African Customary Dispute Resolution vs Alternative Dispute Resolution for Juvenile Crime in Ghana

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Abstract

Juvenile delinquency is a challenge for most African states, and Ghana is no exception. Recidivism, stigmatisation and victim dissatisfaction indicate that Ghana's formal criminal justice system, with all its merits, has posed severe challenges to the administration of juvenile justice.

This article examines the practice of Alternative Dispute Resolution (ADR), which utilises restorative conflict resolution processes in place of prosecution and sentencing in juvenile justice systems of various jurisdictions. Through processes such as victim-offender mediation, ADR invites full participation and consensus between victims, offenders and persons indirectly affected by the crime committed and seeks full and direct accountability. Some inadequacies of ADR principles and practices render it less relevant to the African context. The resultant lacuna can be filled with indigenous dispute resolution practices to combat crime and its repercussions, constituting the African Dispute Resolution (AfDR). The reliance on Ubuntu in South Africa's Child Justice Act and traditional justice system mechanisms in the Democratic Republic of Congo, Rwanda and Uganda to deal with the aftermath of genocides and wars are contemporary examples of AfDR. Ghana would need to rely on AfDR to complement its formal criminal justice system to alleviate juvenile delinquency.

Keywords: Alternative Dispute Resolution; African Customary Dispute Resolution; Ghana; juvenile crime; restorative justice.

UNISA university of south africa PRESS
Journal of Law Society and Development
https://unisapressjournals.co.za/index.php/JLSD
Volume 8 | 2021 | #9237 | 23 pages

https://doi.org/10.25159/2520-9515/9237
ISSN 2520-9515 (Online), 2313-8289 (Print)

Introduction

This article examines the practice of Alternative Dispute Resolution (after this referred to as ADR), within juvenile justice systems of various jurisdictions based on a review of legislation and existing literature. ADR utilises restorative conflict resolution processes in place of prosecuting and sentencing and has had some success. However, the shortcomings of ADR make it unsuitable for the Ghanaian juvenile justice system. This article identifies customary dispute resolution systems as appropriate systems for dealing with crime and its repercussions. A clarion call has been made to investigate the efficacy of traditional or indigenous peace-making systems, not as an alternative, but as a complement to Western-oriented approaches to conflict management in West Africa (Brewoo and Abdallah 2015). In response, this article proposes that Ghana utilises traditional peace-making systems referred to as African Dispute Resolution (after this referred to as AfDR) to mitigate juvenile crime in Ghana.

Crime among young people requires pragmatic efforts to control, because it dramatically disturbs the mental and physical health and the lives of affected children (Gilad, Gutman, and Chawaga 2019). Juvenile delinquency is increasing, and Africa struggles to curb it (Gbadebo 2019). Recidivism among juveniles also continues to rise since the criminal justice system fails to protect juveniles or make detention a last resort, while government support for rehabilitating and integrating the juvenile is lacking (Kandala 2018). The various theories of retribution, deterrence and rehabilitation have informed most nations' criminal justice systems as gleaned from various legislation that proscribe and regulate criminal conduct and criminal proceedings. The practice has subjected juveniles to the same criminal justice system as adults, with a few modifications in most jurisdictions. However, this has not been without ramifications such as the negative influence of adults, mental and physical mistreatment of youth through confinement in fortress-like institutions, and the stymying of their chances to rise above a life of crime which are salient reasons for the development of a separate justice system for juveniles (Nellis 2016).

The General Assembly of the United Nations set the pace for the administration of juvenile justice distinct from adult justice systems when it adopted the following resolutions: (i) the 1985 Standard Minimum Rules for the Administration of Juvenile Justice, commonly known as the “Beijing Rules”; (ii) the 1990 Guidelines for the Prevention of Juvenile Delinquency or “Riyadh Guidelines”; (iii) the 1990 Rules for the Protection of Juveniles Deprived of their Liberty.

Jurisdictions worldwide are enacting specific legislation for children involved in crime. This practice has been promoted by the United Nations Economic and Social Council in its Resolution on restorative justice programmes in criminal matters (UN 2002). South Africa’s Children’s Act No. 38 of 2005 and Child Justice Act No. 75 of 2008; Uganda’s Children Act, CAP 59 of 1996 and Ghana’s Juvenile Justice Act No 653 of 2003 are examples of such legislation.

These juvenile justice systems, regulated by law, span the period of arrest, through the court processes and up to the reintegration of the juvenile offender into the community, and it is not uncommon to locate juvenile courts, borstal institutions, correctional centres and other institutions charged with the responsibility of handling young persons involved in crime. For example, under Ghana's Juvenile Justice Act, the police may arrest a young person suspected of committing an offence and arraign him before the juvenile court under section 5. Again, the juvenile court is seized with powers under section 29 to impose custodial sentences on young persons in conflict with the law. Correctional centres may detain the juvenile under section 39 of the Act.

Most of these legislations espouse principles of ADR. Nevertheless, this article contends that in their implementation, they have proved to be inadequate for Africa, hence the need for a multifaceted approach through the adoption of indigenous dispute resolution practices.

Alternative Dispute Resolution (ADR)

The application of ADR principles in the administration of criminal justice is often referred to as restorative justice. Restorative justice as defined by the United Nations Economic and Social Council in its Resolution on restorative justice programmes in criminal matters is, "any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator."[1]

Restorative justice aims to reduce crime by focusing on restorative conflict resolution processes in place of prosecuting and sentencing and has been in existence in varied forms among indigenous people and civilisations since ancient times. The values and practices of restorative justice are akin to the African culture as seen among the traditional Tiv, Igbo and northern part of Nigeria (Abdulraheem-Mustapha 2018).

Restorative justice invites full participation and consensus between victims, offenders and neighbours indirectly affected by the crime committed (Makiwane 2015). Restorative justice seeks full and direct accountability (Nabudere and Velthuizen 2013) and to heal what is broken and reunite what has been divided. This movement has gathered momentum in countries like Australia, Canada, the United Kingdom and South Africa (Luyt and Matshaba 2014).

Restorative justice takes several forms: family group conferencing, victim-offender mediation, victim impact statement (Makiwane 2015), circle sentencing, community reparation boards, and restitution programmes, known as an "umbrella concept" (Claes

1 UN ECOSOC Resolution 2002/12 "Basic principles on the use of restorative justice programmes in criminal matters" (24th July 2002).

and Shapland 2016). The most prevalent forms are victim-offender mediation and conferencing.

Victim-Offender Mediation

Under victim-offender mediation programmes (from now referred to as VOM), the victim and offender are brought together with a neutral third party facilitating the meeting. The victim describes their experience and the effect the crime has had on them (Makiwane 2015), while the offender explains their conduct. The mediator then helps them to make things right. The parties do not meet as the mediator goes between them until they arrive at restitution (Luyt and Matshaba 2014).

Family Group Conferencing

Family Group Conferencing (from now referred to as FGC) emerged from New Zealand in 1989 in child welfare and youth justice (Warner-Roberts and Masters 1999) as an alternative to court proceedings for serious and persistent young offenders (McCold 2001; Maxwell and Morris 2001). Typically, victims, offenders and supporters meet to dialogue and arrive at a restitution agreement (Steyn and Sadiki 2018). FGC is beneficial to the victim, offender and community as the offender accepts responsibility and is accountable to the victim (Anderson 2017). An essential element in FGC is accountability and responsibility. It involves the families of the victim and offender who must engage in conversation to find a solution to the wrongful conduct of their members (Dzur 2017). This is the difference between conferencing and victim-offender mediation (Luyt and Matshaba 2014).

Restorative justice initiatives have addressed juvenile justice issues in Asia, Europe and the Middle East (Luyt and Matshaba, 2014). In countries like South Africa, legislation provides for restorative justice initiatives in the juvenile justice system. A child may be ordered to appear at an FGC or VOM by a court subject to section 53(7) of the Child Justice Act.

African Dispute Resolution (AfDR)

Indigenous dispute resolution practices and processes have been used in resolving disputes among African communities for as long as they have existed and constitute the African Dispute Resolution (AfDR). Spearheaded by community leaders (Aiyedun and Ordor 2016), disputes are settled under AfDR by deliberation and discussion rather than force and the correction of wrongdoing by compensation, instead of punishment except where the offence was serious like murder (Ayittey, 2006). These features reflect principles of restorative justice hence the assertion that the values and practices of restorative justice are akin to the traditions of indigenous people (Consedine 1995). Also, local justice processes in Africa reflect restorative approaches to justice (Wielenga, Batley, and Murambadoro 2020). In Africa, restorative justice has been

highlighted by the recovery of indigenous justice practices and national restorative responses to genocide and civil war (Luyt and Matshaba 2014).

Ghana is a multicultural society with several ethnic groups whose language and culture are distinct; therefore, conflict resolution methods vary among different sections of the population. As such, a juvenile in the Kumasi metropolis would be subject to the Akan customary system, while their counterpart in Hohoe municipal area would be subject to the Ewe customary system. Nevertheless, there are certain commonalities among the various tribes. For instance, community well-being is prioritised over individual interests. Among the Akan of Ghana, it is known as *biako yƐ* or *kor yƐ,* and among the Ewe tribe *dekaworwor.* This is similar to the Ubuntu philosophy, where the community is more important than the individual (Mangena 2015).

Ubuntu Underlies South Africa's Child Justice Law

The spirit of the concept of restorative justice is embedded in African society through the notion of *Ubuntu* (Skelton and Cheryl 2001). Mbiti (1970) describes Ubuntu as a philosophical belief system and communitarian thesis from the Nguni language family, which comprises isiZulu, isiXhosa, and other Bantu tongues, which 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 (Msila 2015). A common belief in all the cultures that embrace the Ubuntu philosophy is that the community is more important than the individual and that conflict is resolved collectively, while achievements are also celebrated collectively; therefore, restorative justice and Ubuntu are closely related concepts that cannot be treated in isolation (Mangena 2015). Furthermore, a core doctrine of *ubuntu* is that it derives its meaning from connectivity; thus, a person is only regarded as such through others (Matambo 2020).

South Africa's Child Justice Act 2 was enacted to promote the spirit of Ubuntu in the child justice system. The prosecutor may divert a child who commits an offence before a preliminary inquiry by the child justice court occurs. They may also be diverted during the trial before the prosecution closes its case[3] or after being convicted.[4] Under section 73(1)(c) of this Act, a child justice court that convicts a child of an offence may refer the matter to any other restorative justice process following the definition of restorative justice. This omnibus clause gives the court unfettered discretion in adopting restorative justice in any form to decide upon the sentencing of a child who has been convicted of an offence, and Skelton (2002) opines that this provision allows indigenous models of restorative justice to be developed.

2 Child Justice Act No. 75 of 2008.
3 Section 67.
4 Section 73.

This Act's emphasis on Ubuntu and its influence might account for the steady decline in the number of children in remand awaiting trial and those in prison between 2005 and 2015 (Mkhize and Zondi 2015).

Ghana's Juvenile Justice System

The primary laws which regulate the criminal justice system in Ghana are the Criminal Code with all its amendments, the Criminal Procedure Code, and the Juvenile Justice Act 653 of 2003. Ghana's Juvenile Justice Act (after this referred to as Act 653) passed in 2003, is specific legislation that is consistent with the 1990 Guidelines for the Prevention of Juvenile Delinquency which provide that governments enact and enforce specific laws and procedures to promote and protect the rights and well-being of all young persons. Under section 25 of Act 653, the court has the discretion to decide whether a juvenile charged with an offence should be diverted from the criminal justice system. The court decides to divert the juvenile after a social enquiry report has been submitted to the court per section 24, Act 653. This provision is in line with principles of restorative justice and advances Ghana's juvenile justice jurisprudence. The Act stipulates the purpose of the diversionary programme and its minimum standards. Nevertheless, 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 can infer that the referral of cases 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.

Act 653 section 32(1) expressly mentions the use of VOM for juveniles. However, no mention is made of FGC or any other form of restorative justice. This is an inadequacy of the Act, which deprives juveniles of the benefits of FGC. According to Ayete-Nyampong (2014), little has changed regarding challenges confronting Ghana's juvenile justice system since the enactment of the Act. Moreover, the presence of recidivists at junior correctional centres in Accra indicates that Act has not fulfilled its expectations in delivering restorative justice to the offender, victim, or community (Nyarko, Aikins, Nyarko, and Aboagye 2019). Statutory changes in juvenile justice laws have not manifested in practice, and a gap between law and practice has been created (Ame 2017, Mensa-Bonsu 2017). This gap can be filled by utilising time-tested customary dispute resolution institutions and structures involved in adjudicating juvenile justice for centuries which have proven sustainable as they have survived significant social, political, and economic changes (Ame 2019).

While incarceration causes prison inmates to experience psychopathological symptoms such as depression and anxiety, younger prisoners have significantly higher psychopathological symptoms than older ones (Adzam 2017). Furthermore, the sentence duration and type of crime do not predict significant differences in psychopathological symptoms among prisoners (Adzam 2017). These discoveries imply that incarcerating a juvenile should be proscribed unless the safety of society or

the juvenile is in issue. Again, stigmatisation and discrimination encountered by formerly incarcerated people upon their release hamper their efforts at reintegration into their communities as opportunities for jobs and housing, among others, are adversely affected (Dako-Gyeke and Baffour 2016). This set of factors cause recidivism which is a limitation of the formal justice system.

Restorative Justice and Recidivism

The enactment of primary legislation in 2003, which provides for restorative justice in the juvenile justice system, evinces Ghana's intention to deal with youth crime effectively. A significant feature of Act 653 is the provision for diversion in sections 24(4) and 25(1), which enable the court to remove a young offender from the formal criminal justice system at the onset of the proceedings. Diversion is defined under section 60 of Act 653 to mean the referral of cases of children alleged to have committed offences away from the criminal justice system with or without conditions. Upon the social worker's recommendation, a judge may make an order to refer the juvenile offender to a Child Panel that has the jurisdiction to mediate and promote reconciliation under section 24 of the Children's Act.

Child Panels established in every district have non-judicial functions to mediate a child's criminal and civil matters. Section 32 of the Children's Act mandates the Child Panel to assist in victim-offender mediation in minor criminal matters involving a child where the circumstances of the offence are not aggravated and seek to facilitate reconciliation between the child and any person offended by the action of the child. In the course of mediation, Child Panels may propose an apology, restitution to the offended person, or service by the child to the offended person. These functions of the Child Panel reflect the values of restorative justice. The Children's Act expressly mentions victim-offender mediation, one of the prevalent formats of restorative justice. In reality, these Child Panels do not function effectively due to the lack of childcare experts to serve on the panel (Adu-Gyamfi 2019). Moreover, the absence of training for panel members and the financial constraints of District Assemblies have led to a withdrawal of services provided by members of the panel who are not being paid their allowances (Adu-Gyamfi 2019).

Under Act 653, ADR may also be available post-sentencing to promote the reintegration of the juvenile into the community. The statute hints at such a possibility under section 29(1)(a)(i), where it provides that a court may discharge the offender conditionally or unconditionally or deal with the case in any other lawful manner. Thus, a juvenile not diverted from the formal justice system as outlined above may also access some ADR interventions after the trial. Probation is one such intervention where the juvenile

offender is placed under the supervision of a probation officer assigned to the district (s)he (the juvenile offender) lives in, for a duration of between six and 18 months.[5]

However, research indicates that a shortage of licensed probation officers and a lack of resources has led to parole abandonment, a pre-release programme that reintegrates juveniles into society (Kotey 2018). Juvenile offenders eligible for probation are likely to be detained at correctional centres and thus contribute to recidivism as pre-release and post-release reintegration programmes do not exist in senior correctional facilities in Ghana due to the abandonment of parole.

From this discussion, restorative justice cannot be delivered as envisioned under Act 653. Some forms of restorative justice may not intend to affect recidivism at all (Claes and Shapland 2016). Nevertheless, recidivism is a challenge in Ghana's criminal justice system, and a restorative justice system that offers no relief is not relevant for Ghana's juvenile justice system.

African Dispute Resolution Reduces Recidivism

The incidence of recidivism is reduced under AfDR processes due to its emphasis on repairing the harm between the offender and the victim, and reconciliation because African perspectives of justice prioritise social harmony and the interconnectedness of the community (Wielenga, Batley, and Murambadoro 2020). AfDR processes ensure offenders' reintegration into society as crime is viewed against the victim, ancestors, and society. Stringent steps must, therefore, be taken to atone for the offence, appease the ancestors and deter other future offenders. The objective is to reintegrate perpetrators with their communities and reconcile them with the victims by establishing the truth, confessions, reparation, repentance, and forgiveness.

Custodial sentences are not known to African customary systems. Historically, among the Ashanti of Ghana, 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 (Rattray 1969). And just like the Ashanti, among the Baraza, penal sanctions such as imprisonment were never imposed (Kiyala 2016).

Among the Acholi of Uganda, the *mato oput* rite of reconciliation addresses issues of accountability and reconciliation through the incorporation of tolerance and forgiveness. The process recognises and seeks to salvage and affirm the moral worth and dignity of victims, perpetrators, and the community to prevent the recurrence of gruesome crimes. Similarly, the Baraza of the Democratic Republic of Congo also operated as a judicial avenue to ensure accountability by promoting healing and reconciliation where rituals are performed to cleanse and rehabilitate perpetrators and restore victims' dignity (Kiyala 2016). Rwanda's Gacaca courts also provided for

5 Section 31.

apology, compensation, community service, or contributing to a compensation fund. Based on the nature of the crimes committed, retribution would require weighty imprisonment sentences with severe conditions attached, but that would have dire effects on the nations and stall the healing process.

Custodial sentencing causes recidivism because criminals learn techniques from hardened criminals in prison and are likely to commit more severe crimes upon release (Aaniazine 2017). Children are impressionable; therefore, juvenile offenders in lawful custody or detention must be separated from adult offenders[6] to prevent them from becoming criminalised. A common feature of AfDR is the absence of custodial sentencing, which reduces the incidence of recidivism. Juveniles who appear before AfDR settings are less likely to re-offend because they have not been influenced in criminality by more hardened criminals in custody.

Scope of Restorative Justice

The suitability of restorative justice processes to serious offences remains a subject of debate among proponents of restorative justice and its praxis. Umbreit (2001) avers that victim-offender mediation is offered for crimes that range from petty misdemeanours to assault and murder. Morris and Maxwell (2001) also posit that the impact of serious offences on victims is more significant than minor offences; therefore, given the practicality of limited resources, restorative justice processes should be targeted at more serious offences. Nabudere and Velthuizen (2013) argue that serious offences ought not to fall within the ambit of restorative justice as a formal court of law is best placed to deal with dangerous criminal offenders.

Jurisdictions differ in their approach to serious offences under restorative justice. For instance, in the court-ordered youth conference scheme in Northern Ireland, except for those facing a charge of murder, all young offenders are eligible to be dealt with using a youth conference. Similarly, in New Zealand, youth conferences are held for all offences except murder and manslaughter (Daly 2001). The United Kingdom, on the other hand, discourages the use of the restorative justice process in domestic violence cases.[7] In South Africa, the Supreme Court has cautioned against restorative justice for serious offences in the cases of *Director of Public Prosecutions, North Gauteng v Thabethe*,[8] and *Seedat v S.*[9] In Ghana, serious offences are outside restorative justice

6 Article 5 clause 4 of the 1992 Constitution; Section 46 (7) of the Juvenile Justice Act.

7 "Best Practice Guidance for Restorative Justice Practitioners" issued by the UK Home Office. Restorative Justice Council, (Best Practice Guidance for Restorative Practice, February 2011) <https://restorativejustice.org.uk/sites/default/files/resources/files/Best%20practice%20guidance%20for%20restorative%20practice%202011.pdf> accessed 30 April 2019.

8 *Director of Public Prosecutions, North Gauteng v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 569 (SCA).

9 *Seedat v S* (731/2015) [2016] ZASCA 153.

processes purview. Section 25(2) of Act 653 proscribes the diversion of a juvenile who commits a serious offence from the criminal justice system.

Act 653 requires a social enquiry report to be submitted to the juvenile court where a juvenile has been charged with an offence.[10] Subsection 4 of section 24 provides that "[t]he 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." A minor offence is defined under section 60 of Act 653 to include petty theft, petty assault, and threatening offences. Therefore, a juvenile charged with a "serious" offence cannot be diverted from the criminal justice system irrespective of their age. Serious offences under section 46(8) of Act 653 include robbery with aggravated circumstances, rape, indecent assault involving unlawful harm, drug offences, offences related to firearms, defilement, and murder. The Act further mandates the court to place a juvenile found guilty of any of these offences in a correctional centre. With the age of criminal liability in Ghana at 12, it is not inconceivable that a young child could be a resident of a correctional centre.

In 2012, 48 juvenile offenders were admitted into custody at the senior correctional centre, and 13 were between 12 and 15 years old (Ghana Prisons Service 2012). While three of them were admitted at the correctional centre for indecent assault and robbery offenses, the other 45 juvenile offenders were admitted for stealing, unlawful entry, causing damage, conspiracy, fraud, and others (Ghana Prisons Service 2012) which all constitute minor offences. The number of juveniles admitted into custody at the senior correctional centre was 59 in 2013, 103 in 2014, and 63 in 2015 (Ghana Prisons Service 2015). Data on the breakdown of offences is not readily available, but one may surmise that the data from 2012 is a microcosm of the entire juvenile justice system.

While the law prevents young persons accused of committing serious offences from accessing restorative justice and its benefits, juveniles who commit minor offences are not referred to restorative justice initiatives either. Both sets of juveniles are put together in correctional centres at the discretion of magistrates. Accordingly, the restorative justice model under Act 653 is not suitable for Ghana's juvenile justice system.

African States Utilise Indigenous Dispute Resolution Practices to Combat Serious Crime and its Repercussions

In the aftermath of violent conflict and civil wars, community-based models of transitional justice that have emerged include the Mato *oput* process in Uganda (Derluyn, Vandenhole, Parmentier, and Mels 2015) and the Gacaca people's courts in Rwanda (Palmer 2015). The Baraza institution among the Kivu of the eastern Democratic Republic of Congo also stands out as an example of a viable indigenous conflict resolution and management system relevant today (Kiyala 2016). This new

10 Section 24.

approach to justice is an example of participatory justice (Luyt and Matshaba 2014) and a community-based model of transitional justice that has emerged (Kiyala 2016).

Rwanda's traditional conflict resolution mechanism known as Gacaca is a restorative justice process adopted in the post-genocide era to handle genocide-related offences and the consequences of the genocide (Ingelaere 2008). 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 (Palmer 2015).

The principal goal of the Gacaca was not to establish guilt or apply state law, but it focused on how to re-include the person who had caused disorder to society (Penal Reform 2005). The Gacaca courts became a hybrid of the traditional Gacaca courts, the regular criminal court, and state prosecution. This is because the government of Rwanda realised that a judicial system that ensures the participation of the community in the process of investigation could be a viable option in the modern judicial system (Nabudere and Velthuizen 2013).

In Uganda, four-fifths of about 66,000 people abducted by the Lord's Resistance Army in northern Uganda were under 18 years old (Macdonald 2017). These young people were forcefully conscripted into the rebel's army, and they carried out heinous crimes at the orders of the older soldiers. Through no fault of theirs, these "child soldiers" became perpetrators of terror and needed to be reintegrated into the community. A pact signed in 2007 during peace talks in Juba advocated the use of traditional justice system process mechanisms, such as *culo kwor* ("compensation for the dead"), *mato oput* ("to drink from the tree"), *kayo cuk, ailuc,* and *tonu ci koka* "with the necessary modifications, as a central part of the framework for accountability and reconciliation," and that the government would make the legislative changes and implement policies to include traditional dispute resolution mechanisms as part of an overarching justice framework (Oomen 2016).

This type of justice is more readily accessible to the people who suffered most from violent conflict. Acholi reconciliation techniques emphasize a particular ritual called *mato oput*, which proponents said had been used before the war to reconcile clans after a murder (Macdonald 2018). 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 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 (Oomen 2016).

A draft Transitional Justice Policy published in 2013 set out the need to incorporate traditional justice mechanisms to resolve conflict (Sarkin 2016). Transitional justice processes include community-based dispute mechanisms (Macdonald 2018), which

have a unique role in promoting and maintaining peace. Their presence in transitional justice mechanisms connotes a greater likelihood of acceptance and long-term sustainability (Hopwood 2015). Today, Acholi land is relatively peaceful (Macdonald 2018) due to the post-conflict transitional justice, which included community-based dispute mechanisms.

Among the Baraza, serious crimes such as the murder of community members required cleansing rituals accompanied by reparations (Kiyala 2016). The Baraza operated on the moral principle that all community members were "custodians" of ancestral moral norms; accordingly, perpetrators were held accountable to educate the community and foster communal reconciliation through rituals to cleanse and rehabilitate wrongdoers and restore dignity to victims (Kiyala 2016). This principle is evident during Gacaca sessions as parties shake hands at the end of the process and share a traditional libation and meal as reconciliation (Mbagwu 2015). This practice is similar to 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 (Morhe 2010).

The principle of accountability through acknowledgment ensured that former child soldiers were held accountable without being (re)victimised or (re)traumatised, and reconciliation and reintegration could occur (Derluyn et al. 2015). The referral of such serious crimes to a restorative justice setting accords with the assertion that restorative justice can do very effective work in serious crimes where the criminal justice system rarely meets the profound harms and needs of victims of serious crimes (Gustafson 2005; Skelton 2007).

The Permissibility of Coercion in Restorative Justice

There is an ongoing debate on whether the informal nature of restorative justice should be maintained or whether there is a need to make it structured and coercive. Doolin (2007) posits that the preferred view is that coercion may be necessary to maximise the application of restorative justice. This, she believes, is necessary so that all opportunities to extend restorative justice approaches in the penal system beyond diversionary practices operating on the periphery of the criminal justice system are not lost.

Act 653 provides for a juvenile justice system to protect the rights of juveniles, ensure an appropriate and individual response to juvenile offenders, provide for young offenders, and connected purposes. The promulgation of this law is in line with modern trends as its goals are akin to that of restorative justice. In the same vein, the functions and procedures of the Child Panel are a reflection of restorative justice principles. Therefore, it is alarming to discover that most of the few Child Panels established are not functioning as the lawmaker envisioned (Ame 2017). The Child Panels are also ineffective because litigating parties refuse to honour invitations to appear before the panel or reject the decision made by the Child Panel because they perceive the panel

lacks the power to enforce its decisions or agreements (Adu-Gyamfi 2019). In those instances where a party rejects the decision of the Child Panel or refuses to appear before it, the only option the panel has is to advise the affected party to proceed to the Family Tribunal. Therefore, restorative justice under this section of the Act cannot be delivered due to the non-coercive approach adopted by Ghana's Act 653.

Decisions of Customary Dispute Resolution Processes are Effective and Binding

In contrast, AfDR decisions are binding on parties because of the decision-makers and the process. The African customary system places a premium on the role of elders in the community. This notion is encapsulated in an Acholi proverb "A village without elders is like a tree without roots." Older people in society are believed to be custodians of the values and customs of the community. So, the community can rely on them to give wise counsel and sound judgements in disputes before them. Mbagwu (2015) asserts that the onus falls on the elder to make peace because, in most traditions, the oldest family member takes responsibility for the wrongs committed by his family or community members. This is a widely-held belief expressed severally in proverbs, adages, and even symbols among the Akan of Ghana. A common adage conveys this belief: "*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 a part of the python consumers." The respect young people have for their elders makes the AfDR suitable for the needs of parties to Ghana's juvenile justice system.

Historically, Rwanda's Gacaca sessions were presided over by society's elders, the Inyangamugayo ("people of integrity"). Palmer asserts that in practice, the functioning of Gacaca depends heavily on the *Inyangamugayo* as, through their decisions and management of the courts, they have shaped how Gacaca has operated in each community (Palmer 2015). 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 members of the community and may even know the perpetrators or victims personally.

Similarly, in the Acholi tradition's mato oput, the two belligerent sides of a conflict are brought together through elders' intercession (Mangena 2015). Such intercession leads to accepting responsibility, which indicates repentance, and then terms for reparation are agreed on. The offender must accept responsibility for the crime committed and then seek forgiveness; then, healing may occur.

Decisions of the AfDR are also effective and enforceable because participants are conversant with the process. In the Gacaca, baraza, and mato oput systems, the hearings took place in the community where the people could be involved in the process with the slightest inconvenience. Participants' familiarity with AfDR processes and the informal modes of information gathering (Sone 2016) make the process more appealing than formal justice systems. In contrast to the formal system where the court sits afar away

and proceedings are mainly incomprehensible to the unlearned, the convenience of accessing justice under AfDR makes it more suitable to address juvenile crime in Ghana. Fazal (2014) asserts that indigenous young people are more likely to perceive an intervention or practitioner as credible when such interventions are implemented by someone with a shared place, language, histories or beliefs. Fazal's assertion, coupled with the finding by Pooley (2020) that cultural sensitivity is essential to the success of youth offending programmes, bolsters the argument for the adoption of AfDR in juvenile crime in Ghana.

The urgency with which cases are heard further enhances the enforceability of decisions of customary dispute resolution systems. Unlike Ghana's formal justice system characterised by undue delays (Ofori-Dua, Onzaberigu and Nimako 2019), AfDR is credited with expedited justice delivery (Ibrahim, Adjei, and Agyenim Boateng 2019). In Rwanda, the sheer number of suspected perpetrators and the extensive bureaucracy of the formal justice system meant that the courts could not deal with the genocide cases (Oomen 2016). According to Hankel (2016), with 1500 cases being decided per year, special courts established in the criminal and military judicial bodies to deal solely with genocidal crimes and other crimes committed during the mass murder, would have taken decades to try the accused persons. Gacaca courts were therefore relied on to deliver justice timeously.

In light of the primary shortcomings in the delivery of restorative justice in Ghana, the restorative justice model envisioned under Act 653 is not suitable for the needs of the juvenile justice system; hence a rethink of the juvenile justice system by policymakers and stakeholders is inevitable. This article has considered instances of AfDR in dealing with the aftermath of conflict and war in some African states and the Ubuntu philosophy that underlies a contemporary African juvenile justice system. Having noted the relevance of AfDR, it is necessary to acknowledge that they have some weaknesses.

Criticisms of AfDR

Lack of Procedural Guarantee in Criminal Matters

It is posited that indigenous dispute resolution systems do not uphold the procedural guarantees required in criminal cases (Bennett 2012; Weeks 2013). For instance, the restorative nature of customary justice processes and the need to accept responsibility may conflict with the right to be presumed innocent. In response to this criticism, Aiyedun and Ordor (2016) argue that traditional leaders emphasize how disputing parties decide, rather than how proceedings are conducted.

Under Article 40 of the United Nations Convention of the Rights of the Child, children accused of breaking the law have a right to a fair trial, including the right to be presumed innocent until proven guilty. The right to be presumed innocent is enshrined in the

Constitution of Ghana[11] and applies to children and adults. This procedural safeguard is to ensure that children are not wrongly punished for acts they did not commit. The person who alleges the commission of a crime by a child must adduce evidence to establish it. However, children are vulnerable, and this procedural safeguard can easily be ignored due to AfDR's emphasis on the admission of guilt, forgiveness, and reconciliation. To minimise this risk, 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 (Nabudere and Velthuizen 2013). Moreover, once flexible traditions and local institutions are formally recognised, limits to the application of customary law can be set by human rights law (Oomen 2016).

Uncertainty of Indigenous Dispute Resolution Processes

An important characteristic of law is certainty. The principles of law must be known by the people expected to live by them. As custodians of the values and norms of the society, chiefs and elders had a duty to transmit them to the younger ones. The transmission was done orally and, like indigenous dispute resolution processes, they were often undocumented because the societies were preliterate. This has caused Osaghae (2000) to conclude that since customary law is unwritten, it is uncertain. However, Ubink (2018) asserts that the unwritten nature of customary law makes it flexible, relational, and negotiable. The flexible nature of proceedings in the customary dispute resolution process is necessary for an effective juvenile justice system. The inflexible nature of proceedings has been identified as one of the reasons the formal court system is unattractive to a vast majority of the citizens of Africa.

Nevertheless, although customary law was oral, it was not uncertain as its unique feature lies in its recognition and acceptance by the people it applies to (Arowosaiye 2016). Moreover, the fact that the law is unwritten does not make it uncertain. The British constitution is not written, but one cannot say that the law is in doubt.

Conclusion

There has been a clarion call to investigate the efficacy of traditional or indigenous peace-making systems, not as an alternative, but as a complement to Western-oriented approaches to conflict management in West Africa (Brewoo and Abdallah 2015). In response, this article suggests an adoption of AfDR as an appropriate restorative justice model to form part of the existing legal framework for Ghana's juvenile justice system. This is because although Ghana has legislation on restorative justice for its juvenile justice system. Indications are that the model of restorative justice as envisioned by the law is not suitable. Juveniles, therefore, cannot harness the possibilities restorative justice has to offer. This article has identified traditional peace-making systems referred

11 Article 19 cl 2(c) of the 1992 Constitution.

to as African Dispute Resolution as an appropriate form of restorative justice to mitigate juvenile crime in Ghana. It is proposed that experiences of transitional justice mechanisms discussed here would inspire and inform Ghana's juvenile justice system to develop processes that would adequately address the needs of victims and juvenile offenders.

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