ALTERNATIVE DISPUTE RESOLUTION FOR JUVENILES IN CRIME: A CASE FOR GHANA'S LEGAL SYSTEM

by

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ALTERNATIVE DISPUTE RESOLUTION FOR JUVENILES IN CRIME: A CASE FOR GHANA'S LEGAL SYSTEM

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June 2022

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DEDICATION

This thesis is dedicated to all grandchildren of Dr. Helena Asamoah-Hassan.

"…Yet with a steady beat
Have not our weary feet
Come to the place for which our fathers sighed?"

James Weldon Johnson (1871-1938) and J. Rosamond Johnson (1873-1954)

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SUMMARY AND KEY TERMS

This research sets out to explore the use of Alternative Dispute Resolution in Ghana's juvenile justice system, emphasizing traditional customs and practices to solve juvenile delinquency. The mixed-method approach was used for this study carried out in Kumasi, the capital of the Ashanti Region, Ghana. Purposive sampling was used to select respondents with some experience in the juvenile justice system. Interviews were conducted, and questionnaires were administered to gather data. The study discovered that Ghana's legislations address juveniles' needs; however, violations of the fundamental human rights of juveniles and of victims of juvenile crime continuously undermine the juvenile justice system.

It was found that magistrates and legal practitioners knew about restorative justice. Nevertheless, an absence of viable options to exercise restorative justice meant that only a minority of legal practitioners practiced it. All these factors have contributed to creating dissatisfaction with Ghana's legal system among members of the public. The need then arises for restorative justice approaches within Ghana's juvenile justice system that appropriately address the needs of the juvenile, victim, and community affected by the crime. The study discovered a legal framework for Alternative Dispute Resolution mechanisms in Ghana's juvenile justice system. Moreover, the results indicate that people prefer alternative legal pathways to the formal criminal justice system.

The research revealed that customary dispute resolution systems are viable alternatives to the conventional justice system. They offer restorative justice to parties who appear before them to settle their disputes and are equipped to deliver justice to the juvenile justice system. Moreover, integrating customary dispute resolution with the juvenile justice system would enhance achieving juvenile justice and positively address juvenile delinquency in Ghana.

As a contribution to the existing sources of knowledge, the study reveals the need for viable options for prosecution and detention of juveniles due to a shortage in options for diverting juveniles. It also reveals a lack of confidence in child justice panels by magistrates, legal practitioners, and members of the general public. The study recommends enacting legislation to increase diversions for juveniles from the formal justice system and co-opt traditional authorities into the juvenile justice system.

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KEY TERMS

Alternative dispute resolution; community integration; criminal justice system; customary dispute resolution; Ghana’s juvenile justice system; juveniles; juvenile rehabilitation; rehabilitation; restorative justice; victim satisfaction.

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OPSOMMING

Hierdie navorsing is daarop gemik om die gebruik van Alternatiewe Geskilbeslegtiging in Ghana se jeugregstelsel te ondersoek, met die klem op tradisionele gebruike en praktyke om jeugmisdaad op te los. Die gemengde-metode benadering is gebruik vir die navorsing wat gedoen is in Kumasi, die hoofstad van die Ashanti-streek van Ghana. Doelgerigte steekproefneming is gebruik om respondente met 'n mate van ervaring in die jeugregstelsel te selekteer. Onderhoude is gevoer en vraelyste is gebruik om data in te samel. Die studie het ontdek dat Ghana se wetgewing jeugdiges se behoeftes aanspreek maar skendings van die fundamentele menseregte van jeugdiges en slagoffers van jeugmisdaad ondermyn egter voortdurend die jeugregstelsel.

Dit is bevind dat landdroste en regspraktisyns bekend is met herstellende geregtigheid. Nietemin weens die afwesigheid van lewensvatbare opsies om herstellende geregtigheid uit te oefen, beteken dit dat slegs 'n minderheid van hulle dit beoefen. Al hierdie het daartoe bygedra om ontevredenheid met Ghana se regstelsel onder lede van die publiek te skep. Die behoefte ontstaan dan vir herstellende geregtigheidsbenaderings binne Ghana se jeugregstelsel, wat die behoeftes van die jeug, slagoffer en die gemeenskap wat deur die misdaad geraak word, gepas aanspreek. Die studie stel ‘n wetlike raamwerk voor vir alternatiewe geskilbeslegtingsmeganismes binne Ghana se jeugregstelsel. Boonop dui die resultate daarop dat mense alternatiewe regsweë bo die formele strafregstelsel verkies.

Bevindinge van die navorsing het aan die lig gebring dat tradisionele geskilbeslegtingstelsels lewensvatbare alternatiewe vir die konvensionele regstelsel is. Tradisionele geskilbeslegtingstelsels bied herstellende geregtigheid aan partye wat voor hulle verskyn om hul geskille te besleg en is toegerus om geregtigheid aan die jeugregstelsel te lewer. Boonop sal die integrasie van tradisionele geskilbeslegtingstelsels met die jeugregstelsel die lewering van jeuggeregtigheid verbeter en die oplossing van jeugmisdaad in Ghana bevorder.

As 'n bydrae tot kennis, onthul die studie die behoefte aan lewensvatbare opsies vir vervolging en aanhouding van jeugdiges weens 'n tekort aan afleidingsopsies vir jeugdiges. Dit openbaar ook 'n gebrek aan vertroue in kinderregspanele deur

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landdroste, regspraktisyns en lede van die algemene publiek. Die studie beveel aan dat wetgewing ingestel word om afleidings vir jeugdiges van die formele regstelsel te verhoog en tradisionele owerhede in die jeugregstelsel te koöpteer.

SLEUTEL TERME

Alternatiewe geskilbeslegting; gemeenskapsintegrasie; strafregstelsel; tradisionele geskilbeslegtingstelsels; Ghana se jeugregstelsel; jeugdiges; jeugrehabilitasie; rehabilitasie; herstellende geregtigheid; slagoffer tevredenheid.

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UKUFINGQA

Lolu cwaningo luhlose ukuhlola ukusetshenziswa kOkunye Ukuxazululwa Kwengxabano ohlelweni lwezobulungiswa lwezingane lwaseGhana, kugcizelelwa indima yamasiko nezinqubo zendabuko ekuxazululeni ubuhlongandlebe bezingane. Kusetshenziswe indlela exubile ocwaningweni. Ucwaningo lwenziwa eKumasi, inhlokodolobha yeSifunda sase-Ashanti eGhana. Ukusampula okuhlosiwe kwasetshenziswa ukukhetha abaphenduli ababenolwazi oluthile ohlelweni lwezobulungiswa lwezingane. Kwenziwa inhlolokhono futhi kubhalwa imibuzo ukuze kuqoqwe imininingwane. Ucwaningo luveze ukuthi umthetho waseGhana ubhekelela izidingo zezingane; nokho-ke, ukwephulwa kwamalungelo abantu ayisisekelo ezingane kanye nezisulu zobugebengu bezingane kuhlale kubukela phansi wuhlelo lwezobulungiswa lwezingane. Kwatholakala ukuthi izimantshi kanye nabameli babenolwazi ngobulungiswa bokubuyisela esimeni. Kodwa-ke, ukungabikho kwezinketho ezisebenzayo zokusebenzisa ubulungiswa bokubuyisela esimeni kwakusho ukuthi idlanzana kuphela labo ebelikwenza lokho, okudala ukunganeliseki ngohlelo lwezomthetho lwaseGhana phakathi kwamalungu omphakathi.
Okutholwe kulolu cwaningo kuveze isidingo sezindlela zobulungisa bokubuyisela esimeni ngaphakathi kohlelo lwezobulungiswa lwezingane zaseGhana ezizobhekana ngokufanele nezidingo zezingane, izisulu kanye nemiphakathi ethintekile ngenxa yobugebengu. Kwakhelwa uhlaka lomthetho Lwezinye Izindlela Zokuxazulula Izingxabano ngaphakathi kohlelo lwezobulungiswa lwezingane lwaseGhana. Ngaphezu kwalokho, imiphumela yocwaningo iphakamise ukuthi abantu bancamele ezinye izindlela zomthetho ohlelweni olusemthethweni lwezobulungiswa bobugebengu.
Okutholwe ocwaningweni kubonise ukuthi izinhlelo zendabuko zokuxazulula izingxabano ziyindlela esebenzayo esikhundleni sohlelo lwezobulungiswa oluvamile. Izinhlaka zendabuko zokuxazulula izingxabano zinikeza ubulungiswa bokubuyisela esimeni esimisiwe ezinhlangothini ezivela phambi kwazo ukuze zixazulule izingxabano zazo futhi zihlonyiselwe ukuhlinzeka ngosekelo ohlelweni lwezobulungiswa lwezingane.
Ngaphezu kwalokho, ukuhlanganisa ukuxazululwa kwezingxabano ngokwesintu nohlelo lwezobulungiswa lwezingane kungathuthukisa ukulethwa kobulungiswa kwezingane futhi kusize ukuxazulula ubuhlongandlebe bezingane eGhana.

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Njengomnikelo olwazini, ucwaningo lwembula isidingo sezinketho ezisebenzayo zo-kushushiswa nokuboshwa kwezingane ngenxa yokushoda kwezinketho zokuphambukisa kwezingane. Iphinde yaveza ukuntula ukwethemba ithimba lezobulungiswa ezinganeni phakathi kwezimantshi, abameli kanye namalungu omphakathi jikelele. Kwenziwa iziphakamiso zokuthi umthetho ushaywe ukuze kunyuswe ukuphambukiswa kwezingane ohlelweni lwezobulungiswa olusemthethweni nokwenza kube nokwenzeka ukuthi iziphathimandla zendabuko zifakwe ohlelweni lwezobulungiswa lwezingane.

AMAGAMA ASEMQOKA

Ezinye izindlela zokuxazulua izingxabano; ukuhlanganiswa komphakathi; uhlelo lwezobulungiswa bobugebengu; isiko lokuxazulula izingxabano; Uhlelo lwezobulungiswa lwezingane lwaseGhana; izingane; ukuvuselelwa kwezingane; ukuvuselelwa; ubulungisa bokubuyisela; ukwaneliseka kwesisulu.

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ABBREVIATIONS AND ACRONYMS

ADR	Alternative Dispute Resolution
AEA	American Evaluation Association
CID	Criminal Investigation Department
CRC	The United Nations Convention on the Rights of the Child
CVCW	The United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime
ECOSOC	United Nations Economic and Social Council
FBOs	Faith-based Organisations
IJS	Informal Justice System
ILO	International Labour Organization
JDL	The United Nations Rules for the Protection of Juveniles Deprived of their Liberty
JLOS	Justice Law and Order Society
LRA	Lord's Resistance Army
MMR	Mixed Methods Research
NGO	Non-Governmental Organisation
OHCHR	Office of the United Nations High Commissioner for Human Rights
PNDCL	Provisional National Defence Council Law
RISE	Reintegrative Shaming Experiments
RJP	The United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters

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RNCM	The United Nations Standard Minimum Rules for Non-custodial Measures
SAJJ	South Australia Juvenile Justice
TRC	Truth and Reconciliation Commission
UPDF	Uganda People's Defence Force
UN	United Nations
UNDP	United Nations Development Program
UNHRC	United Nations Human Rights Committee
UNICEF	United Nations International Children's Emergency Fund
UNISA	University of South Africa

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CHAPTER ONE

INTRODUCTION

1.1 Background to the study

Conflicts are an inescapable part of human life.[1] When conflicts occur, there is a disruption in the lives of the individuals who must take steps to resolve the conflict and ensure that it does not escalate. Measures must also be put in place to ensure that it does not recur since prevention is one of the functions of law. Law determines whether society engages in particularly positive or harmful behaviour.[2] The law stipulates the systems and institutions responsible for managing conflicts between people and enforcing the decisions of the institutions. The court is one of several institutions responsible for resolving disputes through litigation, which takes place in a formal justice system. However, this has not always been the case.

Indigenous people did not have the legal institutions that exist today.[3] 'Indigenous people' are ethnic groups who were not settlers and occupied their original homeland before colonisation by the Western states. These societies were predominantly homogenous and organised in families and clans, with leaders who performed diverse functions. These functions, according to Ayittey,[4] could be categorised as spiritual, legislative, judicial and executive, and were essential to ensure the survival of society. Unlike modern legal systems, a peculiar characteristic of indigenous legal systems was that the rules were not written.[5] However, members of society, both adults and children, knew what society's expectations were and generally complied with such.

With the advent of a formal justice system also came rights and responsibilities, and the only way to assert one's right was to prosecute. Litigation became daunting for several reasons, such as the interminable time spent in and out of courtrooms with the associated expenses and the ill-will bred between litigants.[6] These and a few other

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[1] Weeks,1992 as cited in Isenhart and Spangle *Resolving conflict 1*.
[2] Kelsen 1942-1942 *Chic. Law Rev.* 79.
[3] Sone 2016 *Afr. Insight* 52.
[4] Ayittey *African institutions*.
[5] Ubink 2018 *Dev. Change* 931.
[6] Fiadjoe *Alternative dispute resolution 1*.

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reasons, according to Fiadjoe,[7] contributed to the search for alternatives to litigation, which led to the interest in and growth of Alternative Dispute Resolution (ADR) mechanisms.[8] ADR refers to all the processes involved in resolving disputes outside of courtroom litigation.[9] ADR is expressed in various ways and ranges from mediation to arbitration, negotiation, and others. ADR mechanisms and processes could be included in the formal justice system, but they could also operate independently of the traditional court system or structures.

The failings of the court system have not been limited to civil matters only. There has been an increasing realization of the incapability of the courts to offer justice for everyone or tackle the issue of crime effectively. According to the United Nations Development Program,[10] several factors serve as barriers to access justice and weaken the criminal justice system. These barriers include (a.) long delays; (b.) the prohibitive costs of using the system; (c.) lack of available and affordable legal representation that is also reliable and has integrity; (d.) inadequacies in the existing laws effectively fail to protect women, children, the poor, and other disadvantaged people, including those with disabilities and low levels of literacy.[11]

These barriers that prevent access to justice have compelled states worldwide to embark on significant law reform efforts to manage crime. The major law reform effort is the emergence of the restorative justice practice, which seeks to resolve criminal matters by utilising ADR methods and principles. Here, the offender, victim and the community directly affected by the crime are brought together to resolve the effects of the crime committed and to promote peace and reconciliation through ADR methods such as mediation.[12]

Restorative justice has been in existence among indigenous people and civilisations in various forms since ancient times. The values and practices of restorative justice are akin to the traditions of indigenous people, such as the Māori and the Celts. The Māori are the Polynesian people of New Zealand, and the Celts a collection of ancient

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[7] Fiadjoe *Alternative dispute resolution* 1.
[8] Alternative Dispute Resolution from now on referred to as ADR.
[9] Chukwu and Nwosu 2016 *LPAAA* 220.
[10] United Nations Development Program from now on referred to as UNDP.
[11] UNDP *Access To Justice* 4.
[12] O'Mahony and Doak *Reimagining restorative justice.*

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tribes in Europe. Similarly, ancient Arab, Greek, and Roman civilisations practiced varied forms of restorative justice. States such as Australia and New Zealand embarked on legislative reforms in the 1980s and introduced restorative practices into their juvenile justice systems more recently. The justice system allows cases to be diverted from the courts to enable victim-offender mediation in Australia. In New Zealand, legislation permits family group conferences to be convened to deal with juveniles' serious issues.[13]

British criminologist Marshall defines restorative justice as:

> A process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.[14]

Under restorative justice, the victim, offender and community must collectively work together to ensure justice in the aftermath of a crime. Restorative justice is commonly applied to various practices that seek to respond to crime in a more constructive way than using conventional forms of punishment.[15] It could occur before, during or after a criminal prosecution.

In line with emerging modern trends in dispute resolution, Ghana enacted the Alternative Dispute Resolution Act[16] to provide for disputes by non-litigious means such as arbitration, mediation and customary arbitration. The ADR Act regulates civil law matters and not criminal law, as it does not mention the resolution of criminal issues. The Act states "[t]his Act applies to matters other than those that relate to … any other matter that by law cannot be settled by an alternative dispute resolution method".[17] It thus appears that criminal matters are exempt from the disputes that can be settled under the provisions of the ADR Act.

Consequently, while disputants in civil matters may avail themselves of other non-litigious means to resolve disputes, defendants in the criminal justice system have no such 'privileges' under this somewhat recent Act. In view of the seeming success

[13] Bowes 2004 *J.P.* 888
[14] Marshall 1996 *Eur. J. Crim. Policy Res*.
[15] Dignan and Marsh *Restorative justice 85.*
[16] Alternative Dispute Resolution Act, 2010 (Act 798), from now on referred to as ADR Act.
[17] Section 1 (d).

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achieved by the ADR, this study would like to examine the possibility of extending these emerging trends into the arena of criminal law, emphasizing young people.

Several jurisdictions worldwide use ADR in their criminal jurisprudence in the form of restorative justice.[18] This study would like to explore restorative justice's underlying principles and propose adopting the same principles into Ghana's criminal jurisprudence to benefit young offenders. Therefore, a review of Ghana's legal regime would be carried out to ascertain the extent of restorative justice that already exists in our laws.

The primary laws that have regulated the criminal justice system in Ghana are the Criminal Code,[19] which was enacted in 1960 with its amendments, and the Criminal Procedure Code.[20] The Criminal Procedure Code provided for young offenders,[21] but since 2003, all such provisions have been repealed by the enactment of the Juvenile Justice Act.[22] Other statutes relevant to this work include the Courts Act,[23] the Chieftaincy Act,[24] and the Children's Act.[25]

As the title suggests, Ghana's Juvenile Justice Act provides extensively for young persons who fall foul of the law in Ghana. The preamble states that the Juvenile Justice Act is:

> An Act to provide a juvenile justice system, protect the rights of juveniles, ensure an appropriate and individual response to juvenile offenders, provide for young offenders and for connected purposes.

After this law has been in force for more than a decade, this study analyses the impact of this law on the young offender and how the courts have interpreted and implemented several provisions such as 'diversion.'[26]

Most states provide for juvenile justice systems as part of their criminal jurisprudence and enact laws to protect the rights of victims and young persons involved in crime.

[18] Australia, Brazil, South Africa, Uganda, United Kingdom.
[19] Criminal Code,1960 (Act 29).
[20] Criminal Procedure Code,1960 (Act 30).
[21] Sections 340-351;370-381 of Act 30.
[22] Juvenile Justice Act, 2003 (Act 653).
[23] The Courts Act 1993 (Act 459).
[24] Chieftaincy Act, 2008 (Act 795).
[25] Children's Act,1998 (Act 560).
[26] Section 25 of the Juvenile Justice Act.

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However, the high recidivism rates suggest that the justice systems consistently are not achieving their objectives. According to Zehr:

> Rather than focussing on the traditional rehabilitation versus retribution debate, many researchers and policymakers now consider restorative justice and, more precisely, the concept of restoration as a valid third alternative.[27]

Restorative justice is not a novelty in jurisdictions such as the United Kingdom, the United States of America, Australia, Canada, Hong Kong, and South Africa. It is a fast-growing phenomenon evidenced by the increasing number of states who have adopted restorative justice and its practices in various forms.

In Australia, cases are diverted from the courts to allow victim-offender mediation. In New Zealand, family group conference*s* are convened to deal with serious cases involving juveniles.[28] In its Bill stage, South Africa's Child Justice Act 75 of 2008[29] was touted as an emerging system emphasising restorative justice, built on a reconciliation theory rather than that of punishment.[30] England's Referral Order, introduced in 2002 as part of youth justice reforms, is considered an innovative response in contrast to the reaction to young offenders who commit crimes.[31]

Epstein writes that; Bosnia-Herzegovina has introduced laws that provide an educational recommendation (without judicial proceedings) to avoid bringing criminal proceedings against the child, thereby encouraging juveniles not to re-offend.[32] She cites a few examples of European states, such as the Republic of Ireland, where restorative justice is expressed in three types of intervention. They include family conferencing (which involves the young person and his/her family finding a solution to the offending behaviour), restorative justice (where the victim may be present and some form of reparation arranged), and supervision by a specially trained police officer. She also asserts that victim-offender mediation is offered informally in Finland and may constitute grounds for waiving prosecution. Furthermore, in Italy, where pre-trial is used for all types of offences, compliance with court-approved programmes

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[27] Zehr *Crime and justice.*
[28] Bowes 2004 *J.P*.
[29] Child Justice Act, 2008 (Act No 75 of 2008).
[30] Johansson and Palm 2003 *Int J Law Policy Family.*
[31] Edwards 2011 *J. Crim. Law.*
[32] Epstein 2009 *CL&J* 614.

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would result in a pardon by the court. This practice in Italy seems to resonate with Allen[33] who observes that restorative justice techniques are widespread responses to wrongdoing by juveniles and adults in Australia, New Zealand and parts of Europe and North America which are used in varied formats.

Restorative justice has faced its criticisms. It has been argued that some forms of the restorative justice practice do not affect recidivism.[34] Another concern is that offenders are not sufficiently held accountable for their actions, therefore, victims could view restorative justice as an escape for offenders who are only interested in avoiding pain.[35]

Given the emerging international trends, juvenile justice in Ghana ought not to be whittled down to consist merely of deterrence, rehabilitation or retribution but should have as its focus the repair of the harm caused by the offender to ensure that he is reintegrated into society and not ostracised. Thus, this study focuses on the various forms of restorative justice and, keeping Ghana's particular socio-cultural landscape in mind, argues for adopting suitable forms of restorative justice into the juvenile justice system.

1.2 Conceptualisation

Key concepts relevant to the study are identified and conceptualised to enable the researcher and reader to understand the terms used. According to Christensen et al., core concepts in a study must be identified by the steps or operations applied to measure them.[36]

1.2.1 Alternative Dispute Resolution

Alternative Dispute Resolution refers to all processes involved in the resolution of disputes outside of courtroom litigation.[37] ADR is expressed in various ways and ranges from mediation to arbitration, negotiation, and others.

[33] Allen 2003 *J.P*.
[34] Claes and Shapland 2016 *RJIJ* 315.
[35] Zehr *Restorative justice*.
[36] Christensen, Johnson and Turner *Research methods.*
[37] Chukwu and Nwosu 2016 *LPAAA* 220.

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Ghana's Alternative Dispute Resolution Act, 2010 (Act 795) defines Alternative Dispute Resolution in Section 135 as the collective description of methods for resolving disputes other than through the normal trial process. This definition will be relied on here because of the relevance of this Act to this study.

1.2.2 Customary practices

The terms 'customary', 'indigenous', and 'traditional' are sometimes used interchangeably in such studies. These words appear to refer to the same phenomena.

Bennett[38] defines customary practices as social practices that the community accepts as obligatory and customary law since the body of law derived from these practices in its most pristine form is unwritten and is an oral repertoire.

The term 'traditional justice systems' refers to non-state justice systems that have existed (although not without change) since pre-colonial times and are generally found in rural areas.[39]

Article 1 (1) (b) of the International Labour Organization Convention No. 169 (ILO) identifies 'indigenous peoples' as "peoples in independent countries who are regarded as indigenous on account of their descent from populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present states boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions." In view of this definition, the practices of such people in respect of the resolution of disputes are what this study is referring to.

According to the United Nations Development Program,[40] traditional and indigenous justice systems refer to the types of justice systems at the local or community level that the State has not set up. It is a system of justice that usually follows customary law or an uncodified body of rules of behaviour, enforced by sanctions, varying over time.[41] The UNDP presumably mentions traditional and indigenous together because they are both based on customary law.

[38] Bennet *Customary law* 1.
[39] OHCHR *Human rights* 12.
[40] United Nations Development Program from now on referred to as UNDP.
[41] UNDP *Programming for Justice* 97.

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According to the United Nations Human Rights Committee,[42] conceptually, both traditional justice and indigenous justice systems can be considered customary justice systems because both are based principally on the customs and practices of communities.[43]

The 1992 Constitution of the Republic of Ghana[44] recognizes customary law as a source of law in Ghana.[45] It defines it as the rules of law that apply to particular communities in Ghana by custom. Although we often use the terms interchangeably, 'customary' would be the appropriate term in this study for ease of reference. The use of same incorporates 'indigenous' and 'traditional.' Again, the word 'customary' in this study is more appropriate based on the recognition given by the 1992 Constitution.

1.2.3 Disputants or parties

Disputants or parties are used to describe what may be regarded as the plaintiff and respondent under the formal civil justice system, and the victim and accused, defendant or offender, under the formal criminal justice system. This terminology is adopted because traditional and informal justice does not clearly distinguish between civil and criminal matters in respect of procedure.[46]

1.2.4 Juvenile

This is a child or young person, usually below the age of twenty-one, who is not old enough to be considered an adult.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice[47] is one of the main instruments explicitly used for treating young persons from member states that are in conflict with the law. It defines a juvenile as a child or young person who, under the respective legal systems, may be dealt with as retribution for an offence in a manner that is different from that used for an adult

Under section 1 of Ghana's Juvenile Justice Act, a juvenile is a person under eighteen who is in conflict with the law. Further, a juvenile becomes a juvenile offender under

[42] United Nations Human Rights Committee from now on referred to as UNHRC.
[43] OHCHR *Human rights* 6.
[44] 1992 Constitution of the Republic of Ghana from now on referred to as 1992 Constitution.
[45] Article 11.
[46] Stevens http://www.gsdrc.org/docs/open/ssaj4.pdf (Date of use:18 April 2019).
[47] United Nations Standard Minimum Rules for the Administration of Juvenile Justice from now on referred to as Beijing Rules.

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section 60 of the Act, where a juvenile is convicted of an offence. The court may impose a sentence of imprisonment for one month or upward without the option of a fine. The term 'juvenile' refers to the definition given under the Act, which is the relevant legislation for this research.

1.2.5 Juvenile Justice System

This study adopted the definition given by the United Nations International Children's Emergency Fund (UNICEF) regarding juvenile justice systems. According to UNICEF, the juvenile justice system refers to the laws, policies, guidelines, customary norms, systems, professionals, institutions, and treatment applicable to children in conflict with the law, witnesses, and victims.

1.2.6 Restorative Justice

Restorative justice has diverse origins and exists in various forms. It, therefore, does not have a universal definition. However, its objectives, principles, processes, and values are distinguished by its goals, where most definitions converge.

According to Zehr,[48] restorative justice focuses on the harms done and the consequent needs and obligations of all parties involved. The parties here are the victims, offenders and communities where the harm occurred. Marshall[49] defines restorative justice as a process whereby parties with a stake in a specific offense collectively resolve how to deal with the aftermath of the offence and its implications for the future. According to Bazemore and Walgrave,[50] this resolution is primarily oriented toward doing justice by repairing the harm caused by the crime. The central theme is that harm occurs to an individual, community, or both, whenever a crime is committed, and that harm ought to be repaired with all parties' collective participation.

Restorative justice, according to the United Nations Economic and Social Council (ECOSOC) in its Resolution on restorative justice programmes in criminal matters,[51] is:

> Any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime,

[48] Zehr *Crime and justice.*
[49] Marshall 1996 *Eur. J. Crim. Policy Res*.
[50] Bazemore and Walgrave *Restorative juvenile justice*.
[51] ECOSOC Resolution 2002/12 of 24th July 2002.

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participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.

This definition will be used as it captures salient principles pertinent to this study.

1.3 Research problem

The research problem is motivated by the need to provide an innovative approach to reduce juvenile crime in Ghana and ensure that the needs and responsibilities of juveniles and parties affected by juvenile crime are addressed adequately.

Ghana's juvenile justice system faces challenges that undermine efforts to rehabilitate juveniles and address the needs of victims and parties affected by juvenile crime. Increased crime rates in Ghana[52] and a gradual increase in retention of juveniles in the criminal justice system are some indications that all is not well with Ghana's juvenile justice system. The Ghana Prisons Service reports that in 2012, the average daily lockup for juveniles stood at a hundred and seventeen.[53] This figure dropped to ninety-eight in 2013.[54] However, two years later, the number of juveniles in correctional centres had climbed to two hundred and fifty-five,[55] representing an increase of 260%. The most recent report puts the number of juveniles in detention at two hundred and ninety-nine.[56] The absence of consistent data on the number of juveniles in correctional years shows that official statistics on juvenile justice in Ghana are not correctly kept.[57]

Challenges that have confronted Ghana's juvenile justice system since its inception include an absence of legal representation for juveniles, juveniles serving detention in adult prisons, a lack of logistics and human resources, as well as a lack of implementation of policies.[58] With the enactment of the Juvenile Justice Act in 2003,

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[52] Mantey and Dzetor 2018 *Am. J. Appl. Sci.* 322.
[53] www.ghanaprisons.gov.gh/pdf/Annual%20Report%202012.pdf.
(Date of use: 29 February 2020).
[54] Ghana Prisons Service
http://jmamoah.yolasite.com/resources/Annual%20Report%20Prisons%202013.pdf
(Date of use: 29 February 2020)
[55] http://www.ghanaprisons.gov.gh/MANAGEMENT%20OF%20PRISONERS.pdf.
(Date of use: 10 November 2018)
[56] https://ghanaprisons.gov.gh/about-us/statistics.cits (Date of use: 13 June 2022).
[57] Mensa-Bonsu *Juveniles* 8.
[58] Ame 2017 *Ghana Soc Sci J 24.*

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informed by three fundamental principles: (i) the best interest of a child; (ii) international human rights standards; and (iii) restorative justice or diversion (alternative measures)[59], the rights of young persons within Ghana's criminal justice system appear to have been given some protection.

However, it is doubtful whether this is adequate as the challenges mentioned above persist.[60] These challenges have caused dissatisfaction among victims, offenders and the general community. This study recognizes the consequences of these challenges and endeavours to confirm the assertions made through qualitative research and explore innovative ways of mitigating the challenges.

Still, studies from other jurisdictions suggest that legislative reforms that provide alternatives to formal justice in the form of restorative justice could effectively address juvenile delinquency and repeat offending among the youth. Therefore, this study explores the feasibility of utilising restorative justice practices to augment the formal court system in Ghana to curb juvenile delinquency.

1.4 Research statement

Introducing restorative justice into Ghana's criminal justice system through traditional rulers as adjudicators or mediators will significantly decrease juvenile delinquency and engender community well-being.

1.5 Research aims and objectives

This study explores the possibility of developing a restorative justice model for Ghana's juvenile justice system through reliance on traditional customs and practices. The objectives of the study are:

- To outline Ghana's juvenile justice system and determine whether it upholds human rights standards for accused persons as enshrined under the 1992 Constitution.
- To explain and assess ADR mechanisms that exist within the juvenile justice system.

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[59] Ame 2017 *Ghana Soc Sci J.* 21.
[60] Ayete-Nyampong 2014 *Prison Serv. J.* 27; Ame 2017 *Ghana Soc Sci J.* 24.

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- To investigate the integration of customary dispute resolution practices and processes with Ghana's juvenile justice system.

1.6 Research questions

In line with the objectives of the study, these questions have to be answered:

Main question

Why and how can ADR, especially customary dispute resolution, contribute to solving the societal problem of juvenile delinquency in Ghana?

Sub-questions

- What ambiguities in Ghana's legal system have created dissatisfaction with the justice system among community members over the years?
- What ADR interventions should be made to ensure that the young offender emerges from the criminal justice system reformed and is integrated into society?
- How feasible is it to integrate customary dispute resolution practices and processes with Ghana's criminal justice system to benefit young offenders?

These constitute the thematic areas of this paper and serve as a guide for further analysis and reflection.

1.7 Hypothesis

This study contends that a reliance on traditional rulers as adjudicators or mediators in offences involving juveniles could contribute to a significant decrease in juvenile delinquency and engender satisfaction in the community. This is because, over the years, particular challenges in Ghana's legal system have caused dissatisfaction among juveniles, victims and parties to juvenile crime. These challenges, which include a lack of logistics and human resources, non-implementation of policies, and an absence of legal representation for juveniles, prevent the juvenile justice system from adequately addressing the needs and responsibilities of juveniles, victims and parties affected by juvenile crime. Ultimately, these challenges impede the integration

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of juveniles into society, thereby undermining the purpose of the juvenile justice system.

The study contends that the juvenile justice system should utilise customary dispute resolution processes to overcome these challenges. These dispute resolution processes broadly address the needs and responsibilities of juveniles and parties affected by juvenile crime. As a pluralist State, Ghana recognises customary rules and practices of all its ethnic groups. Therefore, utilising customary dispute resolution mechanisms in the juvenile justice delivery system is workable.

The study further contends that processes, procedures and structures of customary dispute resolution spearheaded by traditional rulers whose responsibilities include adjudication and mediation of disputes of their relatives can be incorporated into the juvenile justice system. As custodians of the customs and practices of their ethnic groups, these rulers wield authority and influence over their subjects and residents within their localities and possess established structures for mitigating crime. Therefore, they can augment the juvenile justice system and enhance its delivery in Ghana.

1.8 Scope and purpose of the study

Various challenges confront societies all over the world. While some of these challenges are to some communities, others are not. Juvenile delinquency is one of those challenges that cut across boundaries. It would therefore be worthwhile to study the mechanisms adopted by jurisdictions that have had some success with addressing juvenile delinquency. Furthermore, a critical assessment of Ghana's specific needs and systems would suggest how those mechanisms could be adapted and suited for maximum benefit in Ghana.

In light of the preceding discussions on the evolving nature of justice delivery worldwide and the adoption of modern trends by several jurisdictions worldwide to solve crime among the youth, it is proposed that Ghana's criminal justice system adopt restorative justice in the form of customary dispute resolution.

To establish world-class institutions in developing countries, it would be worthwhile to bear in mind that institutions are more likely to bear fruit if they "evolve out of roots

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already growing in the soil."[61] The success of the utilisation of restorative justice practices in Ghana's juvenile justice system, as proposed by this study would depend mainly on the ability of stakeholders to adapt indigenous practices to fit the specific needs of society. Therefore, the institutions entrusted with implementing these practices are vital. Institutions here refer to traditional rulers or chiefs in Ghana who hold courts to adjudicate customary law cases. Thus, this study explores the possibility of traditional rulers judging or mediating criminal matters involving young persons as offenders or victims.

Ghana's socio-cultural setting is not peculiar to Ghana alone but quite common in Africa. Ghana did not exist long before colonialism, but it was organised as several ethnic groups co-existing independently. These ethnic groups had varied cultures, including the Ashanti, Dagbani, Dangme, Fanti, and others. These groups had leaders in chiefs and elders revered by their subjects. These leaders performed executive, legislative, judicial, and even spiritual functions and were thus very powerful. These traditional rulers regularly held court with their elders and settled disputes among their subjects on all issues, ranging from land disputes to matrimonial misunderstandings and crime. The decisions of these chiefs were final, and they often delivered justice.

The authority of these traditional rulers began to wane during the colonial era. When Ghana gained independence from the British in 1957, the central government elected by the people assumed these chiefs' duties and responsibilities. However, legislation as far back as 1961[62] recognizes and provides for the settlement of disputes by the traditional rulers and refers to the same as 'Customary Arbitration.' The ADR Act, which is relatively recent, provides extensively for the same under Part III.

The supreme law of the land, the 1992 Constitution, recognizes customary law and stipulates that customary law forms part of Ghana's legal system.[63] This constitutional provision is indicative of legal pluralism in Ghana. For instance, the laws of Ghana recognize marriages contracted under customary law. Likewise, under Ghana's legal system, decisions made by a traditional court would be given effect by the formal courts of the land unless they did not observe the rules of natural justice.

[61] Dam *Law-Growth nexus* 6.
[62] Arbitration Act, 1961 (Act 38).
[63] Article 11(1)(e), (2), (3).

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Some traditional rulers in Ghana have called on the government to create an atmosphere for traditional rulers to transform Ghana's lives.[64] The Asantehene Otumfuo Osei Tutu II[65] alluded to this school of thought recently when he called for the role of traditional rulers to be defined under the 1992 Constitution.[66]

In carrying out this study, a review is carried out of the practice of restorative justice in Rwanda, Uganda, and South Africa and how the practice has influenced theory over the years.

1.9 Rationale of the study

Ghana faces the challenge of delinquent behaviour exhibited by young people.[67] Like other nations, Ghana has a juvenile justice system that addresses the needs and obligations of parties involved in and affected by juvenile crime. However, the challenges the juvenile justice system faces[68] indicate that the needs of parties to the crime are not being met. Restorative justice, which seeks to address these needs, has been adopted into the justice systems of several nations, and Ghana is no exception. Although restorative justice has existed in Ghana's statutes since 2003, inherent flaws of the restorative justice model under the Juvenile Justice Act have rendered it inoperable.[69] Therefore, this research explores the chief's customary court as a viable avenue for restorative justice for Ghana's juvenile justice administration. While the resolution of criminal cases at informal chiefs' courts in Ghana has been the subject of research,[70] this research differs in that it focuses on juveniles.

This study aims to contribute to solving the societal problem of juvenile delinquency in Ghana. Furthermore, findings from the research will contribute to the discourse on the juvenile in Ghana's criminal justice system.

The findings will be used to make recommendations for reform in Ghana's criminal justice system as far as young offenders or children are concerned. The data gathered in this study will be helpful to policymakers to enable them to initiate policies,

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[64] Peace FM http://www.peacefmonline.com/pages/local/news/201806/354989.php (Date of use: 27 July 2018).
[65] The king of the Ashanti kingdom.
[66] JoyOnline https://www.myjoyonline.com/news/2018/August-23rd/asantehene-wants-role-of-traditional-rulers-defined-in-the-constitution.php (Date of use: 24 August 2018).
[67] Alhassan 2019 J. educ. soc. behav. sci. 2.
[68] Ame 2017 *Ghana Soc Sci J.* 24; Ame 2019 *J. Glob. Ethics* 260.
[69] Adu-Gyamfi 2019 *Br. J. Soc. Work* 2069.
[70] Morhe *Resolution of criminal cases at informal chiefs' courts* 169.

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programmes and projects geared towards reducing reoffending and facilitating the seamless re-entry of juvenile offenders into society.

This study makes an essential contribution to the scholarly body of knowledge. This study's findings augment research on restorative justice, African dispute resolution, and the juvenile justice system in Ghana. Again, this study extends the boundaries of restorative justice, African dispute resolution, and Ghana's juvenile justice system. The findings from this study will benefit various stakeholders in Ghana's juvenile justice system, such as judges and magistrates, legal practitioners, teachers, and students of the law.

1.10 Research methodology

This study is a descriptive socio-legal study that involves a review of books, journal articles, legislation on juvenile criminal justice, and restorative justice. The research methods used are direct observation, interviews, and questionnaires. The research also involves interviews with traditional rulers, Non-Governmental Organisations (NGOs) involved in the rehabilitation and reintegration of juvenile offenders, and direct observation of traditional court sessions. Questionnaires are used to elicit information from stakeholders in Ghana's juvenile justice system, juvenile offenders, and victims of juvenile crime. Court documents such as records of decided cases are also reviewed in this work.

1.10.1 Research design

As social science researchers strive to produce credible and testable theories, there is an emphasis on utilising adequate measurement tools, and this has resulted in a renewed focus on using multiple measurement techniques.[71] This research was conducted using qualitative and quantitative approaches to gathering and presenting knowledge in line with this concept. The researcher employed a qualitative approach using interviews and direct observation, and the quantitative approach to collect numerical data by administering questionnaires. The data were subsequently analysed and interpreted by using charts.

[71] Gray *et al Qualitative and quantitative methods* 75-76.

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According to Dantzker,[72] researchers must create a feasible plan or blueprint known as a research design to complete any research successfully. To find compelling answers to the research questions and achieve the study's goals, the researcher created a blueprint that outlined how she would conduct the research. The blueprint outlined who would be involved in the process, what needed to be done, where the said activity would take place, when it would happen, and why. To understand the participants' personal experiences to arrive at valid deductions, the researcher employed. According to Dobinson and Johns, [73] empirical research is relevant due to the importance of legal research in informing policy and legal reform.

A qualitative inquiry aims to discover and describe what particular people do in their everyday lives.[74] That approach is appropriate for this study because it enabled the researcher to ascertain the feasibility of utilising customary conflict resolution practices as a restorative justice model for juvenile offenders in Ghana. The researcher used the qualitative method to gather primary data through interviews with traditional rulers. According to Ampofo et al.,[75] qualitative methods are increasingly gaining preference because they make the experiences and voices of the research participants feature prominently. Denzin and Lincoln[76] also assert that qualitative research involves an interpretive, naturalistic approach to the world where the researcher studies things in their natural settings and attempts to interpret phenomena in terms of the meanings people bring to them. As part of the research process, the researcher gathered information from multiple sources and organised the data into themes, a vital characteristic of a qualitative study.

This study also employed the quantitative method to collect data as there is no single omnipotent research method.[77] Dantzker et al.[78] define the quantitative method as describing a phenomenon through a numerical system. The researcher used the quantitative method to gather data using questionnaires, and the responses obtained were analysed and presented in charts and tables. Quantitative data was needed in this study. It often supplies important macroscopic context, which could be essential

[72] Dantzker *Research methods* 93.
[73] Dobinson and Johns *Legal Research* 6.
[74] Erickson *Research* 36.
[75] Ampofo et al 2004 *Gend. Soc*.
[76] Denzin and Lincoln *Handbook of qualitative research* 10.
[77] Van Peer, Hakemulder and Zyngier *Scientific methods for the humanities*.
[78] Dantzker *Research methods* 247.

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for answering specific research questions such as public opinion surveys.[79] Patton[80] believes that qualitative and quantitative methods can be used to research the same study if the researcher knows what has to be done and what he expects to achieve. While qualitative data provides a detailed understanding of a problem, quantitative data provides a more general understanding.[81] The qualitative methods were therefore relied on to give meaning to the numbers produced by the quantitative method. This practice is in line with the observation made by Dantzker et al.[82] that both methods are appropriate and necessary for criminal justice and criminological research.

This approach resulted in various responses that enabled the researcher to unearth information that would not have been obtained if a single method had been used. According to Creswell and Garrett,[83] multiple research strategies are becoming researchers' choices because methodological pluralism provides better quality data than a single approach. These multiple research strategies are known as Mixed Methods Research (MMR) and are defined as an:

> Umbrella term applying to almost any situation where more than one methodological approach is used in combination with another, usually, but not essentially, involving a combination of at least some elements drawn from each of qualitative and quantitative approaches to research.[84]

According to Ngulebe,[85] MMR has seen unprecedented growth in the last twenty years because researchers recognise that the complexity of current research issues warrants multi-faceted research designs and methods. Also, combining quantitative and qualitative research leads to a better understanding of research problems rather than using either approach, as the strengths of both methods are synthesized.[86]

MMR has been criticised for several reasons. MMR may not answer the research questions as 'the best method for any given study... may be purely qualitative or purely quantitative, rather than mixed'. MMR is also criticised for being more time-consuming than quantitative-only or qualitative-only approaches, especially for time-bound

[79] Roberts *Legal Research* 114.
[80] Patton *Qualitative evaluation and research methods*.
[81] Creswell and Plano Clark *Mixed methods research*.
[82] Dantzker *Research methods* 60.
[83] Creswell and Garrett 2008 *S. Afr. J. Educ*.
[84] Bazeley Mixed methods in *management 133*.
[85] Ngulebe 2013 *ESARBICA Journal* 11.
[86] Steyn and Steyn 2006 *SAJEMS* 326.

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projects such as masters and doctoral studies. It was worth considering that the research problem determines the research approach and the methods used to obtain the data needed to answer the questions, where such data is located, and how the information is collected and analysed.[87] Therefore, MMR was employed because it is feasible and adds value to the study.[88]

1.10.2 Data collection

The researcher gathered data from primary as well as secondary sources. While interviews of traditional rulers and participants' responses to questionnaires were the primary data sources, information gathered from textbooks, journal articles, legislation, statutes, and unpublished works in print and electronic formats constituted the secondary sources.

1.11 Limitations of the study

Like all research, this study was faced with some challenges. The research was conducted at the height of the SARS CoV-2, also known as the COVID-19 (Coronavirus disease) pandemic. There were a host of restrictions that impacted how the study was conducted. A ban on public gatherings in Ghana during this research period meant that traditional court sessions were suspended. Hence the researcher could not observe the sessions as planned but had to rely on the narration of the proceedings by the traditional rulers.

Again, the restrictions put in place by the Government of Ghana during the pandemic meant that visits by members of the public to institutions such as correctional centres, remand homes, and prisons were suspended. Approval received for an application made to conduct the research at the correctional centre in Accra was subsequently withdrawn on the above-stated grounds. The withdrawal of the approval meant that the researcher could not administer questionnaires to juveniles in detention as planned earlier.

Also, the restrictions during the pandemic prevented face-to-face meetings, so interviews could not be carried out in the conventional mode. Therefore, communication tools such as Zoom, Skype and WhatsApp applications accessed

[87] Saunders, Lewis and Thornhill *Research methods* 369.
[88] Creswell and Garrett 2008 *S. Afr. J. Educ*.

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through the World Wide Web were used to conduct interviews. Poor internet connectivity and unstable power supply made the interview process cumbersome, but these problems were surmountable.

The research is limited in its scope as it focuses on young people below 18 years who are in conflict with the law. This limits how the findings can be generalised and applied to adult offenders. However, existing literature and similar research can authenticate the findings of this study and thereby identify generalisable and transferable results.

1.12 Thesis layout

This thesis is organised into eight primary chapters, and below is a summary of each chapter:

Chapter 1: The first chapter introduces the reader to the study by providing general background and outlining the nature and scope. It captures the research's rationale, aims and objectives, and identifies and contextualises vital concepts relevant to the study. Limitations encountered during the study are also mentioned in this chapter.

Chapter 2: The second chapter examines the theoretical footprint of the research and reviews available literature regarding the study's three main thematic areas: restorative justice, customary dispute resolution, and the juvenile offender.

Chapter 3: The third chapter discusses the methodology applied in this research. The chapter presents the research design, profile of the research area, population and sampling, data sources and collection instruments, and how the data are analysed. This chapter also discusses the ethical considerations that the researcher adopted to conduct the research.

Chapter 4: The empirical manifestation in Africa of the theoretical framework of analysis established in the previous chapter is described in Chapter 4. It reviews the literature on the customary justice system and its characteristics, for example, restorative justice. It also examines how restorative justice in Rwanda, Uganda, and South Africa has influenced theory.

Chapter 5: The fifth chapter of this study provides the Ghanaian perspective on the study's three thematic areas that are logically linked to ensure harmony and a balanced literature overview. It examines the state of the juvenile justice system, alternative dispute resolution for juveniles in Ghana, and the feasibility of integrating

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customary dispute resolution practices with Ghana's legal system to benefit young offenders. It identifies a gap for which a new model would be required.

Chapter 6: The data gathered from the field is presented and analysed to identify the themes in response to the research questions.

Chapter 7: In this chapter, the study presents a new juvenile justice model that fuses customary dispute resolution practices with the juvenile justice system.

Chapter 8: In this final chapter, conclusions on the research findings and their relation to the research purpose are given. Recommendations for advocacy, action and further research are also discussed here.

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CHAPTER TWO

THEORETICAL FRAMEWORK AND LITERATURE REVIEW

2.1 Introduction

Like most formal criminal justice systems, Ghana's penal system is founded on the principles of deterrence and rehabilitation. The justice system's goal is to deter the offender and other like-minded members of society from future criminal conduct, principally through the imposition of custodial sentences. Research indicates that these ideals are not being met, as custodial sentences have adverse effects such as recidivism[89], stigma[90], victim dissatisfaction[91], or reprisal[92] for society and the individual concerned.[93]

Ghana has declared a clear intention to address youth crime on all fronts, as seen in the provisions in respect of restorative justice in its primary legislation on youth crime enacted in 2003.[94] However, it appears that the restorative justice model provided under the Juvenile Justice Act is unsuitable for Ghana's juvenile justice system. Shortcomings in the delivery of restorative justice in Ghana require policymakers and stakeholders to rethink the juvenile justice system. Some African states, such as South Africa, have adopted restorative justice in their fight against crime by capitalizing on their indigenous dispute resolution systems and devising a means to synthesize it with their formal justice system.

This chapter begins with the theoretical footprint of the research and reviews available literature on the three main thematic areas of the study: restorative justice, customary dispute resolution, and the juvenile offender. These thematic areas have been logically linked to ensure harmony and a balanced literature overview. The problems mentioned above have been considered logically to widely explore and understand the various facets of restorative justice, customary dispute resolution and the juvenile.

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[89] Antwi *Recidivism* 40.
[90] Glover et al 2018 *OALibJ.* 15.
[91] Ofori-Dua, Onzaberigu and Nimako 2019 *J. Victimol. Victim Just.*124.
[92] Teye *Prisoner social reintegration* 105.
[93] Mensa-Bonsu *Criminal Law 1213*.
[94] Juvenile Justice Act.

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2.2 Alternative dispute resolution

This section examines the emergence of Alternative Dispute Resolution (ADR) and its expansion into criminal justice. It discusses examples of ADR and its interpretation within the criminal justice systems of states.

The formal justice system emphasizes the rule of law and is characterised by extensive laws on diverse subject areas and copious procedural laws. Non-specialists cannot easily interpret these laws due to the legal language used. As a result, litigants have to rely on lawyers to represent their interests. As a result, litigation becomes prolonged and costly. The adversarial nature of litigation means that when judgement is delivered, any illusions about the restoration of good relations between the feuding parties disappear because there is always a winner and a loser at the outcome of any litigation. These and a few other reasons led to the emergence of ADR mechanisms. ADR refers to all the processes of resolving disputes outside of courtroom litigation.[95]

Fiadjoe[96] asserts that it might be more accurate to describe ADR not as an alternative to litigation but as one technique appropriate in the context of dispute resolution. ADR is expressed in various ways, ranging from mediation to arbitration, negotiation, and others. ADR mechanisms and processes can be placed within the formal justice system, but they can also operate independently of the traditional court system or structures. ADR predates the court system as its inception can be traced to traditional societies in Africa, Asia and the Far East that had no coercive means of resolving disputes and had to rely on consensus building.[97] The success of ADR depends more on the parties' confidence in the flexible, voluntary and private processes and outcomes rather than adherence to rigid codes.[98]

The failings of the court system have not been limited to civil matters only. There has been increasing concern about the inability of the courts to offer justice for everyone or to deal with the issue of crime effectively. According to the UNDP,[99] the criminal justice system is weakened by several barriers to access to justice. These barriers

[95] Chukwu and Nwosu 2016 *LPAAA* 220.
[96] Fiadjoe *Alternative dispute resolution* 2.
[97] Fiadjoe *Alternative dispute resolution* 2.
[98] Chukwu and Nwosu 2016 *LPAAA* 222.
[99] UNDP *Access To Justice* 4.

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mentioned in the previous chapter[100] include long delays; prohibitive costs of using the system; lack of available and affordable legal representation that is reliable and has integrity; abuse of authority and powers, resulting in unlawful searches, seizures, detention, and imprisonment; and weak enforcement of laws and implementation of orders and decrees; inadequacies in existing laws effectively fail to protect women, children, poor and other disadvantaged people, including those with disabilities and low levels of literacy.[101] Sadly, this list is not exhaustive.

A significant problem in the criminal justice system is the overpopulation of incarceration centres worldwide. The Institute for Criminal Policy Research estimates that in 2016 there were 10.35 million prisoners worldwide. Still, the actual figure may be more than 11 million as the data neither included figures from countries such as North Korea and Somalia nor captured the number of persons in police detention.[102] Moreover, as of 2010, the number of young people below 18 years old in custody was estimated to be about a million.[103] These figures are alarming and of great concern to all stakeholders.

Globally, states have had to embark on significant law reform efforts to manage crime. Among the significant law reform efforts is the emergence of the practice that seeks to resolve criminal matters using principles supported by ADR. The practice known as Restorative Justice has been in existence in various forms among indigenous people and civilisations since ancient times. The values and practices of restorative justice are akin to the traditions of indigenous people such as the Māori, Aotearoa youth, aboriginal Australians, Western Samoa and the Celts[104], and ancient Arab, Greek and Roman civilisations.[105]

States such as Australia and New Zealand embarked on legislative reforms in the 1980s and introduced restorative practices into their juvenile justice systems. For example, cases can now be diverted from the courts to allow victim-offender mediation

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[100] Paragraph 1.1.
[101] UNDP *Access To Justice* 4.
[102] Penal Reform International https://cdn.penalreform.org/wp-content/uploads/2018/04/PRI_Global-Prison-Trends-2018_EN_WEB.pdf. (Date of use: 16 September 2019).
[103] Penal Reform International https://cdn.penalreform.org/wp-content/uploads/2018/04/PRI_Global-Prison-Trends-2018_EN_WEB.pdf. (Date of use: 16 September 2019)
[104] Consedine *Restorative justice*.
[105] Braithwaite 1999 *Crime Justice* 1.

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in Australia. In addition, in New Zealand, family group conferences are convened to deal with serious cases involving juveniles.[106] (Victim-offender mediation and family group conferences are both forms of restorative justice.)

2.3 Restorative justice

This section discusses restorative justice by examining the suitability of serious offences and the link between restorative justice and recidivism. It also explores the goals of the restorative process and its impact on the victim and offender.

2.3.1 Definitions of restorative justice

Jurists have attempted to explain this concept from the renewal of post-modern restorative justice. British criminologist Marshall whose definition of restorative justice is captured earlier in this study[107] contends that restorative justice occurs when parties who have an interest in an offence committed decide together on how to deal with the effect of the offence. Restorative justice has also been defined as 'every action that is primarily oriented toward doing justice by repairing the harm that a crime has caused.'[108] Doolin simplifies it and states it is an alternative way of responding to offensive behaviour.[109] Zehr,[110] an American criminologist regarded as a pioneer of the restorative justice concept, summarises it when he describes restorative justice as focusing on the harm done and the consequent needs and obligations of all parties involved.[111]

The central theme in all these definitions is that the victim, offender and community must collectively work together to ensure justice is done in the aftermath of a crime. This theme is clearly stated in the definition of restorative justice, adopted by the United Nations Economic and Social Council in its Resolution on restorative justice programmes in criminal matters:

> Any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime,

[106] Bowes 2004 *J.P*.
[107] Chapter 1 paragraph 1.1.
[108] Bazemore and Walgrave *Restorative juvenile justice*.
[109] Doolin 2007 *J. Crim. Law*.
[110] Zehr *Crime and justice.*
[111] The parties here are the victims, offenders, and communities.

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participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.[112]

Thus, we may summarise that restorative justice occurs when a jurisdiction adopts any system that has at its core the repair of harm caused by crime to respond to crime and any unacceptable behaviour in a society. Restorative justice is commonly applied to various practices that seek to respond to crime more constructively than conventional forms of punishment. As mentioned in the previous chapter,[113] restorative justice can occur before, during or after a criminal prosecution.[114]

2.3.2 Suitability of restorative justice for serious offences

Scholars believe that serious offences do not fall within the ambit of restorative justice, as a formal court of law is best equipped to deal with dangerous criminal offenders.[115] Not all crimes have the same consequence when carried out. While some outcomes of crime are fatal, others are not. Every jurisdiction determines what conduct amounts to 'serious offences' within their territory. Crimes involving murder or manslaughter, armed robbery, robbery, or sexual offences are severe offences as they are reprehensible, and, in such cases, tough sanctions must be applied. The effect of a ruthless crime such as armed robbery can be devastating to the victim and the community

The State might have to respond firmly and decisively to punish the perpetrator, and such punishment should serve as a deterrent to other would-be offenders. By removing perpetrators from the community, potential victims will be safeguarded against possible future behaviour from an offender.[116] The State can do this through a formal court of law and institutions such as the police and prisons.

Restorative justice is viewed as a soft option since offenders are not sufficiently held accountable for their actions. Victims could view restorative justice as an escape for offenders interested only in avoiding pain.[117] Another way of expressing this criticism

[112] UN https://www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf (Date of use: 15 September 2019).
[113] Paragraph 1.1.
[114] Dignan and Marsh *Restorative Justice*.
[115] Nabudere *and Velthuizen Restorative justice in Africa* 82.
[116] Garland *Punishment*.
[117] Zehr *Restorative justice.*

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is contained in the assertion that many frustrated victims strongly feel that there can be no reconciliation without justice.[118] This criticism is one of the pertinent arguments levelled by the restorative justice movement critics, and there is some research to bolster this argument. Findings from the South Australia Juvenile Justice Research on Conferencing project revealed that only twenty-eight per cent of victims who participated in a restorative conference believed that the main reason the offender apologised was that they were really sorry.[119] Thirty-one percent also indicated that they believed the offender apologised because they thought they would get off easier.[120] Some offenders could opt for the restorative justice option to avoid imprisonment, and since that decision is not born out of sincere remorse, the offender will pretend to cooperate.[121]

An apology from a convicted murderer to the victim's family sounds like justice has not been served. However, the restorative justice process requires that the offender admit his wrongdoing and say how sorry he is for the harm done to the victim after listening to the victim narrating the effect of the offender's action on his (the victim's) life. This process, according to Bottoms,[122] is a "delicate and precarious transaction" that "can be emotionally fraught." It is an embarrassing experience for the offender who must undergo this in the presence of a mediator, his family, the victim's family, or community members, depending on whether it is a victim-offender mediation or conferencing process. The shame he endures is a substantial amount of punishment, for as French sociologist Durkheim[123] indicates, "it is shame which doubles most punishments." Such a process will hold the offender accountable meaningfully, which is one of the main objectives of restorative justice.

Restorative outcomes sometimes focus on apologies, reparation, or community work, but restorative justice entails more. Any outcome can be viewed as restorative if it is agreed to and considered appropriate by the parties involved.[124] Restorative justice concedes that the State should impose some form of retributive justice for serious

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[118] Nabudere *and Velthuizen Restorative justice in Africa* 43.
[119] Daly *Conferencing* 77.
[120] Daly *Conferencing* 77.
[121] Bennet 2006 *J. Appl. Philos.*
[122] Bottoms *Restorative justice*.
[123] Durkheim, Lukes and Scull *Durkheim* 108.
[124] Morris 2002 *Brit.J. Criminol. 599.*

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crimes,[125] especially where society's safety requires the offender's imprisonment; however, this does not exclude such prisoners from participating in a restorative justice process because society does have to denounce crime, and restorative justice is the optimal method for doing so.[126]

2.3.3 Restorative justice and recidivism

A school of thought believes that restorative justice negatively impacts juvenile delinquency because the primary goal of restorative justice is not to deter future offending, and not all forms of restorative justice are intended to affect recidivism.[127] This observation is a cause for concern considering that recidivism contributes to the global challenge of overpopulated incarceration centres and the associated problems. The prisons and detention centres' poor state, fuelled by the formal criminal justice system's focus on retribution, deterrence and rehabilitation, has become the bane of nations. Thus, reducing recidivism is a compelling argument for most states to introduce restorative justice principles into their statutes.[128]

Professor of Criminology and Restorative Justice Dignan[129] asserts that restorative justice promises a different way of dealing with the aftermath of an offence using a wide variety of practices that seek to respond to crime in a more constructive way than conventional forms of punishment. The focus of the process is in the name. It does not seek retribution or mere rehabilitation but to restore the parties, namely the offender, victim and community, to the state they were in before the offence was committed. Future offending behaviour is less likely in those circumstances when compared to existing criminal justice practices.[130] Recidivism, which the Merriam-Webster dictionary defines as 'a tendency to relapse into a previous condition or mode of behaviour', may not be the focus of restorative justice, but it could be concomitant. Therefore, an empirical study would have to be carried out about restorative justice's impact on participants.

[125] Nabudere *and Velthuizen Restorative justice in Africa* 7.
[126] Skelton 2007 *Acta Juridica 239*.
[127] Claes and Shapland 2016 *RJIJ* 315.
[128] Daly 2002 *Punishm. Soc*. 73.
[129] Dignan 1999 *Crim.L.R.* 48.
[130] Hayes *Reoffending* 427.

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According to Maxwell and Morris,[131] the rate of reoffending, the length of period before recurrence, and the appropriate group for comparison are significant challenges that researchers face to determine the criteria for reoffending. In addition, a high level of diligence and skill is required to ensure that the data gathered is accurate.

The Canberra Reintegrative Shaming Experiments published in November 2000 analysed the effects of conferencing on recidivism by comparing samples from the court and a conference.[132] The sample groups were young, violent offenders below the age of thirty, drunk-driving offenders, and juvenile property offenders who had been randomly assigned to either a conference or a court. The findings were that the first group of young offenders who were conferenced after a violent offence yielded significantly lower reoffending rates than young offenders who were processed through the courts. However, the differences in the rate of reoffending for the other three groups were slight or insignificant.

Another study was conducted in New Zealand six years after family group conferencing was carried out in 1990-1991. More than two-fifths of the young people were not reconvicted or were convicted once; only about a quarter were classified as persistently reconvicted.[133] This finding indicates that conferences do contribute to reducing recidivism.

Umbreit's[134] study on the Victim Offender Mediation program in four states of the United States of America revealed a marginal impact of the mediation process on reducing recidivism, indicating that mediation is relatively brief and unlikely to alter criminal and delinquent behaviour. A combination of restorative justice processes and practices such as counselling that address the causes of crime will have a higher possibility of reducing crime than a stand-alone restorative process.[135]

The criticism that restorative justice has no impact on juvenile delinquency is a blanket statement that may not apply to everyone or in all instances. It is also important to remember that adopting a restorative approach depends on local needs and

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[131] Maxwell and Morris *Family group conferences* 244.
[132] Tyler et al 2007 Law Soc. Rev 553.
[133] Maxwell and Morris *Family group conferences* 244.
[134] Umbreit and Coates *Victim offender mediation* 20.
[135] Hayes *Reoffending* 437.

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customs.[136] States enact laws best suited to their particular needs; hence whatever restorative justice practices are adopted to be practised by a state would be geared towards a particular result.

The restorative justice model views delinquency or crime as a violation of the victims and relationships. Hence, it seeks redress for victims, compensation from offenders, and community reintegration of victims and offenders.[137] Whenever a crime is committed, people and interpersonal relationships are violated.

This view enables participants to put matters in perspective. The idea that violation of the law is a matter solely in the purview of the state, with the victim and community as onlookers, is a result of the statutes. Crimes are considered an offence committed against the State.[138] Christie,[139] however, disagrees and insists that the State has 'stolen' the conflicts and ought to give them back to their rightful owners, who are the victim, the offender, and the broader neighbourhood. This should be accomplished through the establishment of victim-oriented courts. This is what restorative justice attempts to do.

Christie[140] outlines a four-stage process that the court should observe to further the restorative justice goals. In the first stage, it should be established whether it is true that a particular person has broken the law. In the second stage, it should be considered what the offender, in particular, could do for the victim. In the third stage, if the court finds it reasonable that punishment is levied on the offender, aside from suffering in his restitutive actions towards the victim, it may be meted out. Finally, the various kinds of support for the offender represent the fourth stage.

The essence of restorative justice is in the name. Restorative justice heals the victim, makes the offender accountable, and brings the community together. This approach to justice seeks to restore parties affected by the crime as much as possible to their original positions before the crime occurred.

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[136] Hargovan 2009 *Acta Criminol.* 63.
[137] Bell *Young offenders and juvenile justice*.
[138] Van Ness and Strong *Restoring justice*.
[139] Christie 1977 *Brit.J. Criminol.* 3.
[140] Christie 1977 *Brit.J. Criminol. 10.*

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Until recently, the victim had become the forgotten third party of the criminal trial as there was almost no place for the victims of crime in criminal justice.[141] Then, however, grassroots organisations and criminologists began to focus on crime victims. Subsequently, the UN's General Assembly adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[142] Article 1 of the Declaration defines victims of crime as:

> Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws.

And

> A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.[143]

These expansive, all-encompassing definitions leave no room for doubt about who a victim is.

The restorative justice processes emphasize the victim, who needs healing. Christie[144] argues for the need to establish 'an alternative' to the penal system of punishment where the parties to a conflict would themselves play a part in finding a solution to the problem before them, oriented towards the victims and their needs and wishes. Some scholars have asserted that restorative justice starts with the condition of the victim, who has suffered profound harm and whose needs are rarely met by the criminal justice system.[145]

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[141] Dijk and Wemmers *Victims.*
[142] OHCHR https://www.ohchr.org/Documents/ProfessionalInterest/victims.pdf (Date of use: 14 December 2021)
[143] Article 2.
[144] Christie 1977 *Brit.J. Criminol.* 10.
[145] Skelton 2007 *Acta Juridica* 242-243.

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The victim needs to know what to expect after the perpetrator has been apprehended and be informed of his/her level of involvement in the justice process. Sharpe[146] identifies this as the victim's 'need for information'.

Victims also need reparation. Victims in the criminal justice system often feel that they are left to fend for themselves, with little or no support from the State, while the offender is protected at the expense of the State.[147] The criminal justice system often overlooks the issue of compensation to crime victims.

Victims should be enabled to express their anger towards offenders. Formal justice does not allow the victim to describe how he feels about the violation of his person or property. Zehr[148] refers to this as the victims' need for vindication. Skelton[149] posits that the criminal justice process does not encourage truth-telling since the criminal trial process's structure inadvertently does the reverse instead. A guilty plea that may result in a sentence provides no opportunity to the victim for vindication, nor is there any such opportunity for the victim of unsolved crimes. It is worse when the State agencies fail to perform their duty. The offender is discharged or acquitted; the victim is left to suffer injustice silently or take the law into their own hands and wreak vengeance on the offender.

Restorative justice seeks full and direct accountability from the offender in a meaningful way. A fundamental principle of restorative justice is that offenders must face the fact that they have broken the law and harmed some persons and must be made aware of how their actions have damaged others. They should expect to explain their behaviour so that the victim and community can understand it, and the offenders must take steps to repair the harm.[150] This process also helps to identify the rehabilitative needs of the offender.[151]

Restorative justice considers that harm has occurred and injury suffered due to the offender's actions. It concedes that the offender must be held accountable for his actions to ensure fairness. There are various ways in which an offender is made

[146] Sharpe *Restorative justice*.
[147] Qudder 2015 *Eur. Sci. J. 306.*
[148] Zehr *Crime victims*.
[149] Skelton 2007 *Acta Juridica* 233.
[150] Sharpe *Restorative justice*.
[151] Lilles *Circle sentencing.*

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responsible for the offence perpetrated. The starting point is that the offender must admit his guilt. For instance, during the conferencing process, the offender must acknowledge responsibility for the offence.[152] Next, the victim is entitled to request an apology from the offender, who then renders the apology, and the victim may express forgiveness towards him. As part of the principles of restorative justice, the victim is neither obliged nor pressured to forgive and reconcile with the offender until he/she is ready to do so.[153]

Our criminal justice systems do little to heal the wounds created by the offence and even less to *build the community*.[154] (author's emphasis). The persons indirectly affected by the crime also have to be part of the justice process because crime and wrongdoing cause harm that must be repaired through a holistic approach involving the entire community.[155] Mediator and restorative justice practitioner Sharpe[156] asserts that restorative justice seeks to strengthen the community to prevent further harm. Crimes cause damage that may reveal pre-existing injustices. These may result from a long-term dispute between the offender and the victim that erupted into criminal behaviour. It may also be as systematic as racial and economic inequalities, which must be addressed to strengthen the community.

The preceding discussion elucidates the relevance of restorative justice. The ECOSOC Resolution on Restorative Justice in Criminal Matters emphasizes that restorative justice processes could contribute to many beneficial outcomes, including redressing the harm done to the victims, holding offenders accountable for their actions, and engaging the community to resolve conflict.[157] This resolution is the culmination of nearly two decades of work to build states' capacities to respond to crime using restorative justice approaches.

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[152] Skelton *Africa* 473.
[153] Brown and Marriot *ADR principles and practices*.
[154] Hill 2009 *Contemp. Read. Law Soc. Justice*
[155] Newey 2019 *BYU Educ. & L.J.* 244.
[156] Sharpe *Restorative justice*.
[157]UN https://undocs.org/pdf?symbol=en/e/res/2016/17 (Date of use: 14 December 2021).

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2.4 Customary dispute resolution

This section examines the concept of customary dispute resolution with salient characteristics of reconciliation and reparation, which is similar to restorative justice. It looks at how human rights may be implicated under customary law and compares customary dispute resolution to the formal justice system.

2.4.1 Features of customary dispute resolution

Customary dispute resolution, expressed as indigenous conflict resolution approaches, is referred to as informal justice systems or traditional justice systems.[158] Informal Justice System (IJS), defined broadly, refers to:

> The resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party that is not part of the judiciary as established by law and/or whose substantive, procedural or structural foundation is not primarily based on statutory law.[159]

On the other hand, traditional justice systems refer to non-State justice systems that have existed, although not without change, since pre-colonial times and are generally found in rural areas.[160]

Based on both definitions, one can deduce that those conflicts have always been part of the lives of humanity, and the satisfactory resolution of such conflicts through written or unwritten obligatory practices is why those societies still survive today. Zartman[161] asserts that pre-colonial African societies are reputed to hold secrets of peacemaking locked into their ways of life, customs, and traditions before the disruptive activities brought about by colonization. This assertion has been substantiated by scholars who assert that many societies had their own 'indigenous conflict management mechanisms before the colonization of Africa.[162] According to Sone,[163] the traditional concept of conflict resolution is to reconcile and make peace between disputing parties, ensure the reintegration of the disputing parties into society, and promote co-operation and harmony between them that may help improve their relationship.

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[158] UN https://undocs.org/pdf?symbol=en/e/res/2016/17 (Date of use: 14 December 2021).
[159] UN informal_justice_systems.pdf (un.org) 8.
[160] OHCHR *Human rights* 12.
[161] Zartman *Modern conflict*.
[162] Adjei and Adebayo *Indigenous conflict resolution*.
[163] Sone 2016 *Afr. Insight* 52.

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Reconciliation and reparation are the primary focus of the traditional justice system, and the people rely on their leaders to dispense justice through informal procedures. In addition, the whole justice process involves members of the community. These essential features of the traditional justice system differentiate them from formal courts, where procedures are adversarial, complex, and lengthy. Outcomes such as a prison term or a significant monetary award would be unsuitable for dispute resolution philosophy in traditional communities.[164]

2.4.2 Human rights under customary justice systems

There are claims that the traditional justice system discriminates against certain groups. Indigenous dispute resolution systems are sometimes rooted in traditions and customs that marginalize vulnerable groups such as women and youth. This criticism is rooted in the widely-held belief that traditional practices do not always adhere to international human rights standards.[165] Some of the grounds for discrimination include age, gender or race. Children and women are disadvantaged in informal justice systems, which tend to be dominated by middle-aged and older men as adjudicators.[166] Some customary practices such as succession, inheritance or property ownership do not favour women, so any decision taken by the traditional courts on those subject areas is bound to go against the woman.

Power imbalances also characterise the traditional justice system, diminishing the available justice options. Power may be transferred and diffused due to favouritism, kinship, personal ties, marriage bonds, family relationships, political affiliation, physical strength, gender, level of education, socio-economic status, and ethnicity. [167] These factors erode the confidence of the victim in the customary justice process.

According to the Secretary-General's Special Representative on Violence against Children,[168] one of the disadvantages of reliance on customary law is the risk of children being treated as adults at a very young age because maturity is ten years or even younger in many communities. Corporal punishment still occurs in some

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[164] OHCHR *Human rights* 18.
[165] Nabudere *and Velthuizen Restorative justice in Africa* 109.
[166] UN informal_justice_systems.pdf (un.org) 122.
[167] Tat and Bagshaw 2014 *CRQ* 217.
[168] SRSG *Restorative justice* 25.

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traditional systems, which could potentially abuse children's rights. The traditional system is structured around the family unit; hence, vulnerability increases when the child's best interests do not coincide with their parents' or guardians' or close family.[169]

Education and legislation are tools societies could utilise to guarantee the protection of the human rights of persons involved in the justice system. This is necessary to alleviate the shortcomings of the indigenous dispute resolution system and gain public confidence in the ability of traditional institutions to protect the interests of vulnerable groups.

2.4.3 Customary justice systems and the formal justice system

There is a widespread use of customary dispute resolution forums in Africa as they play a central role in dispute resolution. In some African states, customary justice systems handle 80 to 90 per cent of the total caseload.[170] These high figures, which indicate people's preference for traditional courts over formal courts, can be attributed to several factors.

Customary justice systems embrace informal modes of information gathering in contrast to the formal evidentiary rules of the State justice system.[171] This makes the whole process less cumbersome and eliminates the need to have legal representation. Schapera[172] reports that a feature of the Tswana[173] judicial system is the absence of professional lawyers to advise disputants or persons accused of an offence on points of law or help them conduct their case. Most of the time, proceedings are conducted in the native language. The punishment of incarceration given by the formal courts is foreign to those who prefer compensation to be made to the victim. In addition, communities are concerned about the effect incarceration would have on the defendant's family and their ability to provide for themselves.[174]

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[169] UN informal_justice_systems.pdf (un.org) 122.
[170] OHCHR *Human rights* 17.
[171] Sone 2016 *Afr. Insight* 60.
[172] Schapera 1957 *J. Afr. Law* 153.
[173] Schapera writing on the Tswana peoples in 1957 indicated that they were a number of tribes with their own individual chiefs who inhabited the Bechuanaland Protectorate. Schapera 1957 *J. Afr. Law* 150. Bechuanaland Protectorate is the Republic of Botswana at present.
[174] OHCHR *Human rights* 19.

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Leaders in the community are responsible for settling disputes among community members. Therefore, the traditional system is more appealing than the formal system, where disputants appear before a judge who is often a stranger, and the parties might need a translator to facilitate communication between them. This brings to the fore the issue of cultural sensitivity. According to Pooley,[175] cultural sensitivity refers to incorporating culturally appropriate activities in interventions, such as engaging service providers from the same cultural backgrounds to design and deliver programmes and paying attention to people's language, traditions and norms during interventions. Available literature suggests that indigenous young people are more likely to perceive an intervention as credible when such interventions are carried out by someone from a shared origin, using the same language, and has the same history or beliefs.[176] Furthermore, a study that reviewed youth offender programmes found that in Australia, out of nine programmes, five identified cultural sensitivity as critical to the effectiveness of such programmes.[177]

Sone[178] asserts that in respect of philosophies and methods, traditional justice systems are more acceptable than formal state structures such as a court because they typically involve victim participation, which agrees with the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

2.4.4 Customary justice as restorative justice

Traditional justice systems revolve around the same fundamentals as restorative justice. These processes are part of a well-structured, time-proven social system geared towards reconciliation and maintaining and improving social relationships.[179] The justice systems use more understandable language, have significantly more healing potential, are less costly, and promote more direct involvement between the accused and the victim, their families, and the community.[180] These are intended to restore social relations in society and establish new balances. Restoration of social relations enables people to regain control over their lives, based on acceptance. When

[175] Pooley 2020 *Trends Issues Crime Crim. Justice* 8.
[176] Fazal *Youth incarceration 33*.
[177] Pooley 2020 *Trends Issues Crime Crim. Justice* 8.
[178] Sone 2016 *Afr. Insight* 53.
[179] Ibrahim, Adjei and Agyenim Boateng 2019 *GJDS* 37.
[180] SRSG *Restorative justice* 25.

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this happens, perpetrators take responsibility for their wrongful actions ('crimes'), reparation is made, and reconciliation occurs.[181] Reparation is not limited to the payment of money or goods. It includes a demonstration of goodwill and a gesture of good faith that embody the concept of restorative justice under customary law and modern restorative justice processes.

The ideals of restorative justice are evident in the Baranganic approach to justice, an indigenous example of community correction that deals with delinquency and offending behaviour and promotes indigenous knowledge and community participation in the rehabilitation and reintegration of boys in conflict with the law.[182] The Barangay is a minor government institution in the Philippines that implements community programmes to protect young persons and settle petty disputes and criminal offences.

Mangena[183] sets out the fundamentals of restorative justice that are similar to those of traditional justice, as follows;

- All restorative justice processes involve repairing the damage through the payment of compensation to the victim by the offender.

- All restorative justice processes bring together the offender and his/her victim to resolve the conflict.

- All restorative justice processes are meant to benefit the offender and his/her victim, with the latter being the biggest beneficiary.

- All restorative justice processes should involve an arbitrator or mediator who is not in any way related to the offender or victim, and his/her job is to ensure that discussions progress smoothly.

2.5 The juvenile offender

This section of the study examines the justice and welfare theories that underlie the juvenile justice systems of various nations. It also reviews the rehabilitative nature of restorative justice for the juvenile.

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[181] Nabudere *and Velthuizen Restorative justice in Africa* 12.
[182] Sanchez *Youth justice 169*.
[183] Mangena 2015 *SAJP* 7.

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2.5.1 Historical origins of the juvenile justice system

Under the respective legal systems, a child or young person may be dealt with for an offence differently from an adult as a juvenile.[184] Moreover, in most nations, a separate system exists for such children. The system is known as the juvenile justice system. It comprises laws, policies, guidelines, customary norms, systems, professionals, institutions, and treatment specifically applicable to children in conflict with the law, witnesses, and victims.[185]

Children have not always been afforded special recognition or treatment in society. Until the Middle Ages, a weaned child was considered a small adult who could mingle, compete and play with mature adults.[186] In the tenth century, artists could not depict a child, except as a man on a smaller scale.[187] Until the eighteenth century, adolescence was confused with childhood. Morawski[188] quotes the caption on a sixteenth-century calendar depicting ages: 'this is what becomes of children when they are eighteen,' and 'at twenty-four, a child is strong and brave.' By the nineteenth century, society had moved from childhood ignorance to centring the family around the child.

During the Industrial Revolution in the nineteenth century in Western Europe and North America, "adolescence," a new stage of childhood that describes the latter part of childhood, was formulated. The associated social problem of dealing with adolescents who were either deviant or had committed crimes led to the legal concepts of "juvenile delinquency" and "juvenile justice."[189] Bartollas[190] asserts that it was during this period that age-based behaviours, regarded as offences if committed by children but not adults, became known. In the twentieth and twenty-first centuries, most states recognized that the child is distinct from an adult, and this recognition is reflected in the laws they had and still enact. Due to the work and influence of international bodies

[184] UN Beijing rules United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) | OHCHR
(Date of use: 30 April 2019).
[185] UNICEF *Juvenile justice indicators* 1.
[186] Aries *Childhood* 10.
[187] Aries *Childhood* 10.
[188] Morawski *Archivum romanicum*.
[189] Binder, Geis and Bruce *Juvenile delinquency*.
[190] Bartollas *Juvenile delinquency.*

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such as the United Nations (UN), states have created separate criminal justice systems for young people.[191]

2.5.2 The philosophy of justice concerning juvenile offenders

The justice philosophy holds that young offenders can differentiate between right and wrong and should be appropriately punished for their crimes to deter others. They should be held accountable for their actions and face the consequences thereof. Scholars assert that the retributive model is aligned with traditional legal models of criminal responsibility and just desserts, and punishment is viewed as a morally required response to wrongdoing, making the offender pay or suffer for the harm caused. Whether or not punishment affects future behaviour is incidental from a retributive standpoint.[192]

Retributive punishment for the offender is the preferred method for controlling crime because it is more effective than rehabilitation. Punishment ranging from the payment of fines to community service and incarceration is an unpleasant experience meant to convey society's displeasure at the offender's conduct so that he would stop his offensive behaviour and that other like-minded persons will be deterred from engaging in such offensive behaviour. By reducing deviancy, punishment is beneficial as it yields significant social rewards. In support of this view, Lynch[193] attributes statistics regarding a decline in the juvenile crime rate for a decade to judicial willingness to retain young persons in the youth justice system after legislative reform in 2010 in the Youth Court jurisdiction, which introduced broad sanctions.

This philosophy has been criticised for potentially making children who come into contact with the justice system likely re-offend.[194] This criticism has been voiced because children are impressionable, and when they enter the criminal justice system, they are likely to encounter career criminals who might influence them and change their lives. However, several scholars indicate that the public supports severe

[191] The United Nations Standard Minimum Rules for the Administration of Juvenile: The 1990 Guidelines for the Prevention of Juvenile Delinquency or 'Riyadh Guidelines'; The 1990 Rules for the Protection of Juveniles Deprived of their Liberty.
[192] Fondacaro and O'Toole 2015 *New Crim. Law Rev.* 141.
[193] Lynch 2014 *Victoria U. Wellington L. Rev.* 522-533.
[194] Petrosino, Turpin-Petrosino and Guckenburg 2010 *Campbell Syst. Rev.* 38.

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punishment of young offenders, especially violent offenders, and that the public supports rehabilitation and is willing to incur expenses to fund it. [195]

Findings from a study to examine support for different approaches to sanctioning violent juvenile offenders indicate an overwhelming favourite is a dual emphasis on punishment and rehabilitation for violent delinquents, not just punishment.[196] These findings confirmed the work done by earlier scholars who posit that while the public supports harsh/severe punishment of young offenders, the people also support rehabilitation. Instead of punishment for disciplinary purposes, public support for rehabilitation indicates their belief in rehabilitation as a corrective measure in juvenile justice systems.

2.5.3 The welfare theory of rehabilitation

Muncie[197] asserts that the welfare system of justice operates under the theory that the most appropriate way of handling young offenders is to identify and meet their needs instead of effecting punishment. The child's best interests are at the heart of this approach to justice. Under this justice model, young offenders must be supported and rehabilitated because they may have found themselves involved in crime due to psychosocial problems such as a dysfunctional home. This justice model relies on institutions to protect, help and educate juveniles to prevent and eliminate such criminal conduct.

In countries such as Belgium and New Zealand, where the 'welfare' model prevails, the focus is on the child's needs. The State plays the role of parents through the courts, social services, and other agencies responsible for protecting juveniles within the criminal justice system by ensuring that sanctions are tailored according to their specific needs.[198]

However, it would be wrong to assume that welfare systems are automatically preferable to a juvenile justice approach since welfare arrangements could be equally

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[195] Jonson, Cullen and Lux *Rehabilitation*.
[196] Mears, Pickett and Mancini 2015 *J. Quant. Criminol.* 474.
[197] Muncie *Youth and crime*.
[198] Dolezal *Welfare to responsibility* 97.

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coercive in depriving juveniles of their liberty.[199] According to Muncie,[200] welfare approaches do not always lead to beneficial outcomes for young people but could lead to further oppression. For example, such approaches may lack due process, safeguards for obtaining reliable evidence from young people, testing of evidence, and procedures for scrutiny or appeal following the disposal of juvenile cases.

Vesvikar and Sharma[201] assert that institutional care offered in practice is far from a genuine attempt to change the profoundly custodial nature of the juvenile justice system. Children often idle their time in the institutions, take drugs, and become unproductive due to an acute shortage of staff and personnel to teach vocational training courses. They also assert that the children are taught skills with no viable market; hence, they have no means of earning a decent living upon release.[202] These sad examples of the failings of the welfare justice model point to one conclusion: the rehabilitation options for children within juvenile correctional institutions are inadequate.

2.5.4 Rehabilitation through restorative justice

The sentencing of an individual convicted of a criminal offence is driven mainly by three key considerations: retribution (punishment), deterrence, and rehabilitation. In the case of juvenile offenders, the principle of rehabilitation is often assigned the most weight.[203] The discussion above shows that the various systems have been unsuccessful in rehabilitating juveniles. Restorative justice guarantees the rehabilitation of the child through its processes, as experiments in restorative justice seem to promise new beginnings.

Aside from the use of juvenile diversion programmes, there has been little research on the legal situation of children in informal justice systems.[204] In Croatia, the restorative justice model for juveniles involves out-of-court settlement instead of prosecution. This independent, special obligation requires the offender to take responsibility for his/her wrongdoing, be ready to meet with the victim, and honour the

[199] Vesvikar M and Sharma R *Juvenile justice system in India* 192.
[200] Muncie *Youth and crime*.
[201] Vesvikar M and Sharma R *Juvenile justice system in India* 193.
[202] Vesvikar M and Sharma R *Juvenile justice system in India* 193.
[203] Young, Greer and Church 2017 *BJPsych Bull.*
[204] Campistol et al 2017 *R.J.* 30.

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mutual agreement by making amends and reparation. Dolezal[205] asserts that applying this conditional opportunity model of restorative justice in Croatia has proved effective, as judicial statistics reveal that from 1998 to 2010, 35–45 per cent of cases involving juveniles brought to the state attorney's office were resolved.

In the Philippines, the Baranganic approach to justice[206] discussed earlier in this study,[207] as an indigenous example of community correction, has been used for young male offenders and has been considered a successful strategy for achieving the restorative justice aims.

A significant strength of the restorative justice process is its emphasis on the juvenile being accountable for the offence committed. Accountability implies admission of guilt and sanctions, which range from an apology to reparation, community service, or whatever the parties may agree upon, as restorative justice processes are varied and must be suitable to the needs of the people. A study conducted in the United States of America to measure the support for simultaneously employing juvenile rehabilitation and punishment to sanction youth discovered that 85% of subjects support balanced justice or primarily rehabilitative sanction. Their support is based on the belief that successful reform of juveniles is possible, that young offenders deserve treatment and services, and that young offenders are willing to reform.[208] These findings are an indication of the approval of restorative justice. The support and interest shown by members of the public mean that restorative justice has been identified as the panacea for the beleaguered juvenile justice system.

2.6 Analysis of the theoretical framework of the study

This study suggests that reliance on the traditional justice setting would benefit Ghana's juvenile justice system. Customary justice emphasizes peaceful resolution of conflicts and the integration of offenders into the community, and the processes involve the active participation of the offender and the victim. Therefore, there is a lesser likelihood of victim dissatisfaction or reprisal. The offender is made accountable by having to admit guilt and facing sanctions, including an apology, reparation in the

[205] Dolezal *Welfare to responsibility* 99.
[206] *Cultural perspectives on youth justice* 169.
[207] Paragraph 2.4.4.
[208] Mears, Pickett and Mancini 2015 *J. Quant. Criminol.* 475.

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form of compensation, or community service. These sanctions are imposed with the victim's agreement in the presence of community members, which ensures the security and welfare of the community.

The juvenile offender can reintegrate into the community due to the absence of custodial sentencing as in customary justice systems in Ghana. Reintegration would reduce recidivism and eliminate the stigma former prisoners face from their families and the community. Consequently, juvenile delinquency in the community would decrease.

As discussed in the preceding chapter,[209] juvenile delinquency is a social problem many nations face, and its repercussions for society could be dire. Hence, there is a requirement to understand how countries could effectively handle juvenile delinquency. The theoretical framework of this study focuses on how the use of ADR and especially customary dispute resolution could contribute to solving the societal problem of juvenile delinquency in Ghana.

The plight of the juvenile in the formal justice system can be harrowing, making them vulnerable. As a vulnerable group, a degree of special protection must be afforded them. Due to the work and influence of international bodies such as the UN,[210] some nations have taken the vital step of creating separate criminal justice systems for young people. These juvenile justice systems have laws, policies, institutions and personnel distinct from adult criminal justice systems, whose role is to ensure that the juvenile is rehabilitated and desists from future offending.

The welfare system of justice is a model on which some juvenile justice systems are based. The welfare system that seeks to identify the needs of young offenders has on its focus the best interests of the child and formulates sanctions following the child's specific needs.[211] However, the failings of this welfare model are evident in the profoundly custodial nature of the juvenile justice system, as discussed in paragraph 2.5.3 above. A viable option would be restorative justice.

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[209] Paragraph 1.8.
[210] The United Nations Standard Minimum Rules for the Administration of Juvenile: The 1990 Guidelines for the Prevention of Juvenile Delinquency or 'Riyadh Guidelines'; The 1990 Rules for the Protection of Juveniles Deprived of their Liberty.
[211] Dolezal *Welfare to responsibility* 97.

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Numerous definitions proffered for restorative justice emphasize the victim, offender and community working together to ensure justice is served in the aftermath of a crime. As enumerated under paragraph 2.3.3, restorative justice entails healing, accountability and unifying the community. These restorative justice objectives make it appropriate for the juvenile justice systems of the nations. Restorative justice has reconciliation and reparation as its primary focus, which are the exact characteristics of customary dispute resolution.

Customary dispute resolution seeks to reconcile and make peace between disputing parties, ensure the reintegration of the disputing parties into society, and promote co-operation and harmony between them that may help improve their relationship.[212] Customary dispute resolution forums are widespread in Africa, and the UN[213] asserts that traditional justice systems handle 80 to 90 per cent of the total caseload in some African states. These high figures, which indicate people's preference for traditional courts over formal courts, can be attributed to several factors. These factors include informal modes of information gathering,[214] the non-requirement of legal representation,[215] conducting the process in the native language, and the absence of custodial sentencing.

These features of customary dispute resolution make it more suitable to solve the societal problem of juvenile delinquency than the current juvenile justice system in Ghana. The latter operates under the welfare justice model, which is often custodial and, as mentioned in the introductory part of this chapter,[216] has repercussions of recidivism[217], stigma[218], victim dissatisfaction[219], or reprisal[220] for society and the individual concerned.[221]

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[212] Sone 2016 *Afr. Insight* 52.
[213] OHCHR *Human rights* 17.
[214] Sone 2016 *Afr. Insight* 60.
[215] Schapera 1957 *J. Afr. Law* 153.
[216] Page 22.
[217] Antwi *Recidivism* 40.
[218] Glover et al 2018 *OALibJ.* 15.
[219] Ofori-Dua, Onzaberigu and Nimako 2019 *J. Victimol. Victim Just.124*.
[220] Teye *Prisoner social reintegration* 105.
[221] Mensa-Bonsu *Criminal Law 1213*.

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2.7 Summary and reflections

This review indicates that the failings of the formal court system have necessitated the emergence of ADR. Several factors that have weakened the legal system serve as barriers to justice and have compelled states to embark on significant law reform efforts to manage crime. One such reform is relying on the restorative justice practice that seeks to resolve criminal matters using principles espoused by ADR. Restorative justice has the central theme of the victim, offender and community working together to ensure justice is served in the aftermath of a crime. Healing, accountability and societal unity are fundamentals present in customary justice systems, where perpetrators take responsibility for their wrongful actions, reparation is made, and reconciliation occurs. The literature review indicates that the restorative justice model is more attuned to the needs of parties in the juvenile justice system because it involves the juvenile, victim and community members affected by the crime committed. The next chapter deals with the research methods employed to perform the study.

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CHAPTER THREE

RESEARCH METHODOLOGY

3.1 Introduction

This study explores the possibility of reducing juvenile crime in Ghana by relying on customary dispute resolution processes as a restorative justice model. The study seeks to answer the question, 'Why and how can ADR, and especially customary dispute resolution, contribute to solving the societal problem of juvenile delinquency in Ghana?'. This chapter discusses the research methodology employed to achieve the study's objectives and describes the scientific methods used to gather information.

The chapter presents the research design, profile of the research area, population and sampling, data sources and collection instruments, and how the data are analysed. It also presents ethical considerations upheld by the researcher. Qualitative and quantitative data are presented in this chapter. Regarding the qualitative data presented, pseudonyms have been used to identify respondents to ensure their anonymity and confidentiality.

3.2 Research milieu

The study area is the Kumasi metropolis, the most populated city in Ghana. The last population census in Ghana in 2010 put the number of people in Kumasi at 2 035 064.[222] However, there is an indication that the population had risen to 3 206 000 by 2019.[223] According to Nyarko et al.,[224] in Ghana, juvenile delinquency is rife in the major urban cities of Accra and Kumasi. Kumasi is the seat of the Ashanti kingdom, one of the largest tribes in Ghana, with a well-structured hierarchical chieftaincy structure that is of much relevance today. As the Ashanti Region's capital, the Kumasi metropolis's cosmopolitan nature is a common feature of most towns and cities in Ghana. Therefore, the policy-makers could implement the findings from this study in other parts of the country.

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[222] Ghana Statistical Service Census2010_Summary_report_of_final_results.pdf (statsghana.gov.gh) (Date of use: 7 October 2019).
[223] Macrotrends https://www.macrotrends.net/cities/21108/kumasi/population (Date of use: 11 October 2021)
[224] Nyarko et al. 2019 *J. Law Policy Glob.* 166.

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Figure 1: Map of Ghana
(Source: Permanent Mission of Ghana to the United Nations website, 2021)

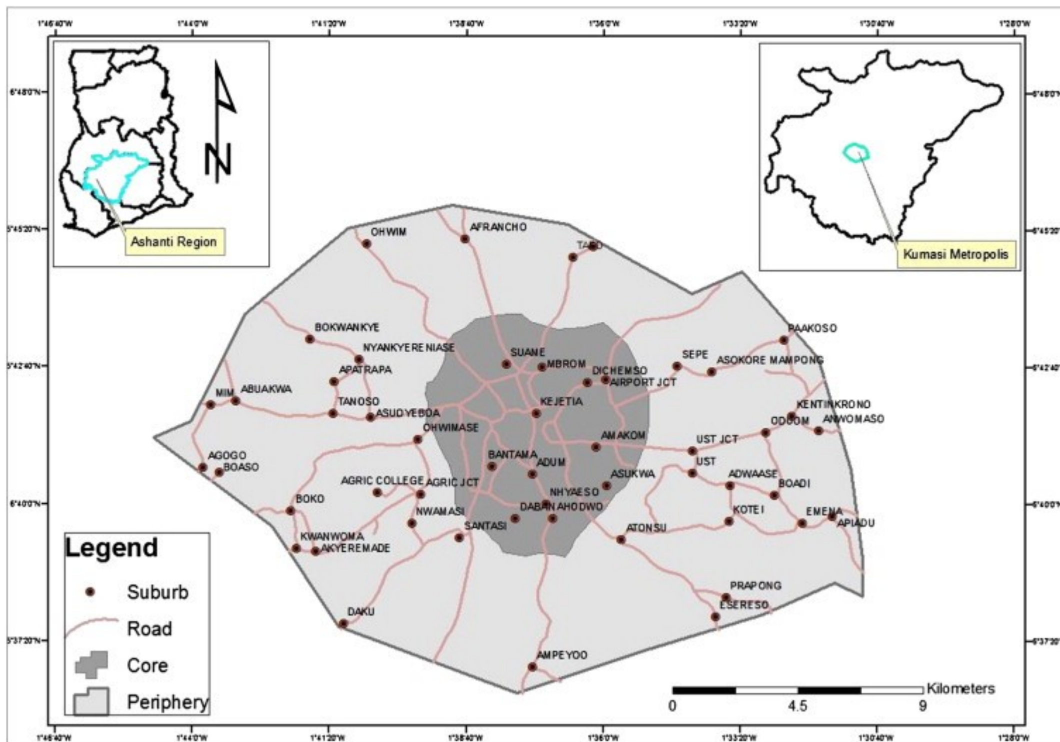

Figure 2: Map of the Kumasi Metropolis
(Source: Cartography Unit, University of Cape Coast, 2010)

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3.3 Research population

In keeping with the notion of the research population as subjects or data items that could be included in the study[225] and the entire group or class from which information was to be gathered,[226] the relevant population for this study consisted of juvenile offenders and their victims before the juvenile courts in Kumasi. It also included traditional rulers and professionals involved in Ghana's criminal justice system, such as judges, state prosecutors, lawyers and NGOs.

3.4 Sample and sampling

The researcher adopted the sampling process, defined as selecting a portion of the population to represent the entire population.[227] Time and cost constraints necessitated the sampling process; hence the city of Kumasi in Ghana was chosen to collect data from the various people.

The research used four sample groups: juvenile offenders, victims of juvenile offenders, professionals involved in Ghana's criminal justice system, such as judges and lawyers, and traditional rulers. The purposive sampling method was used in selecting members from each group because, in the researcher's opinion, they best fit the study requirements based on their knowledge of the topic and their accessibility. Furthermore, according to Dantzker et al.,[228] these are significant factors of the sampling method.

The first sample group comprises juvenile offenders before the juvenile courts in the Kumasi Metropolis, juvenile offenders in the correctional centre, and former juvenile offenders in a correctional centre. The number of juvenile offenders before the juvenile courts was unknown; however, available statistics put the number of those in the correctional centres at 255 as of 2015.[229] Hence it was proposed that a sample size of 80 for this group should be a fair representation.

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[225] Polit and Hungler *Nursing research* 37.
[226] Dantzker *Research methods* 68.
[227] Polit and Hungler *Nursing research* 95.
[228] Dantzker *Research methods* 73.
[229] http://www.ghanaprisons.gov.gh/MANAGEMENT%20OF%20PRISONERS.pdf.
(Date of use: 10 November 2018)

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A request to invite members of this group to participate in this survey was sought from the Ghana Prisons Service, Judicial Service of Ghana, and the Angel Zoe Foundation, respectively - institutions that deal with juveniles before the courts, juveniles in incarceration centres, and rehabilitation of former juvenile offenders. The researcher contacted individual members of this group to identify those willing to participate in the survey. In addition, the researcher contacted parents or guardians of juveniles under 18 years old to seek permission for their wards' participation in the study.

Upon receiving consent from the parents, evidenced by a signed consent form, the children signed a consent form, and copies were given to the parents. Juveniles whose parents or guardians did not consent were not invited to participate in the study.

The second sample group consisted of persons who work with the judicial service of Ghana as juvenile court judges or magistrates, and prosecuting or defence lawyers in the Kumasi metropolis. Six courts in the Kumasi metropolis have jurisdiction over juvenile matters, and it was proposed that the judges in all the courts form part of the study. Permission was sought and received from the Judicial Service of Ghana to invite juvenile court judges in the Kumasi metropolis to be part of the survey. The judges were approached individually and invited to be part of the study.

Over a hundred lawyers in the Kumasi metropolis work as state attorneys or private litigators. The latter often act as defence lawyers for the juveniles. About fifty lawyers in the Kumasi metropolis were approached individually and invited to participate in the survey. Questionnaires were presented to them after they consented to be part of the study.

The third sample group consisted of victims of juvenile crime. Members of this group were located in ongoing cases before the juvenile courts. The researcher sought approval from the Judicial Service of Ghana before inviting members of this group to participate in the research. Upon receiving approval from the Judicial Service of Ghana, victims of juvenile crime were invited to participate in the research process by completing questionnaires. An initial number of 10 participants was proposed to correspond to the projected number of juveniles before the courts in the first sample group. However, the prevailing circumstances at the time of research (the COVID-19 Pandemic) necessitated an increment of 10 to be made to the number of participants.

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Where the victims were under 18 years old, consent was sought from their parents or guardians for their wards to participate in the study. Upon receiving permission from the parents, evidenced by a signed consent form, the children signed a consent form, and copies were given to the parents. Victims whose parents or guardians did not consent were not invited to participate in the study.

The fourth sample group comprised traditional rulers who held courts in the Kumasi metropolis. Several traditional rulers in the Kumasi metropolis hold courts, and it was expected that ten rulers would be a fair representation. Letters of invitation were sent out to the traditional rulers to introduce the research and invite them to participate in the survey. The interviews were conducted after the traditional rulers consented to be part of the study. Each interview lasted between an hour and an hour and a half.

Aside from traditional rulers, all other participants were required to complete a questionnaire that took about 30 minutes; however, the process lasted almost an hour. The questions addressed basic demographic information, the participants' experience with the criminal justice system, and their opinions on restorative justice options. There was the need to explain the entire process, sign the consent forms, and offer clarifications required by the participants.

At the end of the research period, data was collected from one hundred and thirty-four individuals, including magistrates, juveniles standing trial in court, former juvenile offenders; victims of juvenile crime; legal practitioners; traditional rulers, and the Executive Director of a Non-Governmental Organisation. Out of a hundred and fifty questionnaires distributed, a hundred and twenty-three were returned, representing a response rate of 82%.

3.5 Research instruments

The data collection techniques most suited to obtaining the information sought were used in this study. The instruments for collecting data from the traditional rulers were semi-structured interviews. The data was gathered from books, journals, law reports, legislation, unpublished theses, and Internet sources to undertake the desktop research. Responses to questionnaires administered to juvenile court judges in Kumasi and juveniles before the court, legal practitioners, victims of juvenile crime, and former juvenile offenders were reviewed. Charts, tables, and figures were used to

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depict the information received. Secondary data obtained from articles in journals, books and law reports were retrieved from official sources to ensure that others could use or replicate the findings.

3.5.1 Interviews and questionnaires

Questionnaires were distributed, and interviews were conducted to elicit information regarding participants' opinions on Ghana's criminal justice system, based on their interaction and experience, knowledge and impression of restorative justice, as well as their view on the role of traditional authorities in the criminal justice system. Questionnaires were selected as a technique for collecting data from juvenile delinquents and victims of juvenile crime because they are a category of respondents highly likely to be unwilling or unable to participate in other forms of research investigation. The use of questionnaires proved to be the most suitable technique for eliciting information from the sample group comprising juvenile delinquents.

Semi-structured interview techniques were used during the interviews with the traditional rulers. These interviews were conducted using the zoom video conferencing application, which proved to be most suitable for the process. This application facilitated the interview to be recorded after permission had been granted by the respondents, to be played back, critically studied, compared, and contrasted with already documented information for similarities or differences.

The use of technology brought a few challenges in its wake, such as unreliable Internet connection. In addition, there was the possibility of the interviewee not having the zoom application or being unable to work with it, as well as unintended expenditure for the interviewee based on the cost of data for the proceeding. These challenges were anticipated and mitigated by using the services of a research assistant. The Information Technology savvy research assistant facilitated the process with her laptop computer and smartphone. The act of using a smartphone to access data is not new, as Garcia, Welford and Smith[230] have observed that:

> By their very nature and interactive design [smartphones] are extremely capable of collecting and even generating qualitative data.

[230] Garcia, Welford and Smith 2016 *Qual. Res.* 3.

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There was no cost to the interviewees, and aside from a few hitches with the Internet, the process was successful.

An anticipated challenge was the inclination of Ghanaians to mask their feelings to appear 'nice' and supply responses they imagine the researcher would want. Such conduct is known as the Hawthorne effect, rendered by Polit and Hungler[231] as behaviour displayed by study participants simply because they are aware of it. This fear turned out to be unfounded as most interviewees indicated that the issue of juvenile delinquency is topical and a distressing subject and required serious attention, and they proceeded to give their frank opinions. The interview protocol is attached to this study as Appendix A.

Data collected in this study has been analysed using percentages, fractions, variance, and correlation. Tables, charts, graphs, recorded dialogue with accompanying comments from the investigator, or a critical essay are some of the various forms through which data analysis can be presented.[232] Data obtained through the questionnaires were analysed using Excel, a Microsoft Office software.[233] The NVivo[234] programme that performs qualitative data analysis was also used as part of this research process. These computer programmes also generated charts and tables to analyse the data.

3.5.2 Law in context research

This study adopts a 'law in context' approach to research. This approach to legal writing rejects legal characterisations of problems and solutions and identifies them as social problems to which new solutions can be offered. This approach, which involves identifying and classifying the problem and the solution, can 'always be illuminating for legal research.'[235] Statutes created the juvenile justice system, and statutes also regulate its processes and procedures. Therefore, the relevant statutes in Ghana and a few other African countries in the thematic areas of the study were examined to discover the interpretation and application of law within the social context instead of

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[231] Polit and Hungler *Nursing research*.
[232] Gray et al *Qualitative and quantitative methods*.
[233] Gray et al *Qualitative and quantitative methods*.
[234] NVivo https://www.qsrinternational.com/nvivo-qualitative-data-analysis-software/home (Date of use: 28 April 2021) released in March 2020.
[235] Pendleton *Legal Scholarship* 235.

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using an autonomous system of rules and regulations. The statutes are the enacted laws of Rwanda, South Africa, and Uganda, which practice restorative justice.

3.5.3 Desktop research

This is a descriptive socio-legal study; therefore, a sizeable amount of information is located within books, printed media and electronic journals. To discover information on restorative justice practices in juvenile justice, the researcher had to collate and review the opinions of jurists expressed in books, articles, and reports. Restorative justice is a relatively new concept in Ghana; therefore, there is a dearth of information directly related to the thematic areas of this study. However, principles of restorative justice expressed in international law are embodied in conventions and treaties that constitute soft law; therefore, recourse to international conventions, resolutions, guidelines and rules formed the basis of this research.

3.5.4 Questionnaire design and administration

Each questionnaire consisting of twenty questions was designed and distributed to juveniles, victims, juvenile court magistrates, and lawyers involved with juvenile offenders. The questionnaires were pilot-tested randomly to assess the relevance of the questions to be studied.

A hundred and fifty questionnaires were distributed to juvenile court judges, juveniles, victims, and lawyers. A hundred and twenty-eight were returned, representing a response rate of 85%. Twenty questionnaires were administered to juveniles who had trials in court during the study period, and eighteen of them were returned.

A total of twenty-five victims consented to participate in the research and were given the questionnaires, which they completed and returned. A total of thirty-eight former juvenile offenders took part in the study by completing the questionnaire. Forty-two legal practitioners who consented to participate in the study completed the questionnaire. In the Kumasi Metropolis, there are six juvenile courts, but only five of the courts participated in the study because one of the judges had retired and had not yet been replaced; hence the court was not in session.

The research was conducted at the height of the COVID-19 Pandemic. There were a host of restrictions that impacted how the study was conducted. The questionnaire was generated using the Microsoft Forms Program and sent to the participants via

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email and WhatsApp Messenger. Participants could access the forms on their mobile phones and complete the survey. Responses given by participants were instantly transmitted via the Microsoft digital platform. This process proved to be convenient for the participants.

Most legal practitioners, former juvenile offenders, and victims opted to participate in the study using this model. The use of mobile phones to gather data in this study confirmed the observation by Kaufman and Peil[236] that the omnipresence of newer media technologies, such as smartphones, offers broad methodological potential for the social sciences.

The rest of the participants opted to participate using the conventional method; thus, the forms were printed out and delivered. While handing out and receiving the forms, COVID-19 protocols were observed to ensure the safety of researchers and participants and reduce the spread of COVID-19. The research assistant donned personal protective equipment such as surgical masks, face shields and gloves. In addition, contact between the research assistant and participants occurred outdoors at all times, and a distance of two metres was maintained between the parties as part of the protocols. The research assistant also had antibacterial hand sanitisers to keep her/his hands clean where water was unavailable.

The questionnaires are attached to this study as Appendices B, C, D and E.

3.6 Data handling

The data gathered from the field was 'sanitized' and then entered into the NVivo software to be coded. In the software, the data was coded to generate concepts. The research questions and the framework, words, phrases and themes were identified, coded and labelled accordingly. The codes were subsequently placed in categories and sub-categories to facilitate analysis and interpretation. The themes, patterns, inconsistencies and contradictions linking the data with existing literature on the juvenile justice system were identified to analyse the data.

[236] Kaufmann and Peil 2020 *Mob Media Commun 2*.

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3.7 Ethical considerations

The researcher wrote to the Judicial Service of Ghana to seek approval to research the juvenile courts. Official letters that outlined the study's objectives were also written to selected traditional authorities within the Kumasi metropolis to request their participation in the research. The researcher received permission to research the Judicial Service of Ghana and the traditional authorities. Prior to the commencement of research, ethical clearance was obtained from the college's Research Ethics Review Committee. In carrying out the research, the researcher adhered to the UNISA Research Policy, UNISA Research Ethics Policy, and UNISA Intellectual Property Policy.

Before data collection, the research objective was explained to respondents to obtain their consent, which was granted verbally and subsequently given in writing by completing the consent forms. Before respondents consented to participate in the research, they were informed that participation was voluntary. Since some of them were children, the researcher had to obtain the consent of their parents and guardians.

Information received from the respondents has been kept safe using passwords, and their identifiable personal data has been anonymised. All authors of secondary information cited were given the necessary acknowledgement in the study. Ethics refer to appropriate conduct and procedures required to carry out research. According to Leedy and Ormrod,[237] ethics relates to protection from harm, voluntary and informed participation, right to privacy and honesty with professional colleagues. It determines the criteria by which a researcher can judge his/her work. The research ethics applied in this study are the principles of beneficence, respect for human dignity and justice.[238] To ensure the protection of the rights of the participants, the researcher observed principles promoted by UNISA.[239] The following principles were also adhered to:

[237] Leedy and Ormrod *Practical research* 120.
[238] Polit and Hungler *Nursing research*.
[239] UNISA https://www.unisa.ac.za/static/intranet/Content/Departments/College%20of%20Graduate%20Studies/Documents/Policy%20on%20Research%20Ethics%20-%20rev%20appr%20-%20Council%20-%2015.09.2016.pdf (Date of use: 30 September 2018).

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3.7.1 Informed consent

The ethical code of research requires participants to agree to the research before it begins, and this is what Israel[240] refers to as informed and voluntary consent. In line with UNISA's policies, the study participants were asked to indicate their willingness to participate in the study by appending their signature or mark, where applicable, to a consent form.

Before starting the survey, the researcher obtained consent from all participants in the various sample groups. Participants in sample groups one and three, persons below 18 years of age, were children and considered vulnerable. Children are usually distinguished as a group "of special vulnerability" based on their lack of capacity or freedom to give autonomous consent to participate in research.[241] Israel[242] maintains that special procedures must be adopted to obtain consent from vulnerable groups. Hence, their parents or guardians were informed of the study through a Participant Information sheet, and their consent to their children or wards taking part in the research was requested.

The Participant Information sheet outlined the study's scope and general aim, the research's voluntary participation nature, and what such participation would entail. Parents or guardians who granted their children or wards permission to participate in the study signed a consent form to that effect, and so did the young persons before the questionnaires were handed to them. Young persons whose parents or guardians refused permission were not invited to participate in the study. Prospective adult participants invited to participate in the study were also given copies of the Participant Information Sheet, and their consent was obtained before they participated in the research.

3.7.2 Risk and harm minimisation

The goal of research to discover previously unknown knowledge or verify existing data can be met without inflicting undue stress, strain or pain on respondents.[243] Guided by this caution, the researcher took all the necessary steps to ensure an ethical approach to gathering the data. The participants' age required the researcher to take extra

[240] Israel *Research ethics* 186.
[241] Prinsloo et al *Vulnerability of children* 216.
[242] Israel *Research ethics* 187.
[243] Dantzker *Research methods*.

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precautions to ensure that they suffer no harm from the research. Harm cannot be limited to physical damage but includes psychological, social and economic damage.[244]

As an extra precaution, participants were informed of their right to bypass questions that caused any form of discomfort or to withdraw from the process at any time. The researcher and field workers were also available to answer any participants' questions.

3.7.3 Confidentiality and anonymity

The research participants were assured that they would be anonymised and that personal identifiers would be removed from research-related information during data reporting. The researcher did this to ensure confidentiality, as a result of the assertion that participants in social science research face more significant danger from what happens to data after it has been collected.[245]

Participants were also informed that all personally identifiable data contained in paper-based and computer-based records would be anonymised and accessible only to the researcher and supervisors. They are entitled to review the data.[246] Moreover, the results to be presented would only contain information that cannot be linked to real-world identities. Therefore, the researcher adopted strategies such as removing names, identifying sources from confidential data at the earliest possible stage, and disguising the community's name where the research took place, as suggested by Israel.[247]

3.8 Summary and reflections

This chapter deals with the research methods employed to perform the study. The critical elements discussed were the research area, population, sampling procedure, research design, research instruments, ethical considerations and data handling. The qualitative approach and quantitative research design were adopted in the study. In addition, there was desktop research. The quantitative method was used to gather data through questionnaires, and the responses obtained were analysed and presented in charts and tables. Results of the interviews were transcribed and analysed

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[244] Israel *Research ethics* 190.
[245] Israel *Research ethics* 189.
[246] Creswell and Plano Clark *Mixed methods research*.
[247] Israel *Research ethics* 189.

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to validate the quantitative findings. Qualitative methods were relied on to give meaning to the data gathered using the quantitative method to address the study's research questions. Chapter four examines the practice of restorative justice in Africa.

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CHAPTER FOUR

RESTORATIVE JUSTICE AND ALTERNATIVE DISPUTE RESOLUTION IN AFRICA

4.1 Introduction

Africa comprises five main regions, namely Northern Africa, Western Africa, Central Africa, Eastern Africa, and Southern Africa[248] and has been home to approximately 10 000 different polities and states before the colonisation of these regions in the late 19th century by European powers.[249]

African traditional communities have existed for centuries due to their values, norms, cultural practices and traditions.[250] The duty to regulate human conduct as a society meant that rules had to be made and sanctions applied for non-adherence to the rules. It then shows that Africans enjoyed human rights established by customary law and tradition.[251] The indigenous African society had its systems and structures for adjudicating disputes and ensuring peace and harmony in their communities. They formed a well-structured, time-proven social system geared towards reconciliation, maintaining and improving social relationships.[252] Despite numerous ancient conflicts, inter-tribal wars, colonialism and modernism, these communities are not extinct, indicating their resilience.

Conflicts and crime are not strange phenomena on the African continent. The continent has had more than its fair share of trouble, from civil unrest to inter-tribal wars, ethnic cleansing and genocide. The effect of all these has been devastating as numerous lives have been lost, with families and communities torn apart. Therefore, these conflicts must be resolved and future conflicts avoided by healing the victims, repairing the social fabric and protecting the peace.

These ideals have necessitated African states to devise varied modes of delivering justice by augmenting their formal criminal justice system with indigenous practices.

[248] Sayre *Africa*.
[249] Chepkemoi https://www.worldatlas.com/articles/how-many-countries-are-in-africa.html. (Date of use: 18 April 2019).
[250] Oshita et al *Conflict resolution*.
[251] Williams *Black civilization*.
[252] Osei-Hwedie and Rankopo *Indigenous conflict resolution* 33.

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This augmentation has been done diversely and constitutes the African restorative justice experience. The African method of incorporating indigenous conflict resolution practices into its formal adjudication system received the UN endorsement. The UN Secretary-General, in his August 2004 report on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, indicated that:

> Due regard must be given to indigenous and informal traditions for administering justice or settling disputes to help them to do so in conformity with both international standards and local tradition.[253]

According to Uwazie,[254] various ADR programmes and initiatives sprung up in the 1990s and early 2000s in response to the sobering conflict reports on the African continent. In their wake, these conflicts had left communities, societies and families torn apart with economic, social and cultural costs, among other things. These ADR programmes focused on practical skill-building and foundational knowledge on interpersonal and community disputes, namely negotiation, mediation, conciliation, arbitration, and some combination of processes.

This chapter is the empirical manifestation in Africa of the theoretical analysis framework established in the previous chapter. It reviews the customary justice system, examines the claim that human rights could be compromised under customary justice systems, and compares it with the formal justice system. Again, it looks at characteristics of the customary justice system, which makes it similar to restorative justice. The following sections discuss restorative justice in Rwanda's Gacaca courts and restorative justice for juveniles in Uganda and South Africa. These case studies illustrate customary and hybrid justice systems that could be applied to juvenile justice. They also demonstrate the role of legislation and the judiciary in harmonising customary and formal justice systems for the juvenile's optimum benefit.

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[253] Annan https://www.ictj.org/sites/default/files/UNSC-Global-Justice-Post-conflict-2004-English.pdf (Date of use: 18 April 2019).
[254] Uwazie *Peace-building* 2.

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4.2 Theoretical discussion

This section explores claims that human rights are compromised in customary justice systems. It compares customary and formal justice systems and postulates that customary justice goals and processes are analogous to restorative justice.

4.2.1 Implication of human rights under African customary justice systems

Traditional courts often work without legal representation, and the proceedings more often reflect local power relations than an application of individual rights. However, as these power relations are often skewed against foreigners, women and younger people, equal treatment could also be a concern.[255]

A common feature of African traditional dispute resolution is the role spirituality plays. Parties to the conflict are members of the community. They have been socialised to believe that the dead play a vital role in maintaining harmony in society. Opoku[256] asserts that "the Akan live with the spirits of the dead" as they believe their dead relatives' souls are near them. Therefore, a person who tells a lie risks being killed or injured by the ancestors while resolving the conflict.[257] Furthermore, it is believed that the ancestors are invoked as mediators when the parties swear an oath at the beginning of the process, so the parties should bear in mind that there are consequences for not being truthful. This belief confirms the assertion that the collective decision to punish persons who deviate from the norms of society gives credence to the collective conscience of both the living and the dead.[258]

Some traditional practices are shrouded in rituals, religious observances and secret society activities, making their credibility, accessibility and applicability questionable. The result is that disputants are likely to agree to an unfavourable deal due to their fear of the consequences of non-adherence to the practices instead of having a genuine interest in resolving the dispute. This approach to resolving conflicts might be because the African criminal justice system did not desire only a physical solution to

[255] Oomen *Traditional dispute resolution mechanisms* 183.
[256] Opoku *Festivals* 7.
[257] Mbagwu *Border disputes* 58.
[258] Adjei and Adebayo *Colonial justice*.

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conflicts but also social and spiritual[259] resolutions. Most often, disputants participated because they believed in the system's fairness.

Indigenous dispute resolution systems are sometimes rooted in traditions and customs that marginalize vulnerable groups such as women and the youth. This criticism is rooted in the widely-held belief that traditional practices do not always follow international human rights standards,[260] as mentioned earlier in the study.[261] Nevertheless, education and legislation could alleviate this shortcoming of the indigenous dispute resolution system and gain public confidence in the ability of traditional institutions to protect the interests of vulnerable groups. Reliance on education and legislation will guarantee the protection of the human rights of persons who access justice through such education and legislation. To outline how this criticism of the indigenous dispute resolution system has been mitigated, Nabudere and Velthuizen[262] cite the case of Liberia's 'Palava Hut.'

The 'Palava Hut' is an indigenous practice for resolving disputes among two major ethnic groups in Liberia and is seen as a form of accountability, and a means to achieve reconciliation. However, the 'Palava Hut' sometimes uses 'trial by ordeal' procedures, translating into human rights abuse. In the wake of the civil wars in Liberia that started approximately three decades ago and continued into the new millennium, interventions have been necessary to enable the country to recover. Liberia opted to harmonise statutory and customary law as part of the recovery process by adopting and designing a national 'Palava Hut' programme. The 'trial by ordeal' aspect of the 'Palava Hut' has been outlawed, and the International Centre for Transitional Justice admonished the designers of the national 'Palava Hut' programme to ensure that categories of vulnerable people, including women and children, enjoy equal access to these practices and are protected by them.

Sometimes indigenous dispute resolution systems do not uphold the procedural guarantees required in criminal cases. For instance, the restorative nature of customary justice processes and the need for accepting responsibility may conflict with the right to be presumed innocent. In response to this criticism, Aiyedun and

[259] Boege *Peacebuilding* 449.
[260] Nabudere *and Velthuizen Restorative justice in Africa* 109.
[261] Paragraph 2.4.2.
[262] Nabudere *and Velthuizen Restorative justice in Africa* 108.

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Ordor[263] argue that traditional leaders emphasize how disputing parties reach a decision rather than how proceedings are conducted.

An important characteristic of law is certainty. The principles of law must be known by the people expected to live by it to be of effect. As custodians of the values and norms of society, chiefs and elders have to pass these values on to the younger people. The transfer was done orally as indigenous dispute resolution processes were often undocumented because the societies were preliterate.[264] The assertion that customary law is undocumented and largely uncertain is common rhetoric.[265]

Nevertheless, Arowosaiye[266] asserts that although customary law was only oral, it was not uncertain, as its unique feature lies in its recognition and acceptance by the people it applies to. Arowosaiye's assertion is valid, as the African oral tradition preserved their culture for generations. Moreover, the law being unwritten does not make it uncertain. The British constitution is not written, but one cannot say that the law is doubtful. Most importantly, customary law is unwritten, making it flexible, relational, and negotiable.[267]

Oomen[268] opines that once flexible traditions and local institutions are formally recognized, human rights law could limit customary law's application. If traditional authorities are to be relied on to dispense restorative justice, the security and dignity of victims, perpetrators and others affected by the outcomes of activities must be guaranteed.[269] The security of people outside the structures should not be threatened by criminals who enjoy the leniency of the elders. Victims should be assured that they will not be intimidated into submission if unsatisfied with an outcome. Offenders should feel confident that they will be treated fairly and receive punishment proportionate to their offence. Traditional structures can only be enabled to contribute to reconciliation in a broader sphere if these guarantees exist.

[263] Aiyedun and Ordor 2016 *LDD* 163.
[264] Osaghae *Traditional methods 209*.
[265] Arowosaiye 2016 *ANULJ* 41.
[266] Arowosaiye 2016 *ANULJ* 41.
[267] Ubink 2018 *Dev. Change* 934.
[268] Oomen *Traditional dispute resolution mechanisms* 177.
[269] Nabudere *and Velthuizen Restorative justice in Africa* 82.

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4.2.2 Customary justice system versus formal justice system in Africa

In sub-Saharan Africa, the emphasis by many informal justice systems on reconciliation, restoration, compensation and reintegration is preferred over the custodial sanctions that dominate many formal criminal justice systems.[270] This observation forms the core of the theory that in respect of juveniles' protection, customary justice systems are preferable to the formal justice system. The shortcomings or inadequacies of the formal criminal justice system that emphasizes retribution and deterrence have caused states to become disillusioned and devise a means of incorporating their indigenous practices into their legal systems. Penal Reform International identifies some inadequacies, for example, the high cost of litigation, inflexible nature of proceedings, slow pace of determining cases, corruption and high technicality, and argues that these are the reasons why the formal court system is unattractive to a vast majority of the citizens of Africa.[271]

The absence of imprisonment from the customary justice system makes it better suited to protect juveniles. The UN Secretary-General's Special Representative on Violence against Children notes that customary justice systems tend to use more accessible language, have more significant healing potential, are less costly, and promote more direct involvement between the accused and the victim, their families and the general community.[272]

The flexible nature of proceedings in the standard dispute resolution process is necessary for an effective juvenile justice system. The inflexible nature of the formal court system proceedings makes it unattractive to a vast majority of the citizens of Africa.[273] The formal system, with its unyielding and unbending approach to the interpretation and application of its rules, as evidenced by principles such as ‘stare decisis,’ is not preferred over the ‘flexible, relational and negotiable’ customary justice system.[274]

[270] UN informal_justice_systems.pdf (un.org) (Date of use: 18 April 2019).
[271] UN informal_justice_systems.pdf (un.org) (Date of use: 18 April 2019).
[272] OHCHR *Human rights* 69.
[273] UN informal_justice_systems.pdf (un.org) (Date of use: 18 April 2019).
[274] Ubink 2018 *Dev. Change* 934.

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Africans relied on their local leaders' wisdom and judicial skills to resolve disputes.[275] Over the years, the institution of chieftaincy that hitherto had been viewed as sacrosanct due to its spiritual, legislative, administrative and judicial roles has been experiencing a diminishing legitimacy. In modern times, traditional institutions have lost a significant part of their authority and legitimacy due to being compromised by corruption, chieftaincy disputes and national politics. Nevertheless, the indigenous criminal justice system is formidable in its objectives and processes and has kept society together for generations despite its flaws. Therefore, the assertion by Nabudere and Velthuizen[276] that traditional structures are probably the most suitable instruments to complement modern state structures to practice restorative justice is very enlightening.

The African customary system places a premium on the role of elders in the community. An Acholi proverb, 'A village without Elders is like a tree without roots,' encapsulates this notion. Older people in society are believed to be custodians of the values and customs of the community, and as a result, they can be relied on to give wise counsel and sound judgements in disputes before them. Mbagwu[277] asserts that the onus falls on the elder to make peace since, in most traditions, the oldest family member takes responsibility for the wrongs committed by his family or community members.

This widely-held belief is expressed severally in proverbs, adages and symbols among the Akan of Ghana. A common saying that conveys this belief is *"opanin a otena efie ma nkwadaa we nanka, yere bu nnakawefoo a oka ho."* To wit, "an elder who watches the young consume a python is regarded as part of the python consumers." Thus, the presence of an elder in one's family or community is an assurance that the right thing will always be done, in contrast with the formal justice system, where magistrates or judges are appointed by the State and not infrequently transferred. Thus, death or transfer would occasion an inordinate delay in the delivery of justice. To the victim of a crime, justice delayed is justice denied.

[275] Aiyedun and Ordor 2016 *LDD* 157.
[276] Nabudere *and Velthuizen Restorative justice in Africa* 83.
[277] Mbagwu *Border disputes* 58.

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4.2.3 Customary dispute resolution akin to restorative justice in Africa

Communal harmony and the mending of broken relationships that result from conflicts are exceptional values upon which Africa's conflict resolution outlooks/approaches are based. Emeritus Bishop Desmond Tutu[278] [1931 – 2021] observed that a characteristic of traditional African jurisprudence is restorative justice, whose themes include healing breaches, redressing imbalances, restoring broken relationships, and rehabilitating both victim and perpetrator in the spirit of *ubuntu*.

The notion that crimes are wrongs against the State, without acknowledging the victims of criminal actions and their relatives, is alien to the African. The crime committed offended the clear and non-negotiable beliefs held by the community and was thus considered harmful to the gods. This collective consciousness was enshrined in the laws concerning public and private crimes.[279] In the ancient era, the victim of wrongdoing or their relations usually proceeded against the wrongdoer by an ordinary civil action and recovered compensation in the form of money if the wrongful act was successfully proved.[280]

Accordingly, four main principles were relied on to maintain peace in most African communities. The first was the settlement of disputes by deliberation and discussion rather than force. The second was correcting wrongdoing by compensation, rather than punishment, except in serious offences such as murder. The third was adjudication and assessment by elders who were considered impartial. The fourth was fairness.[281]

Mbagwu[282] asserts that non-parties to a conflict may participate in justice delivery in parts of Africa. She cites Uwazie,[283] who proffers that among the Igbo of Nigeria, people who are not directly involved in a case may participate in the peace process as historians or custodians of cultural values that may be relied on in order to resolve the matter. She states that the resolution process is usually held in the square, where

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[278] Tutu *Forgiveness* 51.
[279] Waindim JN https://www.accord.org.za/conflict-trends/traditional-methods-of-conflict-resolution/. (Date of use: 18 August 2019).
[280] Arowosaiye 2016 *ANULJ* 39.
[281] Ayittey *African institutions*.
[282] Mbagwu *Border disputes*.
[283] Uwazie *Peacekeeping*.

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other villagers attend and contribute. Earlier, Schapera[284] asserted that all cases are heard in public among the Tswana peoples, and any tribesman may attend and participate in the proceedings.

The need for cohesion in the community cannot be overemphasized. A salient characteristic of traditional African dispute resolution is ensuring that disputes between parties are resolved amicably. This principle is evident as parties shake hands at the end of the process and, in some Gacaca sessions, share a traditional libation and meal as a gesture of reconciliation.[285] Furthermore, Mbagwu maintains that the compensation paid by the guilty for crimes is intended to restore harmony and peace in society.[286] This practice is similar to that of the Ewe tribe of Ghana. Perpetrators of a serious offence are ordered to provide a ram to be slaughtered and shared between the parties to signify acceptance of the peaceful settlement.[287]

4.3 Traditional dispute resolution in Rwanda

This section examines *Gacaca*, a traditional dispute resolution system in Rwanda, and how restorative justice is expressed through community-based courts founded on the customary *Gacaca* model in post-genocide Rwanda.

4.3.1 The Gacaca court system

The *Gacaca* system demonstrates a reliance on restorative justice in Rwanda. *Gacaca* is a State-implemented but locally administrated set of transitional justice processes that draw their name and some of their procedural aspects from a traditional Rwandan dispute resolution process.[288] In the pre-colonial era, the people of Rwanda held informal sessions to resolve family disputes and minor offences and restore harmony and social order.[289] These sessions, known as *Gacaca*, were presided over by the *Inyangamugayo (*"those who detest disgrace"), society's elders. *Gacaca* is a Kinyarwanda concept that means "justice on the grass."[290] People sat on the grass

[284] Schapera 1957 *J. Afr. Law 153*.
[285] Mbagwu *Border disputes* 60.
[286] Mbagwu *Border disputes* 58.
[287] Morhe *Resolution of criminal cases at informal chiefs' courts* 108.
[288] Palmer *Post-genocide Rwanda* 116.
[289] Mangena 2015 *SAJP* 8.
[290] Ingelaere *Gacaca courts 33*.

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outside their houses to settle disputes such as inheritance of property or marital squabbles but not serious crimes.

A western-style judicial system was introduced in Rwanda during the colonial era, but *Gacaca* remained integral.[291] When Rwanda became independent, local authorities began to hold *Gacaca* sessions and played the role of Inyangamugayo in resolving local administrative issues such as the illegal occupation of land and unpaid debt. Local people who acted as judges heard the disputing parties, asked questions, listened to statements from community members, and then gave a verdict. If the parties accepted the ruling, the matter ended. If the parties did not, further investigation would be carried out, or the case would be referred to a regular court.[292]

Building on the traditional system, a law establishing *Gacaca* courts to prosecute offences related to genocide and crimes against humanity was promulgated in 2001.[293] This was in response to the genocide that took place between 1990 and 1994 and ravaged Rwandan society. According to Palmer,[294] the courts expected that they would, among other things, re-establish unity and harmony among Rwandans and give penalties aimed at correcting those who pleaded guilty. These factors reveal that the focus of Gacaca was to dispense restorative justice.

The government of Rwanda realised that a judicial system that ensures the community's participation in the investigation process could be a viable option in the modern judicial system.[295] By 2004, under the legislation, the Gacaca courts became a hybrid of the traditional ones, the regular criminal court and state prosecution. Ingelaere[296] asserts that the *Gacaca* system is a distinctively modern phenomenon despite its traditional appearance.

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[291] Waldorf 2006 *Temple Law Rev. 49;* Human Rights Watch https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts (Date of use: 20 October 2021); Ingelaere *Gacaca courts* 34.
[292] Ingelaere *Gacaca courts 34*.
[293] "Organic Law n° 40/2000 of January 26, 2001 creating '*Gacaca* tribunals' and organizing prosecutions of offenses that constitute the crime of genocide or crimes against humanity committed between October 1, 1990 and December 31, 1994;" Official Gazette of the Republic of Rwanda, March 15, 2001, pp 66-98.
[294] Palmer *Post-genocide Rwanda* 119.
[295] Nabudere *and Velthuizen Restorative justice in Africa* 49.
[296] Ingelaere 2009 *J. Mod. Afr.* Stud 507.

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The referral of serious crimes to a restorative justice setting aligns with scholars' assertion that restorative justice could work very effectively in case of serious crimes because victims of such crimes have suffered profound harm and have needs that are rarely met by the criminal justice system,[297] as earlier mentioned in this study.[298] Werner[299] notes that 'in dealing with the genocide, the *Gacaca* courts would be addressing crimes far more serious than those traditionally brought before the forum while adhering to restorative principles.' Palmer[300] confirms this assertion and notes that the post-genocide *Gacaca* courts dealt exclusively with crimes of genocide and crimes against humanity.

The theory that human rights are compromised under customary dispute resolution systems is evidenced in the *Gacaca* system. *Gacaca* was initially criticised for non-adherence to due process.[301] Palmer[302] posits that the State's failure to provide sufficient legal safeguards meant they had to rely on the *Gacaca* system. Its non-adherence to the presumption of innocence meant that the rights of individuals were compromised.

The *Gacaca* is preferable to formal justice. The *Gacaca* courts deliver expedited justice; hence they are preferred to the formal justice system. The courts that were meant to deal with the genocide cases could not do so due to the sheer numbers of suspected perpetrators and the extensive bureaucracy of the formal legal system. Oomen[303] describes it as a dilapidated court system with no possibility of trying all those cases. Between September 1998 and July 2014, the court in Arusha that was set up to deal with genocide crimes had delivered only fifty-two decisions. Special courts established in the criminal and military judicial bodies to deal solely with genocidal crimes and other crimes committed during the mass murder had processed about eight thousand cases. With one thousand five hundred cases decided annually, the special courts would have taken decades to try the accused persons.[304]The wheels

297 Skelton 2007 *Acta Juridica* 242-243.
298 Paragraph 2.3.3.
299 Werner 2010 *APCJ* 64.
300 Palmer *Post-genocide Rwanda* 199.
301 Sarkin 2001 *J. Afr. Law* 164.
302 Palmer *Post-genocide Rwanda* 120.
303 Oomen *Traditional dispute resolution mechanisms* 171.
304 Hankel *Gacaca Courts.*

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of justice were grinding very slowly, and it was apparent that the courts could not deliver the justice needed; therefore, society resorted to the established traditional structure.

4.3.2 Gacaca and restorative justice

Palmer[305] maintains that in practice, the functioning of *Gacaca* depends heavily on the *Inyangamugayo's* decisions and management of the courts that have shaped how *Gacaca* has operated in each community. This assertion confirms the emphasis of African justice systems on the role of elders in society in delivering justice. The efficacy of the inyangamugayo can be traced to the fact that they are community members and may even know the perpetrators or victims personally. They are not judges appointed by the State and imposed on the community, who may not be conversant with the practices of the local people or even speak their dialect as pertains to the formal criminal justice system. Local community leaders' adjudication or mediation of local conflicts renders the customary justice system preferable to the formal justice system.

The new *Gacaca* courts provide for an apology and compensation, as well as community service or contributing to a compensation fund. Under this law, an accused person whose confessions were accepted could choose to take his prison sentence or have it converted into community service. Those who confessed had part of their prison term provisionally suspended; therefore, the only requirement for completing the sentence left was community service.[306] This option contrasts with the formal justice system, which emphasizes imprisonment for offenders. The nature of crimes committed implies that retribution requires weighty imprisonment sentences with severe conditions attached, but that would have dire effects on the nations and stall the healing process.

Gacaca and restorative justice have similar goals. Truth, accountability, reconciliation and participation are the focus of the *Gacaca.* From a study of the *Gacaca* proceedings, the pursuit of “truth” emerged as the dominant justification of the courts' activities as people needed basic information.[307] The victims and survivors needed to know what happened, emphasizing truth-telling. Accountability was essential to the

[305] Palmer *Post-genocide Rwanda* 125.
[306] Palmer *Post-genocide Rwanda* 119.
[307] Palmer *Post-genocide Rwanda* 126.

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Gacaca, and among the *inyangamugayo,* there was a general focus on identifying the individuals who should account for their actions during the genocide. Reconciliation is also necessary. In the rural areas, an indication that reconciliation has taken place is the exchange of livestock between the parties; or the successful avoidance of a Gacaca hearing. However, there has been a shift from adamantly advocating reconciliation as an objective to a more precise focus on the court's role in determining the truth.[308] This shift aligns with restorative justice principles, which view forgiveness as incidental to the process.

Another feature of the *Gacaca* is participation, and Palmer[309] opines that the involvement of the community members is essential because the information about the genocide is with the people. Restorative justice invites community members who must recover from the crime committed. Members participate in the restorative justice process by being physically present, asking questions, or offering their opinions. This practice confirms an earlier assertion that the very nature of *Gacaca* provided the people of Rwanda with a sense of ownership of the conflict.[310]

Today, the *Gacaca* courts are a marked departure from what it originally was; however, we still see restorative justice at work here. The thrust is the same, since the judgements passed are based on the community's interests.[311] Accordingly, some Rwandans aver that the *Gacaca* courts have set in motion the reconciliation process within their communities.[312] This Rwandan experience teaches us that indigenous customs and practices could be adopted into the modern criminal justice system and modified to suit society's needs. These reflections of Penal Reform International may guide us:

> From 2002 to the present day, the implementation of the *Gacaca* process reflects, it seems to us, a willingness to continuously adapt the institution to reality. First, it focused on bringing ownership of a traditional justice mechanism to Rwandans in order to adapt it to the exceptional challenge of prosecuting genocide and to transform it into an innovative mechanism of transitional justice. Secondly, this willingness was translated into legislative changes that supported

[308] Palmer *Post-genocide Rwanda* 139.
[309] Palmer *Post-genocide Rwanda* 141.
[310] Clark *Gacaca*.
[311] Mangena 2015 *SAJP* 9.
[312] Human Rights Watch https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts (Date of use: 20 October 2021).

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the chosen empirical attempt to respond to the limitations and obstacles encountered during the progressive implementation of the process.[313]

4.4 Uganda

This section examines elements of the restorative justice of Uganda's Acholi traditional justice mechanisms and the juvenile justice system, which emphasizes the values of restorative justice.

Since before and after the colonial period, Uganda has faced ethnically driven, politically-manipulated violence, which has been devastating.[314] Three contentious issues must be addressed to resolve the long-standing impasse. They are trust, transparency and transactional justice; therefore, "…an alternative mechanism for accountability such as traditional justice rituals is (sic) essential…".[315] Uganda's failed 2007 peace agreement with the Lord's Resistance Army (LRA) provided traditional justice mechanisms to try lower-level perpetrators. The government would make legislative changes and implement traditional dispute resolution mechanisms in an overarching justice framework.[316]

Accordingly, Joseph Kony's Lord's Resistance Army (LRA) and the government agreed that traditional justice mechanisms, such as *culo kwor*, *mato oput*, *kayo cuk, ailuc,* and *tonu ci koka* would be promoted 'with the necessary modifications, as a central part of the framework for accountability and reconciliation.' Restoring tradition and cultural practices that may have kept the Acholi cohesion intact before the conflict between the LRA and Uganda People's Defence Force (UPDF) could be significant for creating a peaceful environment.[317]

4.4.1 Elements of restorative justice

While *culo kwor* entails compensation as a form of atonement for homicide in the Acholi and Langu cultures, *mato oput* is a reconciliation ceremony that entails drinking

[313] Penal Reform International https://cdn.penalreform.org/wp-content/uploads/2013/06/rep-ga7-2005-pilot-phase-en_0.pdf. (Date of use: 16 September 2019).
[314] Lapwoch and Amone-P'Olak *Social identity* 192.
[315] Latigo *Tradition-based practices*.
[316] Oomen *Traditional dispute resolution mechanisms* 173.
[317] Lapwoch and Amone-P'Olak *Social identity* 193.

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a symbolic drink made from the blood of sacrificed sheep and a bitter root; and *kayo cuk, ailuc,* and *tonu ci koka* also stand for traditional reconciliation rituals.[318]

Uganda's customary system has flaws, including its inability to ensure that the rights of victims, witnesses and perpetrators are protected.[319] Compliance depends on the commitment, goodwill and character of those involved, since the agreements are verbal. The system relies on the contribution of the elders' knowledge and experience in various circumstances; thus, the unavailability of an elder would mean a delay. The patriarchal[320] and status-based character of many traditional dispute resolution mechanisms often results in traditional courts being far more accessible to some people than others. For example, men are generally favoured over women and older people over young people.[321] Again, the fundamental premise of this traditional system is that the aggrieved party and the community would be willing to forgive; however, one cannot impose forgiveness.

This type of justice is more readily accessible to those who suffered most from violent conflict. Moreover, the hearings took place in the community where the people lived to enable them to partake with the slightest inconvenience. They also understood the process as they were already familiar with it. This practice contrasts with the formal system where the court sits far away, and its proceedings are mostly incomprehensible.

a. The similarity of goals between customary dispute resolution and restorative justice

In northern Uganda, restorative justice is akin to restorative justice in other parts of Africa. It is noteworthy that what determines the cleansing process is the remorse shown by the perpetrator, the payment of reparations, and the victim's readiness to forgive.[322] This conflict resolution system promotes a greater sense of unity among members of society who witness or participate in the process. It also serves as a deterrent to others who would have considered committing similar offences. The

[318] Oomen *Traditional dispute resolution mechanisms* 173.
[319] OHCHR *Human rights* 131.
[320] Ubink 2018 *Dev. Change* 936.
[321] Oomen *Traditional dispute resolution mechanisms* 180.
[322] Mangena 2015 *SAJP* 9.

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process often produces community-focused outcomes that have a positive impact on society.

The Acholi tradition's *mato oput* is a rite of reconciliation that addresses accountability and reconciliation issues by incorporating tolerance and forgiveness. The process recognizes and seeks to salvage and affirm the moral worth and dignity of victims, perpetrators and the community to prevent the recurrence of gruesome crimes. The objective is to reintegrate perpetrators with their communities and reconcile them with the victims through establishing the truth, confessions, reparation, repentance and forgiveness. Belligerent parties are brought together through the intercession of elders, and the offender accepts responsibility, which indicates repentance. Terms for reparation will then be agreed upon. The offender must take responsibility for the crime and seek forgiveness; healing may then occur.

Children may be subject to some of these processes for the crimes they might have committed during the period. According to Macdonald,[323] the LRA in northern Uganda abducted 66 000 people, four-fifths under eighteen years old. Some of these young people abducted were forcefully conscripted into the rebel's army and committed heinous crimes at the orders of the older soldiers. Through no fault of theirs, these 'child soldiers' perpetrated terror and had to be reintegrated into the community.

4.4.2 Juvenile justice in Uganda

Data released by the International Centre for Prison Studies as of October 2017 indicates that 54 059 people were incarcerated in Uganda.[324] With a population of 41.99 M, the prison population rate was 129. These figures revealed an increase from 2015, when the prison population stood at 45 092, with a population rate of 115. These statistics imply a high rate of criminality in Uganda and the need for an urgent course of action to control the threat. In the 2015/16 Annual JLOS Performance Report, the number of children arrested per 100 000 child population dropped to 8.4, compared to

[323] Macdonald 2017 *J. East. Afr.* 630.
[324] Walmsley R https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf (Date of use: 16 September 2019).

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9.4 for every 100 000-child population in 2014/15. Uganda recorded an 84.1% diversion rate of juveniles from formal judicial proceedings.[325]

In a keynote address at the 23 Annual Justice Law and Order Section Review in October 2018, the Chief Justice of Uganda, Hon. Justice Bart Katureebe stated:

> Institutionalization of children's remand homes in the justice system is not our primary goal and diversion is being promoted as the most appropriate alternative for children in conflict with the law, in order to ensure that their growth and development is not brought to a halt by the justice system.[326]

One can surmise that juvenile justice is of priority to the nation of Uganda. Furthermore, there is statutory evidence to support this claim. Uganda has a statute specifically for children caught within the criminal justice system. This statute is relevant as a result of the particular history of Uganda.

4.4.3 The Uganda Children Act, CAP 59 (1996)

The Children Act[327] conforms to the Convention on the Rights of the Child. This statute focuses on the healing and restoration of the parties instead of punishment. The Children Act emphasizes the involvement of families and communities in child protection and child justice issues, with the formal justice system being utilised as a last resort. Also, it brings the victim and offender together at a forum supervised by the community. The restorative nature of Uganda's juvenile justice system is visible in its focus and the outcomes evidenced by the statute.

Section 92 of the Children Act provides village executive committee courts with jurisdiction over criminal matters where children have been accused of affray, common assault, bodily harm, theft, trespassing, and malicious damage to property. However, the village executive committee courts may deal only with petty offences. Other cases are to be put before the family and children's courts, while the formal courts hear serious crimes such as defilement, rape, or murder.

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[325] Walmsley R https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf (Date of use: 16 September 2019).
[326] The Justice Law and Order Society Keynote address by the Chief Justice at the 23rd Annual JLOS Review (Date of use:16 September 2019).
[327] The Children Act, CAP 59 (1996).

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This provision is a shortfall in the Act as it appears to limit the jurisdiction of the village executive committee to petty offences.

Section 92 (7) expressly prohibits an order of custody by the village executive committee against any child who appears before it. The remedies available to the village executive committee courts include compensation, reconciliation, restitution, apology, caution, or a guidance order of up to six months.[328] Under the guidance order, a child shall be required to submit himself or herself to the guidance, supervision, advice and assistance of a person designated by the court.

This section is relevant for our purposes as it emphasizes the values of restorative justice. The statute further provides a restriction on the use of certain words. In section 101, "conviction" and "sentence" cannot be used to refer to a child who appears before the family and children's court. "Proof of an offence against a child" and "order" are the words to be used in place of "conviction" and "sentence".

Section 105 outlines the procedure for appeals, and it is reproduced here:

> An appeal shall lie in a case involving the trial of a child from— (a) a village executive committee court to a parish and sub county executive committee court; (b) a sub county executive committee court to a family and children court; (c) a family and children court to a chief magistrate's court; (d) a chief magistrate's court to the High Court; (e) the High Court to the Court of Appeal; (f) the Court of Appeal to the Supreme Court.

The section is a confluence of both formal and informal systems of justice. While the village executive committee and sub-county executive committee courts operate in terms of restorative justice principles, the other courts administer formal justice principles.

Uganda has an alternative system to ensure that the welfare of the young offender is protected. In the aftermath of the wars in Uganda, it has employed its indigenous practice of *mato oput,* among other things, to reintegrate perpetrators with their communities, reconcile them with the victims and prevent the recurrence of gruesome crimes. Adopting an alternative process for administering justice in the wake of such heinous crimes indicates the potential of restorative justice in its criminal justice system for the young delinquent. Also, there is little doubt that this statute's

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[328] Section 92 (4), (5) of the Uganda Children Act.

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establishment of the village executive committee courts reinforces the observation that implementing restorative justice processes in certain mandated situations nationwide is the best option.[329]

4.5 Juvenile justice in South Africa

This section explores principles enshrined in the Constitution of the Republic of South Africa that have a bearing on South Africa's child justice Act, premised on the Botho/Ubuntu philosophy. It examines innovative provisions of the Act geared towards diverting the juvenile from the formal justice system to restorative justice settings and the judicial interpretation of restorative justice.

4.5.1 Botho/Ubuntu and the Constitution of the Republic of South Africa

The importance of the family, the value of goodwill towards society, reconciliation and restoration were the focus of pre-colonial traditional and informal justice forums. The spirit of the concept of restorative justice is embedded in African society through the notion of *ubuntu*.[330] Mbiti[331] describes *ubuntu* as a philosophical belief system and communitarian thesis from the Nguni language family, which includes Zulu, Xhosa, Ndebele, and Siswati, among others, and it means "I am because you are" and "because you are, therefore, I am." *Ubuntu* is not merely a philosophy loosely referred to as African humanism but a way of life that sustained Africa's families, communities and chiefdoms.[332] Furthermore, a core doctrine of *ubuntu* is that it derives its meaning from connectivity; thus, a person is only regarded as such through others.[333] A recent definition given by the Africa Journal of Social Work puts it clearly:

> *Ubuntu* refers to a collection of values and practices that black people of Africa or of African origin view as making people authentic human beings. While the nuances of these values and practices vary across different ethnic groups, they all point to one thing – an authentic individual human being is part of a larger and more significant relational, communal, societal, environmental and spiritual world.[334]

[329] Morris and Maxwell *Restorative justice* 278.
[330] Skelton and Frank *Conferencing* 117.
[331] Mbiti *African religions and philosophy* 204-215.
[332] Msila *Ubuntu*.
[333] Matambo 2020 *AJDG* 123-124.
[334] Mugumbate JR and Chereni 2020 *AJSW*.

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The *Ubuntu* concept exists in several African countries and is known by several names. Among the Yoruba of Nigeria, '*ifowosowopo larin awon ara-ilu*' implies 'togetherness among community people.' Among the Igbo, *Idi n' otu ndi obodo* means 'the oneness of community people*.'* Among the Akan of Ghana, it is known as *biako yƐ* or *kor yƐ* and *dekaworwor* among the Ewe tribe*.* These words translate into oneness, unity, and community well-being over individual interests. However, these have been replaced by a Western individualistic and retributively oriented system.

Mangena[335] asserts that a common belief in all the cultures that embrace the *ubuntu* philosophy is that the community is more important than the individual. Moreover, conflict is collectively resolved while achievements are celebrated collectively; therefore, restorative justice and *ubuntu* are closely related concepts that cannot be treated in isolation.

The Constitution of the Republic of South Africa (1996) declares human dignity, the achievement of equality, and the advancement of human rights and freedoms[336] as some values on which the Republic of South Africa is founded. These values are re-echoed under the Bill of Rights in Chapter 2 of the Constitution, which "enshrines the rights of all persons in South Africa and affirms the democratic values of human dignity, equality, and freedom."[337]

Under the Constitution, the right to human dignity implies that the dignity of all persons must be respected and protected.[338] The right to equality as provided under the Constitution means that all persons are equal before the law and must not be unfairly discriminated against based on, for example, age.[339] Again, the freedom expressed under the Constitution refers to the right not to be detained without trial,[340] treated or punished in a cruel, inhuman or degrading way.[341]

The Bill of Rights stipulates that children have the right to be protected from maltreatment, neglect, abuse or degradation.[342] Furthermore, children must be

[335] Mangena 2015 *SAJP* 7.
[336] Section 1(a).
[337] Section 7(1).
[338] Section 10.
[339] Section 9.
[340] Section 12(1)(b).
[341] Section 12(1)(e).
[342] Section 28(1)(d).

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detained only for the shortest appropriate period and as a last-resort measure.[343] During such periods, children must not be detained with persons above the age of eighteen and must be treated in a manner that takes account of their age.[344] Section 35 of the Bill of Rights also extensively stipulates the rights of arrested, detained and accused persons, including the right to a fair trial.[345]

The Constitution enjoins courts, tribunals or forums to interpret this Bill of Rights to promote values that underlie an open and democratic society based on human dignity, equality and freedom.[346] Also, the Constitution acknowledges rights or freedoms recognized or conferred by customary law that are consistent with the Bill of Rights.[347]

At the heart of ubuntu lie the critical values of fairness, non-discrimination, dignity, respect and civility. These above-mentioned principles agree with the *ubuntu* philosophy, which encapsulates the moral relations demanded by human beings who must live together.[348] The value of dignity, espoused under the Constitution and enumerated above, is said to resonate with ubuntu as they are fundamentally linked to the idea of what it means to be a human being.[349]

While the legal debate on the use of ubuntu within the context of South African constitutional democracy[350] continues, some scholars assert that "…the courts have made full use of the many connotations of ubuntu, such as civility, respect, dignity, harmony, and compassion when interpreting the concept in keeping with the Bill of Rights." [351]

South Africa's Constitution[352] recognizes traditional leaders' role in nation-building and allows for legislation for the participation of traditional rulers in matters affecting their communities. This provision means that traditional rulers may be empowered by law to deal with issues specified by the Constitution relating to traditional leadership, the role of traditional leaders, customary law, and the customs of communities observing

[343] Section 28(1)(g).
[344] Section 28(1)(g).
[345] Section 35(3).
[346] Section 39(1).
[347] Section 39(3).
[348] Cornell D and Muvangua N *Ubuntu and the law*.
[349] Cornell D and Muvangua N *Ubuntu and the law*.
[350] Van Staden 2019 TSAR 204.
[351] Bennet, Munro & Jacobs *Ubuntu*.
[352] Section 212 (1) of the 1996 Constitution of South Africa.

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a system of customary law.[353] It appears that criminal offences do not fall within the purview of this constitutional provision. However, given that the Constitution, the supreme law of the land, recognizes customary law and provides for its application in the courts,[354] it would be commendable if traditional rulers were enlisted to deal with juvenile delinquency.

Like other countries, South Africa has had its challenges with crime over the years. However, statistics released by World Prison Brief are alarming. At the end of March 2019, the general prison population of South Africa stood at 162 875, with a prison population rate of 279 based on an estimated national population of 58.4 million, and the juvenile population constituted 0.1%.[355] These statistics infer that as of March 2019, approximately 1 628 minors were incarcerated. Interventions are required to address juvenile delinquency.

Onyango[356] asserts that given South Africa's detailed history of the apartheid regime, racism, xenophobia and critical conflicts of laws, customs and interests, the indigenous people's customary law must be recognized to bring them on board with the national strategies and government policies. Therefore, it is no surprise that a system with an *ubuntu* theme has been developed for children accused of committing crimes.[357]

4.5.2 Child Justice Act No. 75 of 2008

The Act, in its preamble, outlines as part of its aims:

> the possibility of diverting matters involving children who have committed offences away from the criminal justice system, in appropriate circumstances, while children whose matters are not diverted, are to be dealt with in the criminal justice system in child justice courts; expand and entrench the principles of restorative justice in the criminal justice system for children who are in conflict with the law, while ensuring their responsibility and accountability for crimes committed.

The refreshing nature of this legislation is apparent in the emphasis the Act places on *ubuntu*.[358] Diversion is premised on the notion that while a young person has been

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[353] Section 212 (2).
[354] Section 211 (3).
[355] Research Institute for Crime Justice Policy https://www.prisonstudies.org/country/south-africa (Date of use:16 September 2019).
[356] Onyango *African customary law* 40.
[357] Skelton and Frank *Conferencing* 117.
[358] Section 2 (b).

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involved in antisocial behaviour, it is more damaging to put young offenders through the criminal justice system.[359]

Under the Act, the juvenile may be diverted from the formal criminal justice system at three levels. In the first place, the prosecutor may divert a matter involving a child alleged to have committed an offence before a preliminary inquiry by the child justice court takes place.[360] Here, the prosecutor has the power to divert the case to a restorative justice process but only with the consent of the offender.[361] The restorative justice process will occur only after the court orders have been issued.[362]

The next stage at which a child may be diverted from the formal criminal justice system is during the trial before the prosecution closes its case.[363] The Act requires that where an order of diversion has been made, the proceedings would be postponed and subsequently stopped, pending the court's satisfaction with the child's compliance with the diversion order.

Diversions take varied forms and are enumerated in the Act on two levels.[364] Some level one diversion options include an oral or written apology to a specified person or institution, and a formal caution, with or without conditions.[365] The offences subject to level one diversion include common assault where grievous bodily harm has not been inflicted, perjury, and contempt of court.[366] Crimes under level two include robbery, other than robbery with aggravating circumstances; malicious damage to property, where the amount involved exceeds R1 500; assault, involving the infliction of grievous bodily harm; public violence; culpable homicide; arson.[367] Offences such as treason, sedition, and murder[368] also fall within level two. In addition, the diversion options include compulsory attendance at a specified centre or place for a specified vocational,

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[359] Penal Reform International https://cdn.penalreform.org/wp-content/uploads/2013/06/rep-ga7-2005-pilot-phase-en_0.pdf. (Date of use: 16 September 2019).
[360] Section 41(1)(a).
[361] Section 52.
[362] Section 42.
[363] Section 67.
[364] Section 53.
[365] Section 53(3)(a)(b).
[366] Schedule 1.
[367] Schedule 2.
[368] Schedule 3.

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educational or therapeutic purpose, which may include a period or periods of temporary residence.[369]

This is the final stage at which a child justice court may divert a child from the criminal justice system after he/she has been convicted.[370] Here, the court would refer the child to either a family group conferencing, victim-offender mediation, or "any other restorative justice process according to the definition of restorative justice." Upon completion of the process, written submissions are given to the court, which would subsequently impose a sentence that confirms, amends or substitutes the recommendations it has received.

These provisions of the statute discussed here conform to international restorative justice practice, allowing for diversion at several stages of the criminal process and providing various options for diversions. The omnibus clause in section 73(1)(c) gives the court unrestricted discretion in adopting restorative justice in any form to decide upon the sentencing of a child who has been convicted of an offence. We agree with Skelton, who opines that this provision allows the development of indigenous restorative justice models.[371] Guided by the fact that the promotion of the spirit of *ubuntu* in the child justice system is declared an objective of this Act,[372] it would be worthwhile to consider the role of indigenous rulers in dispensing justice to child offenders since they are the custodians of the principles and customs of *ubuntu*. The Act's emphasis on *ubuntu*[373] and its subsequent solid influence might account for the steady decline in the number of children in remand awaiting trial and those in prison between 2005 and 2015.[374]

The statute provides for family group conferences and victim-offender mediation. These restorative justice programmes may occur either before the trial[375] or before sentencing.[376] The law requires that within 21 days of issuing an order for a child to appear at a family conference or victim-offender mediation, the probation officer

[369] Section 53(4)(b).
[370] Section 73.
[371] Skelton 2002 *Brit.J. Criminol*.
[372] Section 2 (b).
[373] Section 2 (b).
[374] Mkhize and Zondi 2015 *Agenda* 57.
[375] Sections 61(2) & 62 (3).
[376] Section 73 (1)(a), (b).

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appointed by the magistrate or an inquiry magistrate must convene the same.[377] This provision is commendable as it offers the victim and the offender an early opportunity to leave the formal criminal justice system at the onset of the proceedings.

The statute echoes one of the values of restorative justice: the consent of a victim and offender for the implementation of the restorative justice process. This requirement is met under sections 61(1)(b); 62(1)(b), which provide that family group conferences and victim-offender mediation can take place only with the consent of the victim and the child.[378] The parties cannot agree on a plan. The Act mandates them to end the conference. The probation officer must refer the matter back to the magistrate, inquiry magistrate, or child justice court to consider another diversion option.[379] A central theme is the intention of the legislator to provide as much opportunity as possible to the victim and offender to leave the formal criminal justice system.

The criticism that restorative justice lets off the offender easily cannot be substantiated by this Act because diversion programmes must be accredited and have a valid certificate of accreditation by the Cabinet member responsible for social development.[380] Therefore, arbitrary programmes that would have no meaningful impact on the offender and victim cannot be performed. Furthermore, section 56 is consistent with an objective of the Act, which is to reinforce children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safeguarding the interests of victims and the community.[381]

The absence of the concepts of 'offender' or 'juvenile' under the Act is noteworthy, and it lays the foundation of a statute focused on singling out children in conflict with the law for special protection. Instead, the Act refers to 'child' and defines it as:

> Any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 4 (2).[382]

It appears that the legislator intended this statute to be quite expansive.

[377] Section 61(2) & 62 (3).
[378] Sections 61(1)(b); 62(1)(b).
[379] Section 61 (8).
[380] Section 56.
[381] Section 2(b)(i).
[382] Section 1.

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South Africa's Child Justice Act is a trailblazer for African juvenile justice systems. It is a clear indication of the utilization of legislation to effect change. Existing structures and procedures, such as traditional courts, must be utilised in light of the limited human and material resources to succeed in restorative programmes. In addition, restorative practices must adhere firmly to moving the responsibilities, resources and control from state-sponsored restorative professionalism to local communities and laypeople.[383]

4.5.3 Judicial interpretation of restorative justice

The South African courts have had some interaction with restorative justice. Skelton asserts that the Constitutional Court of South Africa has demonstrated its support for restorative justice yet portrays a significant weakness when it emphasizes court-ordered apologies despite the gravity of the crime.[384]

The case of *Seedat v S*[385] stands out as it reflects modern-day restorative justice in practice. In this case, the trial court found the accused, aged 60, guilty of the rape of a woman aged 58. Before sentencing, the victim, through her lawyer, requested compensation, and the request was rejected by the trial court, which handed the offender a seven-year prison sentence. On appeal, the High Court set aside the sentence and ordered that the accused pay R100 000 to the complainant. The State appealed on the grounds that the sentence was incompetent and invalid. The Supreme Court upheld the appeal of the State, and in delivering the unanimous judgement of the court, Tshiqi JA stated:

> I, however do not share the sentiments of the high court that restorative justice is an appropriate sentencing option in this matter. As this court stated in Director of Public Prosecutions, North Gauteng v Thabethe [2011] ZASCA 186; 2011 (2) SACR 569 (SCA) para 20: 'I have no doubt about the advantages of restorative justice as a viable alternative sentencing option provided it is applied in appropriate cases. Without attempting to lay down a general rule I feel obliged to caution seriously against the use of restorative justice as a sentence for serious offences which evoke profound feelings of outrage and revulsion amongst law abiding and right-thinking members of society. An ill-considered application of restorative justice to an inappropriate case is likely to debase it and make it lose its credibility as a viable sentencing option'.

[383] Froestad and Shearing *Conflict resolution* 540-541.
[384] Skelton 2013 *RJIJ* 141-142.
[385] *(731/2015) [2016] ZASCA 153.*

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The dictum of the eminent judge summarises the position of the Supreme Court of Appeal in South Africa on restorative justice: It is a 'viable sentencing option' that must be considered and applied only in appropriate cases if it is to retain its credibility. This position is quite instructive in the campaign to implement restorative justice in Ghana's criminal justice system. However, with all due respect to the learned judge, it is essential to note that restorative justice cannot be whittled down to a mere 'sentencing option.'

Restorative justice encompasses much more than that, and as has been outlined earlier, under South African law, restorative justice interventions may occur before, during or after trial.[386] Admittedly, the parties in this matter were not minors, therefore the Child Justice Act provisions did not apply. In light of the principle of *stare decisis* and the ramifications of the decisions of the highest court of the land on lower courts such as the child justice courts, one would desire extensive pronouncements from the court on emerging trends and practices. Insofar as young offenders are concerned, it ought not to be an 'option' but a necessity.

Decisions from the High Courts in South Africa suggest that restorative juvenile justice involving juvenile offenders is considered a crucial element of the court's jurisprudence. The mandate of the Act and its provisions, which include the child's best interests, a preliminary inquiry by the child justice court, and diversion of the child from the criminal justice system, have all been the subject of decisions of the court.

The Gauteng North High Court, in its review judgement of *The State v CKM, FTM, and IMM*[387], delivered on 19 January 2012, was instructive on the mandate of the Child Justice Act. According to the Court:

> It introduced a comprehensive system of dealing with child offenders and children coming into conflict with the law that represents a decisive break with the traditional criminal justice system. The traditional pillars of punishment, retribution and deterrence are replaced with continual emphasis on the need to gain understanding of a child caught up in behaviour transgressing the law by assessing her or his personality, determining whether the child is in need of care, and correcting errant actions as far as possible by diversion, community-based programs, the application of restorative justice processes and reintegration of the child into the community.

[386] Sections 41 & 67 of Child Justice Act.
[387] (20/1).

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The extensive provision on diversion under the Child Justice Act has received judicial approval, which is evident in judicial pronouncements made by the Court severally.

The Act emphasizes that the paramount consideration of a child justice court must be to uphold the child's best interests.[388] In S v Ndwandwe[389], the Pietermaritzburg High Court gave an expansive definition of "child" under section 63. According to D. Pillay J, similar to the case of a child accused, child witnesses should be afforded protection under section 63. This expansive definition given by the Court ensures that the best interests of the child victims are of importance, furthering the goals of restorative justice.

Under the Act, a preliminary inquiry must be conducted when a child has been arraigned before the Court. Section 43 stipulates a preliminary inquiry that considers the estimated age of the child, establishes whether the matter can be diverted before the plea, and identifies a suitable diversion. In *The State vs. Thwala*[390], the High Court set aside the conviction of a juvenile and ordered the matter to be tried afresh before a different magistrate who would hold a preliminary enquiry in terms of section 43 of the Child Justice Act. The High Court made these orders because no enquiry was conducted in accordance with section 43 of the Act. Upon presenting the pre-sentence report requested by the Court, it was discovered that the accused was not 19 years old as indicated on the charge sheet but 14 years old.

The Court has been unequivocal regarding the diversion of juveniles from the criminal justice system. In the *State v Tervin Chetty*[391], the High Court in Pietermaritzburg, in its special review judgement, ordered the conviction and sentencing of a 17-year-old convicted on a theft charge by a Magistrate's Court, who was cautioned and discharged as an adult offender, to be set aside. Setting aside the order, Olsen J held that the accused should have been dealt with under the Child Justice Act and that “it would have almost inevitably resulted in diversion as provided for in chapter 8 of that Act”.

[388] Section 63 (4).
[389] (AR99/12) [2012] ZAKZPHC 47.
[390] (A92/2015) [2015] ZAGPPHC114.
[391] [2014] DR326/14.

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In *Al Gani NO v The State* [392], the accused was initially assumed to be 18 years at the commencement of the trial, but it transpired that she was 17 years old at the time of the offence. In its review judgement, the South Gauteng High Court quashed the conviction and held:

> The failure to consider diversion from the criminal justice is, of itself a fatal factor in the conviction process.

The significance of diverting juveniles from the criminal justice system cannot be overemphasized, as indicated by the dictum of Victor J:

> This is the child's second conviction. If the principle of diversion had been applied in relation to the first charge, she could well have been diverted away from the criminal justice system at that stage. Two criminal convictions before reaching the age of 18 years is (sic) the very kind of problem which the Act aims to address…The objectives of diversion are set out very clearly in section 51 of the Act. It is now incumbent on the criminal justice system including the presiding officers to give consideration to the objectives of diversion and to remove children from the system where appropriate.

The Court has not merely advocated for the diversion of children from the justice system, but it has made pronouncements regarding the required standards during the diversion. In *The State v BL,*[393] the accused was 16 years old when he allegedly committed the offense. He was charged with and convicted of robbery with aggravating circumstances, and after his plea of guilty, he was sentenced to 3 years of correctional supervision.

In its special review judgement, the North Gauteng High Court set aside the sentence imposed on the accused by the magistrate and remitted the matter to the Magistrate's Court to determine the nature and scope of the correctional supervision and for compliance with the provisions of section 75 read with section 72 of the Child Justice Act. Section 75(a) of Act 75, which allows juveniles of fourteen years or older to be sentenced to correctional supervision, must be read subject to section 72(2) of the CJA, which deals with community-based sentences. Mabuse J, delivering the judgment of the Court, held:

[392] (H47/11).

[393] (A125/2012) [2012] ZAGPPHC 27; 2013 (1) SACR 140.

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> Because the term "Correctional supervision" refers to diverse non-custodial measures, it was not enough, let alone appropriate, for the trial magistrate just to sentence the accused to "correctional supervision"…the magistrate should… identify the specific measures applicable to the accused and thereafter formulate a general framework in which the measures would be implemented.

These cases indicate the position of South Africa's judiciary on restorative justice involving juveniles.

The use of customary dispute resolution mechanisms in Rwanda, Uganda and South Africa is discussed here and suggests that these mechanisms have been successfully used for transitional justice purposes where serious offences were committed. Therefore, these customary dispute resolution mechanisms could reduce juvenile delinquency and recidivism and engender satisfaction in our juvenile justice systems if states would utilise them.

4.6 Practice of restorative justice influence on the current theory

There has been a long history of conflict in African countries. In recent years, the spike in conflicts across the continent has proven the resolve of African societies in finding long-lasting solutions to their problems, and this is evident in the use of strategies discussed in this chapter.

The practice of restorative justice in Rwanda, Uganda and South Africa has influenced theory over the years. Evidence and knowledge of the suitability of customary dispute resolution practices for addressing conflict situations have been generated. Therefore, NGOs and policymakers are informed on relevant strategies and how best they can be applied. Scholars could describe, explain, predict and understand the phenomena of restorative justice in African customary dispute resolution systems based on evidence acquired.

These strategies include *ubuntu*, which prioritises community interest above individual interest[394] and necessitates joint conflict resolution. The traditional justice systems emphasize reconciliation and restoration of social harmony rather than punishment,[395]

[394] Mangena 2015 *SAJP* 7.
[395] Mbagwu *Border disputes*.

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and therefore the non-existence of incarceration as punishment for offenders makes it more effective. Since communities are concerned about the effect incarceration would have on the defendant's family and their ability to provide for themselves,[396] this aspect of traditional justice mechanisms furthers the goal of reconciliation. Nevertheless, Ingelaere[397] notes that in the wake of *Gacaca* courts, generally, reconciliation remains challenging and, in some cases, impossible, especially regarding people involved in killings. He also reports strained social relations between survivors and relatives of incarcerated perpetrators due to *Gacaca* activities.[398]

Similarly, traditional justice is preferred to formal justice in post-conflict Northern Uganda due to the amnesty process and reconciliation; however, accountability and reparation must be incorporated appropriately.[399]

A feature of the *Gacaca* courts was proximity and participation as the courts sat to resolve conflicts that occurred in the community. The Gacaca process allowed perpetrators and victims to meet in the same forum as a means of effecting justice and bringing reconciliation to Rwandans.[400] The process enabled them to speak out about their experiences, which brought relief. However, the fear of being ostracized by the community[401] or being victims of reprisals[402] caused witnesses to remain silent, undermining the process. States that wish to utilise indigenous dispute resolutions should guarantee an environment where witnesses may testify openly and freely, without fear of repercussions, and respect freedom of expression.[403]

The utilisation of Gacaca courts as a transitional justice mechanism brings to the fore Rwanda's capacity to address its problems by using indigenous practices, and it

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[396] OHCHR *Human rights* 19.
[397] Ingelaere *Rwanda's Gacaca courts* 82.
[398] Ingelaere *Rwanda's Gacaca courts* 80.
[399] The Princer Group International Limited https://www.researchgate.net/publication/281773510 (Date of use: 20 October 2021).
[400] Penal Reform International https://cdn.penalreform.org/wp-content/uploads/2013/06/Gacaca_final_2010_en.pdf (Date of use: 20 October 2021).
[401] Human Rights Watch https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts (Date of use: 20 October 2021).
[402] Penal Reform International https://cdn.penalreform.org/wp-content/uploads/2013/06/Gacaca_final_2010_en.pdf (Date of use: 20 October 2021).
[403] Human Rights Watch https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts (Date of use: 20 October 2021).

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proves their relevance in modern jurisprudence. We learn that serious crimes can be the subject of dispute resolution mechanisms similar to *Gacaca*. Nevertheless, it is essential that states considering customary dispute resolution mechanisms to prosecute serious crimes ensure that certain safeguards are in place because, based on what took place in the *Gacaca* courts, compromises made by the Rwandan Government led to violation of the rights of the parties.[404] Therefore, Human Rights Watch[405] insists that an independent body to receive complaints and investigate allegations of law errors or due process violations must be established.

The Gacaca court system was efficient regarding speed and cost as it cleared the backlog of genocide cases; they dealt with approximately 130 000 individuals incarcerated after the genocide and thousands more accused while the courts sat.[406]

Another instance of the influence of traditional justice mechanisms on theory is evident in the Princer Group's findings on post-conflict recovery in Northern Uganda.[407] Uganda's *mato oput* practice aimed at reintegrating past perpetrators into the community and proved effective at holding offenders accountable for the offences they committed. The report[408] indicated that the community needs reparation and reconciliation and reduced victimhood, which community leaders could all facilitate. This finding portrays the African society's premium on traditional leaders and establishes that judges' familiarity with disputants makes traditional justice systems accessible and efficient.[409]

[404] Penal Reform International https://cdn.penalreform.org/wp-content/uploads/2013/06/Gacaca_final_2010_en.pdf (Date of use: 20 October 2021); Human Rights Watch https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts (Date of use: 20 October 2021).
[405] Human Rights Watch https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts (Date of use: 20 October 2021).
[406] Ingelaere *Rwanda's Gacaca courts* 29.
[407] The Princer Group International Limited https://www.researchgate.net/publication/281773510 (Date of use: 20 October 2021).
[408] The Princer Group International Limited https://www.researchgate.net/publication/281773510 (Date of use: 20 October 2021).
[409] OHCHR *Human rights* 19.

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The practice of Uganda's Acholi *mato oput* has helped integrate some LRA combatants into society; however, some victims of the conflict are not Acholi; therefore, they were unwilling to submit to a process that is not part of their tradition.[410]

In the past, customary justice systems may not have been widely recognized among scholars or the international community. However, the praxis of Rwanda's *Gacaca* and Uganda's *mato oput* in the aftermath of the genocide and civil war has generated much interest. Therefore, scholars, students, policy-makers and researchers are finding innovative strategies to resolve African conflicts.

4.7 Summary and reflections

This review indicates that as part of efforts to re-establish unity and harmony among Rwandans post-genocide, Gacaca courts were established to prosecute offences related to genocide and crimes against humanity. These Gacaca courts drew their name and some of their procedural aspects from a traditional Rwandan dispute resolution process that relied on voluntary confession, demonstration of remorse, apology, and request for forgiveness by perpetrators. The restorative nature of the Gacaca courts is evident in the focus of the proceedings: truth, accountability, reconciliation and participation.

In Uganda, the reliance on traditional justice mechanisms has been touted as part of the framework for accountability and reconciliation in the wake of ethnically-driven and politically-motivated violence. Again, Uganda’s Children Act, which emphasizes the involvement of families and communities in child protection and child justice issues, with the formal justice system being utilised as a last resort, indicates the restorative nature of the juvenile justice system.

South Africa’s Child Justice Act remains a trailblazer for most African nations, based on the underlying *ubuntu* theme, and the emphasis is on diverting children who have committed offences away from the criminal justice system. These children are afforded

[410] The Princer Group International Limited https://www.researchgate.net/publication/281773510 (Date of use: 20 October 2021).

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restorative justice programmes and interventions. The next chapter reviews Ghana's juvenile justice system and the customary system.

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CHAPTER FIVE

GHANA'S JUVENILE JUSTICE SYSTEM

5.1 Introduction

This chapter reviews the literature on Ghana's juvenile justice system by examining its historical origins and various pieces of legislation that regulate it. This chapter provides the Ghanaian perspective on the three thematic areas of this study. The thematic areas discussed in this chapter have been logically linked to ensure harmony and a balanced literature overview. In line with the research questions, this chapter reviews the customary dispute resolution system, including criticisms, such as the implication of human rights concerning the child. This chapter also reviews legislation that regulates this study's thematic areas considering the doctrine of legal pluralism. Also, the uniformity between customary dispute resolution and restorative justice is discovered and examined, making it suitable to contribute to solving the societal problem of juvenile delinquency in Ghana.

5.2 Historical background of the justice system in Ghana

Before the advent of colonialism in Ghana, an indigenous political system revolved around the chieftaincy institution.[411] As discussed earlier in the study,[412] Ghana as a state did not exist before colonialism, but it was organised as several ethnic groups co-existing independently. These ethnic groups include the Ashanti, Dagbani, Dangme, Fanti and others. Chieftaincy has for a long time featured prominently in these societies.[413] The groups had leaders in chiefs, queen mothers, elders and family heads who were highly revered by their subjects and family members. These leaders performed executive, legislative, judicial, and even spiritual functions and were thus very powerful. The chiefs and queen mothers regularly held court with their elders and settled disputes among their subjects on all issues, ranging from land disputes to matrimonial misunderstandings and crime. The decisions of these chiefs were final, and justice was often delivered.

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[411] Assanful 2013 *SJASS* 201.
[412] Paragraph 1.8.
[413] Adjei 2015 *LJH* 14.

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As discussed in the preceding chapter,[414] Africans enjoyed human rights established by customary law and tradition.[415] Moreover, as discussed earlier in this study,[416] these African societies held secrets of peace-making locked in their ways of life, customs, and traditions.[417] The fundamental principle for maintaining peace in the African community was correcting wrongdoing by compensation instead of punishment.[418] Also, the main objective of the courts, which heard the people's disputes, was to reconcile them.[419] This characteristic of the African indigenous dispute resolution system is echoed by African scholars who assert that the system emphasizes reconciliation and restoration of social harmony rather than punishment.[420]

Historically, there were formally constituted courts in African societies with a central authority to settle disputes. Arhin,[421] writing on the Akan ethnic group of Ghana, asserts that the Akan of Ghana had hierarchical courts. The Akan are found in Southern Ghana and are made up of several tribes, such as the Ashanti[422] and Fanti.[423] At the bottom of the hierarchy were the extended family court, known as *badwa,* which consisted of heads of the households of family groups, the heads of the other family groups with whom certain relationships from intermarriage or occupying the same ward existed, and other respected heads of different family groups. This *badwa* was headed by the family head, known as *Abusuapanin.*[424]

The *badwa* settled disputes between members of the family groups referred to as *afisem*. The nature of the disputes resolved by this court did not affect the entire village and included petty squabbles, theft, inheritance of property, adultery, and the like. The focus of the *badwa* was to reconcile the parties and maintain cordial relations between family members. Thus, *mpata,* a reconciliation fee in the form of a drink, was given to the aggrieved party. This was in addition to an apology. Subsequently, both parties

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[414] Paragraph 4.1.
[415] Williams *Black civilization*.
[416] Paragraph 2.4.2.
[417] Zartman *Modern conflict*.
[418] Ayittey *African institutions*.
[419] Arhin *Traditional rule*.
[420] Mbagwu *Border disputes*.
[421] Arhin *Traditional rule*.
[422] As indicated under paragraph 3.2 of this study, the research site is the city of Kumasi, which is the seat of the Ashanti kingdom.
[423] Appiah-Sekyere 2018 *IJASS* 24.
[424] Assanful 2013 *SJASS* 201.

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would swear before the elders to maintain peaceful relations. Relatives could disown a party that did not comply with the decision. According to Awoonor,[425] the role of the badwa was political, which covered the welfare, material and spiritual, of every single member of the family.

Next in the hierarchy was the village chief's court, known as *Odikro's nhyiemu,* which is the village council headed by an *odikro*.[426] Assanful asserts that various family heads assisted the village chief in performing his duties.[427] It heard matters that could not be settled by the badwa and cases involving rules made by the village council regarding areas such as ceremonies connected with village shrines. The king's oath was sworn when an offender refused to comply with the Odikro's nhyiemu or was dissatisfied with the decision. The matter was referred to the divisional court known as *ohene's* court.

The final court at the top of the hierarchy was the *omanhene's* court.[428] Assanful describes it as the apex of the Akan political structure.[429]This court heard matters referred to as taboos (*akyiwadee*), which could carry the death penalty, such as homicide, incest, theft of royal regalia or property of the shrine, and breaking the oath of allegiance to a ruler, which was considered treason. The court aimed to reconcile men with one another. Still, their priority was to appease the spirits disturbed by a breach of taboos committed in terms of the offence under adjudication or by swearing an oath and doing justice to the wronged party.

The preceding discussion on the Akan system is what Gyekye describes as an outstanding feature of a decentralised character.[430]

In 1874, Ghana, previously referred to as the Gold Coast, inherited the Common Law system and its legal system from the British. However, Addo-Fening[431] asserts that the British recognized that chieftaincy was the only "principle of legitimacy in local administration"; hence they enacted legislation that interfered with the chieftaincy

[425] Awoonor *Ghana* 9.
[426] *Odikro* is the village head or chief.
[427] Assanful 2013 *SJASS* 201.
[428] The court headed by the paramount chief.
[429] Assanful 2013 *SJASS* 201.
[430] Gyekye 121.
[431] Addo-Fening *Traditional governance* 691.

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institution and turned it into an instrument of colonialism, and this ultimately diminished the chiefs' legitimacy. The undermining of the leaders disrupted the traditional system, dissipated society's morals and fabric, and eroded social and material justice values.[432]

The authority of these traditional rulers began to wane during the colonial era. When Ghana gained independence from the British in 1957, the central government elected by the people assumed the chiefs' responsibilities. In 1957, Gold Coast won its independence from Britain and became Ghana. One of the relics the colonialists left was the legal system. Thus, Ghana's civil law system is based on Britain's Common Law. In the same vein, Ghana's criminal law system, an adversarial one, reflects the English Criminal Justice system.

5.3 Fundamental human rights in Ghana

Factors such as long delays, prohibitive costs of using the system, and lack of available and affordable legal representation often act as barriers to accessing justice.[433] These barriers already mentioned in this study[434] also infringe on individuals' human rights. This section reviews international and domestic legislation regarding the fundamental human rights of juvenile offenders in Ghana, such as legal representation, duration of court processes, detention of juveniles, and support for victims. Domestic legislation items examined in this section are Ghana's 1992 Constitution, the Criminal Code with its amendments, the Criminal Procedure Code, and the Juvenile Justice Act.

5.3.1 Legislative framework for juvenile justice in Ghana

The primary laws that regulate the criminal justice system in Ghana are the 1992 Constitution of the Republic of Ghana, the Criminal Code with all its amendments, the Criminal Procedure Code, and the Juvenile Justice Act. Aside from these, other specialized legislation outlines offences under Ghana's legal system. An example is the Narcotic Drugs Law[435] which deals with activities that constitute offences in Ghana.

[432] Oshita et al *Conflict resolution*.
[433] UNDP *Access To Justice* 4.
[434] Paragraph 1.1 and 2.2.
[435] Narcotic Drugs (Control, Enforcement, and Sanctions) Law, 1990 (PNDCL 236).

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With the enactment of the Juvenile Justice Act, provisions in the Criminal Procedure Code that regulated the treatment of young offenders in the criminal justice system were repealed.[436]

As a result of international law and practices, states are gradually carving out a separate justice system for young persons who fall foul of the law. While international conventions and guidelines are essentially not legally binding, they offer some guidance to governments to acknowledge human rights. The Economic and Social Council, in its resolution 2005/20 of 22 July 2005, adopted the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.[437] The CVWC provides a framework for a comprehensive protection system for child victims and witnesses of crime. As part of the standards regarding crime prevention and criminal justice of the UN, they are relevant to Ghana's jurisprudence. Similarly, the guideline contained in the United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters,[438] which identifies, among other things, restorative processes such as mediation, is also pertinent.

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty[439] regulates the deprivation of juveniles of their liberty. The JDL mandates nations to ensure that juveniles benefit from arrangements to return to society, family life or employment after release. Article 79 of the JDL tasks states to devise procedures such as early release. Article 80 calls on competent authorities to provide or ensure the provision of services to assist juveniles in re-establishing themselves in society. This is achieved by providing suitable residence, employment and sufficient means to maintain themselves upon release. These arrangements are made to facilitate juvenile offenders' reintegration into society.

The Beijing Rules adopted by General Assembly resolution 40/33 are also an important international source of law in respect of juveniles. Of particular relevance to this study are three articles of the Beijing Rules. Article 1 of the Rules provides that

[436] Sections 340-351;370-381 of Act 30.
[437] Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime from now on referred to as CVWC.
[438] United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters from now on referred to as RJP.
[439] United Nations Rules for the Protection of Juveniles Deprived of their Liberty, from now on referred to as JDL.

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the police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of cases involving juveniles at their discretion, without recourse to formal hearings. Article 18(1) provides for many arrangements for disposal to be made available to the competent authority and to allow flexibility to avoid institutionalisation to the greatest extent possible. Moreover, Article 29(1) provides for the introduction of halfway houses, educational homes and day-time training centres to assist with the reintegration of the juvenile.

Chapter five of Ghana's 1992 Constitution enshrines the fundamental rights and freedoms of citizens in Ghana. Within this chapter, values are prescribed that the criminal justice system must uphold, for example, the inviolability of persons' dignity and fair hearings within a reasonable time. Those values have a bearing on the juvenile justice system and are expressed in articles fourteen, fifteen, and nineteen. These articles will be examined in the succeeding paragraphs.

Ghana's Juvenile Justice Act is specific legislation consistent with the 1990 Guidelines for the Prevention of Juvenile Delinquency[440] that recommends that governments enact and enforce specific laws and procedures to promote and protect the rights and well-being of all young persons.[441] The Act was passed in 2003 and, guided by the welfare principle, regulates the conduct of young people who are in conflict with the law. Section 2 of the Juvenile Justice Act stipulates as follows:

> Welfare Principle.
> The best interests of a juvenile shall be
> (a) paramount in any matter concerned with the juvenile; and
> (b) the primary consideration by a juvenile court, institution, or other body in any matter concerned with a juvenile.

Crook[442] asserts that the Ghanaian judiciary has aligned itself with an international climate of opinion that advocates ADR. Therefore, examining the veracity of this claim regarding the juvenile justice system is essential.

Under the Act, a senior police officer may, on the recommendation of a probation officer, public prosecutor or magistrate, issue a formal caution, with or without conditions, to a juvenile in the presence of a parent, guardian, close relative or a

[440] 1990 Guidelines for the Prevention of Juvenile Delinquency also known as 'Riyadh Guidelines'.
[441] Paragraph 52.
[442] Crook *Alternative dispute resolution* 3.

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probation officer.[443] A caution under this section is given as an alternative to prosecution, and this is one of the stages in the criminal justice process where restorative justice initiatives could be introduced.[444] If the police officer decides to issue a formal caution with conditions, he must fill out Form 1B of the Schedule. The contents of Form 1B indicate that the juvenile will give a verbal or written apology to the victim, parents or family; or make some reparation.[445] This section reflects Article 11 of the Beijing Rules cited above.

This section also reflects on the commitments made under the Kampala Declaration on Prison Conditions in Africa, drafted in September 1996 by the African countries and especially noted by the ECOSOC in its Resolution 1997/36 of 21st July 1997.[446] Among the commitments made, *petty offences should be dealt with according to customary practice* or mediation without recourse to the formal system***;*** *petty offences should be dealt with according to customary practice*, provided that this meets human rights requirements and that those involved so agree. (Emphasis by author) These international conventions are a clear call for utilising customary dispute resolution mechanisms in the delivery of juvenile justice. Ghana should ensure that it complies with its commitments as a dualist state.

The Act allows the court to decide whether a juvenile charged with an offence should be diverted from the criminal justice system.[447] "Diversion" under the Act means referring cases of children alleged to have committed offences away from the criminal justice system with or without conditions.[448] The court decides to divert the juvenile after a social enquiry report has been submitted to the court per section 24 of the Juvenile Justice Act. This provision is in line with the principles of restorative justice and advances Ghana's juvenile justice jurisprudence. The Act stipulates the purpose of the diversionary programme and its minimum standards. However, it fails to state expressly what the diversion options are. However, when sections 25, 26, and 27 are read in light of section 24(4), one could infer that the referral of cases of children alleged to have committed offences, is to get them away from the criminal justice

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443 Section 12.
444 Hoyle *Policing* 294.
445 Form 1B of the Schedule to the Act.
446 ECOSOC Refworld | UN Economic and Social Council Resolution 1997/2: Agreed Conclusions (Date of use: 30 April 2019).
447 Section 25.
448 Section 60.

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system with or without conditions, is done to facilitate victim-offender mediation under the supervision of Child Panels.

Section 32 (1) expressly mentions the use of victim-offender mediation, one of the prevalent formats of restorative justice. Under the Children's Act, Child Panels established in every district have non-judicial functions to mediate a child's criminal and civil matters.[449] The Child Panel must assist victim-offender mediation in minor criminal matters involving a child, where the circumstances of the offence are not aggravated. Child Panels must also facilitate reconciliation between the child and any person offended by the child's action. In mediation, they may propose an apology or restitution to the offended person or service by the child.[450] These functions of the Child Panel reflect the values of restorative justice.

It is vital to note that section 25 (2) expressly forbids diversion for serious offences. Under the Interpretation section of the Act, "serious offence" includes offences such as robbery, rape, defilement and murder.[451] Section 46 (8) adds the following to the list of serious offences under the Act: indecent assault involving unlawful harm; robbery with aggravated circumstances; drug offences; offences related to firearms. Perhaps the law should be amended to allow children who have committed severe violations to be diverted from the criminal justice system with or without conditions. This would be similar to provisions under South Africa's Child Justice Act, as discussed earlier in paragraph 4.5.2, where a child during trial or upon conviction may be referred to a restorative justice process that may include periods of temporary residence.

5.3.2. Legal representation

Individuals charged with crimes and those arrested, restricted or detained have a right to defend themselves in person or have the services of a lawyer of their choice. Under the 1992 Constitution:

> A person charged with a criminal offence shall –
> be permitted to defend himself before the court in person or by a lawyer of his choice. [452]

[449] Sections 27 and 28.
[450] Section 32.
[451] Section 60.
[452] Article 19 clause 2 (f) of the 1992 Constitution.

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> A person who is arrested, restricted or detained shall be informed immediately, in a language that he understands, of the reasons for his arrest, restriction or detention and of his right to a lawyer of his choice.[453]

The designation of legal representation for accused persons as a fundamental human right under the 1992 Constitution makes it crucial for juvenile offenders. The availability of legal representation for juveniles and victims ensures that their rights will be upheld and justice delivered. The presence of lawyers ensures that the trial is held within the period stipulated in the law.

Under the Juvenile Justice Act, a juvenile arrested has the right to the services of a lawyer upon arrest and during questioning or interview by a police officer of an alleged offence. A juvenile also has the right to legal representation and legal aid during proceedings in court:

> At least one parent, a guardian or a close relative of a juvenile shall be informed of the arrest of the juvenile by the police as soon as possible after the arrest and the juvenile shall have right of access to legal advice.[454]
>
> A juvenile shall not be questioned or interviewed by the police in relation to any alleged offence unless a parent, guardian, lawyer or close relative of the juvenile is present at the interview.[455]
>
> The juvenile court shall, at the commencement of proceedings in court, inform the juvenile in a language that the juvenile understands of the following,
> (c) the right to legal representation; and
> (d) the right to Legal aid.[456]

The preceding provisions reflect rule 7 of the Beijing Rules,[457] which identify the right to counsel as a basic procedural safeguard that represents essential elements for a fair and just trial. These provisions are necessary to safeguard the interests of the juvenile in a criminal justice system whose spurious rules can be complex and confusing to the average bystander. The right to legal aid also ensures that the juvenile can access justice and has assistance navigating this complex justice system. It also

[453]Article 14 clause 2 of the 1992 Constitution.
[454] Section 11(1).
[455] Section 13(1).
[456] Section 22.
[457] UN Beijing rules United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) | OHCHR
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helps to eradicate one barrier to access justice: prohibitive costs of using the system[458] discussed severally in this study.[459] These provisions indicate Ghana's intention to create a juvenile justice system fit for purpose.

5.3.3 Delay in court processes

Delay in the court process is often identified as an impediment to the administration of justice. To prevent delays, the 1992 Constitution stipulates that all persons arrested, restricted or detained on suspicion of committing a crime, should be tried within a reasonable time.

> Where a person arrested, restricted or detained under paragraph (a) or (b) of clause (3) of this article is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular, conditions reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.[460]

> A person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court.[461]

This requirement for prompt settlement of criminal cases is in accordance with international human rights standards as contained in conventions such as the Beijing Rules. Article 20(1) of the Beijing Rules requires that each case shall from the outset be handled expeditiously, without any unnecessary delay.

The phrase 'reasonable time' is not defined under the 1992 Constitution, therefore the interpretation of what amounts to a reasonable time becomes a subjective one. This vagueness of what amounts to reasonable time for a criminal case to be decided is cured under the Juvenile Justice Act. The Act underscores the need to avoid delays in criminal processes involving juveniles by stipulating that, cases involving juveniles must be completed within six months of the juvenile's first appearance in court, reproduced below:

> Expeditious Hearing.
> The case of a juvenile charged with an offence before a juvenile court shall be dealt with expeditiously and if the case is not completed within six

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[458] UNDP *Access To Justice* 4.
[459] Paragraphs 1.1; 2.3 and 5.3.
[460] Article 14 clause 4 of the 1992 Constitution.
[461] Article 19 clause 1 of the 1992 Constitution.

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> months of the juvenile's first appearance in court, the juvenile shall be discharged and is not liable for any further proceedings in respect of the same offence.[462]

The section's title indicates the lawmaker's intention to avoid delays in trials involving young people. This provision ensures that the parties' lives are not disrupted, as they are predominantly young people who might be acquiring education or a vocation at that point in their lives. According to Ofori-Dua and others,[463] the main complaint of crime victims in the Kumasi metropolis is the undue delay in accessing justice.

5.3.4 Detention of juveniles

The liberty of an individual is a fundamental human right and is therefore not to be taken lightly. A common form of punishment in the criminal justice system is to place juveniles in custody or detention. Here, the individual's freedom of movement is restricted, and they are detained in an institution established primarily for that purpose. Therefore, an order of detention would have to be given to meet the needs of all the parties involved. Under international law, the juvenile shall be deprived of his/her liberty only if he/she has been tried and found guilty of a serious act involving violence against a person, and if there is no other appropriate punishment.[464]

Under the Beijing Rules, the detention of juveniles shall be limited to the minimum period possible.[465] This is known as the 'last resort principle' under international law.

Juveniles in custody are separated from adults to protect them from exploitation, abuse and negative influences by adults, and to ensure that they are detained at facilities that cater to their particular needs. The separation of juveniles from adults is enshrined in the 1992 Constitution and reproduced here:

> A juvenile offender who is kept in lawful custody or detention shall be kept separately from an adult offender.[466]

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[462] Section 33.
[463] Ofori-Dua, Onzaberigu and Nimako 2019 *J. Victimol. Victim Just. 127*.
[464] Article 17(1)(c) of the Beijing Rules, UN Beijing rules United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) | OHCHR (Date of use: 30 April 2019).
[465] Article 17(1)(b) of the Beijing Rules, UN Beijing rules United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) | OHCHR (Date of use: 30 April 2019).
[466] Article 15 clause 4 of the 1992 Constitution.

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This right is in accordance with international principles expressed in the CRC and the Beijing Rules. The CRC requires every child deprived of liberty to be treated with humanity and respect, especially to be separated from adults, unless it is considered in the child's best interests not to do so.[467] The Beijing Rules also stipulate that juveniles in institutions shall be kept separate from adults and detained in a different institution or part of an institution that holds adults.[468]

This fundamental human right enshrined in the 1992 Constitution is repeated in the Juvenile Justice Act, which states that no juvenile or young offender should be detained in an adult prison.[469]

5.3.5 The Victim

The vital role of the victim of a crime perpetrated by the juvenile in the criminal justice system cannot be overemphasized. Hence, the CVWC, [470] which requires particular strategies for child victims and witnesses who are particularly vulnerable to recurring victimization or offending, is pertinent. Despite this directive, the Juvenile Justice Act prioritizes the juvenile over the other parties in the juvenile justice system. The preamble to the Act indicates that the objective of the Act is to "protect the rights of juveniles, ensure an appropriate and individual response to juvenile offenders, provide for young offenders and for connected purposes." However, the victim and the community have some needs that the Juvenile Justice Act does not meet. The Act goes further to limit the role of the victim and community to being mere onlookers because it views crime as offences against the State. However, as earlier discussed,[471] this crime is the victim's property, and the State has 'stolen' it. [472]

The only reference to the victim under the Act is the section outlining the purpose of juvenile diversion from the criminal justice system:

> The purpose of diversion is to:
> (d) provide an opportunity to the person or community affected by the harm caused to express their views on the impact of the harm;

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[467] Article 37(c).
[468] Article 26(2).
[469] Section 46 (7) of the Juvenile Justice Act.
[470] Article 38 of the CVWC.
[471] Paragraph 2.3.3.
[472] Christie 1977 *Brit.J. Criminol.* 3.

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(f) promote reconciliation between the juvenile and the person or community affected by the harm caused.[473]

Under the Juvenile Justice Act, diversion operates to remove the juvenile from the criminal justice system to a Child Panel in the community, for victim-offender mediation. Before this order is made, per section 24, a social enquiry report must be prepared by a probation officer and submitted to the court. Although the victim will be affected by the outcome of this report, the Act makes no provision for the victim's interests or views to be taken into consideration. Likewise, the law does not require the victim's consent before the court refers the matter to a victim-offender mediation. This contradicts stipulations under the RJP,[474] where consent of the victim and offender is required before restorative processes commence. In contrast is South Africa's Child Justice Act,[475] where family group conferences and victim-offender mediation can occur only with the consent of the victim and the child.

These provisions of the Juvenile Justice Act lend credence to the assertion by Qudder[476] that victims in the criminal justice system often feel that they are left to fend for themselves, with little or no support from the State, as discussed earlier in this study.[477] At the same time, the offender is protected at the expense of the State.

Of great concern is the opinion that little has changed regarding challenges confronting Ghana's juvenile justice system since the enactment of the Act.[478] Therefore, it is time for Ghana's juvenile criminal justice system to investigate the feasibility of adopting indigenous approaches to conflict resolution because statutory changes in juvenile justice laws have not manifested in practice. A gap between law and practice has been created.[479] This gap could be filled by utilising time-tested customary dispute resolution institutions and structures[480] that have been involved in juvenile justice

[473] Section 26 (1).
[474] Article 7.
[475] Sections 61(1)(b); 62(1)(b) of the Child Justice Act.
[476] Qudder 2015 *Eur. Sci. J.* 306.
[477] Paragraph 2.3.3.
[478] Ayete-Nyampong 2014 *Prison Serv. J*. 27.
[479] Mensa-Bonsu *Juveniles* 4; Ame 2017 *Ghana Soc Sci J.* 24.
[480] Ame 2019 *J. Glob. Ethics* 257.

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adjudication for centuries and have proved sustainable as they have survived significant social, political and economic changes.

5.4 Restorative justice in Ghana

This section explores the rights of children under customary law and claims that the human rights of individuals could be impaired under customary justice systems. The section examines the theory of legal pluralism within Ghana's jurisprudence, recognising customary law and practices, making it a viable alternative to the formal justice system. The section also examines the practice of restorative justice in Ghana's juvenile justice system as well as its shortcomings, which necessitate introducing a model that inculcates customary justice practices.

5.4.1 Human rights under customary law

The concept of a child's right is not known to the customary system, and some forms of customary dispute resolution could be problematic.[481] This theory holds that customary systems cannot be relied on to dispense justice effectively today, as some of their practices are outmoded and are an affront to modern civilisation. This phenomenon is problematic when considering certain fundamental rights in our criminal justice system, such as legal representation, privacy and appeal, enshrined in the 1992 Constitution.[482]

As already mentioned, Ghana comprises several ethnic groups with their own particular beliefs and practices. However, one notable characteristic they have in common is the absence of the concept of the rights of a child. In pre-colonial ethnic groups, society was organised around the central unit - the family. To ensure the community's survival, it was essential that all the members played their well-defined roles and recognized that the common good was paramount. According to Ame,[483] under the traditional justice system, chiefs and selected elders of supposedly high moral character and integrity were selected to deal with children and adults who conflicted with the laws of the land.

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[481] Ghana Government http://mogcsp.gov.gh/index.php/mdocs-posts/justice-for-children-policy/ (Date of use: 14 December 2019).
[482] Article 19 of the 1992 Constitution.
[483] Ame 2018 *J. Fam. Hist.* 396.

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Rights enjoyed by children in Ghana today did not exist and, as succinctly put by a scholar, opportunities for children to express their views were limited.[484] Ame[485] asserts that there was no distinct "adolescent" stage of life, as the two main stages were childhood and adulthood; therefore, a juvenile was considered a miniature adult. He further asserts that children who were in conflict with the norms or traditions of society were subject to the same justice system or social control system as adults. Therefore, as outlined above, children who committed offences could be sanctioned by the family head, clan head, elders or chief. Depending on the nature of the offence, the sanction meted out was likely not different from if it were an adult because of how society viewed crime.

As mentioned earlier,[486] a crime had been committed against the victim, the ancestors, and the community. In such a case, stringent steps were required from the offender to atone for the offence, appease the ancestors and to help deter future offenders. The punishment depended on the severity of the offence and ranged from ostracism to stigma or ridicule, fine, trial by ordeal, banishment, or even capital punishment.[487] In some instances, the punishment was not borne by the individual alone but by his family members.[488] Rattray[489] maintains that religion rather than laws directed the individual's behaviour and served as social control. This practice might account for the effectiveness of the social control system, since adults and children were more likely to conform to society's expectations by upholding the value system.

This perceived shortcoming of the customary dispute resolution system has prompted experts to suggest that it is irrelevant to our time. The United Nations Office of the High Commission on Human Rights[490] notes that certain fundamental human rights could be violated under the indigenous system and this view is widely recognized. A fundamental right it identifies as lacking in the customary system is the right to an appeal. If the customary dispute resolution system plays a vital role in delivering justice to the Ghanaian juvenile, the right to an appeal must be guaranteed. As mentioned

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[484] Twum-Danso 2009 *Int. J. Child. Rights*.
[485] Ame 2018 *J. Fam. Hist.* 395.
[486] Paragraph 4.2.1 above.
[487] Rattray *Ashanti law and constitution* 373.
[488] Abotchie *Social control*.
[489] Rattray *Ashanti law and constitution* 399.
[490] OHCHR *Human rights* 14.

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earlier,[491] the traditional leadership structure system of the Akan is hierarchical, and the *odikro nhyiemu* handles cases that the badwa could not settle. It would stand to reason that an appeal would fall within that category. It would be worthwhile to ascertain, through empirical evidence, what the actual state of affairs is.

Another fundamental right that an indigenous court does not uphold is legal representation. A person who commits an offence is answerable for his/her conduct, whether he/she is an adult or a child. The process is about truth-finding, not prosecution or persecution. The proceedings are conducted in the parties' local language, and no legalese is required in order to state their case, therefore there is no need for them to be represented by a lawyer. These features contrast with the formal justice system and its copious rules of procedure that uphold the sanctity of the right to legal representation in criminal matters. However, the accused persons have no legal representation most of the time, as observed by Amnesty International.[492]

The right to privacy is absent in indigenous dispute resolution, as the hearings are conducted in public and can be attended by anyone. The dispute resolution process is participatory, and as indigenous laws are primarily unwritten,[493] these are fora for education and reinforcement of society's values. This practice is contrary to the formal system where the law seeks to protect the juvenile. Ghana's Juvenile Justice Act stipulates that the juvenile has a right to privacy from the time of arrest and through to any stage of the matter.[494] The Act also makes it an offence to release information or publication that may lead to the identification of the juvenile within that period. A person found liable could be imprisoned for up to twelve months or liable for a fine not exceeding 250 penalty units.[495] According to Ubink[496], it is predominantly as a result of being present at traditional dispute settlement events that people learn the rules and norms and what is regarded as proper behaviour during a court hearing, or how they may access justice from the traditional court.

[491] Paragraph 5.2.
[492] Amnesty International https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF. (Date of use: 6 January 2020).
[493] Ubink 2018 *Dev. Change* 943.
[494] Section 3 (1) of the Juvenile Justice Act.
[495] Section 3 (2) & (3) of the Juvenile Justice Act.
[496] Ubink 2018 *Dev. Change* 944.

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The means of resolving disputes under some indigenous dispute resolution practices could be problematic, as alluded to in the Justice for Children Policy.[497] For example, among the Akan, one of the approaches to dispute resolution is to 'let sleeping dogs lie', thus, it is not uncommon for the adjudicator or mediator to say to the parties during the process, "*m'atu me nan asi so*", translated to mean, 'I have stepped in to resolve this matter; there is no need to recount what happened as it will open old wounds.' The parties must therefore refrain from airing their grievances and accept the opinion or judgement of the adjudicator or mediator. This practice is intended to prevent parties from opening up old wounds and slowing the healing process. However, the danger in allowing 'sleeping dogs lie' is that "…those dogs can wake up any day to proceed with the vilest of actions".[498]

This conflict resolution approach fails to consider that sometimes true healing can commence only at this point, and there can be no substitute for discovering the truth. Victims are an integral part of the justice system, and their participation must be accorded the utmost importance. It is necessary to ensure that victims are not made to feel that reparations are being substituted for discovering the truth because any effort to divorce reparation and truth will be seen as an attempt to forget the past, leaving behind many untold stories of misery.[499] Since the arbiter uses his discretion, such a conflict resolution approach creates the perception that the decisions are arbitrary. Such a scenario causes parties to believe that the process is discriminatory. The resultant effect is that some conflicts that could have been resolved amicably are now in the courts.[500]

These are some of the features of the customary dispute resolution system that could prevent it from dispensing restorative justice to the juvenile justice system in Ghana today. As a precondition for traditional institutions to be involved in the achievement of restorative justice for juveniles, and as earlier discussed,[501] the security and dignity

[497] Ghana Government http://mogcsp.gov.gh/index.php/mdocs-posts/justice-for-children-policy/ (Date of use: 14 December 2019).
[498] Nabudere *and Velthuizen Restorative justice in Africa* 127.
[499] Nabudere *and Velthuizen Restorative justice in Africa* 43.
[500] Ibrahim, Adjei and Agyenim Boateng 2019 *GJDS 39*.
[501] Paragraph 4.2.1.

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of victims, perpetrators and persons affected by the outcome of the activities should be guaranteed.[502]

The criticisms discussed above are not peculiar to the customary justice system in Ghana, as shortcomings of Rwanda's Gacaca courts, mentioned in paragraph 4.3.1 of the preceding chapter on restorative justice and ADR in Africa would indicate. The judges' perceived non-neutrality was mainly because they were members of the community who were likely to know the perpetrators or victims personally. These shortcomings, among other things, have caused researchers such as Palmer[503] to conclude that the reliance by the State on Gacaca to deliver justice, premised on restorative principles in the aftermath of the genocide, resulted in compromising the rights of individuals.

On the other hand, the evolved Gacaca, which emerged through legal and social engineering, reveals a concerted effort of adherence to due process, evidenced by the provision of the right to be presumed innocent. For instance, Ingelaere asserts that the accused often live unrestricted in the community. As part of the hearing process under the Gacaca, the parties and possible witnesses are heard after the judges have read the collected testimonies.[504] Aside from the difficulty in assessing judges' non-neutrality, judges' familiarity with the disputants promotes accessibility and efficiency in traditional justice systems,[505] but this familiarity cannot be relied on as evidence of the system's non-adherence to due process. However, a convicted person may appeal to a Gacaca appeal court made up of a different group of judges.[506] This process mitigates the perception of non-adherence of traditional justice systems to due process.

As discussed in the preceding chapter,[507] in Uganda where older people are generally favoured over young people due to the patriarchal and status-based character of many traditional dispute resolution mechanisms, traditional courts are far more accessible to some groups than others.[508] Children involved in crime are vulnerable, and a system

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[502] Nabudere *and Velthuizen Restorative justice in Africa* 82.
[503] Palmer *Post-genocide Rwanda* 120.
[504] Ingelaere *Gacaca courts* 42.
[505] OHCHR *Human rights* 19.
[506] Ingelaere *Gacaca courts* 43.
[507] Paragraph 4.4.1.
[508] Oomen *Traditional dispute resolution mechanisms* 180.

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that does not afford them special protection leaves much to be desired. However, the enactment of The Children Act[509] changed the narrative, as it ushered in a juvenile justice system that emphasized the involvement of families and communities in child protection and child justice issues. It, *inter alia*, brings the victim and offender together in a forum supervised by the community to heal and restore the parties, as opposed to punishment. Under section 92 of the Act, children in conflict with the law must appear before village executive committees who may issue orders for compensation, reconciliation, restitution, caution, or a guidance order of up to six months.[510] This arrangement is evidence of the restorative nature of Uganda's juvenile justice system today.

Like the Ghanaian setting, under customary law in South Africa, children's protection rights are subordinate to the broader family interest. The group interests often take precedence over the child's interests.[511] However, research suggests that fora that deal with children in conflict with the law in customary law settings are non-adversarial and promote restorative justice instead of punitive justice.[512] Participants of the research in the KwaZulu Natal province indicated that where a child in the community committed a crime, elders would meet all the parties affected to resolve the matter by promoting peace, reconciliation and restitution in a forum known as *izibonda*.[513] It thus appears that the potential for the rights of juveniles to be compromised is relatively minimal.

5.4.2 Legal pluralism

The search for justice in Ghana's juvenile justice system by utilising customary dispute resolution mechanisms emphasizes State law pluralism. It contributes to Ghana's legal system because justice may require the maintenance of a form of State law pluralism, as in the case where the State "recognizes" customary law by itself enforcing some of its norms.[514] A robust legal pluralism challenges the State's claim to a fair resolution of legal disputes. It enables participants to select dispute resolution forums based on

[509]The Children Act, CAP 59 (1996).
[510] Section 92 (4), (5) of the Uganda Children Act.
[511] Martin and Mbambo *African customary law and oractices* 37.
[512] Boege *Peacebuilding* 439.
[513] Martin and Mbambo *African customary law and practices* 75.
[514] Woodman 1996 *J. Afr. Law* 166.

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accessibility, efficiency, legitimacy, jurisdiction and cost.[515] This line of reasoning has been confirmed by a recent study in Ghana that found that, unlike the formal system where bureaucracy results in the courts being clogged with cases and a delay of justice, in the indigenous courts, justice is dispensed quickly as processes and procedures are well-attuned to local needs.[516] This finding led the researcher to conclude that Indigenous conflict management mechanisms have proved to be immediate, meaningful, accessible and affordable, thus they are suitable for settling disputes at the local level due to their acceptable outcomes.[517]

Woodman[518] defines legal pluralism in general as the state of affairs in which a category of social relations is within the fields of operation of two or more bodies of legal norms, and notes that an example of pluralism is when state law coexists with customary law. According to Benton,[519] legal pluralism was a defining feature of colonial administrations that sought to harness local dispute resolution mechanisms to help legitimize and institutionalize their rule, thus the legal landscape in any given African country reflects an interaction between two or more sources or systems of law. The combination of received or imposed laws of foreign origin and customary laws creates the fabric of pluralism within which the current African states must function.[520] This principle makes it possible for indigenous practices suitable for restorative processes to be adapted to suit the needs of Ghana's juvenile justice system.

According to Article 11 of the 1992 Constitution of Ghana, customary law, which is "the rules of law, which by custom apply to particular communities in Ghana," is one of the sources of law in Ghana.[521] This constitutional provision implies that customary rules and practices form part of the law recognized by the State, and the courts of the land will give effect to such rules. As a result of the numerous ethnic groups in Ghana, 'customary law' does not refer to one particular custom. People are already familiar with their local norms and traditions; hence it would not be strenuous to utilise customary dispute resolution mechanisms in the juvenile justice delivery system.

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[515] Swenson 2018 *Int. Stud. Rev* 440.
[516] Ibrahim, Adjei and Agyenim Boateng 2019 *GJDS* 39.
[517] Ibrahim, Adjei and Agyenim Boateng 2019 *GJDS* 39.
[518] Woodman 1996 *J. Afr. Law* 157.
[519] Benton *Law and colonial cultures* as cited in Swenson 2018 *Int. Stud. Rev* 441.
[520] Aiyedun and Ordor 2016 *LDD* 159.
[521] Article 11(1)(e), (2) & (3) of the 1992 Constitution.

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As mentioned earlier, Ghana's legal system is a colonial relic that must co-exist with the legal systems of the various ethnic groups as enshrined in the 1992 Constitution.[522] Ghanaian historian Robert Addo-Fening[523] postulates that the Gold Coast Colony and Protectorate came into existence by a Proclamation dated 24th July 1874. Subsequently, in 1876, Britain introduced the Supreme Court Ordinance, which provided courts to administer their laws to the indigenes, introducing the formal justice system. In 1888, the Full Bench of the Supreme Court ruled in *Oppon v. Ackinie*[524] that civil and criminal jurisdiction of Her Majesty "exercisable in the Protected Territories at the commencement of the Ordinance was to a great extent concurrent with the jurisdiction exercisable by the native Kings and Chiefs." Moreover, the law had "in no way impaired the judicial power of Native Kings and Chiefs."

Subsequently, customary law had to be proved as facts, by evidence enunciated by the Privy Council in *Angu v. Attah*[525] and *Amissah v. Krabah*.[526] The effect it had was to subjugate the customary law system. Under the Courts Ordinance,[527] courts were to take judicial notice of customary laws only if they were not "repugnant to natural justice, equity, and good conscience, nor incompatible either directly or by necessary implication with any ordinance for the time being in force."[528] This test came to be known as the "repugnancy test." Ame[529] notes that the modern system with its laws and sanctions always precedes the traditional system whenever the two appear to conflict. Today, it is no surprise that the traditional justice system is regarded inferior to the formal justice system.[530]

Under the 1960 Republican Constitution, the *Angu v. Attah* principle (as it later on came to be known), as well as the repugnancy test, were repealed. Under the Courts Act,[531] any question of the existence or content of a rule of customary law became a question of law for the court and not a question of fact.[532] The High Court held that

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[522] Article 11 (1), (2), (3).
[523] Addo-Fening *Traditional governance* 689.
[524] Oppon v. Ackinie (1887) Sar. F.C.L.232;(1887) 2 G.&G.4.
[525] Angu v. Attah (1916) P.C. `74 - `28, 43.
[526] Amissah v. Krabah (1936) 2 W.A.C.A.30, P.C.
[527] The Courts Ordinance, Cap. 4 (1951 Rev.).
[528] Section 87 (1) of the Courts Ordinance, Cap. 4 (1951 Rev.)
[529] Ame 2018 *J. Fam. Hist*. 399.
[530] Henry et al 2019 *AAJOSS* 22.
[531] The Courts Act, 1960 (C.A.9) from now on referred to as C.A. 9.
[532] Section 67 (1).

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after 1 July 1960, the customary laws of the various tribal communities became part of the country's law. The only test for their validity is whether they fulfil conditions that under the general law of Ghana must be satisfied by all customary laws.[533] Taylor J, as he then was, held:

> The trinity natural justice, equity and good conscience are the ghosts of the colonial era and no judge in modern Ghana can now minister to their pretensions, as arbiters of the contents of our customary laws.[534]

This principle established under the C.A.9 is repeated in the current Courts Act.[535] When read in conjunction with Article 11 of the 1992 Constitution, a legal foundation for customary dispute resolution mechanisms within the juvenile justice delivery system is apparent. Woodman[536] asserts that the search for justice in Africa may require modifications in the laws, which are the constituent elements of the many instances of legal pluralism. In the next section we review a few statutes and identify the need for legislative intervention to ensure the participation of traditional authorities in the restorative justice process for juveniles.

Alternative Dispute Resolution Act, 2010 (Act 798)

Proceedings at the chief's court are viewed under the laws of Ghana as customary arbitration. Under the ADR Act, a customary arbitrator to whom a party submits for customary arbitration shall inform the other party of the request and invite that other party and the party who made the submission to pay a fee or a token for the arbitration.[537]

The ADR Act regulates civil law and not criminal law. The ADR Act makes no mention of the resolution of criminal matters and provides:

> This Act applies to matters other than those that relate to…any other matter that by law cannot be settled by an alternative dispute resolution method.[538]

It thus appears that criminal matters are exempt from the disputes that can be settled under the provisions of the Act. In other words, the lawmaker did not intend criminal

[533] Ibrahim v. Amalbini [1978] GLR 368-403.
[534] Ibrahim v. Amalbini [1978] GLR at 399.
[535] The Courts Act 1993 (Act 459).
[536] Woodman 1996 *J. Afr. Law* 166.
[537] Section 90(2).
[538] Section 1 (d).

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proceedings to be subject to the ADR Act. Therefore, disputants in civil matters may avail themselves of other non-litigious means to resolve their disputes. Still, parties in the criminal justice system have no such ‘privileges’ under this relatively recent Act.

Section 89 (2) of the ADR Act provides:

> Except otherwise ordered by a court and subject to any other enactment in force, a person shall not (a) submit a criminal matter for customary arbitration; or (b) serve as an arbitrator in a criminal matter.

A person who contravenes this section commits an offence that attracts a punishment of up to 12 months imprisonment.[539] In addition, this section appears to make it impossible for criminal matters to be resolved through traditional rulers in the customary arbitration process. However, upon properly interpreting this section, criminal matters are not conclusively outside the purview of customary arbitration. The Act places two condition precedents that must be met. First, the court must order for a criminal matter to be submitted for customary arbitration. Then there must be no law that prevents such an order from being made.

The lawmaker must have had cogent reasons for imposing the condition precedents under section 89 (2). However, an amendment of this section by deleting the words “*and subject to any other enactment in force*” would make it easier for children who commit offences to be diverted to the chief’s courts to access restorative justice.

The Courts Act, 1993 (Act 459)

Section 73 of the Courts Act provides:

> Any court with criminal jurisdiction may promote reconciliation, encourage and facilitate a settlement in an amicable manner of any offence not amounting to felony and not aggravated in degree, on payment cases of compensation or on other terms approved by the court before which the case is tried, and may during the pendency of the negotiations for a settlement stay the proceeding for a reasonable time and in the event of a settlement being effected shall dismiss the case and discharge the accused person.

This provision promotes restorative justice in all courts that adjudicate criminal matters and includes the juvenile court. However, it concerns offences that are not felonies but

[539] Section 89 (3).

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misdemeanours, as specified by the Criminal Procedure Code. [540] Therefore, there would be the need to amend this section to make provision for children who are charged with offences that amount to felony and may also be aggravated in degree. As discussed earlier,[541] the formal court of law is best equipped to deal with dangerous criminal offenders.[542] However, as already discussed,[543] while a young person has been involved in antisocial behaviour, putting young offenders through the criminal justice system is more damaging.[544]

Of equal importance are the needs of other parties like the victim. As discussed in this study,[545] the criminal justice system hardly meets the serious needs of victims of serious crimes.[546] The customary justice system, through the restorative justice it affords parties, provides victims with the healing needed. The law should therefore be amended to allow children who have committed severe violations to be diverted from the criminal justice system to *promote reconciliation encourage and facilitate a settlement in an amicable manner of any offence* with or without conditions.

Chieftaincy Act, 2008 (Act 759)

The Chieftaincy Act was promulgated in 2008 to consolidate the laws relating to chieftaincy in Ghana. Under the Act, a traditional council is given the exclusive jurisdiction to hear matters involving chieftaincy.[547] In addition, the traditional council has the powers of a District Court to enable it to conduct its proceedings on civil matters in accordance with customary law.[548] The traditional council may, under the powers given to it by this Act, 'make an award of a civil nature including an award of compensation to an injured person.[549] However, the traditional council may not impose a fine or term of imprisonment as punishment.[550] The Act also confirms the power of

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[540] Section 296 (4).
[541] Paragraph 2.3.2.
[542] Nabudere *and Velthuizen Restorative justice in Africa* 82.
[543] Paragraph 4.5.2.
[544] Penal Reform International https://cdn.penalreform.org/wp-content/uploads/2013/06/rep-ga7-2005-pilot-phase-en_0.pdf. (Date of use: 16 September 2019).
[545] Paragraphs 2.3.3 and 4.3.1.
[546] Skelton 2007 *Acta Juridica* 242-243.
[547] Section 29.
[548] Section 35 (1).
[549] Section 35 (3)
[550] Section 35 (4)

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a chief to act as an arbitrator in customary arbitration of disputes where the parties give their consent.[551]

Section 30 allows chiefs to arbitrate disputes between parties in customary arbitration after the parties have consented. As discussed earlier,[552] under the juvenile justice system, the decision to divert the juvenile from the formal justice system is solely the court's decision, and the consent of the juvenile offender and the victim of juvenile crime to the diversion are not required. The requirement for the parties' consent, a sine qua non for the arbitration process, is essential for criminal restorative justice processes involving young people. This will enhance the juvenile justice system and help address the parties' needs adequately.

The Chieftaincy Act does not expressly refer to or imply that chiefs or traditional councils can hear criminal matters. To enable children in conflict with the law and victims of juvenile crime to access restorative justice through the chiefs' courts, the law needs to be amended to allow chiefs and traditional councils to hear criminal issues involving children as perpetrators or victims.

Rules of Court Practice Direction

A Directive issued by the Chief Justice in line with disclosures and case management in criminal matters came into force on the first day of November 2018. These rules are for resolving criminal cases in all courts with criminal jurisdiction, with the overriding objective 'to ensure that criminal cases are resolved fairly, justly, efficiently (includes referral to Alternative Dispute Resolution (ADR) in the appropriate cases).'

Where the accused pleads not guilty, the case is to be adjourned for a case management conference comprising the accused, prosecution and the judge or magistrate.[553] The judge/magistrate must consider whether the parties involved in the offence in question are amenable to an amicable settlement under sections 1 of the ADR Act and 73 of the Courts Act. The matter may then be referred for ADR under section 169(2) of Act 30.

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[551] Section 30.
[552] Paragraphs 5.3.1 and 5.3.5.
[553] Rules 1 (5); 4.

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This practice direction is commendable for adopting restorative justice into Ghana's criminal justice system. Conspicuously absent from this directive is the parties' consent to the case management conference, which is disagreeable to the restorative justice practice. This is also in contradistinction to South Africa's Child Justice Act[554] discussed earlier in the study.[555] In the juvenile court, therefore, a case could be referred to the traditional council after the management conference to incorporate customary dispute resolution mechanisms under this practice direction.

As discussed in paragraph 5.3.1 of this study, the Juvenile Justice Act regulates matters regarding children in conflict with the law in Ghana. The juvenile court established under the Act has criminal jurisdiction over juvenile matters; therefore, the Rules of Court Practice Direction bind it. When read in conjunction with Section 73 of the Courts Act as discussed above, the juvenile court *may make an order to promote reconciliation, encourage and facilitate a settlement in an amicable manner of any offence not amounting to felony and not aggravated in degree.* (Emphasis mine). Such an order made by the juvenile court meets the requirement under section 89 (2) of the ADR Act discussed above. Therefore, this Practice Direction vests the courts with jurisdiction to submit a criminal matter for customary arbitration at the traditional council.

Juvenile Justice Act, 2003 (Act 653)

Section 24 provides for submitting a social enquiry report to the juvenile court before which a juvenile has been charged with an offence. Subsection four of section 24 provides:

> The social enquiry report may include a recommendation for the matter to be referred to a child panel established under the Children's Act, 1988 (Act 560) but the referral shall only be in respect of a minor offence.

Section 25 provides for the diversion of a juvenile charged with an offence from the criminal justice system, with or without conditions. The court decides to divert the juvenile after a social enquiry report has been submitted to the court under section 24 of the Juvenile Justice Act.

[554] Section 52.
[555] Paragraph 4.5.2.

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Section 27 of the same Act provides the minimum standard for a diversion programme. It requires that the programme promote the dignity and well-being of the juvenile, the development of his/her self-esteem, and his/her ability to contribute to society. This section strengthens the foundation for implementing restorative justice in the Ghanaian juvenile justice system. The Juvenile Justice Act does not indicate precisely the 'diversion programme' it refers to under sections 25, 26 and 27. However, when these sections are read in light of section 24(4), one can infer that the referral of children alleged to have committed offences away from the criminal justice system with or without conditions is done to facilitate victim-offender mediation under the supervision of Child Panels.

Under the Children's Act, Child Panels established in every district have non-judicial functions to mediate a child's criminal and civil matters.[556] This quasi-judicial body must assist in victim-offender mediation in minor criminal matters involving a child and facilitate reconciliation between the child and any person offended by the child's action. In mediation, it must propose an apology, restitution to the offended person, or service by the child to the offended person.[557] These functions of the Child Panel reflect the values of restorative justice. Section 32 (1) expressly mentions the use of victim-offender mediation, one of the prevalent formats of restorative justice.

Adu-Gyamfi[558] identifies Child Panels as mechanisms for diverting children who commit crimes away from court processes. They also function as a non-adversarial support system designed to protect children while addressing their delinquent behaviour. He cites Ame[559] with approval, who opines that primarily due to inadequate funding, 'very few child panels have been established, and of those, very few are functioning as envisioned by the lawmakers.'[560] Moreover, he further argues that to strengthen the Child Panels and eliminate the duplication of roles, the juvenile courts should deal only with serious offences. In contrast, the Child Panel is mandated to deal with only minor offences. It may be worth pointing out that the traditional council is an institution capable of performing the duties of the Child Panel.

[556] Sections 27 and 28.
[557] Section 32.
[558] Adu-Gyamfi 2019 *Br. J. Soc. Work* 2062.
[559] Ame 2017 *Ghana Soc Sci J.* 21.
[560] Adu-Gyamfi 2019 *Br. J. Soc. Work* 2070.

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In conclusion, he indicates that the Government of Ghana has, in the Justice for Children Policy, acknowledged that the Child Panels need reformation, given the constraints under the law in terms of the composition and mode of appointment of panel members and their lack of resources.[561] The Child Panel system is unable to deliver as expected. There appears to be a significant detachment between legal arrangements for correcting juvenile offenders and the actual practice.

Evidence provided in this section highlights the need for legislative intervention to ensure juveniles have access to restorative justice through the participation of traditional authorities in the criminal justice system.

The proposal to adopt customary dispute resolution mechanisms to deliver restorative justice to Ghana's juvenile justice system attests that legal pluralism is essential. Africa's search for justice may require the maintenance or enhancement of legal pluralism and not its abolition,[562] contrary to post-genocide Gacaca courts in Rwanda that were established to deal exclusively with genocide and crimes against humanity[563] and continue to adhere to restorative principles.[564] Under legislation, the Gacaca courts became a hybrid of the traditional Gacaca courts, the regular criminal court and state prosecution, a marked departure from its initial intent. The effect of such a hybrid after the genocide meant that the erstwhile system of legal pluralism had been abandoned. This development in Rwanda differs from Ghana's existing state of affairs outlined above. The 1992 Constitution expressly identifies customary law as a source of law in Ghana,[565] thereby introducing legal pluralism.

Provisions in South Africa's Constitution indicate the existence and practice of legal pluralism in the State, as it recognizes customary law and provides for its application in the courts.[566] The Child Justice Act, which emphasizes *ubuntu* and provides restorative justice for juveniles, does not facilitate legal pluralism. The Act appears to allow indigenous models of restorative justice to be developed. It has an omnibus clause that gives the court unrestricted discretion in adopting restorative justice in any

[561] Ghana Government http://mogcsp.gov.gh/index.php/mdocs-posts/justice-for-children-policy/ (Date of use: 14 December 2019).
[562] Woodman 1996 *J. Afr. Law* 166.
[563] Palmer *Post-genocide Rwanda* 199.
[564] Werner 2010 *APCJ* 64.
[565] Article 11.
[566] Section 211 (3).

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form so as to decide upon the sentencing of a child who has been convicted of an offence.[567] Traditional rulers are the custodians of the principles and customs of *ubuntu.* One would have thought that the role of indigenous rulers in dispensing justice to child offenders, right from the onset when they come into contact with the criminal justice system, would have been delineated under the Act. However, such an omnibus clause with the necessary modifications would be a welcome addition to Ghana's juvenile justice legislation.

5.4.3 Homogeneity of customary dispute resolution and restorative justice

The customary dispute resolution mechanisms of Ghana's various indigenous ethnic groups reflect principles of restorative justice: the juvenile justice system could work better by incorporating the same principles. The indigenous institutions' perspective indicates that societies could apply indigenous conflict resolution mechanisms to address local conflicts because the mechanisms use accessible language, have more significant healing potential, are less costly, and promote more direct involvement between the accused and the victim and their families and the community.[568] Scholars believe that the fundamental goals and aims that restorative justice seeks to achieve are embedded in indigenous dispute resolution practices. Ame[569] intimates that restorative justice practices and methods, which are increasingly gaining popularity within the juvenile justice systems of several countries across the globe, are indigenous systems of doing justice.

One of the principles of a credible justice system is its ability to respond to the needs of those who use it.[570] In the Ghanaian juvenile criminal justice system, the main parties are the victim, the young offender and the community, including their families. Ghana has a plethora of criminal legislation, and although that may not necessarily infer a credible criminal justice system, the existence of relevant legislation is an excellent place to start.

[567] Section 73(1)(c).
[568] OHCHR *Human rights* 69.
[569] Ame 2019 *J. Glob. Ethics* 264.
[570] Woolf L https://webarchive.nationalarchives.gov.uk/20060214041256/http://www.dca.gov.uk/civil/final/sec2a.htm#c1 (Date of use: 18 September 2019).

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As the title suggests, Ghana's Juvenile Justice Act provides extensively for young persons who fall foul of the law, and section 1 defines a juvenile as a person under eighteen years old who is in conflict with the law. When a juvenile is convicted of an offence for which the court may impose a sentence of imprisonment for one month or upward without the option of a fine, he becomes a juvenile offender.[571]

The Act regulates Ghana's response to youth crime. A young person under the Act is a person who is eighteen years or above eighteen years old but still under twenty-one.[572] In Ghana, the age of majority is eighteen, as a citizen of Ghana obtains the right to register as a voter for public elections and vote[573]; and one ceases to be a child in the eyes of the law.[574]

A juvenile enters the formal criminal justice system upon an arrest made by the police, with or without an arrest warrant or by a private person without an arrest warrant.[575] The Juvenile Justice Act provides:

> A police officer may give an informal caution instead of arresting a juvenile if it is in the juvenile's best interest to do so.[576]

Subsection 3 of section 12 also provides a formal caution that a senior police officer can give juveniles. This section is the first example of the Juvenile Justice Act having any semblance to restorative justice. A caution under this section operates as an alternative to prosecution. This section aligns with the Beijing Rules.[577]

The Beijing Rules was adopted by General Assembly resolution 40/33 and provides:

> the police, the prosecution, or other agencies dealing with juvenile cases shall be empowered to dispose of cases involving juveniles, at their discretion, without recourse to formal hearings (emphasis mine) under the criteria laid down for that purpose in the respective legal system and also per the principles contained in these Rules.[578]

[571] Section 60 of the Juvenile Justice Act.
[572] Section 60.
[573] Article 42 of the 1992 Constitution.
[574] Section 1 of the Children's Act.
[575] Sections 5 & 6 of the Juvenile Justice Act.
[576] Section 12.
[577] Paragraph 11.
[578] Paragraph 11.

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The removal of the juvenile from the criminal justice system at the outset may be the optimal response where the offence is not serious and where the family or other informal social control institution has reacted or is likely to react. South Africa's Child Justice Act does not give a policeman such roles. The prosecutor can decide not to prosecute a child, as mentioned earlier. In comparison to South Africa's law, this provision furthers Ghana's restorative justice interest.[579]

The Act expressly proscribes the use of diversion for serious offences.[580] Under the Act, "serious offence" has been defined to include robbery, rape, defilement and murder, and indecent assault involving unlawful harm; robbery with aggravated circumstances; drug offences; offences related to firearms.[581] This definition is a cause for concern when one considers that under the Act, a juvenile offender under the age of fifteen who has been convicted of a serious offence shall be detained in a Senior Correctional Centre.[582] Therefore, a child of twelve years old who commits a serious violation will not be able to avail himself of the opportunities that restorative justice offers but will be subject to a detention order.[583] However, South Africa's Child Justice Act provides that children may be diverted from the formal criminal justice system where they have been accused of serious offences such as assault involving the infliction of grievous bodily harm, public violence, culpable homicide, arson, treason, sedition, and murder.[584]

The practice in Uganda is different from that of South Africa. In Uganda, traditional conflict resolution systems that address accountability and reconciliation issues by incorporating tolerance and forgiveness have been used in the aftermath of violent conflict and gruesome acts. The perpetrators who are reconciled to their victims and reintegrated with their communities are primarily children.[585] Once traditional conflict resolution systems have been used for such serious offences, it stands to reason that restorative justice can be used to handle juvenile crime.

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[579] Section 12 of the Juvenile Justice Act.
[580] Section 25 (2).
[581] Sections 46 (8) & 60.
[582] Section 46 (4).
[583] Section 26 of Act 29 makes 12 the age of criminal liability in Ghana.
[584] Schedules 2 and 3.
[585] Macdonald 2017 *J. East. Afr.* 630.

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While some scholars view that restorative justice is not meant for serious offences, others believe that restorative justice is optimal for denouncing crime. As earlier discussed in this study,[586] Nabudere and Velthuizen[587] assert that restorative justice concedes that the State should impose some form of retributive justice for serious crimes. However, as already mentioned in this study,[588] victims of serious crimes have suffered profound harm and have serious needs that are rarely met by the criminal justice system.[589] Excluding serious offences from restorative justice processes is an approach that removes opportunities for healing from victims. In addition, she asserts that the restorative justice process should be made available to benefit the victim of a serious crime. If the safety of society requires the offender's imprisonment, this does not exclude such prisoners from participating in a restorative justice process.[590]

Garland[591] opines that some offenders must be incarcerated to protect the public from future offences. In other words, harsh punishment will keep the offender from offending again and reduce recidivism. Although this might be the lawmaker's intention, prison sentences or incapacitation do not deter offenders.[592] The prospect that children as young as twelve may be subject to detention orders under the Act is alarming, especially considering the incarceration of offenders referred to in studies in Ghana. Agbesi[593] concluded that there was an overuse of imprisonment by the judiciary in Ghana when he discovered during his research at the Ho Central prisons that a third of convicted offenders were imprisoned for theft without violence, and more than 55% of convicted prisoners were first-time offenders. Sometimes incarceration becomes counter-productive. In a study on how rehabilitation could reduce recidivism in Tamale Central Prison, the researchers discovered that criminals learn techniques and values from more hard-core criminals while in prison and, therefore, graduate from lighter to more severe crimes upon release.[594]

[586] Paragraph 2.3.2.
[587] Nabudere *and Velthuizen Restorative justice in Africa* 7.
[588] Paragraphs 2.3.3 and 4.3.1.
[589] Skelton 2007 *Acta Juridica* 242-243.
[590] Skelton 2007 *Acta Juridica* 239.
[591] Garland *Punishment*.
[592] Glover et al 2018 *OALibJ.* 12.
[593] Agbesi 2016 *PPAR* 4.
[594] Aaniazine *Rehabilitation programmes* 110.

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Restorative justice prefers offenders who pose significant safety risks and are uncooperative to be placed in settings that emphasize safety, values, ethics, responsibility, accountability and civility.[595] In accordance with this principle, the Juvenile Justice Act proscribes the detention of juvenile and young offenders in adult prisons and instead establishes junior and senior correctional centres.[596] In reality, the provisions of the law are often disregarded, and injustice is meted out. For instance, an eighteen-year-old charged with the robbery of GHS1,200 (equivalent to 222 USD) was convicted on his plea and sentenced to a term of 15 years imprisonment in Ghana recently.[597] A sixteen-year-old boy serving a seven-year sentence in the Kumasi Central Prisons and an eighteen-year-old boy on remand for seven months at the Winneba Local Prison are poignant examples of the failings of Ghana's juvenile justice system.[598]

There is a shortage of literature on the experiences of juveniles in correctional centres under the Juvenile Justice Act. However, a recent study discovered the circumstances that had led inmates of two correctional facilities for young offenders into behaviour considered criminal and the effect it has had on them and society. The researchers found some positive outcomes to being in the various correctional homes. Some respondents intimated that they had learned to control their behaviour, cope with others, and acquired some vocational skills.[599] However, on the other hand, and as there are always two sides to a coin, the respondents averred that some of the correctional centre's adverse effects had been the disruption to their schooling, stigmatization, acquisition of bad habits from the correctional home, and a few other problems.[600]

Disruption to the education of juveniles has consequences as scholars proffer a correlation between the level of education and criminality. According to Petersilia:

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[595] Nabudere *and Velthuizen Restorative justice in Africa* 5.
[596] Section 46 (7).
[597] Joy Online https://www.myjoyonline.com/news/2019/October-1st/18-year-old-to-spend-15-years-in-prison-for-robbery.php (Date of use: 1 October 2019).
[598] Crime check Tv Gh https://www.youtube.com/watch?v=1YxvvTjmDWo.
(Date of use: 1 October 2019).
[599] Nyarko et al. 2019 *J. Law Policy Glob.* 170.
[600] Nyarko et al. 2019 *J. Law Policy Glob.* 170.

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> While illiteracy and poor academic performance are not direct causes of criminal behaviour, people who have received inadequate education or exhibit poor literacy skills are disproportionately found within prison.[601]

In Ghana, available evidence exists to support this school of thought. In a recent study among thirty female inmates at the Nsawam Medium Security Prison to investigate how women in prison cope with their familial relationships, Anku[602] discovered that although women with varying levels of education were in jail, the majority had a low educational background. A further finding was that women with lower levels of schooling commit more crimes of a violent nature than those with higher education.[603]

Aside from the findings of the effects of imprisonment on reoffending, there is evidence to suggest that incarceration affects the mental health of prisoners. A recent study was carried out at the Nsawam Medium Security Prison in Ghana to investigate prisoners' anxiety, depression and suicidal ideation. The study found information that revealed that irrespective of whether the prisoner or the Ghanaian society classifies some crimes as bigger or smaller, or some duration as long or short, among the prisoners, the psychopathological symptoms experienced by relatively all inmates are similar.[604] Adzam[605] also observed that prisoners who had completed only JHS suffer more psychopathological symptoms than prisoners who had completed tertiary education, and younger prisoners had significantly higher psychopathological symptoms than older ones.

Adzam[606] identifies psychopathological issues as those caused partly by the internal conditions of the prison, such as the relationship with inmates and officers, inadequate resources such as water, food and healthcare facilities, and external conditions such as relationships lost or left behind such as family, friends and property. This study was carried out in an adult prison where conditions are arguably quite different from correctional centres. However, this study is relevant to us for two reasons. Firstly, younger persons are more likely to be anxious, depressed or suicidal after spending time in detention. Secondly, the nature of the offence has no bearing on how anxious,

[601] Petersilia *Parole and prisoner re-entry*.
[602] Anku *Women in prison* 68.
[603] Anku *Women in prison* 70.
[604] Adzam *Prisoners in Ghana* 84.
[605] Adzam *Prisoners in Ghana* 62.
[606] Adzam *Prisoners in Ghana* 95.

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depressed or suicidal an inmate will feel. These findings poignantly substantiate the theory that the criminal justice system creates new psychological and emotional trauma through exclusionary and punitive practices.[607]

Ghana's criminal justice system is not responsive to the needs of victims who are generally disillusioned with the system, as illustrated by the findings of a study that examined the perceptions and experiences of crime victims in the Kumasi Metropolis of Ghana.[608] Some victims indicated that all they wanted was the return of their stolen items, and the matter settled out of court. The general perception was that the courtroom was unfavourable and unfriendly. Instead, they would prefer the police to settle their case without going to court. As already mentioned in this study,[609] their main complaint was the undue delay in accessing justice, which they attributed mainly to defence counsels.[610]

The appeal of restorative justice to victims continues to form an integral part of the discourse, especially concerning evidence emerging from available studies. A study carried out by Ofori-Dua and others[611] discovered an increase in the call for a shift in criminal sanctioning from custody to community rehabilitation. During the survey in the Kumasi Metropolis, the researchers found that the public appeared receptive to community service and preferred it to incarceration.

These findings correspond to the results of a similar study carried out in Accra in 2016.[612] Out of twenty-four respondents, twenty-two advocated for community service for offenders instead of custodial sentencing. The latter has the potential of curbing recidivism since the offender would not meet 'hardened criminals' who would further impact them negatively. The other two respondents opposed the idea because, taking into account the logistics involved, it would be expensive to implement, and the community service was not a firm punishment. Interestingly, these two respondents work with the judiciary.

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[607] Wexler *Therapeutic jurisprudence*.
[608] Ofori-Dua, Onzaberigu and Nimako 2019 *J. Victimol. Victim Just. 126*.
[609] Paragraph 5.3.3.
[610] Ofori-Dua, Onzaberigu and Nimako 2019 *J. Victimol. Victim Just. 123*.
[611] Ofori-Dua et al 2015 *Int J Soc Sci Stud*. 141.
[612] Parimah, Osafo and Nyarko 2016 *ICPS* 55.

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Restorative justice is becoming the preferred form of justice in Ghana today. In a study on the Ghanaian experience of restorative justice, respondents indicated that victims and their assailants should be brought together for reconciliation because most victims might harbour resentment against their assailants and could be looking for an opportunity for revenge, leading to further crimes.[613] Except for the recidivists, all categories of respondents suggested that reconciling the victim and the offender could take place outside the formal court system. They explained that this was, and still is, the practice in traditional Ghanaian societies. The researcher found a strong desire among the respondents for the introduction of restorative justice principles into Ghana's justice system so that victims' needs and hurts would be addressed as offenders take responsibility for their crime and make purposeful approaches to right their wrongs so that they and the community are healed.[614]

According to Dako-Gyeke and Baffour,[615] community members believe that the current correctional system cannot reform offenders. Emerging studies suggest that the needs of parties who use the criminal justice system are not being met but could be met by introducing a restorative justice model. This restorative justice model, based on traditional or indigenous peacemaking methods, would operate not as an alternative but as a complement to the juvenile justice system of Ghana.

5.5 Summary and reflections

The review indicates that juvenile delinquency is a global challenge, and nations are devising various means of taking care of it. A common approach has been to establish a separate justice system for children in conflict with the law. These justice systems are based on retributive or welfare models. However, the review indicates that the justice models on which these juvenile justice systems are based are fraught with diverse challenges, hence the need to adopt a more practical approach to juvenile crime. The review indicates that a restorative justice paradigm that incorporates indigenous conflict resolution mechanisms is more attuned to the needs of the parties to the crime because it involves the active participation of the juvenile, victim and community members affected by the crime that had been committed.

[613] Teye *Prisoner social reintegration* 105.
[614] Teye *Prisoner social reintegration* 122.
[615] Dako-Gyeke and Baffour 2016 *J. Offender Rehabil. 242*.

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The review also indicates that nations have fashioned their restorative models for their juvenile justice systems based on their own particular indigenous practices. The review also showed that in Ghana, the welfare model of Ghana's juvenile justice system does not address the needs of the juvenile, victim or community; therefore, the restorative justice model would be more suitable for the juvenile justice system. The law provides for the diversion of juveniles who commit minor offences from the criminal justice systems to Child Panels where restorative justice in the form of victim-offender mediation may take place. Restorative justice addresses the needs of juveniles and their victims, as discussed in paragraph 2.3 of chapter two of this study.

The Child Panels are the only diversion opportunity for juveniles under the law; therefore, their non-performance discussed earlier in this chapter under paragraph 5.4.2 means that children in conflict with the law cannot be diverted from the formal criminal justice system. Therefore, most of these children are punished by the imposition of a fine, while others are committed to correctional centres, which have adverse effects, as discussed in paragraph 2.6 of chapter two of this study. The absence of a viable restorative justice model has created a gap in Ghana's penal jurisprudence concerning children in conflict with the law. The next chapter presents the findings of the study.

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CHAPTER SIX

PRESENTATION, DISCUSSION AND FINDINGS OF EMPIRICAL RESEARCH

6.1 Introduction

This section presents the findings from the research collected through questionnaires and interviews conducted. Detailed descriptions of the research participants and the themes emerging from the research are presented in accordance with the study's objectives. The findings concern Ghana's juvenile justice system and how ADR mechanisms, especially customary dispute resolution, could solve the societal problem of juvenile delinquency in Ghana.

Various pieces of legislation that regulate the juvenile justice system are discussed in this chapter, including and emphasising the relevant provisions regarding ADR mechanisms. This method was crucial to this study because the judicial system is a creature of statute. Therefore, any meaningful assessment of the system ought to begin with the law that established it. Participants' views on the state of the juvenile justice system and ADR for juveniles are also presented here because their interaction and experiences with the justice system were necessary for this study to achieve its objectives.

6.2 Research participants

Some basic facts important to criminological research are age, sex, level of education, nature or type of offence, and duration of time spent in court or the criminal justice system. The various groups in this study and their demographics are outlined below.

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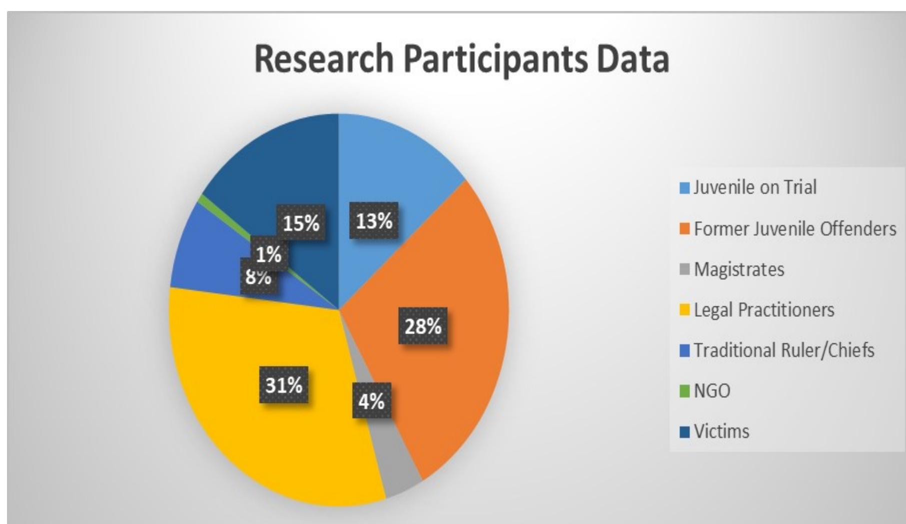

Figure 3: Research Participants' Data
(Source: Field data, 2021)

Responses from current juvenile offenders

Questionnaires were administered to twenty juveniles being tried for various offences in the juvenile courts in the Kumasi Metropolis. Eighteen returned the questionnaires; for purposes of this study, they will be referred to as the JC group. Fifteen participants in this group identified themselves as male, two as female, and the last preferred not to say. The demographics of the JC group participants are set out in Table 1 below.

ID	Age	Education	Offence	Duration of Trial
JC1	19-21	Senior High School	Assault and battery	Less than three months
JC2	19-21	Senior High School	Assault	Less than three months
JC3	19-21	Senior High School	Rape	Less than three months
JC4	16-18	Senior High School	Theft	Less than three months
JC5	12- 15	Junior High School	Rape	Three to six months
JC6	19-21	Undergraduate degree and above	Rape	Less than three months
JC7	16-18	Senior High School	Rape	Three to six months
JC8	16-18	Senior High School	Robbery	Three to six months

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JC9	19-21	Senior High School	Rape	More than six months
JC10	16-18	Senior High School	Robbery	Three to six months
JC11	19-21	Senior High School	Rape	Less than three months
JC12	19-21	Senior High School	Assault and battery	Three to six months
JC13	16-18	Senior High School	Rape	Three to six months
JC14	19-21	Senior High School	Assault	Less than three months
JC15	12- 15	Junior High School	Assault	Three to six months
JC16	19-21	Undergraduate degree and above	Rape	Less than three months
JC17	19-21	Senior High School	Rape	More than six months
JC18	16-18	Senior High School	Theft	Less than three months

Table 1: Demographics of Juvenile Offenders
(Source: Field Data, 2020)

Responses from former juvenile offenders

Questionnaires were administered to persons convicted of offences by the juvenile court and who had spent some time in a correctional centre. Thirty-eight returned the questionnaires, and for purposes of this study, this group of former juvenile offenders will be referred to as the XJ group. Participants in this group were all males. The demographics of the XJ group participants are set out in Table 2 below.

ID	Current Age	Conviction Age	Sentence in months	Education	Offence Charged with
XJ1	19	14	6	Nil	Assault and theft
XJ2	31	15	36	Further Education/Trade	Breaking and entry
XJ3	19	14	6	Nil	Assault
XJ4	23	16	18	Primary	Theft
XJ5	27	15	36	Nil	Defilement
XJ6	35	16	36	Junior High	Breaking and entry
XJ7	23	16	12	Primary	Assault
XJ8	27	15	6	Nil	Theft

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XJ9	37	17	15	Senior High	Defilement
XJ10	37	17	12	Junior High	Defilement
XJ11	28	15	15	Nil	Theft
XJ12	36	17	18	Senior High	Breaking and entry
XJ13	38	17	15	Primary	Assault
XJ14	23	15	18	Nil	Theft
XJ15	19	16	12	Primary	Assault
XJ16	28	16	36	Nil	Robbery
XJ17	23	15	36	Further Education/Trade	Breaking and entry
XJ18	28	15	12	Nil	Theft
XJ19	24	16	24	Primary	Assault
XJ20	24	17	18	Senior High	Breaking and entry
XJ21	28	15	36	Further Education/Trade	Theft
XJ22	24	16	18	Nil	Theft
XJ23	36	17	36	Senior High	Defilement
XJ24	38	17	12	Junior High	Assault
XJ25	39	17	24	Primary	Assault
XJ26	38	17	15	Senior High	Robbery
XJ27	38	17	18	Further Education/Trade	Assault
XJ28	28	15	36	Primary	Defilement
XJ29	24	16	12	Primary	Robbery
XJ30	39	17	18	Junior High	Theft
XJ31	19	16	24	Primary	Theft
XJ32	38	17	15	Junior High	Defilement
XJ33	38	17	18	Primary	Defilement
XJ34	36	17	36	Further Education/Trade	Robbery
XJ35	19	16	15	Primary	Theft
XJ36	24	17	18	Primary	Assault
XJ37	28	16	24	Senior High	Defilement
XJ38	27	16	36	Further Education/Trade	Theft

Table 2: Demographics of Former Juvenile Offenders
(Source: Field Data, 2020)

Responses from legal practitioners

This group comprises forty-two lawyers who practice in the Kumasi metropolis and consented to be part of the study. The participants were twenty-five private legal

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practitioners who act as defence lawyers for offenders and seventeen state prosecutors who prosecute lawbreakers. This group has been code-named LP, and their demographics are set out in Figure 4 below.

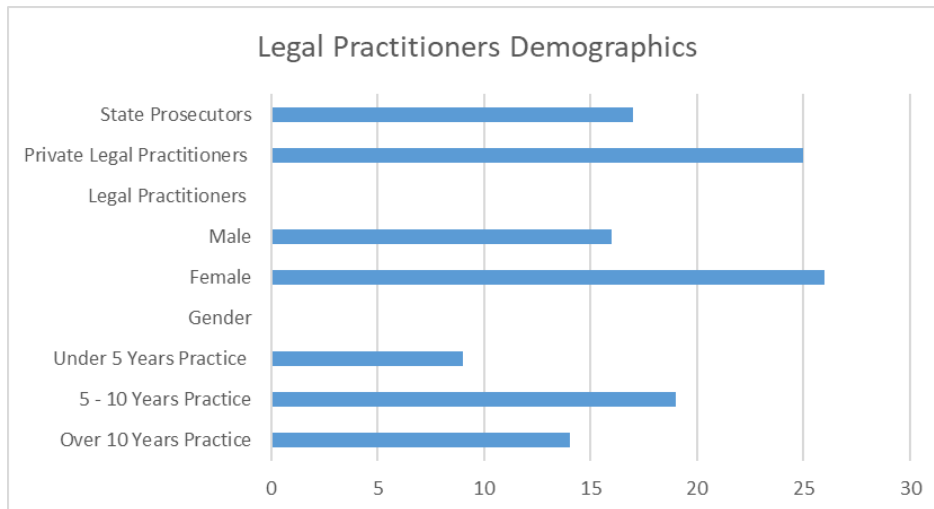

Figure 4: Legal Practitioners
(Source: Field Data, 2020)

Responses from Judges and Magistrates

Kumasi metropolis has six juvenile courts to hear criminal matters involving juveniles. At the time of research, one of them had recently retired and had not been replaced. The remaining five magistrates participated in the research process by completing the questionnaire. The participants' identities are kept anonymous and referred to as the MJ group, with their demographics shown in Figure 5 below.

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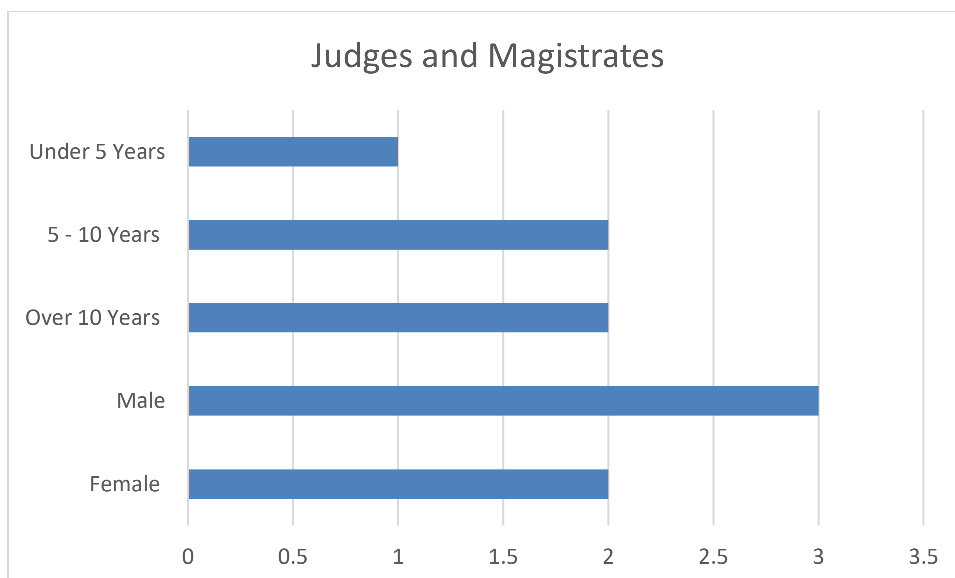

Figure 5: Judges and Magistrates
(Source: Field Data, 2020)

Responses from victims

Criminal proceedings involving juvenile perpetrators were ongoing at juvenile courts at various stages. Twenty victims of offences committed by juveniles were identified to complete a questionnaire as part of the study. All twenty completed the questionnaires and returned them. Fourteen were women, while six were men. This group will be referred to as the VC group and their demographics are given in Table 3 below.

Name	Age	Education	Gender	Occupation	Offence
VC1	12-21	Senior High School	Woman	Student	Raped
VC2	12-21	Senior High School	Man	Student	Had phone and other items stolen
VC3	21-50	Junior High School	Woman	Not working	Raped
VC4	12-21	Senior High School	Woman	Student	Assaulted
VC5	12-21	Senior High School	Man	Student	Assaulted and battered
VC6	12-21	Senior High School	Woman	Not working	Raped

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VC7	12-21	Junior High School	Woman	Student	Raped
VC8	21-50	Undergraduate degree and above	Woman	Student	Robbed
VC9	12-21	Primary school	Woman	Student	Raped
VC10	12-21	Senior High School	Man	Student	Assaulted
VC11	12-21	Senior High School	Man	Student	Had phone stolen
VC12	12-21	Senior High School	Woman	Student	Raped
VC13	12-21	Senior High School	Man	Student	Assaulted and battered
VC14	21-50	Junior High School	Woman	Student	Raped
VC15	12-21	Primary school	Woman	Student	Raped
VC16	12-21	Senior High School	Woman	Student	Assaulted
VC17	12-21	Senior High School	Woman	Not working	Raped
VC18	12-21	Junior High School	Woman	Student	Raped
VC19	21-50	Undergraduate degree and above	Woman	Student	Robbed
VC20	12-21	Senior High School	Man	Student	Assaulted

Table 3: Victims
(Source: Field Data, 2020)

Responses from traditional rulers

Ten traditional rulers who hold court in the Kumasi Metropolis were interviewed as part of the study. With experience ranging from one to fourteen years, they described the structure of the customary court and the processes involved in customary dispute resolution.

Name	Town	Length of Experience (year)
A	AX	1

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B	BX	12
C	CX	7
D	DX	9
E	EX	14
F	FX	8
G	GX	8
H	HX	10
I	IX	5
J	JX	13

Table 4: Traditional Rulers
(Source: Field Data, 2020)

Responses from a Non-governmental Organisation

This non-governmental organisation (NGO), which we shall refer to as Evolve, set up in Ghana for charity works, has as part of its objectives the rehabilitation and reintegration of the juvenile offender. An interview was conducted with the executive director of Evolve to solicit her views on the thematic areas of this study, based on her involvement and interaction with the juvenile justice system.

6.3 Restorative justice

The researcher deemed it expedient to explore the extent of participants' knowledge and experience of restorative justice to address the research questions; therefore, this section presents findings on the implementation of ADR within the juvenile justice system.

6.3.1 State of alternative dispute resolution for juveniles

The study found that four out of the five magistrates had experienced increased numbers of juvenile cases before their courts. Thirty-four participants of the LG group also indicated an increase in the number of juvenile cases they encountered. According to all the participants of the MJ group, the monthly number of criminal suits involving juveniles before their courts are fewer than ten, and the number of juveniles who appear before the court daily is fewer than five. In group LP, nineteen participants

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had encountered fewer than five cases involving juveniles; fourteen had encountered between five and ten juvenile cases; nine had experienced more than ten juvenile cases.

All participants in the MJ group indicated that the most common offences juveniles are charged with in their courts are serious offences. Five participants in the LP group indicated that the most common offences juveniles are charged with are minor offences; eight indicated serious offences, and the remaining twenty-nine participants stated a combination of both minor and serious offences. The details of offences in the JC,[616] VC,[617] and XJ groups[618] indicate that the most common offences juveniles are charged with are a combination of minor and serious offences. These findings lend credence to the earlier mentioned observation[619] by Nyarko et al.[620] that juvenile delinquency frequently occurs in the major urban city of Kumasi.

The magistrates and legal practitioners were asked to indicate the most common outcomes of juvenile cases. All five participants in the MJ group indicated that fines were the outcome of juvenile cases that had come to their court. Among the legal practitioners, thirty-eight of the participants said that the punishment was incarceration, three said fines, and one said community service. The finding that 92% of the legal practitioners indicated that detention is the most common outcome of juvenile cases in Kumasi supports Agbesi's[621] assertion regarding the overuse of imprisonment by the judiciary in Ghana, discussed in the preceding chapter.[622] Also, the finding regarding orders of fines made by the court confirms an earlier observation made by Kotey[623] that when a juvenile goes to trial and is found guilty, they pay a fine.

[616] Table 1 under paragraph 6.2 above.
[617] Table 3 under paragraph 6.2 above.
[618] Table 2 under paragraph 6.2 above.
[619] Paragraph 3.2 of this study.
[620] Nyarko et al. 2019 *J. Law Policy Glob. 166*.
[621] Agbesi 2016 *PPAR* 4.
[622] Paragraph 5.4.3.
[623] Kotey *Reintegration of juveniles* 32.

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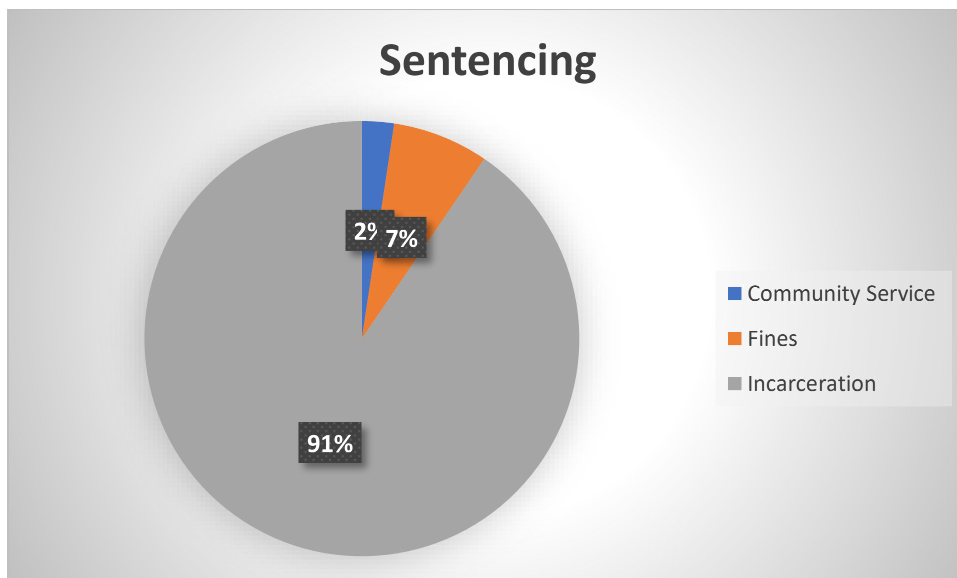

Figure 6: Sentencing at the Juvenile Court
(Source: Field data, 2020)

It was discovered that all five members of group MJ knew about restorative justice and had diverted juveniles from the justice system. However, five participants in the LP group did not know about restorative justice, and eleven participants were unfamiliar with diversion. Of the five participants who did not know about restorative justice, two had been practising lawyers for more than ten years and were state prosecutors. The other three had also been practising lawyers for between five and ten years, and one of them was a state prosecutor.

Regarding the eleven participants of the LP group who were not familiar with diversion, six were state prosecutors, and five were private practitioners. While four of these state prosecutors had been in practice for between five and ten years, the other two had been in practice for less than five years. Five private practitioners were not familiar with diversion. Four had been practising for five to ten years, and the last person had been practising for less than five years.

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6.3.2 Exercise of diversion

The Juvenile Justice Act provides for the diversion of the juvenile from prosecution to mediation, as discussed in Chapter five.[624] Therefore, participants were asked to indicate their experience diverting juveniles from the criminal justice system.

The findings indicate that nine members of the LP group had never diverted juveniles from the justice system. Among these nine participants were six state prosecutors and three private practitioners. The state prosecutor set consisted of two participants who had been in practice for more than ten years and four others who had been in practice for five to ten years. While LP24 indicated that he diverted juveniles from the justice system every week, four members of the LP group stated that juveniles were diverted every month. All four were private practitioners: two had been practising for five to ten years, and the other two for less than five years. Nineteen members of the LP group also indicated that juveniles had been diverted from the justice system every year. In this group were eleven state prosecutors and eight private practitioners. Four of the eleven state attorneys had practised for more than ten years, five had practised for between five and ten years, and two had practised for less than five years.

The study found that all five participants of the MJ group hardly ever diverted juveniles from the criminal justice system, due to a lack of confidence in Child Panels. Twelve participants in the LP group also indicated the exact reason given by the magistrates for not diverting juveniles from the justice system. Fourteen members of the LP group cited a lack of diversion options; sixteen group members gave no response. These findings could be attributable to the assertions by Ame[625] , and Adu-Gyamfi[626] discussed in paragraph 5.4.2.[627]

Three participants in the MJ group indicated that they had diverted the juveniles from the criminal justice system on the parties' recommendation. MJ5 indicated that he had diverted juveniles from the justice system based on the court's decision, the parties' recommendation, and the victim or complainant's recommendation. In the LP group, twenty-two participants indicated that diversion had been made due to the court's

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[624] Paragraph 5.3.
[625] Ame 2017 *Ghana Soc Sci J.* 21.
[626] Adu-Gyamfi 2019 *Br. J. Soc. Work* 2070.
[627] Page 115.

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decision. Seven participants indicated that diversion had been made on the recommendation of the lawyers or parties. Thirteen participants gave no response.

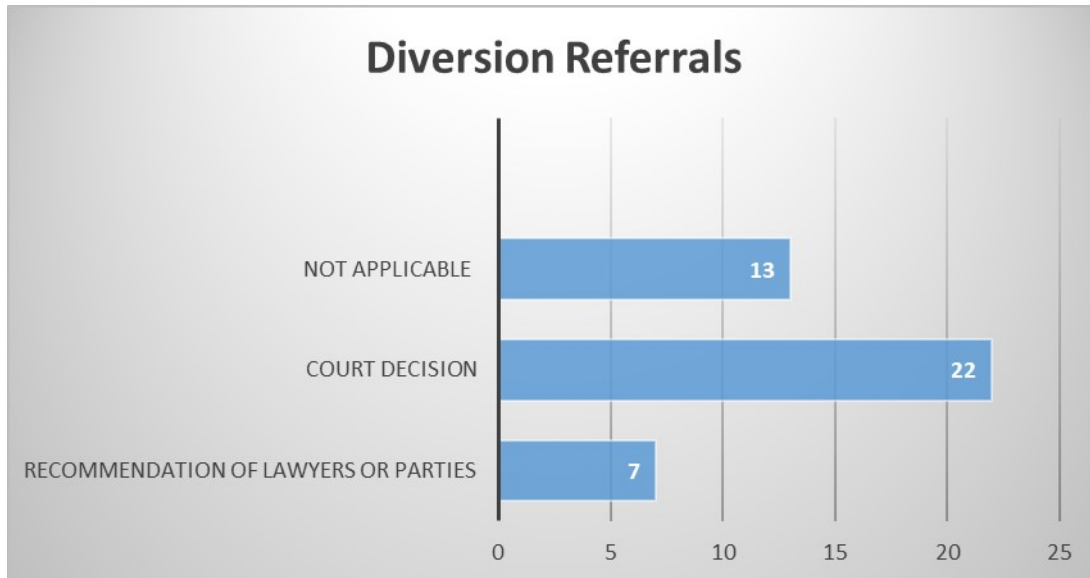

Figure 7: Diversion Referrals by Lawyers
(Source: Field data, 2021)

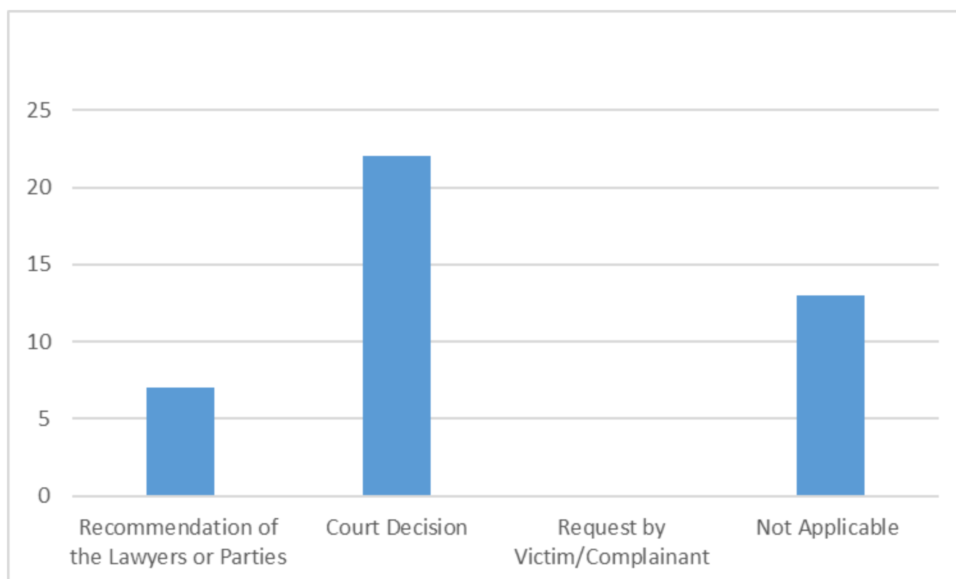

Figure 8: Decision to Divert Juveniles
(Source: Field data, 2020)

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The study found that three members of the MJ group had diverted juveniles to a Child Panel, and the matter had been settled. In the LP group, twenty-one participants indicated that the reason for their diversion was a referral to a Child Panel, out of which nine had been settled, and twelve had not been settled. Twelve participants also referred to traditional authorities: seven had been settled, while five had not. LP10 also indicated a referral to an opinion leader, but the matter had not been settled. Twelve participants gave no response.

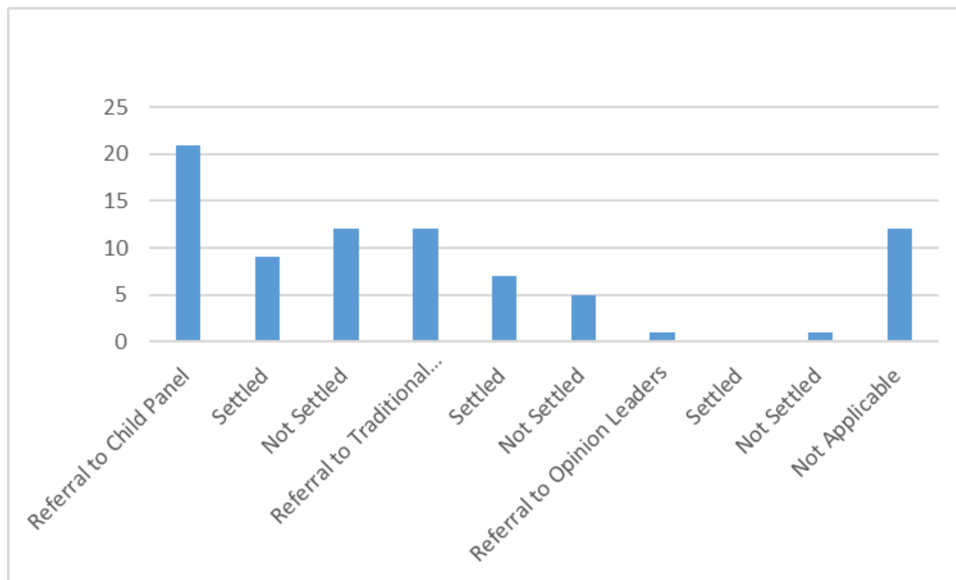

Figure 9: Outcome of Diversion Options
(Source: Field data, 2020)

6.3.3 Victims and restorative justice

The appeal of restorative justice to victims continues to form an integral part of the discourse, especially regarding evidence emerging from available studies. The findings reveal that sixteen participants in the VC group suggested detention in a correctional facility as punishment, befitting the juvenile, and the remaining four participants asked for compensation. Two of these four participants were VC2 and VC11, males aged between twelve and twenty-one whose phones had been stolen by the juvenile. The other two, VC3 and VC14, were females aged between twenty-one and fifty who had been raped.

The finding that 80% of victims of juvenile crime suggested detention in a correctional facility as a fitting punishment for the juvenile did not support the assertions by Ofori-

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Dua and others,[628] and Parimah and others,[629] regarding an increase in the call for a shift in criminal sanctioning from custody to community rehabilitation, discussed in paragraph 5.4.3 of this study.

The vital role of the victim of a crime perpetrated by the juvenile in the criminal justice system cannot be overemphasized. Hence, the CVWC, which requires particular strategies for child victims and witnesses who are particularly vulnerable to recurring victimization or offending, is essential.[630] Despite this directive, the study found that the Juvenile Justice Act prioritizes the juvenile over other parties in the juvenile justice system. As discussed earlier in this study,[631] the juvenile is the focus of the Act. However, the victim and the community have some needs that the Juvenile Justice Act does not meet.

6.3.4 Perceptions of restorative Justice

The study discovered that all five members of group MJ knew about restorative justice, but five participants in the LP group did not know about it. Out of these five participants, two had been practising lawyers for more than ten years and were state attorneys. The other three had also been practising lawyers for between five and ten years; one of them was a state attorney. Another finding was that eleven legal practitioners, six of whom were state prosecutors, were unfamiliar with diversion. These findings imply that juveniles prosecuted or represented by these lawyers had been denied the opportunity to access the benefits of restorative justice.

Four magistrates indicated that they had diverted juveniles from the criminal justice system on the parties' recommendation. It is inconceivable that parties whose recommendations the court considers diverting the juvenile from the formal justice system are unfamiliar with diversion. These findings are rather disappointing and call into question the relevance attached to the juvenile justice system by members of the legal profession.

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[628] Ofori-Dua et al 2015 *Int J Soc Sci Stud*. 141.
[629] Parimah, Osafo and Nyarko 2016 *ICPS* 55.
[630] Article 38 of the CVWC.
[631] Paragraph 5.3.5.

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When asked what restorative justice outcomes would benefit juveniles, three participants of the MJ group said community service. The other two participants said community service, reparation and apology. Fourteen members of the LP group said community service, six said reparation, four said an apology, and seventeen said community service, reparation and apology.

Participants offered various suggestions regarding ADR interventions to reform the juvenile offender and facilitate his/her reintegration into society. MJ1, MJ2 and MJ3 suggested community service, while MJ4 and MJ5 suggested community service, reparation and an apology. LP4 suggested that counselling should be recommended for juvenile offenders under some circumstances. LP34 insisted that opinion leaders in the community could also be relied on to help the juvenile, and LP39 suggested chiefs. According to LP10, "Ex-police officers and state attorneys who have decided not to prosecute the juvenile must be involved in the restorative process." LP39 also said, "I think chiefs have a lot to offer, so they should be allowed to participate in the criminal justice system and start with juveniles."

The findings revealed that all five magistrates, forty-one out of forty-two legal practitioners and fifty out of fifty-six juveniles and former juveniles, suggested that paying compensation, performing community service, and rendering an apology are appropriate punishments for juveniles. These forms of punishment are all restorative justice outcomes. The findings confirm earlier discoveries by Ofori-Dua et al.[632] and Parimah et al.[633] discussed earlier in this study[634], and further establish that society realises the need for the juvenile justice system to focus on alternative means of resolving youth crime aside from detention in a correctional facility.

However, Evolve expressed some scepticism about restorative justice:

> Our institutions do not have what it takes to facilitate restorative justice. The social circumstances of the individual prevent the objectives of restorative justice from being achieved. There are too many red flags in the implementation of restorative justice. Ghana lacks a database on citizens; hence there is no means of ascertaining that the individual is a first-time offender, appropriate for restorative justice. Again, the effects of urbanisation make individual tracing difficult. We would need a working police system as our

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[632] Ofori-Dua, Onzaberigu and Nimako 2019 *J. Victimol. Victim Just. 126*.
[633] Parimah, Osafo and Nyarko 2016 *ICPS* 55.
[634] Paragraph 5.4.3. of chapter 5.

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> institutions are not well equipped to undertake such measures. For example, the social welfare department should monitor the juvenile to ensure compliance with restorative justice orders.

The assertion by Evolve that some institutions such as the police and social welfare departments are incapable of embarking on meaningful restorative justice approaches is not unfounded. It can largely be attributed to a lack of resources, which Adu-Gyamfi[635] describes as "…the perennial underfunding of social work services due to the low priority accorded social work by the Government".

6.3.5 Offences suitable for restorative justice

Under the Juvenile Justice Act, only minor offences may be referred to Child Panels that are empowered to assist in victim-offender mediation. This provision limits the impact of restorative justice in the juvenile justice system. The findings reveal that 69% of legal practitioners indicated that minor and serious offences among juveniles had increased. The findings indicate that while minor offences committed by the juveniles and suffered by the victims amounted to forty-one cases, there were thirty-five serious offences. This means that several juveniles who could have benefitted from restorative justice initiatives were excluded from accessing them because they had been charged with serious offences. Under the law in Ghana, serious offences are exempt from the purview of restorative justice. Under South Africa's Child Justice Act, a wide range of offences committed by children could be diverted from the criminal justice system to a restorative justice setting.[636]

Participants in groups JC, VC and XJ were asked to indicate the appropriate punishment to be meted out to juveniles. An overwhelming majority of juveniles and former juveniles indicated a preference for restorative justice outcomes such as compensation to the victim, community service, or an apology instead of detention in a correctional facility. In the JC group, six participants suggested an apology, four suggested community service, six suggested compensation to the victim, and two suggested detention in a correctional facility. These two, JC6 and JC7, were both charged with the offence of rape.

[635] Adu-Gyamfi 2019 *Br. J. Soc. Work* 2068.
[636] Discussed under chapter 5, paragraph 5.5.1.

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In the VC group, sixteen participants suggested detention in a correctional facility as fitting punishment for the juvenile, and the remaining four participants asked for compensation. Two of these four participants were VC2 and VC11, males who had their phones stolen by the juvenile. The other two, VC3 and VC14, were females raped by the juvenile. In the XJ group, fourteen suggested compensation for the victim, eleven suggested community service, nine suggested an apology, and four suggested a period of detention in a correctional centre. These four were found guilty of defilement, robbery, assault and theft, respectively.

This finding supports the hypothesis that restorative justice is considered a soft option where offenders are not sufficiently held accountable for their actions, and victims could view restorative justice as an escape for offenders who are only interested in avoiding pain.[637] This hypothesis is further evident in the findings from Evolve, who asserted, “An apology or fine is seen as a slap on the hand, which could result in reoffending.”

Nevertheless, most participants indicated a desire for mediation between the offender and victim in the juvenile justice system for all offences. Twelve participants of the JC group indicated that they would want to speak to the victim of their offence; four said no and two said maybe. Twenty-nine participants of the XJ group indicated that they would like to talk to the victim of their offence; nine said no. Ten participants of the VC group indicated that they would want to meet with their aggressor, while the other ten said they did not wish to. Six members said they would tell the offender how his/her conduct has affected them; the other four wanted to ask questions.

These findings are consistent with those of Teye,[638] who found that respondents in his study, including prisoners, ex-offenders and prison service officials, revealed a strong desire for formal adoption of restorative justice principles in the justice administration system in Ghana.

6.3.6 Re-integration of the juvenile into society

International law mandates all states to ensure that juveniles benefit from arrangements to return them to society, family life or employment after release from

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[637] Zehr *Restorative justice.*
[638] Teye *Prisoner social reintegration* 122.

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detention.[639] This study found that the Juvenile Justice Act makes no provision for the re-establishment of the juvenile in society. The study found that in the absence of support from the State, NGOs such as Evolve play vital roles in preparing inmates for integration into society. Evolve teaches juvenile inmates some skills in business management and annually provides working tools and capital to inmates upon their release. This finding corroborates Kotey's[640] assertions that NGOs and Faith-Based Organisations (FBOs) may be the only organisations offering support and assistance to ex-offenders in developing countries.

The findings in this study do not indicate that the juvenile justice system has delivered restorative justice effectively as provided for under the Juvenile Justice Act. The finding that 80% of the victims of juvenile crime suggested detention in a correctional facility as fitting punishment for the juvenile as opposed to restorative justice indicates their preference for the formal court setting to a restorative justice setting. This is because only the court can impose an order of detention against the juvenile. Again, the finding that 50% of the victims indicated that they would not want to meet their juvenile assailant as part of the justice process implies that they are unaware of the benefits of restorative justice.

6.4 Integration of customary dispute resolution practices with the juvenile justice system

This section presents findings on integrating customary dispute resolution practices and processes with Ghana's juvenile justice system. To address the research question, it was imperative to initially discover how the customary dispute system operates and, subsequently, explore how it could be utilised in the juvenile justice system.

6.4.1 The customary court system

Responses given by several of the chiefs[641] during the interview process indicated that chiefs in the Ashanti kingdom have always performed judicial functions. These are some of the responses:

[639] Discussed under chapter 5 paragraph 5.3.
[640] Kotey *Reintegration of juveniles* 2.
[641] Appendix F.

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> Chiefs are meant to protect their subjects' lands and property and serve the Asantehene in whatever capacity. Chiefs and their traditional council adjudicate on matters within their formal area. This is a form of decentralisation because referring all disputes to the Asantehene's Court would overwhelm it. (Chief B).[642]

> Before Ghana became a state, chiefs ruled in their communities, and they settled disputes. (Chief E).[643]

> Chiefs have always been expected to ensure the peaceful resolution of disputes amongst their subjects and to punish offenders. (Chief I).[644]

These findings corroborate Adjei and Adebayo's[645] assertions about African conflict management discussed earlier in this study.[646]These findings also establish the authority of chiefs among the Ashanti tribe to adjudicate disputes among their subjects. Furthermore, these findings confirm Sone's[647] assertions regarding the traditional concept of conflict resolution discussed earlier in this study.[648]

The study found that the chief could adjudicate cases on his own; however, he usually sat with his sub-chiefs or elders and a linguist (the 'okyeame', which refers to a royal court spokesperson for the chief. The chief is spoken to by members of the public through the 'linguist') to adjudicate and mediate disputes. The chiefs also indicated that their courts used registrars or secretaries to ensure that proper documentation and records were kept of proceedings before the court. Chief D had this to say:

> As many as twelve to fifteen subchiefs may sit in Court or, at the very minimum, five. They all participate in the judicial process by cross-examining the parties. The Chief is the last to speak. The linguist is present. There may be divided ideas or a consensus instead of the formal system where you have a lone judge. The Chief's Court also has registrars and secretaries. The proceedings are recorded and can be transcribed for the parties subsequently. This erodes the need for parties to rely solely on their memory.[649]

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[642] Appendix F.
[643] Appendix F.
[644] Appendix F.
[645] Adjei and Adebayo *Indigenous conflict resolution*.
[646] Paragraph 2.4.1
[647] Sone 2016 *Afr. Insight* 52.
[648] Paragraph 2.4.1.
[649] Appendix F.

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Some of these chiefs are mentioned in the response given by Chief A, who maintained:

> My Court consists of sub-chiefs, including the kontihene, akwamu, benkum, nifa, gyaase, adonte, okyeame. We also have a linguist and a secretary. The subchiefs are capable of hearing a case in my absence. In addition, the Traditional Council of the AX stool may invite Chiefs from other stools to sit in our Court. Our secretary records the proceedings of the traditional council.[650]

The cases brought to them include land issues, marital issues, disputes between family members, defamation, and invocation of curses.[651] Others include parties not performing their duties under an agreement[652] and criminal cases that do not include death or severe injury.[653] Chief J said:

> Most of the cases are over land ownership. However, we also have instances that involve parties not performing their duties under an agreement, child neglect, or matrimonial suits.[654]

According to Chief I:

> Land Cases involving the invocation of curses, land disputes, marital issues, and criminal ones do not include death or severe injury.[655]

However, regarding his court, Chief B also said:

> We do not handle crime.[656]

The chiefs were unanimous in asserting that the medium of communication in their courts is the local Asante Twi language. Still, they were quick to add that they engage interpreters for individuals who may not understand the language. A unanimous

[650] Appendix F.
[651] Appendix F.
[652] Appendix F.
[653] Appendix F.
[654] Appendix F.
[655] Appendix F.
[656] Appendix F.

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assertion was that their court proscribed legal representation as a purely traditional system.[657] Nevertheless, a power of attorney can be given to another person.[658] Moreover, a lawyer may petition the traditional council upon the matter's conclusion and receipt of the transcripts. [659] Also, the chiefs seek legal opinion when faced with complex issues.[660]

Chiefs G and E indicated the general position:

> Parties who come before us have no legal representation because we do not permit it. (Chief G).[661]

> We do not permit the parties to have legal representation as that is not part of our culture. (Chief E).[662]

All the chiefs agreed with the assertions made by Chiefs G and E but had some additions. According to Chief A:

> Lawyers do not represent litigants before the traditional council. However, a lawyer may petition the traditional council upon the matter's conclusion and receipt of the proceedings.[663]

Also, according to Chief B:

> No lawyers are admitted to represent clients before our courts. However, we often consult lawyers for their legal opinion when faced with complex issues.[664]

In confirmation of what the other chiefs have said, Chief D explained:

> No legal representation is allowed before our Court because it is a purely traditional system. Nevertheless, a power of attorney can be given to another person.[665]

[657] Appendix F.
[658] Appendix F.
[659] Appendix F.
[660] Appendix F.
[661] Appendix F.
[662] Appendix F.
[663] Appendix F.
[664] Appendix F.
[665] Appendix F.

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These findings support the earlier discussed theory[666] that customary justice systems tend to use more accessible language and Oomen's[667] assertion that traditional courts often work without legal representation.

These courts do not sit every day to adjudicate matters. Four of the chiefs indicated that their courts sat fortnightly; two stated that they sat weekly; four indicated that their courts sat three times a week, but with a caveat that, depending on the urgency of a matter, a court could sit the entire week. According to Chief A, [668] juvenile delinquency and the invocation of curses are urgent matters requiring the court to sit on days they ordinarily would not. The study found that the courts hear up to five cases during very busy court sessions and sometimes have to adjourn them.[669] In addition, Chief C said that some tough cases could run into weeks before they are settled.[670] Chief A said:

> Court often sits at 3 pm. Moreover, emphasizing reconciliation and avoiding litigation, we can hear about 4 or 5 cases. The length of the case depends on the evidence or witnesses produced by the parties.[671]

The study discovered that to initiate a matter before the chief's court, a party reports the matter to the linguist, pays the appropriate fees, and invites the other party who may agree to litigate or instead request that the matter be settled amicably.[672] Before the hearing, the linguist leads the parties to the registrar to record the suit at law, both parties pay 'ntaadwamu,' and the losing party forfeits his/her money, while the victor gets his/her money back.[673] Chief C outlined the process:

> A report is usually made to the linguist, who informs the Chief. Also, a party can commence an action by reporting the matter and paying a fee 'nsaman.' The palace contacts the other party. He also produces a fee 'me pii so' indicating his commitment to have the matter heard by the Chief's Court. Before the hearing, an amount of money referred to as 'ntaadwamu' is collected from both parties. He who loses the case loses his money while the victor gets his money back.[674]

[666] Discussed under paragraphs 4.2.2 and 5.4.3 of this study.
[667] Oomen *Traditional dispute resolution mechanisms* 183.
[668] Appendix F.
[669] Appendix F.
[670] Appendix F.
[671] Appendix F.
[672] Appendix F.
[673] Appendix F.
[674] Appendix F.

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Chief D's response further expands that given by Chief C when he reports:

> A party reports the matter to the linguist, pays appropriate fees and invites the other party. The responding party may agree to litigate; sometimes, they may decline to litigate but instead ask that the matter be settled amicably. The linguist leads the parties to the registrar to record the suit before the hearing can begin.[675]

This finding on the commencement of proceedings at the chief's court substantiates earlier discussion that[676] proceedings at the chief's courts are considered customary arbitration.

In addition, the parties bring cases pending before the formal court to the traditional court. According to Chief J, when parties in cases before the formal court request the traditional court to help resolve the issue, the traditional court petitions the court to withdraw the issue to settle.[677]

The chiefs were asked how their courts arrived at their decisions and enforced them. The study found that a minimum of five sub-chiefs are required to sit with the chief to decide cases, and all of them participate in the judicial process by cross-examining the parties.[678] After consultations, they each give their opinion, but the chief is not bound by it.[679] The chief is the last to speak, and the parties are made to swear the 'Wednesday' oath to comply with the decisions of the stool (the royal seat on which the chief sits).[680] This approach effectively gets parties to adhere to the decisions because, according to Chief G, they know that disobedience will incur the wrath of society and the ancestors.[681] Also,

> Disobeying the Chief is an offence against the stool that embodies past and present community members, and this could have undesirable effects on the individual. (Chief I).[682]

[675] Appendix F.
[676] Discussed under chapter 5 paragraph 5.3.
[677] Appendix F.
[678] Appendix F.
[679] Appendix F.
[680] Appendix F.
[681] Appendix F.
[682] Appendix F.

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This finding accords with the earlier discussions under paragraphs 4.2.1 and 5.4.1 of this study.

The study found that the power of the chief emanates from the people. Chief D asserted:

> The people willingly participate in the process since they live in the community. The refusal to comply with orders of the Chief prevents you from accessing certain privileges and rights from the Chief in the future. The power of the Chief emanates from the people; hence members of the community will compel you to conform with the norms and expectations of society.[683]

In accord with this statement, is the assertion made by Chief H:

> Since the parties live in the community, including their family, they are compelled to carry out our decisions. They also know that a failure to do so might have repercussions on themselves and their families, such as stigma from community members.[684]

Therefore, parties conform to the norms and expectations of society; else, there would be repercussions such as stigma on themselves and their families.[685] Again, a refusal to comply with orders of the chief would prevent the parties from accessing certain privileges and rights from the chief in the future.[686] Also, rules such as the refusal of a permit to bury recalcitrant persons in the community[687] help to enforce orders of the court. In addition, individuals who refuse to comply with the court's orders could be handed over to the police. Also, sanctions could be applied to the defaulting party because disobeying the chief is an offence against the stool that embodies past and present community members.[688]

To discover the nature of the court's orders, respondents were asked to indicate the outcome of the cases. According to the participants, the parties adhere to laid-down rules regarding customary law cases. For instance, invocation of curses is prohibited,

[683] Appendix F.
[684] Appendix F.
[685] Appendix F.
[686] Appendix F.
[687] Appendix F.
[688] Appendix F.

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therefore a guilty party is instantly fined in the form of money, schnapps or livestock;[689] The number of sheep to be slaughtered is negotiable, based on the party's circumstances. In times past, the heinous nature of the crime committed influenced the number of sheep to be supplied.[690] According to Chief I, the gravity of the offence determines the number of sheep the offending part will be ordered to slaughter, and the offending party is also ordered to replace or return stolen items.[691]

Almost all the participants indicated the absence of community service and custodial sentences from the traditional court. According to Chief C:

> Community service and custodial sentences are left to the police, government, and law courts. We sometimes order the offending party to slaughter a sheep. The number of sheep to be slaughtered is negotiable, based on the party's circumstances. In times past, the heinous nature of the crime committed influenced the number of sheep supplied. An order to pay a fine may be made on rare occasions.[692]

Chief I also mentioned the slaughter of sheep in the response he gave:

> We often order the offending party to purchase schnapps or slaughter a sheep or more, depending on the gravity of the offence. We also order the offending party to replace or return stolen or damaged items. We do not impose custodial sentences or community service.[693]

The chiefs were asked what options were available to a party dissatisfied with their decisions. According to the participants, the Ashanti traditional system is hierarchical, with the Asantehene’s court at the apex,[694] therefore, the parties have a right to lodge an appeal against the decision of the present court-to the Asantehene’s court. The study's findings confirm earlier assertions by Arhin[695] that courts in the Akan ethnic group to which the Ashanti tribe belongs are hierarchical.

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[689] Appendix F.
[690] Appendix F.
[691] Appendix F.
[692] Appendix F.
[693] Appendix F.
[694] Appendix F.
[695] Arhin *Traditional rule*.

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The study found that the customary justice system is not entirely prevented from hearing a case a second time. However, it must be based on aggravating grounds, such as new documentary evidence discovered after the decision.[696] An interesting finding was that parties could appeal to the formal courts for redress from a decision given at the chief's court, as stated by Chief F.[697] This feature operates as an additional avenue for disputants, and it also allows the court to scrutinize potential abuse within the customary justice system.

The customary dispute resolution process at the chief's court has characteristics similar to those of the formal courts in the judicial system. The parties' case is called, evidence is taken from them and their witnesses, a decision is given that the parties must abide by, and a party dissatisfied with the decision may appeal against it. However, the differences between both systems lie in the details. Unlike the formal justice system, which focuses on delivering justice even at the expense of the parties' relationship, at the core of customary justice systems is the peace and unity of the parties. Therefore, all the processes are geared towards this end.

6.4.2 Customary court and criminal matters

Historically, the chief's court heard criminal matters; however, findings from the research indicate that today, the customary court does not have the jurisdiction to resolve criminal issues. According to the chiefs,[698] the law prevents chiefs from hearing criminal matters in the traditional court. However, some of their assertions indicate that they do hear criminal cases. For instance, Chief H[699] indicated that petty offences are usually reported to their court, and they often order the offending party to make a payment for medical bills incurred by the injured party. Chief G[700] also stated that parties sometimes prefer the chief to settle or mediate the issue, which could be a criminal one.

As discussed in paragraph 5.4.2, section 89(2) of the ADR Act appears to prohibit traditional leaders from hearing matters of a criminal nature. A violation of this section is an offence punishable by a fine, imprisonment, or both. However, upon proper

[696] Appendix F.
[697] Appendix F.
[698] Appendix F.
[699] Appendix F.
[700] Appendix F.

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interpretation, this provision does not prohibit criminal matters from being referred to customary arbitration. A criminal matter may be submitted for customary arbitration in the absence of any law preventing it and in pursuance of an order given by a court. A reading of this legislation in conjunction with section 73 of the Courts Act discussed in paragraph 5.4.2 implies that customary courts may decide cases involving juveniles only upon the orders of a court.

Therefore, traditional authorities who resolve criminal issues without an order of the court engage in illegality and place themselves and the parties at the risk of prosecution.

Participants' opinions on whether traditional authorities should be involved in hearing criminal matters were divided. Some were opposed to the idea, while others were not. According to Chief H, investigation and prosecution of crime should not be carried out by chiefs but by the State, which already has the machinery in place.[701] Some chiefs were not opposed to the suggestion but had reservations, such as the lack of expertise and logistics of traditional authorities to effectively deal with certain types of crime, such as cybercrime.[702] Chief A maintained that traditional authorities lack the personnel and machinery to punish adult wrongdoing.[703] In contrast, interviewees such as Chief G and Chief J insisted that the courts hear criminal matters that were not serious offences because they reside in the community and the chiefs, victims and perpetrators live in the community and know one another.[704]

6.4.3 Juveniles at the customary court

To further explore the mechanism of the customary court, the chiefs were asked whether children were subject to the same procedures as adults. Chief A indicated that the court was not rigid and unbending regarding cases involving children; therefore, each case was handled in accordance with its facts.[705] There is no blanket rule for deciding cases involving children.

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[701] Appendix F.
[702] Appendix F.
[703] Appendix F.
[704] Appendix F.
[705] Appendix F.

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According to Chief G,[706] children who come to their courts do not swear an oath before giving evidence, but a parent or relative must accompany them. While these findings corroborate Ame's[707] assertion that children are subject to the same justice system as adults,[708] they also introduce a significant concept. The court adopts a flexible approach in children's proceedings, such as mediation sessions. This finding is consistent with Ubink's[709] opinion that the customary law system is flexible, relational and negotiable in character.

With regard to whether traditional authorities should be allowed to decide criminal matters that involved young people, the study found that the chiefs were unanimous, hoping that the traditional court could be involved in the administration of juvenile justice. According to them, children must be protected at all costs.[710] Also, young people needed guidance that chiefs could provide, therefore, chiefs might be involved in juvenile justice administration, depending on the nature of the offence [711] Another chief stated that as the 'father' of the community, it would be helpful if the chief were involved in resolving a dispute because when a crime occurs, the injured party, their relatives and the community all suffer.[712] Moreover, Chief I felt children should not be left to the harsh court system.[713]

Stakeholders' opinions about whether traditional authorities should be allowed to decide criminal matters involving young people were also sought. In this study, some juveniles and victims believed that several local customs and practices were outdated. They envisaged that outmoded customs and practices could be challenging if the chiefs decided their cases. Evolve opined that although chiefs used peaceful means of resolving disputes, some traditions impeded children's rights; moreover, urbanisation could render the chieftaincy institution powerless.[714] However, a few comments made by the chiefs suggest that these perceptions might not be unfounded. For instance, in outlining traditional practices that could benefit the juvenile justice

[706] Appendix F.
[707] Ame 2018 *J. Fam. Hist.* 395.
[708] This was discussed earlier in this study under paragraph 5.4.1.
[709] Ubink 2018 *Dev. Change* 934.
[710] Appendix F.
[711] Appendix F.
[712] Appendix F.
[713] Appendix F.
[714] Appendix F.

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system, Chief D cited corporal punishment. Chief B suggested, "Isolate the child from his family and friends and deprive him of some food for some time."[715] The traditional authorities were not unaware of this limitation, as Chief F[716] admitted that chiefs did not have what it took to deal effectively with certain types of crime.

These findings are an indication that some customs may not have kept up with the evolving rate of society and, as a result, could be unsuitable to address the needs of parties. However, it is crucial to be guided by the assertion made by Arowosaiye,[717] as discussed earlier in this study,[718] that the unique feature of customary law lies in its recognition and acceptance by the people to whom it is applicable. These findings, therefore, have to be interpreted with caution.

6.4.4 The involvement of the Chiefs

In group LP, twenty-eight participants representing 66 per cent indicated that chiefs should be involved in juvenile justice administration, and only four assigned reasons for their decisions. LP38 insisted that chiefs settle issues affecting the youth, and the Child Panels were not performing as expected. LP39 and LP41 said chiefs had a lot to offer and should not be side-lined by our justice delivery system but be allowed to take part in the juvenile justice system and start with juveniles. Furthermore, LP42 suggested that chiefs should be given basic legal training, with supervisory powers given to the court.

The remaining 14 members of the group did not think chiefs should be involved in the administration of juvenile justice, and only one of them offered a reason. According to LP4, they had reservations about using traditional authorities because of the difference in customs and traditions between tribes.

All five magistrates in this study indicated that chiefs should not be involved in the administration of juvenile justice but gave no reason. A rejection of the involvement of traditional authorities in the administration of juvenile justice was an important finding, notwithstanding an absence of reasons for these decisions. However, it is vital to consider the possible bias in these responses. As professional officials entrusted with

[715] Appendix F.
[716] Appendix F.
[717] Arowosaiye 2016 *ANULJ* 41.
[718] Paragraph 4.2.1.

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adjudicating disputes, the responses of these magistrates most likely indicated their desire not to have their professional boundaries infringed.

Participants in JC, VC and XJ were also asked if they would like their cases to be decided by their chiefs. In the JC group, fourteen participants indicated that they would not want their cases to be heard by the chief and elders of the community. Although six of them suggested a lack of privacy at the chief's court when asked to explain their decision, the others provided no reason. The other four members of the JC group who indicated that they would want to have their cases heard by their chiefs indicated that their reason was that the process at the chief's court was faster than at the formal courts.

All the participants in the VC group indicated that they would not want their cases to be heard by the chief and elders of the community. Only two of them gave a reason for their decision: the process of the chiefs' courts is slow. A possible explanation for this finding might be that the victims prefer the power and force that the justice system's courts wield. Another possible explanation is that they have no confidence in proceedings under the customary justice system due to reservations about the system and the people at the helm of affairs. Evolve maintains that modernisation and urbanisation could render chieftaincy institutions powerless.

In group XJ, twenty-seven participants indicated that they would not want their cases to be heard by the chief and elders of the community. While thirteen cited the lack of privacy as the reason for their decision, thirteen cited fairness concerns, and one said the chief's court process was slow. The eleven participants who indicated they would want their cases to be decided by the chiefs gave various reasons. Six of them said the process before the chief's court was faster than the formal courts; three said they preferred the local language, and two said the system was more reliable than other systems.

All the chiefs in this study indicated their willingness and desire to adjudicate juveniles' issues. They assigned various reasons and included the following:

> Children must be protected at all costs, especially children below twelve years because they live in the community and are known by all. (Chief A).[719]

[719] Appendix F.

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> Young people need much guidance, and we are in a position to offer it, so depending on the nature of the offence, I would say yes. (Chief G).[720]

> Yes. Chiefs should do so because of the other parties involved. The injured party, their relatives, and the community all suffer when a crime occurs, so it would be helpful if the Chief, the 'father' of the community, is involved in resolving the dispute. (Chief H).[721]

> Yes, they may. Children make many mistakes, and we should help them instead of leaving the courts to do this as their system can be harsh. (Chief I).[722]

The inclination of this population is essential and their point of view on the administration of juvenile justice cannot be overlooked because, as indicated in Chapter four[723] of this study, traditional structures are suitable instruments to complement modern state structures in order to practice restorative justice.

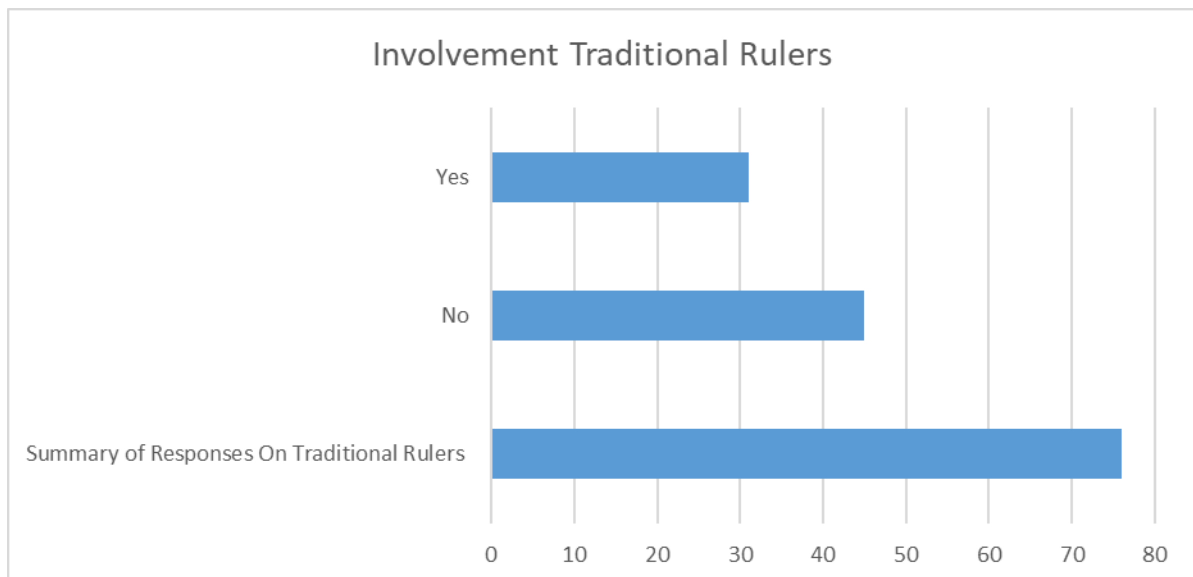

Figure 10: Summary of Responses regarding Involvement of Traditional Rulers
(Source: Field data, 2020)

[720] Appendix F.
[721] Appendix F.
[722] Appendix F.
[723] Paragraph 4.2.2.

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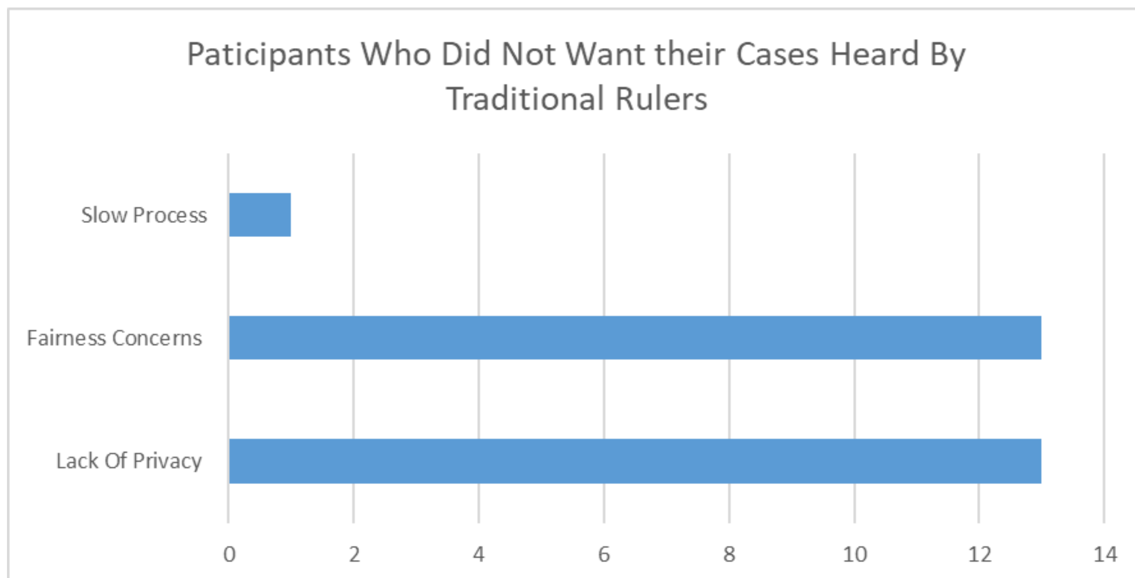

Figure 11 Participants who did not want their Cases heard by Traditional Rulers
(Source: Field data, 2020)

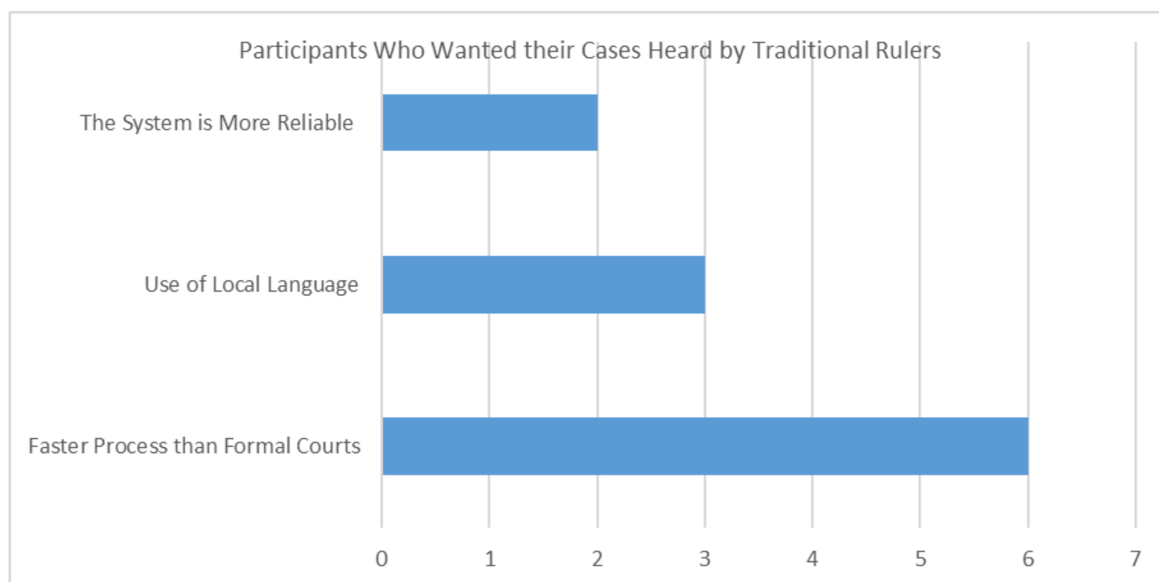

Figure 12: Participants who wanted their Cases heard by Traditional Rulers
(Source: Field data, 2020)

6.4.5 Shortcomings of the customary system

Participants in groups JC, VC and XJ were asked about challenges they would face if their case were decided by the chief and elders of the community.

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Participants cited three dominant challenges: Lack of privacy in the traditional court, outmoded customs and practices, and a lack of understanding of the practices and processes. In the JC group, fifteen participants cited the lack of privacy and the remaining three stated that outmoded customs and practices were the challenges they envisaged at the chief's court. In the VC group, eighteen cited the lack of privacy, and the remaining two mentioned outmoded customs and practices. In the XJ group, ten cited the lack of understanding of their practices and processes; twelve cited the lack of privacy, and nine cited outmoded customs and practices.

The right to privacy in criminal matters is relevant; hence its alleged absence from the customary justice system had to be investigated. The chiefs were unanimous that their court sessions were held openly.[724] On the lack of privacy as a perceived shortcoming of the traditional court, the chiefs admitted that their court sessions are public. However, according to Chief B:

> It is incorrect to say that we have no privacy in our courts. On the contrary, certain matters are given due privacy. Marital issues, for example, are not discussed in the open public.[725]

The General position as rendered by Chiefs J and D is reproduced here. Chief J said:

> Our emphasis is on informing society what constitutes acceptable conduct and what does not, hence the lack of privacy in our sessions, but we hear certain cases privately.[726]

Furthermore, Chief D also said:

> Generally, the community must know the outcome of litigation before the palace; hence our sessions are open to all. However, this is not absolute because the nature of some matters requires that they be dealt with privately. For instance, issues between spouses are not discussed in public, likewise family matters.[727]

[724] Appendix F.
[725] Appendix F.
[726] Appendix F.
[727] Appendix F.

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Aside from educating society on the norms and values, another purpose for public trials as proffered by Chief F:

> An individual's shame during a public trial is also meant to deter others from engaging in acts that society frowns on.[728]

This assertion is supported by Chief A, who said:

> A public hearing serves as a deterrence to like-minded criminals.[729]

Following this, the findings in this study indicate that customary court sessions are held in public for several purposes. Primarily, community members must be educated regarding the norms and values of their culture, and being present at the court session to hear the outcome of litigation serves this purpose.[730] This finding agrees with Ubink's[731] assertion mentioned earlier in this study,[732] that it is predominantly through being present at traditional dispute settlements that people learn the rules and norms and what is regarded as proper behaviour during a court hearing, as well as how they may access justice from the traditional court.

The public hearing of cases is also meant to deter like-minded individuals from engaging in unacceptable conduct based on the individual's shame while undergoing a public trial.[733] Contrary to expectations, the findings also revealed that the customary court's lack of privacy during hearings is not universal, as some issues are given due privacy.[734] For instance, marital problems and family issues often require confidentiality and, in those cases, the public is excluded from the hearings. This finding implies that juveniles who appear before the customary courts may be given due privacy by having their cases heard away from the public. The chief and his elders decide to do that, based on the circumstances of the case.

[728] Appendix F.
[729] Appendix F.
[730] Appendix F.
[731] Ubink 2018 *Dev. Change* 944.
[732] Chapter 5 paragraph 5.4.1.
[733] Appendix F.
[734] Appendix F.

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Regarding the issue of the lack of a fair hearing, the chiefs were asked to comment on the practice where an adjudicator could prevent a party from giving evidence by saying '*m'atu me nan asi so'* (translated literally to mean 'I have stamped my foot on this issue, there is no need to recount what happened as it will open old wounds'). According to Chief B:

> Our decision to let sleeping dogs lie when deciding cases is not a violation of the law. This is often invoked to prevent undue lengthening of cases once the parties are agreed to it.[735]

Chief C said:

> At the Chief's palace, power and authority, not the rule of law, settle disputes. However, 'm'atu me nan asi so' is usually raised where the matter is between an older and younger person and the former is wrong. Alternatively, when it is a family matter which must not be drawn out to antagonise parties further.[736]

According to chief D, this approach is invoked when there must be a compromise.[737] Chief E also had this to say:

> M'atu me nana asi so' is usually invoked over family matters because no guilty or not guilty decision is given.[738]

Chief J summarises the views put forward by the other chiefs in his statement:

> Our goal is to settle disputes between parties, and we often employ whatever convenient means we can to make that happen. This might include us asking the parties to 'let sleeping dogs lie.[739]

Furthermore, Chief A adds:

> 'M'atu me nan asi so' is usually applied in domestic issues to promote amicable settlement. But it is not used in criminal matters.[740]

[735] Appendix F.
[736] Appendix F.
[737] Appendix F.
[738] Appendix F.
[739] Appendix F.
[740] Appendix F.

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His assertion is supported by Chief F:

> We do not always ask the parties to let sleeping dogs lie when settling cases; however, we would promote reconciliation and cohesion in the family. We do not do so when the issue is a criminal one.[741]

Findings from the study indicate that asking parties to 'let sleeping dogs lie' when deciding cases is a customary practice used in several circumstances. For instance, it could be utilised to truncate otherwise lengthy hearings where the parties have consented.[742]

The practice could be used where the matter before the court is a dispute between an older and younger person and the former is in the wrong.[743] In that case, no further evidence must be given since it is culturally inappropriate to scold an older person in the presence of a younger person and in favour of the younger person. When the dispute is between family members, the practice encourages an amicable settlement by avoiding the need to declare a guilty verdict,[744] which is the natural consequence of litigation. However, this practice is not applied in criminal matters.[745] This finding is pivotal for this study as it implies that the practice of letting 'sleeping dogs lie' will not be used when a juvenile appears before the chief's court.

These findings on the practice of '*m'atu me nan asi so'* corroborate Sone's[746] view that traditional justice systems embrace informal modes of information gathering, in contrast to the formal evidentiary rules of the state justice system as discussed earlier in this study.[747]

6.4.6 Offences before the customary court

Participants were then asked to suggest offences committed by young people that are appropriate for traditional authorities to decide.

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[741] Appendix F.
[742] Appendix F.
[743] Appendix F.
[744] Appendix F.
[745] Appendix F.
[746] Sone 2016 *Afr. Insight* 60.
[747] Chapter 2 paragraph 2.4.3.

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The chiefs were unanimous in their response to this question. The consensus was that non-serious offences committed by young people could be heard by the chiefs.[748] According to Chief J:

> Our chiefs and elders can resolve matters that are not very serious because they have done so historically.[749]

Chief G had this to say:

> Petty offences which do not require them to be locked away in prison cells."[750]

Likewise, Chief H:

> Minor offences would be appropriate as it is often the most common amongst young people.[751]

These 'petty' and 'minor' offences have been explained by the response given by Chief F:

> Non-serious offences like theft, fighting, or even assault because the young children in our communities need guidance, so it would be helpful if chiefs and elders were involved, especially where their conduct is detrimental to society.[752]

In addition, three magistrates and twenty-nine legal practitioners suggested that it would be appropriate for traditional authorities to decide cases of misdemeanours. Evolve suggested that if chiefs were allowed to participate in the juvenile justice delivery system, they may decide on "petty theft, or assault with no serious damage to property." [753]

One unanticipated finding was that a magistrate and five legal practitioners suggested that traditional authorities hear serious offences involving juveniles. While the magistrate had been in that role for more than ten years, two legal practitioners were

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[748] Appendix F.
[749] Appendix F.
[750] Appendix F.
[751] Appendix F.
[752] Appendix F.
[753] Appendix F.

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state prosecutors, and three were private practitioners. Serious offences defined under the Juvenile Justice Act include robbery, rape, defilement, murder, indecent assault involving unlawful harm, robbery with aggravated circumstances, drug offences and the use of firearms.[754] This finding indicates confidence in the customary justice system and the restorative justice it affords parties. It also acknowledges the healing available to victims with profound needs, which as already discussed in this study,[755] Skelton[756] asserts are rarely met by the criminal justice system.

The study found that three participants in the MJ group had suggested that traditional authorities should be involved in the juvenile justice system post-sentence. In Group LP, eighteen participants, six of whom were state attorneys and twelve private practitioners, indicated that traditional authorities could be involved in the juvenile justice system after arrest. Nine participants said that traditional authorities could be involved in the juvenile justice system after arraignment of the perpetrator. Six were state attorneys, while the other three were private practitioners. Five participants said that traditional authorities could be involved in the juvenile justice system post-sentence. Four of them were private practitioners and one was a state attorney. The remaining nine gave no response to this question.

During the study it was found that twenty-four participants of the LP group had indicated that traditional authorities could adjudicate matters involving juveniles based on a combination of traditional practices and modern legal principles. Five suggested that it could be done in accordance with traditional practices, while three said it had to be in accordance with current legal principles. The remaining nine group members gave no response to this question, and none of the MJ group members responded. MG5 suggested that courts connected to the ADR system could be used to resolve matters relating to juveniles.

6.4.7 Customary practices suitable for the juvenile justice system

Participants were asked to identify traditional practices that would benefit juveniles, victims and community members.

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[754] Sections 46 (8) & 60.
[755] Paragraphs 2.3.3; 4.3.1 and 5.4.3.
[756] Skelton 2007 *Acta Juridica* 242-243.

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In response to this question, the chiefs mentioned practices in their set-up that they believed would benefit the juvenile justice system. According to chief J:

> The juvenile can be reprimanded in the full glare of the community and asked to offer a public apology to the victim and the community. He can also be made to pay a fine. The victim can also receive an apology and be compensated by the offender.[757]

Chief F also said:

> We can order the juvenile to carry out community service such as farming, cleaning, or weeding.[758]

Chief D spoke about corporal punishment:

> Our indigenous practices can restructure our society to bring back communal neighbourliness and eschew individualism. One such practice is corporal punishment meted out to erring juveniles which would serve as a deterrence.[759]

Chief E suggested counselling and role modelling[760] , which was also mentioned by Chief G, who said:

> We do much counselling. We also do role modelling. We also believe in appeasing the party who has been wronged, so we also order compensation from the juvenile's parents.[761]

Chief, I also had this to say:

> Most people do not like shame or stigma, which follows a rebuke from the Chief and elders. We also order the offender to compensate the victim and sometimes the victim's family as well.[762]

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[757] Appendix F.
[758] Appendix F.
[759] Appendix F.
[760] Appendix F.
[761] Appendix F.
[762] Appendix F.

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On the issue of shame which Chief I mentioned, Chief H had this to say:

> The stigma and public ridicule are often enough grounds to prevent an offender from repeating the wrong conduct.[763]

Moreover, Chief F had this to say:

> The shame an individual undergoes during a public trial is also meant to deter other individuals from engaging in acts the society frowns on.[764]

Some of the examples they gave included fines, compensation, community service, apology, shaming, corporal punishment and counselling. Some of the chiefs were doubtful regarding the effectiveness of a fine or community service orders made against children. According to chief B:

> There is considerable difficulty supervising and enforcing community orders involving children, so I would not advise that. Also, levying the parent with a fine does not affect the child's behaviour; hence it is ineffective.[765]

An additional finding was that the offending party could be made to offer a public apology.[766] Chief A's response was all-encompassing as it addressed the stakeholders' needs-the juvenile, the victim, and the community. He said:

> The young person can undergo mandatory service to the community, and the victim must be compensated. A reprimand from the Chief may also be sufficient for the victim. Where an item is stolen or destroyed, an order for it to be replaced can be made. Regarding the community, we involve them by having the hearings in public to avoid mob justice and deter others.[767]

Again, he captured the essence of this study when he said:

> Criminal matters which involve child offenders under the age of twelve should be referred to traditional authorities. The state may also insist that the traditional council follows due process. This would shorten the child

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[763] Appendix F.
[764] Appendix F.
[765] Appendix F.
[766] Appendix F.
[767] Appendix F.

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offender's time in the criminal process and protect him from the media's harmful effects.[768]

The finding in respect of compensation is consistent with the assertion by Ayittey[769] that a fundamental principle that African communities relied on to maintain peace was the correction of wrongdoing through compensation rather than punishment, except in serious offenses such as murder. A finding that an order of compensation may be directed at persons responsible for the juvenile[770] confirms the idea of collective family responsibility in the African society expressed by Mbagwu[771] and Abotchie[772], as discussed in the literature review.[773]

An interesting discovery made during this study was that out of the four victims who indicated a preference for compensation from the offending juvenile, two had suffered the crime of rape while the other two had their phones stolen.

An additional finding was that the offending party could be made to offer a public apology under customary practice.[774]The study found that none of the victim participants suggested an apology from the juvenile as an appropriate punishment. Also, Evolve maintained that an apology is often considered insufficient punishment for an offender.[775] As discussed earlier in Chapters four and five of this study,[776] an apology from offending children to their victims or other persons affected by the crime is a feasible option under Uganda's Children Act, South Africa's Child Justice Act, and Ghana's Children's Act.

The findings also reveal that under the customary justice system, the shame or stigma that follows a public rebuke from the chief and elders is considered punishment for wrongdoing.[777] These findings confirm earlier writings by Rattray[778] as discussed in

[768] Appendix F.
[769] Ayittey *African institutions*.
[770] Appendix F.
[771] Mbagwu *Border disputes*.
[772] Abotchie *Social control*.
[773] Paragraphs 4.2.2. and 5.4.1.
[774] Appendix F.
[775] Appendix F.
[776] Paragraphs 4.4.2; 4.5.1 and 5.3.1.
[777] Appendix F.
[778] Rattray *Ashanti law and constitution* 373.

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this study,[779] that stigma from ridicule was a form of punishment under the Ashanti customary system. The findings also indicate that stigma is present in the juvenile justice system as an unintended consequence of detention. For instance, XJ33's family members do not want to associate with him; XJ34 has lost most of his schoolmates and friends, and XJ37 insists, "many people are now avoiding me because of the time I spent in the correctional centre." Evolve also maintains that stigma among juveniles is relatively high.[780] These findings match those observed in earlier studies by Nyarko et al.[781] as discussed in Chapter five.[782]

6.5 The juvenile offender

An objective of the study was to outline Ghana's juvenile justice system and determine whether it upholds fundamental human rights for accused persons as enshrined under the 1992 Constitution. The Constitution upholds values such as the inviolability of persons' dignity and a fair hearing within a reasonable time. It was, therefore, necessary that this study investigate whether the juvenile justice system supports these values.

6.5.1 Bail

The liberty of the juvenile who has not been found guilty of an offence by the court is precarious, and to ensure minimal infringement on the individual's rights, the Juvenile Justice Act provides that a juvenile charged with an offence shall be released on bail by the court unless there is a danger to the juvenile or community.[783] The study sought to discover whether juveniles had been granted bail while their case were pending before the courts.

Findings from this study revealed that while participants in group JC indicated that they had all been granted bail, eight former juvenile offenders were not granted bail during their trial and had to remain on remand. The eight participants are XJ10, XJ16, XJ26, XJ27, XJ29, XJ31, XJ34 and XJ36, all first-time offenders. They were each accompanied to court by a Police Criminal Investigation Detective (CID), but none had legal representation. The study found that most of them neither understood the court

[779] Paragraph 5.4.1.
[780] Appendix F.
[781] Nyarko et al. 2019 *J. Law Policy Glob.* 170.
[782] Paragraph 5.4.3.
[783] Section 21.

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process nor the reason for its decision. Also, most of them indicated that the Police CID who accompanied them to court did not understand the court's process, hence their dissatisfaction with the entire court proceeding.

XJ27 was undergoing vocational education when he was charged and prosecuted for assault. He was convicted and incarcerated at the correctional centre for between one and two years. He asserts that although his friend who accompanied him to court understood the court proceedings, he did not understand the court process or why the court arrived at its decision and, upon reflection, says, "I am angry that I was locked up in the correctional centre."

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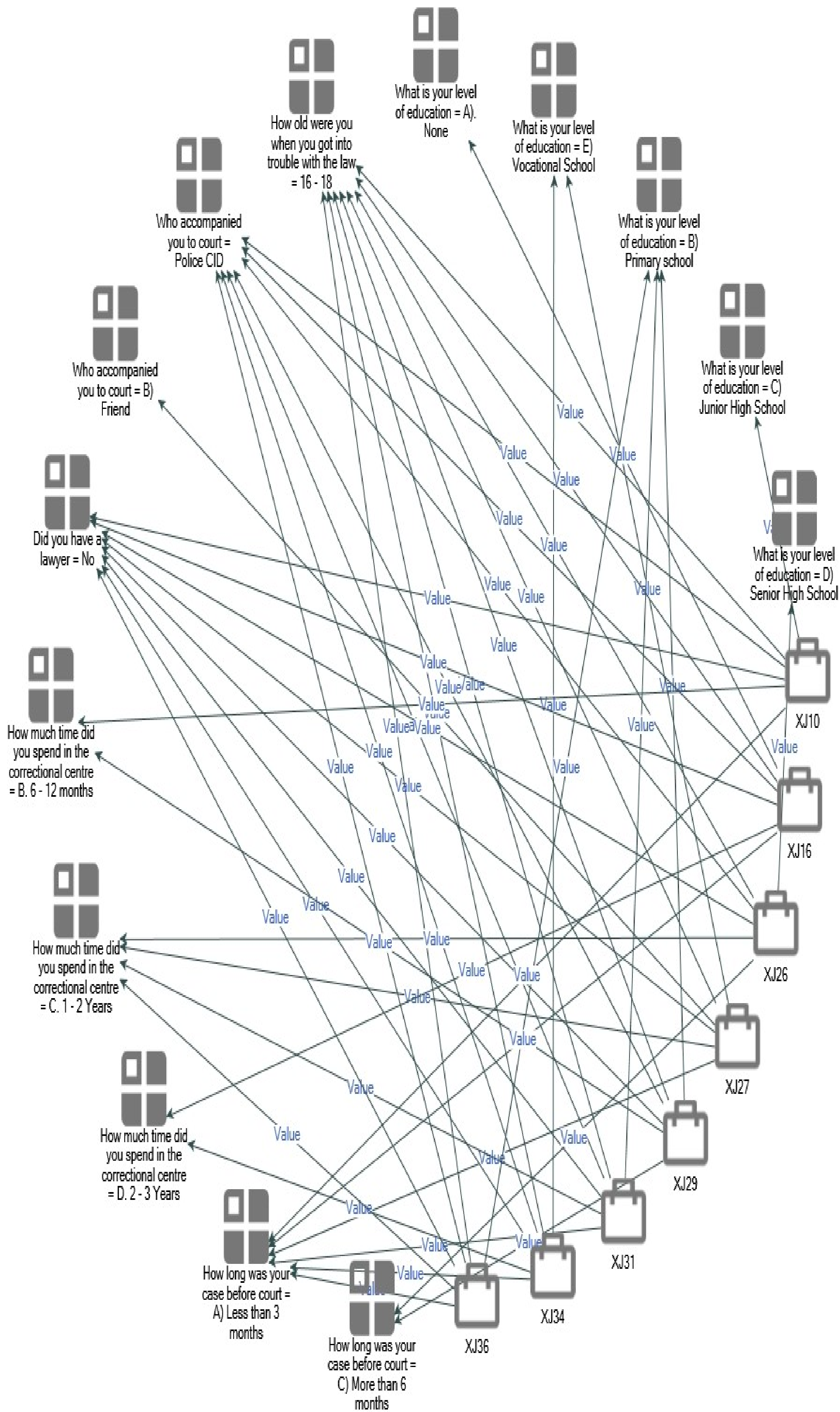

Figure 13: Attributes of former Juvenile Offenders not granted Bail
(Source: Field data, 2020)

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6.5.2 Legal representation

From the data collected the study found that all participants in Group JC had defence lawyers, which represents a hundred per cent. Similarly, all twenty participants in Group VC had engaged lawyers to represent their interests. In Group XJ, ten participants constituting 26.3 per cent indicated that lawyers represented them during their trial, while the remaining twenty-eight participants, constituting 73.6 per cent, had no legal representation. The data set reveals that nine of these twenty-eight participants who had no legal representation were between twelve and fifteen years old and neither understood the court process nor why the court had arrived at its decision. Three of them were incarcerated for two to three years at the correctional centre for breaking and entry, theft and defilement.

The findings do not wholly support the observation by Amnesty International as regards the non-existence of legal representation for juveniles in Ghana[784] and indicate a recent positive development that would improve the juvenile justice system.

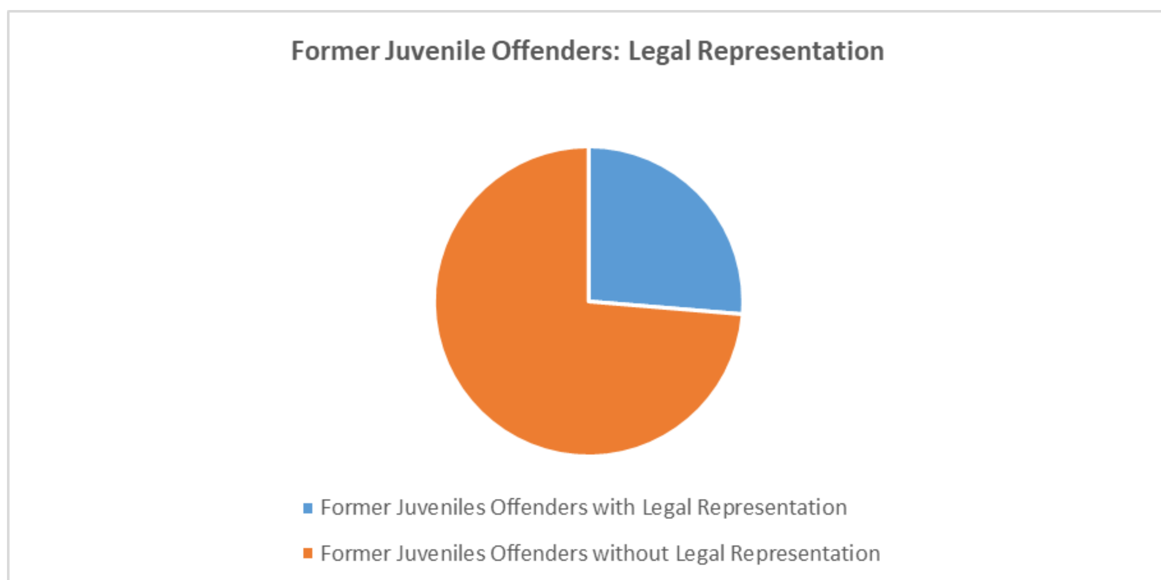

Figure 14: Legal Representation for ex-juvenile Offenders
(Source: Field data, 2020)

[784] This was discussed earlier in paragraph 5.4.1.

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6.5.3 Duration of court hearing

The study found seven participants indicated that their cases had been before the court for more than six months. Out of these seven participants, four were former juvenile offenders, two were juveniles standing trial, and one was a victim of juvenile crime. Seventeen participants indicated their cases had been before the court for three to six months. Eight were victims of juvenile crime, seven were juveniles standing trial, and two were former juvenile offenders. Fifty-two participants indicated their cases had been before the court for less than three months. Thirty-two of these participants were former juvenile offenders; eleven were victims of juvenile crime, while nine were juveniles standing trial.

These delays portray a complete violation of Articles 14 and 19 of the 1992 Constitution and section 33 of the Juvenile Justice Act discussed in Chapter five.[785] Unsurprisingly, 60 per cent of the former juvenile offenders cited 'adjournments and delay' as the cause of their dissatisfaction with the court process. This finding is consistent with the earlier discussed[786] assertion of Ofori-Dua and others[787] that undue delay in accessing justice was the leading complaint of crime victims in the Kumasi Metropolis.

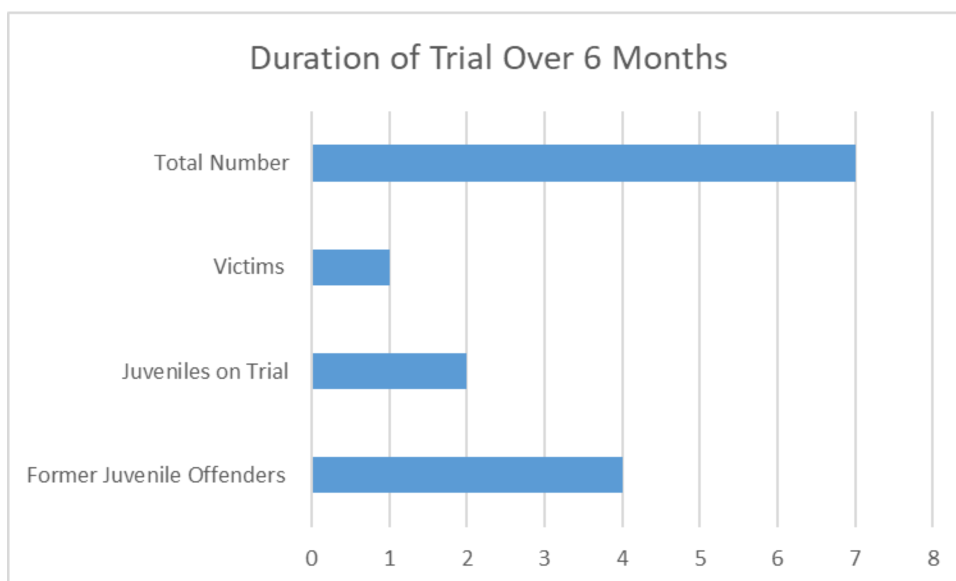

Figure 15: Juvenile Cases in Court for more than six Months
(Source: Field data, 2020)

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[785] Paragraph 5.3.3.
[786] Under paragraph 5.5.3. of this study.
[787] Ofori-Dua, Onzaberigu and Nimako 2019 *J. Victimol. Victim Just.* 127.

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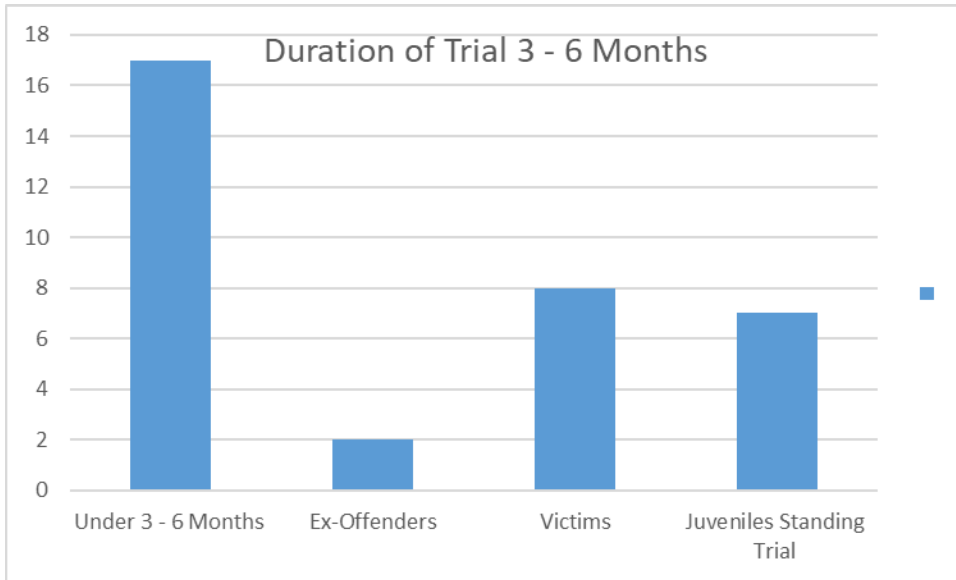

Figure 16: Juvenile Cases in Court for three to six Months
(Source: Field data, 2020)

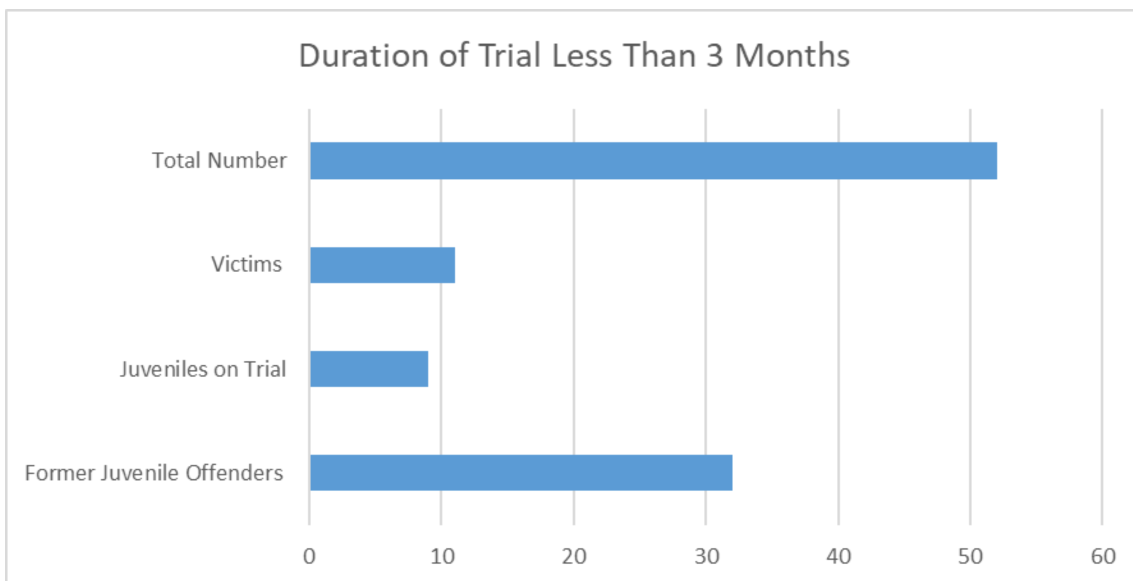

Figure 17: Juvenile Cases in Court for less than three Months
(Source: Field data, 2020)

6.5.4 Court processes

To ascertain participants' impression of the court process, they were asked whether they understood the process and the outcome or possible outcome of their cases.

Out of seventy-six participants, fourteen said that they understood the process. Out of the fourteen, ten were victims of juvenile crime, two were juveniles standing trial, and

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two were former juvenile offenders. The remaining sixty-two indicated that they did not understand the court process. The participants were thirty-six former juvenile offenders, sixteen juveniles standing trial, and ten victims of juvenile crime.

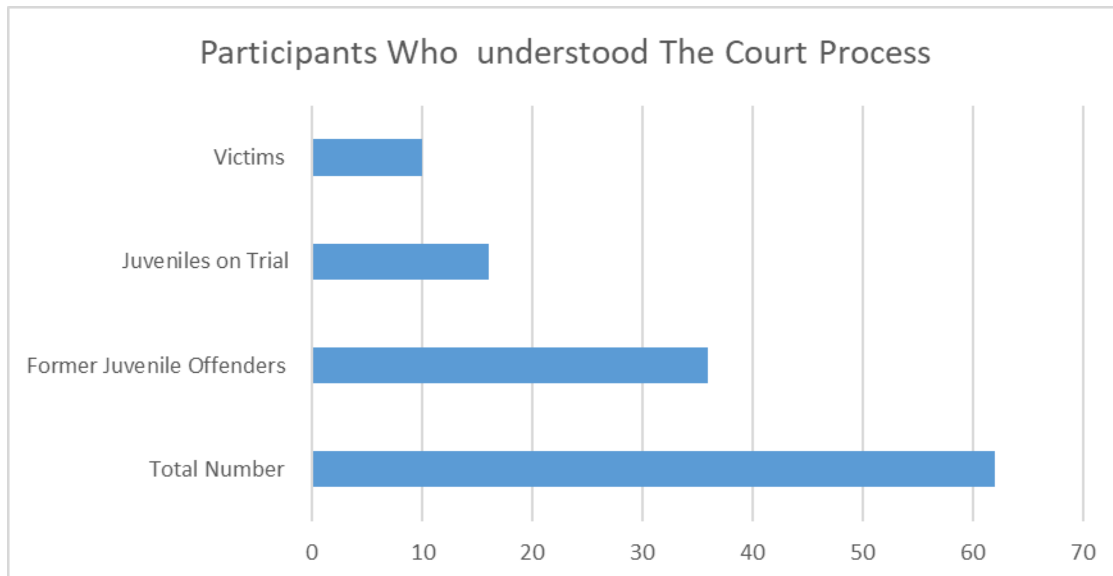

Figure 18: Participants who understood the Court Process
(Source: Field data, 2020)

The study found that sixty-eight participants did not understand outcome or possible outcome of their cases. They were thirty-six former juvenile offenders, sixteen juveniles standing trial, and sixteen victims of juvenile crime. Eight respondents, constituting four victims of crime, two juveniles standing trial, and two former juvenile offenders, said they understood the outcome or possible outcome of their cases.

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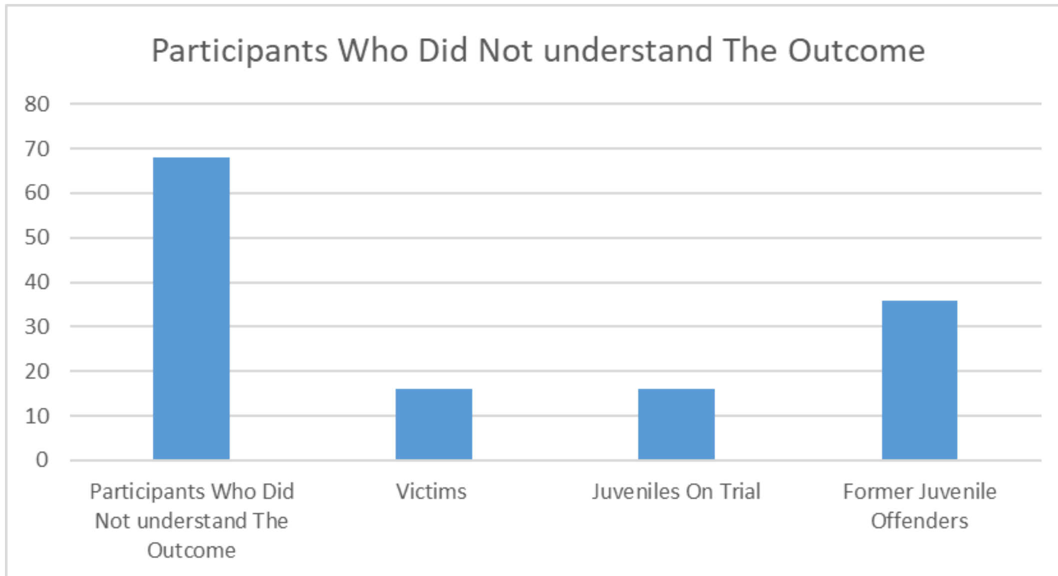

Figure 19: Participants who did not understand Outcome of Cases
(Source: Field data, 2020)

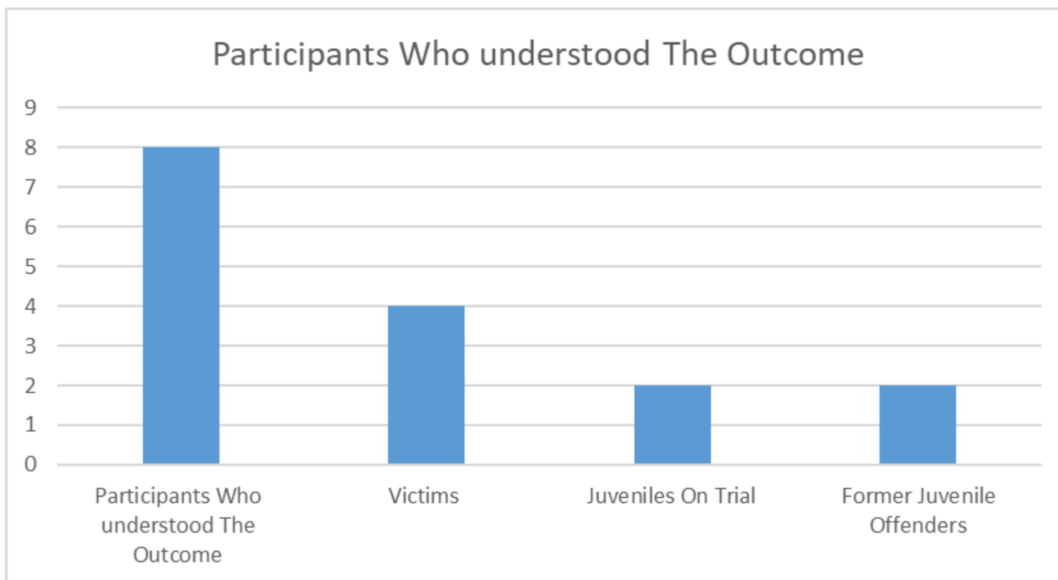

Figure 20: Participants who understood the Outcome
(Source: Field data, 2020)

A range of responses was elicited to answer the question: 'Were you satisfied with the court proceedings?' Thirty of the thirty-eight participants who responded to this question expressed dissatisfaction with the court process. According to six of them, the expenses involved in going to court caused them to be dissatisfied. Adjournments

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and delays were the reasons given by five participants. Unfamiliar court personnel and surroundings were the reason for four participants' dissatisfaction with the court process. Two of them indicated that the complex language of the court caused dissatisfaction. Furthermore, thirteen cited all the reasons mentioned as the cause of their dissatisfaction with the court process.

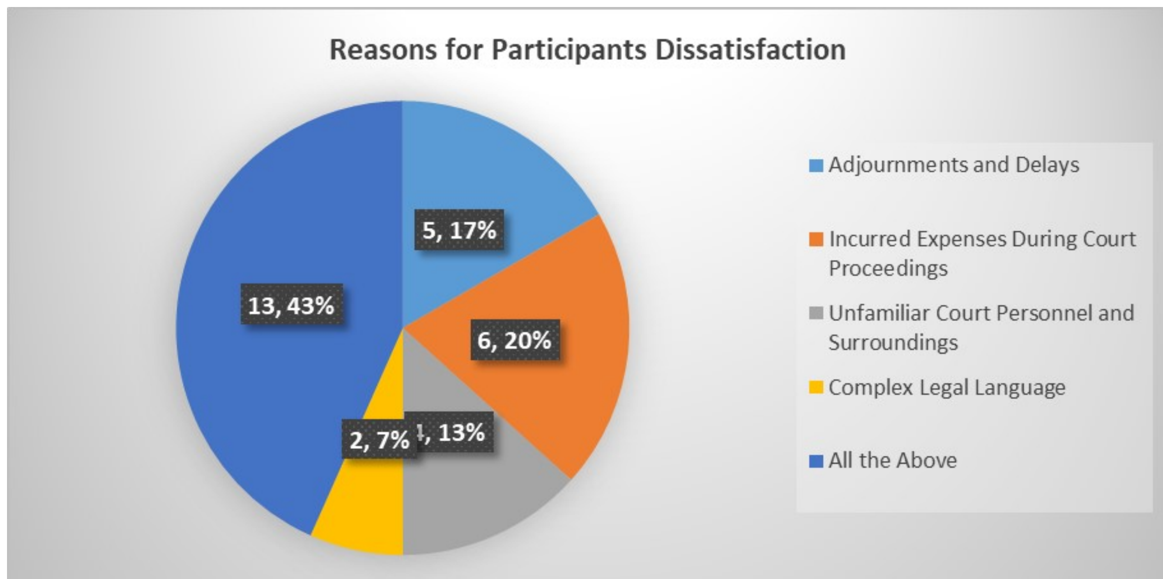

Figure 21: Reasons for Participants' Dissatisfaction
(Source: Field data, 2020)

6.5.5 Detention

According to the data gathered, members of the XJ group detained at the correctional centre had varied impressions of their time in detention. XJ15 said that the officers were very harsh. XJ17, sentenced for breaking and entry, said during his stay at the correctional centre, "I was exposed to illicit drugs." XJ22 said he was shocked to discover gangs in the correctional centre. According to XJ27, thoughts of time spent in the correctional centre following a conviction of assault when he was a teenager make him angry. According to XJ24, "I was exposed to alcohol in the correctional centre." These findings corroborate the assertion made by Aaniazine[788] about the counter-productivity of incarceration, as discussed in the preceding chapter.[789]

[788] Aaniazine *Rehabilitation programmes* 110.
[789] Paragraph 5.4.3.

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The study also found that XJ2 had acquired vocational skills in carpentry during his stay at the correctional centre, and XJ25 said he had learnt to be time-conscious during his stay. XJ18 said his experience at the correctional centre taught him to live a quiet life. XJ10 noted that "I learnt to be courteous at the correctional centre due to the 'do before complain' culture." XJ3 said that he got to know God while at the correctional centre. While XJ12, who spent between one and two years in the correctional centre for the offence of breaking and entry, said: "I learnt how to do hard work to earn a living." These findings corroborate earlier findings by Nyarko et al.,[790] who reported some positive outcomes in correctional homes as discussed earlier under paragraph 5.4.3. of this study.[791]

According to XJ33, family members do not want to associate with him due to his time at the correctional centre. XJ34 and XJ37 expressed similar sentiments. XJ34 said he had lost most of his schoolmates and friends due to incarceration. XJ37 also said, "many people are now avoiding me because of my time in the correctional centre." On this issue, Evolve maintains that:

> Stigma suffered by juveniles is relatively high, and this affects their reintegration efforts into society. Securing a job becomes difficult; hence their financial prospects are dire. In addition, family rejection is a challenge these young people are confronted with.[792]

This finding confirms the assertion made by Glover and others**[793]**, discussed in Chapter 2 of the study,**[794]** that stigma is a repercussion of custody under the juvenile justice welfare system.

The findings also indicate that juveniles and adult offenders are often detained together. XJ36, a former juvenile offender, stated that he had shared a cell with adults while he was on remand in police cells for about two months during the pendency of his trial. Evolve also reported that some juveniles are placed with adults in police cells

[790] Nyarko et al. 2019 *J. Law Policy Glob.* 170.
[791] Page 121.
[792] Appendix F.
[793] Glover et al 2018 *OALibJ.*15.
[794] Paragraph 2.6.

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during arrest and treated alike.[795] These aspects violate their fundamental human rights, as discussed in Chapter 5.[796]

6.6 Impact of customary courts on society

From the findings discussed supra, customary courts contribute to securing the lives and future of children who conflict with the law and children who are victims of crime. This makes the children beneficial to their family, community and the state. As severally mentioned in this study,[797] the formal justice system does not address the needs of victims as adequately as the customary courts do. For example, the requirement that a parent or relative must accompany children before the customary court indicates that the child's rights would be safeguarded. For instance, the presence of a parent or relative would ensure that the child is not intimidated and is confident in accessing justice in unfamiliar territory.

The eagerness exhibited by all the chiefs in the study to participate in rehabilitating children who are in conflict with the law is significant. As earlier mentioned in this study,[798] the chieftaincy institution existed before the advent of colonialism in Ghana[799] and was recognised as the only “principle of legitimacy in local administration.” [800] Therefore, it brings value to the juvenile justice system. A well-structured system of adjudication of cases replete with an appeal procedure outlined above under paragraph 6.4.1 will complement the current juvenile justice system.

Also, the finding on using the local language at the customary courts and the fact that legal representation is proscribed at customary courts[801] makes it easier for child offenders and victims to access justice. Not only do parties understand the proceedings because it is in their native tongue, but the absence of legalese produced by lawyers makes the process easier to understand. The absence of legal representation under the customary system effectively addresses the issue of a lack of available and affordable legal representation that is also reliable and has integrity[802]

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[795] Appendix F.
[796] Paragraph 5.3.4.
[797] Paragraphs 2.3.3; 4.3.1 and 5.4.3.
[798] Paragraph 5.2.
[799] Assanful 2013 *SJASS* 201.
[800] Addo-Fening *Traditional governance* 691.
[801] Paragraph 6.4.1.
[802] UNDP *Access To Justice* 4.

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and prohibitive costs of using the system as barriers to justice discussed earlier in the study.[803] Therefore juveniles and victims who need justice can access it.

As discovered from the findings, custodial sentencing as punishment is absent under the customary court system. The absence of custodial sentencing means juveniles put before the customary court will not be placed in a situation to learn techniques and values from more hard-core criminals while in prisons and, as Aaniazine[804] asserts, graduate from lighter to more severe crimes upon their release.[805] A lack of association with other criminals would also reduce recidivism or reoffending for juveniles. This would make society safer.

The lack of custodial sentencing in customary courts means that juveniles found guilty of an offence in formal or vocational education will not have their schooling disrupted. The findings indicate that some inmates receive vocational training at the correction centre.[806] However, as discussed earlier,[807] most juveniles have their education or are disrupted when placed in correctional centres.[808] This is one of the shortcomings of the formal justice system, which the customary courts can mitigate. The continuous education of children in conflict with the law is vital for their development, and the State, in the long run, would need citizens with relevant skills to contribute to national development.

Again, the lack of non-custodial sentences under customary courts means that costs to the state for running correctional centres can be avoided. Funds used by the state to cater to juveniles in correctional centres, facilities and staffing can be saved and expended on other sectors of the economy.

6.7 Summary and reflections

This chapter presents the findings obtained by means of a graphic and interpretive analysis of the data gathered and the study's objectives are also discussed. The findings reveal an infringement on the rights of juveniles and parties to the crime within

[803] Paragraphs 1.1; 2.2 and 5.3.
[804] Aaniazine *Rehabilitation programmes* 110.
[805] This was discussed earlier in the study under paragraph 5.4.3.
[806] Paragraph 6.5.5.
[807] Paragraph 5.4.3.
[808] Nyarko et al. 2019 *J. Law Policy Glob.* 170.

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the juvenile justice system. While some juveniles were denied bail during their trial, others had their cases in court for more than six months. The findings also revealed that legislation provided for restorative justice within the juvenile justice system; however, parties hardly benefitted from it due to a lack of viable options. The findings also indicate that the Ashanti customary justice system is equipped to deliver restorative justice for juveniles, and participants prefer it to the formal justice system. The next chapter introduces a new paradigm for Ghana's juvenile justice.

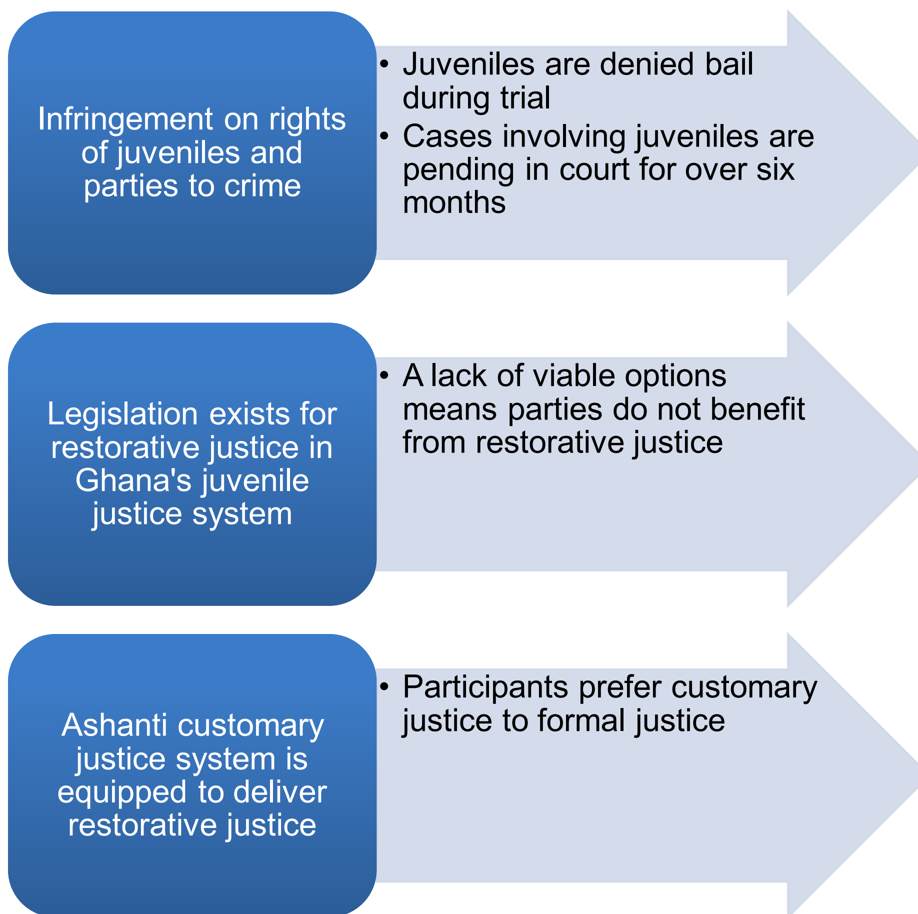

Figure 22: Summary of Findings
(Source: Author's construct 2021)

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CHAPTER SEVEN

PROPOSED RESTORATIVE JUSTICE MODEL FOR JUVENILES IN GHANA

7.1 Introduction

The findings from the research presented in the previous chapter indicate an infringement on the rights of juveniles and parties to the crime that significantly undermines Ghana's juvenile justice system. This study chapter introduces a new restorative justice model for Ghana's juvenile justice system. This model, which is a hybrid between the formal justice system and customary dispute resolution, is thoroughly outlined to operate not as an alternative but as complementary to the existing juvenile justice system of Ghana.

7.2 Ghana's juvenile justice system

Ghana's Juvenile Justice Act established the juvenile justice system and has the objective of protecting juveniles' rights and ensuring an appropriate response to juvenile offenders, as discussed earlier in this study.[809] Therefore, this study outlined Ghana's juvenile justice system to determine whether it upholds fundamental human rights for accused persons as enshrined in the 1992 Constitution.

As seen earlier in this study,[810] articles fourteen, fifteen and nineteen of the 1992 Constitution stipulate values the criminal justice system must uphold. These values are fundamental rights and freedoms of citizens in Ghana, including the inviolability of persons' dignity and ensuring a fair hearing within a reasonable time. It was, therefore, necessary that this study investigate whether the juvenile justice system supports these values.

7.2.1 The welfare principle

As mentioned earlier in the literature review,[811] Ghana's juvenile system is founded on the Juvenile Justice Act, which has the welfare principle as its bedrock. The welfare

[809] Paragraph 5.3.5.
[810] Paragraph 5.3.1.
[811] Paragraph 5.3.1.

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principle stipulates that the best interests of the juvenile are paramount in all matters. Therefore, processes carried out in institutions involved in the administration of juvenile justice must be geared towards ensuring that the best interests of the juvenile are met. As discussed earlier,[812] the welfare principle operates upon the theory that the most appropriate way of handling young offenders is to identify their needs and meet them instead of handing down punishment. However, evidence from the findings indicates that the needs of juveniles and other parties affected by their crime are not being met under Ghana's juvenile justice system.

This study examined the right to a fair hearing within a reasonable time for accused persons as enshrined under the 1992 Constitution and found that an accused person who is arrested, restricted, or detained and not tried within a reasonable period must be released unconditionally or conditionally. Furthermore, as discussed earlier,[813] where proceedings against a juvenile have not been completed in six months, such proceedings must be discontinued. The juvenile is discharged and is not liable for any further proceedings regarding the same offence; therefore, their lives are not disrupted, as they might be acquiring education or a vocation at that point in their lives.

However, a finding that 9% of juvenile respondents in this study were before the court for more than six months,[814] and four of them were subsequently convicted and sent to correctional centres is evidence of failings of the justice system. Despite legal stipulations, delays in the trial of juveniles continue to occur.

The inviolability of the dignity of persons is a fundamental right enshrined under the Constitution. The observance of this right is called into question regarding the detention of juveniles in the justice system. This study discovered that while minor offences are the most common offences juveniles are charged with, detention is the most common outcome of juvenile cases in the juvenile system. This finding indicates a violation of international law such as the 'last resort principle', as discussed earlier in Chapter 5 of this study.[815]

Detention is the most common outcome of juvenile cases, and as discussed earlier,[816] has caused a decline in the rate of juvenile crime in New Zealand. However, it appears

[812] Paragraph 2.5.3.
[813] Paragraph 5.3.3.
[814] Discussed under paragraph 6.5.3.
[815] Paragraph 5.3.4.
[816] Paragraph 2.5.2.

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that in Ghana's case, detention of juveniles exacerbates the challenges of the juvenile justice system, since this study found an increase in juvenile cases going before the courts, even though detention is the most common outcome of juvenile cases.

The study found that juveniles detained in remand homes and correctional centres are idle and become unproductive or receive inappropriate vocational training, confirming Dako-Gyeke and Baffour's[817] assertion that the current correctional system is incapable of reforming offenders, as discussed earlier.[818] This shortcoming of the correctional system is further revealed in the acquisition of bad habits and the inability of former juvenile offenders to reintegrate into society and assume constructive roles. Consequently, the juvenile justice system has engendered the violation of the dignity of the juvenile.

Under the 1992 Constitution[819], juveniles in custody must be separated from adults, but this study discovered that this right is often breached, as juveniles in Ghana are placed in police cells with adults and treated similarly. Therefore, juveniles are at risk of abuse, exploitation and negative influence from adult offenders.

Another significant finding was that the needs of victims of juvenile crime and persons affected by the harm caused by the juvenile are not met under Ghana's juvenile justice system. The only reference to the victim under the Juvenile Justice Act is a description of their role during the diversion of the juvenile from the formal justice system.[820] Also, as discussed in paragraph 5.3.5, the victim's consent to the mediation process is not required. These contribute to the sentiment that the justice system rarely meets victims' needs, as indicated by Skelton[821] and discussed severally in this work.[822]

Consequently, this study's finding that most victims preferred that their juvenile assailants are detained in a correctional facility[823] can be attributed to that sentiment.

An interesting discovery made during this study was that out of the four victims who indicated a preference for compensation from the juvenile, two had suffered the crime of rape while the other two had their phones stolen. Understandably, the payment of

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[817] Dako-Gyeke and Baffour 2016 *J. Offender Rehabil. 242*.
[818] Paragraph 5.4.3.
[819] Article 15 clause 4 of the 1992 Constitution.
[820] Section 26(1) of the Juvenile Justice Act.
[821] Skelton 2007 *Acta Juridica* 242-243.
[822] Paragraphs 2.3.3; 4.3.1 and 5.4.3.
[823] Discussed under paragraph 6.3.3.

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compensation to the victim helps replace what was stolen. However, a preference for compensation by victims of rape is not easy to understand and confirms the complex nature of the needs of victims. This demonstrates the need for a multi-faceted approach to address their needs.

It is important to note that the emotional/psychological state of victims of juvenile crime is an emotive subject, and a certain level of vindictiveness that victims feel towards the offender and their need for retribution ought not to be discounted. However, with the advent of ADR, victims could access justice through arbitration, mediation or negotiation without recourse to the formal courts, and restorative justice could be a means of catharsis for them.

These examples of the failings of the welfare justice model point to one conclusion: the rehabilitation options for children within juvenile correctional institutions are inadequate.[824]

7.2.2. Diversion

With these shortcomings, it is apparent that the juvenile justice system has to adopt approaches to solve juvenile delinquency. One such approach is to avoid juvenile institutionalisation because it is more damaging if young offenders are taken through the criminal justice system. This approach is referred to as diversion, and under the Juvenile Justice Act, the juvenile is removed from the criminal justice system to a restorative justice setting, which allows for a formal or informal caution to be given to the juvenile by a police officer in place of arrest, or ADR mechanisms such as victim-offender mediation to take place under the supervision of a Child Panel.

During the study, it was discovered that magistrates and legal practitioners hardly exercise the option to have the juvenile diverted from the criminal justice system because they have no confidence in the Child Panels. In addition, half of the practitioners reported that cases they had referred to these Child Panels were not settled. This could be attributed to the public's perception that the Child Panels lack the power to enforce their decisions or agreements, as averred by Adu-Gyamfi.[825] The study discovered that practitioners faced a challenge in the diversion exercise: a lack

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[824] Paragraph 2.5.3.
[825] Adu-Gyamfi 2019 *Br. J. Soc. Work* 2067.

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of options. This contrasts with South Africa's Child Justice Act, whose omnibus clause gives the court unrestricted discretion for adopting restorative justice processes for sentencing a child convicted of an offence.[826]

The study found that the Juvenile Justice Act makes no provision for re-establishing the juvenile in society. Diversion options are not only meant to avoid institutionalising the juvenile but to ensure that he/she returns to family life, society or employment after release. In the absence of support from the State, non-governmental organisations play vital roles in preparing inmates for integration into society.

In addition, the study discovered that most juveniles fall outside the scope of diversion and are unable to take advantage of restorative justice and its benefits. This is because serious offences are the most common offences juveniles are charged with before the courts, and the Juvenile Justice Act prohibits the use of diversion for serious offences.[827]

The majority of the magistrates and legal practitioners indicated a preference for restorative justice outcomes as appropriate punishment for juveniles. However, the findings in this study do not indicate that the juvenile justice system has delivered restorative justice effectively as provided for under the Juvenile Justice Act. The finding of a paucity of diversion options in Ghana's juvenile justice system connotes a lack of viable alternatives to juvenile prosecution, and engenders an overreliance on the custodial system with its attendant repercussions. A viable diversion option is required to eliminate these repercussions and make restorative justice effective in Ghana's juvenile justice system.

As discussed earlier in this study,[828] restorative justice is the optimal method to denounce juvenile crime, and it is essential to adopt pragmatic strategies to deliver effectual restorative justice under Ghana's juvenile justice system. Guided by Nabudere and Velthuizen's[829] assertion regarding the appropriateness of traditional structures to complement modern state structures to practice restorative justice,[830] the

[826] 73(1)(c) of the Child Justice Act.
[827] Section 25(2) of the Juvenile Justice Act.
[828] Paragraph 2.3.2.
[829] Nabudere *and Velthuizen Restorative justice in Africa* 83.
[830] Paragraph 5.2.2.

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study explored the feasibility of adopting customary justice practices as a restorative justice model for juveniles in Ghana.

7.3 Customary dispute resolution as a diversion option

Restorative justice and African customary dispute resolution systems are essentially the same. Moreover, as discussed earlier in this study,[831] reconciliation, maintenance and improvement of social relationships are at the nucleus of both systems. The chief's court, which has historically been involved in resolving conflicts, is an appropriate forum for addressing parties' needs in the juvenile justice system.

The customary dispute resolution process at the chief's court has similar characteristics to the formal courts in the judicial system. As outlined under paragraph 6.4.1 of the study, the parties' case is called, evidence is taken from them and their witnesses, and a decision is given that the parties must abide by. A party dissatisfied with the decision may appeal against it. However, the differences between both systems lie in the details. Unlike the formal justice system, which focuses on delivering justice even at the expense of the parties' relationship, the peace and unity of the parties are at the core of customary justice systems. Therefore, all processes are geared towards this end.

Traditional societies have since time immemorial relied on their unique practices and processes to resolve disputes among members of society. The recognition by the 1992 Constitution of customary law as a source of law in Ghana's legal system gives individuals the right to submit their disputes to the chief's court for resolution under their customs and practices. However, criminal matters may be submitted for customary arbitration only upon an order of the court.[832]

Customary dispute resolution systems operate in accordance with the principles of reconciliation, maintenance and improvement of social relationships. Its relational and negotiable attributes described by Ubink,[833] coupled with a flexible approach in the proceedings that involve children at the chief's court, make it an appropriate medium for creating an effective juvenile justice system. The lack of copious substantive and

[831] Paragraph 2.4.4.
[832] Discussed under paragraphs 5.4.2 and 6.4.2.
[833] Ubink 2018 *Dev. Change* 934.

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procedural rules, as well as complex legalese and the proceedings being conducted in the native language means that customary justice is accessible by more people.

Customary justice systems have handled all types of crimes, based on their customs and practices. They have been relied on to denounce crimes committed by young persons in Uganda. Under those circumstances, perpetrators of violent conflict and gruesome acts who are reconciled to their victims and reintegrated with their communities are primarily children.[834] Customary justice systems could utilise the same skills for dealing with juveniles involved in all kinds of offences, thereby achieving restorative justice outcomes.

Sanctions imposed under customary justice systems are meaningful and purposive. As already mentioned in this study,[835] in prehistoric Ashanti practices, the severity of an offence determined the punishment meted out, such as ostracism, stigma, ridicule, fines, trial by ordeal, banishment or capital punishment.[836] The findings of this study revealed that the punishments of the chiefs' courts today are in the form of fines, compensation, apology, shaming and counselling.

Conspicuously absent punishments include capital punishment, banishment and trial by ordeal. Such forms of punishment are anathema to juvenile justice systems' goals and underlying principles. The non-existence of such forms of punishment under customary justice systems today places traditional courts in good stead to contribute meaningfully to achieving juvenile justice in Ghana.

The customary justice process addresses the needs of parties affected by a crime committed by a juvenile, including an appropriate sanction. The findings from the study indicate that the payment of fines and compensation are the most prevalent forms of sanction imposed by the traditional courts, who often hand down an order for compensation to be paid to the victim for the injury or loss they may have suffered. This finding is consistent with the assertion by Ayittey[837] that a fundamental principle that African communities relied on to maintain peace was the correction of wrongdoing

[834] Macdonald 2017 *J. East. Afr.* 630.
[835] Paragraph 5.4.1.
[836] Rattray *Ashanti law and constitution* 373.
[837] Ayittey *African institutions*.

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through compensation, rather than punishment, except in serious offenses such as murder.

Sometimes, the order of compensation is in addition to the payment of costs as a result of the assailant's wrongful conduct. The payment of compensation also addresses the needs of victims who, as discussed in this study,[838] often feel that they are left to fend for themselves with little or no support from the State, while the offender is protected at the expense of the State.[839] The rationale for compensation is to recognize and pacify the victim for the loss or suffering endured, and punish the offender by compelling him to part with his resources.

The findings also indicate that shaming is a punishment for wrongdoing among members under the customary justice system. Shame or stigma is expected to follow a rebuke from the chief and elders since it is given openly. The offender is expected to desist from such wrongful conduct, and other like-minded individuals will also be deterred from such behaviour. These findings confirm earlier writings by Rattray[840] and mentioned earlier in this study,[841] that ridicule was a form of punishment under the Ashanti customary system. As a homogeneous community, shaming and stigmatizing from ridicule operated as an effective social control tool, and their potency can be deduced from this Twi idiom: '*animguaseƐ ne fƐreƐ deƐ, fanyinam owuo*', and translated to mean 'I would rather die than be disgraced.' This idiom reflects how dreadful the punishment of shame or stigma is viewed under the customary justice system.

Under customary justice processes, community reintegration of offenders is ensured as they address the needs of all the parties. Offenders are made accountable for their actions by means of appropriate punishment, and victims receive reparation. Therefore, customary justice processes could be combined with the formal juvenile justice system to assist children in conflict with the law as well as the persons affected by their actions.

838 Paragraphs 2.3.3 and 5.3.5.
839 Qudder 2015 *Eur. Sci. J.* 306.
840 Rattray *Ashanti law and constitution* 373.
841 Paragraph 5.4.1.

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7.4 The hybrid restorative justice model

The proposed hybrid restorative justice model merges the formal justice system with customary dispute resolution mechanisms to address the challenges of Ghana's juvenile justice system discussed in the immediately preceding paragraphs of this chapter. In this model, cases involving juveniles will be referred to the chief's court for resolution in accordance with their customs and practices. The nature of the offence would determine whether a referral can be made to the customary justice setting and whose responsibility it would be to make such a referral. A juvenile commits a minor offence, and law enforcement agencies refer them to a customary justice setting. Where the juvenile is not referred to a customary justice setting, he/she must be arraigned before the court in terms of the provisions of the Juvenile Justice Act.

Details of the referral, such as the biographical details of the juvenile and victims, offence committed, and the customary justice setting the referral was made to, are documented and filed at the court. The content of the documentation is relevant to ensure proper management of the juvenile and the persons affected by the crime, by means of supervision of the process and collection of accurate data.

Minor offences brought to the court should be referred to the customary justice setting to resolve the juvenile's arraignment. However, in exceptional cases where the judge decides not to make such a referral to divert the juvenile from the formal justice system, he/she must record the reasons for such a decision. The decision to refer a serious offence to a customary court for resolution is at the discretion of the judge, who must record his/her reason for diverting the juvenile from the formal justice system.

In the case of a serious offence, a referral to a traditional justice setting may be made only by a court of competent jurisdiction. This would require that a juvenile suspected of committing a serious offence under the Juvenile Justice Act be arraigned before the juvenile court and referred to a customary justice setting upon the court's orders. The court may make such an order in place of prosecution, or as an alternative to sentencing where parties have given evidence and a verdict was arrived at by the court.

Before an order to divert the juvenile from the court is made, the judge shall be required to seek the victim's consent to participate in the restorative justice process. Decisions

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made by the court to divert the juvenile from the formal justice system or not could be appealed by either the juvenile or the victim. An order to divert the juvenile to a restorative justice setting shall include a time frame within which the customary court must conclude the customary arbitration process and report back to the court.

The juvenile undergoes customary arbitration at the chief's court, essentially a restorative justice process. To ensure the effectiveness of the process, the formal court has supervisory jurisdiction over the process at the chief's court. Upon completion of the restorative process, a report must be submitted to the court, detailing the outcome of the proceedings. The court will be vested with the authority to amend, confirm or substitute the recommendations in the report.

Measures must be put in place to address shortcomings of the customary justice systems identified in the study. The supervisory jurisdiction retained by the court is to ensure the observance of procedural safeguards, which are not always present in customary justice settings. For instance, the absence of legal representation for parties under the customary justice system should not occasion injustice to parties. Also, chiefs and their personnel will be equipped with fundamental legal training and logistics to help them deal effectively with crime. Again, decisions from the chief’s court could be appealed against in the formal courts.

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7.5 A comparison between the current juvenile justice system and the proposed model

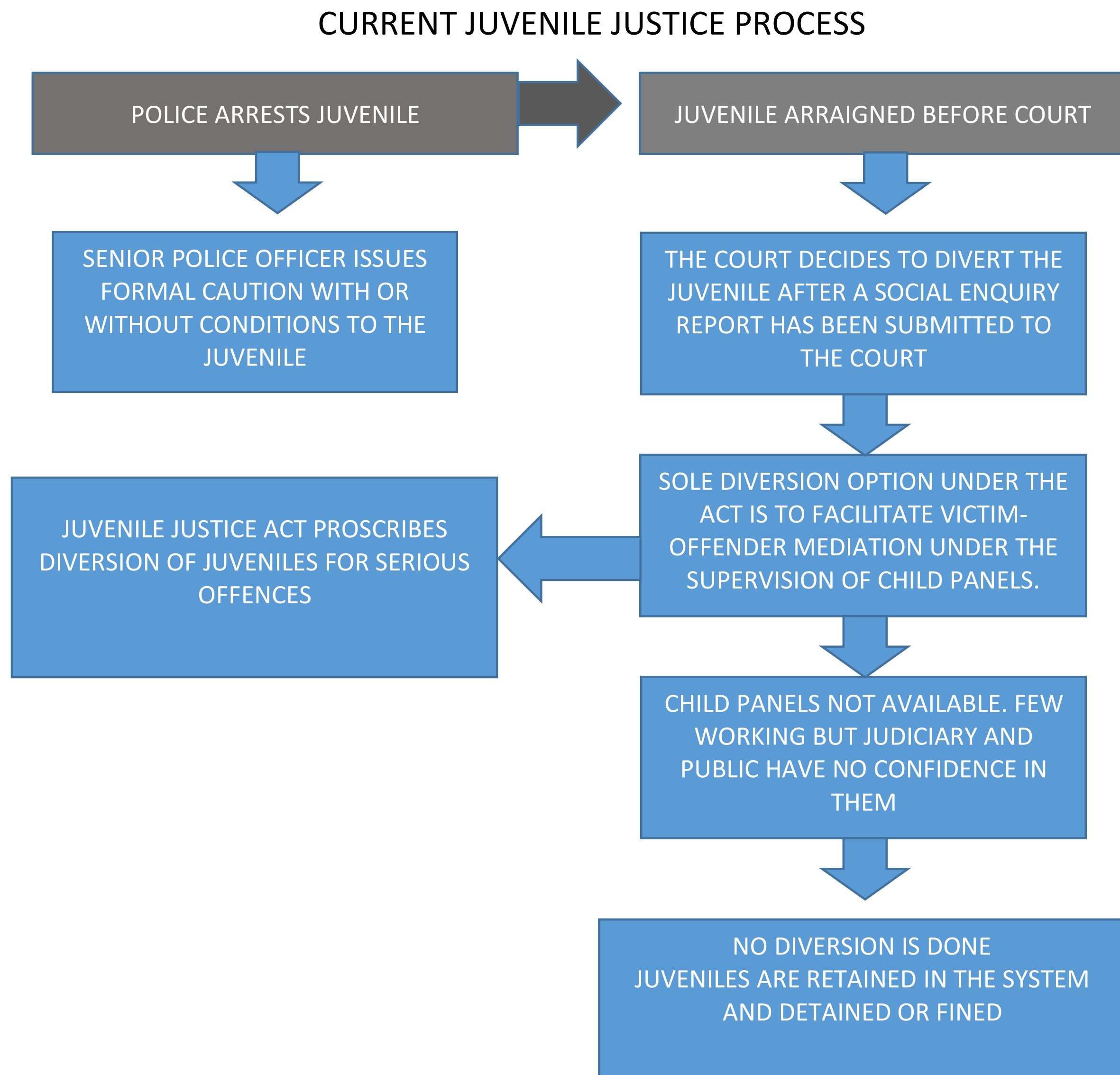

Figure 23: Current Juvenile Justice Process
(Source: Author's construct 2021)

The process that a juvenile goes through in Ghana's juvenile justice system is outlined in the diagram above. A juvenile who commits an offence is arrested by the police who issues a formal caution with or without conditions. The caution given as an alternative to prosecution is one of the stages in the criminal justice process where restorative

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justice initiatives can operate. Conditions given to the juvenile include a verbal or written apology to the victim, parents or family; or some reparation is determined. All these are restorative justice initiatives as well. However, serious offences are proscribed from diversion from the justice system, therefore they may be referred to the juvenile court. The court has the discretion to divert juveniles in cases involving minor offences from the formal justice system.

Under the law, juveniles may only be diverted to Child Panels for victim-offender mediation. However, there are no avenues for diversion because only a few functioning Child Panels exist, therefore the cases have to be heard by the courts, and the juveniles are either detained in correctional centres or fined. Hardly any rehabilitation takes place at the detention centres, and instead, the juveniles could acquire bad habits from others. In addition, fines imposed by the courts are often borne by parents or relatives. Therefore, the juvenile justice system hardly contributes to the rehabilitation of the juvenile.

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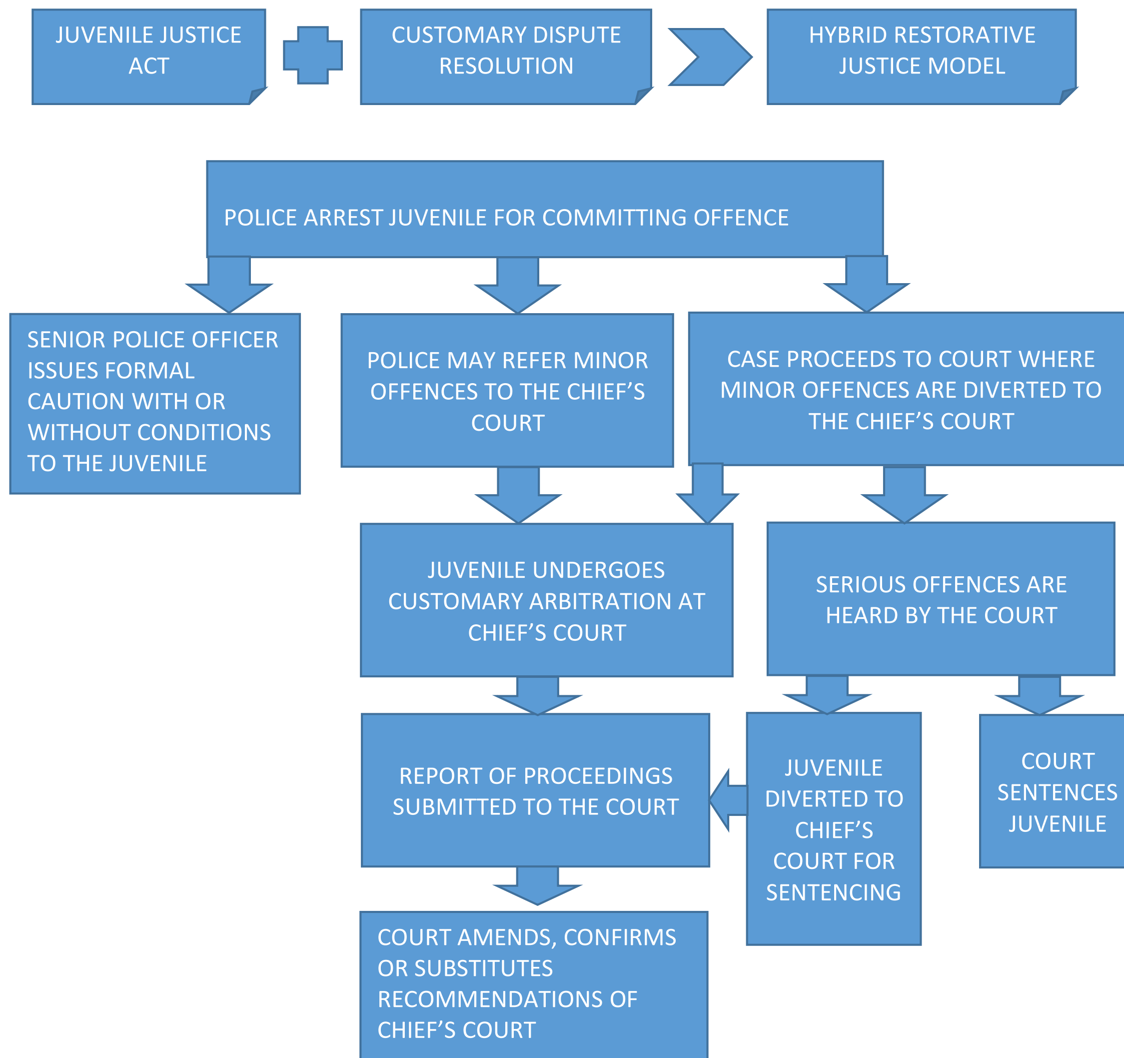

Figure 24: Hybrid Restorative Justice Model
(Source: Author's construct 2021)

This diagram outlines the juvenile justice process under the proposed hybrid restorative justice model. This model merges provisions under the Juvenile Justice Act with customary dispute resolution. In this system, the police officer may refer the juvenile to the chief's court if the offence committed was minor. However, the victim must consent to the referral, evidenced in writing. Notice of the referral and basic details of the juvenile and victim must be filed with the court by the police officer to

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ensure effective monitoring of the process. The offending juvenile undergoes customary arbitration at the chief's court, essentially a restorative justice process.

The juvenile arraigned before the court may also be referred to the chief's court in place of prosecution or as an alternative to sentencing after evidence has been taken from the parties and a verdict arrived at by the court. An order to divert the juvenile to a restorative justice setting shall include a time frame within which the customary court must conclude the customary arbitration process and report back to the court. The chief's court decisions are submitted to the juvenile court to be amended, substituted or confirmed in exercising its (juvenile court's) supervisory powers. This ensures that due process has been followed and that the parties' rights have been upheld. This hybrid juvenile justice process has the potential to rehabilitate the juvenile, address the needs of victims and persons affected by the crime, and reintegrate the juvenile into society.

7.6 Summary and reflections

This chapter examines the welfare principle of Ghana's Juvenile Justice Act in terms of available literature and research findings. The implication of the inclusion of the juveniles' fundamental human rights, such as the right to a fair hearing within a reasonable time and separation of juveniles from adults in detention, indicates that the juvenile justice system does not uphold the welfare principle. The inability of the system to address the needs of victims, as well as the parties affected by the crime, are painful examples of the failings of the welfare justice model. The rehabilitation options for children in the juvenile correctional institutions are inadequate, therefore there is a need for a viable restorative justice approach in the juvenile justice system, and customary justice systems are best suited to provide such options. Customary justice systems are effective in managing conflict and its aftermath, therefore a hybrid restorative justice model that merges the formal justice system with customary dispute resolution mechanisms is proposed with which to address the challenges of Ghana's juvenile justice system.

The next chapter provides a summary of the main findings, principal themes, and suggestions for advocacy and action are provided in the next chapter, which is the final aspect of this study.

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CHAPTER EIGHT

CONCLUSIONS AND RECOMMENDATIONS

8.1 Introduction

This final chapter of the study features a general overview of the study's findings and recommendations. The findings and implications of this study are aligned with the objectives of this research, and recommendations for advocacy, action and further research are discussed here. The chapter ends with the conclusions derived from the findings of the work.

8.2 Objectives

At the commencement of this study, the researcher identified the problem of an increasing rate of juvenile crime in Ghana[842] and the inability of the formal criminal justice system to resolve the concomitant repercussions for society effectively,[843] and attempted to confirm the perception by means of empirical research. The researcher also explored the feasibility of utilising emerging global restorative justice practices to augment the formal court system in order to curb juvenile delinquency. The researcher postulated that introducing restorative justice into Ghana’s criminal justice system through traditional rulers as adjudicators or mediators would significantly decrease juvenile delinquency and engender satisfaction in the community. The researcher proposed to carry out research geared towards exploring the possibility of utilising the strengths of ADR in the form of customary dispute resolution mechanisms to improve Ghana’s criminal justice system for the benefit of all the parties with a stake in the offence committed, namely the young offender, the victim and the community.

The following research objectives were achieved:

8.2.1 Objective one: Juveniles' human rights as enshrined under the 1992 Constitution.

The 1992 Constitution contains and stipulates the fundamental rights and freedom of citizens in Ghana and the values that the criminal justice system must uphold. These values include a fair hearing within a reasonable time, the inviolability of persons'

[842] Paragraph 1.3.
[843] Paragraph 5.5.

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dignity, and the separation of juveniles in custody from adults. In this study, the state of the juvenile justice system was explored in light of the stated values. The study discovered that the juvenile justice system is premised on the welfare principle, which requires that the juvenile's best interests be the primary consideration in any matter concerned with a juvenile. The system relies on institutions such as courts and correctional centres to protect and help young persons, and suppress criminal conduct among them

An examination of the right to a fair hearing within a reasonable time for accused persons, as enshrined under the 1992 Constitution, found that an accused person who is arrested, restricted or detained and not tried within a reasonable period must be released unconditionally or conditionally. Furthermore, in terms of the Juvenile Justice Act, where proceedings against a juvenile have not been completed in six months, such proceedings shall be discontinued and the juvenile discharged. However, evidence from the research indicated that despite these legal stipulations, delays in the trial of juveniles continue to occur.[844]

One of the fundamental provisions of the 1992 Constitution is the right of accused persons to legal representation of their choice. This study discovered that most juveniles and victims of juvenile crime had legal representation during the pendency of their trial. This discovery contradicts the assertion by Amnesty International[845] that legal representation is almost non-existent for adults and juveniles in the criminal justice system in Ghana. The existence of legal representation for juveniles and victims of juvenile crime is a positive development with far-reaching benefits for Ghana's juvenile justice system.

The inviolability of the dignity of persons is a fundamental right enshrined in the Constitution, yet its observance is doubtful with regard to the detention of juveniles in the justice system. This study discovered that minor offences are the most common offences juveniles are charged with, yet detention is the most common outcome of juvenile cases in the juvenile system. This finding defies principles of international law such as the 'last resort principle,' discussed in paragraph 5.3.4 above.

[844] Paragraph 6.5.3.
[845] Amnesty International
https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF.
(Date of use: 6 January 2020).

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Detention is a common outcome of juvenile cases in Ghana, yet it exacerbates the challenges of the juvenile justice system, as this study found an increase in juvenile cases before the courts. The study found that the detention of juveniles in remand homes and correctional centres has both positive and negative outcomes for juvenile offenders. The assertion by Dako-Gyeke and Baffour,[846] discussed in paragraph 5.4.3, that the current correctional system is incapable of reforming offenders was confirmed by this study's findings that children in custody are often idle or receive vocational training that is unsuitable. This shortcoming of the correctional system is further revealed in the inability of former juvenile offenders to reintegrate into society and assume constructive roles upon their release. Consequently, the juvenile justice system has contributed significantly to the violation of the dignity of the juvenile.

A fundamental human right of juveniles in custody under the 1992 Constitution of Ghana is separation from adults.[847] This right agrees with international law principles and ensures that juveniles are protected from abuse, exploitation and negative influence from adult offenders. This study discovered that this right is often breached, as juveniles are placed in police cells with adults and treated similarly.[848]

In view of all these shortcomings, it is apparent that the juvenile justice system has to adopt approaches that would mitigate juvenile delinquency. One such approach is to avoid juvenile institutionalisation because it is more damaging if young offenders are taken through the criminal justice system.[849] This approach is referred to as diversion, and under the Juvenile Justice Act, juveniles can be diverted from prosecution to mediation under the supervision of Child Panels.[850] This mediation between the juvenile and the victim indicates restorative justice in the juvenile justice system.

The study also discovered that the Juvenile Justice Act does not meet the needs of victims of juvenile crime and the community affected by the harm caused by the juvenile. As discussed in paragraph 7.2.1, there is a sole reference to the victim under the Act. Unlike in South Africa,[851] where family group conferences and victim-offender mediation can occur only with the consent of the victim and the child offender, the

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[846] Dako-Gyeke and Baffour 2016 *J. Offender Rehabil. 242*.
[847] Discussed under paragraph 5.3.4.
[848] Discussed under paragraph 6.5.5.
[849] Penal Reform International https://cdn.penalreform.org/wp-content/uploads/2013/06/rep-ga7-2005-pilot-phase-en_0.pdf. (Date of use: 16 June 2022).
[850] Discussed earlier in the study under paragraphs 5.3.1 and 5.4.2.
[851] Sections 61(1)(b); 62(1)(b) of the Child Justice Act.

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victim's consent under Ghana's juvenile justice system is not obtained before the matter is referred for mediation. These factors contribute to the sentiment that victims are left to fend for themselves with little or no support from the State, while offenders are protected at the expense of the State.

Consequently, the finding of this study that a majority of victims preferred that their juvenile assailants be detained in a correctional facility[852] can be attributed to that sentiment. This is in contrast to findings by Parimah et al.,[853] who reported that most participants in their study advocated that some offenders should be given community service instead of custodial sentences, and by Ofori-Dua et al. [854] The latter also reported an increase in the call for community rehabilitation for criminal sanctions instead of custody.

8.2.2 Objective two: ADR mechanisms in the juvenile justice system

The juvenile justice system provides for the removal of the juvenile from the criminal justice system to a restorative justice setting. The removal allows for a formal or informal caution to be given to the juvenile by a police officer in place of arrest, or ADR mechanisms such as victim-offender mediation to take place under the supervision of a Child Panel.

The study discovered that magistrates and legal practitioners hardly ever divert[855] juveniles from the criminal justice system, primarily due to a lack of viable diversion alternatives and because they have no confidence in the Child Panels. This could be attributable to the public's perception that the Child Panels lack the power to enforce their decisions or agreements, as stated by Adu-Gyamfi.[856] This contrasts with South Africa's Child Justice Act, whose omnibus clause gives the court unrestricted discretion for adopting restorative justice processes to sentencing a child convicted of an offence.[857]

The study found that the Juvenile Justice Act contains no provisions for re-establishing the juvenile into society.[858] In the absence of support from the State, non-

[852] Discussed under paragraph 6.3.3.
[853] Parimah, Osafo and Nyarko 2016 *ICPS* 55.
[854] Paragraph 2.3.3.
[855] Reported under paragraph 6.3.2.
[856] Adu-Gyamfi 2019 *Br. J. Soc. Work* 2067.
[857] 73(1)(c) of the Child Justice Act.
[858] Discussed under paragraph 6.3.6.

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governmental organisations play vital roles in preparing inmates for integration into society. These roles include teaching them skills in business management and providing working tools and capital to inmates upon their release.

The research revealed that both minor and serious offences among juveniles are increasing. However, under the Juvenile Justice Act, only minor offences may be referred to Child Panels empowered to assist with victim-offender mediation. Therefore, many juveniles cannot access restorative justice and its benefits because they have been charged with a serious offence, unlike what pertains to South Africa's Child Justice Act discussed in paragraph 4.5.1. The study found that most of the other participants indicated a desire for mediation between the offender and victim in the juvenile justice system for all types of offences, as indicated by Teye.[859]

Victims of juvenile crime are essential stakeholders in the juvenile justice system, and their perceptions of restorative justice are a necessary aspect of the discourse. This study discovered that an overwhelming majority of the victims suggested detention in a correctional facility as a fitting punishment for the juvenile.[860] However, most magistrates and legal practitioners preferred restorative justice outcomes as appropriate punishment for juveniles.[861] Nevertheless, they were unsure whether institutions such as the police and social welfare departments could embark on meaningful restorative justice approaches.

The findings in this study do not indicate that the juvenile justice system has delivered restorative justice effectively as stipulated in the Juvenile Justice Act. The discovery that legal practitioners, some of whom were state attorneys who prosecute criminal cases on behalf of the State, were not familiar with diversion is an indication of the state of restorative justice in Ghana's juvenile justice system. Again, the finding that half of the victims did not want to meet their juvenile assailant as part of the restorative justice process implies that they are unaware of the benefits of restorative justice.

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[859] Teye *Prisoner social reintegration* 122.
[860] Discussed under paragraph 6.3.3.
[861] Reported under paragraph 6.3.4.

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8.2.3 Objective three: Integration of customary dispute resolution practices and processes with Ghana's juvenile justice system.

Since time immemorial, traditional societies have relied on their unique practices and processes to resolve disputes among members of society. The study found that under the laws of Ghana, proceedings at the chief's courts are considered customary arbitration.[862] The 1992 Constitution recognizes customary law as a source of law in Ghana's legal system, therefore individuals have a right to submit their disputes to the chief's court for resolution in keeping with their customs and practices. However, criminal matters may be offered for customary arbitration only upon an order of the court.[863]

The relational and negotiable attributes of customary law described by Ubink[864] are evident in the flexible approach to proceedings that involve children at the chief's court, as found by this study. Customary dispute resolution systems operate under the same principles of reconciliation, maintenance and improvement of social relationships as restorative justice. The study findings indicate that what happens in the chief's court is more mediation than adjudication, and the role the chief plays is more that of a mediator than a judge. This finding forms the basis for the proposition that the customary system would be an appropriate medium for providing an effective juvenile justice system.

The customary dispute resolution system faces some criticisms that could undermine its potential to contribute meaningfully to solving the societal problem of juvenile delinquency. These criticisms refer to the outmoded local customs and practices and the violation of certain fundamental human rights. Participants indicated that several laws and customs were outmoded, as chiefs had not modernised their systems. The study discovered that chiefs who were the repositories of local customs and practices were aware that customary justice systems could not remain static and they were amenable to change. This admission by the chiefs indicates their willingness to adapt to society's evolving needs and reduces the threat of applying local customs and practices that are outmoded and not relevant.

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[862] Discussed under paragraphs 5.3 and 6.4.1.
[863] Discussed under paragraph 5.4.2 and 6.4.2.
[864] Ubink 2018 *Dev. Change* 934.

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Another criticism against customary dispute resolution systems is that fundamental rights such as privacy, fair hearing, legal representation and appeal could not be guaranteed.[865] The right to privacy in a criminal trial implies a right to have the individual's identity kept from the public. Still, in the customary justice setting it is believed that trials are held publicly. The study found that customary court sessions are held in public to educate community members on the norms and values of society, and to deter like-minded individuals from engaging in unacceptable conduct, based on the individual's shame while undergoing a public trial. However, not all matters were heard openly as marital issues were not made public. This indicates that juveniles placed in this forum might not have their cases heard openly.

The right to a fair hearing is enshrined in Article 19 of the Constitution,[866] and it implies that parties can tell their side of the story and question the other party and their witnesses. However, this study discovered that an approach to customary dispute resolution is to 'let sleeping dogs lie,' where parties must refrain from giving evidence and accept the opinion or judgement of the adjudicator or mediator.[867] This approach is employed under various circumstances. For instance, when the dispute is among family members, the method encourages an amicable settlement by avoiding a guilty verdict. This is evidence that unity and reconciliation are the bedrock of the customary justice system. The study discovered that this approach is not employed when the issue is a criminal one, therefore a juvenile who appears before the chief's court is assured of a fair hearing.

A finding of this study was the absence of legal representation in the customary dispute resolution system, which has been alluded to by Oomen.[868] The lack of extensive substantive and procedural rules in the customary dispute resolution system, the absence of complex legal language, and carrying out proceedings in the native language eliminate the need for legal representation at these fora. However, parties are allowed to have a power of attorney, and the chief's court does hear petitions from lawyers after the case has been decided and the lawyer has received the records of the proceedings. Moreover, in the case of children, parents or guardians are required

[865] Discussed under paragraph 6.4.5.
[866] Discussed under paragraph 5.4.1.
[867] Discussed under paragraph 6.4.1.
[868] Oomen *Traditional dispute resolution mechanisms* 183.

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to represent their children at the Chief's court. These findings ensure that the absence of lawyers does not result in injustice to the parties.

The study also found that the Ashanti customary courts were hierarchical,[869] therefore, a party dissatisfied with the outcome of his/her case had the right to appeal to the court higher than the one where his/her case had been heard. An appeal could also be made to the formal courts after a decision of the chief's court. Furthermore, just as in the formal court system, the chief's court could re-hear a case where new evidence has emerged. These findings indicate that the right to appeal is guaranteed under the customary justice system.

In view of the above-mentioned information, the chief's court, which has historically been involved in resolving conflicts, continues to be an appropriate forum for addressing the needs of parties in the juvenile justice system.

The study indicates that the chiefs would like to be involved in the administration of juvenile justice, and most legal practitioners concurred. This finding confirms Teye's[870] report on an interest in the involvement of chiefs in the administration of justice, as discussed in paragraph 5.4.3 of this study. The reasons cited by the legal practitioners were that the process before the chief's court was faster than the formal courts, the use of local language made the system more accessible, and the system was reliable.

The magistrates and victims indicated that chiefs should not be involved in the administration of juvenile justice. The magistrates cited no reasons for their opinions. A plausible explanation for the victims' response could be the power and force that the justice system's courts wield, as well as reservations about the customary justice system and the people at the helm of affairs. Findings from the study indicate that the chiefs are aware of the limitations of the customary justice system and are prepared to mitigate its impact on the delivery of justice in their courts.

[869] Discussed severally under paragraphs 5.2; 5.4.1 and 6.4.1.
[870] Teye *Prisoner social reintegration* 106.

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8.3 Principal findings of research as contribution to knowledge

- The researcher carried out a comprehensive review of available literature in the subject area, and it was discovered that literature is limited and that there is a lack of reliable scholarly work on the praxis of restorative justice under Ghana's Juvenile Justice Act and the resolution of cases of juvenile crime by means of customary dispute resolution mechanisms. Results of this study fill that gap, thereby contributing to the existing body of knowledge.

- While there are several studies on juvenile delinquency and recidivism in Ghana, most of these studies focus on the causes and effects of juvenile delinquency on juveniles and society in general, and propose measures to mitigate them. This study differs from all these other studies. It endeavours to examine a number of practical and realistic ways of reducing the incidence of juvenile delinquency in Ghana in view of the success of restorative justice practices adopted in other jurisdictions by utilising customary institutions and practices.

- This research serves as an easy reference for scholars interested in acquiring knowledge of legislation on restorative justice for juveniles in Ghana. It analyses the available legislation and international conventions that have a bearing on the juvenile justice system in Ghana.

8.4 Recommendations for advocacy and action

The findings from this study indicate that ADR, especially customary dispute resolution, could contribute to solving the societal problem of juvenile delinquency in Ghana, therefore the following recommendations could enhance delivery of justice by the juvenile justice system.

8.4.1. Engendering community members' satisfaction with the juvenile justice system

a. Amendment of the Juvenile Justice Act by a repeal of the provision that proscribes diversion for serious offences

In terms of the Juvenile Justice Act, juveniles charged with serious offences cannot be diverted from the criminal justice system to restorative justice settings by either the

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court or the police. This provision deprives victims, juveniles and community members affected by the offence of the opportunity to access restorative justice, which would heal the victim, make the offender accountable, and bring the community together.

An amendment to that section of the Act would give juveniles charged with serious offences the opportunity to be diverted from the formal criminal justice system to restorative justice settings so that they and their victims could avail themselves of all the benefits that restorative justice has to offer.

b. Policy formulation of programmes undertaken at the detention centre

Admittedly, some juveniles have to be detained, due to the nature of the offences they committed and for their own benefit. It is therefore essential to formulate a policy to ensure that inmates receive some form of education or training, irrespective of the duration of their detention. Such policy would ensure that time spent in detention by juveniles is used productively in the acquisition of the relevant skills and education to broaden their options and enhance their employability.

c. Establishment of a scheme to promote employment of former inmates of correctional centres by the government

Under the scheme, the Ministry of Youth and Sports, through its agencies such as the National Youth Employment Programme and the Youth Employment Authority, would reserve a quota of their roles for former inmates of correctional centres. Provision of employment for juveniles would guarantee desistance from crime as former juvenile offenders receive gainful employment, and eradicate or significantly reduce their penchant to rely on crime as a means of livelihood.

In addition, the government would put in place tax relief policies such as tax holidays for companies in the private sector enrolled in the scheme. Again, the government would offer support in the form of grants and loans to former inmates of correctional centres desirous of setting up a business based on the skills acquired during the period of detention. Such support would be accessible through a fund set up under the scheme.

d. The Juvenile Justice Act has to be amended to include provisions for re-establishing the juvenile in society after a period of detention

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To ensure that the juvenile re-integrates into the community after a period of detention, the principal Act that legislates juvenile justice in Ghana must have mandatory provisions for probation and parole to prepare inmates for integration into society. These provisions would prepare the inmate for gradual assimilation into society and offer counselling to mentally and emotionally prepare them for the stigma and rejection they are likely to face from family and friends upon their release. The inmates would receive direction for earning a livelihood based on their skill set. All these measures would ensure that the juvenile does not become a recidivist due to rejection from family or friends, or for survival.

e. Restorative justice and its impact on the juvenile justice system and society should be of public interest

Civic education is necessary to create awareness among the public regarding the plight of the juvenile and the victim under the juvenile justice system. Moreover, the benefits of restorative justice must be publicised to encourage more people to partake in restorative justice processes and procedures.

f. Continuous legal education for members of the bench and bar must have restorative justice as a focal area for juveniles

While the introduction of ADR into legal training in Ghana may have contributed to the development of ADR in Ghana, the awareness and effective professional practice of restorative justice by members of the legal fraternity are not widespread. This state of affairs has to be remedied to ensure that prosecuting attorneys and private legal practitioners are fully up to date with modern practices of juvenile justice systems worldwide.

8.4.2 ADR interventions to reform and reintegrate young offenders

a. Legislation for Child Panels to implement their decisions

Child Panels established under the Children’s Act that supervise mediation sessions between juvenile offenders and their victims are the only avenues for exercising restorative justice in the juvenile justice system. However, the findings reveal a lack of confidence in these child justice panels by magistrates, legal practitioners, and members of the general public. This lack of confidence is premised on the public

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perception that the child justice panel does not have the authority to enforce its decisions. Therefore, to build public confidence in these panels, legislation must be enacted to give the panels authority to implement the decisions or agreements made at their sessions. The authority to ensure compliance or to penalise parties for non-compliance with the decisions or agreements made at these sessions will build confidence in the process and ensure the full involvement of participants.

b. Legislation to increase options for the diversion of juveniles from the juvenile justice system must be enacted

The shortage in options for diverting juveniles from the criminal justice system limits ADR uptake into the juvenile justice system. An increase in diversion options would ensure a twofold impact on the criminal justice system. On the one hand, the system would be unclogged to enable the magistrates to concentrate on complex cases, and on the other hand, long delays and lengthy trials that impede the administration of justice would be eradicated from the juvenile justice system.

8.4.3 Integration of customary dispute resolution practices and juvenile justice system

Legislation must be promulgated to co-opt traditional authorities into the juvenile justice system. Such legislation would make the chief's courts an avenue for juveniles diverted from the formal justice system to access restorative justice. It would also vest supervisory authority in the courts to curb excesses of customary dispute resolution systems and ensure the adherence and observation of human rights.

The legislation would also ensure training for traditional authorities on information communication technology and co-operation with security agencies to ensure that they are abreast with modern changes, further enhancing justice delivery. Equipment and modern instruments and tools such as computers, printers and recorders to assist in the mediation of juvenile crime would have to be made available to traditional authorities. Similarly, security agencies have to be trained to work with traditional authorities to ensure that justice is delivered to parties in the juvenile justice system.

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8.5 Further research

From the findings of this research, some recommendations for future research are given below:

- It is important that further research continues to explore restorative justice options for juveniles in Ghana.
- Future research should investigate the potential effect of delays in juvenile trials on parties affected by the crime in Ghana.
- It is also important that future research examines the victims of juvenile crime in Ghana.
- Future studies could investigate the relationship between gender and desistance from crime among juveniles.
- In addition, the impact of crime on the juvenile's family might prove to be an essential area for future research.

8.6 Conclusion

This study investigated why ADR, especially customary dispute resolution, could contribute to solving the societal problem of juvenile delinquency in Ghana and how it could be done.

Juvenile delinquency is a problem with repercussions for the primary victim and members of society. To address this problem, Ghana, like other nations, has a different justice system for children in conflict with the law. This juvenile justice system regulates the arrest, prosecution and rehabilitation of the juvenile with the aid of institutions such as the police, courts and correctional centres. However, the violation of fundamental human rights of juveniles that are enshrined in the 1992 Constitution and repeated in the Juvenile Justice Act indicates a failure of the juvenile justice system that ought to be remedied.

A violation of juveniles' fundamental human rights such as the right of accused persons to legal representation of their choice a fair hearing within a reasonable time, the inviolability of persons' dignity, and separation of juveniles in custody from adults,

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implies effective justice is often not delivered to the juvenile, victim or community. It is therefore necessary to explore alternatives to institutional care settings in the juvenile justice system.

The juvenile justice system makes provision for removing the juvenile from the criminal justice system to a restorative justice setting to allow for ADR mechanisms such as victim-offender mediation to occur under the supervision of a Child Panel and to ensure the re-integration of the juvenile into society. However, a lack of confidence in the Child Panel by members of the public means the failure to achieve meaningful restorative interventions. The predicament of the juvenile is further compounded by the absence of options for diversion. The juvenile justice system has been unable to deliver restorative justice effectively, and the requirement arises to identify institutions capable of undertaking significant restorative approaches.

Customary dispute resolution systems could contribute meaningfully to solving the problem of juvenile delinquency in Ghana in that customary dispute resolution processes are founded on the same ideals as restorative justice, such as accountability of the offender, and participation of the victim and persons affected by the crime in the process. These ideals facilitate the offender's integration into the community and, coupled with the absence of custodial sentencing, significantly reduce the incidence of recidivism and its consequences.

Furthermore, the freely available nature of customary justice settings eliminates the need to employ and train personnel as well as the associated expense. Customary justice operates in accordance with time-tested systems of resolving conflicts, and the role of the traditional ruler as a mediator makes him/her more suitable for dealing with children in conflict with the law. Although there are criticisms in respect of the customary dispute resolution systems, these criticisms could be discounted, due to checks and balances in the system that ensure the safeguarding of the child who appears before them. The excesses of the customary dispute systems could be curbed by human rights laws once the customs and traditions are formally recognized through legislation.

Moreover, the pluralist nature of Ghana’s jurisprudence, which recognizes customary law and practices of communities in Ghana, enables the formal juvenile justice system

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to harness the benefits and potential of customary law. The symbiotic relationship between formal justice and customary dispute resolution systems will benefit society.

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APPENDICES

Appendix A: Guidelines for interview of traditional rulers

Introduction

1. Name of Chief and Traditional Area.

2. Length of experience as a Chief

3. What functions do Chiefs in Ghana today perform?

4. Where do Chiefs derive authority to perform judicial (adjudicatory) functions?

5. Have Chiefs always performed judicial (adjudicatory) functions? (Historical background)

6. In exercise of your judicial functions, to what extent do you liaise with the formal courts? The Police?

7. In exercise of your judicial functions, what is the nature of cases which come before your court?

Structures of the court

8. How is your court constituted? (Personnel, record-keeping, medium of communication, legal representation for parties?)

9. How often does your court sit? Where does it sit? Is it open to the public?

10. Who are the main stakeholders in your setup?

11. How do cases come before your court?

12. What is the number of cases you hear in a session? Length of time spent on deciding a matter?

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13. What is the outcome of these cases? (Incarceration? Fines? Community service? Reparation?)

14. How are you able to enforce your decisions?

15. What options are available to a party dissatisfied with your decision?

16. Are there some cases that involve children?

17. Do you have specific rules for cases involving children?

18. What are some challenges you face as an adjudicator?

19. What help would you require to make your system operational?

Restorative justice

20. Have you heard of restorative justice?

21. What is the view of traditional authorities towards criminal proceedings in their courts?

22. Should traditional authorities be allowed to decide criminal matters?

23. Should traditional authorities be allowed to decide criminal matters involving young people?

24. What type of offences committed by young people would be appropriate for traditional authorities to decide? Why?

25. If traditional authorities are given the power to decide criminal matters involving young people, would you want to exercise that function? Why?

26. Based on your knowledge and experience, is this a function chiefs you know will be willing to exercise?

27. Based on your knowledge and experience, what indigenous practices would be of benefit to juveniles? Victims? and members of the community?

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28. There is a perception that traditional courts do not adhere to the rule of law (lack of privacy, m’atu me nan asi so). What is your opinion?

29. Are there any suggestions you have?

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Appendix B: Questionnaire for judges and magistrates

Position in the Judicial Service
A. Judge
B. Magistrate
Gender
A. Male
B. Female
Length of experience as a Judge or Magistrate
A. 0-5 years
B. 5-10 years
C. More than 10 years
Number of criminal suits involving juveniles monthly
A. Less than 10
B. Between 10 and 20
C. More than 20
Number of juveniles who appear before the court daily
A. Less than 5
B. Between 5 and 10
C. More than 10
In your tenure as Judge or Magistrate has there been an increase in juvenile cases before your court?
A. Yes
B. No
What are the most common offences juveniles are charged with?
A. Serious offences
B. Misdemeanours

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What is the outcome of these cases?
A. Incarceration
B. Fines
C. Community Service
Do you know about restorative justice?
A. Yes
B. No
How often does your court divert juveniles from the criminal justice system?
A. Frequently
B. Less Frequently
C. Never
Why does the court opt to divert cases involving juveniles?
A. Court's Decision
B. Recommendation of the Parties
C. Not Applicable
What is the nature of the diversion if any?
A. Referral to Child panels
B. Referral to traditional authorities
C. Other
D. Not Applicable
What is often the outcome of diverted cases?
A. The matter is settled
B. The matter is not settled
C. Not Applicable
What challenges does your court experience in the exercise of diversion?
A. Lack of diversion options
B. Lack of confidence in child panels

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C. Other (please specify)
Based on your knowledge and experience, what restorative justice outcomes would be of benefit to juveniles?
A. Reparation
B. Community Service
C. Apology
D. All of the above
Should traditional authorities adjudicate matters involving juveniles?
A. Yes
B. No
How can traditional authorities adjudicate matters involving juveniles?
A. According to their traditional practices
B. According to modern legal principles
C. A combination of traditional practices and modern legal principles
D. Not Applicable
At what point should traditional authorities be involved in juvenile crime system?
A. After arrest
B. After arraignment
C. Post-sentence
D. Not Applicable
What kind of offences should traditional authorities adjudicate?
A. Serious Offences
B. Misdemeanours
C. Serious Offences and Misdemeanours
D. None
Could you make any additional suggestions?

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Appendix C: Questionnaire for juveniles

How old are you?
A. 12- 15
B. 16-18
C. 18-21
What is your level of education?
A. None
B. Primary school
C. Junior High School
D. Senior High School
E. Vocational School
F. Other
What offence have you been charged with?
Is this the first time you have been charged with *this* offence?
A. Yes
B. No
Is this the first time you have been charged with *an* offence?
A. Yes
B. No
How long has your case been here?
A. Less than 3 months
B. 3-6 months
C. More than 6 months
Has hearing of your case began?
A. Yes
B. No

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Are you on bail or in custody?
A. Yes
B. No
Do you have a lawyer?
A. Yes
B. No
Who accompanies you to court?
A. Relative
B. Friend
C. Nobody
Do you understand the court process?
A. Yes
B. No
Does the person accompanying you understand the process?
A. Yes
B. No
Do you understand the possible outcome of your case?
A. Yes
B. No
What punishment given to children your age for this offence would be acceptable to you?
A. Detention in a correctional facility
B. Community service
C. Pay compensation to the victim
D. Apology to the victim
Would you like to speak with the victim of your offence?

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A. Yes
B. No
Would you want your case to be decided by the Chief and elders of the community?
A. Yes
B. No
Why?
A. The use of local dialect
B. The process is faster than the court
C. The system is more reliable
D. Other (please specify)
Who would you like to be present?
A. Parents or relatives
B. Lawyer
C. Social worker
What challenge would you face if your case were to be decided by the Chief and elders of the community?
A. Lack of understanding of their practices and processes
B. Lack of privacy
C. Outmoded customs and practices
D. Other (please specify)
Is there anything you wish to say about the situation you find yourself in?

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Appendix D: Questionnaire for victims

How old are you?
A. Below 12
B. 12-21
C. 21-50
D. Above 50
What is your level of education?
A. None
B. Primary school
C. Junior High School
D. Senior High School
E. Vocational School
F. Other
Gender
A. Male
B. Female
What is your occupation?
What offence did the juvenile commit against you?
Is this the first time he/she committed this offence against you?
A. Yes
B. No
How long has your case been in court?
A. Less than 3 months
B. 3-6 months

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C. More than 6 months
Do you have a lawyer?
A. Yes
B. No
Who accompanies you to court?
A. Relative
B. Friend
C. Nobody
Do you understand the court process?
A. Yes
B. No
Do you understand the possible outcome of your case?
A. Yes
B. No
What punishment given to the juvenile would be acceptable to you?
A. Detention in a correctional facility
C. Community service
D. Compensation
E. Apology
As part of the process would you like to meet with the juvenile?
A. Yes
B. No
What would you like to say to the juvenile if you meet?
A. Ask him/her questions
B. Tell him/her how their conduct has affected you
C. Ask for an apology
D. Other (please specify)

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Where would you want to meet with the juvenile?
A. Before the Chief and elders of the community
B. Before Religious leaders
C. In Court
D. Other (please specify)
Would you want your case to be decided by the Chief and elders of the community?
A. Yes
B. No
Why?
A. The use of local dialect
B. The process is faster than the court
C. The system is more reliable
D. Other (please specify)
Who would you like to be present?
A. Parents or relatives
B. Lawyer
C. Social worker
What challenge would you face if your case were to be decided by the Chief and elders of the community?
A. Lack of understanding of their practices and
B. Lack of privacy
C. Outmoded customs and practices
D. Other (please specify)
Do you have any additional suggestions as to how juveniles who commit offences should be treated?

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Appendix E: Questionnaire for legal practitioners

Role as legal practitioner
A. State Prosecutor
B. Private Practice
Gender
A. Male
B. Female
Length of experience as a legal practitioner
A. 0-5 years
B. 5-10 years
A. More than 10 years
Number of juvenile cases you have encountered
A. Less than 5
B. Between 5 and 10
C. More than 10
Do you think juvenile cases are on the increase?
A. Yes
B. No
What are the common offences juveniles are charged with? (Please tick all that apply)
Serious Offences i. Murder ii. Rape/Defilement iii. Indecent assault involving unlawful harm iv. Robbery with aggravated circumstances v. Drug offences vi. Offences related to firearms.
Minor Offences i. Petty theft ii. Petty Assault iii. Threatening Offences
What is/are the outcome(s) of these cases?
A. Incarceration
B. Fines

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C. Community Service
Do you know about restorative justice?
A. Yes
B. No
Are you familiar with the application of diversion under the Juvenile Justice Act, 2003 (Act 653)?
A. Yes
B. No
How often have juveniles been diverted from the criminal justice system?
A. Frequently
B. Less Frequently
C. Never
In your experience what are the most common reasons for diversion?
A. Court's own Decision
B. Recommendation of the lawyers/Parties
C. Not Applicable
What is the nature of the diversion if any?
A. Referral to Child panels
B. Referral to traditional authorities
C. Other (please specify)
D. Not Applicable
What are the outcomes?
A. The matter is settled
B. The matter is not settled
C. Not Applicable
What challenges do you face in the exercise of diversion?
A. Lack of diversion options
B. Lack of confidence in child panels

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C. Other (please specify)
Based on your knowledge and experience, what restorative justice outcomes would be of benefit to juveniles?
A. Reparation
B. Community Service
C. Apology
D. All of the above
Should traditional authorities adjudicate matters involving juveniles?
A. Yes
B. No
How can traditional authorities adjudicate matters involving juveniles?
A. According to their traditional practices
B. According to modern legal principles
C. A combination of traditional practices and modern legal principles
D. Not Applicable
At what point should traditional authorities be involved in juvenile crime system?
A. After arrest
B. After arraignment
C. Post-sentence
D. Not Applicable
What kind of offences should traditional authorities adjudicate?
A. Serious Offences
B. Misdemeanour
C. Serious Offences and Misdemeanours
D. None
Could you please indicate any additional suggestions that you have?

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Appendix F: Field research report

Form Number	Interviewee	Date	Venue
Form 1	Chief A of AX Town	7th November 2020	Zoom Application
Form 2	Chief B of BX Town	14th November 2020	Zoom Application
Form 3	Chief C of CX Town	21st November 2020	Zoom Application
Form 4	Chief D of DX Town	28th November 2020	Zoom Application
Form 5	Chief E of EX Town	5th December 2020	Zoom Application
Form 6	Chief F of FX Town	13th December 2020	Zoom Application
Form 7	Chief G of GX Town	20th December 2020	Zoom Application
Form 8	Chief H of HX Town	20th December 2020	Zoom Application
Form 9	Chief I of IX Town	27th December 2020	Zoom Application
Form 10	Chief J of JX Town	27th December 2020	Zoom Application
Form 11	Executive Director, Evolve NGO	29th December 2020	Zoom Application

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