

RESTORATIVE JUSTICE IDEALS AND VICTIMS OF CRIME IN NIGERIA: TOWARDS A REPARATIVE JUSTICE APPROACH*

Abstract

Restorative justice theory seeks to make the victim the central focus of criminal justice process by underscoring on their personality and the harm they have been suffered, owing to the crime perpetrated against them. Arguably, it is a theory of justice rooted in the ancient practice which views crime as solely between the parties involved, i.e. the victim and the perpetrator and criminal justice as aimed at restitution and reconciliation. For instance, indigenous African practices on the settlement of dispute, reflect restorative justice ideals of reconciliation and making the victim 'whole again'. Indigenous practices of confession and penitence by the offender, taking responsibility for the harm done and making amends are all reflective of reparative justice. A resurgence of the restorative justice in modern criminal justice system began with the re-emergence of the victims' rights crusade in the nineteenth century. In Nigeria, criminal justice is rather retributive and perpetrator-centric while, relegating the victim to the background in the criminal justice process. This paper adopts a purely doctrinal and desktop approach to examine the restorative justice theory as the legal basis for reparations to victims of crimes and particularly, narrows down on the reparative justice theory as a foundation for reparation to victims of crime in the administration of criminal justice in Nigeria.

Keywords: crime, justice, reparative, restorative, victims

1. Introduction

The trite dictum depicting criminal justice as a three-way traffic suggests that criminal justice includes justice for the victims.¹ Justice for victims in criminal cases could mean a vast range of things, which may be achieved procedurally and substantively. Repairing the harm suffered by victims as a result of crime, underscores their right to justice especially, in cases involving systemic and criminal human rights violations. Broadly, it may be safely argued that the concept of reparation to victims of crime especially, in the context of transitional justice, is hinged on the theory of restorative justice as against retributive justice which is typical of the conventional criminal justice system generally. Proponents of restorative justice posit that restorative justice process fosters reconciliation of parties, increases the likelihood of victims' reparation and satisfaction, and reintegration of offenders.² Hence, restorative justice is captured in three main goals such as encounter, amends and integration.³

From the restorative justice theory goal to 'amend', stems the reparative justice theory which particularly focuses on repairing the harm victims have suffered owing to crime or massive violation of their human rights. Reparative justice theory centralises victims of crime in its approach to criminal justice by focusing on repairing the harms resulting from the crimes perpetrated against victims of crimes. The historical development of the criminal justice reveals that the attention paid to victims and their need for a remedy in criminal cases waned as the State took over criminal prosecution as a public matter. Until a resurgence of a victim-oriented system in international human rights documents and a few States' domestic legislations in the late nineteenth century, reparation to victims was not a central theme of criminal justice.⁴ While it may be argued that the concept of remedies to victims of crime, made accessible through civil proceedings can make up for reparation to victims, this paper posits that the concept of repairing the harm of victims of crimes may not exactly be the same with civil remedies. The concept of civil remedies, arguably, solely hinged on corrective or compensatory justice theory whereas, it is difficult to solely, ascribe this conception of justice to the idea of repairing victims' harm.

The conventional criminal justice system in Nigeria does not make victims its central focus in relative comparison to the perpetrator or even the society as advocated by the popular dictum. Although there is historical evidence of reparation being rooted in the traditional criminal justice system in indigenous

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¹ Per Justice Oputa JSC, *Godwin Josiah v State* [1985] 1 NWLR 125.

² Margarita Zernova, *Restorative Justice: Ideals and Realities* (Ashgate 2007) 50. Margaret Urban Walker, 'Restorative Justice and Reparations' (2006) 37:3 *Journal of Social Philosophy*. 377, 385.

³ Gerry Johnstone, and Daniel W. Van Ness, 'The Meaning of Restorative Justice' in Gerry Johnstone and Daniel W. Van Ness (eds), *Handbook of Restorative Justice*. (Willan, Publishing 2007) 5-23.

⁴ Andrew Ashworth, 'Some Doubts About Restorative Justice' (1993) 4:2 *Criminal Law Forum* 277, 277. Zernova, 2007. *op. cit.* (n. 2) 8.

societies in Nigeria,⁵ the formal system of administration of criminal justice system does not offer victims reparative options except via remedies available through civil proceedings. The prevalent disposition of the criminal justice system, begs the question whether victims actually get justice from the criminal justice system or they are left to 'fend' for themselves and seek available remedies through the civil proceedings outlets. Is it, in deed, possible to chart a pathway for victims to obtain reparative justice in addition to whatever form of justice the criminal justice avails them? While it appears that the criminal justice system in Nigeria is largely built on the ideals of retributive justice, can there be nuances which attempt to accommodate the ideals of restorative justice? is it the case that by focusing on the aftermath of crimes and its effects on the immediate and actual victims and the remote and passive victims, the criminal justice system might become overwhelmed?

This paper interrogates the above questions in the light of the restorative justice narrative. The paper is divided into five sections. The first section gives a brief introduction to the paper. The second section articulates the basic ideals of the restorative justice theory within the criminal justice discourse. The third section evaluates a reparative perspective to restorative justice within the criminal justice system. The fourth section analyses the practical implications of implementing a reparative approach to criminal justice while the final section concludes by proposing a reparative approach to criminal justice in Nigeria.

2. Contextualising Restorative Justice in Criminal Law

Restorative justice has no single version or single practical application, as many authors have various definitions of what restorative justice entails and its components.⁶ Consequently, different models have emerged from the practice of restorative justice.⁷ However, there is a consensus on the idea that restorative justice is sharply contrasted with retributive justice and largely victim-centric.⁸ The restorative justice theory proposes a justice system that focuses on the victims rather than the perpetrators and affirms the role of the victim as important and central to the criminal justice system. The variations in the definition of restorative justice are also reflected in the aims and ideals which various authors ascribe to it. Thus, the main themes of restorative justice range from reconciliation and participation to restoration and healing.⁹ Restorative justice also symbolises a course of justice founded on fact finding and establishing the truth rather than imposing sanctions on perpetrators. Hence, restorative justice is multi-dimensional and incorporates both substantive and procedural justice.¹⁰ Restorative justice process whether substantive or procedural, must mirror three main goals of encounter, amends and integration. Among many strains of the restorative justice theory, this paper focuses on the reparative perspective of the restorative justice theory. This view of restorative justice theory underscores the interest of the victims and emphasises the provision of remedy for the wrong they have suffered or repair of the damage done to them as the primary aim of the criminal justice process. The Latin Maxim expressed as *Ubi jus ibi remedium* states that 'where there is a wrong there is a remedy', thus, victims have a right to remedy having suffered wrong. Reparation is arguably, the main means of providing remedy to victims of crime and in fact an indispensable remedy for victims. The principles of restorative justice such as participation, healing and restoration, reconciliation, are symbolically captured in the concept of reparations.

⁵ Maiwa' azi Dandaura Samu, 'Nigerian Indigenous Justice Examined through the Lens of the Restorative Justice System' (2013) *Justice and Human Security Initiatives* 1-19 <https://www.academia.edu/6778006/NIGERIAN_INDIGENOUS_JUSTICE_EXAMINED_THROUGH_THE_LENS_OF_THE_RESTORATIVE_JUSTICE_SYSTEM> accessed 16 July, 2021.

⁶ Several authors have varying conception of the meaning and central themes of restorative justice. Some authors consider it as reconciliation, repair of social connection and peace building others view it as atonement for wrongs perpetuated against the victims. Walker, 2006. (n. 2). 378. Zernova, 2007. *op. cit.* (n. 2) 1, 35-36. Ashworth, 1993. *op. cit.* (n. 4) 280.

⁷ Zernova identified three broad categories of restorative justice models. She identifies victim/offender reconciliation/mediation programmes, family group conferencing and sentencing circles from various practices across different countries. Zernova, 2007. *op. cit.* (n. 2). Chapter One: 8. In the context of transitioning societies, transitional justice measures such as truth commissions and reparative efforts are modelled after restorative justice ideals. For instance, the South African Truth and Reconciliation Commission identified restorative justice as its guiding principle.

⁸ This poses an apparent limitation of the theory of restorative justice in criminal justice process. It may be inapplicable in cases involving crimes which are regarded as 'victimless' or circumstance crimes which may not necessarily have an identifiable victim but they are crimes because they are proscribed in the moral interest of the public. E.g. Possession of narcotic drugs, prostitution.

⁹ Zernova summarises the ideals that various restorative justice narratives seek. Zernova, 2007. *op. cit.* (n. 2) 1, 35.

¹⁰ Some authors like Zernova, and Van Ness consider restorative justice as both a process and value.

With respect to criminal justice, restorative justice theory takes a positivist view of the concept of crime.¹¹ It emphasises the role of the victim in the criminal justice process and advocates a shift from a retributive aim of criminal justice to restorative goals.¹² In the conventional criminal justice system, the State represents the interest of the public and supposedly, that of the victims. Hence, in a traditional criminal justice process, especially in common law jurisdictions like Nigeria, victims are not a party to the legal proceedings, at best, they merely play roles as witnesses for the State and their interests seem to be subsumed in that of the State.¹³ Gleaning from the various perspectives on restorative justice, Zernova presents various views of restorative justice advanced by proponents and identifies seven ideals of restorative justice discernible from all the versions presented by restorative justice advocates.¹⁴ This paper highlights these ideals and aligns with five of these ideals in assessing the concept of reparation to victims of crimes. First, restorative justice provides a radical redefinition of crime and justice differently from the retributive and punitive conception in conventional criminal justice.¹⁵ Restorative justice theory conceives crimes from a private and perhaps sociological perspective, as acts against actual individuals rather than against an abstract entity referred to as the State and violation of the relationship between them. This is in contrast to the purely legal and punitive approach which considers crime as a violation of the law or wrongdoing against the State. This ideal projects that the conception of crime as a public wrong rests on assumptions which, are inimical to the actual interests of both victims and offenders. Crime is viewed as an injury against an individual; hence, criminal justice requires healing and repair of such injury by holding offenders accountable for the harm inflicted on victims and taking steps to repair the harm.¹⁶ As Ashworth argues, the conventional criminal justice process does not deny the reality of the injury inflicted on the victim, hence, in both retributive and restorative perspective the harm of the victim is the focus of criminal investigation and trial although, with different aims on outcomes.¹⁷ Crimes are also social wrongs against the society as much as they are harm perpetuated against the victims.¹⁸ Therefore, a reconceptualization of crime solely, as private conflict, affecting the relationship between the victim and the offender, is a gross distortion and perversion of the ideals of criminal law in its entirety. The absurdity of these propositions is further revealed when considered in the light of core international crimes, which are so regarded because of the gravity of actions against the direct victims and the international community. Rather than such radical redefinition of crime, it is more plausible to incorporate the idea of criminal justice as reparative aimed at repairing the harms inflicted on victims.

Second, restorative justice seeks a remodelling of the criminal justice process. Besides reconceptualising crime and criminal justice, restorative justice equally advocates a significant shift from the conventional criminal justice process which make representatives such as legal and other professionals, the main actors of the process. The main stakeholders are the victim, the offender and the immediate community affected by the crime and they should own the conflict and the process of resolving the conflict without the representative role of any professional acting supposedly, in their interest.¹⁹ This model of restorative justice is summed up as participatory justice which proposes a disposal of the formal legal process of pursuing criminal justice in formal courts and by legal professionals who, act on behalf of the victims in representative capacities.²⁰ A restorative justice approach advocates direct and full participation of the main parties involved namely; the victim, the offender and the immediate community affected by the crime, in a less formal approach in which the professionals play very passive roles. This view posits that in the context of criminal justice, restorative

¹¹ The South African Truth and Reconciliation Commission reports that restorative justice seeks to redefine crime from being characterised as an offence against the State to ‘any injury to and violation of particular human beings.’ Truth and Reconciliation Commission of South Africa Report. 1999. “Concepts and Principles”. Volume 1, Chapter 5. London: Palgrave Macmillan. paragraph 82.

¹² Zernova, 2007. *op. cit.* (n. 2) 53.

¹³ In some civil law jurisdictions, victims are accorded rights such as the opportunity to make impact statements. They may even be accorded the status of ‘*partie civile*’.

¹⁴ Zernova, 2007. *op. cit.* (n. 2) Chapter two:36-48.

¹⁵ Zernova, 2007 *Ibid* 36.

¹⁶ Walker identifies establishing genuine accountability and direct liability of the perpetrator for the harm inflicted on the victim as one of the central themes of reparations. Walker, *op. cit.* (n. 2) 385.

¹⁷ While restorative justice focuses on the repairing victims’ harms, retributive justice is concerned about imposing punishment on the offender responsible for the harm.

¹⁸ Ashworth, 1993. *op. cit.* (n. 4) 286.

¹⁹ Walker. 2006. *op. cit.* (n. 2) 385. Garbett views restorative justice as a process rather than a value which, allows actual parties with stake in a particular offence collectively determine the aftermath of the offence and its future implications. Claire Garbett, ‘The International Criminal Court and Restorative Justice: Victims, Participation and the Processes of Justice’ 2017 5.2 *Restorative Justice: An International Journal*. 198, 201.

²⁰ Zernova, 2007 *op. cit.* (n. 2). 49.

justice should operate outside the conventional criminal justice system.²¹ The main argument is that it is undesirable for restorative justice to be incorporated into the conventional criminal justice system of a State; rather, restorative justice measures should be informal and voluntary. Arguably, victim participation in the criminal justice process is an indispensable feature of restorative justice. Although authors differ on the scope and scheme of this feature, victim participation with respect to the reparations should be defined in so far as it restores the victim and repairs the harm he has suffered as a result of the crime perpetuated against him. Thus, victim participation must be encouraged although with defined limitations.

While it is important to involve victims in the criminal justice process, the aim is not to arrogate the criminal justice process to the victims, rather the involvement of the victims should be aimed at truth telling and healing for the victims and the society and ultimately, restoration to the victim. For instance, as Ashworth asserts, restorative justice paradigm is not extended to influential involvement of victims in sentencing stage through victims' impact statement. This may rather distort the established legal order in criminal justice system. Ashworth draws a line between what he refers to as victims' 'procedural rights' and victims' 'service rights'.²² While it may appear patronising to victims to refer to their right: to information on the progress of their case; care and support and; their general right to reparation as 'services', a clear distinction must be drawn between the procedural rights of a victim, and legal and reparative rights of the victim without giving place to retributive tendencies of a victim.²³

The voluntariness of the justice process is the third ideal which the restorative justice theory proposes to criminal justice process.²⁴ Restorative justice approach in this regard has two discernible strains of arguments. On one extreme is the position which argues for voluntary and free participation of the offender and the victim in resolving their 'conflict'. This suggests a mediative approach to criminal justice process where criminal justice agents only play a facilitative role rather than the alleged coercive approach of the traditional criminal justice process which imposes cooperation on the parties. The other strain of argument and more acceptable line of thought opposes an absolutely voluntary and free settlement of criminal matters. Rather, criminal justice process must engage voluntary participation especially with regards to offenders and employ coercive sanctions against offenders who are unwilling to voluntarily participate through reparation. Coercive sanctions may be judicially enforced through reparative measures which repair the harm of the victims or through community service. Absolute freedom of participation is unrealistic in responding to crime as suggested by some extreme views of voluntary participation in criminal justice process, where there is no measure of judicial coercion which enforces participation. In a situation where an offender is not arrested or apprehended and made to answer for his crime, it is unlikely that offenders would willingly engage restorative justice process. Thus, it appears impracticable to suggest an absolutely voluntary model of participation without such sanctions.

In the context of this paper, an extreme view of voluntary participation cannot be supported in the light of the human right based view of the concept of reparations to victims. The practice of reparation may have its roots in traditional and indigenous practices in ancient times, which were largely private and informal, but the significance of reparations cannot be overemphasized or detached from a formal criminal justice process. The traditional criminal justice model cannot be dispensed with, in favour of a reconciliatory and mediative model between the parties (the defendant and the victim).²⁵ The more plausible view is the position that restorative justice should be firmly entrenched in the criminal justice system of a State.²⁶ Although many legal systems make explicit provisions for some forms of compensation and restitution to victims by the defendant upon conviction, with respect to certain crimes, the practice in common law jurisdictions may offer a slight variation to the proposition that the principle of reparation should operate outside the traditional criminal justice process. Victims can only pursue reparative claims as civil claims arising from the criminal

²¹ Zernova, 2007 *Ibid* 53.

²² Ashworth, 1993. *op. cit.* (n. 2) 282-283, 296.

²³ Ashworth, 1993. *Ibid.* 297-298.

²⁴ Zernova, 2007 *op. cit.* (n. 2) 47.

²⁵ Zernova, 2007. *op. cit.* (n. 2) 7. Walker, 2006 *op. cit.* (n. 2) 385.

²⁶ This is in line with the arguments of restorative justice advocates who opine that restorative justice should be firmly made an integral part of the criminal justice system. Gordon Bazemore, and Lode Walgrave, 'Restorative Juvenile Justice: In Search of Fundamentals and Outline for Systematic Reform' in Gordon Bazemore and Lode Walgrave (eds), *Restorative Justice: Repairing the Harm of Youth Crime*. (Criminal Justice Press, 1999) 45-74. James Dignan, 'Restorative Justice and the Law: The Case for an Integrated Systemic Approach' in Lode Walgrave, (ed), *Restorative Justice and the Law*. (Willan Publishing, 2002) 168- 190. Zernova, 2007. *op. cit.* (n. 2). 53

action.²⁷ While the success of the civil claim is largely independent of the criminal charge, the cause of action relies on the same set of facts which may give rise to both civil and criminal liability of the defendant. In fact, this may be a strong argument to assert that victims can pursue reparative claims outside the criminal justice process. It may even be further argued that victims stand a better chance at some form of compensatory justice when they pursue their claims via civil proceedings. The huge flaw with this argument however, is the question whether victims, indeed, get repair for the harm they have suffered or they are just offered some form of placatory remedy. How reparative are the civil remedies to the criminal damage? This question becomes more glaring in situations of gross international crimes which, usually involve large number of victims and have graver effects. The victim's need for effective remedy cannot be divorced from the contextual reference to the gravity and criminal element of the harms inflicted on the victims.

Flowing from the foregoing, the reparative need of the victims may outweigh their interest in retribution or punishment of the accused. Victims may favour the apprehension and prosecution of the perpetrator(s) but are more likely to appreciate a justice system which also prioritises reparative measures which are 'intentional and effective' rather than a 'righteous' fulfilment of the law which, peddles compensation as a one size fits all measure. Besides, the relative legal challenges such as cost, and evidentiary issues which often discourage victims from pursuing an independent civil case, in reality, it is likely that where victims have the means to pursue such claims, they would rather implement such means for personal restoration without the involvement of the court. In the same vein, restorative justice may be independent of the traditional criminal justice model but need not be informal. Reparation models presented by transitional justice measures in some countries are implemented in form of administrative reparation which, does not necessarily have to be juridical in nature.²⁸ In situations of massive violation of human rights which may have adversely affected the domestic justice system of a State, the mostly adopted approach to victims' reparation is usually administrative programmes which address both individual and collective needs of a victim without recourse to the courts. However, whether integrated into the conventional criminal justice process or implemented independently of it, both perspectives on the operational application of restorative justice agree that the justice system of a State must provide a legal framework and funding for restorative justice ideals such as reparation

Fourth, in criminal justice, the idea of restorative justice seems to be pitched against retributive justice hence, restorative justice is broadly viewed by some proponents as an alternative to punishment.²⁹ Restorative justice regards punitive response to the harm inflicted on victim as ineffective and unacceptable and proposes a more empathic and productive approach which aims at repairing the victim's harm and restoring relationships. On the one hand, reparative measures are largely aimed at repairing and not necessarily poised to inflict punishment.³⁰ On the other hand, it is often argued that restorative measures may be viewed as punitive as long as it imposes some form of pain or burden upon offender hence, some proponents argue that it is an alternative form of punishment rather than an alternative to punishment. Whether it is viewed as an alternative form of punishment or an alternative to punishment, restorative justice is not incompatible with retributive justice. The strategy and response proposed by both forms of justice may be largely different; the goals are analogous, when viewed within the lens of ensuring accountability for perpetration of crime. While one form of justice holds the perpetrator accountable through penal sanctions the other form of justice ensures that the perpetrator pays for his crime by repairing the harm, consequent upon his action or omissions by providing reparations to the victims of his crime.³¹ Thus, as some authors asserts, the goals of restorative

²⁷ This is unlike the practice in civil law jurisdiction where the victim may apply as '*partie civile*' in order to participate in the criminal proceedings and consequently apply for some form of remedies. Although the Administration of Criminal Justice Act (ACJA) 2015 provides that the Court may *suo motu* order compensation or restitution to victims, these are solely at the Court's discretion which does not suggest any right on the part of the victims. Secs. 314, 319 and 321 of the ACJA.

²⁸ Countries such as Chile and Argentina provided widespread administrative reparations to victims of brutal acts of repressive regimes and authoritarian government in between the period of 1973-1990 and 1976-1983 respectively, following the work of truth commissions in these countries. In Chile, compensatory sums were paid to victims to the tune of \$ 16 million dollars annually in addition to social and welfare services to victims, monuments and memorials in honour of victims. In Argentina, a law providing a lump sum to victims was made and funded by government to the tune of \$ 6 billion dollars, cumulatively. In Peru, Correa writes about reparations in Peru post repressive administration in the country. C Correa, 'Reparations in Peru from Recommendations to Implementation' (International Centre for Transitional Justice, 2013).

²⁹ Zernova, 2007 *op.cit.* (n. 2) 38.

³⁰ Thus, it is difficult to identify with authors' claim that criminal prosecution and punishment amounts to reparation for the whole society. Dinah Shelton *Remedies in International Human Rights Law* (3rd ed. Oxford University Press, 2015) 14.

³¹ There seems to be no consensus on the form of accountability required from the perpetrator and the institution or procedure for effecting such accountability. Walker qualifies accountability on the part of the perpetrator in terms of genuineness, thus, suggesting there could be processes which may demonstrate sham accountability from perpetrators. Walker, 2006. *op. cit.* (n.

justice and retributive justice are not mutually exclusive, they may be indispensably complementary.³² This ideal which narrows on accountability is the bedrock for the reparative approach of restorative justice.

Similarly, by holding perpetrators accountable and responsible for their criminal actions, the fifth ideal of restorative justice conveys an unconventional rehabilitative approach to reforming perpetrators in criminal justice process.³³ Unlike the position which views perpetrators as victims of social or psychiatric disorder in need of treatment by professionals who, focus on the rehabilitative need of the offenders, restorative justice proffers a more constructive perspective. Restorative justice aims at reforming the offender by equally amplifying the needs of the victim and integrating them into the process through direct and active participation of both the victim and offender in the criminal justice process. For instance, encounter measures which engage truth telling, direct confrontation between the two parties and victim impact statements in formal criminal justice process may elicit the severity and gravity of the offenders' criminal action and trigger remorseful attitude from them. Also, the role of reparations in this regard is double-edged. Reparation, it is argued, provides repair for the victims' harm on the one hand and high probability of reintegration of offenders into the society, on the other hand.³⁴ Walker argues that through accountability, the perpetrator has an opportunity to regain his dignity and self-worth and get reintegrated into the society without stigmatisation.³⁵ Although there seem to be no empirical proof for this assertion, it is cannot be discarded as speculative. This goal of restorative justice as highlighted by Walker appeals to the theme of reconciliation as asserted by many authors on restorative justice but appears to deviate substantially from the victim-centeredness nature of reparations. Through reparations, victims are more likely and willing to accept offenders and promote their reintegration. Although the reformative role of restorative justice is the most heavily criticised of all its ideals, it undoubtedly enjoys some credibility.³⁶

3. Distilling a Reparative Approach to Criminal Justice

The last two ideals of restorative justice as highlighted by Zernova, which make up the sixth and seventh ideals in this paper, are mirrored in the reparative theme of restorative justice. Restorative justice is conceptualised as a victim-centred form of justice, which repairs harm and restores peace and harmony instead of punishing the offender and leaving the victims to seek remedy privately without State inputs as it were.³⁷ By redefining crime and repositioning victims as the principal stakeholder in criminal justice process, since real persons as against an abstract entity, referred to as the State, are actual victims of crime, thus, restorative justice focuses on the need of the victim in responding to crime. Thus, it provides 'encounter' and 'amend' measures which facilitate full participation and reparation for victims. The retributive justice perspective focuses on the perpetrator, in responding to and addressing crime. It asks questions in order to decipher who is responsible for the crime and seeks to impose requisite sanctions on them. However, restorative justice is interested in discovering who has been harmed, how they have been harmed and what could be done to repair the harm. Restorative justice seeks to amplify the rights of victims in criminal justice process rather than the retributive approach which subsumes the rights of victims within that of the State. Ashworth contends that unlike the pre-nineteenth century era, criminal cases were strictly between the offender and the victim, the moment the State took over criminal matters, it came with a downward decline in the recognition of victims' rights.³⁸ The conventional criminal justice system seemed to focus on the State and the accused person much more than it concerned itself with the rights of victims. However, from the beginning of the nineteenth century, victims' rights in criminal cases seemed to receive more recognition. International and regional documents such as the United Nations Declaration of Justice in 1985³⁹ and the Council of Europe's Recommendation on the Position of Victim in the Framework of Criminal Law and Procedure ushered a significant development in the recognition of victims' rights. This in turn, influenced

2) 386. The credibility of the justice process lies in the objectivity of the parties involved in facilitating the process which is better guaranteed by the conventional criminal justice system.

³² Zernova, 2007 *op. cit.* (n. 2) 39.

³³ Zernova, 2007 *Ibid* 39.

³⁴ It is arguable that reparation may foster the deterrent aim of criminal justice although without any empirical proof. The idea that an accused person will be required to 'repair' the damage he has caused to the victim through asset forfeiture, in addition to punitive sanctions imposed by the criminal justice system may have deterrence value on the probability of the commission of crime. Authors like Braithwaite, J. 2002. *Restorative justice and responsive regulation*. Oxford University Press.

³⁵ Walker, 2006 *op. cit.* (n. 2) 385.

³⁶ Zernova, 2007 *op. cit.* (n. 2) 42-44.

³⁷ Zernova, 2007 *Ibid* 42-44. Walker, 2006. *op. cit.* (n. 2). 386.

³⁸ Ashworth, 1993. *op. cit.* (n. 4). 277.

³⁹ UN General Assembly Res.40/34, UN Doc. A/40/53 1986.

countries such as the United States, United Kingdom and some other States to make expansive provisions for the rights of victims in the administration of criminal justice.⁴⁰

Since restorative justice defines crime in terms of harm, the spotlight is on the victim with the aim of repairing the harm. There is no justice where the harm occasioned by the crime has not been repaired. Harm in the criminal context, is not limited to material or physical harm but also includes psychological and relational injuries that impact the victim negatively and disrupt societal peace and harmony. Victims need to be healed of such injury⁴¹ resulting from crime which reparation effectively addresses. Material reparation may suitably address material damage however some authors posit that symbolic reparations are necessary to address relational injuries in order to facilitate repair and restoration of pre-existing relationship, altered by the commission of crime.⁴² In many domestic jurisdictions like Nigeria, it would appear ironical that victims who are at the receiving ends of the actions of the perpetrator and directly incur harm emanating from a crime are made mere objects of the criminal proceedings. The interests of the victim in relations to the harm they have suffered is subsumed in the interest of the State and their interest is secondary to that of the collective which is, the State. While they may pursue remedial reliefs for damages suffered through civil proceedings, such proceedings are entirely independent of the criminal proceedings.

The aim of restorative justice to repair the harm perpetrated against victims may have birth the reparative justice theory. Within the broader context of restorative justice, is the reparative justice theory which, the concept of reparations exemplifies.⁴³ Following the increased trend towards reasserting the rights of victims as a central part of the criminal justice system, came the development of reparative justice theory.⁴⁴ The reparative justice theory redefines the relationship of victims with the criminal justice system⁴⁵ and particularly underscores the concern and needs of victims in criminal law in relation to the harm they have experienced owing to the crime committed against them. Restorative justice may be further described as the form of justice which defines what amounts to repair of the victims' harm differently from what intends to just correct the perpetrator's criminal action against the victim. While restorative justice inclusively advocates for increased role of victims in criminal justice process, reparative justice emphasizes more, the centralisation of victim needs and interests in the outcomes of criminal justice process. Restorative justice emphasizes victim participation in the criminal justice process in order to achieve broader goals such as recognition, solidarity, reconciliation and restoration etc. Reparative justice moves further and advocates victims' participation in criminal justice process for the sole purpose of repairing the harm inflicted on the victims. Thus, it is more plausible to view reparative justice as a subset of restorative justice theory.

The main themes of reparative justice are centred around repositioning victims' role in criminal justice process with the aim of repairing their harm and prioritising their needs and interest in criminal justice. Unlike some extreme variants of the restorative justice theory, it is detrimental to criminal justice to arrogate the control of the criminal justice process to victims by making them and their interest the sole concern of criminal justice. Rather, criminal justice is better served where the needs of the society as a whole is put at par with the interest and needs of the concrete victims to have their 'sores cleaned up and possibly healed, vis-a-vis the aim of discouraging impunity.' The notion of reparative justice which takes the aim of *restitutio in integrum* have been faulted by some authors in the context of harm occasioned by massive violation of human rights, involving many victims. De Greiff advocates a conception of justice that admits reparations to victims of massive violations within a broader context of justice which, transcends trying to repair the harm occasioned against the victims. He argues that in single, isolated cases of abuse, this conception of

⁴⁰ Ashworth, 1993. *op. cit.* (n. 4) 278-279.

⁴¹ Zernova, 2007 *op. cit.* (n. 2) 44. Although some authors also discuss repentance and forgiveness the means of repair in criminal justice. They posit that forgiveness is one of the needs of the victim and repentance a need for the offender as well so as to 'whole'. It is difficult to legally conceptualise forgiveness as a substantive need of the victim. Forgiveness is a personal choice of the victim which is more difficult to elicit from the victim to the offender through the instrumentality of the law. A sociological approach may be better suited for the theme of forgiveness. Also, it may not always be the case that perpetrators feel remorse for their criminal actions so much as to desire forgiveness from the victim.

⁴² Zernova, 2007 *Ibid* 44. Genuine apology following truth telling proffers the possibility of repair and restoration of social harmony. Indeed, it is possible for victims to experience a catharsis effect from knowing the truth and sincere apology from the offender.

⁴³ Conor McCarthy, 'Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory' [2009] 3. 2 *The International Journal of Transitional Justice*. 250, 251.

⁴⁴ McCarthy, 2009. *Ibid*. 253.

⁴⁵ McCarthy states that the reparative justice theory may have influenced some of the developments in relations to justice to victims in the criminal justice system of some domestic jurisdictions. Mc Carthy, *Ibid*. 252.

justice can be sustained.⁴⁶ However, in the context of gross and systematic violation of human rights, the aim of reparation may not visibly achieve the repair of damage done to the victims especially, in line with their expectation. Justice in such context should focus on the ‘reconstruction of the rule of law’ with specific focus on the public, collectively and not necessarily to restore the victim *restitutio in integrum*. De Greiff argues that the goals of justice in reparation cases are recognition, civic trust and social solidarity.⁴⁷ The criminal justice system is traditionally more poised to focus on the perpetrator and the proscribed conduct with the aim of deterrence through punishment, presumably in the interest of the society. In this regard, the State takes charge of the criminal justice process from start to finish arguably, based on the social contract theory. However, while the society may be regarded as an ‘abstract’ victim in whose interest the State takes control of the criminal justice process, it should not be done at the expense or to the detriment of the ‘concrete/direct’ victim.

While the aim to repair victims’ harm sounds more practical and applicable, the theme of restoration of harmony/reconciliation as suggested by many authors, appears ambitious and superfluous. The theme of reconciliation is largely based on assumption of a pre-existing healthy relationship which may not necessarily be the case. Walker acknowledges that restoration of relationships does not have to refer to a prior circumstance and may not be a probable and desirable aim in many situations of harm or violations.⁴⁸ Walker’s model focuses on reconciliation which does not necessarily assume an existing relationship between the victim and the perpetrator which needs to be restored but emphasises the restoration of a ‘morally adequate’ environment to engender civic trust within the society, which instil shared commitment towards a code of behaviour within the society and guarantees the State commitment against impunity for the violation of such commitment. This is in contrast with corrective justice which he describes as episodic and reactive.⁴⁹

In the context of reparation to victims of crime, some authors argue for social solidarity rather than reconciliation as one of the aims of restorative justice. De Greiff’s assertion of ‘social solidarity’ as one of the aims of reparation, mirrors the aim of corrective justice. Corrective justice as distinct from distributive justice, seeks to restore equality which, has been disrupted on the by wrongdoing/crime.⁵⁰ This is largely the basis of justice in relation to legal remedies in the law of torts. Although corrective justice is largely criticised because it seems to assume a prior exiting situation of equality hence, the reason Walker seems to criticise corrective justice approach to reparations.⁵¹ Although restorative justice is intrinsically different from corrective justice, corrective justice is a feature of reparations especially juridical reparations.⁵² It may be impossible to realise the aims of restorative justice as it relates to recognition and reconciliation without alluding to the ideals of corrective justice.⁵³

Corrective justice centralises such theme as compensation and restitution in order to make good the victim’s loss which themes, in themselves, are essential steps in restoring harmony and engendering civic trust. The goals of restorative justice such as acknowledgment and apology are incomplete steps of recognition without actual reparative efforts which addresses the injury/harm that is being acknowledged. Such move of recognition will only evince a superficial approach to the ideals of restorative justice which, does not only seek to acknowledge victims’ rights and interest in the light of the harm they have suffered but also enact a system that may likely prevent recurrence of such harm. In cases involving criminal violation of human

⁴⁶ Pablo De Greiff, ‘Justice and reparation’ in Pablo De Greiff (ed.) *Handbook of reparation*. (Oxford University Press, 2006) 451.

⁴⁷ De Greiff, *ibid*.

⁴⁸ Walker, *op. cit.* (n. 2) 385.

⁴⁹ Walker, *ibid*. 380.

⁵⁰ R W M Dias, *Jurisprudence*. (5. edn, LexisNexis, 2013) 65.

⁵¹ Walker. 2006. *op. cit.* (n. 2) 386.

⁵² There is no single comprehensive description of corrective justice and many authors, like Shelton, seem to describe reparations from the standpoint of corrective justice. It is difficult to conceive reparations to victims of massive violation of their human rights as solely corrective justice. Thus, Walker distinguishes between restorative justice and corrective justice. Walker, 2006. *ibid*. However, this study strongly differs from Walker’s view of reparative justice as simply, the same with corrective justice.

⁵³ It is argued that since the action of the offender created the unhealthy relationship which restorative justice seeks to restore, logically, such restoration is only achievable where harm resulting from the offender’s action has been ‘corrected’. For instance, where an offender who holds on unlawfully to the property seized from his victim, it may be difficult to achieve reconciliation without restitution of such property to the victim. Shelton argues that reparation may also be viewed as a form of corrective justice Shelton, D. 2015. *op. cit.* (n. 30). In this context, Shelton probably, referred to juridical reparations.

rights, justice to victims cannot be simply conceived as compensatory or corrective hence, the importance of other ideals of restorative justice.

In the context of systemic and criminal violations, the goal of reconciliation is relevant and important especially for transiting societies which need to come to terms with the mass atrocities of the past and look forward to a stronger society. It is more plausible to view criminal justice as being aimed at asserting and recognising equality of the rights of the victim and the perpetrator and victim's dignity rather than reconciliation. The perpetrator's crime against the victim may be viewed as an attempt to establish superiority of his rights over that of the victims.⁵⁴ Hence, by acknowledging the crime perpetrated against the victim and the harm suffered therefrom and providing appropriate remedy to the victim, he is accorded recognition of the right to equality and dignity which the perpetrator attempted to strip him of through his actions. Recognition is incomplete where no remedy is provided to the victim, such may just amount to a 'cheap and inconsequential gesture'. The process of recognition will fulfil the need for truth telling and healing that, comes with the victim relieving his experience through active participation in the criminal justice process. This strongly affirms the conception of reparation as a right rather than a privilege bestowed on the victim. While it may provide a victim with a privilege, such privilege is not undeserved such as one provided on the platform of inequality.⁵⁵ In this regard, reparation entrenches victim's civic trust in the justice system of State that guarantees equality and inclusion⁵⁶and strengthens social solidarity.⁵⁷

The aims of the criminal justice system should not just be the prevention of crime but should also include the provision of reparation to victims of harm.⁵⁸ Where a victim has suffered some form of harm, the victim's entitlement to a restorative remedy that seeks to restore the victim and not just mere compensation as it is often perceived, should be right-based and should not necessarily be conviction-based. The torts law concept of judicial remedies for wrongs are strongly built on the views of corrective justice⁵⁹ which, strictly consider justice in terms of remedies or satisfaction due to victims, a method of 'repaying' victims in order to set records right.⁶⁰ As far as judicial proceedings are concerned, the same circumstances of facts may give rise to two causes of actions involving both criminal and civil liabilities, hence, the lines of distinction with respect to harm may be fluid.⁶¹ Once it can be asserted that the victim in deed suffered some form of loss or harm, it becomes immaterial whether the alleged perpetrator is apprehended, prosecuted or convicted and the victim should be remedied as of right and not necessarily as a humanitarian assistance or development programme. The rationale for this argument is the fact that it is a crime and not just a civil wrong that is purely the business of the parties involved. The State owes a specific duty to the victim and the entire society in criminal cases which should transcend mere investigation, prosecution, conviction and punishment. Whether the perpetrator is convicted and able to provide reparation or not, the victim has a right to reparation and the State should become responsible to the victim in offering reparation as of right. This argument may however not hold for all forms of crimes because crimes by their nature are in differing forms. Ashworth seems to fault some of the rhetoric of restorative justice in this respect as he highlights the case of inchoate offences and the extension of victimisation to the community or State where it may be difficult to determine the metrics of assessment and the quantum of harm.⁶²

⁵⁴ De Greiff, 2006. *op. cit.* (n. 46). 460. Shelton also opines in similar terms that reparation affirms and recognises the rights of victims as individuals who are human rights holders. Shelton, D. 2015. *op. cit.* (n. 30) 18.

⁵⁵ Hence assertions by some authors which view reparation as 'preferential treatment' of victims may not be absolutely the correct position. Naomi Roht-Arriaza, 'Reparations decisions and dilemmas' [2004] 27 *Hastings International Law and Comparative Law Review* 157.

⁵⁶ De Greiff, *op. cit.* (n. 46). 463-464. De Greiff's thesis is not impregnable in this respect. He heavily relies on the assumption that individuals within a State relates on a principle of normative reciprocity in their interaction with one another and the law, however, this may not necessarily be the case. Sanctions imposed by law the State may account for the commitment of individuals within the state to the rule of law. Walker shares similar opinion on the concept of civic trust which engenders mutual and shared respect within 'morally adequate relations' among individuals in a society thus, restraining them from unacceptable behaviour and treatment of one another. Walker, 2006. *op. cit.* (n. 2) 386.

⁵⁷ Although largely premised on reparation contextualised for a society transiting from a repressive period to a democratic dispensation and with respect to reparation programmes, the aims of reparation as espoused by De Greiff apply to reparations in all context.

⁵⁸ Ashworth, 1993. *op. cit.* (n. 4) 287.

⁵⁹ Ashworth, 1993. *Ibid.* 283.

⁶⁰ Walker, 2006. *op. cit.* (n. 2) 380-381.

⁶¹ Ashworth, 1993. *op. cit.* (n. 4) 284.

⁶² Ashworth 1993. *ibid.* 294-295.

Following the political and modern social contract theory,⁶³ it is further arguable that providing reparations to victims in criminal justice should not be the private business to be pursued by the victims in a private cause of action, at their discretion. In so far as it concerns the criminal justice system in most legal systems, the citizens of a State have ceded their rights to retribution in criminal matters, to the State. In return, the State guarantees the security and safety of the citizens and enforcement of criminal law in terms of prosecution and punishment of offenders, thus, meting out punitive justice to perpetrators. Thus, criminal justice is solely a public matter and the business of the State. Although the wrongs are committed against private individuals, they are assumed to be wrongs against the society as a whole and not just against the immediate victim. Therefore, if criminal human rights violations although perpetuated against private individuals, have been made a matter of public concern, it is arguable that providing effective remedy for such gross criminal acts should not just be limited to criminal prosecution of the perpetrators but also extended to providing effective means of restoring or repairing the harm done to the victim whether directly, where its actors are responsible for such act or indirectly, where perpetrator is unable to solely provide remedy to such gross and criminal violation. By reason of social contract between the State and its citizens, the State owes a duty to: provide adequate and prompt justice through a functional justice system to its citizens; make provisions for easy access to justice and; appropriate remedy to aggrieved party.⁶⁴

Thus, this paper proposes a conjunctive approach to restorative justice which is more appropriate in providing a holistic criminal justice system which addresses impunity and the need for accountability for crimes as well as ensures redress and remedy for victims of crime. Contrary to probable contentions that restorative justice may pave a way for offenders to buy their way out of punitive measures against them, this paper does not advocate for restorative justice which trumps retributive justice but a harmonious incorporation of the two theories of justice to offer victims and the society a more just and equitable approach to criminal justice. Reparation is one of the ideals of restorative justice and in fact, the basis of reparative justice theory. Juridical reparation, it may be argued, is designed to fulfil the need of victims for remedy although court prosecutions may not be the only recognised way of establishing accountability and liability, truth commissions established in transitional societies have equally fulfilled this aim of restorative justice to provide healing to victim and afford them the opportunity to discover the truth. Administrative reparations, conversely, may not necessarily focus on accountability or liability of the accused but focuses on reparative efforts towards the victims' harm. It may not always be the case that the perpetrator may become directly liable to the victim especially where there is no formal procedure to ensure the process of accountability or where liability cannot be determined in the context of the other themes which the restorative justice seek to achieve.

4. Practical Approaches to Reparative Justice for Victims of Crime

In the light of the above, this paper posits that reparative justice to victims of crime will be adequately implemented through reparation and should be practically incorporated in the administration of criminal justice in Nigeria. First, restorative justice proposes a largely responsive and reactive form of justice. It is a theory of justice which aims at solution-providing rather than being proactive and prophylactic. Thus, it is an equally suitable approach of justice in addition to the conventional retributive approach to crimes and criminal justice. While the aims of retributive justice may effectively implement the goal of ensuring accountability and preventing impunity for crimes, restorative justice provides the appropriate balance needed in effectively addressing the needs and interests of the victims of crimes through the instrumentality of reparation.

Second, restorative justice is victim-centric. There is no restorative justice where victims are not the focus. This does not rule out the fact that processes in achieving restorative justice may involve other actors who may not be victims but the focus of this form of justice is the victim principally. This is in sharp contrast to retributive justice which focuses mainly on the perpetrator, demand accountability from the perpetrator and relegates the role of the victim at best, to that of a witness. Reparation to victims of crimes is clearly victim-focused and can be effectively modelled alongside retributive justice aims the criminal justice system.

Third, restorative justice proposes a reparative approach to criminal justice especially in responding to the harms inflicted on victims owing to the crimes perpetrated against them. Reparation aims at restoring victims

⁶³ Bassiouni alluded to the concept of social responsibility and reparations as practised in indigenous societies M. Cherif Bassiouni, *Introduction to international criminal law*. (Martinus Nijhoff, 2014)

⁶⁴ Although Bassiouni argues that the responsibility to provide remedy for an aggrieved party does not lie against the State. Bassiouni. *ibid.* 207.

in so far to *status quo ante*, in so far as it is practicable. Thus, reparation in criminal justice, is not merely based on corrective justice which seeks to compensate for wrong. Reparation in criminal justice is not just a value but also a process; hence, it may combine both juridical and administrative reparations.

Fourth, incorporating reparations to victims in the administration of criminal justice contemplates the co-existence of the ideals of retributive and restorative forms of justice without undermining the core values of each form of justice. Unlike the propositions by some restorative justice authors, crimes are conceptually defined as wrongs against the; State, which is the representative of the society and; the victims and a gross infraction of their human rights. Criminal justice, thus, involves legal professionals who act on behalf and in the sole interest of each of the parties concerned, without detracting from their participation in the process. The view that criminal justice process be made less formal and relegate experts, professional and even the State to facilitative roles in the justice process reflects an extremely sociological view of restorative justice and does not necessarily countenance the legal approach to restorative justice or an effective blend to both. This view does not appear sustainable and practicable, given the modern realities of criminal activities and the undeniable force of the social contract theory. It is practically impossible to conceptualise crime as privately between the perpetrator and victims alone. Restorative justice for victims of crimes while focusing essentially on the victim cannot exclude or relegate the role of the State to mere facilitative role. It is practically impossible to allow full uncontrolled participation of every victim of crime apparently to the gravity and severity attached to crimes as against moral or civil wrong. Thus, direct and full participation of the victims is desirable, total control of the process in criminal cases, as contemplated by some restorative justice authors, is largely, infeasible.

Fifth, emphasizing on reparation to victims of crimes in a common law jurisdiction like Nigeria will promote outcomes which suitably address the needs of victims as important stakeholders in the criminal justice process. The role of a victim in the criminal justice process is largely very passive or barely non-existent except as a witness. Incorporating a concept like reparation will influence victims' participation and the extent of their rights within the criminal justice system. There is a general consensus on some of the rights of the victims of crime across different jurisdictions.⁶⁵ In so far as restorative justice focuses on the victim, reparation essentially mirrors the core aim of restorative justice. The reparative model of restorative justice contemplated in this paper does not challenge State autonomy in taking over criminal matters on the behalf of the victims. Rather, it emphasizes States' role in prioritising victims' needs and interest in the administration of criminal justice. Criminal matters and responses to criminal activities remains a matter of State policy and not individual victim's interest and preference, hence the role of criminal and prosecutorial discretion remain sacrosanct.

5. Conclusion

Reparation to victims of crime captures a significant portion of the ideals of restorative justice theory in so far as the reparative justice theory is concerned. Conclusively, there is no single way to characterize the kind of justice that seeks to restore and amend the wrongs, losses or injuries victims have suffered. However, the concept of reparation is a discernible feature of the restorative justice model which may be incorporated into the administration of criminal justice in Nigeria in order to offer justice to victims of crimes and by inference, the society.

⁶⁵ For instance, most jurisdictions implicitly or expressly guarantee victims' fundamental rights to dignity and fairness, information about the case proceedings.