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NIGERIA'S HUMAN RIGHTS VIOLATION  
INVESTIGATION COMMISSION (HRVIC) AND  
RESTORATIVE JUSTICE: THE PROMISES,  
TENSIONS AND INSPIRATIONS FOR  
TRANSITIONAL SOCIETIES

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**Abstract**

*The lack of peace in most post-colonial African nation-states is tied to unresolved political asymmetry among peoples with contending narratives of origins and power relations. The Justice system bequeathed to these states at their 'flag' independence has been unsuitable for evolving a justice continuum that can ameliorate the asymmetry and consequent conflicts. However, Restorative Justice appears to hold promises and inspirations for affected nation-states. Nevertheless, this article contends that a perceived hyperromanticisation of Restorative Justice's promises must be tempered with critical realism about its ambiguities. Nigeria's Restorative Justice experiment, "Human Rights Violation Investigation Commission", serves as point of reference.*

**Introductory Remarks**

Nigeria is noted for its recurring lack of peace. This lack of peace is rooted in Nigeria's past, like most post-colonial African states. So, any sustainable peace process, especially the mechanisms of justice, designed for such states must pay attention to that past. Nigeria's Human Rights Violation Investigation Commission (henceforth HRVIC) states this fact in its *Report* (HRVIC, 2002b, vol. 1:3.39-3.40). HRVIC *Report* mentions the residual issues from Nigeria's political past, especially what it calls "political asymmetry": "*the unequal power relations (a) within and among states; and (b) between states and the federal government*" (HRVIC, 2002b, vol. 1:3.221-3.228, italics in original). This 'political asymmetry' has concrete implications, on the one hand, for the fear of domination (Southern Nigeria) and intransigence and battle for political control of the centre (Northern Nigeria) (HRVIC, 2002b, vol. 1:3.229-3.23). On the other hand,

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mechanisms of justice, usually invoked for transitional societies, must consider this political asymmetry.

Accordingly, the relationship and tensions between mechanisms of justice, particularly Retributive Justice (as in dominant Criminal Justice system) and Restorative Justice in post-military Nigeria shall be explored within the discourse on the role of law in the modern society, using Phillippe Nonet and Philip Selznick's typologies of law – "Repressive Law"; "Autonomous Law"; and "Responsive Law" (Nonet & Selznick, 2009). Nonet and Selznick's discourse focuses largely on stable societies and mature democracies. Hence, this article offers their typologies regarding the tensions in justice mechanisms in transitional societies struggling between an odious past and the fragile present on the way to a stable future.

In the past, Nigeria variously opted for 'amnesia' and impunity (1966-1970; 1970-1979; 1985-1999). Both amnesia and impunity are extreme expressions of repressive law. Both serve the captors of political power. However, a little over a decade ago (1999), the country appeared to have chosen a justice mechanism not preoccupied with Retribution (an expression of the 'rule of law' feature of autonomous law). At the dawn of democratic rule, the Olusegun Obasanjo administration wanted to show that Nigeria was in transition towards rule of law for all stakeholders. This choice aimed at legitimating the administration after a loathsome past. So, the HRVIC was setup ostensibly to offer this legitimation, as argued by Nwogu (2007, p. 39).

Yet, this mechanism of legitimation of political power appeared to equally opt for a semblance of Restorative Justice (an expression of responsive law with its focus on social aspirations). Why did Nigeria move from one extreme – yet not stuck with another extreme? What are the tensions involved in the choice made by Nigeria in 1999 – tensions originating from paradoxes of Restorative Justice? These are the questions this article shall attempt to answer.

### **Nigeria's Restorative Justice Experiment: A Very Short Background**

The author acknowledges that Nwogu (2007) deals extensively with the HRVIC. To the author's knowledge, Nwogu is the first scholarly book-length engagement with this Commission. Hence, this article will not rehash or contest here Nwogu's findings and interpretations. This section will simply situate this article's discussion.

Nigeria returned to democratic rule after 15 years of uninterrupted military rule. It became democratic at a time of intense discussions globally on transitional justice and sustainable peace. So, Mr Obasanjo, by presidential order, established the HRVIC, within weeks of his inauguration. HRVIC had this brief: to restore the confidence of citizens in the nation's government, and to contribute to national healing of festering wounds covering the period between January 1966 and May 1999. This option, as observed above, really appeared to go beyond autonomous law too. The HRVIC brief appears sensitive to responsive law, with its social awareness, interest in social aspirations, and substantive justice (Nonet & Selznick, p. 16). Accordingly, HRVIC decided from the outset to see its task principally as "using the instrumentality of the law to effect social change in the country" (HRVIC, 2002b, vol 1:2.46). The principal expectations listed by the *HRVIC Report* are (HRVIC, 2002f, vol 2:8.12-8.14):

1. Restoring the dignity of victims;
2. Creating opportunity for perpetrators to "expiate their guilt";
3. Facilitating national catharsis and development of a culture of respect for human rights against prevailing culture of impunity;
4. The Naming of perpetrators and disclosure of the truth about their atrocities are punishment "through public stigma, shaming and humiliation." This can reduce the urge of retribution.

These expectations clearly echo Restorative Justice as a mechanism for responsive law, hence making a strong case for it moving beyond micro issues to 'Restorative Peacebuilding'.

This is understandable since the HRVIC saw its task beyond just serving rule of law. It was sensitive to a

growing legal jurisprudence that addresses problems inherent in legal formalism of autonomous law (cf. Nonet & Selznick, p. 115). Furthermore, some of the commissioners and their collaborators had backgrounds of social/legal activism. Hence, they opted to reconstruct the HRVIC as an opportunity of law responding to social justice issues which lay at the base of Nigeria's intractable low density violence. The HRVIC viewed its task through the prism of Restorative Justice which claims to be an instance of what can be termed 'Responsive Law'. It raised fundamental issues and questions about Nigeria's past, present and future. The HRVIC was designed thus by the Commissioners to go to the roots, aspiring to 'heal from the roots' ('*sanatio in radice*'). It did not shy away from entering the space of public policy, which 'Autonomous Law' typology will argue to be outside the purview of law (Nonet & Selznick, p. 58). It meant considering its mandate within Nigeria's "social contexts and effects of official action" (Nonet & Selznick, p. 73). By this, one can agree with Nonet and Selznick that responsive law, embodied, for instance, in the HRVIC, searches for "*implicit values* in rules and policies" (Nonet & Selznick, p. 79, italics in original), discerning the spirit of the law – within and beyond the letter of the law.

The HRVIC worked and had public hearings in four cities. The Commission rounded-off its work in 2001 and submitted its *Report* to the president, Obasanjo in May 2002, with revelations and recommendations that strengthened the argument for Restorative Justice. The author accessed the *Report* and downloaded it from Nigerianmuse website (see Nigerianmuse, 2009).

### **Why Nigeria Did Not Opt for Pure Retribution**

#### ***1. Recurring Violence as 'Fratricide'***

Nigeria's civil war (1966-1970) and recurring inter-ethnic/religious violence were 'fratricide'. Pure Retribution is not the best option to solve problems between 'brothers/sisters'. What is needed is a mechanism for justice continuum in which all survivors are included in any process of rehabilitation, reconstruction, reintegration, and peacebuilding, leading ultimately to reconciliation. Justice continuum discerns and recognizes different needs of stakeholders

(especially the renewal of the mode of relations after violations and equal entitlement to respect & recognition; commitment to the promise that the past will not repeat itself). Justice continuum accordingly aims at responding to these needs simultaneously (Sharpe, 2004, pp. 20, 26-27). Nigeria was not an exceptional case. Justice continuum discourse in transitional contexts goes on with regard to intra-state violence and atrocities among neighbours-turned-enemies (see Stover & Weinstein, 2004).

So, with the 'miraculous' escape from military regime and the ghosts of that past still haunting the nation, the new civilian administration appeared to be eager to heal the nation, and consolidate democratic rule and civility with an eye on this justice continuum.

## **2. *Post-Military Era***

There was the consideration for the sustainability of democratic rule in the post-military era. Accordingly, Nigeria needed to tread with caution regarding accountability and just retribution due to some obvious, largely pragmatic, reasons. The cruellest atrocities were committed under military administrations. Furthermore, the Military in 'Nigeria-in-Transition' was a strong power broker and spoiler (cf. Nwogu, 2007, p. 24; Ojo, January 2006). The democratically elected president, Obasanjo, is a retired Army General, a former Head of State, between 1976 and 1979. Moreover, he was a major beneficiary of the Military political establishment, and that fact partly informed his later vacillations on the HRVIC's *Report*. In fact, Hakeem Yusuf (2007: 276-281) contends that the military top brass, tacitly condoned by the Obasanjo administration, acted true to type by 'spoiling' the promises of the HRVIC, using the judiciary, which it destabilised and corrupted when in power.

## **3. *The Allure for National Credibility***

The new civilian administration desired credibility and respect, after years of being an international pariah, and more so with post-apartheid South Africa threatening Nigeria's status as continental leader, with its widely acclaimed (albeit controversial) TRC. Hence, an unqualified general amnesty for those with command responsibility during Nigeria's military rule was not

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tenable at that time for the Obasanjo administration. Nwogu rightly remarks about Obasanjo in retrospect of his later actions regarding the HRVIC: "... he (Obasanjo) used the HRVIC as a means to distance himself from his predecessors but was not vested in acting on the moral claim that a transitional government pronounces against the past" (Nwogu, 2007, p. 39).

**4. A Prudential Option beyond Repression and Autonomy**

Considering the points above, the new civilian administration found an option, inspired or challenged by South Africa's TRC, beyond imposed amnesia of the past (an instance of 'repressive law') and the clamour for retributive justice (an instance of 'autonomous law'). The option, represented by the HRVIC (an instance of responsive law), is a mechanism for: i] Accountability i.e. the disclosure and acknowledgement of wrongs and the effects of hitherto imposed 'emotional *toxicness*'; ii] Confronting mythical stories of the over three hundred ethnic groups in Nigeria – stories which fuel primordial conflicts and violations; iii] Responding to legitimate (and also exaggerated) claims for institutional justice (i.e. punishment, material & symbolic reparations), for individuals and communities due to the criminality of the Nigerian State and its agents; iv] National Reconciliation and the possible development of a national consciousness beyond parochial interests and primordial loyalties.

Summarily, Nigeria could not opt for pure retribution (minimalist notion of autonomous law) because the government and the HRVIC recognised the importance of justice continuum. Within this continuum, responsive law (e.g. HRVIC's Restorative Justice) cannot factor out social aspirations and national reconciliation – justice issues that autonomous law, especially the minimalist form (as in pure retributive justice), will not consider.

**Nigeria's HRVIC & the Promise of Restorative Justice**

Nigeria had reasoned that in the face of “the ugly past of collective violence” there was the necessity to come up with and be engaged in “some form of healing process and reconciliation in countries that had experienced violent conflicts and gross violations of human rights” (HRVIC, 2002f, vol. 2:8.5). From this claim and how HRVIC sought to actualise this, one can sense some promises presented by Restorative Justice discourse to which HRVIC appealed. These are outlined forthwith.

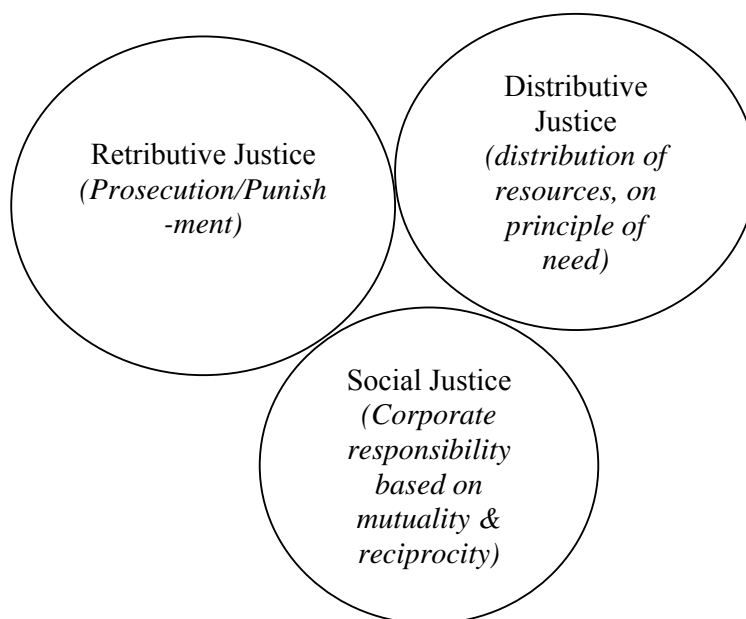
### ***1. Overcoming ‘Toxic’ Emotions***

Whether real or imagined, emotions serve crucial functions. Every human person and group has the capacities and dispositions to experience and act on any human emotion. Manipulation of ethnicity and religion which inspired mass violence and atrocities was possible or helped by a human psychology: the toxicity of humiliation, shame, and worthlessness has a corresponding strong desire for extrication or at least deployment elsewhere. If there are no institutional spaces for removal or displacement, this ‘toxic material’ will be deployed all the same through other means (see Exline & Baumeister, 2000; Fattah & Fierke, March 2009; Pham, 2004; Sloat, 2004; Staub & Pearlman, 2002). Those who do not pay attention to generated, but especially latent, emotions cannot properly understand the past they want to overcome or create a durable mechanism for justice continuum that will take care of that thorny past. Restorative Justice’s strategic relationality at various dialogical interfaces shows itself as being aware of the role of emotions and how these should be proactively dealt with. Hence, Restorative Justice-like HRVIC showed more interest in transformation of toxic emotions at personal, interpersonal, and national levels than Retributive Justice (see HRVIC, 2002b, vol. 1:1.19, 2002f, vol. 2:8.5).

### ***2. Intersecting Three Spheres of Justice***

According to the author’s interpretation of HRVIC’s position on three spheres of justice (Retributive Justice, Social Justice, and Distributive Justice) and their limitations in post-conflict situations, Restorative Justice situates itself at the middle when the circles of

the three spheres barely intersect. By this, Restorative Justice promises to redress the fragmentation of Justice and human persons who are agents and recipients of Justice. One can represent the spheres of Justice in present social-political sphere diagrammatically thus:



**Fig. 1: Spheres of Justice**

The above diagram shows an instance of the practice and limitation of autonomous law, which does not stray into public policy discourse (cf. Nonet & Selznick, p. 58). Hence, it focuses, within the separate spheres of justice, on their rules and policies, adjudicating in times of conflicts. But in transitional societies, this approach is inadequate.

Conversely, Restorative Justice's imagination can be represented thus:





**Fig. 2: Imagined Restorative Justice**

This diagram represents how risky responsive law (as in HRVIC's Restorative Justice) attempts to bridge the divide between legal adjudication and regulation. This representation makes sense because responsive law includes the diversity of problems, the historical and circumstantial alterations of citizens in its legal consideration. Hence this law, embodied in Restorative Justice, responds through "the elaboration of concepts, doctrines, and principles" (Nonet & Selznick, p. 80) on the understanding that responsive law is not just about procedural fairness. It must be socially aware, actively engaging in public discourse via a definition and actualization of substantive justice (Nonet & Selznick, p. 74).

Furthermore, the diagrammatic representations above concerning the HRVIC's discussion on the relationship among the three spheres of justice demand stating the following. First, the distinction made by the Commission between the three spheres of justice and locating reparation within the sphere of Restorative Justice is informed by developments in the global community about some kind of 'reparative justice' (cf. HRVIC, 2002d, vol. 6:3.20-3.25). Second, the distinction draws strength also from evolving

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jurisprudential traditions around the world (see HRVIC, 2002b, vol. 1:2.96-2.98) that pay attention to an ethical responsibility the human society has towards its traumatised members yet with equally compelling ethical consideration of those who are responsible for the atrocities.

### **3. National Reconciliation**

Restorative Justice has the possibility of fostering National Reconciliation – which is the ‘rebuilding of trust’ between groups inhabiting the same socio-political space.

Trust is rebuilt, hence national reconciliation, when there is a narrative harmony between hitherto apparently incompatible and indivisible narratives of primordial identities. Crucial to this construal of reconciliation are the bearers of these conflicting identities who constantly interpret events according to their mythical stories (Govier & Verwoerd, June 2002, p. 183). For instance, though a unanimous national narrative may be an illusion in Nigeria, at least for now, the narrative presented in the *HRVIC Report* (HRVIC, 2002b, vol. 1:2.1-2.31, 3.1-3.244, 2002f, vol. 2:2.6-2.34, chapt. 6:6.27-6.48, chapt. 7:7.1-7.50, 2002c, vol. 7:3.53-91) is laudable. It can serve as the basis for historical studies on Nigeria. Its nuanced account can possibly serve as the basis for civic education and national consciousness, and the bedrock for further political rearrangement in the country without as much combustible myths as in Nigeria today.

### **4. Positive Anthropology**

From a Christian theological point of view, Restorative Justice holds a lot of promises because it has a highly positive and hopeful anthropology. Yes, we do cruel things to one another, but fundamentally we are good. Hence, Restorative Justice does not pronounce a final word on anybody, and nobody is beyond repair. Accordingly, deep in Restorative Justice ethos and praxis is an “Ethics of Growth”, which Christian ethics, at least as informed by Leuven Personalism, can relate with (see Burggraeve, Spring 1988, Summer 1988).

Retributive Justice, on the other hand, has a pessimistic anthropology: we are 'wolves unto one another'. So, the best we can do for 'peace' to reign is to be tough on crime and criminals and understand less. Our saving grace is 'deterrence': the tougher, the better to succeed in persuading us from committing evil. Ingrained in Retributive Justice is an "Ethics of Fear", which implies that we do no harm because we are afraid of the law. But what happens when the Law is not in sight?

### **5. Retributive Justice Does not Deter Sufficiently**

James Gilligan (1996, pp. 11-12, italics in original) offers this insight: "... *all violence is an attempt to achieve justice*, or what the violent person perceives as injustice, for himself or for whomever it is on whose behalf he is being violent.... Thus, *the attempt to achieve and maintain justice, or to undo or prevent injustice, is the one and only universal cause of violence*". Therefore, irrespective of the severity of deterrence and retribution, if emotions associated with unmitigated injustice are not dealt with, Retributive Justice cannot deter. One of the lessons one can learn about Nigeria's descent into war (1966-1970) and recurring low density violence (1980s till date) is this: the displacement of toxic emotions associated with injustice is an ethical imperative, and when the legitimate channels of displacement are blocked or compromised, violent displacement is bound to happen. Restorative Justice recognises this. Hence, its four principles are geared towards finding ways to address the issue of injustice and its toxic emotions, at a dialogical interface (Zehr, Spring 2008), though with the likelihood of chaotic exchange, as noticed during HRVIC's public hearings.

### **6. Restorative Justice: Restoring Colonially Displaced Endogenous Jurisprudence**

Pre-colonial indigenous societies, for instance closely knit communities of Africa's past, viewed penal law to be on reparation of frayed relationships, acknowledging the primacy of restoring harmony to the community after social irruption (for an extended discussion, see Elechi, 2006, chapt. 3). Hence, the intersection between law, religion and culture among these pre-colonial

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peoples necessitated judicial trials and administration of justice being flexible. The flexibility was to enable the legal institution perform its twin objectives – administration of justice and promotion of social harmony (cf. Okafor, June 2006: 40-43). This echoes Nonet & Selznick's 'Responsive Law'.

However, dislocation was colonised peoples' experience of colonial, Western legal system with its little sensitivity to the complex intersection of law, religion, and culture (HRVIC, 2002e, vol 3:7.4). Consequently, Restorative Justice, some of its advocates claim, is a restoration of this complex relationship because of its sensitivity to many post-colonial societies, and racial/ethnic minorities in the Anglo-Saxon world. Significantly, it responds to some postcolonial critique regarding the displacement of indigenous penology and jurisprudence which held law, religion and culture together (cf. Okafor; Oomen, 2009, p. 178; Yakubu, 2003, p. 136). For this reason, it comes as no surprise, to some advocates, that Restorative Justice appears attractive to post-colonial societies (Omale, November 2006; Tutu, 2000, pp. 54-55).

### **Tensions in Restorative Justice**

In spite of the allure of Restorative Justice, one must pay serious attentions to tensions in Restorative Justice if we do not want to compromise the same sustainable peace it claims to be promoting due to what Daly (2002) has aptly termed 'mythical', not real, stories. The following observations are premised on Restorative Justice's grandiose approach to legal reasoning and practice. They seek to confront some of us with the over-idealisation and romanticisation assigned to Restorative Justice (e.g. Omale; Tutu). Accordingly, we will have to confront ourselves with this question: *Is Restorative Justice really worth the trouble and the noise about it?*

#### **1. Restorative Justice's Notion of Reconciliation**

Buying into the language and classification of Criminal Justice, Restorative Justice crucially sees violence as crimes which harm persons. Therefore, reconciliation is more on individual – face-to-face – level. Nigerians

saw this gleefully during the HRVIC public hearings. This individualised, psychotherapeutic notion has some implications.

First, it blurs the interactions between reparation and distributive justice which it claims to integrate (as depicted in fig. 2 above), because a group (e.g. Shell; or ethnic/religious) is not confronted with the imperative of making material reparations as part of bringing about reconciliation between it and the victimised other (e.g. Niger Delta people; or another ethnic/religious group). The impression, therefore, is that Restorative Justice-like initiatives (e.g. HRVIC) do not ascribe criminal liability unto groups, which will demand group reparations. Yet, this kind of reparation contributes to sustainable conflict transformation.

Second, it uses, quite often, redemptive metaphors to express its notion of Reconciliation. For instance, the notion of 'embrace' that is characterised by confession, contrition, forgiveness and restitution is intensely interpersonal. It does not fit large groups because the basic issue between un-reconciled groups is TRUST. Indeed, if attitudinal changes are needed for national reconciliation, then interpersonal reconciliation (highly emotional & directly felt) cannot be bracketed out – or else the transition risks reducing national reconciliation to a political option of coexistence, like Belgium's pragmatic federalism (Massart-Piérard & Bursen, 2007, pp. 19-20) or Nigeria's overcentralised federalism. These two nations are populated by peoples characterised by anger and disproportionate responsibility ethic – responsibility to the self and those bound together by primordial ties. If mutual antagonism between these peoples serves to decrease national progress and respect in the international community, then we should see national reconciliation beyond the 'Holy Grail' put forward by Restorative Justice advocates. National reconciliation that has eye on groups should consider the (re-)generation of significant "quality of trust and cooperative processes" (Govier & Verwoerd, 2002, p. 182) between groups. Hence, *justice continuum – no matter how expansive and dialogical like Restorative Justice – is not an expression of national reconciliation. It is just a means towards national reconciliation.*

Therefore, the success of Restorative Justice-like practice like the HRVIC should not be seen as an

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expression of national reconciliation – as was the mistake for instance about HRVIC (and the TRC). Up till now, Restorative Justice, though deeply concerned about reconciliation, has not come up with sufficient model for national reconciliation, and not just interpersonal reconciliation. Disclosure of Truth (albeit selective) at a dialogical interface is not enough to celebrate national reconciliation because the deeper systemic causes at the meso and macro levels are not given adequate attention. Accordingly, post-conflict establishment of TRUST is the basic index of national reconciliation i.e. qualitative trust between peoples with disparate narratives of primordial identities.

It remains to be seen how attentive Restorative Justice advocates and practices are to this robust form of national reconciliation which makes the following major claim: “[G]roups and individuals who resent each other and are suspicious, or are even hateful toward each other cannot effectively work together within institutions” (Govier & Verwoerd, 2002, p. 184). Consequently, *one should judge Restorative Justice’s success or lack of it in Peacebuilding in contexts similar to Nigeria with the extent of reduced resentment and suspicions between groups making up the nation over a period of time. In this regard, it is much too early to give any positive remark about the success rate of Restorative Justice’s Peacebuilding initiatives – in Nigeria, in Rwanda, and perhaps even South Africa.*

## **2. Strange Romance with the State**

The HRVIC shows how an embodiment of responsive law can end up resembling an embodiment of autonomous law that can be used as a mechanism of constraint, spoiling the social agitation of marginal citizens, on behalf of self-serving political elite. Hence, Restorative Justice is not free and independent as one may think, especially with regards to the State, controlled mostly in transitional societies by this elite. This State has a controlling stake in Restorative Justice’s formation, formulation, funding and practices. Consequently, Restorative Justice structures itself according to the State’s criteria of what works to reduce crime rate. In rhetoric, Restorative Justice claims to be

radical, but in practice its radicality can be questioned. It succeeds as long as the State wills it (Pavlich, 2005, p. 20). This brings to mind Nonet & Selznick observation regarding the limitation of autonomous law. It is not completely out of the control of the captors of power, who allow it to function as long as it can still be used as a mechanism of constraint and legitimation. The fate of Nigeria's HRVIC readily comes to mind. It was the State that set up the Restorative Justice-like process; wholly funded it; went along with it as long as it was convenient for it, but when the outcome went a bit too far even for the State and its cronies, the same State has refused till date to publish the *Report*, although subtly making selective implementation of the HRVIC's recommendations – so long as it finds them convenient.

Accordingly, as long as the State remains the sole monopolist of coercion, invested with the constitutional and legal power to control, violate and redeem, how can Restorative Justice overcome its strange romance with the State? Nowhere this dilemma comes out than when it is confronted with the seriousness of 'social harm', especially the criminality of the State, and corporate crimes (with the active connivance of the State e.g. Shell & Nigeria's federal government). It is a fact that: i] most of the crimes and traumata committed against people affected by violence are caused by the States; ii] the States having the monopoly of the institutions of justice and redress gloss over their criminal actions with the rhetoric of 'sovereignty,' 'national interest,' and a culture of impunity.

Consequently, Cunneen (2006, p. 356) asks advocates of Restorative Justice: "how do we respond to both recent (and not so recent) systematic, fundamental and large-scale abuses of human rights perpetrated and often legitimated by modern states?" Restorative Justice does not offer much hope, judging from the practice and recommendation of Nigeria's HRVIC. Its *Report* recommends that all living military rulers and rebel leaders from 1966 to 1999 should publicly apologise for various crimes committed when they had overall command. Furthermore, the Federal Government should carry the burden of reparations for victims through the proposed "Presidential Fund" though it should encourage all Nigerians to contribute to the Fund (HRVIC, 2002c, vol. 7:3.50). But the HRVIC was not empowered to make those with command and corporate

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responsibilities to experience punishment through “public stigma, shaming and humiliation” experienced by many middle level actors. It appears that Restorative Justice uncomfortably appears utilitarian! To stem retributive impulse in the nation, some lower level persons are ‘sacrificed’ by being punished, while the ‘big fishes’ get slaps on the wrists. Even Archbishop Desmond Tutu is quoted as acknowledging this concerning the TRC: “...we failed to engage the white community enough, those who had been privileged in the apartheid system, or to get beyond the foot-soldiers” (Chivers, February 2006: 20). One can notice that there is the likelihood, like in repressive law and autonomous law, of power differential influencing the outcome of responsive law, as in Restorative Justice practices (Daly, 2003, pp. 36-38; Roche, 2004, pp. 33-41), even in some Truth Commissions (e.g. TRC and HRVIC). It is no wonder, therefore, that some perpetrators with command responsibilities, yet lacking legitimacy, especially in many postcolonial contexts, view Restorative Justice-like initiatives to be good for them, and intensely lobby for these – as is the case in Uganda (Allen, October 2007, p. 148).

What this sadly reminds postcolonial concerns in African contexts like Nigeria and South Africa that have invoked or are invoking Restorative Justice is that Restorative Justice appears to be weak in a context of State’s ‘illegality, non-credibility and unaccountability’. Indeed, the adulation poured on the ‘triumph’ of Restorative Justice over Retributive Justice appears to have taken critical eyes off this contradiction. Yet, what this shows up, in my estimation, is the lack of bargaining power inherent in Restorative Justice. As stated earlier, the relationship between it and the State is too weighted – it is heavily dependent on the State, but the State is completely out of control of Restorative Justice.

Accordingly, if there is a stalemate about justice for the excluded, the disempowered and the vulnerable in the post-colonial State, the State will always have its way, even if Restorative Justice has its say. This postcolonial concern makes Temitope Oriola, in earlier edition of this journal, approve of Biko Agozino’s postcolonial position (even if some might label it ‘anarchic oppositionalism’): “Agozino argues that in ‘criminal



states,' the right to rebel must be recognized as a fundamental human right. He argues that without the recognition of the right to rebel, society will remain a slave to the state. He calls for the trial of the South African state for the injustices of apartheid" (Oriola, November 2006, p. 105).

### **3. Punishment (Not) In Restorative Justice**

Restorative Justice is not punishment-free. Indeed, to reduce the likelihood of recidivism, Restorative Justice knows it cannot discount *punishment*, which I define as *the legal imposition of painful action as a consequence of prior unacceptable behaviour*. Declan Roche gives a telling example that illustrates my claim. As part of the outcome of a Restorative Justice 'Victim-Offender Mediation', a young man (the Offender) who was caught for shoplifting stood in front of the shop wearing a shirt with the inscription: "I am a thief". For Roche, this meant that Restorative Justice can deliver a justice that is as cruel and vengeful as the criminal justice system it claims to be displacing (Roche, 2004, p. 1). This is corroborated by Roger Matthews (2006) in his critical evaluation of Restorative Justice's position punishment, as another instance of weak theoretical base.

Notwithstanding, some Restorative Justice advocates deny the presence of punishment's retributive elements in Restorative Justice (Omale; Tutu; Zehr, 1990). Yet, without 'punishment', even in Restorative Justice, those who have wounded people will not know the gravity of their actions. This informs 'the strategy of bifurcation' that many Restorative Justice advocates are now accepting (cf. Claes, Foque & Peters, 2005; Zehr, 2005). Lode Walgrave (2008), one of the leading thinkers on Restorative Justice in Europe, offers a current position. Punishment, for some offenders, will come as 'reparative sanctions', since it is not compulsory and non-negotiable that victims and offenders should meet face-to-face. Restorative Justice, contra penal retributivists, sees punishment as a means, not a goal. Hence, Restorative Justice is an "inverted constructive retributivism" (Walgrave, chapt. 2, quotation on p. 60).

Furthermore, many offenders persist in denial and self-deception because punishment is present in Restorative

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Justice-like setup like the HRVIC. This is one conclusion one can reach looking back at the public hearings of the HRVIC and its *Report*. One of the Restorative Justice aims of the HRVIC was: the naming of perpetrators; and the disclosure of the truth about their atrocities as punishment “through public stigma, shaming and humiliation” (HRVIC, 2002f, vol. 2:8.14). Laudable as this is, it is ethically problematic with Restorative Justice and Truth Commissions.

It seems the insistence on and the presence of punishment in Restorative Justice is another paradoxical imitation of dominant Criminal Justice logic and practice in order to gain legitimacy by the State that is not punished in Restorative Justice. Yet, as mentioned earlier, the State has been the major perpetrator of mass atrocities and gross violations of human rights, especially in the 20<sup>th</sup> and 21<sup>st</sup> centuries. It should be noted that Restorative Justice finds itself caught in a dilemma: it wishes to appear proactive and forward-looking (‘Responsive Law’) by trying to distance itself from the retributive element of punishment (‘Autonomous Law’). Yet, the denial of the presence of this element of punishment questions Restorative Justice’s credibility by those wounded and those who did the wounding.

On the one hand, the wounded are offended that Restorative Justice denies their entitlement to punishment as expression of retributive emotions of indignation and resentment. If disclosure of Truth is an acknowledgement of unjust imposition of shame and trauma, then the retributive element of punishment is recognition of their undeserved shame and trauma. So, Restorative Justice trivialises their wounds by denying this kind of punishment. On the other hand, those who did the wounding regard Restorative Justice’s denial of punishment’s presence as hypocritical because they experience the retributive element of punishment even in Restorative Justice initiatives. It seems the humanism Restorative Justice ‘preaches’ to bring over and against Retributive Justice is not sufficiently responsive and realistic.

#### **4. The Burden of Voluntariness**

Restorative Justice's highly optimistic anthropology, acknowledged earlier as one of its attraction for Christian ethics, places a high premium on voluntary participation in Restorative Justice practices. It presumes that human beings, no matter how wounded or how wicked, can recognise the need to meet in freedom, openness and empathy with other stakeholders in order to resolve conflicts and collectively overcome 'toxic' emotions. This value of voluntariness is equally a burden on Restorative Justice, especially in Peacebuilding. The HRVIC's Chairman claims that it had the power to subpoena people. However, in the interest of national reconciliation, it decided against invoking that power, believing in concerned Nigerians, especially those implicated in gross human rights violations, to come forward on their own accord (HRVIC, 2002b, vol. 1:1.57). By implication, Restorative Justice will truly work and be successful when people are virtuous and are *response-able* to the blinding tears of those wounded and in pains.

For this reason, it appears that Restorative Justice is doomed where voluntariness is absent. How then does Restorative Justice respond to the rejection of its voluntariness without giving room for impunity? This is when realism (as in 'Autonomous Law') must meet the aspiration of Restorative Justice (as in 'Responsive Law'), without necessarily compromising its 'redemptive' discourse. Not every person will respond to the call of virtue or even of reason. Hence, *Retributive Justice will always be related to Restorative Justice in some way*. Zehr (2005, pp. 271-274), in the afterword of his *Changing Lenses*, acknowledges that it is one insight over the years that he has come to accept.

Even HRVIC *Report* acknowledges this. The 'forgiveness (amnesty)' proposed by the Commission is premised on the following (HRVIC, 2002d, vol. 6): public acknowledgement of wrong; commitment to unravel the truth which victims demand – as part of Restorative Justice; and personal expression of token – reparation through the proposed "Rehabilitation/Presidential Fund" (HRVIC, 2002c, vol. 7:3.50). If these conditions are not met, there can be no "forgiveness (amnesty)". Hence, the offender is liable to a form of punishment – or what I may refer to as the 1<sup>st</sup> level of justice. This is premised on the nature of Criminal justice. It is the structural expression of care of the State and its apparatus, for persons traumatised

by violent infractions. There is also the State's obligation: to foster and promote life after conflict. However, there will be those who will insist there was no atrocity to which they are liable, and are not in need of entering into any post-conflict reconfigured relationships.

Legally sanctioned punishment even in Restorative Justice can be appreciated if one recalls the discussion earlier on justice continuum inferring that some justice mechanisms must be designed to achieve implicit values in law and policies of the State. Hence, it is reasonable for justice continuum to have space for mechanisms of responsive law and simultaneously for autonomous law as part of the realism that not every person and group will respond freely to the implicit values of norms sustaining the human community.

Consequently, what I see as the '1<sup>st</sup> level of justice' (retributive justice) is unavoidable. The 2<sup>nd</sup> level is reparative justice; an example will be Walgrave's 'reparative sanctions' as part of his 'pyramid of restorative law enforcement' (Walgrave, p. 146 [fig. 5.1]); and the 3<sup>rd</sup> level is restorative justice. For the virtuous actors, they will accept the 3<sup>rd</sup> level. For the rational actors, deterrence, and reparative sanctions (part of the 2<sup>nd</sup> level) will be appropriate. However, for the yet 'unredeemed', incompetent or insensitive actors, prosecution and incapacitation (crucial to the 1<sup>st</sup> level) will be the crucial form of justice they shall experience. They deserve to be excluded from the restructuring of post-conflict society as long as they remain in their 'unredeemed' state.

##### **5. The Problematic Language of 'Forgiveness'**

In the original context of Restorative Justice, forgiveness language was nearly absent, because the intention was about coming to terms with a crime such that the traumatised victim feels safe again, and the offender's risk of re-offending is humanely managed. Restorative Justice in its original context does not presume prior friendship, nor does it assume friendship will follow, or relationship will be restored. Justice, even Restorative Justice, does not have to make us

friends. Justice simply owes us respect, safety and security.

However, when Restorative Justice was taken out of its original context and became instrumentalised for national reconciliation goals in transitional societies like Serbia, South Africa, Rwanda, Nigeria and Sierra Leone, words that were originally marginal in Restorative Justice took prominence, due to some advocates' propensity towards a religion-inspired redemptive discourse, especially within the Christian tradition (e.g. Shriver Jr., 1995; Tutu). Christianity's language with regard to reconciliation is very sacramental, following the ancient penitential ritual of: *Confessio Oris*, *Contritio Cordis*, and *Satisfatio Operum* (Moltmann, 1999, pp. 28-29). The flip side is that by subsuming Restorative Justice within this discourse, we are confronted with enormous confusion and ambiguities, especially on the relationship between reconciliation (*which must be programmatic and realistic about creating trust anew after violent conflicts between groups*) and forgiveness which can only be bestowed by the victim. There is confusion also on the relationship between justice (*as a penultimate project*) and reconciliation (*the ultimate one*).

If atrocity committed and suffered is like death – to the perpetrator and the victim – then forgiveness, not justice, brings 'resurrection' for both the victim and the perpetrator. But this is beyond the scope of law, even if responsive. Perhaps, in this way, the HRVIC agrees, as much as I do, with J.M. Coetzee's *Disgrace* that repentance, forgiveness, and admission of guilt (different from acknowledgment of wrong) are transethical (Coetzee, 2000, pp. 51, 53-54, 57). Yet, the HRVIC *Report* equates 'forgiveness' with 'amnesty' for some perpetrators who satisfied some conditions. This equation raises a question: in what sense is forgiveness equated with amnesty – as being set free from prosecution and legally-sanctioned individual punishment? From the assertion of the HRVIC above, the answer will be in the affirmative.

Hence, 'Forgiveness' as invoked here and elsewhere in the HRVIC's *Report* is not 'transethical' i.e. a 'beyond ethics' action coming from the victim towards the perpetrator. Rather, it is political and legal. Reparations (for victims) and 'Forgiveness' (for perpetrators), in the eyes of the Commissioners, are

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peculiar expressions of merciful justice. Even if the notion of ‘merciful justice’ is reasonable and admirable, “forgiveness (amnesty)” is problematic in some ways, due to forgiveness’ meaning. *It is a personally chosen process of relational repair that lets go of toxic emotions towards one(s) who had unjustly transgressed against defined relationship(s)* (cf. Dindia & Tara Emmers-Sommer, 2006, pp. 312, 319; Fitness, 2006, p. 298; Worthington Jr., 2005; Worthington Jr., 2006, p. 197).

Can States or political institutions (e.g. HRVIC) offer forgiveness then, more so offering it on behalf of the victims? Why should Forgiveness (a transethical term) not be considered as separate from Amnesty, a legal term invoked if some basic legal conditions are met in the interest of a clearly defined common good? Forgiveness is like a miracle. It is a human act, yet beyond the control of humans. So this cannot be located in or be preoccupied with settings like the HRVIC. Before suggesting Forgiveness to peoples, there are conditions that are ethically obligatory which must be fulfilled. Justice is one of them. These conditions close injustice gap, reduce unforgiveness, and make forgiveness likely possible (Worthington Jr., 2006, p. 49).

From this analysis, we come to the following conclusion which experts in Victimology and Traumatology will have no qualms about, but which some in some religious traditions, chiefly the Christian Tradition, may object to: *realistically, there can be a future between Neighbours-turned-Enemies without Forgiveness (because we cannot rush it or predict when it shall make its appearance). Similarly, there can be Forgiveness without Reconciliation; sometimes, Forgiveness is the Final Word* because one’s fundamental trust had been so severely damaged that one cannot resume a trustful relationship with offender(s) after traumatic conflict even though one has forgiven the person(s).

Restorative Justice advocates involved in Restorative Peacebuilding must pay more attention to this nuance between Mercy, Justice, Forgiveness & Reconciliation. They must not be so much in a hurry to populate the lexicon and initiatives of Restorative Peacebuilding

with metaphors of forgiveness – although not ruling them out. I recognise that not every author accepts this position, especially those advocating for 'political forgiveness' as part of transitional justice and reconciliation process (see for instance: Shriver Jr.; Minow, 1998; de Gruchy, 2002).

On the one hand, a critical appraisal of objections reveals that the so-called 'political forgiveness' is couched in personal terms – not between groups. It appears some confuse forgiveness between persons from conflicting groups to mean 'political forgiveness' between groups. On the other hand, it appears what is referred to as 'political forgiveness' (e.g. HRVIC's "Forgiveness (Amnesty)") is analytically and in fact an act of State pardon (relieving the burden of justified elements of justice, especially personal reparation and retribution) for convicted or indicted perpetrators – for the sake of safety and stability (political expediency). Hence, with due respect to the opinions for 'political forgiveness', I agree with Anthony Bash (2007, p. 139) that the case they make for political forgiveness as 'corporate forgiveness' "does not stand up to analytical scrutiny."

## **6. A Disproportionality Subverting Postcolonial Concern**

As gleaned from HRVIC, there is a disproportionate emphasis with regard to reparations on the symbolic level, and even on supererogatory issues like repentance and forgiveness, leaving material reparation under recommendations. Hence, there is the impression that this emphasis ultimately favours perpetrators such that victims who gave up prosecution in the name of national reconciliation feel short-changed. It is as if the symbolic dimension is all the sacrosanct reparation that matters for victims.

Towards the end of 2007, one of HRVIC's members, in fact its Secretary, Matthew Hassan Kukah, a Roman Catholic priest, was interviewed as part of Nigeria's 47<sup>th</sup> independence anniversary. He was asked on HRVIC's fate. He suggested that the HRVIC was a massive success, because its task was not national reconciliation or inter-group reconciliation, or some transitional justice issues like effective policing, institutionalisation of human rights norms, and rule of law. These,

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according to Kukah, “are more or less collateral benefits.” The “essence” of the HRVIC was “to let victims tell their stories.” As such, there was none of the victims that appeared before the HRVIC that “did not go home with a feeling, a sigh of relief. Not that their problems were solved but they had a chance to tell their stories” (Babalola, September 30, 2007).

If one follows the logic of Commissioner Kukah to its logical conclusion, then Restorative Justice-like HRVIC was highly restorative basically because it afforded victims “a chance to tell their stories”. Furthermore, according to Kukah’s logic, material reparations (restitution or compensation) were not even considered as crucially important to HRVIC’s work. In other words, material aspects of post-conflict justice are less important to HRVIC’s ‘Restorative Justice’. While perpetrators received their own part of the bargain almost immediately, except those that the HRVIC specifically recommended for prosecution, victims that gave up their rights to prosecution in the name of national reconciliation are still in the lurch. Material reparation (individually and collectively) needed for meaningful post-conflict life is not forthcoming.

This is not peculiar to Nigeria. South Africa’s TRC was bedevilled with this disproportionality; and post-TRC South Africa is still battling with this. Nevertheless, postcolonial discourse contests this narrow focus of justice. Hence, one glimpses at a cardinal flaw of Restorative Justice-like practices like the HRVIC. They inadvertently ‘canonise’ the double standard in international policies and politics, when it comes to Africa particularly: “*To err is human, to atone, humane,* declares one: *to err is human, to forgive, African,* responds another. Is a continent’s humanity of such bottomless reserves that it can truly accommodate the latter?” (Soyinka, 2000, pp. 21-22, italics in original). While reparations for mass violence are borne by some States to another – Germany to France after WW I; Germany to Israel after WW II; Iraq to Kuwait after the Gulf War I (Soyinka, p. 83), reparations after mass violence in post-colonial states are framed within the individualised & psychotherapeutic ambience, with ‘forgiveness’ and reconciliation taking prominent place.



From a postcolonial perspective, therefore, the strategic liberal human rights & psychotherapeutic approach to justice in transitional societies favoured so far by Restorative Justice-like practices like the HRVIC, TRC, and Rwanda's *Gacaca* short-changes mass survivors because this approach cannot engender the kind of socio-cultural and material transformation needed for such transitional societies (Jefferess, 2008, p. 142). This is a disconcerting observation; given the promise noted earlier that Restorative Justice restores endogenous laws and practices of formerly colonised peoples. The crucial question is: Can Restorative Justice overcome this paradox?

### **Concluding Remarks**

In conclusion, there is one pertinent question: *In the light of the issues raised about Restorative Justice in the preceding section, to what extent can one be confident about and be inspired by Restorative Justice?*

There should be confidence because Restorative Justice has come to stay, even in international politics and relations, especially with recent wagers from the United Nations on Restorative Justice (Security Council, 2004; United Nations, 2000, 2006). As a Christian ethicist, I am confident about Restorative Justice's promises for the reason briefly enunciated below.

The Christian ethical realism that informs my positive disposition towards Restorative Justice is Janus-faced: it looks backward to the past of the created order (in order to overcome the narratives of the past that foster violence), and looks forward (to the eschatological goal of creation i.e. the reign of God in its comprehensiveness). So, Restorative Justice is not at variance with Christian theology and its ethics. The ethical principles that propel a Christian responsibility ethic and the ones prodding Restorative Justice are similar. Mercy is shown to be the nature of divine love to humanity. Hope affirms that evil will not have the last word in the good pursued in our general commitment to human flourishing within which our individual vocations are located. Love is the epicentre of our lives and provides the source of transformation. Restorative Justice and Christian ethics probably look at evil similarly: "To love good mutilated by evil with divine love is to love them as good, not as evil, and so

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to separate them from their evil and restore them to wholeness” (Black, 2000, p. 151, 2nd column).

The tensions and paradoxes about Restorative Justice have been raised so that those who are confident about Restorative Justice’s promises as an embodiment of ‘Responsive Law’ and postcolonial restoration of endogenous laws and practices will tread with two crucial virtues: Realism and Humility, lest they develop a hyper-romanticised imagination of Restorative Justice. In paying diligent attention to the tensions in Restorative Justice in practice, we can equally contribute towards sharpening and realising its socially aware and responsible aspirations.

For this reason, inspiration from Restorative Justice should not be expected as a blueprint presented to criminology, postcolonial discourse, philosophy or theology on how to proceed on crime control, transitional justice and peacebuilding. On the contrary, the inspiration this article has in mind means a graced ‘push’ out of one’s academic comfort zone towards daring hermeneutics, even beyond what Restorative Justice might intend or incarnate in practice. From the discussions in this article the reader might appreciate that, as a Christian ethicist, I have been inspired to engage in some fundamental theological rethinking of some inherited notions, to the point of making distinctions between some of them, although they are usually coupled together, e.g. reconciliation & forgiveness; justice & peace; the symbolic & the material, in Restorative Justice discourse and practice, like the HRVIC.

Ultimately, making distinctions between these do not necessarily mean separating them. Making distinction is to show the correlation and interrelationships between these concepts, invoked in relation to reconciliation in transitional societies. Through this kind of exercise we grasp better the role of law as both ‘autonomous’ and ‘responsive’ in such societies. Of course, we likewise recognise its limitations which other sectors, especially religion, can make valuable contributions to ameliorate,

for the sake of peoples desiring detoxification after a toxic past.<sup>1</sup>

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Nigeria's Human Rights Violation Investigation Commission (HRVIC) and restorative justice: The promises, tensions and inspirations for transitional societies. Source: (2010) *African Journal of Criminology and Justice Studies*. 4(1): 55-86. The lack of peace in most post-colonial African nation-states is tied to unresolved political asymmetry among peoples with contending narratives of origins and power relations. The Justice system bequeathed to these states at their "flag"™ independence has been unsuitable for evolving a justice continuum that can ameliorate the asymmetry and consequent co