, there were in existence justice systems that were primarily restorative in nature with little or no punitive elements. Braithwaite, Consedine, Weitekamp and other RJ advocates have supported their arguments with historical references to various pre-modern criminal judicial systems, which they claimed had the aforementioned attributes.[1] This chapter will seek to examine the veracity of these claims by first analysing the concept's history as well as its evolution over the centuries to its current status. An examination will also be conducted of the arguments put forward by several proponents, justifying its superiority over the current judicial system on the grounds of its history, as well as the arguments in opposition. The analysis will also consider whether there were no punitive elements in these pre-modern criminal justice systems.

During the breadth of this chapter, the second part of the comparative analysis between RJ and the Nigerian pre-colonial judicial will be conducted to determine if both systems share similar histories. This analysis will be significant if there is truth in the above mentioned assertions by RJ proponents that RJ practices did exist before the current criminal justice system answer. A comparison in their historical evolutions will also provide insight on whether there are mutual circumstances under which both restorative practices were replaced by respective versions of the current criminal justice system.

[1] K Daly, 'Restorative Justice: The Real Story' (2002) 4 Punishment and Society 55 - 79, 61 - 62.

4.2 Restorative Justice in Early Societies

Various RJ proponents are of the opinion that RJ is not a 'new invention but a return to traditional patterns of dealing with conflict and crime which have been present in different cultures throughout human history'.[2] These include Consedine who believes that Biblical justice was restorative in nature.[3] He further argues that the position was similar in the judicial systems in most indigenous cultures, for example, in the Maori's in pre-colonial New Zealand; the Pacific nations like Tonga, Fiji and Samoa; and in pre-Norman Ireland.[4] Braithwaite also shares similar opinions and claims that RJ is grounded on traditions from ancient Arab, Greek and Roman civilisations that used restorative approaches, even for murder cases.[5] He goes on to claim that 'Restorative Justice has been the dominant model of criminal justice throughout most of human history for the entire world's peoples.'[6]

Weitekamp synthesizes ancient forms of justice and the practice of indigenous groups, both of which he describes as restorative, and states that, [7]

> 'Some of the new…. programs are very old…. [A]ncient forms of restorative justice have been used in [non-state] societies and by early forms of humankind. [F]amily group conferences [and]…. circle hearings [have been used] by indigenous people such as the

[2] M Zernova, *Restorative Justice: Ideals and Realities* (Aldershot: Ashgate Publishing 2007) 7; see also J Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002) 5.
[3] J Consedine, *Restorative Justice: Healing the Effects of Crime* (Lyttelton, New Zealand: Ploughshares Publications, 1995) 12 cited in K Daly, 'Restorative Justice: The Real Story' (n 1) 62.
[4] ibid.
[5] J Braithwaite, *Restorative Justice and Responsive Regulation* (n 2) 3; 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' in M Tonry (ed) *Crime and Justice: A Review of Research* (Vol 25, Chicago, IL: University of Chicago Press, 2002) 1 cited in K Daly, 'Restorative Justice: The Real Story' (n 1) 62. See also DW Van Ness and KH Strong, *Restoring Justice: An Introduction to Restorative Justice* (5th edn, Abingdon, Oxon: Routledge, 2015) 6.
[6] J Braithwaite, *Restorative Justice and Responsive Regulation* (n 2) 3; 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' (n 5) 1 cited in K Daly, 'Restorative Justice: The Real Story' (n 1) 62.
[7] E Weitekamp, 'The History of Restorative Justice' in G Johnstone (ed) *A Restorative Justice Reader* (Cullompton, Devon: Willan Publishing 2003) cited in K Daly, 'Restorative Justice: The Real Story' (n 1) 62.

> Aboriginals, the Inuit, and the native Indians of North and South America…. It is somewhat ironic that we have at [the turn of this century] to go back to methods and forms of conflict resolution which were practiced some millennia ago by our ancestors….'

Weitekamp further draws on a range of well-known works of legal anthropology in order to support his bold claim that RJ has existed since humans began forming communities.[8] He cites the works of Michalowski who believes RJ began in the early acephalous societies. Acephalous societies (i.e. societies without rulers and comes from the Greek word *ακέφαλος* meaning headless) were the only type of human community for some 30,000 years.[9]

These 'acephalous societies', according Hartmann, can be distinguished as 'nomadic tribes and segmental societies'. [10] Both were 'small, economically co-operative and relatively egalitarian and used simple technology'.[11] Three characteristics of acephalous societies are the 'close relationship between these societies and their *lebensraum*[12], a lack of organization as a state and social stratification (from the point of western sociology), and the dealing with conflicts within a society that is not based on institutional force by the state'.[13]

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[8] E Weitekamp (n 7) 114 – 115.

[9] R Michalowski, *Order, Law and Crime* (New York, NY: Random House, 1985); E Weitekamp (n 7) 111; T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (2011) Internet Journal of Criminology 4 <http://www.internetjournalofcriminology.com/Gavrielides_Restorative_Practices_IJC_November_2011.pdf> accessed on 28 February, 2014.

[10] A Hartmann, *Schlicten oder Richten. Der Taeter-Opfer-Ausgleich und das (Jugend-) Strafrecht (Arbitrating or Judging: Offender-Victim Compensation and (Juvenile) Criminal Law)* (München; Wilhem Fink Verlag, 1995); E Weitekamp (n 7) 111; T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 4.

[11] ibid.

[12] German for *habitat* or *living space*; T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 4.

[13] R Kuppe, 'Indigene Rechte und die Diskussion um "Rechte für Gruppen"' (Indigenous rights and the Discussion around 'Group Rights') (1990) 5 Law & Anthropology 1 - 23, 10; T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 4.

Due to these societies' 'diffuse structures, kin-based social organizations and the concept of collective responsibility', individual members all shared a common bond, thus reducing the likelihood of personal selfish interests.[14] These qualities reduced the probability of offences being committed by members of the society. It also produced conformity and placed restraints on potential deviants.[15] If an offence was committed, the society dealt with the matter without the assistance of a formal legal system.[16] After assessing the harm caused by the offender, the society had to regain its lost balance by either assisting the victim or issuing sanctions against the offender.[17] It was vital that the needs of the victim were met as failure to do so had social and economic implications overall on the society due to the collective responsibility that existed between all societal members, including those associated with the parties involved.[18]

A good example of the restorative practices in these acephalous societies was provided by Burton, who studied the Ifugao tribe of Northern Luzon in the Philippines, and claims that,[19]

> 'The kin of each party were anxious for a peaceable settlement, if such could be honourably be brought about…. Neighbours and co-villagers did not want to see their neighbourhood torn apart by internal dissension. Instead of feuding, claims and counterclaims were relayed

[14] RJ Michalowski (n 9); E Weitekamp (n 7) 111; T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 8) 4.
[15] ibid.
[16] ibid.
[17] RJ Michalowski (n 9); E Weitekamp (n 7) 111; T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 4 - 5.
[18] ibid.
[19] RF Barton, 'Ifugao Law' (1919) 15(1) University of California Publications in American Archaeology and Ethnology 1 - 186, 94.

by the *monkalun* [the go-between/mediator] until a settlement was achieved'.

Michalowski further claims that there were four avenues via which restoration of the societal balance could be performed in acephalous societies: Blood Revenge, Retribution, Ritual satisfaction and Restitution.[20] In this current society, Restitution could mean either 'restoration, amends, repayment, compensation or forgiveness'.[21] Restitution in acephalous societies had a different connotation, which involves a combination of all or most of the aforementioned attributes.[22] One probable reason for this is the difference in the manner via which anti-social or deviant behaviour was perceived between acephalous and modern day societies.[23] The subject of Restitution will be discussed in more detail in the next subsection.

4.2.1 Restitution

According to Michalowski, Restitution was arguably the most common method of resolving disputes in acephalous societies because it enables disputing clans to resume normal relations immediately after both parties have settled the conflict.[24] Since both the clans of the offender and the victim took part in the restitution negotiations, both were to some extent in control of the negotiations and their outcome. This permitted a compromise to be reached that will be acceptable to both parties.[25]

Deviant acts in acephalous societies were viewed as a community problem and a communal failure.[26] It was not viewed as a problem that could simply be resolved by making the offender pay some form of compensation. Resolution of the issue required participation

[20] RJ Michalowski (n 9); E Weitekamp (n 7) 111; T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 5.
[21] RJ Michalowski (n 9); T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 5
[22] ibid.
[23] ibid.
[24] E Weitekamp (n 7) 111.
[25] ibid.
[26] RJ Michalowski (n 9); T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 8) 5.

from both the offender and the victim in a restorative process. The community takes a leading role in the process, by appointing a representative who acts as a mediator between the parties.[27] The matter is dealt at a personal level, which they believed assisted in the rehabilitation of the offender and deterred him from committing other offences in the future.[28] Furthermore, the process aided in the restoration of the victim's losses, which both led to a restoration of the balance that was lost when the incident occurred. [29]

Nader and Combs-Schilling also share similar views, though less empathic, on the importance of restitution in acephalous societies. They argue that 'restitution was only one part of a much larger sanctioning system employed by some cultures' and is 'one among many sanctions operating in the social-control system of such societies'.[30] They believe that the restitution process in acephalous societies had six purposes and functions: 'to prevent further, more serious conflicts, particularly to avoid a feud; to rehabilitate the offender back into the society as quickly as possible and to avoid a negative stigma; to provide for the victim's needs; to restate the values of the society by addressing the needs of both the victim and the offender, thus indicating that the society desired some type of justice for all its members; to socialize the members about its norms and values; and to provide regulation as well as deterrence for its members'.[31] They claim that these functions clearly show that restitution served multiple purposes, as a form of sanction, in these societies, which arguably were RJ focused.[32]

Another society where the practice of Restitution was also used was in the ancient Eskimo communities. Adamson Hoebel claims that Restitution was the usual form of

[27] ibid.
[28] ibid.
[29] ibid.
[30] L Nader and E Combs-Schilling, 'Restitution in Cross-cultural Perspective' in J Hudson and B Galaway (eds) *Restitution in Criminal Justice* (Lexington, M.A.: Lexington Books, 1977) 32 - 35; E Weitekamp (n 7) 111 – 112.
[31] ibid.
[32] ibid.

response except in cases of homicide where Blood Revenge could be applied and even then, this was rarely used and in some cases, not all. [33] Hoebel further states there was often no need for a response from the community. For example, in a case involving murder, the offender took over the responsibilities of the victim, including the care of the victim's family.[34] He concludes by stating that 'just as doctors are charged with keeping the human body in healthy balance, pre-modern laws was to keep social body in good health by bringing the relations of the disputants back into balance'.[35]

Fellow historian, Elizabeth Colson, also echoes Hoebel's claim. In her studies of the Neur tribe in Sudan, Colson contends that if a member of the Neur tribe was killed, the response to such a crime depended on several factors. For example, if the victim and offender were members of the same family or were members of different tribes.[36]

Other examples of diverse cultures in early societies with similar restitution practices include: the Code of Hammurabi (c. 1700 B.C.E.) which prescribed restitution via individual compensation for property offences and on several occasions, served as a substitute for the death penalty as did the Code of Lipit-Ishtar (1875 B.C.E.); Middle Eastern Codes such as the Sumerian Code of Ur-Nammu (c. 2050 B.C.E.) and the Code of Eshnunna (c. 1700 B.C.E.) which provided for restitution, even in violent cases; the Roman Law of the Twelve Tables (449 B.C.E.) which required thieves to pay restitution, which may increase depending on the circumstances, for example, if the stolen property was found in their homes and if they resisted a search of their homes; the Lex Salica (c. 496 C.E.) which

[33] ibid; T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 5.
[34] E Hoebel, *The Law of Primitive Man* (Cambridge, MA: Harvard University Press, 1954) 83; T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 5.
[35] E Hoebel (n 34) 279 cited in T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 5.
[36] E Colson, *The Plateau Tonga of Northern Rhodesia: Social and Religious Studies* (Manchester: Manchester University Press, 1962); T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 5 – 6.

were the earliest existing collection of Germanic tribal laws which provided for restitution for crimes ranging from theft to homicide; and the Laws of Ethelbert (c. 600 C.E.) which had detailed restitution schedules.[37]

The existence of restitution practices were also alleged in Hebrew scriptures, with the word 'shalom' used to describe a state of harmony in the relationships between individuals, the community and God.[38] Crime has adverse effects on this 'harmonious state', rupturing the existing relationships and creating harmful ones.[39] Restitution formed an essential part of the judicial process, which can be traced to the Hebrew word *shillum* which is derived from the same root as 'shalom' and implies a connection with the restoration of community peace.[40] Vindication of the victim and the law can be traced to *shillem* which can be translated as 'retribution' or 'recompense' which does not apply to acts of revenge but acts to satisfy or vindicate.[41] Therefore, the purpose of the Hebrew justice process was 'through vindication and reparation, the restoration of the community that had been adversely affected by crime'.[42]

Similar practices also existed in contemporary Japanese cultures, which also placed similar emphasis on the offender making reparation to the victim, which will aid to restoring peace within the community.[43]

From the above examples, an argument could be submitted that restorative practices featured prominently in the justice systems of the previously discussed early societies. It

[37] E Weitekamp (n 7) 114 – 119; DW Van Ness and KH Strong (n 5) 6. See other examples of restorative practices in early societies provided by Braithwaite in J Braithwaite, *Restorative Justice and Responsive Regulation* (n 2) 4, 6 – 7 and 23.
[38] For example, Exodus 22; Leviticus 6; Luke 19; Philemon; DW Van Ness and KH Strong (n 5) 6.
[39] DW Van Ness and KH Strong (n 5) 6.
[40] ibid, 6 – 7.
[41] ibid, 7.
[42] ibid, 7.
[43] DW Van Ness and KH Strong (n 5) 7.

could be argued further that these restorative practices, in the form of Restitution, not only played a significant role in the justice systems of these early societies but was the primary option in attempting to resolve criminal disputes. Due to these societies operating under some kin based structured, the maintenance of law and order was perceived as a collective communal responsibility instead of that of a central authority. Therefore, the use of these restorative practices was viewed as a better alternative in restoring social relationships that may have been damaged because of the criminal act.

The aforementioned circumstances also existed in pre-colonial Nigerian societies whose structure was quite similar to those of the acephalous societies discussed earlier.[44] Their restorative practices also played a prominent role in the judicial systems and there are several similarities, both principles and practice, with their counterparts in other early societies. These include the arrangement of reconciliation meetings between the offender and the victim in the presence of other community members, with senior members of the community acting as mediators. The purpose of these meetings was to reach an amicable resolution that will restore communal harmony.[45] The above analyses also provide evidence that the situation in pre-colonial Nigeria was not an isolated incident but that such systems existed in several jurisdictions over the world.

The above discussion has now raised new questions. If indeed, the use of restorative practices was dominant in most of the justice systems in early societies, what circumstances led to their withdrawal within the current judicial structure? Furthermore, when did this change occur? The next sub section intends to investigate this and could provide an answer to this query. For the purpose of this thesis, the primary focus will be on the circumstances

[44] See Chapter 2, ss 2.2.1; 2.3.1.1 and 2.3.1.3
[45] See Chapter 2, ss 2.2.1; 2.3.1.1 and 2.3.1.3.

in the England because of the previous discussions in the first and second chapter, which focused on the colonial relationship between Nigeria and England.

4.3 The Disengagement of Restorative Practices in Criminal Justice Systems

An examination of the various contentions amongst various RJ advocates and historians also appears to reveal mutual agreement as to when judicial systems deviated from the use of restorative practices as well the reasons for the change of approach. Commentators have narrowed the period that this withdrawal occurred to between 8th to 11th centuries, with specific focus to changes in the judicial systems in England and other parts of Europe.[46] They argue that the 'erosion of restorative justice as a formal paradigm for "criminal justice systems" was completed by the end of the 12th century'.[47] Van Ness and Strong contend that, [48]

> 'As tribal societies in Europe were united into kingdoms under feudal lords, rulers took an increased interest in reducing the sources of conflict, and the interests of the victims began to be replaced by the interests of the state in the resolution of those conflicts. By the middle of the ninth century, fines paid to the state had replaced restitution as the financial sanction of choice'.

[46] K Daly, 'Restorative Justice: The Real Story' (n 1) 63. Some commentators were quite specific to state that the majority of the change took place in the 9th century; see JL Gillin, *Criminology and Penology* (New York: Appleton-Century, 1935) M Fry, *Arms of Law* (London: Victor Gollancz, 1951); P Laster, 'Criminal Restitution: A Survey of its Past History' in J Hudson and B Galaway (eds) *Considering the Victim* (Springfield, IL: Charles Thomas, 1975); all cited in T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 7.
[47] JD Rossner, 'Wiedergutman statt Ubelvergelten' in E Marks and D Rossner (eds) *Tater-Opfer-Ausgleich: Vom zwischenmenschlichen Weg zur Wiederstellung des Rechtsfriedens* (Bonn: Unverdnderte Auflage 1989) cited in T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 7) 7; JJ Llewellyn and R Howse, *Restorative Justice: A Conceptual Framework* (Ottawa, Canada: Law Commission 2002) 6.
[48] DW Van Ness and KH Strong (n 5) 7.

Between 500 and 1350 A.D., although restorative practices were still used, it was no longer the primary method for the resolution of disputes.[49] Historian Henry Maine noted that 'with the coming of the "State power", the individual is steadily substituted for the family as the unit of which civil laws take account'.[50] Schafer, in agreement with this position, argues that what occurred was a shift in focus and priorities, with the interests of kingdom superseding those of victims, with the kingdom now taking the position as the 'victim'.[51]

In England, the invasion by the Normans in 1066 A.D. led to this change in approach as well as the manner via which justice was viewed and prescribed.[52] William the Conqueror and successors after him developed a legal system that established the prominence of the king over the Church in secular matters as well as substituting the local dispute resolution procedures.[53] The *Leges Henrici Primi* (Laws of Henry) handed over jurisdiction to the Crown in several criminal offences including arson, premeditated assault, rape and 'breach of the king's peace given by his hand or writ'.[54] This gave extensive jurisdiction to the Crown when there was a breach and thus, making the king the 'victim' when an offense was committed. At the same time, the real victim no longer enjoyed any status or recognition under the justice process, with the rerouting of the restitution to the king in the form of fines.[55] Even after the introduction of *infangthief* which compelled offenders to pay two separate payments of compensation for harms suffered other than homicide (*bot* to the

[49] S Schafer, *Victimology: The Victim and His Criminal* (Reston, VA: Reston, 1968); B Jacob, 'Reparation or Restitution by the Criminal Offender to his Victim: Applicability of an Ancient Concept in the Modern Correctional Process' 47 Journal of Criminal Law, Criminology and Police Science 645 - 666; P Laster (n 46) all cited in T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 8.
[50] H Maine, *Ancient Law* (London: J. Murray, 1905) 78; T Gavrielides 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 8.
[51] S Schafer, *Victimology: The Victim and His Criminal* (n 49); T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 7.
[52] DW Van Ness and KH Strong (n 5) 7.
[53] ibid.
[54] *Leges Henrici Primi* 109 (L.J. Downer, edited and translated, 1972); DW Van Ness and KH Strong (n 5) 7.
[55] F Pollock, 'English Law before the Norman Conquest' (1989) 14 The Law Quarterly Review 291, 301; DW Van Ness and KH Strong (n 5) 7 - 8.

injured party and *wite* to the lord/king), the victims' claim to *bot* was subsequently constrained.[56]

In the latter part of the Middle Ages, the ideal that the victim should receive compensation was completely lost and replaced by a system where all restitution was paid to the king and the actual victim became a 'passer-by' in the justice process. Gilbert Geis provided evidence of this '"State"-controlled criminal justice system'. He cites the situation in Anglo-Saxon history, following the division of the Frankish Empire by the treaty of Verdun in 843 A.D., where fines were paid to the king with no restitution to the victims.[57] Other historians shared similar views and state that Anglo-Saxon, as well as German rulers, saw the justice process as an opportunity to make profit by denying compensation to victims and having offenders pay such compensation in the form of fines to the state.[58]

The above described situation was not limited to England alone. By the end of the 12th century, other parts of Europe soon witnessed similar changes in their judicial systems with the interests of the State having priority over those of the victim.[59] With the State taking control of conflicts in Europe, a new system of formal law was created to regulate matters on property and relations. This led to intertwining of the concept of individual property and the history of law into a single fused entity.[60] As a result, the rights of the State have priority

[56] This system was developed under the Treatise '*Tractatus de legibus et consuetudinibus regni Angliae*' (The Laws and Customs of the Kingdom of England, dated 1187 A.D.) written by Ranulf Glanvil who was the Chief Justiciar of England during the reign of King Henry II; see F Pollock and FW Maitland, *The History of the English Criminal Law Before the Time of Edward I* (Cambridge: Cambridge University Press, 1898) 451; T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 8.

[57] G Geis, 'Restitution by Criminal Offenders: A Summary and Overview' in J Hudson and B Galaway (eds) *Restitution in Criminal Justice* (Lexington, MA: Lexington Book, 1977); T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 9.

[58] SW Holdsworth, *A History of English Law* (London: Methuen, 1956) 358; F Pollock and FW Maitland (n 56) 495; J Jeudwine, *Tort, Crime and Police in Medieval Britain* (London: Williams and Norgate, 1917) 155 – 156; all cited in T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 9.

[59] N Christie, 'Conflicts as Property' (1977) 17 British Journal of Criminology 1- 15, 3 - 9; JJ Llewellyn and R Howse (n 47).

[60] RJ Michalowski (n 9) E Weitekamp (n 7) 111; T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 10. According to Bentham, 'property and law are born together and die together'. see S Diamond, *Primitive Law* (London: Longmans, Green and Co., 1935) 33.

over the rights of the victim and restorative practices ceased to play a role in the judicial process.

Subsequently, law was classed into 'public' and 'private', creating a new paradigm where *crime* was viewed as an act against the State and the general public whilst actions against individual rights were pursued under *torts*.[61] This also led to the classification of the parties to a criminal dispute as 'the victim' and 'the offender'.[62] The State/Crown was 'sovereign' and had *absolute de facto* powers to make laws that were considered a 'subset of the sovereign's commands'.[63] These laws or commands were applied on the subjects of the sovereign where the threat of force or sanctions may be used to ensure compliance or obedience.[64] This is despite the fact that the sovereign may not have the moral right to rule or that these commands may lack merit.[65]

This new justice system finally gained full prominence, with the move being motivated by desire or political power in the secular and religious spheres.[66] Zehr further argued that this move, which Berman described as 'a legal revolution'[67], resulted in the 'reconceptualization of the nature of disputes'.[68] The crown/state took the place of the victim and the courts setting aside their roles as referees to the dispute and taking up the role as 'defenders of the crown'.[69]

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[61] T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 10.
[62] ibid.
[63] J Austin, *The Province of Jurisprudence Determined* (Cambridge: Cambridge University Press, 1832); Lectures on Jurisprudence, The Philosophy of Positive Law (London: John Murray, 1873); J Bentham, 'The Principles of Penal Law' in J Bowring (ed) *The Works of Jeremy Bentham* (Edinburgh: W. Tait, 1838 – 1843) all cited in T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 10.
[64] T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 10.
[65] C Johnson, *Moral Legislation: A Legal-Political Model for Indirect Consequentialist Reasoning* (Cambridge: Cambridge University Press, 1991) cited in T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 10.
[66] H Zehr, *Changing Lenses: A New Focus for Crime and Justice* (3rd edn, Scottdale, PA: Herald Press 2005) 120.
[67] HJ Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge Massachusetts: Harvard University Press 1983); H Zehr (n 66) 121.
[68] ibid
[69] ibid.

The parameters of this new justice system were set on upholding the authority of the state rather than addressing the harm and loss suffered by the victims. Rather than repairing past harms and restoring relationships, which were prime directives of its predecessor, the new system was more concerned with preventing future crimes by ensuring convicted and potential offenders comply with the law. Subsequently, corporal punishments and the death penalty were later adopted to enforce these objectives, thereby fully abandoning restitutional practices that focused on resolving past harms and addressing the needs of the victim.[70] Penal reformists like Howard and Bentham later advocated reforms to the methods of punishments and this led to the establishment of modern prison system in the 19th century, which was discussed previously in the second chapter.[71]

Llewellyn and Howse believed that this change in approach in justice had devastating and lasting effects on the real victims.[72] According to Christie, they were no longer parties in their own cause as their disputes have been 'stolen' from them by the state and may be locked out of the entire process if they are not called as a witness.[73]

The above discussions appear to highlight another similarity in RJ and the Nigerian pre-colonial judicial system. Just as the British colonialists substituted the indigenous judicial systems with a foreign justice system, the Normans initiated the replacement of restorative practice systems in early societies in England shortly after their invasion.[74] Both foreign powers proceeded to modify the social and political structures of both societies with the establishment of a central government, which conferred upon itself the responsibility of law and order that formerly belonged to families and the communities.

[70] DW Van Ness and KH Strong (n 5) 8.
[71] See Chapter 2, s 2.4.2; ibid.
[72] JJ Llewellyn and R Howse (n 47).
[73] N Christie (n 59) 3 – 9.
[74] See Chapter 1, s 1.2; Chapter 2, s 2.2.2.

This thesis further argues that in the early English societies, the primary reason for the change of approach in the justice system was for the purpose creating a source of revenue for the coffers of the Crown via the creation of a punishment system through the payment of fines. This required the Crown transferring the position and role of the victim to itself as well enacting laws that curtailed restitution payments to the victim. This reason bears a resemblance to the motives put forward in the second chapter for the replacement of the prison system with the indigenous restorative practices in Nigeria. Apart the prison system being used as tool to enforce colonial control, it was also a source of free labour for the implementation of colonial projects.[75] The payment of fines was also introduced in the Nigerian colony, which led to the diversion of compensation payments from the victims to the state, which provided a source of revenue for coffers of the colonial government. To enforce these modifications, the British colonialists altered the approach to justice, with the new colonial central government adopting the role of the victim. Crimes were also viewed as a contravention of the laws against the state rather than a violation of relationships. This system continued even after Nigeria gained independence in 1960.

This thesis argues that the discussions on the comparisons between RJ and the Nigerian pre-colonial judicial systems have highlighted the parallels in both systems. It especially considers the most recent comparison the most ironic and intriguing. This is because just as England and other European societies appear to have lost their indigenous restitutional justice practices as a result of invading states, Nigeria and other African countries experienced similar circumstances with the 'invasion' of colonial rule. This is because the ideology upon which those justice systems were established to control and make

[75] See Chapter 2, s 2.4.3.

profit for the central state was transplanted via colonial rule in the foreign justice systems in each of these respective colonies.

In addition, the recent discussions draws us back to an earlier point raised in the second chapter that the indigenous Nigerian judicial practices appeared foreign to the British colonialists.[76] The thesis still maintains this position despite of the previous discussions in this chapter on the similarities between the two systems. This is because at the time the colonialists arrived, their correlating restitutional practices have been lost for at least six centuries and the new justice system has been firmly enshrined in social and political structure of the home colony. This only leaves us with the thoughts of how the nature and structure of these respective societies' justice systems would be if they were permitted to develop to its full potential without interference from foreign powers.

In concluding this section, one can reasonably understand why a good number of RJ proponents use its history as a tactic to promote its validity. However, there are critics, from within and external to the RJ community, to the manner via which the history of RJ is portrayed. The next subsection will consider these concerns as they have correlative implications to the manner via which the history of the Nigerian pre-colonial judicial systems could be perceived as well as the impact of its validity in the current criminal justice system.

4.4 Critique of the Approach of the Portrayal of the History of Restorative Justice by RJ Proponents

There may be several reasons why some RJ proponents rely heavily on its historical significance to justify the validity of the concept. One may argue that it assists in gaining a

[76] See Chapter 2, s 2.4.1.3.

better understanding/insight of the concept and how it operated in the past, juxtapose to how it operates/should operate presently. Alternatively, it may be that its proponents feel an urge to resort to history in order to strengthen their cause that RJ is a better criminal justice system than the one currently in operation.

The answer seems to be in the affirmative for all, particularly the response that various RJ advocates use its 'history' to justify their position that current criminal justice system is ineffective. They argue that the solution lies in bringing back its predecessor; a system which they describe as being totally opposite to what is in currently in place, both in its practice and in its objectives. However, there have been several critiques of this approach, the most prolific being that advocates of RJ do not portray a full and accurate account of its history.[77]

There have been several complaints by historians about the 'loose history' employed by some RJ proponents to support their arguments.[78] The main crux of the historians' arguments in the debate is that history should be accurate and set in proper context and not used for forensic ends.[79] RJ has also received its fair share of critiques that have come not only from historians, but also from fellow RJ Scholars.[80] Sylvester also cites the critiques put for forward by Daly as an example of those who accused RJ scholars of using historical arguments to create an "origin myth."[81] Daly went on to criticize their selective use of

[77] K Daly, 'Restorative Justice: The Real Story' (n 1) 63; D Sylvester 'Myth in Restorative Justice History' (2003) 1 Utah Law Review 471, 495.
[78] FW Maitland, 'Why the History of English Law Is Not Written' in HAL Fisher (ed) *The Collected Papers of Frederic William Maitland* (Vol 1, 1911) 480,490-91; JGA Popcock, *The Ancient Constitution and the Feudal Law* (Cambridge: Cambridge University Press, 1957) 8; WW Crosskey and C Fairman, 'Legislative History and the Constitutional Limitations on State Authority' (1954) 22 U. CHI. L. REV. 1, 4; MS Flaherty, 'History "Lite" in Modern American Constitutionalism' (1995) 95 COLUM. L. REV 523, 554; all cited in D Sylvester (n 77) 473 (noting that several RJ scholars often 'pick and choose facts and incidents ripped out of context' to serve their own purpose).
[79] JP Reid, 'Law and History' (1993) 27 LOY. L.A. L. REV. 193, 203; M Flaherty (n 78) 554; JH Powell, 'Rules for Originalists' (1987) 73 VA. L. REV. 659, 661 all cited in D Sylvester (n 77) 473 – 474.
[80] D Sylvester (n 77) 474.
[81] K Daly, 'Restorative Justice: The Real Story' (n 1) 63.

history to create for RJ a 'pre-modern past [that] is romantically (and selectively) invoked to justify a current justice practice'.[82] She concludes that the use of this strategy is a mistake because of the potential danger in doing more harm than good to the RJ cause.[83]

To support her position, Daly referred to arguments made by Engel's that myth 'refers not to fantasy or fiction but to a "true story"…which is sacred, exemplary, significant'; the "truth" of myth differs from the "truth" of historical or scientific accounts'.[84] Myth 'differs from other forms of storytelling' in that they 'deal with origins, with birth, with beginnings….with how something…began to be'.[85] In his opinion, Sylvester believes that mythmaking involves an intentional reconfiguration of the past to influence current events, which includes some insertion of fantasy into the story, which end up being fictitious and misleading.[86]

Daly went on to develop the concept of myth in two ways, first as a 'partial truth' that requires rectification by historic or current evidence and secondly, as a 'special form of narrative'.[87] Therefore, RJ advocates 'do not intend to write authoritative histories of justice' but rather, they are 'constructing myths about restorative justice' for utilitarian purposes.[88] She argues that the reason behind this approach is to enable advocates make a claim that RJ was the 'first form of human justice' and that it is 'congenial with modern day indigenous and feminist social justice practices'.[89] This is connected to a need to maintain 'a strong oppositional contrast between retributive and restorative justice', with retributive justice being 'bad' whilst traditional justice, couched in restorative justice principles, is

[82] ibid; D Sylvester (n 77) 474.
[83] ibid.
[84] D Engel, 'Origin Myths: Narratives of Authority, Resistance, Disability, and Law' (1993) 27(4) Law & Society Review 785 – 826, 790-792; K Daly, 'Restorative Justice: The Real Story' (n 1) 56.
[85] ibid.
[86] D Sylvester (n 77) 474.
[87] K Daly, 'Restorative Justice: The Real Story' (n 1) 56
[88] ibid, 62; D Sylvester (n 77) 495.
[89] K Daly, 'Restorative Justice: The Real Story' (n 1) 63

'good'.[90] They believe that both the origin myth and the oppositional contrast are necessary for telling the true story of RJ.[91] Daly has no opposition to this, as she believes it assists advocates in presenting the ideals of RJ to politicians and policy makers in a simplified manner.[92] What she opposes is the manner by which they carry out this objective.

Daly is further concerned with the manner via which RJ advocates select specific histories and judicial practices in pre-modern societies and proceed to 'smooth over and lumped them together as one justice form'.[93] She does not see the justification behind this as she is of the opinion that not all practices in that period have a lot in common. Rather, she believes that this is not only wrong, but also, 'unwittingly reinscribes an ethnocentrism their authors wish to avoid'.[94] Daly highlighted, as an example, the claim that modern conferencing originates from Maori culture.[95] She contends that this claim was made in error as conferencing emerged in the 1980's because of political challenges faced by the Maori people to the welfare and criminal justice systems of the white New Zealanders.[96] According to Daly, conferencing was introduced as result of the need to accommodate different cultural differences and values into the conference process to ensure flexibility.[97] However, it is not

[90] ibid.
[91] ibid.
[92] ibid.
[93] ibid.
[94] ibid.
[95] C Shearing, 'Punishment and the Changing Face of Governance' (2001) 3(2) Punishment and Society 203 – 220, 218; J Consedine (n 3); K Daly (n 1) 63.
[96] K Daly, 'Restorative Justice: The Real Story' (n 1) 63
[97] Conferencing could be defined as a 'fragmented justice form which splices white, bureaucratic forms of justice with elements of informal justice that may include non-white (or non-western) values or methods of judgment, with all the attendant dangers of such "spliced justice"'; see K Daly, 'Restorative Justice: The Real Story' (n 1) 64. See also G Pavlich, *Justice fragmented: Mediating community disputes under postmodern conditions* (New York: Routledge 1996); H Blagg, 'A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia' (1997) 37(4) British Journal of Criminology 481 – 501; 'Restorative Visions and Restorative Justice Practices: Conferencing, Ceremony and Reconciliation in Australia'(1998) 10(1) Current Issues in Criminal Justice 5 – 14; K Daly, 'Restorative Justice: Moving Past the Caricatures' (Paper presented to Seminar on Restorative Justice, Institute of Criminology, University of Sydney Law School, Sydney, April, 1998); M Findlay, 'Decolonising Restoration and Justice in Transitional Cultures' in H Strang and J Braithwaite (eds) *Restorative Justice: Philosophy to practice* (Aldershot: Ashgate/Dartmouth, 2000) 185 – 201.

an indigenous justice practice and to say so is to 're-engage a white-centred view of the world'.[98]

In support of her position, Daly refers to Maxwell and Morris, who she claims are well versed with New Zealand history and contend that, [99]

> 'A distinction must be drawn between a system, which attempts to re-establish the indigenous model of pre-European times, and a system of justice, which is culturally appropriate. The New Zealand system is an attempt to establish the latter, not to replicate the former. As such, it seeks to incorporate many of the features apparent in whanau decision-making process and seen in meetings on marae today, but it also contains elements quite alien to indigenous models'.

Others have submitted similar arguments, dismissing claims by scholars like Weitekamp as an attempt to use 'history to legitimize restorative justice in the present'.[100] Sylvester examined the same anthropological sources on which Weitekamp based his claim on in order to assess the validity of Weitekamp's assertions and he arrived at different conclusion. His examination of these same texts revealed that in addition to the so-called restorative practices that were suggested to be utilised in ancient societies, a range of highly retributive practices were widely used in these communities as well.[101]

An example of this was in Hoebel's work, where he stated that Hoebel also discovered that the Eskimo's legal system not only permitted but also encouraged retaliatory

[98] K Daly, 'Restorative Justice: The Real Story' (n 1) 64. See also H Blagg, Restorative Visions and Restorative Justice Practices: Conferencing, Ceremony and Reconciliation in Australia' (n 97) 12.
[99] G Maxwell and A Morris, *Family, Victims and Culture: Youth Justice in New Zealand* (Wellington: Social Policy Agency and the Institute of Criminology, Victoria University of Wellington, 1993) 4.
[100] K Richards, 'Exploring the History of the Restorative Justice Movement' (Paper presented at the "5th International Conference on Conferencing & Circles", organized by the International Institute for Restorative Practices, Vancouver, Canada, August 5 - 7, 2004).
[101] D Sylvester (n 77) 501 - 519.

killings for serious offences, for example, homicide, sexual offenses and excessive lying.[102] After highlighting these examples, Hoebel admits that 'homicidal dispute, though prevalent, is made less frequent by other processes like restitution.[103] Therefore, Sylvester argues that his conclusions do not support the arguments raised by Weitekamp and other scholars that revenge killings were rarely used.[104] He thus concludes that the argument put forward by Weitekamp and other restorative justice scholars are 'either grossly overstated or flatly contradicted by Hoebel's conclusions'.[105]

Sylvester also examined the judicial practices of the Ifugao in the Philippines, which Weitekamp also cites as an example that these restitutional practices were victim centred as he claims that the victim, through his family, negotiates an appropriate compensation for the loss or harm suffered.[106] In his critique, Sylvester first argues that the victims' claims are subject to the hierarchical or customary practices of the community, thereby taking away the victims' rights to choose their own remedy.[107] This seems to give the impression that restitution was not 'victim centred' but 'community centred' as the practices seem to elevate the community above the individual victim.[108] This position could be found in societies where revenge killing is permitted, as the victims must seek community approval before they can pursue such remedies (Greenland Eskimo).[109]

In addition, Sylvester contends that Weitekamp was wrong in his assertion that it is only the class of the victim that is taken into consideration during negotiations for compensation.[110] According to Hoebel, not only is it the class positions of *both* litigants that

[102] E Hoebel (n 34) 83 - 90.
[103] ibid, 87.
[104] E Weitekamp (n 7) 111 - 119.
[105] D Sylvester (n 77) 502.
[106] RF Barton (n 19);E Weitekamp (n 7); D Sylvester (n 77) 506.
[107] D Sylvester (n 77) 506.
[108] ibid, 506 – 507.
[109] E Hoebel (n 34) 89.
[110] E Weitekamp (n 7) 80; D Sylvester (n 77) 506 – 507.

are taken under consideration, but the status of the offender is considered more important than that of the victim.[111]

Sylvester did not limit his critiques to just the examples cited by advocates in the acephalous societies. He further examined the examples of the early state societies, some of which were discussed at earlier in this chapter, and pointed out similar errors in their claims. He criticized the little or no evidence provided by RJ advocates to support their claims that restorative practices were used in such societies.[112] For example, the lack of evidence provided by Van Ness and Strong and their focus on a philological argument about what shalom meant.[113] He then went to cite various examples under these various judicial systems where retributive punishments for criminal offenses were also available. For example, the Code of Ur-Nammu made provision for imprisonment and even death as punishment for offenses like 'lawless behaviour'.[114] Secondly, under the Hebrew law, there was provision for execution by stoning for 'thirty six capital crimes' including moral abuses, violations of religious laws, homicide, assault and slavery.[115] Finally, the Roman Law made provision for the death penalty for offences including theft of crops at night, arson and for recidivist criminals.[116]

4.4.1 How should the "True" History of RJ be portrayed?

Despite the issues raised above, there are still merits for the use of history to support the position presented by RJ advocates. The critiques raised by scholars like Daly and

[111] E Hoebel (n 34) 116 -117; D Sylvester (n 77) 508.
[112] D Sylvester (n 77) 511 - 512.
[113] ibid, 512; DW Van Ness and KH Strong (n 5) 6.
[114] R Versteeg, *Law in the Ancient World* (Carolina Academic Press, 2002) 8; D Sylvester (n 77) 513.
[115] I Drapkin, *Crime and Punishment in the Ancient World* (Lexington Books, 1989) 70 – 73; D Sylvester (n 77) 514.
[116] R Versteeg (n 114) 335; D Sylvester (n 77) 514.

Sylvester is not that RJ advocates should not refer history to support their arguments; what they question is manner they use history to emphasize RJ's significance.

Daly admits that there is a certain appeal in presenting an oppositional picture of different justice forms, with RJ as the superior model for the purpose of selling it to a wider audience.[117] However, she is concerned that 'when we move from the metaphors and slogans to the hard work of establishing the philosophical, legal and organizational bases of this idea, and of documenting what actually occurs in these practices, the true story fails us'.[118] She highlighted examples of her experiences, stating that even though empirical evidences suggests conferencing in Australia and New Zealand was successful, her findings in her engagement in the South Australia Juvenile Justice (SAJI) project suggest otherwise, with parties unable to reach an amicable resolution.[119] Therefore, in order to motivate legislatures to enact laws that will incorporate RJ practices in their respective criminal justice systems and initiate reforms, the need to present a 'mythological true story' of the concept might seem justified.[120] Daly however warned that great care must be exercised to manage parties' expectation, as the reality is not all encounters between victims, offenders and their respective supporters have a fairy tale ending.[121]

Sylvester shares a similar position with Daly and agrees that in order for RJ advocates to 'convince lawyers and politicians of the wisdom of their approach, it is justified that they impose a rhetorical element into their history'.[122] He however argues that they have gone too far in their narration by presenting the concept as the only form of justice in

[117] K Daly, 'Restorative Justice: The Real Story' (n 1) 72.
[118] ibid.
[119] ibid.
[120] ibid.
[121] ibid, 73.
[122] D Sylvester (n 77) 521

existence in in the periods in question.[123] He advised that RJ advocates curb their excesses in their narratives so that it does not enter entirely into the area of total myth.[124]

Sylvester further went on to contend that the liberties with which advocates take with the history is not necessary as he believes that RJ as an institution works and there is no need to rely on historical mythmaking to justify this.[125] To him, although 'history *matters*, it is not the *only* thing that matters' and there is no need for RJ to have '*a golden age*' as a reference for the concept to be accepted today. The fact that in the same time as these ancient restorative practices, there was in existence a retributive judicial system, which could be quite brutal in its application, could be accepted. Advocates should focus less on 'how it used to be' and more on 'what should be'.[126]

In concluding this section, this thesis agrees with Daly's and Sylvester position on how the true story of RJ should be portrayed. This thesis shares the opinion that RJ's history could act as a good selling point in the promotion RJ, particularly as a lobbying tool to lawmakers and justice professionals associated with the prison system. However, this thesis also believes that what should be told is an account containing as much verifiable historical facts as possible and not an embellished version that will fit a particular narrative. This includes the pertinent fact that retributive sanctions were part of the justice systems in early societies. Their use and significance may vary from one jurisdiction to another as well as in different eras to the point that it could be argued that it was not the primary method of resolving criminal disputes and therefore used *less frequently* than its restorative counterpart. This is the position in pre-colonial Nigeria as discussed in the second chapter. It was established that although these restorative practices were the primary response to

[123] ibid.
[124] ibid.
[125] ibid.
[126] ibid.

criminal disputes, the use of restorative sanctions were still an available option, depending on the nature of the crime and other circumstances.[127]

However, to contend that these retributive sanctions were *rarely used* or even to go further to contend that *they did not exist at all* will be an attempt to portray an account that is simply not true. This is because in the examples of the early societies discussed earlier in this chapter and in pre-colonial Nigeria in the second chapter, there were several identified crimes whose response required either a retributive response or at least a combination of both retributive and restorative sanctions. For example, in pre-colonial Nigeria, the offence of witchcraft is usually punishable by death while the offence of manslaughter, apart from paying compensation to the victim, the offender may also be required to be exiled for a number of years.[128] Examples in other societies include the stipulation for imprisonment or execution for lawless behaviour crimes under the Code of Ur-Nammu and the death penalty under the Roman law for recidivist criminals.[129]

Therefore, this thesis is of the opinion that the narrative of the history of RJ that should be portrayed is not two alternative justice systems (restorative and retributive) that existed separately from each other. Instead, it should be as two justice responses that existed coherently within the same justice system. From the discussions in this chapter and in chapter two, a submission could be made that was the situation in pre-colonial Nigeria and other early societies. Therefore, if restorative and retributive judicial practices could operate side by side under a single system in the past, an argument can be made that they can operate simultaneously under the current dispensation. This will assist RJ advocates in addressing queries on how RJ could function in the current criminal justice system by highlighting the

[127] See Chapter 2, ss 2.2.1and 2.3.
[128] ibid.
[129] R Versteeg (n 114) 8, 335; D Sylvester (n 77) 513 - 514.

relationship between retributive and restorative practices in earlier justice systems. In addition, it will further aid in focusing the discussion on how RJ could be incorporated into the current criminal justice so that it could be a valid option to be considered by the courts for matters which are suitable and where parties are willing to participate.

4.5 Conclusion

Despite the departure from the use of restorative practices, Weitekamp points out that the ideals were not completely abandoned but rather, it was 'deliberately and forcibly co-opted by the crown and then discarded'.[130] Gavrielides argues there is evidence to believe it was never forgotten, despite the fact it remained dormant and relatively inactive.[131]

The 16th and 17th centuries witnessed a revival of the use of restorative practices in some criminal justice systems in Europe. For example, the German legal system developed the notion of *adhaesionsprozess* (joined process) which combined criminal prosecution with civil claims for compensation.[132] The experience is currently different in most countries whose legal systems prescribe that such claims can only be pursued through a separate body of civil law.[133] There was also evidence of sporadic application of restorative practices in several legal systems. However, they were applied at an informal level and were never endorsed by the State.[134] Joseph Sharpe claims that in the 17th Century, various types of

[130] E Weitekamp (n 7) 118.
[131] T Gavrielides, *Restorative Justice Theory and Practice: Addressing the Discrepancy* (Helsinki: HEUNI, 2007); T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 10.
[132] E Weitekamp (n 7) 120. Schafer however pointed that presently criminal trials takes precedence over the victim's claim for restitution and independent hearings are conducted at the same time. It was almost abandoned a few years after it was created and was only kept alive by the force of tradition. See S Schafer, Compensation and Restitution to Victims of Crime (Montclair, NJ: Patterson-Smith, 1970); 'Victim Compensation and Responsibility' (1970) 43 Southern California Review 55 – 67; E Weitekamp (n 7) 120.
[133] J Harding, *Victims and Offenders: Needs and Responsibilities* (London, UK: Bedford, NCVO Occasional Paper 2, 1982); E Weitekamp (n 7) 120; T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 10 - 11.
[134] E Weitekamp, 'Research on Victim-Offender Mediation. Findings and needs for the Future' in The European Forum for Victim-Offender Mediation and Restorative Justice (ed) *Victim-Offender Mediation in Europe: Making Restorative Justice work* (No 20, Society, Crime and Criminal Justice, University of Leuven Press, Leuven, 2000) 99-121; T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 11

community-based mediation were recorded in England in matters where the offender was known and on an informal basis.[135]

Despite the above, there are some laws that provide some restitution and for some compensation. Normandeau points out the *Malicious Damage Act 1861* (Section 52) which provided for the owner of damaged property to obtain recompense up to the sum of £5 and the *Forfeiture Act 1870* (section 4) which allowed the criminal court to order the offender to pay compensation to the sum of £100 for loss of property on application by the victim.[136]

Subsequently, proponents made submissions that restorative ideals should be reintroduced into the justice process. In his work, *Utopia*, Sir Thomas Moore claimed that 'restitution should be made by offenders to their victims; offenders should be required to work for the public to raise money for the restitution payments'.[137] Others like James Wilson, Beccaria, Jeremy Bentham, Ferri and Garofalo also made similar calls for the use of restitution in the criminal justice process.[138] Restorative practices and restitution were also strongly advocated in various international prison congress meetings between 1878 and 1900.[139]

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[135] J Sharpe, 'Enforcing the Law in Seventeenth Century English Village' in V Gatrell (ed) *Crime and the Law* (London: Europa, 1980); T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 11.

[136] The Criminal Damages Act 1971 has repealed the Malicious Damage Act 1861 and the English Proceeds of Crime Act 2002 has repealed the Forfeiture Act 1870.

[137] T Moore, *Utopia, New Haven* (London: Yale University Press, 1990); E Weitekamp (n 7) 120; T Gavrielides (n 9) 11

[138] J Wilson, *Thinking About Crime* (New York, NY: Basic Books, 1985); E Ferri, *Criminal Sociology* (Boston, MA: Little, Brown, 1917); R Garofalo, *Criminology* (Boston, MA: Little, Brown, 1968 (first published in 1914) 419 all cited in E Weitekamp (n 7) 120 – 121.

[139] For example, during 1885 congress in Rome, Garofalo proposed that all nations return to the ancient concept of restitution. Schafer also claims that in the 1895 and 1900 congresses in Brussels, restorative justice was examined quite extensively. Samuel Barrows states that restitution was discussed a new condition of suspension of sentence or conditional release after imprisonment. Although the members of the congresses were unable to pass any resolution that would have led to the incorporation of RJ in the justice systems of the member countries, they did pass a resolution requiring their respective states to increase the rights of victims under civil law; see S Schafer, 'Victim Compensation and Responsibility' (n 132); S Barrows, *Report on the Sixth International Prison Congress, Brussels, 1900* (Washington DC: US Government Printing Office, 1903); G Geis (n 57) 160; B Jacob, 'Reparation or Restitution by the Criminal Offender to his Victim: Applicability of an Ancient Concept in the Modern Correctional Process' 47 Journal of Criminal Law, Criminology and Police Science 645-666; E Weitekamp (n 7) 121 - 122; T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970's' (n 9) 11.

It was not until the 1970's that the RJ movement begun to gain momentum as discussed in the previous chapter. The thesis intends to examine in the next chapter how the modern RJ movement commenced and the various RJ models that begun to evolve from this era. This analysis will also consider evaluations of some these RJ models in several jurisdictions, including success rates and the responses from participants in order to identify good practice. The chapter will conclude with an examination of two RJ prison initiatives to provide a template for developing a model that could be incorporated into the Nigeria prison establishment. These discussions are crucial, as they will assist this thesis in selecting a model that is not only best suited to work in Nigeria, but which reflects the principles and ethos of the restorative practices under the Nigerian pre-colonial judicial systems.

CHAPTER FIVE

RESTORATIVE JUSTICE: PRACTICE AND MODELS

5.1 Introduction

In the last two chapters, this thesis conducted an examination of the ideals upon which the concept, Restorative Justice (RJ), is established as well as its history until the 1970's. This analysis particularly provided us with a clear understanding of the principles guiding the practice as well as the objectives that RJ process aims to achieve. In addition, the analysis in chapter three also provided insight on the role RJ can play in the criminal justice process as well the potential benefits it has to offer to all parties impacted by the criminal act. In both chapters, a comparison was also conducted between RJ and the restorative practices under the Nigerian pre-colonial judicial system discussed in chapter two. This thesis arrived at the conclusion that there are not only similarities in principles and practice, but also both systems share similar histories in the manner via which both practices were substituted following invasions from foreign powers. Both processes were replaced by a justice system where the state has ownership of the justice process and has taken over the role of the victim. These findings have further assisted this thesis in arriving at the conclusion that RJ can act as a 21st century version of the indigenous pre-colonial justice systems, which is a key research question of this thesis.

Following the study in the last two chapters, the next stage of this research is to identify RJ models that operate effectively in the current Nigerian criminal justice system. This thesis will focus on various RJ schemes that could be considered at various stages of the criminal justice process, including post-conviction. In order to do this, this thesis will first examine the practice of RJ in the modern era. Modern RJ justice practices can be traced to the early 1970's with programs initiated in Canada, the United States and England with

specific mention to three models – mediation, circles and conferencing.[1] These RJ models will be examined more closely in this chapter. The thesis will first consider an analysis of various RJ practices around the world, including their respective legal and social structures, challenges and critiques of their operations as well as the experience of the parties who participated in these RJ schemes. The thesis will then proceed to specifically examine RJ models that can be used at the post-conviction stage to acquire inquire insight on how RJ can function within the prison system. Due consideration would be given to the current discussion on the various classification/categories of various RJ prison projects which aim to distinguish those that operate under a full RJ philosophy from those that can be described as 'partially restorative'. The findings from the proposed research will aid this thesis in the consideration of various RJ models that reflect pre-colonial judicial ethos and could be applied at any stage of the Nigerian Criminal Justice process.

5.2 Modern Restorative Justice Practices in the Post-1970's.

RJ, as a social practice and movement, began in the 1970's as a response to a criminal justice system that is considered 'harsh and ineffective in deterring crime or rehabilitating offenders'.[2] This led to calls for a change in criminal justice process and the emergence of several reform initiatives that have contributed to 'a new pattern of thinking' on how to respond to crime.[3] Various stakeholders in the criminal justice process including

[1] P McCold, 'The Recent History of Restorative Justice: Mediation, Circles and Conferencing' in D Sullivan and L Tifft (eds) *Handbook of Restorative Justice: A Global Perspective* (Routledge 2008) 23; DW Van Ness and H Strong, *Restoring Justice: An Introduction to Restorative Justice* (5th edn, Abingdon, Oxon: Routledge, 2015) 27 – 30, 33; G Bazemore and L Walgrave, (eds), *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (Monsey New York: Criminal Justice Press, 1999).
[2] C Menkel-Meadow, 'Restorative Justice: What is it and does it work?' (2007) 3 Annual Review Law Society 161, 163.
[3] DW Van Ness and KH Strong (n 1) 13.

social workers, police officers, prison reformers, lawyers, judges and community/peace activists championed the process.[4]

This new pattern of thinking reflected a shift in criminal justice policy to not only focus on the criminal act itself but also, the injuries to victims, the community and even to the offenders caused by crime.[5] This led to a growing interest in the provision of structured environments enabling victims and offenders to meet and explain to each other their experiences; provide an opportunity to the offender to acknowledge their role in the incident and render an apology or other form of reparation; and for the victim to accept the offender's restitution and forgive them.[6] With the assistance of supporting family members and community representatives, they will investigate the root causes of the offence and offer suggestions on how to prevent re-occurrence of the incident.[7]

Some of these reform initiatives, which predate and have contributed to the RJ theory include[8]:

a) *Informal Justice*, developed in the 1970's and recognized by legal anthropologists[9], which places emphasis on increased participation; more access to the law; deprofessionalization, decentralization and delegalization; and the minimization of stigmatization and coercion.[10] Two major proponents of informal justice were Auerbach[11] (who argues for the need to deprofessionalize the justice system) and

[4] C Menkel-Meadow (n 2) 163.
[5] DW Van Ness and KH Strong (n 1) 13.
[6] C Menkel-Meadow (n 2) 163.
[7] ibid.
[8] DW Van Ness and KH Strong (n 1) 13-18; M Zernova, *Restorative Justice: Ideals and Realities* (Aldershot: Ashgate Publishing 2007) 7 - 8.
[9] Legal anthropologists recognize that legal structures and ways of thinking are specific to particular times and places and that in all societies, justice is pursued using both formal and informal proceedings. See Daniel W. Van Ness and Karen H. Strong (n 1) 15.
[10] R Matthews, 'Reassessing Informal Justice' in R Matthews (ed) *Informal Justice?* (Newbury Park, CA: Sage, 1988); DW. Van Ness and KH. Strong (n 1) 15.
[11] JS Auerbach, *Justice Without Law?* (New York: Oxford University Press, 1983); DW Van Ness and KH Strong (n 1) 15.

Christie[12] (who suggests that the state return possession of the conflict to the victim and the offender, as he believes that participatory justice is a better response to crime).

b) *Indigenous Justice*, otherwise known as customary or traditional approaches to justice which were used by local indigenes, prior or alongside, the Western concepts of justice which were introduced by their colonialists.[13] Van Ness and Strong argue that indigenous practices have contributed to RJ in three ways: 'it demonstrates an intention to repair harm rather than simply inflict equivalent harm; that several RJ practices have roots in indigenous practices, for example conferencing from the practices of the Maori people in New Zealand and circles from the traditions of First Nations people in Canada; and finally, in many non-Western countries, the memories of indigenous practices have contributed to the acceptance of RJ theory and practice'.[14]

c) *Reparative Justice (Restitution)*, based on theories from 1960's that paying back the victim could be a viewed as a just criminal penal sanction, and the following rationales have been offered in support: 'the victim is the party harmed by the criminal behaviour; alternatives to restrictive or intrusive sanctions such as imprisonment are needed; there may be rehabilitative value in requiring the offender to pay the victim; restitution is relatively easy to implement; and this might lead to reduction in retributive sanctions when the public observes the offender actively repairing the harm done'.[15] Advocates include Schafer who argues for re-instatement of restitutionary sanctions against offenders, either in conjunction with or as an alternative to imprisonment[16]; Charles

[12] N Christie, 'Conflicts as Property' (1977) 17 British Journal of Criminology 1- 15, 1, 8; *Limits to Pain* (Eugene, Oregon: Wipf & Stock Publishers, 1981) 94; DW Van Ness and KH Strong (n 1) 15 – 16.
[13] DW Van Ness and KH Strong (n 1) 16.
[14] DW Van Ness and KH Strong (n 1) 16. Nigeria's circumstance also falls under this category. This provides further evidence that RJ could be accepted if introduced in Nigeria as the case in countries like New Zealand, which share similar colonial histories.
[15] DW Van Ness and KH Strong (n 1) 16.
[16] S Schafer, *Victimology: The Victim and His Criminal* (Reston, VA: Reston, 1968) cited in DW Van Ness and KH Strong (n 1) 16. See also S Schafer, *Compensation and Restitution to Victims of Crime* (Montclair, NJ: Patterson Smith, 1970); 'Victim Compensation and Responsibility' (1970) 43 Southern California Law Review

Abel and Frank Marsh who believe that restitution is 'ethically, conceptually and practically superior to contemporary criminal justice' and that the imprisonment should be reserved for offenders who considered to be a danger to the community[17]; and Randy Barnett and John Hagel argues that 'criminal law should be abolished and replaced with the civil law of torts' and that 'crime should be defined by exploring the rights of the victim and not the behaviour of the offender'.[18]

d) *Victims' Rights and Assistance*, whose advocates argue for a criminal justice system that places more importance on the rights of the victim rather than one that concentrates solely on those of the offender. The reform initiative focuses on: 'increasing services to victims in the aftermath of the crime; increasing the likelihood of financial reimbursement for the harm done; and asserting victims' rights to information and intervention during the course of the criminal justice process'.[19] Bard and Sangrey have spoken at great length on victims' needs and proffered practical solutions on how they can be met.[20]

e) *Prison Abolition,* since the 1960's and 1970's, members of the Quakers (The Society of Friends), who were involved in the development of penitentiary at Walnut Street in the late 1700's, have made calls for the reduction of the use of prisons and for alternative responses to crime be used.[21] This was because of reports of abuses in prisons that seemed to be intrinsic in the prison institution, which arguably renders it unamenable to reform.[22] Other proponents of abolition have called for prisons to be

55; 'The Restitutive Concept of Punishment' in J Hudson and B Galaway (eds) *Considering the Victim* (Springfield, IL: Charles C Thomas, 1975)

[17] CF Abel and FA Marsh, *Punishment and Restitution: A Restitutionary Approach to Crime and the Criminal* (Westport, CT: Greenwood Press, 1984); DW Van Ness and KH Strong (n 1) 17.

[18] RE Barnett and J Hagel (eds), *Assessing the Criminal: Restitution, Retribution and the Legal Process* (Cambridge, MA: Ballinger, 1977); DW Van Ness and KH Strong (n 1) 17.

[19] DW Van Ness and KH Strong (n 1) 13.

[20] M Bard and D Sangrey, *The Crime Victim's Book* (2nd edn, Secaucus, NJ: Citadel Press, 1986); DW Van Ness and KH Strong (n 1) 13.

[21] DW Van Ness and KH Strong (n 1) 14.

[22] ibid.

eradicated completely. In its place, they have suggested that restitution, compensation and reconciliation programs be established within local communities so that response to crime will no longer be under the sole control of the state.[23] This position was inspired by the works of Jerome Miller at the Massachusetts Department of Youth Services who closed all custodial facilities for young persons and replaced them with community-based programs.[24] Other major proponents include the members of the 'Utrecht School': Herman Bianchi, Louk Hulsman, Thomas Mathiesen, Fay Honey Knopp and Ruth Morrison.[25]

f) *Social Justice*, where Gerald McHugh's works looks at the penal models in America and claims they developed from a medieval Christian view of not only sin and punishment but other values including 'mercy, relationship, restoration, forgiveness, reconciliation and hope'.[26] He suggests that if such values were applied to the criminal justice policy, it would result in an alternative justice system. Charles Coulson offers a different theological perspective and argues that criminal justice must place emphasis personal responsibility and that in the future, restitution should replace imprisonment for offenders who do not pose a threat to the society.[27] Similarly, Van Ness contends that biblical justice is concerned with the needs and rights of the victims as well as with the worth of the offenders and proposes that justice policies should be based on this premise.[28] Other proponents include Harris, who called for a restructure of the criminal

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[23] ibid.
[24] ibid.
[25] They are known as the 'Utrecht School' because of their association with Utrecht University in the Netherlands; see ibid, (n 1) 14 – 15.
[26] GA McHugh, *Christian Faith and Criminal Justice: Toward a Christian Response to Crime and Punishment* (New York: Paulist Press, 1978) cited in DW Van Ness and Karen H. Strong (n 1) 17.
[27] CW Colson, '"Towards Understanding of the Origins of Crime" and "Towards an Understanding of Imprisonment and Rehabilitation"' in J Stott and N Miller (eds) *Crime and the Responsible Community: A Christian Contribution to the debate about Criminal Justice* (London: Hodder and Stoughton, 1980); DW Van Ness and Karen H. Strong (n 1) 17.
[28] DW Van Ness, *Crime and its Victims: What we can do* (Downers Grove, IL: Intervarsity Press, 1986); DW Van Ness and Karen H Strong (n 1) 17.

justice to reflect 'feminist values' instead of values of control and punishment, with the focus on ensuring participation by all parties.[29]

The aforementioned initiatives have contributed directly or indirectly to the emergence of the RJ idea and practice by attempting to reverse 'the historical process that led to the establishment of Western model of punitive justice and reviving ancient conflict resolution traditions'.[30] This thesis will now proceed to discuss in detail three key models of practice that have contributed to the development of RJ in the modern era. These are Victim-Offender mediation; Conferencing; and Circles.[31]

5.2.1 Victim-Offender Mediation

Although the 1960's and 1970's witnessed various attempts to bring victims and offenders together in various restitution programs, Van Ness and Strong are of the opinion that the meetings were limited to parties determining the amount to be paid as restitution and how these payments were to be made.[32] However, in 1974 in Elmira, Ontario in Canada a new element was introduced into the objectives of these meetings: the victim was given the opportunity to explain to the offender the impact the crime had on them.[33] The case involved two young men who were intoxicated and were accused of vandalizing twenty-two properties to which they pleaded guilty. Their probation officer, Mark Yantzi, was of the opinion that prison or probation will not have the same impact on the offenders as

[29] MK Harris, 'Moving into the New Millennium: Toward a Feminist Vision of Justice' (1987) 67(2) The Prison Journal 27-38; DW Van Ness and Karen H. Strong (n 1) 17 – 18.
[30] M Zernova (n 8) 7 - 8.
[31] ibid, 8.
[32] DW Van Ness and KH Strong (n 1) 27; see further the description of Victim-Offender meetings in Minnesota Restitution Center by J Hudson, 'Contemporary Origins of Restorative Justice Programming: The Minnesota Restitution Center' (2012) 76 Federal Probation 82.
[33] H Zehr, *Changing Lenses: A New Focus for Crime and Justice* (3rd edn, Scottdale, PA: Herald Press 2005) 158 - 159; H Zehr and H Mika, 'Fundamental Concepts of Restorative Justice' (1997) 1 Contemporary Justice Review 47; DW Van Ness and KH Strong (n 1) 27; M Zernova (n 8) 8.

'meeting the victims, listening to their stories, apologizing and paying restitution'.[34] The judge, though hesitant at first, issued the order that the offenders carry out the recommended steps as part of the conditions of their probation.[35] During those meetings, the offenders were able to reach restitution agreements with their victims and because of its success, judges ordered this process in further similar matters from time to time.[36] Zernova believes that this experiment was the first recorded instance of 'victim-offender reconciliation' and led to the establishment of a victim-offender reconciliation program by the Mennonite Central Committee in Kitchener, Ontario. [37]

Victim-offender reconciliation (VOR) is based on 'the idea that following a criminal offence, the victim and the offender have shared interest in righting the wrong'.[38] Emphasis is on reconciling the parties; assisting the victims to recover from the incident; assisting offenders to change their lives and not to re-offend; and incorporating a sense of humanity in the criminal justice system.[39] The process usually involves a 'face-to-face' meeting between the victim and the offender[40], with an unbiased third person acting as a mediator who assists them in reaching a settlement.[41] During the process, the victim can speak freely on how the crime affected them, ask the offender questions, while the offender is given the opportunity to hear how their criminal actions affected the victim, and answer questions raised by the victim. Victim-Offender mediation (VOM) was initially established for the

[34] ibid.
[35] ibid.
[36] ibid.
[37] ibid.
[38] M Zernova (n 8) 8.
[39] H Zehr, *Changing Lenses: A New Focus for Crime and Justice* (3rd edn, Scottdale, PA: Herald Press 2005) cited in M Zernova (n 8) 8.
[40] In the alternative, the mediator or facilitator may meet the parties separately and may have to 'shuttle' between them.
[41] H Zehr (n 39) cited in M Zernova (n 8) 8.

purpose of making the offenders realize how their actions have affected the victim with the hope that this realization will have an impact on the offender.[42]

These meetings, particularly the face-to-face encounters, may also assist to challenge stereotype views, which the parties may have of each other.[43] For example, in the case of the victim, they may be informed that the reason why the offender stole was to provide food for themselves and their family. For the offender, they may be informed that the ring they stole had sentimental value which no insurance policy can replace.

Where possible, at the end of the meeting, the parties may agree on the steps to help them move forward from the incident and draw up an agreement. The agreement may involve some form of financial restitution being paid to the victim, the offender doing work for the victim or the community, the offender signing an undertaking to desist from any further criminal activities or the offender participating in some form of rehabilitation program.[44]

Apart from the Mennonite Community, the victim-offender reconciliation programmes also had their roots in the neighbourhood dispute resolution programs in the United States in the 1960's and 1970's[45] as well as the victims' rights movement.[46] Van Ness and Strong identify Zehr, Claassen and Umbreit as the earliest practitioners and writers on mediation in the United States.[47] Umbreit has written several articles and books while Zehr and Claassen, who are members of the Mennonite Christian tradition, believe that

[42] DW Van Ness and KH Strong (n 1) 28.
[43] H Zehr (n 39) cited in M Zernova (n 8) 9.
[44] ibid.
[45] M Wright, *Justice for Victims and Offenders: A Restorative Response to Crime* (2nd edition, Winchester: Waterside Press, 1996) cited in M Zernova (n 8) 9.
[46] MS Umbreit, RB Coates and B Vos, 'Victim Impact of Meeting with Young Offenders: Two Decades of Offender Mediation Practice and Research' in A Morris and G Maxwell (eds) *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Oxford-Portland Oregon: Hart Publishing, 2001) 112 – 143; M Zernova (n 8) 9.
[47] DW Van Ness and KH Strong (n 1) 27.

church/community based programs offer more in assisting parties than the state-run programs.[48] This includes reaching a reconciliation that provides sincere healing.[49] They argue that 'the community base strengthens the vitality of victim-offender mediation' and that they preferred to state-run programs that are part of or funded by the criminal justice system.[50]

These ideals and practice soon spread throughout the Mennonite community and even into other parts of Canada and the United States[51] with similar programs set up in various part of Europe in the 1980's[52] and also in Australia, New Zealand and South Africa.[53] With the expansion of the programs to outside the Mennonite community, probation officers and governmental agencies began to be use them, with the term 'reconciliation' being replaced with 'mediation' or 'dialogue' because of concerns that the former term sounded too religious.[54] Subsequently, the process was used with the knowledge that the result will have no influence on the sentence of the offender. Van Ness and Strong highlighted as an example the situation in Texas in 1991, where their prison system allowed victims and survivors of serious crimes, where they request it and after careful screening, to meet with their offender.[55]

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[48] MS Umbreit, *The Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research* (San Francisco: Jossey-Bass Inc., 2001); R Claassen and H Zehr, *VORP Organizing: A Foundation in the Church* (Elkhart, IN: Mennonite Central Committee, U.S. Office of Criminal Justice, 1989) all cited in DW Van Ness and K.H. Strong (n 1) 27.
[49] ibid.
[50] R Claassen and H Zehr (n 48); DW Van Ness and K.H. Strong (n 1) 27.
[51] H Zehr (n 39) 159 - 160.
[52] M Wright and B Galaway (eds), *Mediation and Criminal Justice: Victims, Offenders and Community* (London: Sage Publications, 1989); TF Marshall and SE Merry, *Crime and Accountability – Victim/Offender Mediation in Practice* (London: Home Office, Her Majesty's Stationery Office, 1990); H Messmer and HU Otto (eds) *Restorative Justice on Trial, Pitfalls and Potentials of Victim-Offender – International Research Perspectives* (Dordrecht, The Netherlands: Kluwer Academic Publications, 1992); H. Zehr (n 39) 159 – 160; M Zernova (n 8) 9.
[53] M Umbreit, 'Avoiding the Marginalization and 'McDonalization' of Victim-Offender Mediation: A Case Study in moving toward the Mainstream' in G Bazemore and L Walgrave (eds) *Restorative Justice: Repairing the Harm of Youth Crime* (Monsey, NY: Criminal Justice Press, 1999) 213 - 234; MS Umbreit, RB Coates and B Vos (n 46); M Zernova (n 8) 9 - 10.
[54] DW Van Ness and KH Strong (n 1) 28.
[55] ibid.

There were similar experiences in Scandinavian countries, in response to Nil Christie's article 'Conflicts as Property', where he argued that the criminal justice process should be owned by the parties involved but instead, has been stolen by the government.[56] The initial pilot schemes were established for the purpose of exploring how victims and offenders could have primary role in the judicial process. The first pilot began in Norway in 1981 and its success led to its expansion in 20% of the country's municipalities by the end of the decade.[57] The programs were designed to be settlement driven rather than dialogue driven.[58] Similar programs were also set up in Finland and England in the early 1990's and it eventually spread throughout Europe.[59]

VOM schemes in England developed largely on an ad-hoc basis, with small scale and local initiatives rather than national projects.[60] O'Mahony believes that this was due to the lack of any statutory authorization or long term funding which has impeded their development. [61] For example, despite the existence of some VOM schemes, which developed because of their partnership with statutory agencies like the probation service and the police, there have been complications on deciding which agency should support such

[56] N Christie, 'Conflicts as Property' (n 12) 3 – 9.
[57] DW Van Ness and KH Strong (n 1) 28.
[58] ibid.
[59] Key individuals that contributed to the introduction of VOM in Europe include Juhani Ilivari (Finland), John Harding and Martin Wright (England) and Frieder Dunkel and Dieter Rossner (Germany). See J Ilivari, 'Mediation in Finland' in T Peters (ed) *Victim-Offender Mediation in Europe: Making Restorative Justice Work* (Leuven: Leuven University Press, 2000); J Harding, 'Reconciling Mediation with Criminal Justice' in M Wright and B Galaway (eds) *Mediation and Criminal Justice: Victims, Offenders and Community* (London: Sage, 1989); M Wright, *Justice for Victims and Offenders* (Philadelphia: Open University Press, 1991); F Dunkel and D Rossner, 'Law and Practice of Victim/Offender Agreements' in M Wright and B Galaway (eds) *Mediation and Criminal Justice; Victims, Offenders and Community* (London: Sage, 1989); DW Van Ness and KH Strong (n 1) 28.
[60] D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (2012) 21 Nottingham Law Journal 86 – 106.
[61] J Dignan and K Lowey, *Restorative Justice Options for Northern Ireland: A Comparative Review* (HMSO: Criminal Justice Review Research Report No 10, 2000) cited in D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 88.

schemes as well as where referrals should come from.[62] Furthermore, although there have been official support from the government for VOM schemes, there was limited financial support with the Home Office providing funds for a range of pilot projects in England Wales which was discontinued. [63] The Youth Justice board and various victim support organizations in early 2000's supported several mediation projects and the Home Office renewed their financial support for mediation and restorative projects, including services to adult offenders.[64]

Recent developments however seem to demonstrate a change in attitude of the government, with the Ministry of Justice announcing on 19th November, 2013 that £29 million will be made available to Police, Crime Commissioners and charities to deliver RJ for victims for the next three years.[65]

5.2.2 Conferencing

In 1989, the New Zealand government passed into law the Children, Young Persons and their Families Act, which created the 'family group conference', which replaced the Youth Court.[66] This new forum was created to address juvenile offending (between the ages of 14 and 16) and act as a response to juvenile crime.[67] This has been described as 'perhaps

[62] T Marshall and S Merry, *Crime and Accountability: Victim-offender mediation practice* (HMSO, 1990) cited in D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 88.
[63] G Davis, J Boucherat and D Watson, 'Pre-Court Decision Making in Juvenile Justice' (1989) 29 British Journal of Criminology 219.
[64] Such projects have been subjected to intense evaluations which demonstrated encouraging results which shall be discussed in depth later; see J Shapland, A Atkinson, E Colledge, J Dignan, M Howes, J Johnstone, R Pennant, G Robinson and A Sorsby, *Implementing Restorative Justice Schemes (Crime Reduction Programme): A Report on the First Year. Home Office Online Report 32/04*. (London: Home Office, 2004); *Restorative Justice in Practice: Findings from the Second Stage of the Evaluation of Three Schemes. Home Office Research Findings 274* (London: Home Office, 2006); *Restorative Justice: The Views of Victims and Offenders. Ministry of Justice Research Series 3/07*. (London: Ministry of Justice, 2007); *Does Restorative Justice Affect Reconviction? The Fourth Report from the Evaluation of Three Schemes. Ministry of Justice Research Series 10/08* (London: Ministry of Justice, 2008).
[65] Ministry of Justice, 'New Victims' funding for Restorative Justice' (https://www.gov.uk/government/news/new-victims-funding-for-restorative-justice) accessed on 11 May, 2015.
[66] DW Van Ness and KH Strong (n 1) 28, M Zernova (n 8) 10.
[67] ibid.

the best known restorative justice conferencing scheme that has been integrated into a criminal justice system'.[68] It involved the use of police cautions or informal resolutions to divert young people away from the criminal justice process.[69]

This reform arose because of increased concern raised by members of the Maori communities. This was after five years of monitoring and studying the impact of the juvenile justice system on Maori communities, with an increasing number of their children being removed from their families and taken to state facilities by the courts.[70] They claimed that the removal of their children was destructive to their culture as it 'impairs the family and children are considered to be the future of the Maori people'.[71] This and a resurgence of interest in the rights and culture of indigenous peoples, led to the publication of a report by Moana Jackson in 1988 which was commissioned by the New Zealand Department of Justice.[72] The report suggested that racial bias was prevalent in the criminal justice system and it recommended that the Maoris be allowed to deal with criminal incidents in line with their cultural beliefs, thereby resorting to pre-colonial methods of resolving disputes.[73] This

[68] D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 95.
[69] ibid, 96.
[70] DW Van Ness and KH Strong (n 1) 28. Polynesian communities in the Pacific Islands have also raised similar concerns. See G Maxwell and A Morris, *Families, Victims and Culture: Youth Justice in New Zealand* (Social Policy Agency and Institute of Criminology, Victoria University of Wellington, 1993); D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 95.
[71] DW Van Ness and KH Strong (n 1) 28.
[72] J Pratt, 'Colonization, Power and Silence: A History of Indigenous Justice in New Zealand Society' in B Galaway and J Hudson (eds) *Restorative Justice: International Perspectives* (Monsey: Criminal justice Press, 1996) 137 – 155; M Zernova (n 8) 10.
[73] Proponents of family group conferencing claim that it has ancient roots in the 'whanau conference' practiced by the Maori people - M Zernova (n 8) 11. See also A Morris and G Maxwell, 'Restorative Justice in New Zealand: Family Group Conferences as a case study' (1998) 1 Western Criminology Review 1; J Pratt (n 72); J Consedine, *Restorative Justice: Healing the Effects of Crime* (Revised Edition, Lyttelton, NZ: Ploughshares Publishers, 1999). This claim is disputed by critics, see E Zellerer and C Cunneen, 'Restorative Justice, Indigenous Justice and Human Rights' in G Bazemore and M Schiff (eds) *Restorative Community Justice* (Cincinnati, OH: Anderson Publishing, 2001) 246 - 247; C Cunneen, 'Thinking Critically about Restorative Justice' in E McLaughlin, R Fergusson, G Hughes and L Westmarland (eds), *Restorative Justice: Critical Issues* (London: SAGE in association with The Open University, 2003) 187 – 188.

led to the establishment of a process where the power to determine the outcome is taken away from the Judge and given to the family group conference.[74]

The Children, Young Persons and their Families Act prescribes conferencing as the statutory process for the disposal for all but the most serious offences, for example murder and manslaughter.[75] It further prescribes that young persons can only be prosecuted if they had been arrested and referred by the police through a family group conference.[76] The courts are also required to send offenders for family group conferences and they generally have to consider the recommendations when deciding how to deal with the case.[77]

Conferences are administered by the Department of Social Welfare, with a Youth Justice co-ordinator administering the process.[78] Either the police refer matters, after an admission of guilt or matters are referred by the Youth court, after the offender has pleaded guilty or has been found guilty by the court.[79] A family group conference is attended by the offender with their relatives; the victim or their representative; a youth advocate; a police officer and where required, a social worker.[80]

Proceedings may commence with a police officer giving a description of the offence and the offender is invited to admit or deny any involvement. If the offender does admit involvement, the conference will proceed with the victim describing their experience, how the crime affected them and even put forward questions to the offender. Those who attend in support of the victim may also speak about how the incident affected them and ask

[74] DW Van Ness and KH Strong (n 1) 29.
[75] A Morris and G Maxwell, 'Restorative Justice in New Zealand: Family Group Conferences as a case study' (n 73); D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 96.
[76] ibid.
[77] A Morris and G Maxwell (eds) *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Hart Publishing, 2001) cited in D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 96.
[78] ibid.
[79] ibid.
[80] M Zernova (n 8) 11.

questions. The offender is also given an opportunity to respond and apologize and those who accompanied them to the conference are allowed to speak as well.[81]

Parties will proceed to deliberate and offer solutions on what can be done to address the harm caused by the crime. The offender's family will then discuss in private to put forward a plan to address the harm and to prevent the offender from re-offending. The plan must take into consideration 'the views of the victim(s), the need to hold the offender accountable and include measures necessary to prevent re-offending'.[82] The plan will also seek to foster reconciliation between not only the victim and the offender but also within their community.[83] The most common agreed resolutions are an apology and the offender doing work for the community. The plan is presented to the victim and officials involved with the conference. If the plan is acceptable to all those in attendance, the Youth Court would adopt it if the matter was court referred and the agreement will be binding on those involved.[84] Where the Youth Court orders the conference, the court usually accepts the conference's recommendations but may impose additional sanctions in serious cases.[85] The Youth Court may also make decisions where the conference recommends them to do so or where an agreement could not be reached.[86]

[81] M Zernova (n 8) 11.
[82] ibid.
[83] K Daly, 'Conferencing in Australia and New Zealand: Variations, Research Findings and Prospects' in A Morris and G Maxwell (eds) *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Hart Publishing, 2001).
[84] A Morris and G Maxwell, 'The Practice of Family Group Conferences in New Zealand: Assessing the Place, Potential and Pitfalls of Restorative Justice' in A Crawford and J Goodey (eds) *Integrating a Victim Perspective within Criminal Justice. International Debates* (Aldershot: Ashgate, 2000) 207; A Morris and G Maxwell (eds) *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Hart Publishing, 2001) cited in M Zernova (n 8) 11.
[85] G Maxwell and A Morris, 'The New Zealander Model of Family Group Conferences' in D Alder and J Wundersitz (eds) *Family Group Conferencing and Juvenile Justice: The Way Forward of Misplaced Optimism?* (Canberra: Australian Institute of Criminology, 1994) 15 - 36 cited in M Zernova (n 8) 11.
[86] M Zernova (n 8) 11.

Initial evaluations conducted after the Act was introduced observed that there were high levels of satisfaction recorded from young persons (84%) and their parents (85%).[87] For young persons, they were satisfied because they were able to play an active part in the process with half of them stating they were satisfied in their role in reaching a decision and coming up with recommendations.[88] They also stated they had a better understanding of the consequences of their actions and the impact it had on the victim.[89] Families of the young persons were involved in almost all the conferences, with 40% of having extended family members in attendance.[90] The research also found that decisions arrived at the end of the conference were mostly driven by the young person and the family, and not imposed by the Youth co-ordinator.[91]

It must be noted that some of the young persons were not satisfied with their experience, with some complaining they were not fully involve and that they felt intimidated and were unable to express themselves.[92] However, Maxwell and Morris argue that those who have gone through a conference have a better experience than those who appear before a court, with those who have experienced both preferring the former.[93]

[87] G Maxwell and A Morris, *Families, Victims and Culture: Youth Justice in New Zealand* (n 70) 115.
[88] ibid; G Maxwell and A Morris, 'The New Zealander Model of Family Group Conferences' (n 85); G Maxwell and A Morris, 'Research on Family Group Conferences with Young Offenders in New Zealand' in J Hudson, A Morris, G Maxwell and B Galaway (eds) *Family Group Conferences: Perspectives on Policy and Practice* (Monsey, NY: Criminal Justice Press, 1996) 88 - 110; G Maxwell and A Morris, 'Restorative Justice and Reoffending' in H Strand and J Braithwaite (eds) *Restorative Justice, Philosophy to Practice* (Dartmouth: Ashgate, 2000) 93 - 103 all cited in M Zernova (n 8) 11.
[89] G Maxwell, V Kingi, J Robertson, A Morris and C Cunningham, *Achieving Effective Outcomes: Youth Justice in New Zealand* (Ministry of Social Development, 2004) cited in D O'Mahony 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 96.
[90] D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 96.
[91] ibid.
[92] G Maxwell, A Morris and H Hayes 'Conferencing and Restorative Justice' in D Sullivan and L Tifft (eds), *Handbook of Restorative Justice: A Global Perspective* (2006, Routledge) 94; D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 96.
[93] ibid.

The evaluations also reveal that only half of the victims were satisfied with the conference, with the quarter of them stating they felt worse after the process.[94] The most common reasons given by victims for this is that they felt the offender was not remorseful or that they were unable to express themselves as they wished during the conference. Maxwell and Morris have however suggested an alternative reason, which is the lack of experience of those working with the victims.[95] In addition, they adduce that the processes were established with the victims not being the primary focus.[96] They therefore argue that victims' dissatisfaction was due more to procedures external to the actual conference and in the absence of comparable information with victims' satisfaction of the outcomes from the court, it should be viewed as a relative success.[97]

Subsequent research showed a marked improvement with only 5% of the victims stating that they felt worse after the conference.[98] Improved practice, particularly with respect to better preparation with the victim before the conference and supporting them after, have been attributed as the reason for this improvement.[99] This highlights the importance of providing training for effective mediation and managing conferences to ensure that the needs of the victim are met and they have realistic expectations of what can be achieved at the end of the conference.[100] The research also reveals that 81% of the victims felt better

[94] A Morris and G Maxwell 'Restorative Justice in New Zealand: Family Group Conferences as a Case Study' (n 73) 1; M Zernova (n 8) 11; D O'Mahony 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 97.
[95] G Maxwell and A Morris, *Families, Victims and Culture: Youth Justice in New Zealand* (n 70); M Zernova (n 8) 12; D O'Mahony 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 97.
[96] ibid.
[97] Examples of victims' dissatisfaction with external procedures include failure by professionals associated with the process to inform the victims of what occurred after the conference and to make arrangements on reparation to the victim; see G Maxwell and A Morris, 'Research on Family Group Conferences with Young Offenders in New Zealand' (n 88); M Zernova (n 8) 12
[98] G Maxwell et al, *Achieving Effective Outcomes: Youth Justice in New Zealand* (n 89); D O'Mahony 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 97.
[99] ibid.
[100] ibid.

after the conference, with most stating that the conference had helped them to move on from the incident.[101]

Proponents of the family group conferences claim that the conferences have helped to reduce re-offending, particularly where offenders offer sincere apologies for their actions to their victims.[102] In a sample of young offenders who took part in family group conferences between 1990 and 1991, about three quarters were not reconvicted within a year and more than two fifths had either not reconvicted at all or had been reconvicted only once within six years.[103]

A recently conducted study by the Ministry of Justice in New Zealand on two recent surveys revealed that RJ conferences has continued to contribute in reducing recidivism rates, particularly amongst young persons.[104] The 2014 report compared a group of 2,323 participating offenders in conferences from 2008 to 2011 with a similar matched group of offenders who did not participate in a RJ conference. The report revealed that the re-offending rate for those who participated in RJ conferences was 15% lower, over the following 12-month period, when compared with offenders who did not and 7.5% lower over three years.[105] The report also revealed that participants are 37% less likely to be

[101] ibid.
[102] G Maxwell and A Morris, 'Restorative Justice and Reoffending' (n 88); A Morris and W Young, 'Reforming Criminal Justice: The Potential of Restorative Justice' in H Strang and J Braithwaite (eds) *Restorative Justice, Philosophy to Practice* (Dartmouth: Ashgate, 2000); A Morris and G Maxwell, 'Restorative Justice in New Zealand' in A von Hirsch, J Roberts, A Bottoms, K Roach and M Schiff (eds) *Restorative Justice and Criminal Justice. Competing or Reconcilable Paradigms* (Oxford and Portland, Oregon: Hart Publishing, 2003) 257 - 271; M Zernova (n 8) 12; D O'Mahony 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 98.
[103] A Morris and W Young, 'Reforming Criminal Justice: The Potential of Restorative Justice' (n 102); M Zernova (n 8) 12.
[104] Ministry of Justice, New Zealand, *Reoffending Analysis for Restorative Justice Cases 2008-2013* (Ministry of Justice, New Zealand, 2014) <http://www.justice.govt.nz/assets/Documents/Publications/rj-Reoffending-Analysis-for-Restorative-Justice-Cases-2008-2013-Summary-Results.pdf> accessed on 5 August, 2016. The surveys in question were the Ministry of Justice, New Zealand, *Reoffending Analysis for Restorative Justice Cases: 2008 to 2009* (Ministry of Justice, New Zealand, 2011) and Ministry of Justice, New Zealand, *Reoffending Analysis for Restorative Justice Cases: 2008 - 2011* (Ministry of Justice, New Zealand, 2014).
[105] Ministry of Justice, New Zealand, *Reoffending Analysis for Restorative Justice Cases 2008 - 2013* (n 104) 3 – 4.

imprisoned because of their reoffending than comparable offenders within the next 12 months and 29% less likely to be imprisoned within a three-year follow-up period.[106]

The family group conference model later expanded in 1991 to Wagga Wagga in New South Wales, Australia.[107] Both models were very similar, with both being adapted to address adult offenders and are used in various countries all over the world.[108] However, there is a distinct difference between the New Zealand model and the Wagga Wagga model. The New Zealand model is based in social welfare and not the criminal justice system, with several agencies involved in the process.[109] The Wagga Wagga model was police based, with no other agency involved and they were responsible for the organization and facilitation of conferences.[110]

Zernova argues that family group conferences were greatly influenced by John Braithwaite's theories on 're-integrative shaming', which is conducted 'within a continuum of love and respect; the disapproval is aimed at the wrongdoing, rather than the wrongdoer; and shaming is finite and followed by gestures of forgiveness and reacceptance'.[111] This theory is crucial to the restorative cautioning approach as it attempts to deliver the police caution in a way that is not only degrading but also acts as a *reintegrative ceremony*.[112]

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[106] ibid.
[107] Terry O'Connell, an Australian Police officer, after observing the model in New Zealand, adapted it for the purpose of it being used by the police, in the exercise of their common law powers, as an alternative to charging young offenders with juvenile offenses; DW Van Ness and KH Strong (n 1) 29; M Zernova (n 8) 12.
[108] DW Van Ness and KH Strong (n 1) 29.
[109] ibid.
[110] M Zernova (n 8) 12.
[111] J Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989); DB Moore, 'Shame, Forgiveness and Juvenile Justice' (1993) 12 Criminal Justice Ethics 3 – 25; DB Moore and T O'Connell, 'Family Conferencing in Wagga Wagga: A Communitarian Model of Justice' in D Alder and J Wundersitz (eds), *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism* (Canberra: Australian Institute of Criminology) 45 – 86; J Braithwaite and S Mugford, 'Conditions of Successful Reintegration Ceremonies' (1994) 34 British Journal of Criminology 139 – 171; M Zernova (n 8) 12 - 13.
[112] J Braithwaite, *Restorative Justice and Response Regulation* (Oxford: Oxford University Press, 2002) 74 - 78 cited in D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 90.

Similar models were also established in other countries, including the United Kingdom where the Thames Valley Police used the Wagga Wagga model in April, 1998.[113] It was applied to cases involving first time offenders and some second time offenders; who were either juveniles or adult offenders; and who met the conditions for either a caution or reprimand.[114] Concerning the last item, the factors to be considered include 'the existence of sufficient evidence of guilt to give a realistic prospect of conviction; the offender must admit guilt; and the offender (and in a case involving a juvenile, a responsible adult) must give informed consent to the caution'.[115]

During the cautioning sessions, the police officers delivering the caution act in accordance with a script that helps to facilitate structured discussions of what caused the harm. The consequences of the offender's actions and the impact on all those involved (as well as on the offender) will be revealed and discussed. Focus is on the offending behaviour rather than on the offender.[116] Once the offender takes responsibility for his action, attempts will be made to reintegrate the offender back into the community and family. Suggestions will be proffered during discussions on how the offender can repair the harm done, for example through reparation or an apology.[117]

[113] Police-led restorative cautioning schemes, similar to those in operation in Wagga Wagga, Australia in the early 1990's, were introduced in Thames Valley and was advocated by Chief Constable Charles Pollard who was committed to incorporating restorative cautioning for young offenders. The program also provided for training of police officers as well as the implementation of a variety of restorative-based processes, including a complaints system and comprehensive monitoring/evaluation package; see D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 89.

[114] R Young, 'Just Cops Doing 'Shameful Business?' Police-led Restorative Justice and the Lessons of Research' in A Morris and G Maxwell (eds) *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (2001) 195 - 226; R Young and C Hoyle, 'New Improved Police-Led Restorative Justice?' in A von Hirsch, J Roberts, A Bottoms, K Roach and M Schiff (eds) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms* (Oxford and Portland, Oregon: Hart Publishing, 2003) 273 - 291 cited in M Zernova (n 8) 14.

[115] ibid.

[116] ibid, D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 90.

[117] ibid.

Intense evaluations were carried between 1998 and 2001, in 1,915 conferences where victims were present and in a further 12,065 conferences where victims were absent but the cautioning officer attempted to input some form of victim perspective into the proceedings.[118] It was reported that offenders, victims and their respective supporters were generally satisfied and believed they had been treated fairly. However, a small number of victims and offenders either felt they were not adequately prepared or they were coerced into participating. Despite this, a majority of offenders and victims believed that the encounter fulfilled the desired objectives, specifically helping the offenders understand the impact their offences had on the victims and induce a sense of shame in them.

The research further discovered that despite initial deficiencies from the facilitators, for example, dominating sessions and not permitting offenders to express freely their views, or trying to coerce some offenders into apologizing or making reparation, the practice improved considerably towards the end of the research period.[119] The research concluded that RJ cautioning represented significant improvement over traditional cautioning and it was more effective in terms of reducing recidivism.[120] The report also commended the police on their enthusiasm and commitment to the restorative process, with young offenders and their parents expressing their confidence and support in the scheme. The report further stated that scheme had other benefits in terms of assisting to improve police/community relations.[121]

A major piece of legislation was introduced in the late 1990's, following the Government White Paper 'No More Excuses – A New Approach to Tackling Youth Crime

[118] C Hoyle, R Young and R Hill, *Proceed with Caution: An Evaluation of the Thames Valley Police Initiative in Restorative Cautioning* (Joseph Rowntree Foundation, 2002); D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 90.
[119] ibid.
[120] ibid.
[121] ibid, D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 90 - 91.

in England and Wales' which was published in 1997. This paper made several recommendations, including toughening the approach to dealing with young offenders by limiting the number of times individuals could be cautioned by the police.[122] The Crime and Disorder Act 1998[123] introduced a new final warning scheme to replace the police caution, with the emphasis that final warnings should be conducted using a RJ framework.[124] This would require inviting the victim, offender and any relevant supporter/family member to attend the meeting where the final warning will be issued to discuss about the harm caused and how it could be repaired. The meetings will be conducted under the supervision of trained police officers.[125]

Further to the above, the Youth Restorative Disposal was introduced in 2008, which allows police officers to deal with minor offences committed by young persons by way of summary disposal that is similar to a reprimand or final warning, using RJ principles.[126] An evaluation of the Youth Restorative Disposal has argued it to be effective in delivering a swift response to minor offences by young people, with police officers in favour of the scheme. This is because they believe it provides a proportionate response, which seems to have an impact on both young offenders and victims.[127] Youth Restorative Disposals are issued on the spot, with the consent of both the offender and the victim, with reparation

[122] D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 91.
[123] The Act also ensured that the use of restorative principles to shape and guide police cautioning and final warnings for young offenders became standard practice. For example, Section 67 of the Act introduced reparation orders, which required offenders to make some reparation to the victims, and/or to the community; Section 68 (1) (b) requires that before making a reparation order, the opinion of the victim should be sought and Section 69 introduced action plan orders. See also D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 91.
[124] R Young, 'Just Cops Doing 'Shameful' Business? Police-led Restorative Justice and the Lessons of the Research' (n 114); D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 91.
[125] ibid.
[126] ibid.
[127] A Rix, K Skidmore, R Self, T Holt and S Raybould, *Youth Restorative Disposal Process Evaluation* (Youth Justice Board, 2011); D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 91.

usually in the form of a verbal apology with few cases referred to the Youth Offending Teams.[128] However, O'Mahony argues that 'despite being called restorative disposals, there is little to suggest that they involve any significant restorative intervention or process'.[129]

Recent development includes the Youth Conditional Caution, which was introduced on a pilot basis in 2010 to extend the use of conditional cautions to persons, aged 10 to 17.[130] This scheme aims to reduce the number of young people taken to court for low-level offences. It is available to both the Police and Crown Prosecution Service (CPS) for offenders who have no previous convictions, admit guilt and consent to the caution. The conditions attached to the caution may include restorative provisions that support rehabilitation and reparation, for example paying a fine.[131] The offender can accept or refuse the conditional caution and if they accept, any criminal proceedings will be suspended. Once the offender complies with all the conditions of the caution, the case will be discharged and no further prosecution/proceedings will be brought against them. If there is no reasonable explanation for not complying with the conditions, the offer can be withdrawn and criminal proceedings could commence for the original offence(s).[132]

Another example of a conference model is in Northern Ireland, which is the only jurisdiction in the United Kingdom whose RJ conference model for young offenders has statutory backing. [133] The measures introduced provided for two types of disposal: diversionary and court ordered conferences, both of which are administered by a Youth

[128] D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 91.
[129] ibid, 91 - 92.
[130] Section 48 of the Criminal Justice and Immigration Act, 2008.
[131] D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 92.
[132] ibid.
[133] Justice (Northern Ireland) Act 2002, part 4; D O'Mahony and C Campbell, 'Mainstreaming Restorative Justice for Young Offenders through Youth Conferencing: The Experience of Northern Ireland' in Justice J Junger-tas and S Decker (eds) *International Handbook of Youth* (Springer Academic Press, 2006) p 93-116; D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 98.

Conference co-ordinator who draws up a plan, stating how the young person should be dealt for their offence.[134] In court ordered conferences, not only must the young person agree to the process but there must also be an admission of guilt or a conviction by the court.[135] Legislation also provides that the court must refer all young persons to the youth conferences except in cases where the offence carries a mandatory life sentence. The court may also refer matters that can be tried by indictment only or scheduled offences under terrorism legislation. [136]

The format for the conferences in Northern Ireland is quite similar to that used to run the conferences in New Zealand. Meetings are presided over by a Youth Conference facilitator who ensures that 'a youth conference plan', which takes into consideration the nature of the offence and the needs of both parties, following amicable dialogue is drawn up. The type of reparations that could be agreed includes the offender rendering an apology, participating in programs that will address the reasons why the young person committed the offence and even, a custodial sentence.[137]

Evaluations into this scheme were conducted in 2006, which revealed that there was a general positive impact the scheme had on both victim and offenders and that it was relatively successful.[138] The scheme engaged a high proportion of victims, with 69% of the conferences examined having a victim in attendance, which was considered a high number

[134] Diversionary disposals are applied when a young person is referred prior to conviction whilst Court-ordered disposals are applied when a young person is referred post-conviction. See J Jacobson and P Gibbs, *Making Amends: Restorative Youth Justice in Northern Ireland* (Prison Reform Trust, 2009) 4; D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 98.
[135] Justice (Northern Ireland) Act 2002, s 59 (33A) (1); J Jacobson and P Gibbs (n 134) 4; D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 98.
[136] J Jacobson and P Gibbs (n 134) 4; D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 98.
[137] J Jacobson and P Gibbs (n 134) 2; D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 98.
[138] C Campbell, R Devlin, D O'Mahony, J Doak, J Jackson, T Corrigan and K McEvoy, *Evaluation of the Northern Ireland Youth Conference Service* (Belfast: Northern Ireland, NIO Research and Statistics Series: Report No. 12, 2006).

when compared with other restorative-based programmes.[139] The report revealed that 79% of the victims were actually 'keen' to participate, with 91% of them stating that their decision to participate was theirs and were not influenced or pressurized to attend. Despite 71% of the offenders stating they found the process challenging and displayed nervousness, the report revealed that 98% were able to talk about the offence they committed and 97% accepted responsibility for their actions.[140] Both victims and offenders spoke positively of their experience and even preference of the process to the conventional court system because of their direct involvement, which could not be afforded to them in the latter.[141] There was also a clear endorsement of the process from the victims, with 88% of them stating that they would recommend it to persons in a similar position.[142]

Another study conducted in 2007 examined the long term impacts of the youth conferencing process on young offenders in Northern Ireland and found that many of post conference outcomes were positive.[143] The Criminal Justice Inspectorate corroborated these findings in 2008.[144] It must be noted that these reports do not provide evidence that this form of RJ, which has been integrated into Northern Ireland's criminal justice system, will work effectively all the time and in all cases.[145] For example, cases where a party is unwillingly to participate or the guilt of the accused is in contention.[146] Instead, these reports provide

[139] T Newburn, A Crawford, R Earle, S Goldie, C Hale, A Hallam, G Masters, A Netten, R Saunders, K Sharpe and S Uglow, *The Introduction of Referral Orders into the Youth Justice System* (Home Office Research Study, 2002) 242; D O'Mahony and J Doak, 'Restorative Justice: Is more better?' (2004) 43 Howard Journal 484.
[140] D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 99.
[141] ibid.
[142] ibid.
[143] S Maruna, S Wright, J Brown, F Van Marle, R Devlin and M Liddle, *Youth Conferencing as Shame Management: Results of a Long-term Follow-up Study* (Northern Ireland Youth Justice Agency, 2007) 2; D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 100.
[144] Criminal Justice Inspectorate, *Inspection of the Youth Conference Service* (Northern Ireland, Criminal Justice Inspectorate, 2008); D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 100.
[145] D O' Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 100.
[146] ibid.

evidence that in suitable cases, the outcomes has been mostly positive and this has contributed to the international body of research of the advantages of such schemes being integrated into the criminal justice system.[147]

An example of one of the positive outcomes of the conferencing system in Northern Ireland is the reduction of re-offending rates, with records demonstrating that young persons who have participated in restorative conferences have a relatively low level of re-offending.[148] The research showed that those given a court ordered youth conference had 45% re-offending rate, which was lower than those given community, based sentences (54%) or custodial sentences (68%).[149]

5.2.3 Sentencing Circles

A third model of RJ emerged in the 1990's which proponents argue has indigenous roots in the native practices of Canadian communities.[150] Also known as 'community circles' or 'healing circles', Van Ness and Strong argue that these processes 'drew on aboriginal understandings of justice among the First Nations people of Canada'.[151] Circles also use mediation and consensual decision-making techniques. Participants included not only the victim and the offender, but also their family members, friends and interested members of the community and representatives of the criminal justice system.[152]

Describing the process, Zernova states that participants involved may be organized in one large circle or may be split into an inner and outer circle.[153] If the latter procedure is

[147] ibid.
[148] D Lyness, 'Northern Ireland Youth Re-offending: Results from the 2005 Cohort' Statistics and Research Statistical Bulletin (Northern Ireland Statistics and Research Agency, 2008); D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 100.
[149] ibid.
[150] DW Van Ness and KH Strong (n 1) 29; M Zernova (n 8) 16.
[151] DW Van Ness and KH Strong (n 8) 29.
[152] M Zernova (n 8) 16.
[153] ibid.

being used, the inner circle will have the victim, the offender, their supporters and criminal justice professionals who are normally involved in the court process.[154] The outer court consists of professionals who may be required to provide specific information and interested members of the community.[155] The facilitator of the process (referred to as the 'keeper') is in charge of the process and maintains order, occasionally provides summaries of what has been said, ensures respect for the teaching of the circle, mediates differences and guides the circle towards a consensus.[156]

The session usually begins with a prayer, which Zernova argues increases the spiritual sensitivity of the parties and calls them to look beyond their immediate emotions in seeking a resolution to their dispute.[157] She further suggests that praying together emphasizes the parties' inter relationships and communal spirit and that all those involved have suffered as result of the offence. Therefore, participants have a shared responsibility to agree on a solution that will address the harm and loss suffered because of the offence.[158] Facilitators then proceed to introduce themselves and invite other participants to do the same and explain why they are here. The facilitator explains the teachings of the circle and the guidelines from these teachings, including all participants should 'speak from the heart', be brief when speaking and respect their fellow participants by not interrupting when they are speaking.[159]

Discussions are not only restricted to the offence itself, but can also be extended to the underlying circumstances that may have led to the occurrence of the offence.[160] This

[154] ibid.
[155] ibid.
[156] ibid.
[157] ibid.
[158] ibid.
[159] ibid, 16 - 17.
[160] B Stuart, 'Circle Sentencing: Turning Swords into Ploughshares' in B Galaway and J Hudson (eds) *Restorative Justice: International Perspectives* (Monsey, NY: Criminal Justice Press, 1996) 193-206; M Zernova (n 8) 17.

will assist the participants to understand why the offence occurred, agree on what steps can be taken to meet the victim's needs, suggest how the offender can be held accountable and prevent similar actions in the future.[161] The judge who presides over the matter is also present in the circle and upon the conclusion of discussions, will make a judgment and make recommendations based on what has been said in the circle.[162]

This model was first used in 1992, in Mayo in the Yukon Territory of Canada, in the case of *R. v. Moses*.[163] The case involved a twenty-six year man who pleaded guilty to attempted assault of a police officer. He had 43 previous criminal convictions with a long history of alcohol abuse. All the assessments conducted during his incarcerations recommended long-term counselling, substance abuse treatment and other interventions, which were never provided.[164] Due to the concerns of the judge, probation officer and Crown counsel that having the standard criminal justice process will only continue the cycle, they decided to adopt a different approach. They invited his family, leadership of his Nation, the victim and other members of his community to contribute on what they feel will be an appropriate sentence. They changed the physical setting of the courtroom to form a circle where all parties sat and discussed all the issues. They were able to arrive at an amicable resolution where offender's family and the First Nation community agreed to assist and support the offender to change his life.[165]

The use of sentencing circles has been adduced to offer several benefits. Firstly, it allows the parties having ownership of the process. Secondly, the process assists to reconnect offenders with their communities, rebuild broken relationships and addresses the

[161] M Zernova (n 8) 17.
[162] ibid.
[163] (1992) 3 *Canadian Native Law Reporter* 116 (Yukon Territory Court). Its use was reported in the opinion of the trial judge, Barry Stuart.
[164] DW Van Ness and KH Strong (n 1) 29 - 30; M Zernova (n 8) 17.
[165] ibid.

needs of victims. Finally, the process generates community-based solutions to problems and reveals underlying causes of crime, which in turn generates community initiatives that are used to address the needs of the victims and offenders as well as adverse social conditions.[166] Zernova further argues that the process prevents a 'culture shock' by creating an environment where First Nation people can still display attitudes which they consider culturally acceptable, for example avoiding eye contact or showing anger, which may be interpreted as being indifferent or uncooperative in a modern day court.[167]

5.2.4 Other Forms of Restorative Justice Practices

Several other models also share similar attributes with the aforementioned popular models of RJ. These include the Navajo Peacemaking model, which is based on Native American traditions and shares similar attributes with sentencing circles.[168] The traditional Navajo justice system, which consisted of their common law and consensus-focused judicial procedures, was replaced in 1959 by a Western court system.[169] However, the Western court system was not compatible with Navajo culture and the 1980's witnessed the integration of Navajo traditional law into the justice system. The Navajo Peacemaker Courts were created in 1982 to act as a court-annexed system of popular justice, with respected community leaders organizing and presiding over disputes that would have fallen under the purview of criminal law in Western societies.[170] In these courts, decisions are made by the parties in accordance with Navajo values and thinking.[171]

[166] ibid.
[167] M Zernova (n 8) 17.
[168] M Zernova (n 8) 19.
[169] ibid.
[170] ibid.
[171] ibid.

Its proponents have described Navajo justice as a 'horizontal, egalitarian system of justice, where everybody is equally important in the peace-making process'.[172] When a dispute arises, the party who claims to be injured or wronged either makes a direct demand against the accused to correct the harm caused or via the assistance of relatives. In the alternative, they may seek the assistance of a *naat'aanii*[173] in resolving the dispute. The naat'aanii would invite the parties (including the respective clans of the victim and the offender) to a meeting to enable them discuss the issues raised by the victim. Participants are given opportunities to express their views about the dispute. Unlike the keeper in the sentencing circles, the naat'aanii is not a neutral party in the process but has persuasive authority and acts as a guide or teacher.[174] The naat'aanii would perform 'the Lecture', where he/she will apply the teachings drawn from Navajo values and history to the dispute and propose what is required from the parties to resolve it.[175] The parties will then discuss and make a decision on what should be done, for example, the offender may be required to make restitution or reparation. The offender's family will assist the offender to fulfil any obligations and in addition, supervise the offender in order to prevent future occurrence of similar behaviour.[176] Either their agreements can be enforced as the judgment of the court or the parties can draft an informal agreement.[177]

[172] R Yazzie and JW Zion, 'Navajo Peacemaking: The Law of Equality and Justice' in B Galaway and J Hudson (eds) *Restorative Justice: International Perspectives* (Monsey, NY: Criminal Justice Press, 1996) 157 – 173 cited in M Zernova (n 8) 19. This system shares similar attributes with the pre-colonial Igbo judicial system discussed earlier in Chapter 2, s 2.3.1.

[173] Naat'aanii is a leader, chosen for the respect earned from others and is 'someone who thinks well, speaks well, plans well and shows by his behaviour that the person's conduct is grounded in spirituality'. See R Yazzie, 'Navajo Peacemaking: Implications for Adjudication-Based Systems of Justice' (1998) 1 *Criminal Justice Review* 123-131, 125.

[174] M Zernova (n 8) 20.

[175] R Yazzie (n 173) 126.

[176] M Zernova (n 8) 20.

[177] ibid. However, the Navajo people prefer informal agreements as their justice system does not rely on authority, force or coercion but on communal strength of members of the communities; see R Yazzie and JW Zion, 'Navajo Peacemaking: The Law of Equality and Justice' in B Galaway and J Hudson (eds) Restorative Justice: International Perspectives (Monsey, NY: Criminal Justice Press, 1996) 171.

Another example of a practice that is inspired by RJ principles is the Vermont Community Reparative Boards, which were established in 1996 in Vermont to 'enhance social control at the local level by involving citizens in the justice process'.[178] Community boards are used for offenders convicted of minor offences who would have otherwise received probation or short term prison sentences. Judges refer cases to them with volunteers serving on the boards. The victims are encouraged to participate in the process and boards are open to the public. One of the distinguishing factors between this model and most of the other restorative models already discussed is that they have untrained professionals acting as facilitators.[179]

Community board meetings usually commence with parties introducing themselves, followed by a review of the meeting's objectives. Parties will then proceed to discuss the offence and the impact it had on those involved and agree on what measures could be taken by the offender to make amends, for example, writing a letter of apology.[180] The offender usually returns to appear before the board for a mid-term review and at the end of the probationary period before the offender is discharged upon completing the agreement. Any offender who fails to sign an agreement or does not comply with the terms of the agreement will be referred back to the court.[181] It should be highlighted that the community boards have limited powers, for example, they cannot create contracts that will continue beyond a period of ninety days. In addition, they also have limited powers on the length of community service and other types of activities they can prescribe.[182]

[178] D Karp and L Walther, 'Community Reparative Boards in Vermont' in G Bazemore and M Schiff (eds) *Restorative Community Justice: Repairing Harm and Transforming Communities* (Cincinnati, OH: Anderson Publishing Co, 2001); M Zernova (n 8) 20.
[179] M Zernova (n 8) 20.
[180] ibid.
[181] ibid, 21
[182] ibid.

Evaluations into the community boards have revealed that although 52% of offenders successfully complete the terms of their agreements, only 15% of victims attend the board meetings. Various reason are adduced for low victim participation, including that victims do not fully understand the potential benefits in participating in the programme or that the matters referred to the boards are mostly minor offences.[183] Concerns were also raised about the imbalance in the class between those sitting on the board and the offenders whose matters there are presiding over. In addition, the lack of professionally trained facilitators also raised criticisms as the community volunteers appear 'amateurish, undiplomatic and less knowledgeable about restorative principles than trained mediators'.[184]

Similar panel boards exist in the UK in the form of reparation and referral orders issued against young offenders who are brought before the courts. Reparation orders were used for convicted offenders aged between 10 and 17. They were established to take into consideration the victims' needs and to help the prevent offenders from re-offending by confronting them with the consequences of their actions.[185] The order requires young offenders to make specific reparation to the victims (where the victims consent to this) or to the community.[186] However, research into the use of reparation suggest that in practice, focus is more on indirect reparation to the community, which does require the consent of

[183] D Karp and L Walther, 'Community Reparative Boards in Vermont' in G Bazemore and M Schiff (eds) *Restorative Community Justice: Repairing Harm and Transforming Communities* (Cincinnati, OH: Anderson Publishing Co, 2001) 211; M Zernova (n 8) 21.
[184] D Karp and L Walther (n 183) 215.
[185] D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 92.
[186] S Holdaway, N Davidson, J Dignan, R Hammersley, J Hine and P Marsh, *New Strategies to Address Youth Offending – The National Evaluation of the Pilot Youth Offending Teams* (Home Office, RDS Occasional Paper No 69, 2001); D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 92 - 93.

the victim.[187] Therefore, it seems that reparation orders have limited restorative impact, as the needs of the victims in most cases are not taken into account.[188]

The Youth Justice and Criminal Evidence Act of 1999 also provide for the use of RJ for young offenders via referral orders issued by the courts.[189] It provides that all first time offenders, except those who are given an absolute discharge or are sentenced to custody, must be referred to youth offender panels.[190] The panels consist of three members, one from the youth offending team and two trained community volunteers. The panel adopts a conference style approach, using RJ principles to conduct discussions between the young offender; the offender's parents or guardians; the victim(s); two trained members of the community; a youth offending team worker; and anyone else that panel considers capable of having a positive influence on the young offender. Guidelines state that legal representation is not required for young persons as they may prevent them from fully participating in the process, but where they do attend, they may do so as a 'supporter'.[191]

The panel's remit includes helping the offender to become aware of and take responsibility for the consequences of their actions as well as provide them with an opportunity to make reparation to the victim and the community. At the same time, the victim will also have the opportunity to explain how they have been affected by the offender's actions, ask questions, and receive an explanation and/or an apology.[192] At the

[187] Ibid.
[188] ibid.
[189] The Referral Order was revised under the Criminal Justice and Immigration Act, 2008, which came into force on 27 April 2009. Updated guidance is provided by the Ministry of Justice, *Referral Order Guidance 2009* (Ministry of Justice, 2009).
[190] The Courts also have the discretion to use the Referral Order if a young person has been previously convicted by a court, but not given a Referral Order. In exceptional circumstances, they may be used under the recommendation of a Youth Offending Team more than once; Ministry of Justice, *Referral Order Guidance 2009* (Ministry of Justice, 2009); M Zernova (n 8) 26.
[191] Home Office *Referral Order, Guidance for Courts* (2009, Home Office); D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 93.
[192] D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 93.

end of the discussions, an agreed contract will be drafted, based on the Panel's recommendations, which will contain activities to assist the offender to avoid re-offending during the duration of the referral order, for example counselling or drug and alcohol interventions, and some form of reparation to the victim(s) and the community.[193] The Youth Offending Team will ensure that the offender complies with the terms of the contract and if he fails to do so, he may be referred back to court sentencing.

An evaluation of the use of referral orders between 2000 and 2001 found that 'within a relatively short time, youth offender panels have established themselves as constructive, deliberative and participatory forums in which to address young people's offending behaviour'.[194] The research found that 84% of young offenders felt they were treated with respect and 86% said they were treated fairly.[195] It also showed that 75% agreed their contract was useful and 78% stated it helped them stay out of trouble.[196] Parents also agreed that process had a positive impact, especially when compared with their experience in the Youth Court, as they understood the referral order process better and were able to participate in the process.[197] However, despite these initial positive findings, there were a number concerns, including those raised by some magistrates who felt that the lack of discretion in the legislation undermined their authority.[198] Crawford and Newburn also discovered that

[193] ibid.
[194] T Newburn, A Crawford, R Earle, S Goldie, C Hale, A Hallam, G Masters, A Netten, R Saunders, K Sharpe and S Uglow, *The Introduction of Referral Orders into the Youth Justice System* (Home Office Research Study 242, 2002); D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 93.
[195] ibid; D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 94.
[196] ibid.
[197] ibid.
[198] ibid.

some panels had difficulty devising suitable plans because of a lack of local resources and facilities, which they believe is critical for their success.[199]

Following the publication of this research, further research was conducted to investigate the issues raised and this led to key recommendations being made to improve the delivery of the orders.[200] These include ensuring the consistent implementation of guidance on reprimands and final warnings; that referral orders should not be extended to young offenders convicted after a 'not guilty' plea; and that in certain instances, a referral order may be given to individuals with a previous conviction.[201] The UK government introduced changes in the Criminal Justice and Immigration Act 2008 to address these concerns.[202]

Despite the aforementioned areas of progress, there are still further concerns, which are yet to be addressed. These include whether such orders are proportionate as well as the long-term impact on recidivism, in comparison to other disposals.[203] A fundamental issue with the process relates to the extent to which the process actually embraces the principles of RJ, particularly with the victim's limited participation in the process.[204] This may affect any chance of 'encounter, reparation, reintegration and participation', which are key elements of any restorative justice process.[205] Furthermore, the fact that these orders are

[199] A Crawford and T Newburn, *Youth Offending and Restorative Justice: Implementing Reform in Youth Justice* (Willan Publishing, 2003); D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 94.
[200] Youth Justice Board, *Referral Orders: Research into the issues raised in 'The Introduction of the Referral Order into the Youth Justice System'* (Youth Justice Board, 2003); D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 94.
[201] ibid.
[202] D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 94.
[203] S Mullan and D O'Mahony, *A Review of Recent Youth Justice Reforms in England and Wales* (Northern Ireland Office, 2003); D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 94.
[204] T Newburn et al (n 194); D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 94.
[205] D Van Ness and K Strong (n 1); D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 95.

mandatory for the courts to issue where requirements mentioned above are met seriously undermines the parties' rights to consent to their participation in the process, which is a crucial element for the success of any RJ process.[206]

From the above discussion, a submission could be made that the modern practice of RJ in Western societies is beginning to take firm roots with its steady development over the past 42 years since its 'birth' in Kitchener Ontario in 1974.[207] The discussed evaluations on the aforementioned RJ models reveal a general acceptance of the process as well as a number of positive outcomes, including a reduction in recidivism rates in various jurisdictions. However, despite the successes achieved so far, the thesis implores RJ proponents not to rest on their oars. It is vital that more detailed research on RJ practice continues to be conducted, not only for the purpose of 'singing its praises' to politicians, academics, professionals and the general public but also, to identify bad practice and how they can be rectified. The potential benefits of such research cannot be underestimated, in not only academia but also as a vital tool in lobbying politicians to incorporate RJ in all stages of the criminal justice process. The recent study by Shapland and her team is a good example on how quality research could have a high impact in the promotion of RJ in England and Wales.

The UK Government commissioned the research in 2001 and it provided evidence of the effects of three RJ schemes on victims and re-offending.[208] The research was 'the first major evaluation in the world of the use of RJ to promote rehabilitation of adult offenders whilst also considering the views of victims.'[209] It observed over 285 RJ meetings, with 21

[206] D O'Mahony, 'Restorative Justice and Youth Justice in England and Wales: One Step Forward, Two Steps Backwards' (n 60) 95.
[207] J Shapland, G Robinson and A Sorsby, *Restorative Justice in Practice: Evaluating What Works for Victims and Offenders* (Oxon: Routledge, 2011) 5.
[208] The three RJ schemes were the Justice Research Consortium (JRC) (London, Thames Valley and Northumbria); CONNECT (London) and REMEDI (South Yorkshire); J Shapland et al (n 207) 9.
[209] *Ref 2014 - Restorative Justice Research Influences Practitioners and Shapes Governments' Policy on Victims and Offenders' Rehabilitation* (Research Excellence Framework 2014) 1.

of those meetings having no victim present and the remaining 259 having at least one victim and offender in attendance.[210] The research made a number of findings including that over 80% of the victims who participated were satisfied with the process and outcomes with similar numbers for offenders and that RJ reduced the frequency of offending, leading to £9 savings for £1 spent on Restorative Justice.[211] The findings in this research have influenced formulation of legislation on RJ in England Wales as well as the government's RJ Action plan.[212]

The most recent report by the Justice Committee of the House of Common confirms a continued support for the use of RJ in the criminal justice system, with its support of the enactment of legislation enforcing victims' right to RJ once concerns on its capacity are addressed.[213] It advised the Minister of Justice, in its consultation, to seek views from victims in on the enactment and implementation of such a legislative right to RJ for victims.[214] Despite warnings of undue reliance on the cost-saving claims of RJ made by various researches, including the aforementioned discussed Shapland report, the potential benefits to victims and offenders as well as the wider society cannot be ignored.[215] In addition, the Committee believed in not limiting the applicability of RJ, particularly in sexual offences on the condition that appropriate safeguards are taken into consideration, including the appropriate training for facilitators involved in such cases.[216]

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[210] J Shapland et al (n 207) 11 – 12.
[211] J Shapland et al (n 207) 139 – 142; 162 – 165; 170 – 174; *Ref 2014 - Restorative Justice Research Influences Practitioners and Shapes Governments' Policy on Victims and Offenders' Rehabilitation* (Research Excellence Framework 2014) 1.
[212] The Crime and Courts Act 2013, s.44 (Schedule 16) promotes the use of RJ before sentencing.
[213] Commons Select Committee, 'Government should Work towards Right to Restorative Justice for Victims' (House of Parliament, 1 September, 2016) <https://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news-parliament-20151/restorative-justice-report-published-16-17/> accessed on 19 September, 2016; House of Commons Justice Committee, Restorative Justice: Fourth Report of Session 2016-17 (House of Common, HC 164, 1 September, 2016) 3, 27 – 28.
[214] Commons Select Committee (n 213); House of Commons Justice Committee (n 213) 27 – 28.
[215] Commons Select Committee (n 213); House of Commons Justice Committee (n 213) 3, 8 – 10.
[216] Commons Select Committee (n 213); House of Commons Justice Committee (n 213) 3, 14 – 16.

It therefore made a number of recommendations including the improvement of victim engagement with RJ in the youth justice system, with reference to the youth conference model in North Ireland.[217] The pronouncements made by the Committee have received supported from various stakeholders, including the Restorative Justice Council (RJC) and Women's Aid.[218]

In the next series of sections, this thesis shall proceed to consider how RJ is used at the post-conviction stage, specifically in the prison system. The thesis will also consider the current classification/categorization of RJ prison initiatives with due consideration to two specific examples of RJ prison programmes that are in operation in the UK and the US. The purpose of this analysis is to observe how RJ principles and practices can be adapted in the post-conviction stage of the criminal justice process and in a prison environment.

5.3 RJ Prison Iniatives

Despite the huge potential that RJ has to offer in improving the Nigerian penal system and other sectors of the criminal justice system, it will be foolhardy to expect it to be embraced by all prospective parties in all cases. One of the tenets of RJ is that parties must be willing to participate in the process and no one is coerced. This principle must be respected, as any RJ process where any of the parties are forced to participate would have violated one its core values. However, it is contended even where one of the parties is not willing to participate, it should not deny access to the other parties to a restorative scheme when they indicate interest. Therefore, there must be flexibility on the part of the Nigerian

[217] Commons Select Committee (n 213); House of Commons Justice Committee (n 213) 3, 29 – 32.
[218] Restorative Justice Council, 'Restorative Justice Council responds to Justice Select Committee Inquiry Report' (Restorative Justice Council, 1 September, 2016) <https://www.restorativejustice.org.uk/news/restorative-justice-council-responds-justice-select-committee-inquiry-report> accessed 19 September, 2016; Women's Aid, 'Women's Aid and Restorative Justice Council welcome new report from Justice Select Committee' (Women's Aid, 1 September, 2016) <https://www.womensaid.org.uk/womens-aid-restorative-justice-council-welcome-new-report-justice-select-committee/> accessed 19 September, 2016.

penal system by also introducing schemes that will take into consideration such instances when they occur.

The question that still arise from this is can such schemes be said to fall under the banner of RJ if they do not fall under the 'notion's fundamental principles and outcomes'.[219] For example, some 'narrow' definitions of RJ seem to indicate that a process can only truly fall under the RJ umbrella if it ticks certain boxes, for example, all parties (including the victim and the offender) must engage in the process[220] or that the state must play no role in the process.[221] However, it would be erroneous to assume that all parties will be willing to participate in all cases. For example, if a rape victim and the victim's family choose not to participate, should the offender, the offender's family and other sections of the community who are willing, be denied a process that is most suitable to their circumstances? Furthermore, in situations where participation of both the victim and the offender have been secured, as the offender's daily activities are under the control and supervision of the state during the duration of their sentence, how can the state not be involved in any process? If the counter to this position is that the process can commence after the offender has completed their sentence, what if the offender is serving a life sentence?

This thesis therefore contends that these narrow definitions may not be suited for RJ prison initiatives due to the circumstances regarding the nature of the case in question as well as the operations of the prisons.[222] As we discussed in the third chapter, there still lies

[219] DW Van Ness, 'Prisons and Restorative Justice' in G Johnstone and DW Van Ness (eds), *Handbook of Restorative Justice* (Devon: Willan Publishing, 2007) cited in T Gavrielides, 'Reconciling the Notions of Restorative Justice and Imprisonment' (2014) The Prison Journal 1 - 27, 2.
[220] T Marshall, 'The Evolution of Restorative Justice in Britain' (1996) 4(4) European Journal on Criminal Policy and Research 37. This is in line with our earlier discussions in chapter three on Bazemore's and Walgrave's critique of Marshall's definition of RJ as being too narrow; see Chapter 3, 3.6.
[221] N Christie (n 12) 10 - 12.
[222] Research has shown that when RJ is being used in prison, the prison staffs that are using it are unaware that what they are implementing is RJ. This is mostly because it cannot be 'pinned down as one isolated practice and phenomenon' and 'it will mostly be done in bits'. Despite the appeal of a consistent and identifiable model of RJ within the prison system, some practitioners were of the opinion that a narrowed version of RJ may not permit

ambiguities in attempting to find a definition of RJ that is acceptable to all and this thesis argues that any attempt to structure any proposed RJ penal programs to gain general acceptance may be an exercise in futility.[223] More focus and effort should be used in ensuring, as much as possible, that the outcomes reached comply with RJ ethos, which are 'victim reparation, offender responsibility and communities of care'.[224] Even where these all these factors cannot be fulfilled and such processes, as McCold's describes, are 'partially restorative',[225]this thesis argues that such schemes should not be denied the same level of support as their counterparts that comply with the full RJ philosophy. This includes provision of adequate funding, expert facilitators and the involvement of the state where necessary. Therefore, the probable achievement of the best restorative outcome where possible in each individual case, as well as with each case's unique circumstances, should be one of the key factors in determining whether to initiate a restorative scheme. Secondly, having a 'partially restorative' process which produces a restorative outcome that is satisfactory to the parties that participated, with no adverse effect on the non-participating party can be argued to be a step in the right direction.

The next section will now proceed to examine the various categories of RJ Prison initiatives and then proceed to analyse two examples of these prison initiatives for the

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them to apply preparatory stages, like education, before setting up an encounter; see T Gavrielides, 'Reconciling the Notions of Restorative Justice and Imprisonment' (n 219) 8 – 9. See also J Braithwaite, 'Setting Standards for Restorative Justice' (2002) 42 British Journal of Criminology 563-577; T Gavrielides, *Restorative Justice Theory and Practice: Addressing the Discrepancy* (Helsinki, Finland: HEUNI, 2007); D Roche, *Accountability in Restorative Justice* (London: Clarendon Press, 2003).

[223] See Chapter 3, s 3.6.

[224] J Braithwaite, 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' (1999) 25 Crime and Justice: A Review of Research 1-127; P McCold, 'Toward a Holistic Vision of Restorative Justice: A Reply to Walgrave - Presentation at the 4th International Conference on Restorative Justice for Juveniles, Leuven 24-27 October, 1999' (1999) 3 Contemporary Justice Review 357- 414, both cited in T Gavrielides, 'Reconciling the Notions of Restorative Justice and Imprisonment' (n 219) 6; see also T Gavrielides, *Restorative Justice Theory and Practice: Addressing the Discrepancy* (n 222) 139.

[225] P McCold, 'Toward a Holistic Vision of Restorative Justice: A Reply to Walgrave - Presentation at the 4th International Conference on Restorative Justice for Juveniles, Leuven 24-27 October, 1999' (n 224); T Gavrielides, 'Reconciling the Notions of Restorative Justice and Imprisonment' (n 219) 6.

purpose of identifying areas of good practice, which will aide in developing a model for Nigerian prisons. As this section focuses on the use of RJ in prisons, it will only be focusing on programmes where offender involvement is crucial. This is not degrading the status of the victim or the community in any RJ process nor neglecting their own needs. This decision was taken to enable this study operate within the parameters set out at the commencement of this section of the thesis.

5.3.1 Classification of RJ Prisons Initiatives

Various attempts have been made to classify RJ schemes in prison[226] and these has been influenced by a number of factors such as 'the origin of the programs agencies;[227] the programs' objectives;[228] the programs' inclusion of all, few or none of the harmed parties;[229] or the programs' impact on the organizational and cultural aspect of prions'.[230] Recent literature has now classified these RJ Prison initiatives into five broad categories,[231] which are described summarily in the table below:[232]

Categorization of Prison Based RJ Projects	
Categories of Prison-Based RJ Projects	Key Characteristics

[226] Dhami MK, Mantle G and Fox D, 'Restorative Justice in Prisons' (2009) 12 Contemporary Justice Review 433-448; K Edgar and T Newell, *Restorative Justice in Prisons: A Guide to Making It Happen* (Winchester, UK: Waterside Press, 2006); M Liebmann, *Restorative Justice: How it Works* (London: Jessica Kingsley, 2007); DW Van Ness (n 219).
[227] R Immarigeon, *Reconciliation between Victims and Imprisoned Offenders: Program Models and Issues* (Akron, PA: Mennonite Central Committee US Office of Crime and Justice, 1994).
[228] DW Van Ness (n 219).
[229] T Newell, 'Restorative Justice in Prisons Project' in *Restorative Justice in Prisons: Resource Book and Report* (London: HM Prison Service, 2002) 3 - 6 <http://www.thamesvalleypartnership.org.uk/wp-content/uploads/rjinprisonreport.pdf> accessed on 15 September, 2015; 'Restorative Justice in Prisons: Circles and Conferencing in the Custodial Setting' (Paper presented at the Third International Conference on Conferencing, Circles and other Restorative Practices in Minneapolis, Minnesota, 8-10th August, 2002).
[230] G Johnstone, 'Restorative Justice and the Practice of Imprisonment' (2007) 140 Prison Service Journal 15-20.
[231] Dhami et al (n 226).
[232] Table 2, T Gavrielides, 'Reconciling the Notions of Restorative Justice and Imprisonment' (n 219) 8.

1. Offending behaviour programs	No encounter with victims; no direct reparation
2. Victim awareness programs	Encounter with surrogate victims; no reparation to the direct victim
3. Community service work	No encounter with the victim; no direct reparation
4. Victim-offender mediation (direct and indirect)	Encounter with the victim; direct reparation
5. Prisons with a complete RJ philosophy	Encounter with the victim; direct reparation.

Gavrielides has provided further classification, where he delineates the above mentioned categories into two: 'preparatory practices' and 'delivery practices'.[233] The former targets only one party (offending behaviour programs, victim awareness and community service work) and it used to prepare parties for an RJ encounter in order to arrive at restorative outcome, with no infliction of a restorative punishment.[234] The latter refers to programs that involve a direct or indirect encounter (victim-offender mediation and prisons with a complete RJ philosophy) which must operate with a restorative outcome in mind.[235]

[233] T Gavrielides, 'Reconciling the Notions of Restorative Justice and Imprisonment' (n 219) 17.
[234] Gavrielides defines Restorative punishment as the 'restorative pain the offender goes through when entering into a voluntary dialogue of personal transformation and community healing'; see ibid, 14. See also L Elliott, *Security with Care* (Halifax, Novia Scotia: Fernwood, 2011) 28. Deterrence could be a side effect of the process.
[235] T Gavrielides, 'Reconciling the Notions of Restorative Justice and Imprisonment' (n 219) 17.

This is 'irrespective of whether this is successful or not' and will involve the infliction of a restorative punishment.[236]

However, Gavrielides' classification may be problematic for the following reasons. Firstly, it seems to imply that one of the conditions for any programme to achieve a restorative outcome is that it must involve an encounter, whether direct or indirect, with the victim. The question this thesis poses in response is what if there is no victim, because either the victim or his /her family does not wish to participate or after initial preparations with both parties, it was concluded that it would not be in neither parties' interest. This may occur where it is assessed that there is a high risk of further harm being caused, as might happen in our earlier scenario involving the rape victim. Under Gavrielides' classification, all parties may be denied an opportunity in attempting to achieve a restorative outcome separately and they will be left in the preparatory stage.

Secondly, still using the example of the rape case, despite the victim's refusal to participate, the offender is willing to go through a victim awareness programme and upon its conclusion, they expressed true remorse of their actions. This may be done with the offender sharing their experience with a group of younger male juveniles who were guilty of less serious sexual offences, the result of which led to some not re-offending. Despite the remorse of the offender's actions and the subsequent non-reoffending by some young male juveniles who learnt from the initial offender's experience, they may not be categorised as a restorative outcome under Gavrielides' classification. However, if there was a direct/indirect encounter between the offender and the victim which concluded with no restorative outcome, this will still be considered more of a success under Gavrielides classification than the previous scenario. This will be the case as long as the process was

[236] ibid.

run with ‘a restorative outcome in mind’ based on the sole fact there was a direct/indirect encounter with the victim.

This thesis therefore argues that restorative prison schemes which are partially restorative in practice and principles can achieve a restorative outcome that will be of benefit to those who participated. This thesis acknowledges the notion that prison programmes that operate under a full RJ philosophy should be clearly distinguished from those that lack certain aspects. For example, programmes where there is no participation by the real victim like Offending Behaviour and Victim Awareness. Such programmes, due to the lack of engagement between the real victim and the offender which allows the victim to directly inform the offender the consequences of their actions, will not have victim reparation as part of their restorative outcomes. Therefore, such programmes should not be categorised as an RJ process or approach but in the alternative, could be categorised as a ‘Partially Restorative’ process/approach. However, this thesis argues that such programmes can still reach a restorative outcome that could offer potential benefits to the criminal justice process such as recidivism in a manner described in the previous paragraph. Therefore, this thesis advocates for the adoption of both pure RJ and Partially Restorative prison schemes in the Nigerian Criminal Justice system, with a clear understanding of the distinguishing factors in both schemes and the different types of restorative outcomes each respective scheme can offer.

This chapter will now analyse various examples of RJ Prison projects, which are being used in other jurisdictions in the next series of subsections. It will consider an example of a programme that does not involve the participation of the real victim (Partially Restorative) and another programme that has a direct/indirect encounter between the victim and the offender (Pure RJ).

5.3.2 Sycamore Tree Project (United Kingdom)

The Sycamore Tree Programme currently operates in 40 prisons in England and Wales and in over twenty countries around the world.[237] It is a victim awareness programme, developed by the Prison Fellowship, which teaches the principles of RJ to prisoners in groups of twenty by volunteer facilitators.[238] Prisoners over an 8 – 12 week course, learn about 'the effects of crime on victims, offenders, and the community, and discuss what it would mean to take responsibility for their personal actions'.[239] Between 2011 and 2012, over 2,000 prisoners took part in 113 Sycamore Tree programmes across 36 establishments in England and Wales.[240]

The programme consists of approximately fifteen hours of structured discussion and activities and seeks to enable participants to understand the 'wider impact of their criminal behaviour and accept a greater level of personal responsibility; identify with a victim's experience of crime and the need for victim/offender forgiveness and reconciliation; learn about the process of Restorative Justice and how offenders, victims and the wider community can take part; and plan steps to take to reduce offending behaviour whilst still in prison'.[241]

One of the highlights of the course is when a victim of a crime shares with the prisoners how the incident has affected his/her life. In the final session, the offender is given an opportunity to express their remorse through letters, a poem or works of art or craft.

[237] Table 3, T Gavrielides, 'Reconciling the Notions of Restorative Justice and Imprisonment' (n 219) 18.
[238] Prison Fellowship, *The Sycamore Tree Project: A Model for Restorative Justice* (London: Author, Prison Fellowship, 1999); 'Sycamore Tree' <http://www.prisonfellowship.org.uk/what-we-do/sycamore-tree/> accessed on 15 September, 2015.
[239] Prison Fellowship, 'Sycamore Tree' (n 238).
[240] Prison Fellowship, 'Does Restorative Justice Work?' <http://www.prisonfellowship.org.uk/what-we-do/sycamore-tree/does-restorative-justice-work/> accessed on 15 September, 2015.
[241] S Feasey and P Williams, *An Evaluation of the Sycamore Tree Programme on an Analysis of Crime Pics II Data* (Hallam Centre for Community Justice: Sheffield Hallam University, August 2009) 3.

Members of the public are invited to these final sessions to support and bear witness to these symbolic acts of restitution.[242]

An evaluation of the Sycamore Tree programme was undertaken by Sheffield Hallam University in 2009 involving over 5,000 participants who took the course between 2005 and 2009.[243] This evaluation was performed to determine if the programme has assisted in improving participants' attitudes towards the victim(s) of their offending behaviour. Various demographics were considered including age, gender, the risk classification of the prison and the institution.[244] The evaluation involved the use of a 'paired sampled t-test' which measured participants' attitudes at two different times, using various categories including *'victim empathy'* and *'anticipation of crime as worthwhile'*. The purpose of this exercise was to measure the extent to which any changes in attitude could be attributed to the Sycamore Tree programme.[245]

The research made a number of findings including that there were significant positive attitudinal changes that were statistically associated with completion of the programme across the whole sample.[246] The findings also demonstrated an increased awareness by participants of the impact of their actions as well as a reduced anticipation of reoffending.[247]

[242] Prison Fellowship, 'Sycamore Tree' (n 238).
[243] Prison Fellowship, 'Does Restorative Justice Work?' (n 240).
[244] S Feasey and Patrick Williams (n 241) 6.
[245] ibid.
[246] Furthermore, apart from measuring the change in attitudes, the 'paired samples test' was applied to the data to measure the probability that the change in attitude could be attributed to chance. The level of significance applied was the standard $p < 0.05$, this means that the probability is less than 5 in 100 (5%) that the change in attitude of participants could be attributed to chance. Instead, an argument could be made that the change could be attributed to their participation in the Sycamore programme; ibid 8.
[247] S Feasey and Patrick Williams (n 241) 8 - 17.

5.3.3. Resolve to Stop the Violence Project

In September 1997, the Resolve to Stop the Violence Project (RSVP) was established in San Francisco, North Carolina. It was developed as a result of a collaboration between Community Works and the San Francisco Sheriff's Department.[248] It aims to 'bring together all those harmed by crime, including victims, communities, and offenders. RSVP is driven by victim restoration, offender accountability, and community involvement'.[249]

The programme consists of three main components: offender accountability, victim restoration and community involvement.[250] The main objective of the programme is to reduce recidivism and to promote offender accountability by making offenders take responsibility for their actions and accept that they have a choice to take alternative action at the time they committed their offenses. The offender is also informed of the impact of their behaviour on the victim and to have empathy for the pain the victim is undergoing because of the harm caused.[251] Under the Offender Restoration component, inmates participate in group learning sessions up to 12 hours a day, six days a week in education, victim empathy, and restoration, as well as life skills. The offender Restoration component is divided into three components: *Man Alive* (which is designed to help participants explore the roots of their violence as well as to provide them with the tools necessary to stop it); *Survivor Impact* (this involves presentations made by survivors of violent crime that are similar to those committed by the participants. Through sharing their experiences, empathy is created in the participants as they learn ways to repair the harm they have caused to their

[248] J Gilligan and B Lee, 'The Resolve to Stop the Violence Project: Reducing Violence in the Community through a Jail-based Initiative' (2005) Vol. 27(2) Journal of Public Health 143 – 148, 144; Community Works, 'Resolve to Stop the Violence Project' <http://communityworkswest.org/programs-2/resolve-to-stop-the-violence-project/> accessed on 15 September, 2015.
[249] Community Works 'Resolve to Stop the Violence Project' (n 248).
[250] J Gilligan and B Lee (n 248).
[251] ibid.

victims); and *Offender Education Services* (Life Skills, Theatre Arts, Community Renewal Dialogs/Video Links, etc.).[252]

RSVP also works with the victims of the offenders who participated in the programme through a wide variation of social organizations, including domestic violence related, criminal justice and social service agencies. The victims, their families and communities are provided opportunities to be restored through group and individual counselling, community theatre (sometimes in collaboration with the offenders) and public speaking, including weekly presentations within the jail.[253] The main objective is to transform the victim to a survivor and finally, to an advocate/activist through its three step Victim Restoration Program.[254]

The community are not left out as they can participate with both offenders and victims via the Community Restoration component through weekly workshops, forums for public education, community theatre, visual arts and public awareness campaigns.[255]

RSVP has proven successful in reducing violent crime and has resulted in a reduction in recidivism of up to 80% in San Francisco.[256]

If the above discussed initiatives are compared with the pre-colonial Nigerian restorative practices discussed in Chapter 2, there are number of similarities in both objectives and operation. These include emphasis on addressing the needs of both the victim and the offender, with varying degrees of participation of the stakeholders, depending on which type of program you are considering. It is submitted that if similar versions of both

[252] Community Works, 'Offender Restoration' <http://communityworkswest.org/offender-restoration/> accessed on 15 September, 2015.
[253] J Gilligan and B Lee (n 248).
[254] Community Works, 'Survivor Restoration' <http://communityworkswest.org/survivor-restoration/> accessed on 15 September, 2015.
[255] J Gilligan and B Lee (n 248); Community Works, 'Community Restoration' <http://communityworkswest.org/community-restoration//> accessed on 15 September, 2015.
[256] Community Works, 'Resolve to Stop the Violence Project' (n 248).

programmes were integrated into Nigeria's penal system, there is a good probability that they will be successful.

5.4 Conclusion

In conclusion, it is clear that there is a wide variety of RJ models in operation, which is evidence that the concept is thriving in various jurisdictions worldwide. From the local community initiatives to the conferencing models that are backed up by statutes, RJ has indeed come a long way from its early beginnings. The concept has also been used to resolve conflicts between citizens and their governments, for example, the Truth and Reconciliation Commission in South Africa. The United Nations Economic and Social Council (ECOSOC) endorsed a *Declaration of Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, which* was designed not only to encourage the use of RJ globally but also to provide guidelines for incorporating restorative approaches into criminal justice without violating the rights of victims and offenders.[257] This chapter also analysed various evaluations of RJ schemes, applied in various stages of the criminal justice process, in several jurisdictions and was able to identify various achievements, particularly in the area of reducing recidivism. Despite the successes, there are areas that still need improvement. More importantly for this thesis, the study revealed various examples of good practice as well as pitfalls to avoid which will assist with the integration of RJ into the Nigerian Criminal Justice process.

The discussions in this chapter as well as those in the previous chapters have arguably put forward a case that RJ and the Nigerian pre-colonial judicial systems share similarities in history, principles and practice and that the former can act as a 21st century

[257] DW Van Ness and KH Strong (n 1) 33. These principles were addressed earlier in chapter three and this thesis has already recommended that they should be used as a template for the formulation of a RJ policy in Nigeria which shall be discussed at length in the final chapter; see Chapter 3, s 3.3.3.

version of the former. However, before one can consider discussing the introduction of RJ into the Nigerian Criminal Justice system, it is pertinent to address the current challenges, including those in its prison system, some of which were highlighted in the first chapter.[258] Arguably, the most significant issue that needs to be discussed is how to reverse the imbalanced approach to justice so that the equilibrium that existed in Nigerian communities before colonial rule could be restored.

This thesis contends that these issues, as well the reforms needed to bring much required change, need to be discussed at length before delving into how RJ could be integrated into the Nigerian Criminal Justice system. Failure to do some may lead to the traditional adage of putting the 'cart before the horse' as it is important to first create a conducive environment within which RJ could flourish before there can be discussions of incorporating it into such said environment. The next chapter will seek to address these issues and arrive at a strategy that will not only lead to reformation in both prisoners' rehabilitation as well as the Nigerian penal system, but may also have potential impact on other sectors of the entire criminal justice process.

[258] See Chapter 1, s 1.4.

CHAPTER SIX

RESTORATIVE JUSTICE: REFORM IN PRISONERS' REHABILITATION AND THE ENTIRE PENAL SYSTEM

6.1 Introduction

One of the key arguments advocated by this thesis, as highlighted in both chapters one and two, is that there is a need for a change in the manner via which the Nigeria penal system operates as well as a shift in the ideology behind how prisoners are rehabilitated. Arguments were submitted in the conclusion of chapter two that a probable solution lies in the re-adoption of pre-colonial restorative practices that place emphasis on reconciliation, rehabilitation and re-integration rather than on retribution. Furthermore, it was argued in both chapters three and four that Restorative Justice (RJ) bears a similar resemblance in operation, objectives and history to the aforementioned restorative practices and could act as a modern day equivalent. Finally, in chapter five, we were able to identify good RJ practices through the assessment of several RJ models in different jurisdictions that could be integrated into the Nigerian justice process.

Despite the potential benefits that the integration of RJ into the justice system has to offer to all stakeholders,[1] it would be wrong to assume that all of them would easily accept such a proposal. This is because of the existing tensions, evident in the ongoing debates in Nigeria and in other jurisdictions, on whether or not RJ can play a role in the current criminal justice process, particularly in the prison system. This is because of the perceived contrasts

[1] These include all parties involved in the incident, the community as well as professionals associated with the prison system; see Chapter 3, ss 3.3.2 and 3.3.3.

in not only the philosophy but also, in the mode of operations of both RJ and the state justice system. Boyes-Watson described the contrast between both as follows:[2]

> 'The state operates through impersonal and rationalized procedures administered by disinterested professionals with specialized legal, administrative and penal expertise. The goal is to punish, manage or rehabilitate people who violate the law in order to maintain control over its jurisdiction. Restorative Justice, by contrast, seeks to delegate decision-making and control to those individuals directly involved in the incident. The goal is to harness the power of relationships to heal that which has been harmed and to empower the community to engage in processes of repair, reconciliation and redemption in order to restore balance in the wake of harm'.

These two concepts can be also be compared to two different highways leading in different directions from an intersection and the criminal justice systems of various jurisdictions are at that 'crossroads' and are attempting to decide on the appropriate route for the delivery of 'better justice' for all stakeholders.[3]

The debate has led to the creation of two camps. One camp is of the opinion that RJ has no place in the prison system and has argued for the maintenance of the status quo on the grounds that the prison system is effective in reducing crime and they present statistics to support this claim which will be examined later in this thesis. The other camp, consisting of penal abolitionists (abolitionists) and RJ purists believe that RJ has no role in prisons but

[2] C Boyes-Watson, 'What are the Implications of the Growing State Involvement in Restorative Justice?' in H Zehr and B Toews (eds), *Critical Issues in Restorative Justice* (Devon: Willan Publishing, 2004) 215.
[3] DJ Cornwell, *Criminal Punishment and Restorative Justice: Past, Present and Future Perspectives* (Winchester, UK: Waterside Press, 2006) 176; *Doing Justice Better: The Politics of Restorative Justice* (Hampshire, UK: Waterside Press, 2007) 15.

instead can be a replacement for the entire current criminal justice process.[4] It is important that this debate be examined to seek a balance between these two diametrically opposed alternatives, as this may assist in formulating an approach that will be best suited to achieve the much needed reforms in the Nigerian prison system. Primary reference will be made from the situation in England and Wales because of the colonial relationship between them and Nigeria, the impact of which is still heavily influential in policy formulation, as discussed in the chapter two.[5]

This chapter will seek to analyse the arguments for both sides and put forward, if possible, a compromise that would be acceptable to both. The subsequent sections will then proceed to examine the necessary steps that need to be taken into consideration to create an enabling environment for this new proposed RJ system to be integrated into the Nigerian prison system. This may include changes to not only the structures within the penal system, but also in the attitudes of the professionals as well as the public.

6.2 Penal System Advocates V Penal Abolitionists/RJ Purists: The Arguments in Support

The potential benefits of RJ to all stakeholders were discussed in chapter three, including providing an alternative justice process which places priority on addressing the needs of both the victims and the offenders rather than just imposing a sanction on a guilty offender. There is already evidence of a change in attitude to the use of RJ in prisons with

[4] Penal abolitionists argue for an alternative sentencing system where prisons have been abolished; see K Edgar and T Newell, *Restorative Justice in Prisons: A Guide to Making It Happen* (Winchester, UK: Waterside Press, 2006) 22; T Brooks, *Punishment* (New York, NY: Routledge, 2012) 64. It must be noted that this group are in the minority.
[5] See Chapter 2, s 2.5.

many prisons in different jurisdictions currently running some form of RJ initiative, examples of which were highlighted and examined in detail in the previous chapter.[6]

However, despite the benefits RJ has to offer and the several RJ prison initiatives that are already in operation, there is still opposition to its integration in the prison system. Uniquely, opposition comes from both extremes of the debate: those who are of the opinion that RJ has no role in the prison system since the prison is already producing the desired results of reducing crimes. The other comes from RJ purists and abolitionists who believe that not only should RJ be separate from the prison system but from the entire criminal justice process.[7] It must be mentioned that an acknowledgement of the tension that exists between these two sides is key to the discussion as to how RJ can operate in prisons to the satisfaction of all stakeholders as failure to do so may lead to an obstacle to the establishment of the model in Nigeria.[8] This is because such debates continue to have a relative impact on the progress of the use of RJ in the criminal justice system, particularly in prisons. The next series of sub sections will attempt to analyse the positions of both opposing camps from both a theoretical and practical perspective.

6.2.1 The Case for the Penal System Advocates

One of the most popular arguments put forward by those who believe that the prison system should operate without any RJ influence is that RJ is 'a soft option' as it offers cheap justice to victims as the offender is perceived to be receiving a lighter sentence.[9] They

[6] See Chapter 5, s 5.3; MK Dhami, G Mantle and D Fox, 'Restorative Justice in Prisons' (2009) 12 Contemporary Justice Review 433-448; cited in T Gavrielides, 'Reconciling the Notions of Restorative Justice and Imprisonment' (2014) The Prison Journal 1 - 17, 7.
[7] T Gavrielides 'Reconciling the Notions of Restorative Justice and Imprisonment' (n 6) 12.
[8] K Edgar and T Newell (n 4) 22.
[9] ibid, DJ Cornwell, *Doing Justice Better: The Politics of Restorative Justice* (n 3), T Gavrielides 'Reconciling the Notions of Restorative Justice and Imprisonment' (n 6) 10; D Coker, 'Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking' (1999) 47 UCLA Law Review, 1 - 111; J Stubbs, 'Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice' in H Strang and J Braithwaite (eds)

therefore argue that it cannot be used in matters involving serious offences and its use should be at best limited to minor crimes and young offenders.[10]

Another issue highlighted by penal system advocates with RJ is the disagreements amongst RJ advocates on the role of RJ in comparison with the criminal justice system. This is as a result of a paradox within the concept which Pavlich termed as the *imitor paradox*[11] and argues that whilst RJ claims to be a 'substitute' for the existing criminal justice process, it ends up 'imitating' the very same process it claims to be a replacement for.[12] For example, RJ uses similar terms and concepts associated with the criminal justice system like crime, victim, offender and community.[13]

This situation raises a valid question on whether RJ is 'an independent alternative' or an 'appendage' to the criminal justice process.[14] Those in support of the former believe that RJ's principles are incommensurable with those of the criminal justice system and it aims to heal rather than determining guilt, innocence, punishment and retribution.[15] Those in favour of the latter position are of the opinion that RJ operates within and complementary to the criminal justice process.[16] The supporters of the prison system are of the opinion that

Restorative Justice and Family Violence (Cambridge, UK: Cambridge University Press, 2002) 51; S Curtis-Fawley, 'Gendered Violence and Restorative Justice' (2005) 11(5) Violence Against Women 603 - 638, 623.

[10] ibid.

[11] The Latin word *imitor* implies both 'substitution' and 'imitation'.

[12] G Pavlich, *Governing Paradoxes of Restorative Justice* (Abingdon, Oxon: GlassHouse Press, 2005) 14 – 15.

[13] ibid, 14.

[14] ibid, 16 – 20.

[15] J Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002) 12; G Johnstone, *Restorative Justice: Ideals, Values, Debates* (Cullompton: Willan Publishing, 2002); R Graef, *Why Restorative Justice? Repairing the Harm Caused by Crime* (London: Calouste Gulbenkian Foundation, 2000); H Zehr, *Changing Lenses: A New Focus for Crime and Justice* (3rd edn, Scottdale, PA: Herald Press 2005); *Fundamental Principles of Restorative Justice* (Intercourse, PA: Good books, 2002); M Umbreit, *The Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research* (San Francisco, CA: Jossey-Bass, 2002) all cited in G Pavlich (n 12) 16.

[16] G Bazemore and C McLeod, 'Restorative Justice and the Future of Diversion and Informal Social Control' in E Weitekamp and H Kerner (eds) *Restorative Justice: Theoretical Foundations* (Cullompton: Willan, 2002) 167 – 168; D Cooley, *From Restorative Justice to Transformative Justice: Discussion Paper* (Ottawa: Law Commission Canada, 1999); G Pavlich (n 12) 18.

if the former position is adopted, it may lead to duplicity within the justice process with two systems running simultaneously. The issues of double jeopardy arising from such a scenario were discussed at great length in chapter three.[17] Other related issues also discussed in the same chapter include concerns on how to determine whether a matter is suitable for RJ or it should be heard solely by a criminal court.[18] Furthermore, the chapter also considered the potential of victims or alleged offenders being coerced to participate in a RJ process.[19]

Therefore, advocates for the penal system believe that 'prisons works',[20] they are meant to be punitive and that any attempt to detract this objective will delimit their retributive and deterrent roles.[21] In addition, they claim that one of the benefits of the prison system is that it has led to a reduction in crime rates.[22] Hence, these advocates argue that rather than calling for a reduction in the use of prisons or its abolition, there is need for tougher retributive sanctions and the enactment of laws that enforce such sanctions.[23]

These contentions were quite popular amongst politicians in various jurisdictions and were usually made under a tone of fear that crime is a major social problem that needs

[17] See Chapter 3, s 3.5.
[18] ibid.
[19] ibid.
[20] D Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago, USA: The University of Chicago Press, 2001) 14; D Scott, 'The Changing Face of the English Prison: A Critical Review of the Aims of Imprisonment' in Y Jewekes (ed) *Handbook on Prisons* (Willan Publishing, 2007) 62. Former Home Secretary, Michael Howard at the Conservative Party Congress in October 1993, made this declaration. Before then, the population declaration was 'Nothing Works' and the same Conservative Government in its White Paper *Crime, Justice and Protecting the Public* (Home Office, 1990) stated that the 'prison is an expensive way of making bad people worse'; see DJ Cornwell, *Doing Justice Better: The Politics of Restorative Justice* (n 3) 22.
[21] K Edgar and T Newell (n 4) 22.
[22] PA Langan and DP Farrington, *Crime and Justice in the United States and in England and Wales, 1981-1996 Bureau of Justice Statics Executive Summary* (Washington DC: US Department of Justice, 1997) cited in David Garland (n 20) 14; A Liptak, '1 in 100 U.S. Adults' *New York Times* (New York, 28 February 2008) <http://www.nytimes.com/2008/02/28/us/28cnd-prison.html?_r=0> accessed 17 July, 2015 cited in Thom Brooks (n 4) 64.
[23] Politicians urge that we should 'condemn more and understand less' and strive to ensure that prison conditions are suitably 'austere'; see D Garland (n 20) 9-10; M Tonry (ed), *Confronting Crime: Crime Control Policy Under New Labour* (Devon: Willan Publishing, 2003) 16; DJ Cornwell, *Doing Justice Better: The Politics of Restorative Justice* (n 3) 40.

to be addressed.[24] This contributed greatly to the rise of *populist punitivism* which led to criminal policies being formulated based on 'prevailing political ideologies and electoral considerations rather than by criminological principle and rigorous research'.[25] The fear of crime, which in some cases are stirred up by political leaders, leads to a push from the public for the use of strict penal policies that focus more on retribution and deterrence for preserving public safety.[26] Politicians, primarily to secure electoral votes, make declarations and enact penal policies, in response to the demands of the public. They are strongly supported by the media who seek the use of the prison as a 'penal instrument' in enforcing social policy on the 'the war against crime'.[27]

These views were very popular in England and Wales during the 1990's, particularly after some high profile murders such as that of James Bulger in 1993.[28] The then Conservative government adopted penal policies that encouraged the increased use of

[24] The British Crime Survey (UK) and the Bureau of Justice Statistics Sourcebook (US) regularly report findings on public fear of crime; see also M Hough, *Anxiety About Crime: Findings from the 1994 British Crime Survey* (London: Home Office, 1995); C Hale, 'Fear of Crime: A Review of the Literature' (1996) 4 International Review of Victimology 79 – 150. In the *Beveridge Report of 1992,* the Commissioners argued that 'fear of crime' should be included to the list of giant evils that social policy had to confront. See also J Roberts, 'Public Opinion, Crime and Criminal Justice' in M. Tonry (ed) *Crime and Justice, A Review of Research* (Vol 16, Chicago: University of Chicago Press, 1992); M Hough and J Roberts, *Attitudes to Punishment: Findings from the 1996 British Crime Survey* (London: Home Office, 1998) all cited in D Garland, (n 20) 9 - 10.

[25] DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 15.

[26] AE Bottoms, 'The Philosophy and Politics of Punishment and Sentencing' in C Clarkson and R Morgan (eds) *The Politics of Sentencing Reform* (Oxford: Oxford University Press, 1995); DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 24 - 25, 47.

[27] See also JR Blad, 'Against "Penal Instrumentalism": Building a Global Alliance for Restorative Justice Processes and Family Empowerment' (Proceedings at the 4th International Conference on Conferencing, Circles and Other Restorative Practices, 2003) 130 - 141; JR Blad, 'The Seductiveness of Punishment and the Case for Restorative Justice' in DJ Cornwell, *Criminal Punishment and Restorative Justice* (ed) (Winchester: Waterside Press, 2006) 137; D Garland, (n 20) 12; A Matravers and GV Hughes, 'Unprincipled Sentencing? The Policy Approach to Dangerous Sex Offenders' in M Tonry (ed) *Confronting Crime: Crime Control Policy Under New Labour* (n 23) 4 - 5, 51 - 53; DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 24 - 25, 47.

[28] James Bulger was abducted, tortured and murdered by two ten-year old boys, Robert Thompson and Jon Venables, on 12th February, 1993. Thompson and Venables were charged as adults on 20th February, 1993 for the abduction and murder of Bulger and were found guilty on 24th November, 1993. They were sentenced to serve a minimum of 10 years upon the recommendation of the Lord Chief Justice, Lord Taylor of Gosforth. This set aside the initial 8 year minimum recommendation by the trial judge, Mr Justice Morland; see H Siddique, 'James Bulger Killing: The Case History of Jon Venables and Robert Thompson' The Guardian (London: 3 March, 2010) <https://www.theguardian.com/uk/2010/mar/03/james-bulger-case-venables-thompson> accessed on 3 August, 2016; D Wilson, *A History of British Prisons, 1066 to the Present* (London: Reakington Books Ltd., 2014) 162.

imprisonment and longer custodial sentences, which the New Labour government of 1997 not only continued but also proceeded to introduce further punitive sanctions.[29] We also witnessed further 'popular' proclamations made by politicians to support the need for tougher punitive sanctions,[30] for example, *'Tough on crime, tough on the causes of crime'*[31] and *'Zero-tolerance on crime'*[32].

Finally, the penal system advocates rely heavily on statistics that appear to reveal a decline in crime rates in several jurisdictions. These jurisdictions employ a prison policy as its first or main response to crime. For the purpose of this discussion, we shall be focusing primarily on the experiences in England and Wales and in the United States (US). The reasons for the selection of these two jurisdictions are the perceived similarities in the operations of the Nigeria's penal system to the aforementioned countries as well as Nigeria's past colonial relationship with the former from whom the prison system was received. In England and Wales in 2015, there was a 7% decrease in crime rates from the previous survey conducted in 2014, which is the lowest estimate since the Crime Survey for England and Wales (CSEW) began in 1981.[33] A similar situation was also witnessed in the US, with the number of violent crimes in 2013 decreasing to 4.4 percent when compared with 2012 figures, and the estimated number of property crimes decreased by 4.1 percent.[34]

[29] DJ Cornwell, *Doing Justice Better: The Politics of Restorative Justice* (n 3) 40.
[30] D Garland, (n 20) 142; David J Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 24.
[31] Tony Blair at Labour Party conference in 2005 – T Blair, 'Leaders Speech' *British Political Speech* (Brighton, 1995) <http://www.britishpoliticalspeech.org/speech-archive.htm?speech=201> accessed 20 February, 2015.
[32] David Cameron after the London Riots in 2011 – P Hennessy and M d'Ancona, 'David Cameron: It's time for a zero tolerance approach to street crime' *The Telegraph* (London, 13 August, 2011) <http://www.telegraph.co.uk/news/uknews/crime/8700243/David-Cameron-on-UK-riots-Its-time-for-a-zero-tolerance-approach-to-street-crime.html> accessed 20 February, 2015.
[33] Office for National Statistics, 'Crime falls 7% in England and Wales according to Crime Survey figures' (16 July, 2015) <http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/year-ending-march-2015/sty-crime-march-2015.html> accessed on 10 August, 2015.
[34] Federal Bureau of Investigation (FBI), 'Crime Statistics for 2013 Released - Decrease in Violent Crimes and Property Crimes' (November, 2014) <https://www.fbi.gov/news/stories/2014/november/crime-statistics-for-2013-released/crime-statistics-for-2013-released> accessed on 10 August, 2015.

Despite the arguments put forward by penal system advocates for the validation of the current prison system, this thesis argues that are several issues under the current structure. These issues raise questions on the effectiveness of not only the prison structure but also the entire penal system. The following subsections will attempt to analyse these issues from both a theoretical and practical perspective.

6.2.1.1 Theoretical Critique of the Case for the Penal System Advocates

In response to the assertion that RJ is a soft option, one could conclude that one of the reasons for the assertion is that penal advocates believe that an offender may be able to negotiate a reduction in the sentence in exchange for an apology or reparation to the victim. This is not the case as this thesis has highlighted in the third chapter that any outcome reached at an RJ process must be proportionate and not at a disparity with an outcome reached by a court if it had presided over the same matter.[35] Therefore, it is must be clarified to all stakeholders, particularly to victims and offenders, that participating in a RJ process is not a 'get out jail free card' as sanctions will still be prescribed in accordance with the law.

Secondly, whilst some prison proponents have argued that the prison system should take credit for reduction in crime,[36] other theorists have adduced other reasons for the decrease in crime.[37] For example, the fall in heroin epidemics from early 80's and early 90's;

[35] See Chapter 3, s 3.5.
[36] K Edgar and T Newell (n 4) 22; T Brooks (n 4) 64.
[37] O Roeder, L Eisen and J Bowling, *What Caused the Crime Decline* (New York, NY: Brennan Center for Justice at New York University School of Law, 2015) 5 - 6; SD Levitt, 'Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not' (2004) Vol 18(1) Journal of Economic Perspectives 163-190; S Jefferies, 'Six Reasons for the Fall in Violent Crime' *The Guardian* (London, 23 April, 2014) <http://www.theguardian.com/uk-news/shortcuts/2014/apr/23/six-reasons-for-fall-violent-crime> accessed on 10 August, 2015; A Travis, 'Crime Rate in England and Wales falls 15% to its lowest level in 33 years' *The Guardian* (London, 24 April, 2014) <http://www.theguardian.com/uk-news/2014/apr/24/crime-rate-england-wales-falls-lowest-level-33-years> accessed on 10 August, 2015; I Cobain, 'Tough Case to Crack: the mystery of Britain's falling Crime Rate' *The Guardian* (London, 31 August, 2014) <http://www.theguardian.com/uk-news/2014/aug/31/tough-case-mystery-britains-falling-crime-rate> accessed 10 August, 2015; IM Chettiar, 'The Many Causes of America's Decline in Crime' *The Atlantic* (11 February, 2015) <http://www.theatlantic.com/politics/archive/2015/02/the-many-causes-of-americas-decline-in-crime/385364/> accessed 20 August, 2015.

[38] the decline in binge drinking and rising alcohol prices;[39] the state of the economy;[40] the introduction of legal abortion;[41]and the phase-out of leaded petrol.[42] In addition, other local and international studies have contended that there are no consistent links between prison numbers and levels of crime and they question the prison's actual significance or contribution to the decline in crime rates.[43] Several empirical studies, including those conducted by the Brookings Institution's Hamilton Project,[44] the National Academy of Sciences[45] and the Brenan Justice Centre[46] all reached similar conclusions that the impact of incarceration in the decline of crime rates has diminished over the years.

6.2.1.2 Practical Critique of the Case for the Penal System Advocates

It must re-iterated that a discussion on the primary reason for the reduction of crime is not an objective of this thesis. However, for the purpose of this discussion, let us attribute the success in decline in crime rates entirely to the prison system. The questions that then

[38] N Morgan, 'The Heroin Epidemic of the 1980s and 1990s and its Effect on Crime Trends - Then and Now (Home Office, July 2014) 3, 31 - 34.
[39] A Travis, 'Cost of alcohol credited for drop in serious violence in England and Wales' *The Guardian* (London, 23 April, 2014) <http://www.theguardian.com/society/2014/apr/23/alcohol-prices-violence-study-binge-drinking> accessed on 10 August, 2014.
[40] SD Levitt (n 37) 170 - 171.
[41] JJ Donohue III and SD Levitt, 'The Impact of Legalized Abortion on Crime' (2001) Vol 116(2) The Quarterly Journal of Economics 379 – 420, 380.
[42] JW Reyes, 'Environmental Policy as Social Policy? The Impact of Childhood Lead Exposure on Crime (National Bureau of Economic Research, Working Paper No. 13097, 2007) <http://www.nber.org/papers/w13097.pdf> accessed on 10 August, 2015; G Monbiot, 'Yes, Lead Poisoning Could Really be a Cause of Violent Crime' *The Guardian* (London, 7 January, 2013) < http://www.theguardian.com/commentisfree/2013/jan/07/violent-crime-lead-poisoning-british-export> accessed on 10 August, 2014; D Casciani, 'Did Removing Lead from Petrol Spark a Decline in Crime?' *BBC News* (21 April, 2014) <http://www.bbc.co.uk/news/magazine-27067615> accessed on 10 August, 2014.
[43] National Audit Office, *Comparing International Criminal Justice Systems* (London: National Audit Office, 2012); T Lappi-Seppälä, 'Why Some Countries cope with Lesser Use of Imprisonment' (2015) <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Tapio%20Lappi-Sepp%C3%A4l%C3%A4%20London%202015.pdf> accessed on 17 August, 2015.
[44] The Brookings Institution's Hamilton Project stated that incarceration has 'diminishing marginal returns'; see S Raphael and M Stoll, *A New Approach to Reducing Incarceration While Maintaining Low Rates of Crime* (The Hamilton Project, 2004) 11 - 13.
[45] The National Academy of Sciences was of the opinion that 'the incremental deterrent effect of increases in lengthy prison sentences is modest at best'; see J Travis et al (eds) *The Growth in of Incarceration in the United States: Exploring Causes and Consequences* (National Research Council, 2014) 155.
[46] The Brenan Justice Centre concluded that 'the incarceration in the U.S. has reached a level where it no longer provides a meaningful crime reduction benefit'; see O Roeder et al (n 37) 4 - 7.

arises are 'Does the prison really work'; 'Is the sole reliance on the incarceration of offenders an adequate response to crime' and 'Can such a system be sustained for the long term?' It is the submission of this thesis that the answer to the aforementioned questions are in the negative. This is because despite the 'alleged' success in the decline rates, there is at the same time a correlative increase in the number of persons incarcerated and the costs for maintaining each prisoner.

For example, in England and Wales, the prison population increased by more than 90%, from 40,000 prisoners to almost 85,000 from June 1993 to August, 2015, with future projections that prison populations will rise to 90,200 by 2020.[47] During this period, the average annual cost per prison place rose to £36,237, which amounts to an estimated additional cost of £1.22bn annually—over £40 per year for every UK taxpayer.[48] Despite the large number of persons imprisoned and the huge expenses incurred, crime rates are still in high numbers with an estimated 6.8 million recorded incidents as of 16th July, 2015.[49]

Therefore, it is submitted that the use of imprisonment as a sole response to crime 'does not work' when one considers the numbers of persons incarcerated as well as the expenditure incurred. This argument is reinforced when one considers that 45% of adults are reconvicted within a year of their release, with the likelihood of reconviction increasing

[47] Ministry of Justice, *Population and Capacity Briefing for Friday 7 August 2015* (London: Ministry of Justice, 2015); Prison Reform Trusts, 'Prison the facts- Bromley Briefings Summer 2015' (2015) http://www.prisonreformtrust.org.uk/Portals/0/Documents/Prison%20the%20facts%20May%202015.pdf accessed on 13 August, 2015; Ministry of Justice, *Story of the Prison Population: 1993 – 2012* (England and Wales, London: Ministry of Justice, 2013) 1. England and Wales has the highest prison population in Western Europe and third in the whole of Europe; see International Centre for Prison Studies (ICPS), Highest to Lowest – Prison Population Total (Europe) <http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=14&=Apply> accessed on 17 August, 2015; Ministry of Justice, *Prison Population Projections 2014–2020* (London: Ministry of Justice, 2014).

[48] Table 1, Ministry of Justice, *Costs per Place and Costs per Prisoner by Individual Prison, NOMS Annual Report and Accounts 2013-14: Management Information Addendum* (London: Ministry of Justice, 2014) and HM Prison Service, *Prison Service Annual Report and Accounts April 1992–March 1993* (London: HMSO, 1993); Prison Reform Trusts (n 47).

[49] Office for National Statistics, 'Crime falls 7% in England and Wales according to Crime Survey figures' (n 33).

to 58% for those who served sentences of less than 12 months.[50] Furthermore, 68% of those under the age of 18 are reconvicted after a year of release.[51] It is estimated that re-offending by recently released offenders costs the economy between £9 billion and £13 billion a year.[52]

Apart from the above issues, the prison system in England and Wales has experienced other challenges. These include the increase in prisoner suicides as well as racist and social inequalities within the prisons;[53] prison overcrowding and the inhumane conditions under which prisoners are kept;[54] understaffing because of the increased number of persons incarcerated and falls in prison employment;[55] and the increase in the costs of maintaining prisons.[56] All these contribute to the position that the sole use of imprisonment in England and Wales have not only been unsuccessful but are unsustainable for the long-term future. Similar views have been expressed by Nick Hardwick, the immediate former Chief Inspector of Prisons, in his last report where he stated that prisons in England and Wales have deteriorated across all areas in 2014 to their worst level for at least 10 years.[57]

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[50] Tables 16a, 17a and 16b, Ministry of Justice, *Proven Reoffending Statistics: July 2012 to June 2013* (London: Ministry of Justice, 2015) cited in Prison Reform Trusts (n 47).

[51] Tables 16a, 17a and 16b, Ministry of Justice, *Proven Reoffending Statistics: July 2012 to June 2013* (London: Ministry of Justice, 2015) cited in Prison Reform Trusts (n 47).

[52] National Audit Office, *Managing Offenders on Short Custodial Sentences* (London: The Stationery Office, 2010).

[53] Thirty-five percent of the deaths recorded in the prison population for England and Wales in 2014 were self-inflicted. Suicide rates were significantly higher in custody than amongst the general population. In 2014, the rate of self-inflicted deaths amongst the prison population was 100 per 100,000 people, amongst the general population it is 11.9 per 100,000 people. See Table 1.1 and 2, Ministry of Justice, *National Offender Management Service Workforce Statistics Bulletin: December 2014* (London: Ministry of Justice, 2014); Office for National Statistics, *Suicides in the United Kingdom, 2013 Registrations* (Newport: Office for National Statistics, 2015); see also L Elliott, *Security with Care* (Halifax, Nova Scotia, Canada: Fernwood, 2011).

[54] L Elliott (n 53), T Barabas, B Fellegi & S Windt, *Responsibility-taking, Relationship-building and Restoration in Prisons* (Budapest, Hungary: National Institute of Criminology (OKRI)).

[55] There was a twenty-nine percent decrease to 12,980 in the employment of staff in for prisons England and Wales. See Table 2, Ministry of Justice, *National Offender Management Service Workforce Statistics Bulletin: December 2014* (London: Ministry of Justice, 2014).

[56] The average cost for the maintenance of a prisoner in the UK in 2014 is £36,237. See Table 1, Ministry of Justice, *Costs per Place and Costs per Prisoner by Individual Prison, NOMS Annual Report and Accounts 2013 - 14: Management Information Addendum* (n 48).

[57] N Hardwick, *HM Chief Inspector of Prisons Annual report 2014-15* (London: HM Prisons, 2015) 7; Alan Travis, 'Prisons 'at their worst level for 10 years'' *The Guardian* (London, 14 July, 2015) http://www.theguardian.com/society/2015/jul/14/prisons-at-their-worst-level-for-10-years accessed on 14 August, 2015.

A similar situation, if not worse, is being experienced in the US, which has the 'unfortunate' title of incarcerating the highest number of offenders in the world with 2,217,000 presently imprisoned in US prisons.[58] This unusual rate has been described as not only 'inhumane but as an economic folly'.[59] This is because the U.S. government now spends the sum of $80 billion every year on its prisons and jails.[60] The origin of the adoption of the use of prisons as a popular response to crime could be traced to the social uproar of the 1960's and the increasing crime rate of the 1970's and 1980's.[61] This has led lawmakers and the public to support the use of incarceration as a valid response to crime on the belief that 'incarceration not only incapacitates past offenders, but also deters future ones'.[62]

This thesis states that despite there being a decline in crime rates since 1994, crime incidences were still being recorded in high numbers, with 9,795,658 reported incidences of crime (1,163,146 for violent crimes and 8,632,512 for property crimes) in 2013.[63] Therefore, it can be argued that prison has not been successful in deterring future offenders as the both the high numbers of persons incarcerated as well the high numbers of recorded criminal incidences seem to indicate a failure in the system. A comparison of the aforementioned statistics for the England & Wales and the US with those of Nigeria that were highlighted

[58] International Centre for Prison Studies (ICPS), Highest to Lowest – Prison Population Total (Entire World) <http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All&=Apply> accessed on 17 August, 2015. There are five times the numbers in prison presently than there were in 1970, with incarceration rates increasing from 176 prisoners per 100,000 U.S. residents in 1970 to 920 per 100,000 in 2012, or 5.23 times the 1970 rate. See C Bowie, 'Prisoners 1925-81, 2 tbl.1' (Bureau of Justice Statistics, 1982) <http://www.bjs.gov/content/pub/pdf/p2581.pdf>; JJ Stephan, 'The 1983 Jail Census, 1 tbl.1' (Bureau of Justice Statistics, 1984) <http://www.bjs.gov/content/pub/pdf/83jc.pdf>; LE Glaze and EJ Herberman, 'Correctional Populations in the United States, 2012 2 tbl.1' (Bureau of Justice Statistics, 2013) <http://www.bjs.gov/content/pub/pdf/cpus12.pdf> cited in O Roeder et al (n 37) 3.

[59] O Roeder et al (n 37) 1.

[60] See T Kyckelhahn, 'Justice Expenditure and Employment Extracts, 2011 – Preliminary' (Bureau of Justice Statistics, 2014) <available at http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5050>; O Roeder et al (n 37) 3. The average cost for the maintenance of a prisoner in the US in 2005 was $23,876. See also Adam Liptak (n 22).

[61] O Roeder et al (n 37) 3.

[62] SD Levitt (n 37) 177 - 178; O Roeder et al (n 37) 3. Furthermore, the availability of resources in the 1980's and 1990's has enabled the US to carry out this policy; see A Liptak (n 22).

[63] This is despite of the further decrease to 4.4% in violent crimes and 4.1% in property crimes in 2013 from the previous year; see FBI (n 34).

in the first chapter shows similarities in circumstances, with high incarceration rates in 2013 and 2014 despite the decline in the incidences of crime.[64]

Based on the just concluded discussions, one could argue for the eradication of the prison system and for it to be substituted with an alternative. Submissions have been made that this alternative should be RJ by abolitionists and RJ purists. This thesis will now proceed to consider the veracity of these claims.

6.2.2 The case for the Penal Abolitionists/RJ Purists

Penal abolitionists and RJ purists describe the prisons and RJ 'as opposites' which will forever be in conflict as,

> 'Incarceration is the institutional manifestation of the punitive impulse that restorative justice is designed and intended to challenge'.[65]

Penal abolitionists and RJ purists believe that the two concepts are irreconcilable as whilst the objective of the prison is to punish, that of RJ is to heal.[66] They further contend that the impact of imprisonment is so damaging on inmates that one pertinent condition for reforms is the abolition of prisons as its use contradicts the principles of RJ.[67] Therefore, the only criterion for determining whether any RJ initiative is successful is its 'effectiveness at steering offenders away from the inevitably damaging experience of prison'.[68]

Another apprehension of some RJ proponents is that if RJ continues to be integrated with the current practices of punitive philosophy, 'some restorative practices will be co-

[64] See Chapter 1, s 1.4.
[65] R Immarigeon, 'What is the Place of Punishment and Imprisonment in Restorative Justice?' in H Zehr and B Toews (eds) *Critical Issues in Restorative Justice* (Cullompton, Devon: Willan Publishing, 2004) 150.
[66] K Edgar and T Newell (n 4) 22.
[67] ibid.
[68] ibid.

opted whilst others will be marginalized and gradually withdrawn'.[69] They expressed the need to avoid the danger in the attempts to 'package imprisonment as RJ' as well as the 'hijacking of RJ initiatives', for the purpose of 're-legitimizing' imprisonment.[70] Furthermore, RJ proponents argues that this will make the option of imprisonment more attractive to the courts and thereby, increasing its use by judges and consequently, increase the problems of overcrowding in prisons.[71]

In subsequent sections, a similar critique, from both a theoretical and practical perspective, of the case put forward by this side of the debate will be conducted to determine if indeed RJ should substitute the prison system in its entirety.

6.2.2.1 Theoretical Critique of the Case for the Penal Abolitionists/RJ Purists

This thesis also shares some concerns with the above position and argues that the abolitionists and RJ purists have not submitted a strong case for the total abolition of the prison system. In reality, they have had little success in making a case for the use of alternatives, despite the previously discussed arguments.[72] Firstly, they are yet to provide a framework within their RJ model on how the guilt or otherwise of the alleged offender will be determined. Even Christie, in putting forward his victim-oriented court model, stated that

[69] MK Dhami et al (n 6); K Edgar and T Newell (n 4) 22; T Gavrielides, 'Restorative Justice – The perplexing concept: Conceptual fault-lines and power battles within the restorative justice movement' 8 Criminology & Criminal Justice 165-184; all cited in T Gavrielides 'Reconciling the Notions of Restorative Justice and Imprisonment' (n 6) 12.

[70] L Robert and T Peters, 'How Restorative Justice is able to Transcend the Prison Walls: A Discussion of the 'Restorative Detention' Project' in E Weitekamp and H Kerner (eds) *Restorative Justice in Context: International Practice and Directions* (Cullompton, Devon: Willan Publishing, 2003) 95, 116; R Immarigeon (n 65) 143.

[71] For example, if compliance with RJ agreements is a condition for community sentences, with imprisonment the sanction for failure to comply, this may result to RJ sending more offenders to prison. This occurrence is termed 'Net-widening'. See K Edgar and T Newell (n 4) 23. This is known as 'Net-widening'. See A Skelton and C Frank, 'How Does Restorative Justice Address Human Rights and Due Process Issues?' in H Zehr and B Toews (eds) *Critical Issues in Restorative Justice* (Cullompton, UK: Willan, 2004) 205; A Skelton and M Sekhonyane, 'Human Rights and Restorative Justice' in in G Johnstone and DW Van Ness (eds) *Handbook of Restorative Justice* (Devon: Willan Publishing, 2007) 584.

[72] G Johnstone, 'Restorative Justice and the Practice of Imprisonment' (2007) 140 Prison Service Journal 15-20; T Gavrielides 'Reconciling the Notions of Restorative Justice and Imprisonment' (n 6) 12.

this stage will proceed after the traditional courts have determined whether the crime has been committed and if so, who the guilty party is.[73] As already discussed in the third chapter, removing the traditional court from the justice process may be denying both the alleged victim and the alleged offender their rights to have their matters heard via a criminal trial.[74]

In addition, during our discussions of the history of RJ in the fourth chapter, this thesis was able to establish that RJ was not the only form of justice in history and that it existed in tandem with retributive alternatives.[75] This was also the case in the pre-colonial societies in Nigeria as discussed in the third chapter.[76] In both instances, the retributive options were exercised for the most serious of offences or for serial offenders.

6.2.2.2 Practical Critique of the Case for the Penal Abolitionists/RJ Purists

Scholars have made arguments that RJ schemes rarely prevent offenders from avoiding imprisonment. The situation in New Zealand has been highlighted as evidence that despite the popular use of RJ as an alternative to imprisonment, the latter is still being used.[77] Therefore, this thesis argues that the probability of having criminal justice systems where the imprisonment of offenders is no longer an option as punishment, particularly for serious offences, is quite low and not for quite some time. To argue now for a criminal justice system that is 'prison free' is no more than 'wishful thinking' and does not contribute to the debate on how policies and models can be introduced to improve the system currently in place.[78]

Furthermore, one of the arguments against the use of RJ in the criminal justice process is the lack of certainty and consistency in the sanctions agreed from one RJ meeting

[73] N Christie, 'Conflicts as Property' (1977) 17 British Journal of Criminology 1, 10.
[74] See Chapter 3, s 3.5.
[75] See Chapter 4, ss 4.4 and 4.4.1.
[76] See Chapter 2, ss 2.2.1; 2.3 and 2.3.1.
[77] R Immarigeon, *Reconciliation between Victims and Imprisoned Offenders: Program Models and Issues* (Akron, PA: Mennonite Central Committee U.S. Office of Crime and Justice, 1994) 144.
[78] T Gavrielides 'Reconciling the Notions of Restorative Justice and Imprisonment' (n 6) 12.

to another. In the present criminal court system, these two factors are maintained to some extent, particularly in jurisdictions that have sentencing guidelines. However, in RJ matters, there is a risk in disparities in the resolutions, including sanctions, agreed from one matter to the other. This is because the parties make the decisions on the types of sanctions imposed with the assistance of their respective communities instead by a judge who must follow sentencing guidelines as defined by the law. As argued earlier in this chapter and in chapter three, it is important that the principles of proportionality and disparity be maintained in RJ outcomes.[79]

This thesis therefore submits that Abolitionists/RJ purists must seriously consider the fact that RJ alone is not viable response for all offences and that there is need to consider how RJ could be used with other punishment alternatives, including the prisons.

6.3 Seeking a Balance: The Need for Change

From the above discussions, it appears that both sides to the debate seem entrenched in their respective positions and do not perceive a situation where both the prison system and RJ can operate together. In responding to their assertions, a good starting point will be to ask if each concept were permitted to co-exist or operate without the other, will it be able fully assist the criminal justice in providing an adequate response to crime?

Drawing back to the critiques for both sides of the debate, this thesis arrives at a conclusion that neither concept can solely assist the Nigerian prison system in addressing the challenges it is presently facing. Therefore, does a probable solution lie in both concepts working together in order to achieve the desired objectives of the Nigerian prison system?

[79] Chapter 3, s 3.5.

Furthermore, in light of our previous crossroads analogy, how can both concepts work together in light of the fact they are on different 'routes'?

The origins of the above debate could be traced to the shift in criminal justice from the 1960's with the move towards populist punitivism,[80] the demise of rehabilitation[81] and the rise and subsequent retreat of the *justice model*.[82] This has led to a lack of clarity on the role of the criminal justice system in present day societies.[83]

Garland states that 'criminal law and penal policy have been working without clear route maps on a terrain that is largely unknown'.[84] He therefore recommends that the method for addressing these issues will involve not only rewriting the textbooks on criminal justice but also 'our sense on how things work needs to be thoroughly revised'.[85]

This thesis agrees with Garland's position that there is need for change on how we respond to crime and the methods used in the treatment of offenders. One vital step towards this is a shift in the focus of the discussion from the above opposing camps to a third paradigm. This paradigm involves both concepts operating, no more as opposites, but in a symbiotic relationship in order to achieve what we believe is a shared objective. This objective is the provision of an adequate response to crime, acceptable to all stakeholders, which will limit its occurrences to the barest minimum.

[80] See AE Bottoms (n 23); DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 24 - 25, 47.
[81] DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 49.
[82] The Justice model was established on the principle of 'commensurate desert', which means that the punishment issued for the crime must be proportional to the harm caused by the crime. See A von Hirsch, *Doing Justice: Report of the Committee for the Study of Incarceration* (New York: Hill and Wang, 1976) 66; B Hudson, *Justice through Punishment* (Basingstoke: Macmillan Education, 1987) 37-40; DJ Cornwell, *Doing Justice Better: The Politics of Restorative Justice* (n 3) 25 - 26, 49.
[83] DJ Cornwell, *Doing Justice Better: The Politics of Restorative Justice* (n 3) 16.
[84] D Garland (n 20) 5.
[85] ibid.

If we relate this to our analogy of the crossroads, we need to shift our way of thinking that these two concepts or routes are heading towards opposite destinations but rather, in the same destination using parallel routes. The adoption of this approach does not mean a dismissal of the tension that exists between these seemingly opposing concepts. Instead, other RJ theorists call for an embrace of the said tension, stating that their incompatibility may 'generate a kind of creative tension that opens space for the transformation of those institutions'.[86] An example of this transformation is the creation of a lane that connects these parallel routes, thereby creating the means by which one can gain access to the benefits of each route.

An example of the application of this 'creative tension' is how RJ could be used to reduced recidivism rates. Discussions during a prison RJ process provides opportunities to ask the offenders questions on the surrounding circumstances that led them to commit the crime which may not be asked or answered during the adversarial trial process. Further discussions on what offenders need to address these issues, for example, educational, vocational training or attendance at a drug rehabilitation centre, could also form part of the conversations during such said process. The findings and agreements reached could be transferred to the relevant prison and criminal justice authorities to structure rehabilitation programmes that are particularly suited to each respective offender. The arguable advantage of such scheme is that the probability of offenders not re-offending is higher as they will participate in rehabilitation programmes formulated with their input and therefore, specifically structured to their unique situation and circumstances.

The question now is how can this transformation be achieved? From our previous discussions, it is agreed that it would be a challenge, to integrate the philosophical principles

[86] C Boyes-Wilson 'What are the Implications of the Growing State Involvement in Restorative Justice?' (n 2) 216.

of RJ, for example 'inclusiveness, responsibility, reparation and restoration' within the prison system.[87] This is because the prison system usually operates under the principles of 'retribution, deterrence, incapacitation, exemplary punishment, social exclusion and social control'.[88] Examples of how these conflicting principles may clash under the present day prison-based structure, which may limit the application of RJ in prisons, include the use of coercion to maintain order by the prison authorities rather than co-operating with the prison inmates.[89] In addition, the physical separation of prison inmates from their victims may not be able to facilitate the same degree of dialogue with one conducted outside the prison walls.[90] Furthermore, the prison system operates under a controlled regime, which limits opportunities to the offender to make amends to the victim.[91] Finally, the deprivation of the liberty of the offender as punishment limits the conditions via which the offender and victim can meet, for example, the venue of such meetings in most cases will likely be the prison where the inmate is incarcerated.[92]

Despite the above challenges, this thesis contends that the required transformation can still be achieved. The next section examines the various steps that could lead to the required change in the Nigerian prison system.

[87] DJ Cornwell, *Doing Justice Better: The Politics of Restorative Justice* (n 3) 16.
[88] ibid. This conclusion was also reached following a two-year evaluation of a RJ programme called 'A Bridge Towards New Horizons in Turin, Italy'; see also OV Guidoni, 'The Ambivalences of Restorative Justice: Some Reflections on an Italian Prison Project' (2003) 6 Contemporary Justice Review 55 - 68, 57.
[89] K Edgar and T Newell (n 4) 24.
[90] ibid.
[91] ibid.
[92] ibid.

6.4 Steps to Preparing a Foundation for the Integration of RJ into the Nigerian Prison System

Despite the perceived potential of having a prison system in Nigeria that possess an efficient RJ scheme as part of prisoners' rehabilitation, any attempts to implement such changes will still be inadequate if there are no changes in the culture within the Nigerian prison establishment. Prisons in most jurisdictions are built like fortresses for securing the incarcerated inmates as well as excluding the public.[93] This approach does not only deprive the liberty of the inmates but also, limits the activities prisoners can perform as well as the contact they have with the outside world. Furthermore, there is less focus on the provision of proper rehabilitation, education, training and salaried employment for prisoners, with more precedence given to ensuring that they are 'contained' throughout the duration of their sentence.[94] This environment has a damaging impact on the inmates, the consequences of which are prisoners having 'bitter, resentful and negative attitudes towards the prison authorities'.[95] This situation will not be conducive for the integration of RJ into the prison system as prisoners will be more concerned with their personal welfare than in making amends with their victims and the community as well as addressing the issues that led to them to commit the crime.

If the described circumstances are permitted to remain as they are, there is a strong probability that if the offender is released back into the community after completing their sentence, they will return to a life a crime. This is due to a lack of preparation in reintegrating them into the community due to years of isolation as well as poor enhancement of

[93] N Johnstone, *The Human Cage: A Brief History of Prison Architecture* (New York: Walker, 1973) 26 - 27; M Fitzgerald and J Sim, *British Prisons* (2nd edn, Oxford: Basil Blackwell, 1982) 160 - 161.
[94] DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 116.
[95] ibid.

employability skills.[96] This has a negative impact on all parties concerned as their recidivist activities will lead to new victims and the re-run of the same ugly cycle. Instead, this thesis advocates that the Nigerian prison system should adopt a forward-facing approach towards the rehabilitation of its prisoners, with a shift from containment of inmates to preparing them for life after their sentence.[97] This task could be performed with the assistance of the community. Participating in a RJ programme could form part of an offender's rehabilitation as it involves all parties concerned including the community.

With these goals in mind, this thesis shall now proceed to list out the various steps that need to be considered to change the structure of the Nigerian prison system and the approach towards the reformation and treatment of offenders:

6.4.1 Adopting a New General Attitude towards Crime and the Role of the Prisons in the Response to Crime

The first step towards the integration of RJ into the Nigerian Prison system is a shift in our attitudes on how the Nigerian criminal justice should respond to crime and, specifically for this chapter, changing the general perception on the purpose of our prisons.[98] The prisons should no longer be viewed solely for the incarceration of offenders, but also providing appropriate humane rehabilitative treatment while they serve their punishment. In addition, the prison system should provide opportunities for offenders to offer reparation to their victims where possible and plan for their re-integration into the society upon completion of their sentences. Apart from the reducing the risk of recidivism, it is hoped

[96] ibid, 119.
[97] ibid, 118-119. Italy and Sweden are examples of countries that have placed more emphasis on the rehabilitation of offenders rather than on securing their containment. See Penitentiary Law (no. 354 of 26 July, 1975) art 1 and the Swedish Act, Treatment in Correctional Institutions 1974 respectively, both cited in M Wright, *Making Good* (Hampshire: Waterside Press, 2008) 120 - 121.
[98] The incarceration of offenders has become 'an easy response to crime', despite of the inhumane conditions suffered by prisoners as highlighted in Chapter 1, s 1.3.2. See A Liptak (n 22).

that the integration of RJ into Nigerian prisons will enable the reconciliation between victims and offenders as well as the community. This will require a change in both the *internal attitudes* of professionals involved in the criminal justice system, particularly those involved in the management of the prison and the *external attitudes* of the public to the prison system.

6.4.2 Change in the Penology

We mentioned earlier that the penal system of other jurisdictions in Western societies have been plagued by 'penal instrumentalism, ideological dogmatism and the influences of populist punitivism fostered by media attitudes towards crime and offenders'.[99] These factors had led to these countries formulating policies, as their response, which focused primarily on retribution and deterrence via the mass incarceration of offenders in their attempt to be 'tough on crime'.[100] Earlier in this chapter, we highlighted the need for change because of the exorbitant costs, both financially and in human resources; the unsustainability in maintaining these costs for the long-term future; and the lack of justification in the expenditure with the high number of crime and recidivism rates.

The above mentioned issues also signify that there is a continued debate in Western societies on several aspects of penal policy. This includes a clear specification of the role of the prison in deterring and reducing crime as well as a detailed plan on how offenders should be treated and rehabilitated whilst in prison. These continued debates, which witnesses engagements from politicians, professionals, academics and the public, have arguably contributed to some of the recent reforms proposed in several Western countries.[101] For

[99] DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 55.
[100] ibid.
[101] HC Deb 27 January, 2016, vol 605, cols 333–382; HL Deb 21 January, 2016, vol 768, cols 907 – 943; E Muffitt, 'The Old Debate: Punish Prisoners, or Rehabilitate Them?' *The Telegraph* (London: 18 December, 2013)

example, we referred earlier in this chapter to the James Bulger case in which two young children were charged with the abduction and murder of another child. More than 20 years later, the manner via which the case was handled has been called into question, particularly after the European Court of Human Rights (ECHR) ruled that their trial was unfair.[102] Child protection campaigners like the National Association for Youth Justice (NAYJ) argue that criminalising children is 'counterproductive.....it does little to prevent reoffending, makes it harder for them to secure employment in the future and exposes them to more serious offenders increasing the risk of recidivism'.[103] They have called for the minimum age of criminal responsibility to be increased from 10 and 16 in line with recommendations by the United Nations Committee on the Rights of the Child (UNCRC).[104] In addition, the NAYJ have also advocated for the establishment of a welfare approach to children facing criminal charges under 16 years.[105]

The continued debate on penal reforms in the United Kingdom turned a corner, with the former Prime Minister David Cameron announcing on February 2016 on the initiation of several reforms to be conducted within the prison system.[106] In his reform speech,

<http://www.telegraph.co.uk/news/uknews/crime/10514678/The-old-debate-punish-prisoners-or-rehabilitate-them.html> accessed on 3 August, 2016.

[102] The ECHR ruled that the increased tariff to their sentence to 15 years and the role by the Home Secretary in this decision was unjust. Although they did not set aside the conviction, they criticised the manner via which the trial was conducted, for example, the modifications to the court room including the raised dock; A Hill, 'James Bulger Killing: 20 Years On' *The Guardian* (London, 11 February, 2013) <https://www.theguardian.com/uk/2013/feb/11/james-bulger-20-years-on> accessed on 3 August, 2016; M Tran, 'James Bulger Killers did not get a Fair Trial' *The Guardian* (16 December, 1999) <https://www.theguardian.com/uk/1999/dec/16/bulger.marktran> accessed on 3 August, 2016; BBC, 'Bulger Killer's Trial Ruled Unfair' BBC (London, 16 December, 1999) <http://news.bbc.co.uk/1/hi/uk/567440.stm> accessed on 3 August, 2016.

[103] R Williams, 'Were James Bulger's Killers Too Young to Stand Trial?' The Guardian (London, 5 February, 2013) <https://www.theguardian.com/society/2013/feb/05/bulger-killers-young-stand-trial> accessed 3 August, 2016.

[104] ibid.

[105] ibid.

[106] Ministry of Justice, 'Prison Reform: Prime Minister's Speech' (Ministry of Justice, 8th February, 2016) <https://www.gov.uk/government/speeches/prison-reform-prime-ministers-speech> accessed 30 July, 2016; The Guardian Editorial, 'The Guardian View on David Cameron's Prisons Speech: It won't work without Sentencing Reform' *The Guardian* (London, 8 February, 2016) <https://www.theguardian.com/commentisfree/2016/feb/08/the-guardian-view-on-david-camerons-prisons-

Cameron stated that the current system does not work and that the system needs to treat offenders as 'assets to be harnessed' and not as 'liabilities to be managed'.[107] Some of the reforms announced include devolving control to governors, the building of six new model 'reform prisons', more day release and tagging as well as new ideas on prison education.[108] The speech on prison reforms was the first by a Prime Minister in over 20 years and despite the various critiques from the government opposition and other sectors, it was generally regarded as a step in the right direction.[109]

In Nigeria, the exact opposite seems to be case. In fact, when compared to its Western counterparts, it could be argued there is barely any campaign from politicians and the media for stricter use of the prison system in order to be 'tough on crime'.[110] However, at the same time, there appears to be little discussion in the public arena on the reformation of the prison system, particularly from the government. Most calls for reforms comes from ex-convicts, those who have family members in prisons, a few professionals associated with the prisons service and charitable organisations like PRAWA as discussed in the first chapter.[111]

This thesis wishes to submit that a probable reason for the above may be that the subject matter of prison reforms and the treatment, rehabilitation and re-integration of

speech-it-wont-work-without-sentencing-reform> accessed 30 July, 2016; British Broadcasting Corporation (BBC), 'Prisons 'Overhaul' announced by David Cameron' BBC (London, 8 February, 2016) <http://www.bbc.co.uk/news/uk-35518477> accessed 30 July, 2016.

[107] ibid.

[108] The Guardian Editorial, 'The Guardian View on David Cameron's Prisons Speech: It won't work without Sentencing Reform' (n 106).

[109] Some of the critiques include that the Prime Minister failed to address the issue of overcrowding in prisons and lack of availability for work, quality training and education for inmates during their sentence. See The Guardian Editorial, 'The Guardian View on David Cameron's Prisons Speech: It won't work without Sentencing Reform' (n 106); British Broadcasting Corporation (BBC), 'Prisons "Overhaul" announced by David Cameron' (n 106).

[110] A probable reason for this may be because it is hard to imagine how the Nigerian prison system could be more 'tougher' on criminals in light of the current inhumane conditions of Nigerian prisons as discussed in chapter one; see Chapter 1, s 1.3.2.

[111] See Chapter 1, s 1.3.

offenders is not of importance to the social structure of the nation. This may be due to the years spent under both colonial and military rule where there was little regard for the rule of law and the respect of fundamental human rights. These include the rights of law-abiding citizens and not just those accused of violating the law. During those eras, the prisons were used as instruments of control and oppression against its citizens for most of Nigeria's existence.[112] As a result, this thesis contends that the years of undemocratic rule has created the perception in the national psyche that prisons are not places of rehabilitation and reform. Instead, they are only holding cells to store away criminal vagrants who violated the laws of the state and for protecting civilised members of society.[113] Therefore, little or no regards was given towards their development and reformation in order to ensure that their living conditions meet international standards. Yongo, whilst commenting on the lack of development in the prison system under Nigerian political leaders, provides an example of this attitude. He highlights the Obasanjo military administration which considered these inmates as the 'dregs of society' and therefore not worth any consideration.[114]

These factors may account for the insensitive and apathetic attitude towards the plight of prisoners and the conditions under which they are kept. Evidence of this is the lack of urgency in updating the laws regulating the administration of prisons with no significant amendment to the first Prison Act of 1972 in subsequent versions.[115] This thesis acknowledges that it will take quite some time to reverse the damage caused by the years of colonial and military rule on the national social structure. This thesis also concedes that it may be impossible to revert to situation that existed exactly before in Nigeria before colonial

[112] See Chapter 2, ss 2.4.2, 2.4.3 and 2.5.1.
[113] DL Howard, *The English Prisons: Their Past and their Future* (London: Butler and Tarmer Ltd, 1960) cited in E Obioha, 'Challenges and Reforms in the Nigerian Prisons System' (2011) 27(2) Journal of Social Sciences 95 – 109, 96.
[114] PP Yongo, 'Prisons await Obasanjo's Attention' *The Punch* (Nigeria, 21 November, 2000) 33, cited in E Obioha (n 113) 96 – 97.
[115] See Chapter 1, s 1.3.2 and Chapter 2, s 2.5.1.

rule. However, this thesis advocates that the current situation in the Nigerian penal system and the manner via which the country responds to crime could be improved considerably with a change in attitude from all stakeholders. Therefore, the first step required in changing the attitude in the Nigerian penal system is a change in the existing penology, which forms the basis of Nigeria's criminal justice policies and practices.[116]

Penology is proposed to have three main strands: the construction of penal codes; the sentencing of offenders; and the administration of penal sanctions.[117] This tends to imply that there is a process by which criminal offences are identified as well as the stipulation of the appropriate punishment when they occur and how they will be imposed against the offender.[118] The Nigerian criminal justice system currently views crime as a violation against the law and the State and the system is primarily concerned with establishing 'who offended, how blameworthy the offence was and therefore, the extent to which punishment is necessary to mark its seriousness and discourage a recurrence.'[119] As a result, focus is more on offenders and ensuring they get their 'just deserts' which must be proportional to the offence committed, rather than on the concerns of the actual victim and addressing the harms he/she suffered.[120] This retributive approach to criminal punishment is regarded as the 'classical tradition of penology' and it results in prisons being used as instrument of

[116] DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 56.
[117] D Walsh and A Poole (eds), *A Dictionary of Criminology* (London: Routledge & Kegan Paul, 1983) 158.
[118] DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 56.
[119] ibid, 56 - 57.
[120] CWK Mundle, 'Punishment and Desert' in HB Acton (ed), *The Philosophy of Punishment: A Collection of Papers* (London: Macmillan, 1969) 65-82; AGN Flew, 'The Justification of Punishment' (1954) 29(3) Philosophy 291-307; HB Acton (ed), *The Philosophy of Punishment: A Collection of Papers* (London: Macmillan, 1969) 81-104; HLA Hart, 'Prolegomenon to the Principles' in HLA Hart (ed), *Punishment and Responsibility* (Oxford: Oxford university Press, 1969); A von Hirsch, *Doing Justice: Report of the Committee for the Study of Incarceration* (New York: Hill and Wang, 1976); B Hudson, *Justice Through Punishment* (Basingstoke: Macmillan Education, 1987) all cited in DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 57.

punishment (penal instrumentalism).[121] This approach was transplanted with other aspects of the British criminal justice systems because of colonial rule.

This thesis argues that a change in the penology of the Nigerian criminal justice system is required, shifting the purpose of the penal sanctions imposed against offenders, from a retributive/deterrent approach to that of restorative/rehabilitative. The latter will involve a change in our perception of crime, with it also being viewed as a violation of people and relationships.[122] In addition, these violations will create obligations on the part of the offender rather than only guilt.[123] Finally, the approach will encourage the involvement of victims, offenders and the community in the justice process, with the focus centred on the victim needs and creating opportunities for the offender to repair the harm caused.[124]

Therefore, this thesis recommends that the search for good practice should not be limited to Britain and United States alone but should be extended to other countries whose penology is similar to the indigenous pre-colonial judicial systems that were in operation before colonial rule. A good example of such is Norway whose response to crime is primarily on rehabilitation rather than on punishment/retribution. This ideology was greatly displayed in the *Silje Redergard* case, the facts of which closely resembles the James Bulger case and occurred just over a year of each other.[125] The two different responses to similar

[121] AE Bottoms, 'Reflections on the Renaissance of Dangerousness' (1977) Vol XVI, no. 2 Howard Journal of Criminal Justice 74; JR Blad, 'The Seductiveness of Punishment and the Case for Restorative Justice' (n 27) 139-140; H Zehr, *The Little Book of Restorative Justice* (Intercourse PA: Good Books, 2002) 21; all cited in DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 57.
[122] H Zehr, *The Little Book of Restorative Justice* (n 121) 21; DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 58 - 59.
[123] ibid.
[124] ibid.
[125] In that case, two six-year old boys physically assaulted and murdered a five-year old girl, leaving her to die in the snow. Unlike the Bulger case, the killers were never tried and their identities were never published in the Norwegian national dailies. Instead, the government authorities, including psychiatrists and social workers, assisted the offenders, their families and the families of the victim as well their community overcome the tragedy. See E James and I MacDougall, 'The Norway town that forgave and forgot its Child Killers' *The Guardian*

crimes, which were under similar circumstances and facts, clearly show a contrast by the respective countries in their responses to crime. More examples of the contrast is evident their respective approaches to the purpose and management of the prisons as well the treatment of prisoners whilst in custody.

Firstly, Norway believes that punishment via curtailment of the liberty of offenders is sufficient and anything beyond this will be excessive.[126] Secondly, the prisons operate under a philosophy of 'normalcy' where prisoners are kept under living conditions that reflect normal life outside the prison walls.[127] They believe that in order for offenders to reintegrate successfully into society and to reduce the probability of recidivism, offenders need to be treated humanely.[128] This involves having normal interaction with not only their fellow inmates but also with prison guards and prison officials. In addition, during their prison terms, opportunities will be made available to inmates to acquire skills via education and/or vocational training that will assist them in living crime free lives.[129] Significantly, Norwegian prisons also use RJ as part of their rehabilitation programmes to assist with offenders' reintegration.[130] Finally, there are neither capital punishments nor life sentences

(London, 20 March, 2010) <https://www.theguardian.com/theguardian/2010/mar/20/norway-town-forgave-child-killers> accessed on 3 August, 2016.

[126] E James, 'The Norwegian Prison where inmates are treated like people' *The Guardian* (London, 25 February, 2013) <https://www.theguardian.com/society/2013/feb/25/norwegian-prison-inmates-treated-like-people> accessed 3 August, 2016; J Benko, 'The Radical Humaneness of Norway's Hilden Prison' *The New York Times Magazine* (New York, 26 March, 2015) <http://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html?_r=1> accessed on 3 August, 2016; BBC, 'Anders Breivik: Just how cushy are Norwegian Prisons?' *BBC* (16 March, 2016) <http://www.bbc.co.uk/news/magazine-35813470> accessed on 3 August, 2016; C Sterbenz, 'Why Norway's Prison System is so Successful' *Business Insider UK* (11 December, 2014) <http://uk.businessinsider.com/why-norways-prison-system-is-so-successful-2014-12> accessed 3 August, 2016.

[127] ibid.

[128] ibid.

[129] E James (n 126)); J Benko (n 126); BBC, 'Anders Breivik: Just how cushy are Norwegian Prisons?' (n 126); C Sterbenz (n 126).

[130] C Sterbenz (n 126).

with the maximum numbers of years an inmate could be imprisoned in a single term at 21 years.[131]

This thesis acknowledges that there is opposition from within and outside Norway to this radical form of penology. This is because they are of the opinion that the idea of punishment is lost with offenders living in luxurious accommodation, far better than those of some law-abiding citizens do.[132] This thesis is of the opinion that even if one opposes the approach adopted by the Norwegian authorities, it is hard to make a case against the low recidivism and crimes rates in the country.[133] Others may argue that this type of system can only work in societies that have a small population like Norway (just over 5 million) with only a prison population of 3, 679.[134] Therefore, more resources could be made available to cater for the prisoners' needs, especially when the country has one of the most thriving economies in the world.[135] In response, this thesis recommends that in a country like Nigeria, which has a far greater prison population than Norway with fewer resources, responsibilities of operating the prison system should not to be left to the central government alone. As

[131] There could be further increments of 5 years each if the system believes the offender has not been rehabilitated; see E James (n 126); J Benko (n 126); BBC, 'Anders Breivik: Just how cushy are Norwegian Prisons?' (n 126); C Sterbenz (n 126).

[132] E James (n 126); J Benko (n 126); BBC, 'Anders Breivik: Just how cushy are Norwegian Prisons?' (n 126); C Sterbenz (n 126).

[133] Norway has one of the lowest recidivism rates in the world at 20% as well as a relatively low crime rate when compared with the United States, Western European countries and even Nigeria. J Benko (n 126); BBC, 'Anders Breivik: Just how cushy are Norwegian Prisons?' (n 126); C Sterbenz (n 126); Overseas Security Advisory Council (OSAC), 'Norway 2016 Crime & Safety Report' (United States Department of State Bureau of Diplomatic Security, 2016) <https://www.osac.gov/pages/ContentReportDetails.aspx?cid=19044> accessed 3 August, 2016; 'United Kingdom 2016 Crime & Safety Report' (United States Department of State Bureau of Diplomatic Security, 2016) <https://www.osac.gov/pages/ContentReportDetails.aspx?cid=19109> accessed August, 2016; 'Nigeria 2016 Crime & Safety Report: Lagos' (United States Department of State Bureau of Diplomatic Security, 2016) <https://www.osac.gov/pages/ContentReportDetails.aspx?cid=19502> accessed August, 2016; 'Nigeria 2016 Crime & Safety Report: Abuja' (United States Department of State Bureau of Diplomatic Security, 2016) <https://www.osac.gov/pages/ContentReportDetails.aspx?cid=19500> accessed August, 2016.

[134] 26.3% of the prison population also includes pre-trial detainees/remand prisoners; see Institute for Criminal Policy Research, 'World Prison Brief – Norway' (2016) <http://www.prisonstudies.org/country/norway> accessed on 4 August, 2016.

[135] The World Bank, 'GDP per Capita (current U$)' (2016) <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD> accessed on 4 August, 2016

discussed in chapter three, the federal government needs to share and delegate responsibilities to the state governments as well as the local communities.[136] Each of the prisons can develop schemes to make them self-sustaining, for example, invest in mechanized farming to produce agricultural products for prisoners and even their families. In addition, any profit made could be used to pay prisoner allowances/salaries like their Norwegian counterparts. This will assist in easing the burden at the centre and at the same time, in the establishment of efficient and humane prison centres.[137] Therefore, this thesis submits that the success achieved by the Norwegian penal system merits at least a strong consideration as there quite a number of insights that could be learned and incorporated in Nigeria.

It must be re-iterated that this thesis is not requesting a shift from one extreme to the other. Instead, this thesis is seeking for more a balanced approach which will require professionals responsible for administering the Nigerian penal system to consider all these options when determining the appropriate punishment (custodial or non-custodial).[138] Even where a retributive sanction is to be imposed, there should be, where possible, a restorative element, which takes into consideration the needs of the victim.[139] This could assist the offender with his/her integration into the community upon completion of their sentence.[140] For example, an offender serving a life sentence for vehicle manslaughter whilst driving under the influence may be given the opportunity to make amends to the family of the victim when they acknowledge responsibility for their actions. Reparation could be in the form of meeting the victim's family to apologise or writing a letter to them. The offender could also

[136] See Chapter 3, s 3.3.3.
[137] E James, 'The Norwegian Prison where inmates are treated like people' The Guardian (London, 25 February, 2013) <https://www.theguardian.com/society/2013/feb/25/norwegian-prison-inmates-treated-like-people> accessed 3 August, 2016.
[138] DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 59.
[139] ibid.
[140] ibid.

offer to talk to young persons to warn them of the dangers of driving under the influence and the life changing consequences of such actions. However, these acts will in no way reduce their sentence but it could contribute to any application for parole after they have served the minimum number of years.[141]

Furthermore, considerations could be made for the type of sanctions to be imposed under this proposed new regime as they should cater to the offender's unique pathology and the harm caused to a specific victim. This is because the current generic, 'one size fits all' rehabilitative treatment has received criticisms from various proponents of its ineffectiveness.[142] This will require the Nigerian criminal justice system 'removing the blindfold from Lady Justice' at the sentencing stage (after either the defendant has pleaded guilty or his/her guilt has been established) in order to determine the appropriate sanction to be issues against the defendant.[143]

Finally, this thesis wishes to put forward another new approach in not only assisting offenders with their re-integration into their communities when they complete their sentences but also, reduce recidivism rates. This would involve the Nigerian justice system considering the option of expunging the criminal records of ex-convicts. This could vary from a total pardon or to a restoration of some civil rights. In order to be eligible for this and depending on the nature of the offence, the offender will be required to comply with certain requirements. This will include not re-offending for a period and participating in certain

[141] ibid, 62 – 63.
[142] B Hudson, *Justice Through Punishment* (Basingstoke: Macmillan Education, 1987) 28-36; C Friendship et al, *An Evaluation of Cognitive Behavioural Treatment for Prisoners: Home Office Research Finding No 161* (London: Home Office Communications Development Unit, 2002); C Friendship et al, 'Measuring the Penal Impact of Accredited Offending Behaviour Programmes' (2003) 8 Journal of Legal and Criminal Psychology 115-127; G Rose, *The Criminal Histories of Serious Traffic Offenders: Home Office Research Study No. 206* (London: Home Office Communications Unit, October 2003); Civitas, *Fighting Crime: Are Public Policies Working?* (Online Briefing – November) 5-6 <www.civitas.org.uk/pdf/crimeBreiefingNov15/pdf> all cited in DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 61.
[143] H Zehr and B Toews, 'Part II – Stakeholder Issues' in H Zehr and B Toews (eds) *Critical Issues in Restorative Justice* (Devon: Willan Publishing, 2004) 61.

rehabilitative schemes. Once the ex-convict has complied with all stipulated requirements, they could proceed to submit an application for Clemency/Pardon to the appropriate authority.

This thesis contends that this provides another incentive for offenders not to reoffend. One of the challenges that ex-convicts face when they are released from prison is the stigma associated with having served a prison sentence. This affects various aspects of their lives after prison, for example, employment, education and even personal relationships.[144] If an ex-prisoner is informed that there is an opportunity for them to expunge their criminal records which will lead to a restoration of some or all of their civil rights, it can act as an extra motivation from them to not re-offend.

This proposed scheme not only has direct benefits for the ex-offender but also for the criminal justice system and the whole society. For the period in which the ex-offender will be required not to commit any further offences, there is a probability that the justice system will not need to be concerned about that individual re-offending. This will assist to reduce recidivism rates and the costs associated with it. Furthermore, the scheme may also ensure the attendance of the ex-offender at certain rehabilitation programmes that will aid them in acquiring the tools necessary to live crime free lives. This thesis wishes to suggest that the Nigerian criminal justice consider the Clemency/Pardon schemes in Virginia and Florida, US as a template for developing its own version.[145]

[144] See Chapter 1, s 1.4.

[145] Secretary of the Commonwealth of Virginia, 'Pardons' <https://commonwealth.virginia.gov/judicial-system/pardons/> accessed on 1 August, 2016; Florida Commission on Offender Review, 'Clemency: Overview' (2014) <https://www.fcor.state.fl.us/clemencyOverview.shtml> accessed on 1 August, 2016.

6.4.3 Change in the Legal System

As mentioned earlier, this thesis acknowledges that there will be challenges in implementing the above mentioned changes as the much needed structure to support this proposed regime are currently not in place as discussed in the first chapter.[146] As mentioned earlier, RJ opponents contend that RJ is incompatible with the present concepts of criminal jurisprudence and that any attempt to merge the two is 'unrealistic, unnecessarily, intrusive and over-inclusive'. [147] This thesis concedes that making changes to the traditional institutions and practices that have been in place for over a century would be complicated. In addition, there will be considerable costs (financial, human resources and time) without a guarantee that such a change will produce the desire results.[148] An additional obstacle that has been highlighted is that such an introduction may affect the independence of the judiciary, which is viewed as one of its greatest strengths.[149]

In response, this thesis understands that some opposition may arise because of a 'conservatism desire by some sectors of society to maintain the status quo and a resistance to change rather than sound reasoning'.[150] However, the previous discussions on the existing high crime rates, despite the increased numbers of persons incarcerated as well as the excessive costs of the current system, puts forward at the very least, a case for an amendment of the current system.[151] A failure to instigate such reforms effectively amounts to denying the country an opportunity to attempt alternative methods, specifically RJ, with research

[146] See Chapter 1, s 1.3.2.
[147] DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 66.
[148] DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 66 - 67.
[149] R Dworkin, *A Matter of Principle* (Oxford: Oxford University Press, 1986) 10; B Hudson, *Justice Through Punishment* (Basingstoke: Macmillan Education, 1987) 62-63; M Cavadino and J Dignan, *The Penal System: An Introduction* (2nd edn, London: Sage Publications, 1997) 86-88; N McKittrick and S Rex, 'Sentence Management: A New Role for the Judiciary?' in M Tonry (ed) *Confronting Crime: Crime Control Policies Under New Labour* (n 23) 150 – 152.
[150] DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 66 – 67; see Chapter 2, s 2.5.1.
[151] See Chapter 1, s 1.4.

proving the concept to have measurable success, particularly in reducing recidivism, which was discussed in the previous chapter.[152]

Therefore, a number of modifications will be required in the Nigeria criminal legal system to enable the new proposed regime to operate successfully. This thesis proposes that Nigerians politicians must play the lead in this change and they can achieve this by instigating discussions on these issues in the public arena and proposing amendments to current legislation.[153]

An example of such crucial amendment is to the Nigerian Prisons Act so that it clearly stipulates the purpose of the prison and who is a prisoner. An example of legislation which specifies who a prisoner is can be found in the English Prison Act which states that, 'A prisoner, whether sentenced to imprisonment or committed to prison on remand or pending trial or otherwise, may be lawfully confined in any prison'.[154] Furthermore, legislation will also be required to classify those who are remanded or awaiting trial are those who have been charged with a crime and have entered a 'not guilty' plea. This will prevent the police or any other law enforcement agencies from incarcerating persons indefinitely whilst they are conducting their investigations.[155] This legislation must apply to all states within the federation.

In furtherance to the above, further amendments will be required to other general criminal legislation, particularly those in relation to the remand of suspects pending investigation, with some of the issues highlighted in chapter one.[156] This thesis also

[152] See Chapter 5, s 5.2 and 5.3; FWM McElrea, 'Restorative Justice Issues and Trends: Where is Restorative Justice Going?' in (Proceedings of the 4th Annual Conference of the International Corrections and Prisons Association (ICPA), Ottawa: ICPA) 12.
[153] This will work well with the already proposed Prison Bill (2008) and National Centre for Prisoners Reformation and Rehabilitation (Establishment, etc.) Bill (2008) which will be discussed subsequently.
[154] Prison Act 1952, c 52, s 12.
[155] See Chapter 1, s 1.3.1.
[156] See Chapter, s 1.3.2.

acknowledges, in the second chapter, the attempts by the government at the Federal level as well as those by the government of Lagos State to upgrade their respective criminal legislation to address some of these issues.[157] However, the thesis agrees with the opinions of some Nigerian legal jurists that the sections in these acts that address detention time limits of suspects end up contravening one of the primary objectives of these legislations, which is the speedy dispensation of justice.[158] Instead, an argument could be submitted that these provisions reinforce the very same 'holding charge' principle that it was created to curb.[159] This is because the provisions confers statutory jurisdiction on the magistrate courts to make decisions on matters that are not within their judicial remit. Furthermore, it contravenes the suspect's right to the presumption of innocence until proven guilty as well as their right to a fair trial within a reasonable time as provided in the Constitution.[160] This thesis therefore agrees with the position that only defendants who have been charged and have entered a 'not guilty' plea, can only be remanded if they are denied bailed by a competent court or are yet to meet the requirements of their bail if given.

Finally, legislation should also be enacted in all states adopting the use of non-custodial sentences were suitable in all courts in the federation. Clear and detailed sentencing guidelines should also be formulated to guide judges in determining the appropriate sanction, taking into consideration the nature of the offence and mitigating

[157] See Chapter 2, s 2.2.2; Administration of Criminal Justice Act 2015, ss 293 – 299, Administration of Criminal Justice Law, 2011, s 264.
[158] A Bamgboye, 'ACJA 2015: Creating a Timeframe for Holding Charge' The Daily Trust (Nigeria, 11 January, 2016) <http://www.dailytrust.com.ng/news/law/acja-2015-creating-timeframe-for-holding-charge/128387.html> accessed 22 August, 2016.
[159] ibid
[160] The Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended), ss 35(4) and 36(5). These legal jurists contend that the contravention with the Constitution should render the provisions in the legislations null and void; see A Bamgboye, 'ACJA 2015: Creating a Timeframe for Holding Charge' The Daily Trust (Nigeria, 11 January, 2016) <http://www.dailytrust.com.ng/news/law/acja-2015-creating-timeframe-for-holding-charge/128387.html> accessed 22 August, 2016.

factors. Reference can be made to the sentencing guidelines issued by the Sentencing Council of England and Wales.[161]

This thesis however acknowledges these changes will not be immediate but once incorporated into national legislation, they will have a gradual impact, as was the case in in Canada, New Zealand and Australia[162]and endorsed by international organisations.[163] A good example of recent legislation, which can provide a template for Nigerian legislators, is the recently enacted Schedule 16 (Part 2) of the Crime and Courts Act, 2013. This legislation provides for RJ meetings at the pre-sentence stage. Amendments could be made to extend the use of RJ during post sentence.

The implementation of these recommendations could assist in reducing overcrowding and make more resources (both financial and human) available to prison management to enable them establish the previously discussed changes in Nigerian prisons. These changes will assist in creating an enabling environment for the proposed new penology to operate in Nigerian prisons.

6.4.4 Reformation of the Nigerian Prisons Act

It was mentioned earlier that urgent amendments are required in the Prison Act as a necessary condition for implementing changes in the Nigerian penal system. This thesis contends that the Act is outdated and inefficient and not in line with internationally accepted standards, particularly the UN Standard Minimum Rules for the Treatment of Prisoners.[164]

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[161] Sentencing Council of England and Wales, 'Publications' <https://www.sentencingcouncil.org.uk/publications/?type=publications&s=&cat=definitive-guideline&topic=&year=> accessed on 9 September, 2015.

[162] DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 67.

[163] For example, the Economic and Social Council of the United Nations adopted the recommendations of the Commission on Crime prevention and Criminal Justice in July 2002, see JE Eaton and FWM McElrea, 'Restorative Justice – An Explanation' in *Sentencing the New Dimensions* (New Zealand Law Society Seminar, March 2003) 12.

[164] U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

For example, the UN Standard Minimum Rules suggests that there should be no more than one person in a cell and at most, two persons for exceptional cases of temporary crowding.[165] It further suggests that all accommodation in these prisons should meet specific requirements in order to maintain prisoners' good health and comfort.[166] This is not the case in Nigeria as highlighted by Amnesty International in their report in 2008. It states that that due to overcrowding, inmates were not only kept in prisons that could not meet prisoner capacity but also, were kept under inhumane conditions due to lack of sufficient beds, water and food for inmates.[167]

Furthermore, the Act in its current state permits an 'ad-hoc' operation and does not provide a system of accountability, particularly where the human rights of the prisoners are violated. It also does not provide a system of recourse to ensure these rights are protected under the law and by the courts. In addition, there needs to be a clear and precise policies and guidelines on how prisoners are to be rehabilitated, reformed and re-integrated into the society upon the completion of their sentence. These policies should reflect the pre-colonial judicial principles of reparation and reconciliation outlined in the second chapter, which not only sought to account for the needs of the offender but also, the needs of the victim and the community.[168] This thesis therefore argues that these functions need to be incorporated in the statute to enable the NPS and the courts have the required statutory powers to enforce these functions and hold any NPS officer or other government officials accountable if any derelicts in the performance of their duties. Furthermore, having these functions enshrined in law would also create awareness in prisoners and the public of the true purpose of the prions and report any instances of deviations or violations of its functions.

[165] Section 9 (1) of the UN Standard Minimum Rules for the Treatment of Prisoners (n 164).
[166] Section 10 of the UN Standard Minimum Rules for the Treatment of Prisoners (n 164).
[167] Amnesty International, *Nigeria: Prisoners' Rights are Systematically Flouted* (London: Amnesty International Publications, 2008) 22 - 24.
[168] See Chapter 2, ss 2.2.1 and 2.3.

Stakeholders have made several calls for the Prisons Act to be updated and this has led to the House of Representatives Committee on Interior seeking to pass the Prisons Bill of 2008 into law.[169] This bill is a vast improvement to its predecessor as it not only contains provisions that stipulate the aforementioned functions of the NPS[170] but also, provides solutions to some of its current challenges including decongestion of the prisons. These include the State Controller for Prisons in any state notifying the Chief Judge of the state when a prison has exceeded its maximum capacity. The Chief Justice Administration Committee has one month within receipt of the notice to rectify the issue. In addition, the State Controller, in conjunction with the Deputy Controller for Prisons, shall have the power to refuse the intake of further inmates.[171]

Apart from the Prison Bill, two other Bills: The *National Centre for Prisoners Reformation and Rehabilitation* as well as the *Nigerian Prison Service Commission* were also put forward to support the Prisons Bill 2008. The former will create the National Centre for Prisoners Reformation and Rehabilitation which will manage and be responsible for the rehabilitation of prison inmates, for example, through the provision of education and vocational programmes as well as support services in all prisons.[172] The latter will establish the Nigerian Prison Service Commission, which will be responsible for the administrative management of the NPS as well as the expansion, renovation and modernization of current prisons and the construction of new prisons.[173]

Unfortunately, none of these Bills have been enacted and there are no official statements from the Federal government on when the Prison Bill will be passed or for the

[169] This Day Editorial, 'Reforming the Nigerian Prisons' *This Day Newspapers* (Lagos, Nigeria, 13 February 2013) http://www.thisdaylive.com/articles/reforming-the-nigerian-prisons/139318/ accessed 11 May 2015.
[170] Nigerian Prisons Bill (2008) s 5.
[171] Nigerian Prisons Bill (2008) section 6 (4) – (6).
[172] National Centre for Prisoners Reformation and Rehabilitation (Establishment, etc) Bill (2008) section 5.
[173] Nigerian Prisons Service Commission (Establishment, etc) Bill (2006) section 7.

reason for the delay. This forms part of the apathetic attitude by Nigerian legislators towards reforming the prison system as discussed earlier in this chapter. The situation becomes more perplexing when you consider other legislation like the Same Sex Marriage (Prohibition) Act of 2013 only took three years for it enacted.[174] It is very important that Nigerian lawmakers pay closer attention to this issue and attach greater significance to the reforms of the penal system and in general, the Nigerian criminal justice.

The next sub-section will now proceed to discuss in more detail the changes that will be required in the attitudes of professionals, who are involved in the administration of Nigerian's criminal justice system, specifically those directly involved with the day-to-day management in Nigerian prisons.

6.4.5 Change in Attitudes of Professionals to the Prison System

In the above subsection, we identified that one of the key sections of society that will require a change in attitude, for RJ's integration into the Nigerian criminal justice system, are the very persons involved in the daily operations. These are the professionals involved in the penal system, particularly those who are responsible for its management.

The Nigerian Prison Service, like its English counterpart, operates on a hierarchical structure, with the Controller General in charge of the administration of prisons in Nigeria at its apex.[175] The Controller General is responsible for the formulation and implementation of policies in the prisons and therefore, his/her support is important for the use of RJ in

[174] Two earlier attempts were made to enact similar versions in 2006 and 2009 before the Nigerian Senate passed the Same Sex Marriage (Prohibition) Bill on 29 November, 2011. It was passed by the House of Representatives on 2 July, 2013 and assented by President Goodluck Jonathan on 7 January, 2014; see Kaleidoscope Trust Briefing, 'Nigeria: Same Sex Marriage (Prohibition) Act 2013' (Kaleidoscope Diversity Trust. Charity, January, 2014) 3 <http://kaleidoscopetrust.com/usr/library/documents/main/2014-02-nigeria.pdf> accessed 1 August, 2016; AP, 'Nigeria Passes Law Banning Homosexuality' *The Telegraph* (London, 14 January, 2014) <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/10570304/Nigeria-passes-law-banning-homosexuality.html> accessed 1 August, 2016.

[175] Nigerian Prisons Service, 'Directorates' (2015) <http://www.prisons.gov.ng/organogram/index.php> accessed on 11 September, 2015.

prisons. This thesis recommends that sessions should commence first with him and the six (6) Deputy Controllers-General (DCGs) as they together constitute the highest decision-making body in the administration of the Nigerian Prisons Service.[176] They will be informed of the changes in Nigeria's penology and penal system and will then be trained on the principles of RJ and its potential to assist the reformation of prisoners. Ideas will be shared on how these ideals can be passed through the rank and file of the Nigerian Prisons Service. Their recommendations will form the foundation for new training programmes for both existing prison staff and for new recruits.

The second level of training should be conducted with the Controllers of each of the prisons in the country, as they are responsible for the day-to-day management of the prisons under their command. Their contributions on how the new regime can be smoothly integrated will be also be taken under consideration and their advice will be referred up the chain of command. The next group would be the officers under the Health and Social Welfare Directorate as they are responsible for reform and rehabilitation of convicts. They will also develop training sessions and manuals for officers who will be acting as facilitators.[177] Furthermore, the Health and Social Welfare Directorate would also be responsible for developing strategies for informing inmates of RJ programmes and how they can access its use. Similar sessions and trainings will be conducted for the Operations Directorate as they are responsible for ensuring compliance with Prison Regulations and Guidelines and monitoring these programmes will fall under their purview.[178]

[176] Nigerian Prisons Service, 'Directorates' (n 175).
[177] Nigerian Prisons Service, 'Health and Social Welfare Directorate' (2015) <http://www.prisons.gov.ng/organogram/health.php.> accessed on 11 September, 2015.
[178] Nigerian Prisons Service, 'Operations Directorate' (2015) <http://www.prisons.gov.ng/organogram/operations.php> accessed on 11 September, 2015.

Finally, sessions would be conducted with existing prison staff, particularly those who have daily direct contact with inmates. Separate sessions will be conducted with inmates, their families and the communities. They will be educated on what RJ is, the potential benefits and how they can access these RJ services. Ideas on how these programmes can function successfully will be made available to each of the respective Controllers who will have some measure of independence on how it will operate in their respective prisons. Guidelines from the Operations Directorate will be issued to ensure strict compliance and a good level of service is provided to the satisfaction of all participants.

6.4.6 Change in Attitudes of the Public to the Prison System

So what type of changes in public attitude is needed? Are we requesting the public to accept a justice system where there are no penal consequences and the response to all crimes will be to arrange reconciliation meetings where parties will be coerced to ′kiss and make up′ despite the nature of the offence involved and the subsequent consequences? This discussion is not seeking for either of the above but rather, for the re-adoption of attitudes similar to those that existed in the pre-colonial era, which can lead to the introduction of ‘reparative and restorative ethos′ into Nigerian prisons as well as the entire justice system.[179]

In the second chapter, we considered the pre-colonial judicial systems as well as their respective restorative practices in Nigeria and as our primary case study, examined the pre-colonial Igbo judicial system, which was influenced by their traditions, cultures and customs.[180] We highlighted the Igbo′s definition of crime as a ‘conflict between community members′ which can only resolved via the active participation of all stakeholders (the victim,

[179] DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 50.
[180] See Chapter 2, ss 2.2.1, 2.3 and 2.3.1; OO Elechi, ‘The Igbo Indigenous Justice System’ in V Saleh-Hanna (ed) Colonial Systems of Control: Criminal Justice in Nigeria (University of Ottawa Press 2008) 397.

the offender and community members).[181] We also examined how their judicial system was structured based on the principles of restoration, transformation and communitarianism.[182] This thesis contends that their beliefs influenced the focus of their judicial system on the restoration on social safety, with the use of extreme punishment as a last resort.[183] They also contributed to the absence of prisons or the use imprisonment as a method of punishment.[184] More importantly, both the decision making bodies responsible for maintaining law and order as well as the public recognized these principles.[185] Each family unit was responsible for teaching each of its members the societal norms and values.[186]

Nigerian politicians, penal policy makers, those concerned with the administration of justice and the public must set aside the ideology of 'populist punitiveness' from its criminal justice system which was introduced as a result of Nigeria's colonial relationship. This is because it encourages the infliction of strict punishments in the name of preserving public safety, against those considered to be 'criminally dangerous', with little regards to ensuring that its use is limited to offences that deserve such punishment.[187] The application of this principle in a country like Nigeria, which has no option of imposing a non-custodial

[181] OO Elechi, 'The Igbo Indigenous Justice System' in V Saleh-Hanna (ed) Colonial Systems of Control: Criminal Justice in Nigeria (University of Ottawa Press 2008) 395.
[182] ibid.
[183] ibid.
[184] The Igbo's view of incarceration as a taboo further contributed to its absence in pre-colonial Igbo society. See TO Elias, 'Traditional Forms of Public Participation in Social Defense' (1969) 27 International Review of Criminal Policy 18 – 24 cited in Chukwuma Ume, 'Alternatives to Imprisonment: Community Service Orders in Africa' in V Saleh-Hanna (ed), *Colonial Systems of Control: Criminal Justice in Nigeria* (University of Ottawa Press 2008) 384; see also Adedokun Adeyemi, 'Alternatives to Imprisonment in Nigeria: Problems and Prospects' (National Conference on Alternatives to Imprisonment in Nigeria, Abuja, 2000); E Onyeozili & O Ebbe, 'Social Control in Pre-colonial Igboland in Nigeria' (2012) 6 African Journal of Criminology and Justice Studies 29, 39.
[185] E Onyeozili & O Ebbe (n 184) 30 - 37.
[186] ibid.
[187] JR Blad, 'Against "Penal Instrumentalism": Building a Global Alliance for Restorative Justice Processes and Family Empowerment' (Proceedings at the 4th International Conference on Conferencing, Circles and Other Restorative Practices, 2003); JR Blad, 'The Seductiveness of Punishment and the Case for Restorative Justice' (n 27) 137.

sentence, even for minor offences, has led to mass incarceration of offenders.[188] Whereas in England and Wales, a non-custodial sentence could have been imposed for a similar offence.

For example, under Section 390 of the Nigerian Criminal Code, a person found guilty of stealing could be liable to a punishment of 3 years imprisonment.[189] A similar offence of theft in the England and Wales will not impose a custodial sentence if the item in question is worth less than £2,000. Even where it is worth above the said amount, several other mitigating factors, like if the guilty party is a first time offender, could be taken into consideration.[190] The thesis suggests that similar levels of flexibility could be afforded to Nigerian judges under the criminal codes to enable them pass non-custodial sentences for particular offences and with specified mitigating circumstances.

Secondly, from our analysis of the situation of England & Wales as well as the U.S., the enforcement of such a policy via the prisons is not cost-effective in the short-term nor is it economically sustainable in the long term.[191] More credence is lent to this point when it is considered that Nigeria's entire budget for 2015 is to the sum ₦4.5 trillion.[192] This is below the prison expenditure in 2014 for both England & Wales (converted sum in £ = £14.7

[188] In Nigeria, if the offence carries a prison sentence, the court has the discretion, apart from capital offences that carry mandatory punishment, to reduce the level of punishment that would have been imposed. See the case of *Slap v. The A. G. Federation* (1968) Nigerian Monthly Law Reports (N.ML.R.) 326. However, there is no provision for the court to waive aside the custodial sentence if that is the only punishment prescribed for the offence in question.

[189] Criminal Code Act, Cap 38, Laws of the Federation of Nigeria, 2004.

[190] Sentencing Guidelines Council, Theft and Burglary in a Building other than a Dwelling <http://www.sentencingcouncil.org.uk/wpcontent/uploads/Theft_and_Burglary_of_a_building_other_than_a_dwelling.pdf> 11, accessed on 25 August, 2015.

[191] DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 41, 43, 48.

[192] Reuters, Nigeria's Outgoing President approves 2015 Budget < http://www.reuters.com/article/2015/05/20/nigeria-budget-idUSL5N0YB49M20150520> accessed on 24 August, 2015.

billion)[193] and the United States in 2011 (converted sum in $ = $22.6 billion).[194] Thus, there seems to be no justification for its continued use and this point is more pertinent when we consider the lack of satisfaction expressed by several victims, offenders, their respective families and the larger community at various stages of Western judicial systems.[195]

This thesis submits that the general public need to be educated on the importance of considering an alternative policy that is best suited to its own unique circumstance, with its politicians taking the lead towards reformation of the penal system.[196] We must depart from the ideology that crime could only be controlled by incarcerating as many offenders as possible. Instead, a new approach is needed where we first consider whether imprisonment is the best response in each case and if so, how the offender will be rehabilitated during their sentence. Furthermore, due consideration must be given to the plans for their re-integration into society when they complete their prison term to improve their chances of not re-offending. This argument is made stronger when one considers that, despite the high numbers incarcerated offenders, there are also relative high numbers in recidivism. This calls into question the rationale behind the continued use of such tactics in responding to crime.[197] Just incarcerating increasing number of offenders at exorbitant costs and under the same existing philosophy and conditions has not brought about the required results in

[193] Table 1, Ministry of Justice, *Costs per place and costs per prisoner by individual prison, NOMS annual report and accounts 2013-14: Management Information Addendum* (n 48); Prison Reform Trusts (n 47); The Money Converter (2015) <http://themoneyconverter.com/Default.aspx> accessed on 9 September, 2015.
[194] See T Kyckelhahn, 'Justice Expenditure and Employment Extracts', 2011 - Preliminary (Bureau of Justice Statistics, 2014) <available at http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5050> index.html; O Roeder et al (n 37) 3; The Money Converter (n 193).
[195] D Lewis, *Hidden Agendas: Politics, Law and Disorder* (London: Hamish Hilton, 1997) 54; S Box, *Recession, Crime and Punishment* (London: Macmillan, 1987) 47 - 48; TP Thornberry and R Christenson, 'Unemployment and Criminal Involvement' (1984) 49 American Sociological Review 398 - 411, all cited in DJ Cornwell Doing Justice Better: The Politics of Restorative Justice (n 3) 41.
[196] DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 50 - 51.
[197] H Gross, *A Theory of Criminal Justice* (New York: Oxford University Press, 1979) 5; DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 48.

Western societies and it will be an erroneous assumption to expect that it will be any different in Nigeria.[198]

Finally, we must point out the recent developments in the English justice system where we have witnessed calls for change in the prison system as well as recognition of the role RJ can play. Declarations have been made by politicians in support for its use, with the introduction in England and Wales of pre-sentence RJ into the Crime and Courts Act 2013 and the publication of the Restorative Justice Action Plan in 2014.[199] The revised Victims Code, which came into force on December, 10 2013, has assisted in creating awareness of RJ amongst the public as victims are entitled to receive information on RJ from the police.[200]

In the Nigerian context, a change in policy and the law is needed and it must be agreed by all stakeholders that some risks will be undertaken in order to discover better alternative options, rather than just proceeding along the same course of action and hoping for the best.[201] RJ provides such an option and arguments have already been made above for its integration into the present justice system, particularly in this chapter and in previous chapters without undue risk to neither the quality of delivery of the service nor the safety of participants.[202]

[198] DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 48.
[199] D Orr, 'This Government Jails People because it finds helping them too difficult' *The Independent* (London, 14 October, 2006) 16 cited in DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 54; A Asthana and J Doward, 'Prisons Minister says Criminals could cut Jail Sentences by saying "Sorry"' *The Guardian* (London, 25 July, 2010) <http://www.theguardian.com/society/2010/jul/25/criminals-should-say-sorry> accessed on 28 August, 2015; Criminal Justice Act, 2013, sch 16, part 2; Ministry of Justice, *Restorative Justice Action Plan for the Criminal Justice System for the Period to March 2018* (London: Ministry of Justice, 2014).
[200] Crime Prosecution Service, 'Restorative Justice' <http://www.cps.gov.uk/legal/p_to_r/restorative_justice/> accessed on 27 August, 2015.
[201] HL Packer, 'Toward an Integrated Theory of Criminal Punishment' in *The Limits of the Penal Sanction* (London: Oxford University Press, 1969) 65 - 66.
[202] DJ Cornwell *Doing Justice Better: The Politics of Restorative Justice* (n 3) 48. Other alternatives that should be considered are non-custodial sentences like suspended sentences and community service orders.

Education and awareness campaigns informing criminal justice practitioners and the public of the challenges in the penal system, including how RJ could address some of these issues are important. This can be conducted in a variety of ways, for example, in the UK, a number of victims have appeared on several televisions shows to promote the benefits of RJ [203] They not only assist with the promotion RJ but also, its acceptance by all stakeholders.

Finally, this thesis re-iterates that RJ could be used in all criminal matters and is not limited to minor offences or to crimes committed by juveniles.[204] The latter was the case in England, as it was initially applied in crimes involving young offenders who are referred via a Referral order or a Supervision Order and has been promoted by the Youth Justice Board since 2001.[205] Just as the pre-colonial restorative practices were applied to all crimes during the pre-colonial era, the same attitude must also be adopted in the present. This does not mean that safeguards to ensure that the process is not abused will not be in place. Examples of such safeguards, as discussed in the third chapter, include not denying the defendant their right to fair trial, ensuring that the matter is suitable to be referred for RJ and not coercing either the victims or offenders to participate in the process.[206]

6.5 Conclusion

In conclusion, this chapter has addressed the positions of both advocates of the penal system as well as those of Abolitionists/RJ purists and pointed out the need for balance between these two opposing views. It has also addressed some of the required reforms

[203] ITV, 'Family reveal how Restorative Justice let them forgive their son's killer' (3rd March, 2016) <http://www.itv.com/news/2016-03-03/family-reveal-how-restorative-justice-let-them-forgive-their-sons-killer/> accessed on 21 September, 2016; BBC, 'Restorative Justice: "How I got an apology from my abuser"' (22nd October, 2015) < http://www.bbc.co.uk/news/uk-34571936> accessed on 21 September, 2016.
[204] K Edgar and T Newell (n) 24.
[205] ibid; Crime Prosecution Service Restorative Justice' <http://www.cps.gov.uk/legal/p_to_r/restorative_justice/> accessed on 27 August, 2015.
[206] See Chapter 3, s 3.5.

needed in the Nigerian penal system to create this much needed balance and it is hoped that these proposals will lead to a revolution in the not only the penal system but also, the entire Nigerian criminal justice system.

In the final chapter, we shall round up our discussions commencing with a brief summary of all the key points discussed in each of the chapters of this thesis. The chapter will then proceed to recommend the factors that need to be taken under consideration for the formulation of a RJ policy in the Nigeria Criminal Justice system.

CHAPTER SEVEN

RECOMMENDATIONS AND CONCLUSION

7.1 Introduction

In the last few chapters, this thesis was able to establish the following points in the course of putting forward a case for the introduction of Restorative Justice (RJ) in the Nigerian prison system. In the second chapter, the thesis examined the pre-colonial penal system, which focused on reconciliation, reparation and re-integration and compared it with the prison system that was introduced by the British colonialists. It also considered the arguments put forward by them that the prison system was introduced to replace the harsh punishments that were in existence then. During the course of its analysis, the thesis put forward an opposing view that the prison system was used primarily as tool to exercise control over the indigenous population, punish those who opposed the colonial regime and to provide free labour for colonial projects. The thesis also argues that colonial prisons did not consider the needs of the victim or the community in ensuring reconciliation between the key parties and that the offender made some form of reparation to the victim. Furthermore, the prison system failed to observe the principle of ensuring the offender is re-integrated into the community upon completion of the sentence/punishment, which was a key objective of the pre-colonial penal system.

The second chapter reached the conclusion that the primary reason behind the introduction of the prison system by the colonialists was not to provide a more 'humane and dignified' form of punishment but as a tool for the enforcement of colonial rule. It proceeded to argue that if they truly wanted to introduce a more humane and dignified form of punishment, the colonialists should have taken into consideration the aforementioned principles of the pre-colonial penal practices and integrated them into the new prison system.

The chapter closes with a proposition that RJ could act as a modern day equivalent to the pre-colonial penal system.

The third chapter proceeded to examine the concept of RJ and its core principles (Repair, Restore, Reconcile, and Re-integrate). It also analysed in great depth the different RJ definitions provided by various advocates, not to provide a definition that will be universally acceptable but to identify the key objectives that any RJ practice or scheme should aim to achieve. During the course of the analysis, a comparison was made between RJ and the pre-colonial justice system discussed in the second chapter. It arrived at the conclusion that there are similarities, not only in principles but also in practice. For example, both systems believed that the victim is the focal point in the criminal justice process and therefore, should have a 'voice'. Furthermore, participants in the process are not limited to only the offender and the victim but also their families and other members of the community. This and other identified similarities assisted in establishing the theory put forward by this thesis that RJ can function in Nigeria as a modern day equivalent. More credence is lent to this theory following further analysis in the fourth chapter where the history and development RJ was examined. It identified similarities in the manner how early societies in other jurisdictions departed from a RJ based judicial system to the present day criminal justice process.

In the fifth chapter, the thesis conducted an evaluation of various RJ models (particularly *Victim-Offender Mediation*, *Conferencing* and *Sentencing Circles*) as well as the response of various participants, including their experiences and their varied levels of satisfaction after participating in the process. This assisted the thesis in identifying areas of good practice and provided ideas on which types of models are best suited to operate in Nigeria. The chapter also provided further evidence of similarities between modern RJ practices and those in the pre-colonial era, which provides additional grounds for this thesis'

overall argument that RJ could function as a modern day equivalent of the Nigerian pre-colonial restorative practices. In addition, the study of the various RJ models provides encouragement that RJ could be re-integrated into the present Nigerian criminal justice system as the chapter cited various examples of other jurisdictions that have re-integrated some form of RJ into their criminal justice systems. This includes countries like New Zealand who share a similar colonial history with Nigeria. Based on its analysis, the chapter then proceeded to recommend two RJ schemes (the *Sycamore Tree Project* and *Resolve to Stop the Violence Project*) that could be integrated into the Nigerian prison system. The chapter discussed how they have operated in other jurisdictions and the respective levels of success they were able to achieve in reducing re-offending rates.

In chapter six, we discussed in great length the conditions required for creating a conducive environment within the Nigerian penal system for RJ to function effectively. The chapter first addressed the positions of both prison and Abolition/RJ advocates who argue against the introduction of RJ in prisons and arrived at a conclusion that what is required is a 'balance' between the two opposing views. This balance will involve both concepts working together in a symbiotic relationship in order to achieve the following objectives – the successful rehabilitation of offenders as well as their re-integration into society when they complete their sentences. The contrast in the penological systems between the UK and Norway was quite intriguing and provided quite a number of insights on how different countries approach the treatment of prisoners.

The chapter then proceeded to examine how this balance can be achieved and the reforms necessary in the Nigerian prison structure as well as the required change in attitudes of professionals associated with the administration of the prison system and the public. This includes changing the country's attitude and approach when responding to crime. This includes the manner via which we treat offenders whilst in prison and even when they

complete their prison terms. This thesis also highlighted key legislation that needs to reformed and upgraded in order to meet international standards as well as made recommendations on new statutes that could assist in bringing about the desired change.[207] If all or most of these recommendations are implemented, it will be a significant step in reforming not only the prison system but also, other sectors in the criminal justice process.

Having now established a case for the integration of RJ into Nigerian prisons following earlier discussions in the previous chapters, the next section will proceed to analyse the various challenges in applying a RJ penal policy under the present criminal justice model as well as the needed reforms to address these challenges. The findings will assist in creating an environment in Nigeria that will enable any proposed RJ scheme to flourish efficiently.

7.2 The Nigerian Criminal Justice System: The Potential Role of RJ?

Despite the probable reforms to the Nigerian prison system discussed in the sixth chapter which will involve a change in attitude and approach to the country's response to crime, it is contended that on their own, such reforms will be insufficient for the effective implementation of any proposed RJ penal policy in Nigeria, even if fully executed. This is because the prison system does not operate in a vacuum but instead works in conjunction with other sections of the criminal justice process. For example, the police which deals with the investigation of the crime as well as the courts which deal with the determination of the guilt or otherwise of the accused. Therefore, the prison system is just 'one wheel' in the entire criminal justice machinery. This argument becomes more pertinent when one considers that the prison system is itself a subsection of the penal system and imprisonment

[207] See Chapter 6, ss 6.4.1 – 6.4.6.

is just one option in variety of possible sanctions available to the court that could be prescribed solely or in conjunction with other punishments, for example fines.

Finally, imprisonment and other punishments under the penal system are usually considered at the last stage of the criminal justice process and that any proposed RJ penal policy might have limited impact if the initial stages do not establish the proper foundations. Using an analogy of a patient being treated for cancer, the ideal situation is for treatment to be given when the patient started displaying symptoms, for example, sudden appearance of a lump and not wait until the cancer reaches an advanced and maybe incurable stage.[208] This may result in using extreme treatments like chemotherapy, which some may argue does more harm than good, instead of less abrasive treatments like surgery which will be more effective if there is an early diagnosis. This thesis argues that similar circumstances occur within the criminal justice system as the prison could be likened as the 'chemotherapy treatment' for the 'cancerous' crime levels in various jurisdictions. However, as previously argued in the first and sixth chapter, the prison system has been unable to reduce recidivism and in some cases, the offenders seem worse off after the completion of their sentence than when they were initially incarcerated.[209] Therefore, introducing RJ solely at this stage may prove too little, too late for some offenders and may not achieve the desired results.

Therefore, to increase the chances of a reduction in crime rates in Nigeria, it is argued that the proposed reforms in the prison system has to be accompanied with commensurate reforms in the entire criminal justice system for any RJ penal policy to function effectively. One of the primary objectives of these reforms is to lead to a change in the manner via which the justice process is viewed. This begins with clear clarification on its purpose and objective.

[208] National Health Service, *Signs and Symptoms* <http://www.nhs.uk/Conditions/Cancer/Pages/Symptoms.aspx> accessed on 7 June, 2016
[209] See Chapter 1, s 1.4; Chapter 6, ss 6.2.1, 6.4.2 and 6.4.3.

Is it solely about the punishment of convicted offenders via the infliction of pain and/or deprivation of liberty or does it extend to the restoration and healing of those directly involved in the incident as well as the general community? The contention of this thesis is that a criminal justice process must strive to achieve both ideals and arrive at an acceptable 'balance'. This is in line with the previous submission in the third chapter which called for the adoption of a 'Bi-focal' lens in viewing justice rather than only through a 'Restorative lens' as argued by Zehr.[210] Therefore, to achieve the much desired balance, justice must be viewed through the lens of both paradigms.

It must be re-iterated again that this thesis is not calling for the total abolition of prison system as discussed earlier in chapter six.[211] Some of the reasons discussed for this position include the argument that serious crimes like murder and armed robbery require the prescription of some form of imprisonment as punishment. However, during the tenure of the offender's punishment and as part of the rehabilitation process, the offender could participate in an RJ programme with/without the participation of the victim and/or the general community. By participating in the RJ process, not only will the offender be informed of the consequences of their actions and the resulting impact, the offender will be provided with the opportunity to make some form of amends.[212] This will not only assist with their rehabilitation during the sentence but will also aid in their re-integration in the society after the completion of the sentence if the sentence is not a life sentence.[213] The benefits of such a policy is not limited to the victim, offender and the community but is also

[210] See Chapter 3, s 3.5; H Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Scottdale, PA: Herald 2005) 178 – 181.
[211] See Chapter 5, s 6.3.2.
[212] See Chapter 3, ss 3.2, 3.4, 3.5, and 3.7.
[213] ibid.

extended to the state as such a policy, if properly implemented, may lead to a reduction in recidivism rates.[214]

However, this thesis wishes to take a step further and argue that the application of any proposed RJ policy and its core principles should not be limited to the prisons but there is potential that the lessons learnt could also be applied to other sectors of the criminal justice process. This will assist in ensuring that the Nigerian criminal justice system moves from a primarily 'retributive' focus to a more balanced justice system that includes 'restorative' ideals, which can be exercised with retributive punishments in suitable cases. This is similar to the situation that existed in pre-colonial Nigeria before the introduction of colonial rule and also, the prison system which arguably led to the 'tip in the justice scales', upsetting the balance in favour of a more retributive justice process.[215] This thesis is advocating for a restoration of the equilibrium via the introduction of suitable RJ policy in not only the penal system but also to other sectors of the Nigerian criminal justice system.

The next series of sub-sections will proceed to consider what the proposed national RJ policy should contain and thereafter, discuss strategies on how it could be applied within the larger framework of the Nigerian criminal justice system. During the course of the analysis, references will be made to other jurisdictions that have incorporated RJ into their criminal justice systems as well as the United Nations' Basic Principles on the use of RJ in Criminal Matters (UN Basic Principles).[216] This thesis previously argued in the third chapter that these examples, particularly the UN Basic principles, could assist in providing a template for a RJ policy suitable for Nigeria as well as insight on necessary reforms to enable

[214] See Chapter 3, s 3.4; Chapter 6, s 6.3.
[215] See Chapter 2, ss 2.2.1 and 2.3.
[216] United Nations Economic and Social Council (ECOSOC), *United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (E/2002/INF/2/Add.2, 54 – 59), Para 20.

it operate effectively.[217] References will also be made to key points highlighted in the previous chapters on penal reforms, which are also relevant to this discussion. It should be noted that these recommendations are neither exhaustive nor conclusive but instead should be considered as general ideas that could form the basis for further research.

7.2.1 The Contents of the proposed Nigerian RJ Policy

For the purpose of the discussion on the content of the proposed new RJ policy, this thesis will focus only on the key factors. This is because the primary goal of this subsection is not to produce an actual policy but just to identify key subject matters that the proposed policy should address.

The first question that needs to be addressed is the definition of key concepts. In the previous discussion in chapter three, the definitions of RJ provided by Marshall were used as a working definition in determining what RJ is; the relevant stakeholders; the key objectives and the desired outcomes that any restorative process should aim to achieve. It was also indicated that this definition was arguably the most authoritative definition of RJ and has been adopted by the UN in the definition of key concepts in their *Basic Principles* as well as their *Handbook to Restorative Justice Programmes*[218] The aforementioned UN Documents also outlined the features, goals, values as well as objectives of the proposed

[217] See Chapter 3, s 3.3.3.

[218] In these documents, definitions were provided for the following key concepts: Restorative Justice (a way of responding to criminal behaviour by balancing the needs of the community, the victims and the offenders); Restorative Process (any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator); Restorative Programmes (any programme that uses restorative processes and seeks to achieve restorative outcomes) and Restorative Outcomes (an agreement reached as a result of a restorative process. The agreement may include referrals to programmes such as reparation, restitution and community services, "aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender". It may also be combined with other measures in cases involving serious offences). ECOSOC (n 10) para I (1) – (3), 56; United Nations Office on Drugs and Crime (UNODC), *Handbook on Restorative Justice Programmes* (New York: United Nations, Criminal Justice Handbook series) 5 – 6.

restorative programmes.[219] This thesis therefore recommends that Nigeria should adopt the aforementioned UN Basic principles as a foundational template for the proposed Nigerian RJ policy.

Secondly, the policy must clearly state who can participate in an RJ process. In the third chapter, it was concluded that the participants should not limited to the victim, offender and the community but also includes representatives of the state (for example the courts) who must act in a supervisory role.[220] Professionals associated with the criminal justice system, like lawyers and prison officials, may participate if their role is limited to encouraging the main parties to participate and offer advice on an amicable outcome that does not violate parties' legal rights. [221]

It must be re-iterated, as discussed in the third chapter that participation must be voluntary and neither the victim nor the offender may be coerced to participate in the process.[222] Both parties must be advised of their rights and responsibilities under the process.[223] If either party refuses to participate or wishes to withdraw at any time after the process has commenced, they are free to do so and the matter will be referred to the appropriate stage of the criminal justice process for continuance.[224] However, the door will

[219] UNODC (n 12) 7 - 11.
[220] ECOSOC (n 10) para III (15), 58; UNODC (n 12) 34; see Chapter 3, s 3.3.3.
[221] ibid; Kay Pranis, 'Restorative Justice in Minnesota and the USA: Development and Current Practice' (123rd International Senior Seminar Visiting Experts' Papers, 112) <http://www.unafei.or.jp/english/pdf/RS_No63/No63_17VE_Pranis1.pdf> accessed on 6 June, 2016; Department of Justice and Constitutional Development, South Africa, *Restorative Justice – The Road to Healing* (Department of Justice and Constitutional Development, South Africa, 2011) 4 – 5.
[222] ECOSOC (n 10) para III (13) (c), 58; UNODC (n 12) 8; Crown Prosecution Service (CPS), 'The views of the victim' in *Restorative Justice* <http://www.cps.gov.uk/legal/p_to_r/restorative_justice/#an06> accessed on 6 June 2016; Department of Justice and Constitutional Development, South Africa (n 15) 5; Ministry of Justice, New Zealand, 'Restorative Justice in New Zealand' in *More Information about Restorative Justice* <http://www.justice.govt.nz/policy/criminal-justice/restorative-justice/more-information-about-restorative-justice> accessed on 6 June, 2014; see Chapter 3, s 3.5.
[223] ECOSOC (n 10) para III (13) (a) and (b), 58; UNODC (n 12) 8; Department of Justice and Constitutional Development, South Africa (n 15) 4.
[224] ECOSOC (n 10) para II (7), 57; UNODC (n 12) 53; Department of Justice and Constitutional Development, South Africa (n 15) 5; Ministry of Justice, New Zealand, 'Restorative Justice in New Zealand' (n 16).

always be open to either party if they wish to consider participating in a restorative process at a later stage.[225]

Furthermore, it must be clearly stipulated that it will only be in matters where the offender has admitted responsibility or guilt has been established will the matter be referred to a restorative process.[226] The offender's participation in any restorative process should not be considered as evidence of guilt in a subsequent criminal trial.[227] In addition, discussions during the process, including any admissions of guilt made by the offender are confidential and cannot be used against them in subsequent criminal proceedings except where agreed by the parties or where required by law.[228] For example, where the life or health of a third party may be at risk. The reason for this is to ensure full participation by the offenders or any other necessary party as they be will assured that any prejudicial statements made cannot be used against them as this may violate their right to a fair hearing.[229] Depending on the nature of the crime, an admission of guilt may lead to a reduced sentence in conjunction with some form of reparative act agreed by the parties and sanctioned by the supervising/regulating authority.

Any agreement reached at the end of the process must be voluntary and the terms must be 'reasonable and proportionate'.[230] Such agreements could be incorporated into any judgment rendered by the court and would be given the same acknowledgement as any other judicial decision.[231] If the matter was not referred by the court or the court is not involved in the RJ process, agreements reached by the parties could referred to the office of the DPP

[225] UNODC (n 12) 53, chapter 3, s 3.5.
[226] ECOSOC (n 10) para II (7), 57; UNODC (n 12) 74;
[227] ECOSOC (n 10) para II (8), 57; UNODC (n 12) 34;
[228] ECOSOC (n 10) para II (14), 58; UNODC (n 12) 34; Department of Justice and Constitutional Development, South Africa (n 15) 5;
[229] ibid, Chapter 3.5.
[230] ECOSOC (n 10) para II (7), 57; UNODC (n 12) 77; Department of Justice and Constitutional Development, South Africa (n 15) 5 – 6; chapter 3. S 3.5.
[231] ECOSOC (n 10) para III (15), 58; UNODC (n 12) 34

or the appropriate local RJ statutory authority to ensure that parties comply with the terms of the agreement. If the offender fails to comply with the terms of the agreement, the matter could be referred to the criminal justice system for due process.

The proposed new RJ policy must also specify that the restorative process could be initiated at any stage: before pre-trial (it could be initiated by either of the parties or by the police in conjunction with or on the recommendation by the Director of Public Prosecution (DPP) and before the charges are read in court); during the trial (after a plea has been taken and before sentencing has been prescribed) and post-trial (subject to the nature of the crime and suitability, a restorative process could occur either as an alternative to a custodial sentence, in conjunction with a custodial or non-custodial sentence or after release from prison).[232] The nature of the RJ process to be adopted will depend at what stage the criminal justice process is. For example, if the justice process is at the pre-trial stage, an RJ diversionary process similar to the conference model in New Zealand and Northern Ireland, can be applied particularly for juvenile offenders or for minor offences.[233] If the justice process is at the post-conviction stage, the matter could be referred to a restorative prison scheme similar to the Resolve to Stop the Violence Project (RSVP) where the participation of all necessary parties have been secured.[234] The nature of the offence as well as physical, mental and emotional status of the parties, particularly the victim, are part of the factors that would be taken under consideration in determining if the matter should be referred, at what stage and what RJ model should be used.

[232] ECOSOC (n 10) para II (6), 57; UNODC (n 12) 13; Department of Justice and Constitutional Development, South Africa (n 15) 5; Ministry of Justice, New Zealand, 'Availability of services in New Zealand' in *Restorative Justice in New Zealand* <http://www.justice.govt.nz/policy/criminal-justice/restorative-justice/restorative-justice-in-new-zealand> accessed on 6 June, 2016; Australian Law Reform Commission, 'Restorative Justice' in *Alternative Process* <http://www.alrc.gov.au/publications/11-alternative-processes/restorative-justice> accessed on June 6, 2016.; see chapter 3, s 3.5.
[233] Chapter 5, s 5.2.2.
[234] Chapter 5, s 5.3.3.

It must be noted that no matter the stage at which the RJ process commences or the type of model adopted, attempts will be made to ensure the key principles of reconciliation, reparation and reparation are observed. However, as previously discussed in the fifth chapter, this may not be attainable in all cases, particularly where the participation of one of the key parties have not been secured.[235] In such circumstances, the goal would be to ensure that the best restorative outcome is achieved that would be most beneficial to the parties that participated but not to the detriment of the absent party.[236] The potential benefits of the above alternative responses in the Nigerian Criminal Justice system cannot be ignored. If the above procedures are successfully implemented, they could address some of challenges in the Nigerian penal system discussed in the first chapter.[237] These include a reduction in overcrowding in Nigerian prisons as fewer matters will be referred to courts for trial as well as lower recidivism rates as fewer ex-inmates will re-offend.

The thesis also wishes to propose that there should be no limitation on the type of matter that could be subjected to a RJ process. However, it must be re-iterated that sufficient measures, including the ones mentioned above, are taken to ensure that all matters, particularly those of a sensitive nature like rape and murder, should be considered carefully before referring them to a restorative programme.[238] Even after the referral of such matters, safeguards will be in place to ensure that participants, particularly the victim, will face no further harm from participating in the process.[239] Examples of such safeguards include

[235] Chapter 5, s 5.3 and 5.3.1
[236] ibid.
[237] Chapter 1, s 1.4.
[238] See Chapter 3, s 3.5.
[239] ibid.

comprehensive risk assessment and safety planning as well as recognition that victims may face pressure from offender/s to participate.[240]

7.2.2 Application and Enforcement of the RJ Policy in the Nigerian Criminal Justice System

Even if all of the above ideals are incorporated into the proposed RJ policy, there are still questions concerning its application in view of the wider context of the entire Nigerian criminal justice system. It will be unwise for one to assume that there will not be challenges and opposition to change, particularly where a system has been in place for quite some time and is presently engrained in the country's psyche.

The first step towards creating a conducive environment for the execution of the proposed RJ policy is to develop a strategy for its introduction into the Nigerian criminal justice system. This will involve identifying the sections of the current structure that may act as an impediment towards the successful implementation of the national policy. For example, lack of education and awareness of what RJ entails as well as how each sector of the justice system will co-operate and function cohesively under the new policy[241]

To acquire solutions to these challenges, it is suggested that a panel of experts consisting of legal practitioners, law enforcement officials, criminologists, prison officials and other key stakeholders, from various regions of the country and internationally, be appointed.[242] They will consider these issues, drawing upon their experience and arrive on strategies to address them.[243] It is also advised that the panel also observe RJ practices,

[240] Ministry of Justice, New Zealand, 'Family Violence cases in Restorative Justice' and 'Restorative Justice in sexual violence cases' in *Specialist services in Restorative Justice* <http://www.justice.govt.nz/policy/criminal-justice/restorative-justice/specialist-services-in-restorative-justice> accessed on 6 June, 2016; see chapter 3, s 3.5.
[241] UNODC (n 12) 40 – 48.
[242] The panel can be appointed by the appropriate Committee in the House of Assembly, in conjunction with the Ministry of Justice.
[243] UNODC (n 12) 40 – 41.

within and outside the country, to enable them identify good practices and formulate a model(s) that could function Nigeria. The investigation within the country is crucial, as it is important to discover other indigenous restorative practices like the Afikpo model and develop strategies to incorporate them under the formal justice system as performed by the Abia State government.[244] Finally, they will also consider in more depth and detail, the content of the new national RJ policy via the examination of a variety of subject matters, some of which have been highlighted in the previous section and present a draft upon concluding their deliberations.

Their proposed draft will also contain recommendations of various programmes that will be best suited to operate in Nigeria as well management structure, including how matters will be referred; the recruitment and training of facilitators[245] and other personnel and how outcomes/agreement. [246] These programmes will also aim to consider and incorporate local community restorative practices and make provision for the invitation of local community leaders to be trained to act as facilitators to compliance with provisions under the national RJ policy. Finally, a timetable will also be drafted by the panel, detailing a schedule on how RJ will be gradually introduced into various sectors of the Nigerian criminal justice system. This will include identifying various pilot schemes to be established in several prisons, courts and police sectors in different states of the country. The experience from these pilot schemes will be valuable in assessing not only areas of good practice but also, in learning from mistakes made. The expertise of the panel will continue to be sought

[244] See Chapter 2, s 2.3.2.
[245] For example, 'facilitators shall possess a good understanding of local cultures and communities and, where appropriate, receive initial training before taking up facilitation duties' – ECOSOC (n 10) para 19, 58; UNODC (n 12) 48 – 49. This is important for a country like Nigeria that has over 250 tribes. See also Ministry of Justice New Zealand, 'Restorative Justice Facilitator Training and Accreditation: Best Practice' in *Restorative Justice information for providers* <http://www.justice.govt.nz/policy/criminal-justice/restorative-justice/restorative-justice-information-for-providers> accessed on 8 June, 2016; MS Umbreit and J Greenwood , *Guidelines for Victim-Sensitive Victim-Offender Mediation* (Washington, DC: US Department of Justice, Office for Victims of Crime, 2000) 21 – 24.
[246] UNODC (n 12) 42 – 48.

even after changes to the Nigerian criminal structure and implementation of the proposed RJ policy, probably on an annual basis, to address subsequent challenges that may arise with its implementation.[247]

The next step is to present the recommendations of the panel as well as a copy of proposed draft policy to the appointing authority. After further deliberations and amendments to make further improvements if required, the House of Assembly could enact brand new statutory provisions or amend existing ones to reflect this policy and ensure that it has legislative support.[248] Apart from upholding the legitimacy of the RJ policy, legislation will also make provisions to ensure minimum standards/safeguards are kept and provide recourse to any party who may wish to seek redress if these safeguards are comprised.[249] This position is supported by the UN Basic principles, which encourages Member States to enact legislation to support guidelines and standards governing the use of RJ programmes, from when the matter is referred to its conclusion.[250]

In addition, the proposed legislation will provide for the establishment of a governing authority, whether it is a department under the Ministry of Justice or an independent statutory agency. This agency will be responsible for monitoring RJ practice in the country and ensure that standards/safeguards stipulated in legislation and policies are not compromised. The proposed governing authority will also have the powers to create

[247] ibid.
[248] Examples of legislation in other jurisdictions which support the use of RJ in their respective justice systems are Crime and Courts Act 2013, Schedule 16, part 2, s 1ZA (England and Wales); Crimes (Restorative Justice) Act 2004 (Australia); Restorative Justice Act 2015 (Manitoba Canada); Child Justice Act 75 of 2008 (South Africa); Sentencing Amendment Act 2014, s 24A (New Zealand)
[249] M Groenhuijsen, 'Victim-Offender Mediation: Legal and Procedural Safeguards. Experiments and Legislation in some European Legislation' in *Victim-Offender Mediation in Europe—Making Restorative Justice Work* (The European Forum for Victim-Offender Mediation and Restorative Justice, Leuven: Leuven University Press, 2000) 69-82; B Fellegi, *Meeting the Challenges of Introducing Victim-Offender Mediation in Central and Eastern Europe* (Leuven: European Forum for Victim-Offender Mediation and Restorative Justice, 2003) 74 -76; I Aertsen, R Mackay, C Pelikan, J Willemsens and M Wright, *Rebuilding Community Connections—Mediation and Restorative Justice in Europe* (Strasbourg: Council of Europe Publishing, 2004) 46.
[250] ECOSOC (n 10) para III (12), 57; UNODC (n 12) 50 – 51.

new rules concerning the regulation of RJ practice without resorting to the National Assembly to enact them as laws. This will ensure the smooth practice of RJ in the country, as there will be no need to go through the bureaucratic red tape associated with the passage of new statutes, which may lead to the delay in the implementation of reforms when required. They will also be responsible for the supervision and training of facilitators to ensure they act in accordance with high standards as provided in the RJ policy and legislation.

Furthermore, this thesis also proposes that the proposed regulatory body should work in alliance with Non-Governmental Organisations (NGO's) who share similar beliefs in the use of alternative responses to crime. These alliances will be important, particularly in the areas of promoting awareness and understanding of the benefits of RJ to victims, offenders, their communities and the general populace. An example of such NGO's is the Prisoners Rehabilitation and Welfare Action (PRAWA), whose established relationships with both imprisoned and released offenders would be vital in promoting to them the benefits in participating in RJ process.[251]

Finally, the new regulatory body will be responsible for drawing up new strategies on how to improve the use of RJ in the country. This could be achieved via continued co-operation with all stakeholders, seeking their input on how the system could be improved. In addition, they will be responsible for keeping accurate and current data of the outcomes in RJ programmes to analyse strengths and shortcomings. Finally, the new agency will periodically make recommendations to the National Assembly via the Ministry of Justice for alterations to existing legislation or alternatively, for the enactment of new statutes.[252] It

[251] Prisoners Rehabilitation and Welfare Action (PRAWA), Mission, Vision and Values <http://www.prawa.org/mission-vision-and-values/> accessed on 8 June, 2016.

[252] The Ministry of Justice in the UK periodically draw up Restorative Justice Action Plans for the criminal justice system in England and Wales. The key areas that are focused on are equal access; awareness and understanding; and good quality. The proposed regulatory body can adopt similar measures.

is also advised that the regulatory body conducts studies, similar to the one conducted by Shapland et al, on a periodic basis (maybe every 10 years). These studies will evaluate the impact of RJ schemes on victim satisfaction and re-offending rates, identify good practice and render advice on how RJ services could be improved.[253]

7.3 Conclusion

This thesis understands that this research raises many questions, which, due to the limited scope of this thesis, was either partially discussed or not addressed at all. For example, theories on the applicability or otherwise of the use of RJ in other sectors of the Nigerian criminal justice and what commensurate reforms are required in those sectors to complement the reforms already discussed in this thesis. This thesis also raises questions on how such a scheme would be accepted by not only prison inmates but also by victims, communities (both urban and rural), legal practitioners, justice officials and other stakeholders in the criminal justice process. It is suggested that these and other questions could form the basis for future research as these questions are interconnected to the enquiry conducted by this thesis.

However, it could be argued that the most pertinent question is, 'Can such a scheme work and produce the desired reform which is the reduction in crime rates and recidivism?' The honest response is that the incorporation of a RJ policy into the justice system cannot lead by itself to high decrease in crime rates and recidivism. However, an argument could be submitted that these goals could be achieved in conjunction with other reforms in other sectors as well as change in attitudes from stakeholders in the manner via which justice is perceived. There must also be a realistic management in expectations during the implementation of such reforms as well as a great exercise of patience from all stakeholders.

[253] See Chapter 5, s 5.2.4.

A good example of reforms that led to a change in the Nigerian justice system of which it is currently enjoying the benefits, is the introduction of Alternative Dispute Resolution (ADR). This was despite initial opposition to the concept, surprisingly from certain legal practitioners who desired maintenance of the status quo to prolong matters for the purposes of exhorting fees from their clients.[254] Now, not only has the concept acquired legislative backing at both federal and state levels, there is an increasing awareness of its use, with some states' justice systems requiring parties to provide evidence of attempts at ADR before they can file a civil suit.[255]

This thesis is optimistic that RJ will also gain gradual acceptance as an alternative response via which the Nigeria criminal justice system responds to crime. Its use will assist in restoring the ethos and principles that existed in the justice systems in pre-colonial Nigeria where justice was more about restoring the balance and equilibrium that has been disrupted because of the crime and not just about punishment. Maybe, as part of the process of viewing justice under this new proposed paradigm, the symbol of Lady Justice should be slightly amended when sentencing is being considered. Instead, the scales in her hand will be balanced (representing equal weights to both retributive and restorative poles of justice), she removes her blindfold (to ensure the unique and appropriate punishment is prescribed in each individual case) and instead of a sword, an olive branch (to represent all 3 principles of RJ…. *Reconciliation, Reparation and Re-integration*).[256]

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[254] Some went as far as rephrasing the term ADR to mean 'Alternative Drain in Revenue'. See C Etuk, *Report of the Lagos Multi-Door Courthouse (LMDC) to the Governing Council of the LMDC* (April, 2011) 20; Premium Times, 'Lagos Multi-Door Courthouse settles 780 cases in 10 years – Director' *Premium Times* (Abuja, January 12 2013) <http://www.premiumtimesng.com/news/114914-lagos-multi-door-courthouse-settles-780-cases-in-10-years-director.html> accessed June 8 2016.

[255] Constitution of the Federal Republic of Nigeria (CFRN)1999 (as amended), s 19 (d); Arbitration & Conciliation Act, Laws of the Federation of Nigeria (LFN) 2004, Cap A18; Lagos State Civil Procedure rules (2012), Order 3 Rule 11 and order 25 Rule 2 (1); Premium Times (n 42).

[256] DW Van Ness and H Strong, *Restoring Justice: An Introduction to Restorative Justice* (5th edn, Abingdon, Oxon: Routledge, 2015) 172.

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