PROMOTING RESTORATIVE PRACTICES AND CHILD FRIENDLY JUSTICE FOR CHILDREN IN CONFLICT WITH THE LAW: THE KENYAN CONTEXT

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DECLARATION

I, GAKUO ISABEL WANJIRU, do hereby declare that this research is my original work and that to the best of my knowledge and belief; it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: 30.05.2018

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

[MR. MOHAMED RUWANGE]

ABSTRACT

The core objective of this study is to propose the adoption of restorative justice as a complementary mechanism of dealing with juvenile offenders in Kenya. This paper hypothesises that high rates of recidivism and juvenile crime in Kenya is primarily attributed to the retributive nature of the juvenile justice system. It recognizes that more often than not, the current system fails to meet the primary objectives of efficient child justice which is to rehabilitate offenders, deter them from future criminal behaviour, reintegrate them into the society and restore social harmony with all stakeholders.

This research therefore encompasses an analytical study of restorative justice in different countries where it has been adopted as best practice for juveniles. This is done by looking at international, regional and national legal frameworks and principles that support restorative practices. This paper also demonstrates the rates of success of restorative justice in combating juvenile crime compared to instances where it was not applied. The research methodology is purely qualitative, relying on reports of previous studies and relevant academic writing on this area.

The study concludes with findings that restorative justice has not expressly been considered or implemented in the Kenyan juvenile system however prevailing legislation as well as existing Traditional Dispute Resolution Mechanisms set the stage for possible adoption of restorative measures involving communities and the civil society in dealing with children in conflict with the law. The paper recommends that there should be increased implementation of restorative measures which Kenyan laws already provide for, whilst progressively incorporating those that have been seen to work in other jurisdictions.

LIST OF ABBREVIATIONS

CBCPs	Community Based Correction Programs
CPUs	Child Protection Units
FGC	Family Group Conference
FSCE	Forum for Sustainable Child Empowerment
RJ	Restorative Justice
RJC	Restorative Justice Conferences
TDRMs	Traditional Dispute Resolution Mechanisms

LIST OF LEGAL INSTRUMENTS

STATUTES

1. The Constitution of Kenya, 2010.
2. The Children Act, No. 8 of 2001.
3. Borstal Institutions Act (CAP 92).
4. Child Justice Act (No. 75 of 2008) (SA).
5. Children, Young Persons and Their Families Act (1989) (NZ).
6. Crimes Act (No. 43 of 1961) (NZ).

INTERNATIONAL INSTRUMENTS

1. African Charter on the Rights and Welfare of the Child.
2. United Nations Convention on the Rights of the Child.
3. United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the JDL Rules).
4. United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules).

1 INTRODUCTION

1.1 BACKGROUND OF THE STUDY

In the words of *Brian Weke,* a child rights activist and legal expert on juvenile crime, "The legal and policy framework with regard to child rights in Kenya has improved tremendously with coming into force of the *Children Act* in 2001. However more still needs to be done to improve the juvenile justice system."[1] The identification of this study results from the present lacuna in the judicial process in enforcing a system that should cater for the child offender as an individual rather than majorly focusing on the crime itself. Mr. Weke further adds that "One major area needing attention is the implementation of diversion programs, which focuses on the channelling of children from the criminal justice system into programs that make them accountable for their actions." He added that the goal is to rehabilitate the offender and to prevent further offenses while addressing factors that contribute to criminal behaviour. The *Children Act 2001,* which is the primary law in Kenya concerning children in conflict with the law, provides that in all actions concerning children undertaken by any institution or body, the best interests of the child shall be a primary consideration.[2] This is also mirrored in the Constitution of Kenya, 2010.[3]

In practice, the special protection accorded to children under the Act[4] are frequently disregarded, as children are often tried in regular adult courts without cognizance of the fact that they are children. In a study, 16/40 children interviewed by *Human Rights Watch*, and who had been brought to court, said their trials took place in regular courts for adults mixed with adult cases.[5] The creation of the Children Court by the 2001 Act has attempted to separate court proceedings involving children from those which involve adults, however this has not fully succeeded as independent children courts are inadequate. In fact, they are presently three in number; Tononoka Children's Court in Mombasa, Nairobi Children's Court, and the most recent one established in Nakuru which is the first children's court to support a video link to enable Children testify without

[1] http://www.communication-tangaza.org/timothy/diversion-programs-and-juvenile-justice-system/ on 25 July 2017.
[2] Section 4(2), *Children Act* (No. 8 of 2001).
[3] Article 53(2), *Constitution of Kenya,* 2010.
[4] *Children Act* (No. 8 of 2001).
[5] https://www.unicef-irc.org/portfolios/documents/785_jj_ngorep_kenya2.htm on 25 July 2017.

physical contact with the accused.[6] In general, the Children Court takes place in the District Court building but according to the Act should take place in a different room or building, or on a different day or time from other courts.[7] Whether in regular courts or in children courts, proceedings are rushed and do not allow children fair opportunities to be heard.[8] Confused and frightened in court, children often do not understand the nature of the legal proceedings or the dispositions of their cases. Translation is not always available for children who need it. None of the forty children interviewed had been represented by legal or other counsel, and only five said that they had family members present in court.[9]

As at now, there is inadequate enforcement of existing legislation aimed at ensuring that all children are treated with respect for their physical and mental integrity and their inherent dignity.[10] Further, the juvenile justice system does not cover the entire country, as Children courts are less than enough, and the system is generally inefficient.[11] In light of the current situation, there is an urgent need of a process whose principle aim is to repair the damage caused by the child's behaviour and to reform the child into a law abiding citizen.

1.2 STATEMENT OF THE PROBLEM

There is a looming need for a system that is distinct from that of ordinary adult offenders which will ensure that children involved in crime do not become outcasts of the society and do not reoffend. Most child offenders have social-economic factors working against them and contact with the criminal justice system leads to an entanglement with the law that continues for some of them right to their adulthood.[12] The UNCRC specifies that State Parties must offer 'a variety of dispositions, such as care, guidance and supervision orders, counselling... and foster care' as alternatives to institutional care to ensure that children are dealt with 'in a manner appropriate to their offence'.[13] Unfortunately, the Children's Services Department of the Kenyan government

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[6] https://hivisasa.com/posts/maraga-inaugurates-nakuru-childrens-court-inspects-new-molo-law-courts on 25 July 2017.
[7] Section 71(1) (b), *Children Act* (No. 8 of 2001).
[8] https://www.unicef-irc.org/portfolios/documents/785_jj_ngorep_kenya2.htm on 25 July 2017.
[9] https://www.unicef-irc.org/portfolios/documents/785_jj_ngorep_kenya2.htm on 25 July 2017.
[10] The Undugu Society of Kenya, *Street Children and Juvenile Justice in Kenya,* Consortium for Street Children, 2004, p.8.
[11] The Undugu Society of Kenya, *Street Children and Juvenile Justice in Kenya,* 2004, p.8.
[12] Kariuki J, 'Towards a child rights approach; A comparative analysis of the Juvenile justice reform process in Kenya and South Africa' Unpublished LLM Thesis, Central European University, Budapest, 2010, 1.
[13] Article 40, *United Nations Convention of the Rights of the Child.*

spend roughly two-thirds of their entire budget on institutions such as approved schools, borstals and remand homes, leaving scant manpower or resources for community social work or the development of other alternatives to these correctional facilities.[14] The end result is that the vast majority of children in conflict with the law are sentenced to periods of custody within these institutions, in total neglect of the Constitution[15] giving the impression that Kenya has a significant problem of juvenile crime, when in fact court convictions specify as few as 15% of children as actually having committed a criminal offence.[16] From the foregoing, there's a need to undertake a study on the appropriateness of alternative forms of justice and dispute resolution particularly in children cases and to demonstrate how they are best suited to improve the current juvenile system.

1.3 JUSTIFICATION OF THE STUDY

The place of alternative forms of justice in the juvenile justice system has been greatly underrated and an undue weight has been placed on the formal court process. Seeing as modern day justice is progressive, there is a rising need to ensure a wider access to justice in our society, as reliance on the court process has for many years has proved tedious in many respects. For instance, procedural technicalities, backlog of cases, lack of legal representation and a general fear and lack of understanding of the court process. This should not be experienced by anyone who seeks justice, more so, children. Additionally, the crime victims and families often feel as though justice has not been served upon them as they suffer emotional damage and broken relationships, leaving a disconnect in society. Furthermore, there seems to be an aspect of stagnation in the efforts of the judicial system in curbing growth of crime rates. This demonstrates the need for an efficient system that will address crime issues from the offset by catering for the underlying elements resulting to unlawful behaviour in children as well as reuniting them with society upon reforming.

1.4 AIMS AND OBJECTIVES

1.4.1. To demonstrate the effects of the court process and institutionalization on the life of the child offender;

1.4.2. To demonstrate the incompetence that ensues in the current judicial process such as poor age assessment, leading to improper incarceration of children;

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[14] The Undugu Society of Kenya, *Street Children and Juvenile Justice in Kenya,* p.28.
[15] Article 53, *Constitution of Kenya, 2010.*
[16] The Undugu Society of Kenya, *Street Children and Juvenile Justice in Kenya,* p.28.

1.4.3. To show how restorative practices and alternate systems of justice for child offenders have been downplayed in Kenya, unlike other jurisdictions, and why it should be implemented;

1.4.4. To highlight how alternative modes of dispute resolution can be implemented for child offenders; [17]

1.4.5. To show the need for community-based programs such as Diversion programs, and a system of re-integration into society for child offenders and just how that system would work.[18]

1.5 RESEARCH HYPOTHESIS

The root of all crime and related issues in Kenya can be traced back to the ignorance of the judicial system in addressing criminal or anti-social behaviour effectively when it sprouts up at a young age. There is no regard for the tender state of children and the fact that processes and experiences that they are put through heavily influences the outcome of their adulthood. If undesirable behaviour in children is addressed effectively, crime-related issues in the society at large will decrease tremendously.

1.6 RESEARCH QUESTIONS

i. Are there legal safeguards of children's rights in Kenya? Are they adhered to in practice?

ii. Are the principal objectives of the Kenyan Juvenile Justice system met?

iii. Have alternative forms of dispute resolution been implemented? To what extent?

iv. How have Restorative Justice Processes been implemented in juvenile systems of other jurisdictions? Are they successful?

v. What are the most suitable measures to take in order to install Interventions such as Diversion programmes, Restorative Justice Processes and alternative dispute resolution mechanisms? (Ethiopia, South Africa and New Zealand case study)

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[17] http://www.standardmedia.co.ke/article/2000102391/juvenile-justice-system-in-urgent-need-of-reforms on 27 July 2017.

[18] Save the Children Sweden, *Case Study: Diversion of children in conflict with the Law in community-based program centers, Ethiopia,* 2005.

1.7 DEFINITION OF TERMS

Child-Friendly Justice

This is a justice system which guarantees protection and effective implementation of all rights of the child at the highest attainable level, considering the principles in the UNCRC and all other related international and regional instruments. It gives due regard to the child's level of maturity and understanding and the circumstances of each case. It is on the whole a system that is accessible, age appropriate, speedy, diligent, and oriented towards the needs and rights of the child, including the right to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.[19]

Diversion

This is a process that involves removal of an offender from criminal justice processing and often redirecting them to community support services. It is commonly practised formally or informally in many legal systems and serves to hinder the negative effects of subsequent proceedings in juvenile justice administration, such as the stigma of conviction and sentence. In most cases, non-intervention would be the best response. Thus, diversion at the outset may be the optimal response, especially where the family, the school or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner.[20]

1.8 REVIEW OF RELATED LITERATURE

There are a number of credible works and studies that have been carried out, with regards to Juvenile Systems.

The Consortium for Street Children (CSC) which is a network of NGOs working with street-involved children and children at risk of taking to street life in Africa among others, undertook a two-year research and advocacy project with local partners to examine the situation of street children and generally children in conflict with the law in juvenile justice systems in six countries including Kenya. A report compiled documenting the findings of the project in Kenya identifies some major concerns relative to child justice which include: the various legal minimum ages,

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[19] Save the Children Sweden, *Child Protection and Child Friendly Justice: Lessons Learned from Programmes in Ethiopia (Executive Summary),* February 2012, 9.

[20] Commentary on Rule 11, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules),* 29 November 1985, RES 40/33.

which are inconsistent, discriminatory and/or too low, particularly the minimum age of 8 years for criminal responsibility; the incidence of police brutality, particularly against street children, refugee children and those in conflict with the law; the inadequate enforcement of existing legislation aimed at ensuring that all children are treated with respect for their physical and mental integrity and their inherent dignity; the increasing number of children deprived of a family environment; and the absence of a distinction between children in need of special protection and child offenders in legal proceedings.[21] Further, it highlights the absence of an independent complaint mechanism for children in alternative-care institutions and the insufficient financial and human resources allocated for alternative care; the fact that the juvenile justice system does not cover the entire country and the inefficiency of the juvenile justice system generally.[22] This report highlights the gap in achievement of justice in the Kenyan juvenile system in various aspects, thus affirming the need to carry out this study.

Further, a newspaper article published in 2014 brought to light the urgent need for standardised guidelines and procedures for protection of children in the juvenile justice system in Kenya, and amendments to the *Children Act 2001* to entrench Diversion. It highlights that this will shield the child offender from a generally punitive and adversarial criminal justice system which will also ensure that criminal charges are withdrawn and no criminal records are maintained on children, to facilitate rehabilitation and reintegration.[23]

Another viewpoint is as depicted by *Joan Kariuki*[24] in her thesis where she highlights that the legal instruments in Kenya call for alternatives to institutionalization as a rehabilitation technique such as probation, compensation, community service orders and supervision orders. The commentary to Rule 18 of the *Beijing Rules* emphasizes the place of the community in any rehabilitation technique applied to the child. The family's role should not be understated. A child should only be separated for his/her family as a measure of last resort.[25] The paper however goes on to challenge the implementation of alternatives to the trial process, such as Diversion programs. She writes that

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[21]The Undugu Society of Kenya, *Street Children and Juvenile Justice in Kenya,* Consortium for Street Children, 2004, 8.
[22]The Undugu Society of Kenya, *Street Children and Juvenile Justice in Kenya*, 2004, 8.
[23] http://www.standardmedia.co.ke/article/2000102391/juvenile-justice-system-in-urgent-need-of-reforms on 4 August 2017.
[24] Kariuki J, 'Towards a child rights approach; A comparative analysis of the Juvenile justice reform process in Kenya and South Africa' Unpublished LLM Thesis, Central European University, Budapest, 2010, 20.
[25] Rule 18.2, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules).*

the ambiguity and the discretionary nature[26] of diversion has unfortunately resulted in it not being considered the priority measure when dealing with juvenile offenders. She adds that respect for human rights and legal safeguards override the need for diversion and consequently, where a child insists on their innocence, they have a right to have their innocence established by court.[27] This presents an important critique in adoption of restorative justice.

Following the focus on New Zealand, South Africa and Ethiopia as comparators, this paper will endeavour to look at a myriad of reports and journals by governments and agencies such as, *Save the Children Sweden* and the Ministry of Justice (New Zealand) which provide comprehensive documentation of the progress, experiences and lessons gained over the years in the course of practices of specialized systems and services.

1.9 RESEARCH DESIGN AND METHODOLOGY

The approach employed in this study involves mainly secondary sources of data as identified in the literature review, which includes books, articles, journals, statutes and international instruments as well as comparative studies to put the subject matter into perspective.

1.10 STATEMENT OF LIMITATIONS

The challenges faced when carrying out this study include: Time constraints as the study required extensive research which was carried out during the semesters concurrently with the other course work. Secondly is data inaccessibility which arose especially when carrying out the comparative studies as they focus on territories outside Kenya, and in government institutions which involve a long and tedious process to access.

1.11 CHAPTER SUMMARY

The dissertation will be divided into the following core chapters:

Chapter 1: This is the introductory chapter which outlines: the Background of the Study; Problem Statement; Aims and Objectives of the Study; Hypothesis; Research Questions; Conceptual or

[26] Rule 11.2, *Beijing Rules.*
[27] Sloth-Neilsen J, *Child Justice in Africa A guide to Good Practice* Community Law Center 24.

Theoretical Framework; Importance or justification or rationale of the study; Scope and limitations of the study; Definition of terms; Chapter summary.

Chapter 2: This study is primarily founded on two foundational theories of punishment: Restorative Justice pegged against existing Retributive Justice. This chapter also discusses sociological theories of juvenile crime to bring out fundamental reasons behind criminal behaviour in children and the role of society to that extent.

Chapter 3: This chapter focuses on the main issues as expressed in the research questions. It analyses the findings about the operations of the Kenyan juvenile justice system while looking at the system's capacity to adopt RJ. Here, the study covers extensive discussion of the existing legislative framework and TDRMs.

Chapter 4: This stage consists of a comparative study focused on the RJ programs for juveniles in New Zealand, South Africa and Ethiopia. The objective is to demonstrate the best practice mechanisms of restorative justice in terms of implementation of child friendly systems, their benefits and their limitations.

Chapter 5: This paper concludes by providing a succinct description of the main findings of the research and their implications on the study. The chapter also offers plausible recommendations and suggestions for improvement with justifications on the same.

2 THEORETICAL FRAMEWORK OF THE STUDY

To achieve the objectives of this study, it is crucial to examine the various theories that attempt to explain juvenile delinquency, its causes and tangible solutions to combat its rise in the society. Furthermore, relevant theories of punishment come into play to justify the measures adopted when dealing with juvenile matters to ensure that justice is served and fairness upheld.

2.1 WHY DO CHILDREN COMMIT CRIMES?

Juvenile delinquency has been defined as actions that violate the law, committed by a person who is under the legal age of the majority.[28] There is not one set answer on why youth turn to criminal behaviour, but there are plenty of biological, sociological and psychological theories that can help acquire reasoning and knowledge to better understand juveniles.[29] For purposes this study, I will briefly discuss the sociological theories (most relevant to the Kenyan society) which look at societal and environmental influences that lead to criminal behaviour.[30]

2.1.1 Social Disorganization Theory

Theorists Clifford Shaw and Henry McKay (1942) suggested that juvenile delinquency was caused by the neighbourhood in which a person lived. Socioeconomic factors such as high levels of poverty, disease, conflict and despair set the conditions in which antisocial behaviour flourishes.[31] In such areas, conventional institutions of social control (e.g., family, schools, churches, voluntary community organizations) are weak and unable to regulate the behaviour of the neighbourhoods' youths.[32] Thus, delinquency emerges because of the absence of effective parental supervision, lack of resources, and weak community attachment and involvement in local institutions.[33] There is

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[28]Burfeind J and Bartusch D. J, Juvenile Delinquency: An Integrated Approach, Third Edition. <www.jblearning.com/samples/0763736287/chapter_1.pdf > on 16 August, 2017.

[29]< http://juvenilejustice190.blogspot.co.ke/2012/10/oncea-criminal-always-criminal-this-is.html > accessed on 23 August 2017.

[30] Moore M, 'Psychological Theories of Crime and Delinquency' *Journal of Human Behaviour in the Social Environment,* 2011, 227-
<https://is.muni.cz/el/1423/jaro2015/SPP209/um/2_Moore_2011_Psychological_Theories_of_Crime.pdf > on 24 August, 2017.

[31] < http://juvenilejustice190.blogspot.co.ke/2012/10/oncea-criminal-always-criminal-this-is.html > on 24 August 2017.

[32]<http://www.children.gov.on.ca/htdocs/English/professionals/oyap/roots/volume5/chapter04_social_disorganization.aspx > on 24 August 2017.

[33]< http://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0008.xml > on 24 August 2017.

also the aspect of 'cultural transmission' in this neighbourhoods whereby criminal traditions would be passed to successive generations of youths.[34]

2.1.2 Anomie Theory

It is sometimes also termed as 'Strain Theory' or 'Means-Ends Theory'.[35] 'Strain' in this case refers to the discrepancies between culturally defined goals and the institutionalized means available to achieve these goals.[36] American sociologist Robert Merton avers that access to socially acceptable goals plays a part in determining whether a person conforms or deviates.[37] A person may have the socially acceptable goal of financial success but lack a socially acceptable way to reach that goal. One feels the pressure to achieve his goals and also maintain order in society and soon enough, they are overcome by the desire to achieve their goal and will venture into illegitimate means of achieving them. As many youth from poor backgrounds are exposed to the high value placed on material success in capitalist society but face insurmountable odds to achieving it, turning to illegal means to achieve success is seemingly a rational, if deviant, solution.[38]

2.1.3 Labelling Theory

Sociologist Howard Becker in the 1960s put forward a theory of how social processes of labelling and treating someone as criminally deviant actually fosters deviant behaviour and has negative repercussions for that person because of bias.[39] It assumes that no act is intrinsically criminal. Most rules that define deviance and where it arises are framed by the dominant groups in society, such as the police, court officials, experts, and school authorities, and they apply to the subordinate groups. They provide the main source of labelling. For instance, many children engage in activities such as breaking windows, stealing fruit from other people's trees, climbing into other people's

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[34] <http://criminal-justice.iresearchnet.com/crime/juvenile-delinquency/3/ > on 24 August 2017.
[35] Merton R, 'Anomie Theory', < https://www.d.umn.edu/~bmork/2306/Theories/BAManomie.htm> on 25 August 2017.
[36] <https://www.boundless.com/sociology/textbooks/boundless-sociology-textbook/deviance-social-control-and-crime-7/the-functionalist-perspective-on-deviance-62/strain-theory-how-social-values-produce-deviance-375-6183/> on 25 August 2017.
[37] Little W, 'Chapter 7: Deviance, Crime and Social Control', *Introduction to Sociology,* 1st Canadian Edition, < https://opentextbc.ca/introductiontosociology/chapter/chapter7-deviance-crime-and-social-control/> accessed on 25 August 2017.
[38] Little W, 'Chapter 7: Deviance, Crime and Social Control', *Introduction to Sociology,* 1st Canadian Edition.
[39] Crossman A, 'An Overview of Labelling Theory', 2017, < https://www.thoughtco.com/labeling-theory-3026627 > accessed on 25 August 2017.

compounds. In affluent neighbourhoods, these acts may be regarded as innocent aspects of growing up. In poor areas, on the other hand, these same activities might be seen as tendencies towards juvenile delinquency, which suggests that differences of class play an important role in the process of assigning labels of deviance.[40] In detention in particular, the act of imprisonment itself modifies behaviour, to make individuals more criminal. U.S. research confirmed the prejudices of police and judges who continued to label, arrest, and convict the children of dysfunctional families disproportionately.[41]

2.1.4 Social Learning Theory

This is one of the most fundamental theories of juvenile delinquency. Albert Bandura (1977) argues that children learn by observing, modelling and imitating others. Additionally, instruction and social persuasion bear a great influence on behaviour.[42] For example, children learn to be aggressive from their life experiences and learn aggression in different ways: by seeing parents argue; watching their friends fight; viewing violence on television; or, listening to violent music. Consequently, behaviour is conditioned over time by reinforcement. They end up learning that aggression is sometimes acceptable and can produce the desired outcome.[43]

2.2 CORE THEORIES OF PUNISHMENT

The outline above illuminates the causes of criminal behaviour in children, and the influence of the society in that regard. It is therefore imperative to examine the mechanisms best suited to address this problem.

The theoretical basis for punishment is generally in two schools: Backward looking and forward looking theories, i.e. retributive theories and the utilitarian theories respectively.[44] The basic difference between the two concerns the moral purpose served by legal punishment, that is, social benefits in the future or just compensation for past offenses.[45]

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[40] Crossman A, 'An Overview of Labelling Theory', 2017.
[41] Little W, 'Chapter 7: Deviance, Crime and Social Control', *Introduction to Sociology,* 1st Canadian Edition.
[42] Moore M, 'Psychological Theories of Crime and Delinquency' *Journal of Human Behaviour in the Social Environment,* 2011, 227-<https://is.muni.cz/el/1423/jaro2015/SPP209/um/2_Moore_2011_Psychological_Theories_of_Crime.pdf > on 25 August, 2017.
[43] < http://criminal-justice.iresearchnet.com/crime/juvenile-delinquency/3/> on 25 August 2017.
[44] < http://legal-dictionary.thefreedictionary.com/Theories+of+Punishment> on 26 August 2017.
[45] Hsieh D, 'The Scope Problem in Punishment', May 2006, 2.

2.2.1 RETRIBUTIVE JUSTICE

Retributivism is a strictly backward-looking justification of punishment. It is the embodiment of most judicial systems such that punishment is intended to fit the crime. Punishment is regarded as the form of 'payment' for the offense they committed. [46] Immanuel Kant and Georg Hegel, the forefathers of modern retribution opine that the public response to crime cannot be used to achieve any other goals other than punishing the offenders according to 'what they deserve', i.e. punishment that 'equals' the crime.[47] This is the concept of "Just Deserts", which holds that the commission of an offence causes the disturbance of the "right" relationships in society and thus reconciliation of these relationships is achieved through making the offender "pay" for his wrong-doing, mainly through punishment.[48] Retributivism avers that crime involves taking an unfair advantage over a law-abiding citizen and punishment removes such advantage by imposing a burden of law on the criminal.[49]

The reality is that this theory deems punishment as infliction of pain and depravation upon the offender, which, it holds is the only way 'justice can be restored'. Concepts like reducing crime (and recidivism) and enhancing the public's perception of the justice system's fairness are irrelevant to this theory. With regards to Restorative Justice, the concept of a victim-oriented process is entirely alien to a retributive criminal justice system. Even if such processes and other alternative forms of punishment 'fit' and 'equal' the crime, they are secondary to the fundamental goal of 'just deserts'. Nonetheless, the compatibility of retributive and restorative justice exists on their common premise of offender accountability.[50]

2.2.1.1 Retributive Justice for Juveniles in Kenya

The justice system for young offenders in Kenya is essentially retributive. Custodial measures are the most common mode of dealing with child offenders.[51] Juvenile entities, i.e. borstal institutions

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[46] <https://thelawdictionary.org/article/definition-of-retribution-in-criminal-justice/> on 26 August 2017.
[47] Gabbay. Z, 'Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices' 1(2) *Journal of Dispute Resolution,* 2005, 375.
[48] Starkweather D A, 'The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining' Indiana Law Journal S] (3) Article 9, 857.
[49] Stanford Encyclopaedia of Philosophy, *Legal Punishment,* 2017 Revision.
[50] Gabbay. Z, 'Justifying Restorative Justice: A Theoretical Justification, 2005, 376.
[51] Kariuki J, 'Towards a child rights approach; A comparative analysis of the Juvenile justice reform process in Kenya and South Africa' Unpublished LLM Thesis, Central European University, Budapest, 2010, 57.

and approved schools bear much likeness to the adult prison systems.[52] The purpose of these institutions and other mechanisms are intended to secure the best interests of the children, prioritizing their care, protection and rehabilitation.[53] Furthermore, institutionalization is meant to be sought as the last possible alternative. However, in actual practice, this is not necessarily the case. Furthermore, alternative dispute resolution mechanisms have not been accommodated in the juvenile system. This will be discussed further in the upcoming chapters.

2.2.2 RESTORATIVE JUSTICE

This is a forward-looking form of justice which is predicted and expected to be a better method of handling crimes, particularly for juvenile delinquency.[54] Howard Zehr explains the "Restorative lens" to be the view that "crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation and reassurance."[55]

This theory best forms the foundation of child-friendly justice. It upholds the importance of involving primary stakeholders of crime: the victim, the offender and their respective communities of care, in an attempt to restore the harm caused and repair broken bonds.

It underpins an approach to justice that is flexible and based on mutual recognition, respect and free will among participants. RJ is adaptable to meet the specific requirements of the child and to reflect social and cultural contexts. It has the potential, therefore, to promote and protect the best interests of the child throughout the various procedural stages.[56]

2.2.2.1 Supporting Theories

Restorative justice is also supported by the *Reintegrative Shaming Theory* propagated by John Braithwaite (1989) claiming that: tolerance of crime makes things worse; stigmatization, or disrespectful out casting of criminals makes crime worse still; however reintegrative shaming done

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[52] The Undugu Society of Kenya, *Street Children and Juvenile Justice in Kenya,* Consortium for Street Children, 2004, 28.

[53] Section 191, *Children Act* (No. 8 of 2001).

[54] Fathurokhman F, 'The Necessity of Restorative Justice on Juvenile Delinquency in Indonesia, lessons learned from the Raju and AAL cases', Faculty of Law, Sultan Ageng Tirtayasa University, 2013, 968 - < http://www.sciencedirect.com > on 27 August, 2017.

[55] Zehr H, 'Changing Lenses: A New Focus for Crime and Justice', 1990.

[56] Report by the Special Representative of the Secretary-General on Violence against Children (SRSG), *Promoting Restorative Justice for Children*, New York 2013, 4.< http://srsg.violenceagainstchildren.org/page/919>

by disapproval of the act within a continuum of respect for the offender and whereby disapproval is terminated by rituals of forgiveness, prevents crime.[57] Following this theory, the key way to show respect is to be fair, to listen, to empower others with process control and to refrain from bias on the grounds of age, sex or race.

This introduces the *Procedural Justice Theory.* It suggests that victim-offender conferences and other modes of RJ do not have all the procedural safeguards of court cases yet they are structurally fairer because of who participates and who controls the discourse. Criminal trials invite along those who can inflict maximum damage on the other side, whereas RJCs invite those who can offer maximum support to both the victim and offender side. In other words those present are expected to be fair and therefore tend to want to be fair. Presently, empirical evidence shows that procedural fairness results in subsequent compliance with the law.[58]

Additionally, the *Theory of Unacknowledged Shame* highlights that shame can be a destructive emotion as it can lead one to attack others, attack self, or avoid the act again or withdraw. Therefore, a process is needed to enable offenders to deal with that shame which often arises when a serious criminal offence has occurred.[59] This theory views RJ as having the potential to institutionalize pride and acknowledged shame (usually done by apology and reciprocated by forgiveness), which heals damaged social bonds. Following this theory, offenders in RJ programs may accept and discharge shame more than when they go through court proceedings.[60]

Proponents of RJ generally believe that this approach can alleviate the incompleteness of the formal criminal justice system, which tends to leave the needs of the victims, offenders, and communities unmet and the harm caused by the wrongdoing unrepaired, whereas RJ is an integrated process that addresses all of the parties' needs.[61]

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[57] Braithwaite J, 'Restorative Justice: Theories and Worries', 123rd International Senior Seminar Visiting Experts' Papers, Resource Material Series No. 63, 47.

[58] Braithwaite J, 'Restorative Justice: Theories and Worries'123rd International Senior Seminar Visiting Experts' Papers, Resource Material Series No. 63, 48.

[59] Braithwaite J, 'Restorative Justice: Theories and Worries', 48.

[60] Braithwaite J, 'Restorative Justice: Theories and Worries', 50.

[61] Fathurokhman F, 'The Necessity of Restorative Justice on Juvenile Delinquency in Indonesia, lessons learned from the Raju and AAL cases', Faculty of Law, Sultan Ageng Tirtayasa University, 2013, 972 - < http://www.sciencedirect.com > accessed on 27 August, 2017.

2.2.2.2 Criticisms of Restorative Justice

Keeping in mind all these apparent advantages of restorative justice, there have been critiques put forward to challenge the same.

One primary critique is that, like rehabilitation, RJ results in different punishments to equally culpable offenders.[62] This inherent inconsistency in outcome is often viewed as an infringement on the principle of equality and a contradiction to the criminal justice system's ideal of uniformity and consistency.[63]This amounts to a lack of standardization and predictability of the process applied in each case as well as the resulting remedies. A possible solution to this is having lawful restrictions and supervision over these practices' outcomes. Similarly, the law can and should assure offenders they are not denied their constitutional rights, and the criminal justice system can install control mechanisms to ensure offenders are not subject to degrading or unacceptable sanctions in restorative processes. Ultimately, this can reduce the diversity of outcomes and contribute to a more foreseeable range of possible results.[64]

Theorist John Braithwaite highlights a few concerns, one of which being that RJ practices can increase victim fears of re-victimization. A study in Australia shows that some victims are actually worse off as a result of going through a RJ process, however the reduction of such fear was also found to be twice as common.[65] While victims are mostly surprised to learn how shy, ashamed and inadequate offenders are, some offenders are formidable and, in some occasions, even threaten the victim. Such cases can destabilize RJ programmes especially in the media. Victims are often enticed into RJ before they are ready. Pressure to achieve "speedy trial" objectives for offenders can be quite contrary to the interests of victims who may need much more time and counsel before dealing with the matter.[66] He adds that RJ can be a "shaming machine" that worsens the stigmatization of offenders. Considering that the offender already carries burdensome shame, even small amounts of overt shaming are very likely to push the offender into a defensive stance, to the point that they will be unable to even feel, much less express, genuine shame and remorse.[67]

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[62] Gabbay. Z, 'Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices' 1(2) *Journal of Dispute Resolution,* 2005, 349.

[63] Dolinko D, 'Restorative Justice and the Justification of Punishment', 2003, UTAH L. REV. 319.

[64] Gabbay. Z, 'Justifying Restorative Justice: A Theoretical Justification, 2005, 394.

[65] Braithwaite J, 'Restorative Justice: Theories and Worries', 123rd International Senior Seminar Visiting Experts' Papers, Resource Material Series No. 63, 51.

[66] Braithwaite J, 'Restorative Justice: Theories and Worries', 52.

[67] Braithwaite J, 'Restorative Justice: Theories and Worries', 52.

Another worry raised is that the process is prone to capture by the Dominant group. This is the situation especially for child offenders whereby their parents or guardians participate in the conferences almost entirely without the involvement of the child. Interviews found fully 45% of young offenders, compared to 20% of family members saying they were not involved in making the conference decision. Data showed family members of the offender having by far the largest influence on the decision, followed by professionals who were present, the young offender and the victim. For indigenous or traditional restorative processes, the indigenous leaders would manipulate the justice system and abuse their power by having certain biases.[68]

In addition, there is concern that RJ practices can trample rights because of impoverished articulation of procedural safeguards. An example will be that unsupervised police power could amount to abuse. For instance for a child offender, failure to require parental attendance during questioning, or refusal to grant access to a lawyer, or unauthorised searches and excessive force could become hidden in cases dealt with by RJCs.[69]

2.3 UBUNTU PHILOSOPHY

This theory forms an integral part of African culture in the approach to RJ. It states that 'a person is a person because of or through others'.[70] In a landmark South African case, it was defined as 'a culture which places sole emphasis on communality and the interdependence of the members of the community.' It upholds humanity and recognizes that each person is entitled to unconditional respect, dignity, value and acceptance from community members, which he also ought to reciprocate to them.[71] This puts the role of traditional African practices into perspective. The spirit of brotherhood and togetherness is inherent in African customs and they foster reconciliation and reintegration upon occurrence of wrongdoing. It is therefore vital that the role of Customary Law is given due regard in fostering child-friendly justice.

2.4 UTU PHILOSOPHY

The essence of RJ in Kenya is put into context by the African concept of 'Utu' which is the foundation of societal bonds in the Kenyan society. It illuminates the core values of humanity,

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[68] Braithwaite J, 'Restorative Justice: Theories and Worries', 53.
[69] Braithwaite J, 'Restorative Justice: Theories and Worries', 54.
[70] Khomba JK, The African Ubuntu Philosophy, published Phd Thesis, University of Pretoria, Pretoria, 2011, 127.
[71] *S v Makwanyane* (1995), Constitutional Court of South Africa.

compassion and dignity embedded in our culture which we must strive to maintain even as our society continues to evolve. Implementation of RJ is a step towards a progressive justice system as it employs mechanisms which preserve these essential aspects of our culture by ensuring that that the justice process is holistic and the community together with all primary stakeholders are involved. As a result, the justice process is not hijacked by Western forms of justice as is the case today with the adversarial court system which does not give due regard to our cultural values. In the case of children involved in crime, the significance of 'Utu' cannot be understated. These persons ought to be dealt with by a process that takes cognizance of their fragility whilst ensuring that they take accountability for their actions. The current court system is arguably impersonal to the needs of the victims, offenders and community at large whereas RJ is oriented towards all the parties involved and seeks to repair the harm caused.

2.5 CONCLUSION

This paper is fundamentally founded on the theory of restorative justice with due regard to the African context as propagated by the Ubuntu philosophy. The purpose is to find a realistic avenue of establishing restorative practices whilst giving sufficient emphasis of cultural practices that form the fabric of the African society.

3 THE CAPACITY OF RESTORATIVE JUSTICE IN THE KENYAN JUVENILE SYSTEM

This chapter encompasses a discussion of research questions (i), (ii) and (iii). This is done by analysing national, regional and international legal safeguards that exist with regard to rights of the child pitted against the current state of the Kenyan juvenile justice system on the ground. Furthermore, the chapter discusses whether restorative practices exist in the Kenyan setting and to what extent they operate in cases of children in conflict with the law.

3.1 INTERNATIONAL STANDARDS

3.1.1 United Nations Convention on the Rights of the Child (UNCRC)

After ratification of this convention on 30th July 1990, it became part of Kenyan law by virtue of Article 2 (6) of the 2010 Constitution. It was the flag bearer for child law reforms resulting in the *Children Act 2001*. The Act seeks to give effect to UNCRC in Kenya.[72]

This Convention provides the framework through which juvenile justice is to be examined and administered. Particularly, Article 40 (1) stipulates that a child alleged to have committed an offence shall be treated in a manner that promotes the child's sense of dignity and worth and which takes into account the child's age and the desirability of promoting the child's reintegration and ability to assume a constructive role in society. It emphasises the use of alternative measures to judicial proceedings where appropriate and proportionate both to their circumstances and the offence.[73] It has been interpreted as requiring States at the very least to develop legislation, guidelines and directives to ensure recourse to diversion.[74] Article 37 provides for due process rights of the accused child and prohibits the imposition of capital punishment or life imprisonment without parole on a child offender. It stresses on having arrest, detention or imprisonment of a child as a measure of last resort and for the shortest appropriate period. The 2010 Constitution

[72] Preamble, *Children Act* (No. 8 of 2001).
[73] Article 40 (3) (b), *United Nations Convention on the Rights of the Child,* 20 November 1989, RES 44/25.
[74] Sloth-Nielsen Julia, *Child Justice in Africa: A Guide to Good Practice,* Community Law Center 24.

explicitly adheres to this standard.[75] All in all, the best interest of the child is the overarching principle in all provisions of this Convention.[76]

3.1.2 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)

These rules provide guidelines for States in protecting child rights and providing for the needs of the child in the creation of separate and specialized infrastructure for juvenile justice. They stress on a child-rights approach to justice.[77] They are expressly mentioned in the preamble of the UNCRC and also form some of the fundamental provisions, such as issues of non-discrimination and detention as a measure of last resort and for the shortest period. These rules are not expressly binding, however when read with related instruments they may be viewed as having legal authority.[78]

3.1.3 United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the JDL Rules)

These rules seek "to counteract the detrimental effects of deprivation of liberty by ensuring respect for the human rights of juveniles".[79] They deal with child offenders held in custody at the pre-trial and trial stage and also those committed to rehabilitation institutions. Rule 1 stresses on the child-rights approach stipulating that the juvenile justice system should uphold the rights and safety and promote the physical and mental wellness of juveniles. These rules emphasize that deprivation of liberty ought to be a measure of last resort at which point it should be for "the minimum necessary period" and "limited to exceptional cases".[80] Rule 72 provides for a supervision mechanism through regular and unannounced inspections whereas Rule 78 discusses the right of a juvenile to make a complaint or seek assistance for that purpose. The rules also establish standards with regards to the physical environment and accommodation, education, medical care and disciplinary

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[75] Article 53 (1) (f), *Constitution of Kenya* (2010).
[76] Article 3, *United Nations Convention on the Rights of the Child,* 20 November 1989, RES 44/25.
[77] Cappelaere G, *Introduction to United Nations Standard Minimum Rules for the Administration of Juvenile Justice,* Defence for Children International (1995).
[78] Cappelaere G, *Introduction to United Nations Standard Minimum Rules,* (1995).
[79] Defence for Children International (2003), *Kids behind Bars: A Study on Children in conflict with the law: Towards investing in prevention, stopping incarceration and meeting international standards,* Amsterdam: Defence for Children International, 12. <www.kidsbehindbars.org> on 28 December 2017.
[80] Article 1, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty,* 14 December 1990, RES 45/113.

measures to be adhered to in the management of juvenile facilities.[81] Kenya has however only partially implemented these rules leaving much room for improvement.[82]

3.2 REGIONAL STANDARDS

3.2.1 African Charter on the Rights and Welfare of the Child

This Charter was enacted to better appreciate the socio-cultural and economic realities in Africa in spheres where it is argued that the UNCRC lacks[83]. Kenya ratified it on 25 July 2000. The Charter makes extensive provisions for the protection of the rights of the child however it does not sufficiently provide for rights of child offenders. It omits the recurrent theme in all child justice legislations that detention shall be the last resort and that deprivation of a child's liberty shall not be exercised arbitrarily or unlawfully.[84] Luckily, these provisions are accounted for under Article 53 of the 2010 Constitution of Kenya.

Overall, these instruments set out the foundational principles of a model juvenile justice system in any jurisdiction. They establish general rules of international law, which by dint of Article 2 (5) of the 2010 Constitution, are part and parcel of Kenyan law.

3.3 DO NATIONAL LAWS AND PROCEDURES MEET INTERNATIONAL STANDARDS?

In addition to the constitutional safeguards as previously discussed, the 2010 Constitution further stipulates that a child has the right to be protected from abuse, neglect, all forms of violence, inhuman treatment and punishment and hazardous or exploitative labour,[85] as articulated in the UNCRC.[86] The Constitution states that upon detention, children are to be held separate from adults and in conditions that take account of the child's sex and age.[87] Most importantly, the best interest of the child is enshrined as the paramount principle.[88]

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[81] Rules 31-71, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty.*
[82] Defence for Children International (2003), *Kids behind Bars*, 67. <www.kidsbehindbars.org> on 28 December 2017.
[83] Viljoen F, *State Reporting under the African Charter on Human and People's Rights'*, Journal of African Law, 2000, 110-118.
[84] Gose, *The African Charter and the Rights and Welfare of the Child,* Community Law Center (2002), 67-75.
[85] Article 53 (1) (d), *Constitution of Kenya* (2010).
[86] Article 37 (a), *United Nations Convention on the Rights of the Child,* 20 November 1989, RES 44/25.
[87] Article 53 (1) (f) (ii), *Constitution of Kenya* (2010).
[88] Article 53 (2), *Constitution of Kenya* (2010).

Similarly, the statutes governing juvenile justice in Kenya are primarily the Children Act of 2001, the Borstal Institutions Act CAP 92, Community Service Orders of 1998, and the Probation of Offenders Act CAP 64. Above all, the Children Act governs all forms of children relations, thus providing essential safeguards for children in conflict with the law such as the best interest principle, non-discrimination, and right to health care, and protection from child labour[89]. The Act further establishes the National Council for Children Services which is tasked with the formulation of policies concerning child welfare activities and ensuring that Kenya meets its international and regional obligations in relation to children.[90]

The minimum age of criminal responsibility in Kenya is 8 years. The Penal Code stipulates that if the child is between 8 and 12 years of age, and commits a criminal offence, then before prosecution, the court must establish whether the child understood the consequences of his/her actions to determine if they will be prosecuted or not.[91] A male child below 12 years is considered incapable of having carnal knowledge of another. There is some level of inconsistency which may give rise to arbitrariness in administration. The Committee on the rights of the Child states that the 8-year threshold is far lower than the recommended age set at 12 years. Age assessment has often presented a challenge and is more often left to the discretion of the magistrate dealing with the child's case. The court usually orders for a medical report which, as research indicates, would be prepared through an examination of the child's dental formula and by questioning the child rather than an authentic scientific study.[92] The lack of set standards for age assessment, paired with such incompetence in ascertaining age challenges the adherence to the proportionality principle in terms of sanctions considered for an offender.[93]

The Act also establishes the jurisdiction of a separate court (Children's Court) to try a child for any offence save for murder or manslaughter or an offence in which the child is charged together with a person of or above eighteen years.[94] Having separate infrastructure coincides with the Beijing rules.[95] Additionally, the Act stipulates that a subordinate court may remit cases regarding

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[89] Section 4-10, *Children Act* (Act No. 8 of 2001).
[90] Section 32, *Children Act* (Act No. 8 of 2001).
[91] Section 14(2), *Penal Code* (No. 81 of 1948).
[92] Kariuki J, 'Towards a child rights approach; A comparative analysis of the Juvenile justice reform process in Kenya and South Africa' Unpublished LLM Thesis, Central European University, Budapest, 2010, 53.
[93] Rule 5, *Beijing Rules*.
[94] Section 184, *Children Act (Act No. 8 of 2001).*
[95] Cappelaere G, *Introduction to United Nations Standard Minimum Rules,* (1995).

children to the children's court where jurisdiction allows it.[96] Evidently, Kenyan laws heed to international standards in various respects.

3.4 HAVE RESTORATIVE MEASURES BEEN ADOPTED IN KENYAN CHILD JUSTICE?

Kenyan Laws do not expressly provide for alternative systems to the court process.

The rules on judicial proceedings pertaining to child offenders are provided under the Fifth Schedule of the Children Act.[97]The Act particularly states that no child shall be held in imprisonment.[98] However, it provides for instances of institutionalization such as: a court order for committal to a charitable children's institution; sending the child to a rehabilitation school if he is above 10 years but under 15 years; committal to a borstal institution if s/he is above 16 years; or ordering him to be placed in an educational institution or vocational training programme; or admission to a probation hostel.[99] A committal order to a custodial institution shall not exceed three years unless by court order.[100] In practice, detention is the most common method of dealing with young offenders.[101] The large number of children in custody institutions suggests that Kenya's child crime problem is far more serious than it actually is: 85% of these children have committed no crime at all.[102] The Act makes no provision for diversion.

3.4.1 Alternatives to Custodial Measures

Firstly, at the pre-trial stage, a child is entitled to bail unless the charge is of murder or manslaughter or if there is reason to believe that such release would defeat the ends of justice.[103] In reality however, this applies to very few cases and often the children are not aware of this right. During trial, the Court is directed to make orders under the Act only where the same is deemed more beneficial than not making any orders at all. At this point the Court must consider the age

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[96] Section 185, *Children Act* (Act No. 8 of 2001).
[97] Section 194, *Children Act* (Act No. 8 of 2001).
[98] Section 190, *Children Act* (Act No. 8 of 2001).
[99] Section 191, *Children Act* (Act No. 8 of 2001).
[100] Section 53(3), *Children Act* (Act No. 8 of 2001); Section 6, *Borstal Institutions Act* (CAP 92).
[101] Kariuki J, 'Towards a child rights approach; A comparative analysis of the Juvenile justice reform process in Kenya and South Africa' Unpublished LLM Thesis, Central European University, Budapest, 2010, 54.
[102] The Undugu Society of Kenya, *Street Children and Juvenile Justice in Kenya,* Consortium for Street Children, 2004, 30.
[103] Fifth Schedule, Section 5, *Children Act* (Act No. 8 of 2001).

and understanding of the child, their physical, emotional and educational needs, their religious standing, cultural background and any harm they have undergone or are likely to undergo.[104]

For non-custodial sentences, the Act provides that the court may place the child under probation, admit the child to the care of a fit person, impose a fine or compensation, or issue a community service order.[105] Section 10(6) of the Fifth Schedule states that whenever possible, the court shall consider alternatives to remand such as close supervision or placement with a counsellor or a fit person determined by the court. Section 12 dictates that every case involving a child shall be handled expeditiously and without unnecessary delay. Where the case in a Children's Court is not completed within 3 months after his plea has been taken, the case shall be dismissed and the child shall not be liable to any further proceedings for the same offence. Further, owing to its seriousness, if a case is heard by a court superior to the Children's Court the maximum period of remand for a child shall be six months, and thereafter released on bail. If such case is not completed within twelve months after taking plea, the case shall be dismissed and the child shall be discharged, free from liability in any further proceedings for the same offence. With regards to after care, a child who has completed their detention period at a rehabilitation school or borstal institution is subject to supervision by an authorized person.[106]

Although many safeguards are provided for in law, many are not implemented in practice. Furthermore, restorative processes that opt out of judicial proceedings are not expressly accommodated in the legislation, neither are they a prime consideration during the court process. One of the greatest challenges in administration of child justice presently is the absence of protection of fundamental child rights. Take for example the absence of jurisdiction of the Children's court in murder or cases where a child is jointly accused with an adult. This has seen many children tried and convicted in general courts without the necessary protections availed to them. The Magistrates in these courts have not been properly trained and lack adequate experience in dealing with child offenders.[107] Another good example is the right to legal representation in all cases.[108] The reality is that most children appear in court without any legal representation, placing them at a disadvantage due to the intimidating nature of the court and requisite procedures.

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[104] Section 76, *Children Act* (Act No. 8 of 2001).
[105] Section 191, *Children Act* (Act No. 8 of 2001).
[106] Section 54(2), *Children Act* (Act No. 8 of 2001); Section 29, *Borstal Institutions Act* (CAP 92).
[107] Kariuki J, 'Towards a child rights approach; 55.
[108] Section 18 and Section 77, *Children Act* (Act No. 8 of 2001).

Although the National Legal Aid Programme was established to resolve this, there has been no substantial change.[109]

3.4.2 The place of Traditional Dispute Resolution Mechanisms (TDRMs)

Customary Laws are largely accommodated in Kenyan Laws. The Constitution identifies them as part of national laws[110] and highlights the applicability of TDRMs in exercising judicial authority.[111]It recognizes each person's right to participate in the cultural life of one's choice.[112] Generally, the traditional African concept of justice is restorative, essentially emphasising on repairing the relationships that had been strained by the harm caused and restoring social harmony rather than punishing the wrongdoer. The penalties, therefore, usually focus on compensation or restitution in order to restore the status quo, rather than punishment.[113] In pre-colonial Africa, many African citizens were resolving their disputes using the traditional and informal justice forums.[114] Kenya was dissociated from cultural justice practices to a large extent during the colonial period when the western notion of retributive justice was introduced. This explains why the goal of the current justice system seems to be punishment of the offender rather than rehabilitation.

Presently, both the Common Law and Community Justice systems have been applied for many years. This hybrid system includes traditional courts that run alongside formal courts. A prominent example of traditional justice is present in the *Meru Community.* The community was largely administrated by the council of elders known as *Njuri Nceke* who were tasked with maintaining harmony and dispensing justice. The council adjudicated cases brought by the victim of a wrongdoing by another. The ultimate aim in settling cases was promoting reconciliation which was seen as a prerequisite to having a strong community. A wrong was deemed to have occurred if the victim suffered harm, irrespective of whether the accused person had a guilty intent.[115] This was also the case in the *Kamba community.*[116] The outcome of a hearing would often times be

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[109] Kariuki J, 'Towards a child rights approach; 56.
[110] Article 2 (4), *Constitution of Kenya* (2010); also Section 3 (2), *Judicature Act* (Act No. 16 of 1967).
[111] Article 159 (3), *Constitution of Kenya* (2010).
[112] Article 11 and 44, *Constitution of Kenya* (2010).
[113] Merry S, 'The Social Organization of Mediation in Non-Industrial Societies: Implications for Informal Community Justice in America.' 1982, In The Politics of Informal Justice Vol. II, Comparative Studies Richard L. Abel (ed.) New York: Academic Press.
[114] Omale D, 'Justice in History: An Examination of African Restorative Traditions and the Emerging Restorative Justice Paradigm'43.
[115] Kinyanjui S, Restorative Justice In Traditional pre-colonial "Criminal Justice Systems" in Kenya, *Tribal Law Journal,* 14.
[116] Kinyanjui S, Restorative Justice In Traditional pre-colonial "Criminal Justice Systems" in Kenya, 5.

payment of compensation to the victim, which was the foundation of RJ in the community. Compensation sought to restore the victim and was deemed as justice. For instance, in a case where a young girl was killed, her family could request for compensation in the form of a cow and a girl from the accused's family. Though compensation in homicide cases can never be adequate, it was deemed sufficient to restore the victim. Compensation also gave the offender an opportunity to make things right, which was in itself a means of restoring him back into the community.[117] Similar traditional systems were also applied in other communities such as the *Kamba* and *Kikuyu* communities. Imprisonment has never existed as a penalty for any offence in traditional justice forums. Corporal punishment, however, has been and continues to be administered by a number of traditional systems in Africa – almost invariably on juvenile offenders, but never on women or girls.[118] This is however outlawed by the Children Act.[119]

In general, the place of TDRMs should not be seen as incompatible to the modern justice systems. A concrete example is the *R v. Mohamed Abdow Mohamed* case. The accused was charged with the murder of Osman Ali Abdi. On the hearing day, the State counsel informed the court that the counsel for the deceased family had written to the Director of Public Prosecutions requesting that the charge be withdrawn on account of a settlement reached between the families of both the victim and offender. Under the direction of the DPP, the State Counsel made an oral application in court to have the matter marked as settled. The court allowed the application and discharged the accused, in respect of the DPP's power to discontinue criminal proceedings at any stage. According to the court, the ends of justice would be met by allowing the application rather than disallowing it.[120]

The applicability of community justice systems is often in conflict with the formal court process.[121] Its application is limited to the court's discretion and is a rare occurrence more so for children matters. In informal justice systems, mechanisms such as religious authorities, traditional leaders, customary courts, tribal/clan social structures and community forums have a critical role to play in aligning TDRMs with child-sensitive restorative justice. However, training on children's rights, child development and relevant legislation, and development of necessary skills is indispensable

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[117] Kinyanjui S, Restorative Justice In Traditional pre-colonial "Criminal Justice Systems" in Kenya, 14-15.

[118] Kariuki F, 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed [2013] eKLR.*

[119] Section 191 (2), *Children Act* (Act No. 8 of 2001).

[120] *Republic v Mohamed Abdow Mohamed* (2013) eKLR Criminal Case No. 86 of 2011.

[121] Waruhiu J, Gachichio F, Rotich E, 'Constitutional Community Justice Systems in Kenya', 2011 < http://www.pambazuka.org/governance/constitutional-community-justice-systems-kenya> on 2 January, 2018.

in order to achieve restorative outcomes and protect the best interest of the child.[122] Training is vital in community justice to avoid instances of insufficient protection of offenders' rights by sidestepping the legal processes that provide many protections against both wrongful conviction and disproportionate punishment.[123]

3.5 CONCLUSION

From the discussion above, we see that alternative measures and traditional modes of justice are not alien to the Kenyan justice system. The State is party to some integral international treaties which set the stage for implementation of restorative practices. As a matter of fact, Kenyan laws have a great appreciation for the objectives of RJ. However, in terms of actual application, the Kenyan juvenile system is far from efficient as more often than not, the process is over dependent on the courts which do not give due regard for the other avenues that already exist in the law. This indicates that there is a lot of room for reforms to accommodate RJ in dealing with juvenile crime.

[122] Report by the Special Representative of the Secretary-General on Violence against Children, *Promoting Restorative Justice for Children*, New York 2013, 37.< http://srsg.violenceagainstchildren.org/page/919>
[123] Hughes T, *Restorative Justice: Investment Brief,* April 2016, New Zealand Government, p.3.

4 COMPARATIVE STUDY OF RESTORATIVE JUSTICE SYSTEMS IN COMMON LAW JURISDICTIONS

The purpose of this chapter is to analyse how RJ has been implemented as best practice for child justice in different jurisdictions. The objective is to recognize and appreciate functioning systems of RJ and to examine how they were adopted in other countries. This will be achieved by looking at various legislative frameworks and regulatory safeguards to see how restorative processes were successfully integrated into justice systems. Additionally, it is also vital to analyse the reasons why it is working contrasted with the areas where it is failing to meet desired objectives.

4.1 OVERVIEW OF RESTORATIVE PROCESSES IN VARIOUS COUNTRIES

RJ has gained recognition rapidly over the past few years by many States across the globe. Studies concluded in 2001 show that well over 80 countries use some form of restorative practice in addressing crime, with the actual number being closer to 100.[124] Restorative justice models range from Family Group Conferencing, Victim-Offender Mediation, Circle sentencing, community reparative boards, to victim impact panels.[125] There is no specific way that restorative processes should be delivered. Instead, "the essence of RJ is not the adoption of one form rather than another; it is the adoption of any form which reflects restorative values and which aims to achieve restorative processes, outcomes and objectives".[126] Many countries have found it useful to implement suitable legislation.[127]

Notably, there are key judicial officers and decision-makers that play a vital role in the use of RJ at various levels of the criminal justice system. These are namely: the police, prosecutors, magistrates and judges, probation officers, prison staff and parole officers.[128] Their roles differ in various respects in Common Law and Civil Law jurisdictions. Bearing in mind that Kenya has a

[124] Van Ness D, Centre for Justice & Reconciliation at Prison Fellowship International Washington, DC, *An Overview of Restorative Justice Around the World,* April 22, 2005, 1.
[125] Report by the Special Representative of the Secretary-General on Violence against Children (SRSG), *Promoting Restorative Justice for Children*, New York 2013, Chapter 2.< http://srsg.violenceagainstchildren.org/page/919>
[126] Morris A, *Critiquing the Critics: A Brief Response to Critics of Restorative Justice,* British Journal of Criminology, 2002, 600.
[127] Van Ness D, *An Overview of Restorative Justice Around the World,* 2005, 19.
[128] Van Ness D, *An Overview of Restorative Justice Around the World,* 2005, 8-13.

Common Law legal system, this study focuses on Common Law jurisdictions with the most prominent use of RJ practices for children in conflict with the law.

4.2 YOUTH JUSTICE IN NEW ZEALAND

Arguably, New Zealand is the world's most concrete example to date of how a national juvenile system can transition into one incorporating RJ. Since its legislative reforms in 1989, it has operated its entire youth justice system in a non-adversarial manner.[129] The system acknowledges that due to the maturity and cognitive levels of children and young people, offending by them can be suggestive of wider care and protection issues, which if dealt with through a traditional adversarial approach will more likely be destructive. For that reason, New Zealand's juvenile justice system upholds the rights of children and young people as a distinct group and thus provides an individual response to youth offending.[130] The state thus established a primary piece of legislation to properly institutionalize RJ.

4.2.1 Analysis of the Children, Young Persons, and Their Families Act (1989) (CYPF Act)

All matters relating to youth justice are within the special jurisdiction of the Youth Court; a sub-division of the District Court. These courts are guided by the CYPF Act. It establishes procedures that govern State intervention in the lives of children, young people and their families. It introduced a hybrid justice/welfare system which sought to have the young people, their families, victims, the community and the State involved in taking responsibility for offending as well as influence the outcomes.[131] One of its aims is to divert juveniles from Youth Court. Even when matters were referred to the Court, the Act would offer the primary stakeholders a voice in determining the sentence.[132] The Act was a result of an outcry of the Maori population who observed that they were over-represented in the registered crime figures. When a child committed an offence, they were removed from the care of his/her people and grew up ignorant of the culture and communities to which they belonged. As a result, a new process known as *Family Group Conferencing (FGC)*

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[129] McElrea, Fred W.M, 'Twenty Years of Restorative Justice in New Zealand', *Tikkun,* 2012. <http://www.tikkun.org/nextgen/twenty-years-of-restorative-justice-in-new-zealand> on 13 December, 2017.
[130] O'Driscoll S.J, 'Youth Justice In New Zealand: A Restorative Justice Approach To Reduce Youth Offending', 136th International Training Course, Visiting Experts' Papers, Series No.75, 55.
[131] O'Driscoll S.J, 'Youth Justice In New Zealand: A Restorative Justice Approach To Reduce Youth Offending', 56.
[132] Van Ness D, *An Overview of Restorative Justice Around the World,* 2005, 8.

was introduced and legislated by the CYPF Act. FGC thus enshrined Maori cultural practices and values such as reciprocity, reconciliation and family (whanau) involvement in decision-making.[133]

Upon detection of behaviour that is suggestive of criminal offending by a child or young person, and depending on the seriousness of the alleged offending, the following responses are available to the police:[134] issue a Warning; employ alternative action which is a diversion plan that may include an apology, reparation and/or community work; reference to a FGC; or, arrest the young offender, but only when it is necessary, and a summons is considered insufficient. [135]

4.2.2 Family Group Conferences (FGC)

FGC is the rubric of the entire youth system in New Zealand. Therefore, the Youth Court cannot decide over a matter unless an FGC has been convened and any plan or recommendations resulting from the conference is adequately considered by the Court in decision-making.[136]

More precisely, by dint of the CYPF Act, the functions of a youth justice FGC include:[137]

1. to consider whether the young person should be prosecuted (whether before or after proceedings have already commenced) or dealt with in some other way and to make recommendations to the relevant enforcement agency;
2. To address custody issues while the offender awaits trial or sentencing. The FGC considers alternatives to custody, or determines what should be provided to the young person while in custody, for instance, cultural, religious or other needs or wishes of the family;[138]
3. when an accused young person denies a charge but it is proven in court, the case must go back to an FGC who will recommend to the Court how the proven charge should be addressed;
4. In cases of care and protection issues, they make recommendations on how to deal with the matter.

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[133] European Forum for Restorative Justice, *Conferencing: A Way Forward for Restorative Justice in Europe,* Final Report of JLS/2008/JPEN/043, 164.
[134] O'Driscoll S.J, 'Youth Justice In New Zealand: A Restorative Justice Approach To Reduce Youth Offending', 59.
[135] Section 214, *Children, Young Persons, and Their Families Act (New Zealand)* (1989).
[136] European Forum for Restorative Justice, *Conferencing: A Way Forward for Restorative Justice in Europe,* 165.
[137] Section 258, *Children, Young Persons, and Their Families Act (New Zealand)* (1989).
[138] MacRae A and Zehr H, *The Little Book of Family Group Conferences, New Zealand style: A Hopeful Approach When Youth Cause Harm, 2004*, 13.

Essentially, all of the more serious juvenile cases are to be referred to an FGC, with the exception of murder and manslaughter. Nonetheless, an FGC may still be used in such cases to determine custody issues as identified under Provision 3 above. An FGC also seeks to ensure that the interests of the victim are prioritized and it endeavours to put things right.[139]

4.2.3 Foundational Principles of RJ in the New Zealand system

There are seven governing principles enshrined in statute that encourage restorative justice and guide the exercise of any power conferred under the Act. As provided under *Section 208, CYPF Act,* they include:

Public Interest: Unless otherwise required by public interest, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter. Essentially, the FGC is tasked with evaluating other suitable options pitted against criminal proceedings.

Criminal proceedings should not be used as an assisting tool: Criminal proceedings should not be instituted against a child or young person solely for purposes of catering to their welfare needs, i.e. providing accommodation, protection and care to the child in public institutions. This prevents unnecessary charging and increased rated of institutionalization, as was the case before the Act.[140]

Family bond should be strengthened: Any measure of dealing with offending by children or young persons should be designed to strengthen the family of the offender concerned and to foster the ability of families to develop their own means of dealing with offending by their children.

The child should be retained in the community where possible: This should be applied as far as it is practicable and in harmony with the need to ensure safety of the public. Banishment from one's natural community only adds to the child the feeling of isolation and not belonging. This could lead to loss of respect for the community, which could trigger re-offending against that community. Incarceration denies the child the opportunity to develop social skills and support networks necessary to make positive change.[141]

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[139] http://communitylaw.org.nz/community-law-manual/chapter-9-youth-justice/youth-justice-family-group-conferences-chapter-9/ on 15 December, 2017.
[140] MacRae A and Zehr H, *The Little Book of Family Group Conferences, New Zealand style,* Chapter 3.
[141] MacRae A and Zehr H, *The Little Book of Family Group Conferences, New Zealand style,* Chapter 3.

The age of the child/young person must be considered: Age is a mitigating factor in determining whether or not to impose sanctions on the offender and also when determining the nature of such sanctions. This principle accounts for the developing nature of children/youth and the effect it has on their conduct and needs. The minimum age for criminal responsibility in New Zealand is 10 years.[142] A child of 10 or 11 years cannot be prosecuted for a criminal offence, save for murder and manslaughter. Children/youngsters between 12 to 17 years can be prosecuted for various offences, most especially murder and manslaughter. Generally in practice, save for murder and manslaughter, all other offences committed by children/youngsters under the age of 17 are referred to an FGC rather than court.[143]

Sanctions should promote the child's development and be least restrictive in form: The consequent action taken on an offending child should advance the child's growth within his/her family and offer the least restrain on him in accordance with what is most suitable in the circumstances. Maintaining the child in their natural society retains his/her sense of justice and belonging, enhancing their social skills which results in positive change.[144]

The interests of victims must be prioritized: Any measures for dealing with the offending child or young person should have due regard for the interests of the victims of that offending. Having the young person focus on the impact of their actions gives them a proper understanding of what they have done and how they can correct the harm to the best of their abilities.

4.2.4 Primary Goals of the Youth Justice in New Zealand

In summary, the CYPF Act embodies the primary goals of the youth justice system in New Zealand, which are:

Firstly, promotion of *diversion*[145] of the youth offenders which may result in avoidance of formal court proceedings in favour of informal action or in the least serious cases it may be that no action is taken at all, though unlikely where behaviour suggests some risk of criminal offending.[146] Diversionary measures follow the assumption that interaction with the justice system often

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[142] Section 21, *Crimes Act (New Zealand)* (No. 43 of 1961).
[143] MacRae A and Zehr H, *The Little Book of Family Group Conferences, New Zealand style,* Chapter 3.
[144] European Forum for Restorative Justice, *Conferencing: A Way Forward for Restorative Justice in Europe,* 167.
[145] Diversion is also described as the avoidance of harmful interventions but also includes the minimization of negative impacts in circumstances where more harmful interventions cannot be avoided.
[146] O'Driscoll S.J, 'Youth Justice In New Zealand: A Restorative Justice Approach To Reduce Youth Offending', 58.

increases rather than decreases offending, and community-based sanctions cater more effectively to the needs of the youngster than custodial ones. Diversion also aims to prevent labelling them as offenders.[147]The second is *accountability* as offenders are encouraged to take responsibility for their actions and repair the harm caused. Further, the justice process endeavours to *involve the victim* to address their needs and enable them to take part in deciding the outcomes. As a result of implementing FGCs, the system seeks to *involve and strengthen* the offender's family as they are also involved in the process and outcomes. This follows the assumption that family support helps a youngster work through the effects of their behaviour, even if the family unit is dysfunctional. Further, the system aims to enhance *consensus decision-making* in that the outcomes are agreed upon by all participants rather than decided by third parties such as judges and professionals. The processes applied must also be *culturally appropriate* and in line with the participants' needs. Finally, *due process* must be tendered in that the rights of the offender are respected.[148]

4.2.5 Is Restorative Justice working for Juveniles in New Zealand?

Generally, according to a recent international study carried out with regard to RJCs, it revealed that they cause a modest but highly cost-effective reduction in repeat offending, with substantial benefits for victims.[149]

By and large, there have been several detailed reports published about the effectiveness of RJ in New Zealand, more so with regard to adult offenders.[150] The scope of empirical evidence gathered for children and young offenders is comparatively thinner. Nonetheless, the most recent study undertaken by the Ministry of Justice for RJ cases between 2008 and 2013 assessed the impact of RJCs on reoffending, even with regards to young offenders. The study compared conferenced offenders to a matched group of offenders who went through the court process and would otherwise have been eligible for RJ over the same period.[151] It indicates that the rate of recidivism for young offenders (aged 17 to 19) who participated in restorative justice was 17% lower than comparable young offenders over the following 12 month period (and 8.9% lower over three

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[147] MacRae A and Zehr H, *The Little Book of Family Group Conferences, New Zealand style,* Chapter 3.
[148] MacRae A and Zehr H, *The Little Book of Family Group Conferences, New Zealand style,* p. 12.
[149] Strang H, Sherman LW, Mayo-Wilson E, Woods D, Ariel B, *Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review*, Campbell Systematic Reviews, 2013, 2.
[150] Hughes T, *Restorative Justice: Investment Brief,* April 2016, New Zealand Government, p.3.
[151] *Reoffending Analysis for Restorative Justice Cases: 2008-2013,* Ministry of Justice (2016), 2.

years). Young offenders who participated in RJ committed 30% fewer offences per offender than comparable young offenders within 12 months (and 32% fewer offences within three years). RJCs are thus very effective for stopping young offenders from reoffending.

Furthermore, with respect to cultural appropriateness, statistics indicate that in general, RJ has been as effective for the Māori as it is for non-Māori in reducing the number of people reoffending and their frequency of recidivism. The rate of reoffending for Māori who participated in restorative justice was 16% lower over the following 12 month period than comparable Māori offenders (and 6.9% lower over three years). Māori offenders who participated in restorative justice committed 37% fewer offences per offender within the next 12 month period than comparable Māori offenders (and 23% fewer offences within three years). [152] In general, RJ appears to be more effective at reducing recidivism among offenders who committed violent acts, dishonesty offences, or property damage.[153]

Crime prevention is only one of the many aims of RJ conferencing. The benefits to victims are an important outcome for RJ, often perceived as more important than the impact on reoffending. A survey conducted by the Ministry of Justice in 2011 revealed, 77% of victims were satisfied with their overall experience of RJ, before, during and after the conference. It also found that 80% of victims would recommend RJ to others.[154] Additionally, international evidence from 12 randomized control trials where victims were randomly assigned to attend RJ conferences with their offenders concluded that the victims were less fearful of repeat attack by the same person, more pleased with the way their case was handled, and less desirous of violent revenge against their offenders, after receiving far more offender apologies and satisfaction with their justice than control victims.[155]

In a limited number of cases, victims can feel worse after attending an RJC. Evidence from New Zealand surveys suggest that it is more likely when the conference is poorly run, especially when the victim's concerns and questions are not taken seriously; the facilitator is not impartial to everyone in the conference; facilitator does not contact or follow up with the victim after the

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[152] *Reoffending Analysis for Restorative Justice Cases: 2008-2013,* Ministry of Justice (2016), 6.
[153] Hughes T, *Restorative Justice: Investment Brief,* April 2016, New Zealand Government, p.3-4.
[154] *Reoffending Analysis for Restorative Justice Cases: 2008-2013,* Ministry of Justice (2016), 7.
[155] Sherman L. W, Strang H, Barnes G, Woods D. J, Bennett S, Inkpen N, Slothower, M. (2015). Twelve experiments in restorative justice: the Jerry Lee program of randomized trials of restorative justice conferences. *Journal of Experimental Criminology, 11*(4), 501–540. http://doi.org/10.1007/s11292-015-9247-6

conference, or; the offender fails to complete the plan agreed at the conference. Additionally, victim dissatisfaction could result from: pressure on the victim to attend; inadequate support and protection from offender intimidation; victim having insufficient information about the process, or; the offender declines to take responsibility. Although negative outcomes appear relatively uncommon, these findings underscore the importance of maintaining high levels of service quality so as to protect individuals against re-victimization. It is also vital to ensure participation is fully voluntary.[156]

4.3 YOUTH JUSTICE IN SOUTH AFRICA

Drawing closer home, South Africa is one of the many countries that followed suit in legislating RJ as a core component of their juvenile justice system after New Zealand. Although the jurisdiction is not entirely Common Law, it presents a notable example of best practice in RJ. They implemented a specialised piece of legislation, *the Child Justice Act* adopted in 2008.

When incorporating RJ for children, many countries first establish pilot projects drawing from existing international legal standards advocating for diversion of children.[157] Upon implementing a pilot project and identifying its effectiveness, the acquired practices are developed on a larger scale or incorporated into legislation and policy. This was the case in South Africa with *One Stop* centres. The program ensures arrested juveniles are given immediate hearings and the chance of alternative forms of sentencing.[158] The project structure was incorporated in its entirety into the Act and further served as a basis to inform other procedural aspects of the Act, for instance, the specific time frame of 48 hours to process reported cases for young offenders.[159] Additionally, RJ in South Africa was further propagated by the establishment of the *Restorative Justice Centre* in Pretoria in 1998. This organisation did not only offer Victim Offender Conferencing as an alternative to the traditional justice system, but also built capacity within the country for the delivery of RJ programs.[160]

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[156] Hughes T, *Restorative Justice: Investment Brief,* April 2016, New Zealand Government, p.4-5.
[157] Article 40, *United Nations Convention on the Rights of the Child,* 20 November 1989.
[158] Adams S, 'South Africa's One-Stop Child Justice Centres: Protecting the Rights of Children in Conflict with the Law' *UNICEF South Africa,* < https://www.unicef.org/southafrica/media_4270.html> on 18 December 2017.
[159] Report by the Special Representative of the Secretary-General on Violence against Children (SRSG), *Promoting Restorative Justice for Children*, New York 2013, 23.< http://srsg.violenceagainstchildren.org/page/919>
[160] European Forum for Restorative Justice, *Conferencing: A Way Forward for Restorative Justice in Europe,* 220.

The Act defines RJ as *"the promotion of reconciliation, restitution and responsibility through the involvement of a child, a child's parents, family members, victims and communities"*. It specifically lists FGC and VOM as sentence options for juvenile offenders. FGCs could take place as a pre-trial diversion option, however a court may also halt trial proceedings and refer the case to an FGC. A case may also be referred to an FGC after conviction to determine a suitable plan, which the court could incorporate during sentencing. The cases referred to an RJ process at the sentencing stage are usually more serious than the ones referred at the pre-trial stage. When an RJ process is used at the *post-sentence* stage, it will not affect the sentence, but it may affect decisions about parole. Though the use of RJ at this stage has not been fully adopted, there have been some promising signs of development; the Department of Correctional Services adopted RJ as an approach in 2001, and a specific policy on RJ was approved in 2007. [161]

Local research identified a widespread overreliance on incarceration of children who came into contact with the justice system, most of whom are held up in pre-trial detention for minor offences.[162] In most cases, children found guilty of committing minor offences do not reoffend. In essence, these children do not pose a threat to the community or the safety of others, and the harm caused to them by incarceration far exceeds the harm caused by their offence. Notably, research in Canada has demonstrated that the incarceration of children has no deterring effect on other children.[163]

4.3.1 Is Restorative Justice working for Juveniles in South Africa?

Although research about the outcomes of RJ programs in South Africa is not sizeable[164], the much that has been done has revealed some degree of success with regards to victim, offender, family and community satisfaction. The parties involved, including child offenders, recognize that RJ practices avail to them a greater opportunity to be heard and to play a part in deciding the outcome as well as gaining a sense of control over the process. This is essential for the effective

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[161] European Forum for Restorative Justice, *Conferencing: A Way Forward for Restorative Justice in Europe,* 221, 224-225.

[162] Badenhorst, Charmain, *Overview of the implementation of the Child Justice Act, 2008 (Act 75 of 2008)-Good intentions, questionable outcomes*, Criminal Justice Initiative of Open Society Foundation for South Africa, 2011, and Smit, Arina.

[163] Report by the Special Representative of the Secretary-General on Violence against Children (SRSG), *Promoting Restorative Justice for Children*, New York 2013, 29.< http://srsg.violenceagainstchildren.org/page/919>

[164] European Forum for Restorative Justice, *Conferencing: A Way Forward for Restorative Justice in Europe,* 225.

implementation of community-based RJ programs as they operate on these elements as compared to the conventional system.[165]

By 2006, 68 RJ programs were running in the country. A research was carried out on 210 cases from 2001 to 2005 largely involving offenders under 20 years. It revealed that most cases are formally referred by the courts, of which almost 90% were referred at the pre-trial stage of court proceedings. This means that the courts mostly use RJ as a diversionary measure rather than a sentence or post-sentencing measure. It also revealed that majority of the crimes referred to a conferencing program are crimes against the person. Further, about 60% of the cases were referred to RJ programs, with the majority (47%) resulting in an agreement. The data indicated that treatment and rehabilitation are an essential part of the process whereas compensation and community work are only found in a small number of cases. With regards to participants, the victim/offender communities of care, that is friends, teachers, employers, etc. formed the majority in attendance, closely followed by family members. This reflects the African tradition of community involvement in RJ processes.[166]

On the downside, advocates working to promote diversion and RJ have highlighted that one of the main hurdles to implementing South Africa's 2008 Child Justice Act is the negative portrayals of children in the media. High-profile media cases concerning children alleged to have committed serious crimes have provoked intense political debate. Widespread misquotations and misconceptions of the law in the media have fuelled a belief that the law is lax on offenders. This has brought to light the urgent need for effective advocacy and sensitising of the general public to address mistaken beliefs about child offenders, to reassure society of the effectiveness of RJ programs and to disseminate information about the benefits of RJ for children, their families, and society in general.[167] Remarkably, in a local study, children indicated that they would be more encouraged to reform if they were given a second chance through non-custodial measures.[168]

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[165] Report by the Special Representative of the Secretary-General on Violence against Children (SRSG), *Promoting Restorative Justice for Children*, New York 2013, 28.< http://srsg.violenceagainstchildren.org/page/919>

[166] European Forum for Restorative Justice, *Conferencing: A Way Forward for Restorative Justice in Europe,* 225-230.

[167] Report by the Special Representative of the Secretary-General on Violence against Children (SRSG), 35.

[168] Ehlers, Louise, *Children's Perspectives on the Child Justice Bill*, prepared for the Child justice Alliance by NICRO, January 2002.

4.4 YOUTH JUSTICE IN ETHIOPIA

The UNCRC took effect as part of national law in the Democratic Republic of Ethiopia in 1992.[169] The 1995 Federal Constitution provides a framework for the protection and promotion of the rights of children. Additionally, the Ministry of Labour and Social Affairs provides detailed guidelines on institutional childcare, community-based childcare, reunification, foster family care and adoption. However, much like Kenya, the minimum age of criminal responsibility is one of the lowest in the world; set at nine years by the Penal Code. The Code also treats children between 15 and 18 years as adults before the courts. Generally, Ethiopia lacks an overarching, holistic policy on child protection and proper implementation of existing laws.[170] Nonetheless, there are existing child protection structures that are in operation in the country with notable success.

4.4.1 Child Protection Units (CPUs)

CPUs began as a pilot project in 1996 by the FSCE in collaboration with the Addis Ababa City Police Commission. They were initially installed within five selected police stations in the capital city but have now grown to be fully operational in all of the Sub-city police stations in Addis Ababa and in major towns of the regional states.[171] Successful implementation of this programme is attributed to intensive training of all police units on child rights and child protection and learning from practice in other countries which resulted in a Memorandum of Understanding signed between the FSCE and the Police Commission prior to the pilot project. A consensus was reached with police officials about the required features, operations and objectives of CPUs. When children are brought to the CPU accused of committing an offence, their parents are contacted, their case is investigated and a report compiled. Thereafter, a police officer and community worker from the FSCE assess the case and make the decision to either: release the child under the responsibility of parents/guardians; refer the child to the CBCP; or to present the child to a juvenile court.[172] From 1999 to 2009, approximately 11,496 child offenders were supported within CPUs. With time, the Units began the process of recording, compiling, processing, and analysing data on the cases of

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[169] Yohannes, Seyoum and Assefa, Aman, *Harmonisation of laws relating to children, Ethiopia*. African Child Policy Forum, undated.

[170] Save the Children Sweden, *Child Protection and Child Friendly Justice: Lessons Learned from Programmes in Ethiopia (Executive Summary),* February 2012, 2.

[171] Save the Children Sweden, *Child Protection and Child Friendly Justice*, 4.

[172] Save the Children Sweden, *Child Protection and Child Friendly Justice: Lessons Learned from Programmes in Ethiopia (Executive Summary),* February 2012, 3.

child abuse and child offenders. The data operations are sustained by a computer programme, ensuring efficiency of the process, though there is still room for improvement.[173]

4.4.2 Community Based Correction Centres (CBCCs)

The CPU acknowledges the need of diversion of children from the formal justice process into programmes that challenge their offending behaviour whilst allowing them to continue living within their community. CBCCs were first introduced in 2004 and have since been set up in the capital and many other cities in the country. Their primary objectives are: preventing vulnerable children from involvement in criminal activities; helping youngsters avoid the trauma and stigma resulting from interaction with the formal process; keeping young offenders at home not in reformatory institutions; reducing the likelihood of recidivism through individualised rehabilitation; increasing collaboration between police stations and local communities in crime prevention for children. The Centres are run by the police accountable to the CPU and they bring together NGOs, police, families, elders (locally known as *'Mekari Shimagles'*), teachers and volunteers. Majority of the children who attend are referred by CPUs however, they may be referred by the courts or by their parents. Upon reference, an agreement is made with the parents/guardians that the child will attend and meet the expectations set by the Centre. Children are enrolled for about three hours a day after school on weekdays for approximately six to nine months.[174] Local communities provide halls and other facilities for programme activities. Elders in the community also participate together with trained volunteers. This close cooperation between police and civil society is fundamental for the success of child protection.[175]

4.4.3 Is RJ working for Juveniles in Ethiopia?

The biggest challenge with regard to RJ in Ethiopia is that there is no explicit legal provision for the diversion of young offenders to an informal system of rehabilitation and correction. Despite the absence of a formal mandate for diversion more so by police, 99% of the cases are diverted by them.[176] Police are actively promoting diversion due to of effective training, liaison and support, and also because of its success over the years, in spite of awareness that there is no legal backing

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[173] Save the Children Sweden, *Child Protection and Child Friendly Justice,* 4.
[174] Save the Children Sweden, *Child Protection and Child Friendly Justice,* 6.
[175] Save the Children Sweden, *Child Protection and Child Friendly Justice*, 11.
[176] Save the Children Sweden in cooperation with Forum on Sustainable Child Empowerment, *Case Study: Diversion of Children in Conflict with the Law in community-based program centers, Ethiopia,* 2005, 15.

for diversion.[177] The CBCP is perceived by parents, police and other sectors of the society as a successful model in protecting children and appropriate to the local condition. This is a rare situation where protection of children is seen to have been prioritized despite legal difficulties.[178] The success of the diversion model is also attributed to socio-cultural practices concerning arbitration and correction. In the local setting, settlement of disputes and reparation outside administrative systems is the dominant socio-cultural norm, more so through arbitration by neighbourhood elders. Involvement of local elders in diversion therefore resonates with traditional practice. Additionally, the CBCP model compensates for the deficiencies in the structures administering juvenile justice, such as lack of waiting facilities for children and backlog of cases in juvenile courts. Diversion saves resources such as finances and time spent by police during investigation and court procedures.[179]

The CBCP addresses the protection needs and rights of children directly. Firstly, children are protected from some crude traditional methods such as harsh physical punishments and deprivation of basic needs. Although there is no qualified data on the state of children after being discharged from the diversion program, staff members report that majority of children show notable improvement and this reduces the chance of recidivism. Added attention by parents and guardians boosts the child's self-esteem and feeling of acceptance. The diversion model prevents the discontinuation of education, and enrols children who were not in school prior to the CBCP. It also prevents exposure of children to abusive and exploitative procedures in the formal process, such as questioning and court appearances which could be psychologically damaging. Finally, diversion has facilitated reintegration of child offenders by preventing removal from their locality.[180]

4.5 CONCLUSION

RJ is not an abstract concept. It is a forward-looking mode of justice that has proved efficient and functional in jurisdictions where juvenile crime is almost fully eradicated. The manner in which RJ has been implemented varies in each State however the underlying objectives achieved are the same. Evidently, RJ is a mechanism that can be incorporated soundly into the Kenyan juvenile system without requiring total demolition of the functional systems we currently have in place.

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[177] Save the Children Sweden, *Child Protection and Child Friendly Justice*, 11.
[178] Save the Children Sweden in cooperation with Forum on Sustainable Child Empowerment, *Case Study,* 15.
[179] Save the Children Sweden in cooperation with Forum on Sustainable Child Empowerment, *Case Study,* 15-16.
[180] Save the Children Sweden in cooperation with Forum on Sustainable Child Empowerment, *Case Study,* 16.

5 CONCLUSION AND RECOMMENDATIONS

The discussions and analyses carried out in this paper reveal that the restorative approach to justice has not been accommodated in the Kenyan juvenile justice system adequately. There is a gap between the law and practice. The law seemingly caters for the children in all aspects of their rights, but studies carried out on the situation on the ground reveal a rise in crime and rates of recidivism in juvenile justice. Unmistakably, the objective of deterrence and rehabilitation of offenders is often missed. Victim(s) needs continue to be undermined whereas the delicate nature of child offenders and possible underlying issues causing their criminal choices are ignored. Furthermore, the place of customary practices have been greatly understated with regards to children.

Recommendations to enhance promotion of restorative justice call for adequate attention to particular areas:

Legislating Diversionary Measures:

Drawing from the examples of FGCs in New Zealand and South Africa and CBCPs in Ethiopia, laws should be drafted to establish Diversion as the first considered alternative to administrative process for children in Kenya. These laws must be clear and concise to avoid ambiguity and possible abuse of power through wide undefined discretion granted to the police, prosecution and other agencies dealing with child offenders.[181] Statistically, there are substantial benefits to be attained from diversion in terms of reducing rates of recidivism, enhancing efficiency in the juvenile process by relieving the court of an overload of cases, and catering to the needs of the victim, offender, and affected parties more so the community. Vexatious litigation of minor or petty crimes will be reduced significantly. Rehabilitation is more likely to be achieved through restorative processes as opposed to retributive justice.

Prioritizing African Customary Law in Juvenile Justice:

Given the restorative nature of traditional modes of dispute resolution and their central goal of restoring unity and reintegrating all parties to a conflict back into society, TDRMs should be considered as one of the first port of call in cases pertaining to child offenders. These mechanisms reinforce a sense of belonging for the child whilst ensuring that they take account of their actions.

[181] Rule 11.2, *Beijing Rules.*

Furthermore, it enhances alignment of the juvenile system to its international standards such as attaining justice in the shortest time period and protecting the rights and dignity of the child in the process. Legislation should ensure efficient training of stakeholders in TDRMs as well as to regulate this discretionary power to a reasonable extent.

Training Programmes on Child Protection:

One of the profound reasons why children rights are not protected and often abused is the lack of adequate comprehension of these rights, especially by judicial officers. Cases of harassment in the hands of police have become the norm with little to no reforms. There should therefore be a compulsory periodic training of all administrative personnel to better equip them with the skills and necessary knowledge on how to handle child offenders, as adopted in Ethiopia.

Specialized Funding from Government:

The greatest impediment to successful operations of the Child Protection Programs in Ethiopia has been the absence of government funding paired with lack of explicit legislation recognizing the same. This has enhanced the misconception that restorative processes are part of "NGO work" supported by well-wishers, thus undermining the role of duty bearers. Kenya should establish a State fund designated for restorative programs for children so that the place of restorative justice falls under the mandate of the State. This will inevitably legitimize RJ in the justice system despite the absence of a legislative framework. Legislation must however set the boundaries of State power in restorative processes.

Restorative Practices in Custodial Institutions:

In enhancing accountability over wrongdoing and eventual reintegration into society, restorative processes such as VOMs, healing Circles and Surrogate processes need to be introduced. Engaging children in institutional care in this capacity will enhance their cognisance of crime and responsibility and reduce their chances of reoffending. As seen in South Africa, these processes should not have any effect on the sentence so as to ensure that there is no insincerity in the child's will to participate. Although there is no guarantee of success in all cases, the therapeutic nature of these processes cater to the needs of the victims in terms of healing as well as enhancing the child's sense of belonging in the society.

Improvement of After-Care Services:

The Borstal Institutions Act reveals the various roles of the After-Care Committee in catering to the child offender after expiry of their detention.[182] However, the cope of duty is slim in terms of ensuring further rehabilitation and successful integration. These services should accommodate frequent counselling and engagement with the child upto their adulthood. It should cater for their well-being and ensure the child is in the care of a competent person or institution. Specified techniques and standard procedures of tracing and follow up will enable the justice system to monitor rates of recidivism and to identify where the system is failing in rehabilitating these children.

In summation, there is room for progressive adoption of restorative practices in a bid to improve the existing juvenile justice system in Kenya. Compliance with existing legal provisions is the first fundamental step towards this adoption since, as analysed in this paper, there is a significant scope of RJ in the law but is not adhered to. TDRMs must also be prioritized whenever they are deemed sufficient to meet the ends of justice considering the fact that they are already provided for in the law. Modern practices such as FGCs, VOMs and Circles should be adopted to complement the existing system rather than replacing it in its entirety.

[182] Section 26; 29, *Borstal Institutions Act* (CAP 92).

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