

**REFORMING GHANA'S CRIMINAL JUSTICE SYSTEM TO
PROMOTE RESTORATIVE JUSTICE:
A LEGISLATIVE FRAMEWORK PROPOSAL**

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Abstract

Restorative Justice (RJ) aims to create a platform for the various stakeholders of injustice, to wit, the offender, victim, and the community to meet and discuss the consequences of injustice and what can be done to repair the harm. Despite the limited challenges of RJ, it has been embraced as a growing movement within the criminal justice system around the world due to its overwhelming benefits to the victim and offender and the community as a whole by providing healing. This paper adopts the doctrinal research methodology in a bid to critically evaluate the legislative framework as well as some policy documents relevant to the implementation of the RJ theory within Ghana's criminal justice system in a bid to ascertain whether the legal regime is fit for promoting effective implementation of the RJ theory in Ghana. The paper reveals that although varied statutes under Ghanaian law have

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been littered with some principles on RJ the legal regime in Ghana is not robust for the effective implementation of the RJ theory. The paper concludes by proffering recommendations for legislative measures that can be introduced under Ghanaian law to beef up the legal regime for the effective implementation and promotion of restorative programs within the criminal justice system of Ghana.

Keywords: Restorative Justice, Retributive Justice, Criminal Justice System

I. INTRODUCTION

Restorative Justice (RJ) is a way of thinking about what is best for the various connections among crime victims, their offenders, and the criminal justice process.¹ RJ is, therefore, problem-solving approach to crime that involves the parties themselves, and the community generally, in an active relationship with statutory agencies.² RJ rests on the philosophy that when an offense is committed, its repercussions are not only felt by the victims but the offenders and the community at large.³ RJ thus appreciates that crimes cause harm to people and the community as a whole. Its focus is not only on the punishment to be meted out for the offense caused but also on how to repair the harm caused with the active involvement of the offender, victim, and the community to provide healing to all the stakeholders concerned.

When RJ emerged, it was met with a lot of skepticism as to whether it could live up to expectations due to its high aspirations.⁴ For example, apprehensions were expressed by practitioners to the effect that RJ could lead to offenders being stigmatized in a different but harmful way than the stigmatization associated with the retributive justice system.⁵

¹ Lawrence W. Sherman & Heather Strang, *Restorative Justice: The Evidence* (The Smith Institute: 2007). Available at <https://core.ac.uk/download/pdf/322325652.pdf>. Accessed August 20, 2022

² T Marshall (1996), “Restorative Justice: An Overview”, London Home Office, Page 5. Available at http://www.antoniocasella.eu/restorative/Marshall_1999-b.pdf Accessed August 17, 2022

³ *ibid.*

⁴ S Levrant, F.T Cullen, B Fulton & J.F Wozniak (1999). “Reconsidering restorative justice: The corruption of benevolence revisited?” *Crime & Delinquency*, 45(1), 3–27.

⁵ J Braithwaite. *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002)

Others also argue that RJ can pave the way for oppressive or false communities to impose their values on the participants in the RJ process, or that conservative and majoritarian values may be promoted which can trample upon individual freedoms.⁶ Despite the limitations associated with RJ, a growing number of empirical studies have illustrated its enormous benefits to the victims of crimes, offenders, and the community at large in diverse ways. For instance, an empirical study by Sherman et al revealed that RJ reduces the fear of re-victimization and post-traumatic stress among victims and reduces the chances of reoffending after two years compared to retributive criminal justice approaches.⁷ Another study by Wong et al also revealed that RJ has the potential of reducing the rate of recidivism among the youth involved in offending conduct.⁸ Other scholars are also of the view that RJ provides a good foundation for repairing, reclaiming, and transforming offenders and reintegrating them into a productive venture,⁹ as well as being more effective in expressing different forms of competing justice values simultaneously, such as acknowledgment of fault, recognition of effects of harm that arise from the offense, social learning, healing and compensation of victims as compared to the retributive justice system.

⁶ R Weisberg (2003) "Restorative Justice and the Danger of "Community" *Utah Law Review*, 343-74

⁷ L. W Sherman, H. Strang, G. Barnes, D.J Woods, S. Bennett, N. Inkpen, D. Newbury-Birch, M. Rossner, C. Angel, M. Mearns & M. Slothower (2015). "Twelve experiments in restorative justice: The jerry lee program of randomized trials of restorative justice conference" *Journal of Experimental Criminology*, 11(4), 501-540.

⁸ J.S Wong, J. Bouchard, J. Gravel, M. Bouchard & C. Morselli (2016). "Can at-risk youth be diverted from crime? A meta-analysis of restorative diversion programs". *Criminal Justice and Behavior*, 43(10), 1310-132

⁹ Carrie Menkel-Meadow (2007) "Restorative Justice: What is it and Does it Work?" *Annual Review of Law and Social Science*. 3:10.1-10.22

¹⁰Due to the enormous benefits associated with RJ, particularly its efficacy in reducing recidivism, it has thus been argued that it is imperative to incorporate RJ principles into the criminal justice system.¹¹ Thus, a criminal justice system with a strong legislative framework that forms the basis for the implementation of a restorative program is highly desirable to reduce re-offending by offenders, bring about healing to the offender, victim, and the community, as well as promote the social integration of offenders, among other benefits.

The central thesis of the paper is that even though some measures have been put in place under Ghanaian law to promote RJ those measures are not adequate thereby creating the need for the introduction of legislative reforms for the effective promotion and implementation of the RJ theory in Ghana.

There appears to be a paucity of research publication materials on RJ concerning Ghana's criminal justice system. The research and publication materials on the research subject area have over the years focused on the RJ approaches such as truth and reconciliation commissions and peacemaking criminology and their role in addressing post-conflict justice in Ghana,¹² a comparative analysis of RJ practices

¹⁰ P Nonet & P. Selznick. *Law and Society in Transition: Towards Responsive Law* (Berkeley: University of California Press, 1978)

¹¹ Alice Hwang (2020). "Restorative Justice: A Better Alternative For Reducing Recidivism?" *The Sociological Impagination: Western's Undergraduate Sociology and Criminology Student Journal*, Vol. 6, Issue 1, Art. 2

¹² Robert K. Ame & Seidu M. Alidu (2010) "Truth and Reconciliation Commissions, Restorative Justice, Peacemaking criminology, and Development", *Criminal Justice Studies*, 23:3, 253-268.

in Africa,¹³ and the role of RJ and Christian social support in prisoner social re-integration in Ghana.¹⁴ For example, Ame and Alidu's study which illustrates the relevance of RJ in Ghanaian society entailed interviews conducted among four categories of respondents in Ghana, including commissioners of the National Reconciliation Commission, victims of past military human rights abuses, representatives of civil society coalitions and the general public, as well as relying on secondary sources such full report of the National Reconciliation Commission, transcript of Parliaments debates, etc. The study, among others, argues that the principles and practices of RJ and peacemaking criminology not only enhance our understanding of the aims and significance of truth and reconciliation commissions but also serve victims, the community, and perpetrators better than the criminal prosecution approach to address post-conflict justice in Ghana. Gabagambi's study in a similar vein as Ame and Alidu's study also demonstrates the relevance of RJ in Ghana. Gabagambi's study sought to understand whether RJ paradigms or processes for handling criminal matters and conflict in many pre-colonial African communities are relevant to dealing with crime and conflict in African countries in the 21st century. The study relied on qualitative data obtained through desk reviews of existing literature and compares and contrasts the

¹³ Julena Jumbe Gabagambi (2018) "A Comparative Analysis of Restorative Justice Practices in Africa" Available at https://www.researchgate.net/publication/328288480_A_Comparative_Analysis_of_Restorative_Justice_Practices_in_Africa Accessed July 14,2022

¹⁴ T.J Teye (2019) "Prisoner Social Reintegration in Ghana through Christian Social Support and Restorative Justice" Available at <http://ugspace.ug.edu.gh/handle/123456789/33482> Accessed July 18, 2022

application, successes, and challenges of RJ practices in the Republic of South Africa, Ghana, Kenya, Uganda, Nigeria, and Rwanda. The study argues that the RJ paradigm that was in use in Africa before the coming of colonialists should be revived by African countries because it promotes healing, and restores the relationship between offenders, victims, and the community much better than the western adversarial system. Teye's study, on the other hand, sought the views of 150 Ghanaians randomly sampled from targeted subgroups of the population through interviews and questionnaires to examine the role of social support and religiosity towards prisoners' reintegration as well as the strength of RJ in ensuring peaceful co-existence. The study revealed, among others that our society cannot be rid of crimes entirely and that the presence of repeat offenders in our prisons demonstrates that imprisonment (punishment) alone cannot reform people who often break the law and that restorative programs have a pivotal role in the reformatory process.

A general conclusion drawn from the survey of the body of literature above is that none of the literature focuses on the evaluation of the legal regime governing the application and practices of RJ in Ghana. Considering that the legal regime forms the basis for the application and practices of RJ in Ghana, a critical evaluation of it is crucial to ascertain whether it is fit for purpose or whether there is a need for it to be reformed to make it robust. This paper, therefore, seeks to bridge the gap within the research subject area by doing a comprehensive review of the legal regime governing the application and practices of RJ in Ghana to bring to the fore certain legislative challenges concerning RJ

in Ghana and also make useful recommendations on measures that can be put in place under Ghanaian law to promote RJ.

The paper adopts the doctrinal legal research methodology in arriving at its conclusions. The doctrinal legal research methodology deals with studying existing laws, related cases, and authoritative materials analytically on some specific matter.¹⁵ The paper adopts the doctrinal research approach in a bid to discuss the issues involved in the paper because it is important to analytically study the various laws governing RJ in Ghana as well as some policy documents germane to the implementation of RJ in Ghana to identify any possible gaps and inconsistencies in the legal framework to make useful legislative recommendations to promote RJ in Ghana.

The rest of the paper proceeds as follows. The second section focuses on an overview of the RJ theory. The third section discusses the RJ theory within Ghana's criminal justice system. The paper then concludes by proffering useful recommendations on measures that can be adopted under Ghana's criminal justice system to promote RJ.

II. UNDERSTANDING THE RESTORATIVE JUSTICE THEORY

This section aims to discuss the theoretical framework within which the paper is situated to provide the requisite theoretical basis for the

¹⁵ Amrit Kharel, (2018), "Doctrinal Legal Research", *SSRN Electronic Journal*. Available at https://www.researchgate.net/publication/323762486_Doctrinal_Legalwhich_Research Accessed on June 17, 2022

discussion of the RJ theory within Ghana’s criminal justice system in the next section of the paper. Towards this end, this section discusses the emergence of the modern RJ theory, definitions of RJ, the theoretical underpinnings of RJ, and RJ practice models.

A. The Emergence of the Modern Restorative Justice Theory

RJ came to the fore out of the need for a better and more effective response to crime different from the usual retributive response to crime which leads to the judicial punishment of the offender.¹⁶ The source of the modern RJ movement can be traced to two Mennonite practitioners in Ontario, Canada.¹⁷ Frustrated with the existing conventional criminal justice practices, they sought to practicalize their religious beliefs by promoting peacemaking, as a result of which they conducted a series of “victim-offender reconciliation” encounters between two juvenile offenders and the numerous people these young men had offended.¹⁸ This led to the implementation of several forms of victim-offender mediation or reconciliation throughout North America, Europe, and elsewhere and to the development of restorative justice theory.¹⁹

¹⁶ See, for example, Howard Zehr. *Changing Lenses: A New Focus for Crime and Justice*, 3rd edn. Scottsdale, (PA: Herald Press, 2005); D. Van Ness (1993) “New wine and old wineskins: four challenges of restorative justice”, *Criminal Law Forum*, 4 (2): 251–276 & J Burnside, J. and N. Baker (eds) *Relational Justice: Repairing the Breach*. (Winchester: Waterside Press, 1994)

¹⁷ Ted Grimsrud & Howard Zehr (2002) “Rethinking God, Justice, and Treatment of Offenders”, *Journal of Offender Rehabilitation*, 35:3-4, 253-279. Available at https://doi.org/10.1300/J076v35n03_14 Accessed September 10 2022

¹⁸ *ibid*

¹⁹ *ibid*

B. Definitions of Restorative Justice

RJ has been said to encompass a broad set of empowerment-based practices and decisions made in response to crime that incorporates accountability and rehabilitation strategies for varied groups including adolescents, adults, and older adults in the criminal justice system.²⁰

The concept has also been said to refer to diversion from the formal court process, to actions taken concurrently with court decisions, and to meetings between victims and offenders at any stage of the criminal process, as well as measures leading to the release of an offender from incarceration.²¹ Also, according to John Braithwaite, who is touted as being one of the conceptual and practical founders of the RJ theory, the RJ theory rests on the idea that crime hurts as a result of which justice should heal by providing all the stakeholders affected by injustice the opportunity to meet and discuss how the said injustice has affected them and what can be done to repair the harm caused.²²

From the above definitions of RJ, it can be gleaned that the restorative process is an alternative to the usual retributive criminal justice system response to crime that aims at taking into consideration the interests of the various stakeholders, to wit, the victim, offender, and the community with the view to repairing the damage arising from an

²⁰ Tina Maschi & George S. Leibowitz. *Restorative Justice* (Sage publications, 2014)

²¹ Kathleen Daly (2001). "Restorative Justice: The Real Story". Revised version of a paper presented to the Scottish Criminology Conference, Edinburgh, 21-22 September 2000. Available at <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.476.1349&rep=rep1&type=pdf> Accessed July 8, 2022

²² John Braithwaite (2004). "Restorative Justice and De-Professionalization" *The Good Society*. 13(1): 28:31

offense committed. The emphasis of RJ is to promote a healing process for the victim of an offense with the participation of the victim, offender, and members of the community in which the victim and offender belong due to the far-reaching implications of crimes committed.

C. Theoretical underpinnings of Restorative Justice

This stage of the paper focuses on a discussion of the various theoretical underpinnings of RJ because the theories seek to explain why RJ is effective in addressing some of the pitfalls associated with the retributive response to crime.

1. Re-integrative shaming

This theory stems from the belief that a retributive response to crime can lead to adverse consequences for both the offender and the community as a whole. In developing this theory, Braithwaite opined that the labeling effects associated with the retributive response to crimes lead to stigmatization and shame of the offender that rather tend to increase subsequent offending.²³ This is because the stigmatization often humiliates the offender which tends to inhibit the offender's process of social reintegration after the commission of a crime.²⁴ By

²³ John Braithwaite, *Crime, shame and reintegration*. (Melbourne: Cambridge University Press, 1989)

²⁴ J Braithwaite & S. Mugford, (1994). "Conditions of successful reintegration ceremonies: Dealing with juvenile offenders". *British Journal of Criminology*, 34(4),

inhibiting the process of social reintegration, the offender is therefore more likely to commit another crime. The effect of reintegrative shaming however is in stark contrast to the retributive response to crime. Through the process of reintegrative shaming, the offender is rebuked for his/her offense by persons in the life of the offender while at the same time there is a demonstration of the willingness to forgive, respect, and accept the offender as a person.²⁵ Thus, based on the process of re-integrative shaming, the offender is made aware of the consequences of his/her crime by way of disapproval and accepted back into the community fold with open arms thus reducing the likelihood of the offender to re-offend.

2. Procedural Justice Theory

This theory is closely connected to the re-integrative shaming theory. This theory posits that a way of showing respect to the offender which is one of the hallmarks of the re-integrative shaming theory is to be fair, and eschew any form of discriminatory practices on account of race, age, or sex, to listen as well as empower others due to the control they have over the process.²⁶ Procedural justice broadly speaking serves as the vehicle for communicating respect.²⁷ This is because whereas the

139–172; S Maruna, T.P. LeBel, N. Mitchell, & M. Naples (2004). “Pygmalion in the Reintegration Process: Desistance from Crime Through the Looking Glass”. *Psychology, Crime and Law*, 10(3), 271–281

²⁵ Braithwaite, Above, note 23

²⁶ Braithwaite, Above, note 22

²⁷ E. Allan Lind & Tom R. Tyler (1998) “The Social Psychology of Procedural Justice”, *Contemporary Sociology* 18(5)

retributive criminal justice system seeks to encourage the participation of people who can inflict damage to both offender and victim, the conferences held in the RJ process on the contrary tend to invite along those who can provide maximum support to their side, be it the on victim side or the offender side.²⁸ Those present are therefore expected to be fair and tend to be fair to one another.²⁹ Empirical studies conducted lend support to this position by demonstrating that through the RJ processes, offenders felt more empowered to express their views, had more time to do so, and felt their rights were more respected.³⁰

3. The theory of Unacknowledged Shame

The re-integration theory holds the view that the labeling effects associated with the retributive justice system can lead to stigmatization which can promote shame and thus hamper the social re-integration of the offender into the community and promote crime. Proponents of this theory however see a deficiency in the re-integration theory by opining that it is just a theory of shaming, with the emotion of shame left under-theorized. Thus, proponents of the unacknowledged shame theory, such as Scheff, hold the view that there is therefore the need for a process

²⁸ Braithwaite, Above, note 22

²⁹ *ibid*

³⁰ Lawrence William Sherman, Denise C. Gottfredson, & Doris L. Mackenzie (1998) 'Preventing Crime: What Works, What Doesn't, What's Promising' Research in Brief. National Institute of Justice. Available at <file:///C:/Users/User/Downloads/Shermanetal1998PreventingCrimeResearchInBriefNIJ.PDF> (accessed September 11, 2022); Lawrence William Sherman and G. Barnes (1997). "Restorative Justice and Offenders' Respect for the Law." RISE Working Paper 3. Canberra: Law Program, RSSS, Australian National University.

that enables offenders to deal with the shame that is bound to happen at a point in time when a crime has been committed.³¹ Scheff opines that the denial of being ashamed is not an adaptive response and that shame can be a healthy emotion that can assist in the preservation of social bonds necessary for our thriving.³² According to Retzinger and Scheff, the RJ conferences can institutionalize pride and acknowledge shame that heals social bonds.³³ To proponents of this theory, conferences in RJ are ceremonies of constructive conflict in the sense that when hurt is communicated, shame is acknowledged by the offender, respect is shown for the victim's motive for communicating the hurt, and respect is reciprocated by the victim, constructive conflict has occurred between the victim and offender.³⁴ In this constructive conflict, shame is thus acknowledged by apology which is reciprocated by forgiveness.³⁵ By apologizing, offenders are less likely to re-offend. Moore observes that in courtroom justice shame is not acknowledged because it is hidden behind impersonal rhetoric about technical culpability.³⁶ The evidence now supports this theory by illustrating that unacknowledged shame contributes to violence and that offenders may

³¹ T.J Scheff, *Microsociology: Discourse, Emotion and Social Structure* (Chicago: The University of Chicago Press, 1990)

³² *ibid*

³³ SM Retzinger & T.J Scheff. "Strategy for community conferences: Emotions and social bonds". In: Galaway, B, Hudson, J (eds) *Restorative Justice: International Perspectives*. Monsey, (NY: Criminal Justice Press, 1996), 315–336

³⁴ *ibid*

³⁵ N. Tavuchis. *Mea culpa: A sociology of apology and reconciliation* (Stanford University Press, 1991)

³⁶ David B Moore (1994). "Public Anger and Personal Justice: From Retribution to Restoration— and Beyond." Paper presented to Silvan S. Tomkins Institute Colloquium, "The Experience and Expression of Anger," Philadelphia, pp. 6

accept and discharge shame more during the RJ program than when they go through court cases.³⁷

4. Defiance theory

The theory was proposed by Lawrence Sherman who consolidated the propositions of procedural justice, re-integrative shaming, and unacknowledged shame theories into a theory of defiance.³⁸ The theory is predicated on three propositions.

- (i) Sanctions lead to future defiance of the law in the sense that when offenders are frequently sanctioned, they experience the sanctioning conduct as illegitimate, as a result of which they develop weak bonds with the sanctioning agent and community. The offenders, thus tend to deny the shame and rather feel proud of their ostracisation from the sanctioning community.
- (ii) Sanctions produce future deterrence of law-breaking to the extent that offenders begin to experience the sanctioning conduct as legitimate, they have strong bonds to the sanctioning agent and community, accept their shame, and remain proud of the solidarity of the community.

³⁷ Sherman et al (1998 pp.127-129) & Sherman and Barnes (1997), Above, note 30.

³⁸ Lawrence W. Sherman (1993). "Defiance, Deterrence and Irrelevance: A Theory of the Criminal Sanction" *Journal of Research in Crime and Delinquency* 30:445–73.

- (iii) Sanctions become immaterial to future law-breaking in the sense that the factors promoting defiance or deterrence are fairly evenly counterbalanced.³⁹

To Sherman, RJ is more likely to meet the conditions of proposition two than a retributive response to crime. A study conducted by Hagan and McCarthy based on data collected from homeless children in Toronto and Vancouver lends credence to Sherman's defiance theory prediction by revealing that children who have been humiliated, treated unfairly, and had bonds severed because they are victims of sexual abuse or physical violence (with bruising or bleeding) will have their criminal behavior worsened by conventional criminal justice processing more than offenders who have not been abused.⁴⁰

It has rightly been noted that the various theories do not function in isolation but have strong relationships with one another.⁴¹ This relationship between the various theories is exemplified by the fact that by ensuring fairness, as well as empowering others with process control, to refrain from bias on the grounds of age, sex, or race, the procedural justice theory serves as the vehicle in the communication of respect, which is the main feature of the re-integrative shaming theory. The theory of unacknowledged shame also steps in to fill a lacuna in

³⁹ *ibid* at 448-449

⁴⁰ John Hagan and Bill McCarthy, *Mean Streets: Youth Crime and Homelessness* (Cambridge: Cambridge University Press, 1997) pp. 191-7

⁴¹ John Braithwaite, "Restorative Justice: Theories and Worries". A paper delivered at the 123rd International Senior Seminar for Visiting Experts. Available at http://www.antonicasella.eu/restorative/Braithwaite_2004.pdf Accessed September 10, 2022

the re-integrative shaming theory by explaining how the conferences in RJ can assist the offender to deal with the shame associated with his/her crime based on constructive conflict due to the communication of hurt by the victim and the acknowledgment of shame by the offender, which can lead to apology and forgiveness, thus promoting respect for one another, as well as institutionalizing pride and healing social bonds. The defiance theory, on the other hand, is an amalgamation of the propositions of procedural justice, re-integrative shaming, and unacknowledged shame theories based on its empirically supported proposition that the sanctions inherent in RJ are likely to promote future deterrence of law-breaking because offenders begin to experience the sanctioning conduct as legitimate, thereby generating strong bonds to the sanctioning agent and community, and accept their shame and remain proud of the solidarity of the community.

D. Restorative Justice Practice Models

This stage of the paper seeks to discuss the various RJ practice models through which the goals and aspirations of the RJ theory can be realized.

1. Victim-Offender Mediation

The process involves a mediator who encourages the parties to participate in the process and also regulates the interaction between them by assisting them to communicate, as well as monitoring their safety.⁴² This process aims to help in restoring the broken relationship

⁴² DE Peachey, B. Snyder, A Teichrob. Mediation Primer- A Training Guide for Mediators in Criminal Justice System. Available at <https://www.ojp.gov/ncjrs/virtual->

caused by the criminal conduct of the offender. The process thus provides the opportunity for humanization in the sense that it allows the offender to ascertain the impact of his/her on the victim, and for the victims, it helps them to appreciate what the offenders look like to realize that they are humans after all.⁴³ At the center of this process is the emotions of both parties and this avoids stigmatization against the offender because of the human encounter that this process creates.⁴⁴ At the mediation, the facts of the offense are fully explored and an opportunity is presented to the parties to communicate their feelings, after which a written restitution contract is worked out. This restitution contract and a brief report are then submitted to the court or the referring agency and if it is to become a condition of the sentence, it must receive final approval from the court.⁴⁵

2. Family Group Conferencing

Family Group Conferencing (FGC) originated in New Zealand in the latter part of the 1980s partly due to the concerns and traditions of the indigenous Maori population.⁴⁶ The retributive approach was seen as focusing on punishment rather than solutions and excluded the family

[library/abstracts/mediation-primer-training-guide-mediators-criminal-justice-system](#)
Accessed September 15, 2022

⁴³ Masahiro Suzuki & Xiaqyu Yuan (2021). "How Does Restorative Justice Work? A Qualitative Metasynthesis", *Criminal Justice and Behaviour*, vol. 48, issue 10, pp 1347-1365.

⁴⁴ *ibid*

⁴⁵ Ted Grimsrud & Howard Zehr (2002), Above, note 17.

⁴⁶ *ibid*

and the community from the process.⁴⁷ With the FGC, a youth justice coordinator facilitates a conference that includes police who are the prosecutors in the matter, victims and offenders and their respective families and/or supporters, as well as caregivers involved with the family.⁴⁸ The participation of the families helps to provide accountability and support as well as empowers the family.⁴⁹ The process entails four main stages, which include a conference where professionals inform the family of the concerns they have after which there is a private family time, where the family alone can come out with a strategy that addresses the concerns that have been raised.⁵⁰ The strategy or plan is then brought to the attention of the professionals who would only support it if it addresses the concerns raised and does not pose any risk(s) to the child.⁵¹

3. Sentencing Circles

The Sentencing circles model is an alternative form of sentencing that takes into consideration the interests of the offender, victims, families, and the community as a whole. The sentencing circles model is an alternative to the formal sentencing submissions by the defense and prosecutors associated with the retributive justice system. In a

⁴⁷ *ibid*

⁴⁸ *ibid*

⁴⁹ *Ibid*

⁵⁰ Social services and your family-family lives. Available at <https://www.familylives.org.uk/advice/your-family/social-services-and-your-family/social-services-and-your-family> Accessed September 18, 2022

⁵¹ *ibid*

sentencing circle, the offender, victim and their support groups, magistrate or judge, and elders of the community sit in a circle to discuss the circumstances and impact of the offense and determine a sentence that would address the particular situation of the offender.⁵² Together, these various stakeholders ascertain the mechanisms which can be put in place to assist in healing all affected parties and prevent future crimes.⁵³ The involvement of the community as well in the sentencing circles unlike the situation in the family group conferencing model makes this RJ practice model a particularly viable tool that can aid in the social integration of the offender.

III. RESTORATIVE JUSTICE WITHIN GHANA'S CRIMINAL JUSTICE SYSTEM

This section of the paper focuses on the evaluation of statutes such as the Courts Act of Ghana, 1993(Act 459) Alternative Dispute Resolution Act, 2010 (Act 798), the Children's Act, 1998 (Act 560), and the Juvenile Justice Act 2003 (Act 653), as well as the Non-Custodial Sentencing (Criminal Offences) Bill, 2018 which contain some principles on RJ. Policy documents, such as the Ghana Code for Prosecutors, and the Sentencing Guidelines of Ghana will also be

⁵² Jacqueline Fitzgerald (2008) "Does circle sentencing reduce Aboriginal offending?" *Crime and Justice Bulletin*, Number 115. Available at <https://www.bocsar.nsw.gov.au/Publications/CJB/cjb115.pdf> Accessed September 19, 2022.

⁵³ Gordon Bazemore and Mark Umbreit (2001) "A Comparison of Four Restorative Conferencing models." *Juvenile Justice Bulletin*. Available at <https://www.ojp.gov/pdffiles1/ojjdp/184738.pdf> Accessed September 19, 2022.

reviewed due to their relevance to the implementation of the RJ theory in Ghana. The evaluation aims to bring to the fore any possible gaps in the law and make useful recommendations, where necessary.

A. Restorative Justice under the Courts Act of Ghana, 1993(Act 459)

Section 73 of Act 459 provides a legal basis for RJ within the criminal justice system of Ghana by promoting reconciliation in criminal cases in Ghana through the victim-offender mediation RJ practice model. This is however based on the proviso that the offense in question is a misdemeanor in nature and does not amount to a felony or aggravated in degree. Based on this provision, the court on its own or at the request of the prosecution and/or the accused person in the course of misdemeanor criminal proceedings may stay proceedings for a reasonable time to pave the way for the parties to attempt an amicable settlement of the matter. Any such settlement which can be in the form of monetary compensation etc. for the victim will then be announced in court by the parties which will, in turn, be adopted by the court as consent judgment, after which the case shall be dismissed and the accused person discharged.

B. Restorative Justice under the Alternative Dispute Resolution Act of Ghana, 2010 (Act 798)

Act 798 of Ghana also provides a legal basis for victim-offender mediation under Ghanaian law. According to the Act, a court before

which an action is pending may refer the subject matter in dispute or a part of it to mediation at any stage in the proceedings, if the court thinks the mediation will assist in the resolution of the matter or part of it.⁵⁴ Alternatively, based on an agreement, parties in an action before a court may at any time before final judgment is given, apply to the court to either have the whole action or part of it referred to mediation.⁵⁵

A careful reading of section 64 of Act 798 reveals that it does not stipulate that criminal cases are excluded from its ambit. Indeed, if the drafters of Act 798 of Ghana intended to exclude criminal cases from the ambit of section 64, they would have expressly stated so. As a result, it is submitted that the nature of *action* referred to under section 64 refers to both civil and criminal cases. It is also worthy of note that section 64 of the Act must be read together with section 73 of the Courts Act, 1993 (Act 459) already discussed above because it is Act 459 that among others, deals with the jurisdictions of the courts in Ghana in the conduct of cases. Thus, section 64 of Act 798 must be construed in a manner that will make it consistent with section 73 of Act 459. In that regard, it is further submitted that the nature of criminal offenses which fall within the ambit of section 64 of Act 798 must in a similar vein as the situation under section 73 of Act 459 not amount to a felony or aggravated in degree or serious offenses. Section 64(1) and (2) of Act 798 thus gives the court the authority in criminal cases which are not serious either on its own volition where the court thinks the mediation

⁵⁴ Section 64(1) of Act 798.

⁵⁵ Section 64(2) of Act 798.

will help in the resolution of the matter or at the request of the prosecution and/or the accused person based on an agreement between the parties to refer the said matter or part of the matter for victim-offender mediation

C. Restorative Justice Under the Non-Custodial Sentencing [Criminal Offences] Bill, 2018 of Ghana

According to the title of the Bill, its ultimate goal is to provide alternative measures and sanctions for criminal offenses for the rehabilitation of offenders. The Bill can therefore be seen as an attempt to introduce an RJ theory under Ghanaian law. It is on this basis that an evaluation of the Bill is apt in the circumstances to help in identifying any possible gaps for the necessary steps to be taken to remedy the situation if need be. The fact that the Bill represents a bold attempt to introduce an RJ theory into the criminal justice system of Ghana is underscored by clause 1 of the Bill. According to clause 1, the objectives of the Bill are as follows:

- (1) Achieve a system of restorative justice process for the rehabilitation of offenders.
- (2) Reform the operations of the criminal justice system.
- (3) Promote the implementation of alternative forms of sentencing.
- (4) Promote means of reducing the use of imprisonment as a form of punishment for non-serious offenses.

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- (5) Enhance the use of non-custodial sanctions to encourage rehabilitation and social integration of offenders.
- (6) Reducing the negative effect of custodial sentences on offenders.
- (7) Develop means of encouraging the integration of offenders taking into account the interests of victims and the community.

The promotion of restorative response to criminal cases by the Bill is further evident in clause 4 which stipulates that after the conviction of a person for an offense for which there is no prescribed minimum punishment, the court may in the exercise of its discretion and taking into consideration whether the rehabilitation of the offender will be achieved by an alternative means of punishment other than a custodial sentence to make a direction for a victim-offender mediation, absolute or conditional discharge, verbal sanctions, restitution to the victim or family of the victim, family group conference, an arbitrated settlement, supervision order, suspension of a custodial sentence, supervision of the offender for a prescribed period of good behavior and referral to an appropriate treatment center.

Even though the efforts aimed at promoting restorative response to criminal cases under the Bill are commendable, it is however observed that the sentencing circle restorative justice practice model is conspicuously missing from the Bill as one of the RJ practice models which can be adopted by the courts in coming out with sentences. It is worthy of note that this situation can undermine the effective realization of the objectives of the Bill under clause 1 in enhancing the use of non-

custodial sanctions to encourage rehabilitation and social integration of offenders as well as develop the means of encouraging the integration of offenders taking into account the interests of victims and the community. This is so because those objectives can best be realized through the sentencing circle practice model where the offender, victim and their support groups, magistrate or judge, as well as the community will get involved to discuss the circumstances and impact of the offense and come out with a sentence that would address the particular situation of the offender and also help in healing all affected parties which can assist in the rehabilitation and social integration of the offender.

It also observed that under clause 4 of the Bill the court is not duty-bound to take into consideration the restorative justice theory during the sentencing of the offender. This is because clause 4 of the Bill gives the court the authority to exercise its *discretion* as to whether to even take account of the RJ theory in coming out with sentences for offenders. The use of the word *discretion* suggests that the court is not obliged to even take account of the restorative justice program in the first place in deciding the sentence to impose on the offender.

D. Restorative Justice Under the Children's Act of Ghana, 1998, (Act 560)

Act 560 also promotes RJ in criminal cases involving persons below the age of eighteen years. Thus, under section 32 of the Act, a child panel can be constituted in minor criminal cases or offenses not aggravated in nature that involve children in Ghana to assist in victim-

offender mediation between the child and the victim of the offense.⁵⁶ Based on the consent of the parties concerned, the child panel may decide to impose a community guidance order on a child which entails placing the said child under the guidance and supervision of a person of good standing in the community to which the child belongs for a maximum period of six months in a bid to reform the child.⁵⁷ In the course of the victim-offender mediation, a suggestion for restitution to the victim of the offense can be made by the child panel as well as the child made to render an apology to the victim of the offense.⁵⁸ It can be gleaned from section 32 of Act 560 that the Act seeks to promote RJ based on the victim-offender RJ practice model aimed at repairing the harm caused through restitution to the victim, rendering of apology or service by the child to the victim. Act 560 also encourages the involvement of the community in a bid to assist in the reformation of the child.

E. Restorative Justice Under the Juvenile Justice Act of Ghana, 2003 (Act 653)

Act 653 also provides the basis for the implementation of RJ in respect of juvenile delinquents in Ghana. The Act defines a juvenile as a person under eighteen years who has flouted the law.⁵⁹ The implementation of

⁵⁶ See section 32(1) &(2) of Act 560

⁵⁷ See section 32(4) & (5)of Act 560

⁵⁸ See section 32(6) of Act 560

⁵⁹ See section 1(2) of Act 653.

RJ is based on a diversion program sanctioned by the Act in respect of minor offenses only. However, before the implementation of the diversion program under the Act, certain conditions stipulated under section 24 of the Act would have to first be satisfied. Under section 24 of the Act, where a juvenile is charged with an offense, the juvenile court is obliged to make an order to be furnished with a social inquiry report which is required to be taken into account by the court in the making of an order. The social inquiry report shall be prepared by a probation officer who is required to visit the home of the juvenile. The report is also required to include information concerning the background of the juvenile, the present circumstances of the juvenile, the conditions under which the offense was committed, and sentence recommendations. Where the offense in question is minor, the social inquiry report may also include a recommendation that the matter before the juvenile court should be referred to a child panel established under the Children's Act, 1998 (Act 560). Upon receipt of the social inquiry report, the court is obliged to bring the contents of the report to the attention of the juvenile and either the juvenile or his/her legal counsel shall be furnished with a copy of the social inquiry report. The court also has the discretion to request an oral report in addition to the social inquiry report. If the court fails to follow the recommendations given in the report, it is obliged to give written reasons for that situation.

Once the aforementioned conditions under section 24 have been satisfied, the court under section 25 of the Act is enjoined to consider the social inquiry report and then make a decision as to whether the juvenile charged with an offense should be diverted from the criminal

justice system with or without conditions. Section 26 of the Act sets out the objectives of the diversion program which accord with the goals of the RJ theory. These include the following:

1. To encourage the juvenile to be accountable for the harm caused
2. To promote an individual response to the harm caused which is appropriate and proportionate to the circumstances of harm caused.
3. To promote the reintegration of the juvenile into the family and community.
4. To provide an opportunity to the person or community affected by the harm caused, to express their views on the impact of the harm.
5. To encourage restitution of a specified object or symbolic restitution.
6. To promote reconciliation between the juvenile and the person or community affected by the harm caused.
7. To prevent stigmatization of the juvenile which may occur through contact with the criminal justice system.

F. Ghana Code for Prosecutors, 2016

An evaluation of the Code is vital because of the crucial role prosecutors play in the criminal justice system. For instance, it is the prosecutors' work in processing criminal cases in judicial proceedings

that defines our expectations of them.⁶⁰ Particularly, it aids in our understanding of their distinctive professional role and responsibilities, which are summed up in the concept of a duty to seek justice.⁶¹ The Ghana Code for Prosecutors applies to prosecutors when they are involved in cases before a charge is preferred against the accused person.⁶² The Code gives prosecutors the power upon reviewing each case to determine whether or not a person should be charged with a criminal offense by taking into consideration whether there is sufficient evidence to establish a prima facie case against the accused person as well as whether the prosecution is in the public interest depending on the seriousness of the offense.⁶³ Prosecutors are enjoined to prefer charges only where both the evidence and public interest tests have been met.⁶⁴ The Code is however silent on the need for prosecutors to advert their minds to RJ principles in deciding whether to prefer charges against the accused person, especially in misdemeanor cases or cases not aggravated in nature. This is particularly worrying because prosecutors are major stakeholders in the restorative justice process. Considering their role in deciding whether to charge a person for an offense based on the evidence available, prosecutors can play a key role in the restorative justice process as early as possible in the life of a case.

⁶⁰ Bruce A. Green & Lara Bazelon, (2020) “Restorative Justice from Prosecutors’ Perspective”, 88 *Fordham Law Review* 2287.

⁶¹ Russell M. Gold (2017) “Clientless” Lawyers”, 92 *WASH. L. REV.* 87, 95–96 (“The duty to do justice entails ‘specific obligations to see that the defendant is accorded procedural justice’ and that the defendant is treated fairly”)

⁶² Principle 3 of the Code at page 9.

⁶³ Principle 4 of the Code at page 9.

⁶⁴ *Ibid.*

G. Ghana Sentencing Guidelines

A critical analysis of the Ghana Sentencing Guidelines is vital in the discussion of RJ under the criminal justice system of Ghana because restorative mechanisms can be incorporated into the sentencing process. The Ghana Sentencing Guidelines framework mandates judges and magistrates in Ghana to take into account specific considerations such as the effect of the offense on the victim and the victim's family, age and other personal circumstances of the accused, and public interest, among other factors in the imposition of sentences.⁶⁵ The Guidelines framework also mentions restoration as being one of the factors to be taken into account in coming out with sentences and orders.⁶⁶ While the aforementioned considerations are relevant to the RJ theory, it is observed that the Sentencing Guidelines framework, stops short of setting out express principles relevant to the application of restorative mechanisms in the imposition of sentences in Ghana.

IV. CONCLUSION AND RECOMMENDATIONS

Implementation of RJ mechanisms within the criminal justice system around the world is gaining traction despite its limitations due to the empirically established benefits associated with the RJ theory, such as the reduction in re-offending by taking into account the interests of the victims, offenders, and the community as a whole, among other benefits. It is against the backdrop of the enormous benefits associated

⁶⁵ See Principle 4 at page 7 of the Guidelines

⁶⁶ At page 8 of the Guidelines

with the RJ theory that this paper has adopted the doctrinal research methodology to critically and comprehensively evaluate the legislative framework as well as some policy documents relevant to the implementation of the RJ theory in Ghana in an attempt to establish whether the legal regime in Ghana is fit for the effective promotion and implementation of RJ under Ghanaian law. The paper has revealed that although certain efforts have been made under Ghanaian law to promote RJ, the said efforts are inadequate to effectively promote RJ within Ghana's criminal justice system. This is a cause for concern considering that, for instance, an empirical study conducted by Teye, underscores the critical role of the restorative programs in the reformatory process of offenders in Ghana due to the ineffectiveness of the retributive system to reduce the number of re-offenders in Ghana's prisons.⁶⁷ In light of the foregoing, the paper makes the following legislative proposals for the effective implementation and promotion of the RJ theory within the criminal justice system of Ghana.

Firstly, there is a need for a consolidation of all the principles littered in the different statutes as well as the Non-Custodial Sentencing Bill on the application of RJ principles and mechanisms into a comprehensive RJ legislative framework. A comprehensive consolidation will provide for consistency, better reference, and enforcement of the law. Such consolidation will have real practical benefits for those who work with the law, such as legal practitioners and the courts, as well as those concerned with making it, such as Parliament and Government, and for those who need to access or use it, such as citizens. Such a

⁶⁷ Teye, Above, note 14

comprehensive legislative framework will also create a legal inducement for restorative programs; provide guidance and structure for restorative programs, ensure the protection of the rights of offenders and victims in the restorative programs, as well as reduce legal and systemic barriers to the use of restorative programs.⁶⁸

Secondly, there is a need to beef up the legislative framework for the application of RJ in Ghana through the incorporation of clear-cut responsibilities of prosecutors in the restorative justice process due to the crucial roles prosecutors play in restorative programs.

Thirdly, there is the need for the introduction of a provision within the proposed legislative framework that makes it compulsory for judges and magistrates in Ghana to take into account RJ in the sentencing of offenders for offenses other than offenses in respect of which any law prescribes a minimum punishment. Giving judges the *discretion* to take into consideration the RJ theory in coming out with sentences for offenders instead of making it obligatory as is the situation under clause 4 of the Non-Custodial Sentencing Bill tends to undermine the effective implementation of restorative programs.

Fourthly, it will be expedient if the proposed legislative framework will also include the establishment of an RJ Management Board made up of various stakeholders within Ghana's criminal justice system, such as the Police Service, Prisons Service, Attorney General's Department, etc. that will among others, make recommendations for a national plan

⁶⁸ Daniel W. Van Ness & Pat Nolan (1998) "Legislating for Restorative Justice" 10 *Regent U.L Rev.* 53.

of action to promote restorative programs in Ghana, monitor, and report on the progress of such a plan. This strategy will see to the smooth implementation of the restorative programs under Ghanaian law and also assist in identifying any possible challenges for the necessary actions to be taken to remedy the situation.

Finally, although it is commendable that the Non-Custodial Sentencing [Criminal Offences] Bill advocates for the implementation of RJ practice models such as victim-offender mediation, family group conference, etc., considering that social integration of the offender is one of the main tenets of the restorative process, the inclusion of sentencing circles as one of the RJ practice models under Ghanaian law will assist greatly in achieving that goal. This is because due to the active involvement of the community in the sentencing circle process in a bid to assist in the healing process of individuals, and families and ultimately to prevent crime, the offender is more likely to be accepted back into the community fold with open arms.

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