RESTORATIVE JUSTICE AS A FRAMEWORK FOR JUVENILE JUSTICE REFORM

A South African Perspective

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The South African Cabinet has recently given approval for the introduction into Parliament of a Bill that will provide a new system to deal with child offenders. This article suggests that the context of political transition in South Africa made it easier to promote restorative justice as a fundamental principle of juvenile justice reform. The theme of reconciliation that characterized the transition is linked to the African philosophy of humanity and community, ‘ubuntu’. The acceptance of ‘a different kind of justice’, familiar from African traditional justice, community courts and the Truth and Reconciliation Commission provided fertile ground for debates about the modern international trend towards restorative justice approaches, and this has had a notable impact on juvenile justice reform. The article moves on to describe selected aspects of the Child Justice Bill, examining the extent to which these clauses reflect a restorative justice approach. Finally there is a discussion about some of the challenges to promoting restorative justice in an environment of public concern about crime.

The struggle to achieve basic human rights for all in South Africa was a major focus for social, political and legal reformers in the decades following the entrenchment of apartheid. Perhaps because of this, concerted calls for reform of the juvenile justice system only began in earnest at the beginning of the last decade of the twentieth century. During the 1970s and 1980s children were regularly arrested and held in custody on charges relating to political activities, or were detained without trial. A number of political and human rights organizations came to the assistance of these children, their work understandably focusing on the protection of children involved in political activism. By the end of the 1980s, political detentions of children had waned. As the country prepared itself in the early 1990s for a negotiated solution to the country’s political problems, the picture of what children accused of crimes were experiencing in South Africa’s criminal justice system was brought into the spotlight by non-governmental organizations (van Zyl Smit 1999).

Serendipitously, South Africa moved though its negotiated transition from apartheid to a constitutional democracy at the same time as the calls for juvenile justice reform intensified. Also at this time the international restorative justice movement was gathering momentum. Thus it was that advocates for change in the field of juvenile justice found themselves perfectly poised to use the political will of the moment to advocate for the concept of restorative justice. Restorative justice was first promoted in South Africa by the non-governmental sector. As early as 1992, the National Institute for Crime Prevention and Reintegration of Offenders (NICRO), a national non-governmental

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organization, took the lead by framing their diversion and sentencing programmes within a restorative justice paradigm. They began by experimenting with victim-offender mediation based on the Victim Offender Reconciliation Programme developed by the Mennonite Central Committee in Ontario, USA. They later turned their attention to family group conferencing, largely following the New Zealand model. In 1994, a group of NGOs calling themselves the Juvenile Justice Consultancy published a document entitled ‘Juvenile Justice for South Africa: proposals for policy and legislative change’ (Juvenile Justice Consultancy 1994). These proposals suggested the establishment of a separate juvenile justice system in South Africa, and proposed that family group conferences be the centrepiece of this new system. Although these proposals had no official status, they excited much interest among those working with young people at risk, and captured the discourse in the field of juvenile justice (Pinnock et al. 1994: 338).

From 1995 the government started to play a more direct leadership role in the development of juvenile justice policy, and the Minister of Justice appointed a committee under the auspices of the South African Law Commission to draft new legislation for the management of children who are charged with crimes. This work culminated in the Child Justice Bill, which the South African Cabinet has approved for introduction into Parliament in 2002.

This article will explore the idea that the over-riding theme of South Africa’s political transition was one of reconciliation, and that this political context made it easier to promote restorative justice as a fundamental principle of juvenile justice reform. The article will illustrate the tendency of the founders of our new democracy to use the language of restorative justice, at least at the level of national conflict resolution and peace building. The decision to opt for the Truth and Reconciliation Commission is linked to the African philosophy of ubuntu.

The article also describes selected aspects of the Child Justice Bill, examining the extent to which these clauses reflect a restorative justice approach. There is a discussion of some concerns about children’s rights in relation to restorative justice, as well as some of the challenges that will need to be met in promoting restorative justice policy and practice.

**Antecedents**

A remarkable feature of South Africa’s transition was the way in which language that was used by the politicians and former freedom fighters who shaped the destiny of the country is strikingly similar to the language that is used by academics and practitioners in discourse about restorative justice. An interim Constitution was drafted by the negotiating parties in 1993, which set out the rationale for the Truth and Reconciliation Commission. The post-amble to the interim Constitution made the claim that the Constitution provided a foundation for South Africans to transcend the divisions of the past, which had generated violations of human rights and had led to a legacy of hatred, fear, guilt and revenge. The post-amble goes on to say; ‘These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimization.’ (Constitution of the Republic of South Africa Act 1993).
South Africa's Truth and Reconciliation Commission (TRC) has subsequently been explicitly characterized as a restorative justice process by a number of authors (Villa-Vicencio 1999: 407–25; Boraine 2000: 426–8, Rwelemira 2000), although it may have been an incomplete attempt to apply restorative justice principles (Zehr 1997: 20). The chairperson of the Commission, Bishop Desmond Tutu, has stated quite clearly that in his view the Commission’s work was based on the concept of restorative justice, which, he asserts, is a concept compatible with an African view of justice. In an interview about the TRC he is reported to have said, ‘Retributive justice is largely Western. The African understanding is far more restorative—not so much to punish as to redress or restore a balance that has been knocked askew. The justice we hope for is restorative of the dignity of the people’ (Minow 1998: 81).

The Commission sought to reveal the truth about politically motivated violations of human rights during the years of apartheid rule. Sachs has pointed out that the Commission’s role in revealing the truth was not aimed solely at gaining knowledge about what happened, but went further, to the point of gaining acknowledgement of what the cost was in human terms. Acknowledgement, he says, involves an acceptance not only of what occurred but also of the emotional and social significance of what happened, it presupposes a sense of responsibility for the facts and an understanding of the significance they have for the persons involved and for society as a whole (Sachs 1998: 9). The report of the TRC explains that its purpose had nothing to do with vengeance, but rather with helping victims to become more visible and more valuable citizens through public recognition and acknowledgement. In addition, perpetrators could be accountable for their actions and in the process they were given the opportunity to acknowledge their responsibility to contribute to the creation of a new South African society. The public hearings of the Commission, which received extensive coverage in the print and electronic media, exposed the South African public to this different understanding of the function of justice.

Those involved with the development and coordination of the TRC saw it not as an alternative to justice, but as a justice process in itself, albeit a ‘different kind of justice’, a term coined by Charles Villa-Vicencio, director of research of the TRC (Villa-Vicencio 1999: 408). His analysis includes the idea that South Africans needed to learn to live together again, described by Chileans as reconvivencia. For this to happen, it was necessary to find out what had happened during the years of apartheid, why it had happened and who was responsible. He observes that whilst the goals of truth telling and of reconciliation were generally supported by the South African public, there was a concern with what was perceived by some as ‘a lack of justice’. Villa-Vicencio asserts that the TRC was indeed a justice process that embodied a different kind of justice, ‘political restorative justice’, which addressed the legitimate concerns of victims and survivors whilst seeking to reintegrate perpetrators into the community (Villa-Vicencio 1999: 408).

Alex Boraine the Deputy Chairperson of the TRC, describes the core process of the TRC as follows:

Essentially it is the holding in tension of the political realities of a country struggling through a transition founded on negotiation and an ancient African philosophy which seeks for unity and reconciliation rather than revenge and punishment. (Boraine 2000: 423)

The ‘African philosophy’ to which Boraine refers is known as ubuntu. It has been described as an African worldview, which is both a guide for social conduct as well as a
philosophy of life. Archbishop Desmond Tutu explains in his book about the TRC that during the negotiating process, a decision had to be made about what form the commission to deal with South Africa’s past should take. The two possibilities of Nuremberg-type trials or an unconditional amnesty process were overtaken by a third approach of conditional amnesty, and that this approach was consistent with *ubuntu*. He explains further:

*Ubuntu* is very difficult to render into a Western language. It speaks of the very essence of being human. When we want to give high praise to someone we say ‘yu, u nobuntu’ (hey, he or she has *ubuntu*). This means they are generous, hospitable, friendly, caring and compassionate. They share what they have. It also means my humanity is caught up, is inextricably bound up, in theirs. We belong to a bundle of life. We say, ‘a person is a person through other people.’

He goes on to clarify how *ubuntu* is linked to the idea of forgiveness. He asserts that to forgive is not just to be altruistic, it is the best form of self-interest because forgiveness gives people resilience, enabling them to survive and emerge still human despite all efforts to dehumanize them. He concludes that even the supporters of apartheid were victims of the vicious system which they implemented, because within the context of *ubuntu*, our humanity is intertwined (Tutu 1999: 34–35).

The concept of *ubuntu* has underpinned societal harmony in Africa for many years, and guided traditional conflict resolution. Traditional mechanisms to deal with problems arising in communities have been effective structures for upholding African customary law. It has been said that ‘reconciliation, restoration and harmony lie at the heart of African adjudication’ (Allott 1977: 21), and that the central purpose of a customary law court was to acknowledge that a wrong had been done and to determine what amends should be made (Dlamini 1988). Some of these customary courts, known as Izinkundla, Izigcawu or Makgotla are still in operation throughout South Africa today, mostly in rural areas.

The traditional model currently practised in rural areas in South Africa is similar to indigenous traditions in other countries such as New Zealand and Canada (Consedine 1999; Taylor Griffiths and Hamilton 1996: 175–92). It involves elders (almost exclusively men) who preside over the resolution of problems experienced by members of the community, which have not been resolved at the family or community level. With the emphasis on ‘problems’ rather than offences, these structures hear the stories of the parties involved and then make decisions regarding outcomes. These outcomes aim to heal relationships, and they ensure restitution or compensation to victims (van Eden 1995). Symbolic gestures such as sacrifice of animals and the sharing of a meal indicate that the crime has been expiated and the offender can now be reintegrated (Kgosimore 2001).

During the early part of this century there were attempts by the Union government of South Africa to co-opt traditional courts, but they have survived in rural areas where they are still used to resolve community problems. In urban areas however, other structures, loosely modelled on traditional courts developed as a response to a lack of faith in the administration of justice by the apartheid government. During the last two decades of apartheid governance there was an upsurge in community organization against the repressive actions of the state. This led to the emergence of an estimated 400 street committees and community courts in African townships around the country (Scharf 1997). The development of these structures demonstrated a rejection of state authority
in these areas and the decision of people to control issues of safety and security for themselves through these ‘organs of people’s power’. These structures aimed to maintain order through the establishment of mechanisms at street level that would serve to hear disputes between people and make decisions regarding the appropriate resolution of the problems that were brought before them. In the 1980s, community courts identified their role as ‘political and revolutionary’. Although some of these forums produced results compatible with restorative justice, some of them turned into kangaroo courts, doling out very retributive punishments. In 1990 political organizations were unbanned and South Africa began to prepare for the first democratic elections. Many of the community courts ceased to function (Human Rights Committee 1999: 11).

Recently, the South African Law Commission has indicated an intention to give legal recognition to traditional and other informal mechanisms of justice. In its discussion paper on Community Dispute Resolution Structures, the South African Law Commission states that, ‘Because community-based dispute resolution structures serve a useful purpose in meeting the needs of the majority of the South African population for accessible justice, these structures must now be recognized and supported by law’ (SALC 1999: 4). The discussion paper also states that legislation regarding community courts should ensure that these community structures ‘remain informal and flexible in their procedures, inexpensive in their operations, accessible, non-alienating and responsive to the needs of the communities in which they operate’. The law relating to community courts has yet to be developed, but there seems to be a political will to include them in the future justice system.

The importance of traditional courts and community courts is that they have provided a backdrop for debates in South Africa about modern ideas of restorative justice. Their continued existence alongside the mainstream civil and criminal justice system indicates a broad acceptance amongst communities of a different type of justice, and a participative role for communities in the resolution of problems. People’s knowledge of these structures contributed to the acceptance of the Truth and Reconciliation Commission as a vehicle for healing the nation.

The period of transition was a window of opportunity for legal reformism. Writing in this journal in 1999, van Zyl Smit records that there was a conscious effort by criminologists and human rights activists to build a coalition of progressive forces that united around new ideas for dealing with juveniles. Van Zyl Smit is of the view that in the transitional period juvenile justice ‘probably attracted more debate and development resources than any other criminal justice issue and therefore the ideas of how society should ideally be organized in the future were articulated most fully in this context’ (van Zyl Smit 1999: 208).

The coming to power of the first democratically elected government in South Africa provided an opportunity—an obligation, even, to transform organs of society and government policy. After the elections and the installation of the government of national unity in 1994, government began to take a lead in the development of criminal justice policy. The early period of the new democracy was a highly consultative phase of government, and many members of civil society, such as academics and experts from the non-governmental sector, were invited to participate in this phase of policy making. This undoubtedly contributed to the fact that concepts of restorative justice made an appearance in a number of important policy documents that were put out by the government in the first five years of its incumbency.
The National Crime Prevention Strategy, for example, includes the following words regarding diversion of offenders: ‘Diversion programmes are aimed at assisting the offender to build personal resources and self-esteem. They serve to strengthen the restorative component of the criminal justice system, and mobilize family and community resources in problem solving’ (NCPS 1996: 60).

A policy document for the transformation of the Child and Youth Care system, published in 1996 by the Inter-Ministerial Committee for Young People at Risk (IMC) had the following to say:

The approach to young people in trouble with the law should focus on restoring societal harmony and putting wrongs right rather than on punishment. The young person should be held accountable for his or her actions and where possible make amends to the victim. (IMC 1996: 17)

The IMC also established a pilot project on family group conferencing in Pretoria that handled 42 cases in 1997, some of which were relatively serious offences. The project was evaluated and the findings were published in a document that is both a practice research study and an implementation manual (Branken and Batley 1998).

The project did experience some difficulties, which are clearly set out in the research study. ‘People involved in setting up and running family group conferences should bear in mind that while restorative justice is the philosophy on which family group conferences are based, this is largely foreign to criminal justice staff, who have been trained and socialized firmly within a retributive philosophy’ (Branken and Batley 1998: 42).

A further significant contribution to the discussion and thinking regarding restorative justice alternatives has been the range of work that has been undertaken in what may be referred to as the ‘alternative dispute resolution sector’. A number of organizations in South Africa have concentrated on developing practice in alternative forms of conflict resolution. During the 1990s the organizations operated in a range of spheres providing training, and engaging in the resolution and management of conflict. Recently, this sector has become somewhat fragmented, with many of these organizations having become more specialized, applying alternative dispute resolution practices and principles in a range of different spheres such as labour disputes and family matters.

There is an optimistically prophetic tone to the words of Villa-Vicencio:

Alternative justice and mediation options, whether traditional or innovative, whether between labour and business, in community conflicts or in political disputes both past and present, are being currently revisited as a basis for creating a new South African culture of tolerance—and perhaps the beginning of a new justice system. (Villa-Vicencio 1999: 425)

The Child Justice Bill

The law-making process began when the Minister of Justice, Dullah Omar, requested the South African Law Commission to include an investigation into Juvenile Justice into its programme. He appointed individuals from civil society to be members of the Juvenile Justice project committee, whom he knew to be advocates for restorative justice, and who had been part of the non-government lobby group calling for substantial reform to the juvenile justice system. The Juvenile Justice project committee of the South African Law
Commission commenced its work in 1997 and a discussion paper with a draft Bill was published for comment in 1998. The final report of the Commission was completed, and handed to the Minister of Justice in August 2000 (SALC 2000). The Department of Justice legislative advisors have scrutinized the Bill and made very minor changes, none of which alter the restorative justice nature of the Bill. The Child Justice Bill has been approved by Cabinet for introduction into Parliament in 2002.

The Bill will be subject to the normal law-making procedures, including a parliamentary process during which Bills are debated by portfolio committees before being passed. This process offers a platform for public participation through hearings and submissions (de Villiers 2001: 49).

An overview of the Bill is provided below as a basis for a discussion as to whether it does in fact promote restorative justice concepts. The Child Justice Bill includes the following as part of the objectives clause:

The objectives of the Act are to promote ubuntu in the child justice system through—

(i) fostering of children’s sense of dignity and worth;

(ii) reinforcing children’s respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safeguarding the interests of victims and by means of a restorative justice response; and

(iii) supporting reconciliation by means of a restorative justice response; and

(iv) involving parents, families, victims and communities in child justice processes in order to encourage the reintegration of children who are subject to the provisions of the Act. (SALC 2000: 222)

Restorative justice is defined in the Bill as follows:

Restorative justice means the promotion of reconciliation, restitution and responsibility through the involvement of a child, a child’s parent, family members, victims and communities. (SALC 2000: 220)

The proposed system includes alternatives to arrest, compulsory assessment of each child by a probation officer and appearance at a preliminary inquiry within 48 hours of the arrest (or the alternative to arrest). The preliminary inquiry will be chaired by a magistrate, but will take the form of a multidisciplinary case conference, the main purpose of which is to promote the use of diversion. The prosecutor will have the final say about whether or not the case is to be diverted.

Diversion is not completely new in South Africa. However, diversion currently operates in a legislative vacuum, through the sole discretion of a prosecutor. It thus tends to be carried out on an ad hoc basis, with much reliance on positive working relationships between prosecutors, probation officers and service-delivery organizations. Diversion is a core component of the proposed system, and the Bill offers three ‘levels’ of diversion. Level one includes programmes that are not particularly intensive and are of short duration. The second and third levels, however, contain programmes of increasing intensity, which can be set for longer periods of time. The clear intention of setting out a range of options in this way is to encourage those working in the system to use diversion in a range of different situations, even in relatively serious offences. Victim-offender mediation, family group conferences and other restorative justice processes are available at level two and level three, indicating that they are viewed as intensive diversion options.
by those drafting the Bill. The Bill also provides a set of minimum standards for diversion, and builds in procedural rights protections for children being offered diversion.

The provisions on sentencing also reflect a restorative justice approach. The Bill sets out the sentencing options under four rubrics; community-based sentences, restorative justice sentences, sentences involving correctional supervision and sentences with a compulsory residential requirement. The postponement or suspension of sentences is linked to a number of conditions, and the list of conditions includes requirements such as ‘restitution, compensation or symbolic restitution’, and ‘an apology’. Children may be required to make symbolic restitution or a payment of compensation to a specified person or group.

The Bill includes detailed procedures for the setting up and running of family group conferences. The family group conference is empowered to regulate its own procedure and to make such plans as it deems fit, provided that it is appropriate to the child and family and is consistent with the principles contained in the Bill. The plan must specify the objectives for the child and the family, as well as the period in which they are to be achieved, contain details of the services and assistance to be provided for the child and family and include such other matters relating to education, employment, recreation and welfare of the child as are relevant. According to the Bill, family group conferences can happen as diversion options prior to trial, the court can stop the proceedings in the middle of a trial and refer the matter to a family group conference. The court can also, after conviction, send the matter to a family group conference to determine a suitable plan, which the court can then make into a court order for the purposes of sentencing.

In addition to the possibility of referral to a family group conference the Bill also allows for referral to a ‘victim offender mediation or other restorative justice process’. The idea behind the wording ‘other restorative justice process’ is to allow for creative or indigenous models of restorative justice procedures to be developed or to re-emerge. This relates to the understanding that the model of family group conferences outlined in the Bill is largely a ‘borrowed’ model, based on the experiences of other countries, in particular, New Zealand. The Bill therefore provides space for the emergence of a locally developed model.

*Does the Child Justice Bill Promote Restorative Justice?*

In order to examine the extent to which the Bill can be said to live up to its self-description of being ‘aimed at promoting ubuntu by means of a restorative justice response’, it may be useful to examine the Bill against the ‘system possibilities’ described by Zehr in *Changing Lenses* (Zehr 1990: 215–22). He describes three different possibilities. The first is the possibility of ‘civilizing’ the criminal justice system—this entails replacing the adversarial criminal justice system with a system more reminiscent of the civil justice system, where ideas of guilt and punishment are replaced by responsibility and restitution. Johnstone observes that there are few signs of a restorative criminal justice system being created along the lines of this model (Johnstone 2002: 164). The second possible system is a separate or parallel track. This would involve the establishment of a separate restorative justice system that runs alongside, but independent of, the mainstream criminal justice system. Once a decision has been made that the matter will not be taken though the criminal justice system, there are no sanctions linking it back
to that system. The third system described is a parallel but interdependent or interlinked track. In this type of system a separate restorative justice track is created but is linked to, or is interdependent with, the formal criminal justice system.

The Child Justice Bill most closely reflects the third scenario of a parallel track in which a restorative justice approach is developed that is linked to and interdependent with the formal criminal justice system. The decision whether to divert or not is made by criminal justice officials, and a child who does not successfully complete the programme linked to the diversion is brought back for an investigation into the circumstances surrounding that failure—if it appears to be due to wilfulness or negligence on the part of the child, the charges may be reinstated. In relation to sentencing, the inter-relatedness is more pronounced, with outcomes decided upon at a family group conference, victim offender mediation and other restorative justice process being referred back to the court for approval by the presiding officer.

Walgrave has described a version of restorative justice aimed at developing a system in which the overall aim is to deal with offenders and victims in a restorative way. Such a system would include coercive sanctions in addition to voluntary processes. Whilst such a restorative justice system should prioritize the voluntary processes which involve face-to-face meetings between offenders and victims, if these are not possible or appropriate then the formal criminal justice system will need to take over, but it should still aim for restorative justice outcomes (Walgrave 2001: 30). The proposed child justice system described in the Child Justice Bill generally meets this version of restorative justice described by Walgrave. The decision regarding diversion is made at the preliminary inquiry at which criminal justice personnel are present. Diversion to a restorative justice process is voluntary, as the consent of both the child and the parent is necessary. The voluntariness of the decision to opt for diversion may be somewhat illusionary as the alternative will be that the child will be taken through the criminal justice system. Nevertheless, the idea is that that the proposed child justice system itself is aimed at promoting ubuntu through restorative justice approaches. Thus the child is not being denied the opportunity of a restorative solution, which will still be on offer at other stages of the process.

It is true that some cases will not be diverted at any stage. Serious matters will generally proceed to trial and where there is a guilty verdict it is possible that a child in such a matter may be sentenced to a lengthy period of imprisonment. As much as the Bill gives discretion to prosecutors and judicial officers to utilize restorative justice options, it is self-evident that such discretion will sometimes result in children not being referred to those options, and being taken through the formal court system instead. Observers may say that this promotes a bifurcated approach (Harris 1998: 57–69). In a discussion of the risks of a bifurcated version of restorative justice Harris explains that allowing a system in which some cases go through a restorative process and others through the formal criminal justice process will almost certainly result in a ‘soft-hard bifurcation’ in which the ‘soft’ cases will be diverted, and the ‘hard’ cases are put beyond the reach of a restorative solution. This can very easily result in discriminatory practices in which those who are better off can access restorative justice whilst the disadvantaged cannot (Harris 1998: 62). In a country like South Africa with its history of discrimination and the legacy of poverty, such warnings must be taken seriously.

However, an examination of the provisions in the Bill relating to diversion and sentencing indicates that such risks were considered when the Bill was drafted. The
setting out of diversion options in three levels—each one with options more onerous than the level below, is intended to ensure that a wider range of cases are referred for diversion. Restorative justice options are set out at levels two and three, indicating that as they are seen as being suitable for more serious matters. The Bill does not preclude the diversion of any categories of offences, but it can be predicted that prosecutors will rarely stretch the exercise of their discretion to allow for the diversion of very serious cases such as murder. Diversion is not the sole area of operation for restorative justice options, however. The Bill makes provision for victim-offender mediation, family group conferences and other restorative justice processes to take place after the trial has commenced and as part of the sentencing process. Other sentencing options promote restitution and compensation. It is clear, therefore, that if a child is not diverted to a restorative justice alternative at the pre-trial stage, such child has not lost the chance of a restorative justice solution, as these are available at various stages of the system.

It is estimated that more than half of the offences brought to the system will be diverted, once the Bill is passed and put into operation (Barberton et al. 1999: 15). As the system develops and restorative justice results are demonstrated throughout the country, the number of diversions to restorative justice options is expected to increase.

Balancing Children’s Rights and Responsibilities

Writing elsewhere, I have described how the development of the proposed child justice system was influenced by the movements of restorative justice and children’s rights (Skelton 1999: 88–106). In the article I raise a concern about whether these two movements remain strongly influential, or whether public concern about crime has caused the mood in South Africa to shift to a point where the crime control needs of the country are over-riding some of the previous policy commitments, and a more punitive approach is emerging. However, arguments based on restorative justice and the protection of children’s rights has been effectively used to stem the shift towards more punitive measures. This is clearly illustrated by an account of the successful efforts by child rights advocates to ensure that a new minimum sentencing law would not apply to children. The Criminal Procedure Amendment Act was tabled in Parliament in 1997. The purpose of the proposed legislation is to provide for minimum sentences ranging from a minimum of five years to life imprisonment for certain specified offences. Increasingly onerous sentences are prescribed for first, second, third and subsequent offenders. The sentences must be imposed unless there are substantial and compelling reasons for not doing so, and the onus of demonstrating these rest on the accused. The original draft of the legislation included offenders under the age of 18 years within its ambit. Written and oral submissions were made to the parliamentary portfolio committee by children’s rights advocates, arguing that the law should not apply to children. The argument was based on the idea that minimum sentencing would go against the fundamental constitutional principle that the detention of children should always be a measure of last resort, and that minimum sentences for children would make imprisonment a first resort, notwithstanding the clause which gives courts a discretion not to impose the minimum sentence. As a result of the submission the Bill was changed prior to being passed into law so that children under the age of 16 years are now
completely excluded from this statutory provision. Children of 16 and 17 years of age are
included within the ambit of the law, but they are treated differently from adults in that
the onus is on the prosecution to show that there are substantial and compelling reasons
why the young accused person should be given the minimum sentence. This result
indicates that whilst the calls from the public for tougher measures to control crime are
having an effect on the legislature, arguments based on progressive theories such as
children’s rights and restorative justice can have a very positive effect. (Sloth-Nielsen

A number of concerns have been raised about children’s rights and restorative justice
for juveniles (Dumortier 2000). There is a view that restorative justice practice may erode
due process rights such as the right to remain silent and the right to be considered
innocent until proven guilty. These fundamental elements may be placed at risk by a
tendency to coerce children to admit guilt in order to be considered for diversion to
restorative justice options. A further concern is that of net-widening—children may be
referred to programmes in situations where they would otherwise not have been
prosecuted due to a paucity of evidence, or because a case was deemed too petty to
prosecute. The landmark US Supreme Court juvenile justice case of in re Gault 387 US 1,
36 (1967) warned against this type of danger—no matter how much well-meaning
professionals believe that a particular course of action might be advantageous to a child,
there must be constant vigilance towards due process rights.

All diversion entails some risk, as we remove offenders from a system that has built up
many procedural protections over the centuries. The protection of rights is surely
important, but in restorative justice we are striving for more than formalistic
protection—we are aiming higher, hoping for behaviour change, hoping to prevent
reoffending, hoping to balance the needs of the offender with the needs of the victim.
What we need to do is to ensure that the risks are managed, that the rights of child
offenders are protected, whilst at the same time ensuring that an overly protectionist
approach to children’s rights does not hinder the opportunity for the child to
understand that rights come with responsibilities, that the balance between these two is
what makes for harmonious living.

In South Africa there has been very little tension between the children’s rights and
restorative justice movements. This may be largely due to the fact that restorative justice
advocates working towards juvenile justice reform in South Africa themselves come from
a background in children’s rights, and efforts have thus been consistently made to keep a
balanced approach. The Child Justice Bill contains provisions regarding the protection
of children’s rights in relation to diversion. According to the chapter of the Bill dealing
with diversion, a child may only be considered for diversion if (a) such child voluntarily
acknowledges responsibility for the alleged offence, (b) the child understands his or her
right to remain silent and has not been unduly influenced in acknowledging responsi-
bility, (c) there is sufficient evidence to prosecute, and (d) such child and his or her
parent or an appropriate adult consent to diversion and the diversion option.

One area of concern has been raised by professionals dealing with child victims,
particularly victims of sexual offences. They are concerned about the violation of
children by other children being resolved through some form of compensation between
the families. Children and women’s rights activists sometimes describe this as being
condescending towards the victim, and they are of the view that it trivializes what the
victim has experienced as something which can be recompensed through the payment of
damages from one male-headed family to another (Tshwaranang Legal Advocacy Centre 1997).

Even in the sector dealing with child victims in South Africa, however, there are child rights activists who understand the value of restorative justice responses in these matters, and there are a number of diversion and sentencing programmes being run for young sex offenders (Wood and Ehlers 2001: 13). An interesting question which has been posed by a director of Childline, an organization dealing with child victims as well as offenders, relates to the issue of how to deal with the requirement that there be sufficient evidence to prosecute before diversion can be considered. She raises a question about what to do in situations where a child victim may be too young to be a competent witness, thus making it likely that there will be insufficient evidence to get a conviction. In situations like this, where the young offender voluntarily accepts responsibility for the offence, would it not be better for the offender to be diverted to an appropriate programme which will help to deal with his problems and to prevent further offending? This debate has not yet been resolved, and could be the sole subject of an article in itself, but it does highlight the need for an ongoing debate about a balance between the needs of victims and the right of offenders, particularly where both are children.

Challenges to Promoting a Restorative Justice Approach to Child Justice Issues in South Africa

Despite South Africa’s international standing in the field of restorative justice due to the Truth and Reconciliation Commission, there is little evidence of a restorative justice approach in the day-to-day criminal justice system. South Africa was one of the co-signatories to the 1999 United Nations ECOSOC resolution on restorative justice (ECOSOC resolution 1999/26). The Department of Correctional Services has recently launched what they are describing as a ‘restorative justice approach’ committing themselves to education and advocacy on restorative justice, and to using the basic principles of restorative justice recently developed at a UN expert meeting in Ottawa, Canada, to draw up their own programmes (Skosana 2001). This is very encouraging, but it remains in the realms of policy—a visit to any South African court or prison would not provide the visitor with reasons to believe that the country has espoused a restorative justice approach.

Similarly, although a description of the principles of restorative justice to community audiences in South Africa is generally met with a nodding of heads confirming that the concepts are familiar, communities are capable of taking the law into their own hands in ways that are anything but restorative (Sekhonyane 2000: 21–25). There are a number of challenges to be met, both at the level of the people and at the level of their elected representatives, if restorative justice is to become part of law and practice in the future child justice system.

First, there is a major challenge relating to community involvement in restorative justice. Many people have left rural areas to cluster in informal settlements around the major cities. The liberation movement has empowered women and young people, so that the guiding power of elder male community leaders has waned. These factors have had their impact on family structures and community participation in decision making, and they place the African concept of ubuntu under threat.
The emphasis on the rights of the individual child as espoused in the UN Convention on the Rights of the Child does not always harmonize with African concepts of childhood. The balancing of children’s rights and responsibilities understood within the context of the extended family is slightly better reflected in the OAU African Charter on the Rights and Welfare of the Child (Viljoen 2000: 225). The collective of the family has always been seen to be a powerful force of protection for children, but there are signs that this is changing. The idea that ‘it takes a village to raise a child’ seems to be mutating into ‘it takes a village to punish a child’ as community members, frustrated with high levels of crime, begin to take the law into their own hands. A report by the Restorative Justice Centre (a non-governmental organization based in Pretoria) records the findings of a field study of four incidents during the year 2000 in which children suspected of crimes were assaulted, degraded and in one instance, killed by community members taking the law into their own hands (Restorative Justice Centre 2001). The child who died was a 14-year-old named Kagiso who was suspected of breaking and entering a shop. He, together with four other younger children, was locked in a storeroom by the shop owner who poured petrol on the children and then lit a cloth. Kagiso caught fire and died of his burns the next day. And yet, in an echo of traditional practices, the offender, before handing himself over to the police, visited the family of the dead child and paid for the funeral expenses. He was found guilty of murder by a Criminal Court and was sentenced to 26 years’ imprisonment.

This incident and others like it make it absolutely clear that no assumptions can be made about community responses being more benign than the response of the criminal justice system itself. If communities are to be invited to play a greater role in restorative justice solutions for young offenders, this will have to be managed carefully within a framework of minimum standards. These minimum standards will need to be agreed to through consultation with communities. Care will need to be taken not to erode the indigenous knowledge about conflict resolution that does exist, but the rights of children to protection and fair treatment must be rigorously guarded. Interestingly, therefore, South Africa will be developing alternatives not only to the formal justice system, but also to informal processes that, on occasion, have proved to be just as punitive as their formal counterpart.

Secondly, a more immediate challenge is the need to ensure that the Child Justice Bill is enacted by Parliament, with the restorative justice aspects intact. The South African democracy is seven years old. Since achieving democracy, South Africa has struggled to meet the challenge of dealing appropriately with high levels of crime. An opinion poll on voters’ perceptions of crime taken in 1999 show that 47 per cent of members of the public feel ‘unsafe or very unsafe on most days’ (Humphries 2000: 1–6).

The pressures of keeping the electorate calm in an atmosphere of increasing concern about crime have begun to take their toll. Since 1997 the elected representatives in Parliament have shown an increasing tendency to demonstrate that they are tough on crime, as evidenced by the passing of minimum sentencing laws, tighter bail laws and anti-gang legislation during that period (Skelton 1999: 100–5).

The South African Law Commission Report on Juvenile Justice records very clearly that the public perceptions relating to crime have had a definite effect on the process of drafting the proposals. In the introduction to the report the Commission notes the following:
The realization has grown, as the investigation has unfolded against a backdrop of rising public concern about crime, that in order to give the majority of children (those charged with petty or non-violent offences) a chance to make up for their mistakes without being labelled and treated as criminals, the Bill would need to be very clear about the fact that society will be protected from the relatively small number of children who commit serious, violent crime. (SALC 2000: 9)

Fortunately, the parliamentary law-making process in South Africa allows for public hearings in the portfolio committees debating the Bills. The fight to prevent minimum sentences for juvenile offenders described above is an example of how the consultative law making process can be used to balance out a tendency towards a more punitive approach. There is no organized lobby against the introduction of juvenile justice reforms, but the public and the legislature may base their response to the proposed new law on the belief that the proposals are too idealistic, that they will not immediately solve the crime problem, and that they will be difficult to implement. In order to ensure informed debate, non-governmental organizations have formed a coalition called the Child Justice Alliance, which aims to support the Bill as it goes through Parliament.

This important opportunity to make restorative justice an integral part of the domestic criminal law in South Africa must be well utilized, and some careful thought needs to be given to how advocates for restorative justice can best promote the concept. Daly and Immarigeon have provided some interesting guidelines on effective ways to move restorative justice ideas forward. The authors are critical of a tendency amongst restorative justice advocates to explain restorative justice in terms of ‘oppositional caricatures of justice models’, an analytical device in which contrasts are drawn between ‘retributive, rehabilitative and restorative justice models’ (Daly and Immarigeon 1998: 32). The authors contend that this is too simplistic and that it ignores nuances in the various approaches. It also ignores the fact that there are similarities in the approaches. A consequentialist view of retributivism, for example would include the aims of preventing crime and changing behaviour, and these ideas are compatible with restorative justice. Another piece of advice which the authors have to offer is that those advocating for restorative justice should ‘use more precise terms and should promise less’. In this regard they make the following pithy observation:

The rhetorics in crime and justice pull us toward simple understandings of ‘good’ and ‘evil’, whether in academia or popular culture. Some liberal and critical criminologists today may find it seductive to challenge the ‘evils’ of escalating repressive punishment, especially increasing rates of imprisonment which are claimed (wrongly) to have been caused by policies anchored in just deserts. They may see in restorative justice a ‘good’ to supplant this ‘evil’. But in trying to persuade others of its potential goodness, perhaps too much is being promised. In a political climate where citizens and policy makers may demand proofs of the efficacy of restorative justice, advocates many not be able to deliver. (Daly and Immarigeon 1998: 37)

There is a certain atavistic appeal about restorative justice that is undeniable. This can certainly be used to advantage in the debates. It has been noted, however, that there is a tendency to romanticize traditional African society (Skelton and Frank 2001: 104), and advocates of restorative justice in South Africa will need to guard against creating an impression that what is being advocated represents a wholesale return to African methods of conflict resolution. The linkages with the criminal justice system will need to
be kept clear, as well as the need for minimum standards to ensure the rights of children in the proposed system. Arguments for more community participation should be linked to the need to rekindle *ubuntu*. It has been observed that an attempt to use restorative justice processes in the child justice system may become part of the process of rebuilding families and communities, and provide a springboard for a recommitment to *ubuntu* (Skelton and Frank 2001: 117). In not making too many promises, the most reliable approach will be to reflect on the experience of existing projects, illustrating the successes and sketching the potential for the future. The restorative justice aspects of the system will be progressively developed over time.

The risk of presenting retributive justice and restorative justice as opposite paradigms is a very real one. Advocates for restorative justice in South Africa have tended to take this approach in the past (Branken and Batley 1998: 20; Skelton 1999: 99). It is of vital importance in the future debates about the proposed Child Justice system that a way is found to present restorative justice concepts as being compatible with at least some of the aims of crime control. Parliamentarians are in a situation where they feel that they must be seen to be acting effectively to deal with crime. Restorative justice advocates who speak so eloquently about reconciling people and relationships, must find a way to reconcile at least some aspects of the competing paradigms of justice. The crux of this reconciliation of ideas will be to find the similarities in the approaches whilst at the same time highlighting the important differences.

**Conclusion**

The particular political context of South Africa’s transition to democracy provided an enabling environment for the influence of restorative justice on juvenile justice reform. The motivating factors for South Africa’s decision to take the road of the Truth and Reconciliation Commission were clearly linked to restorative justice. The atmosphere of reconciliation, coupled with the history of *ubuntu* and indigenous conflict resolution, provided a unique opportunity for transformation of systems, and ways of thinking about systems. Few countries are likely to experience an opportunity for transformation on this scale.

However, the challenges South Africa faces in the future are not unique to that country, or even to a developing country situation. The question posed in the latter part of this article about how to present restorative justice to criminal justice policy makers is relevant to most jurisdictions. Politicians and criminal justice officials expressing their need to get tough on crime has caused restorative justice advocates all over the world to make repeated assurances that restorative justice is tough on crime. Perhaps the time is right for the debates to reach a further point—restorative justice advocates need to insist that ‘getting tough’ is not enough. ‘Getting tough’ is an expression of the will or attitude of the state as an impersonal punisher. What restorative justice advocates are seeking is an internalized shift in the attitude of the offender, brought about by an understanding of the impact of the crime on the victim. What is required is that the consequences of crimes are understood and experienced by offenders in ways that lead them to change their behaviour and not commit crimes in the future. This makes juvenile justice an important realm to work in because behaviour change is arguably more likely, and the positive results can be exercised throughout the life of that person.
In persuading criminal justice policy makers to allow for a more restorative justice approach, the advice given by Daly and Immarigeon should be taken into account. As it is unlikely that we will succeed in getting the formal criminal justice system replaced with a totally restorative justice system at this stage, it is important not to put policy makers in a position where they feel they must choose between retributive and restorative justice systems. It is better to demonstrate the fact that such systems can operate side by side, interlinked with one another. Some may be of the view that by taking this approach we are selling out on the broader goal of changing the vision of justice. The approach might be seen as a substantial reduction of the idea of ‘civilizing’ the criminal justice system by replacing it with a new system focusing on healing and reconciliation rather than guilt and punishment. However, another way to view it is as a step along the way towards that ultimate goal. If restorative justice processes are in operation, even if they are interlinked with the more formal system, it is then possible to demonstrate the efficacy of restorative justice and in the longer term the system may be able to develop into a more holistic model of restorative justice. Such an approach will place less focus on retribution, and this, in itself, will be an improvement of the criminal justice process. A journey has begun, and we must find the path that is walkable. Whilst walking, we can keep an eye on the ultimate destination. Howard Zehr, writing more than ten years ago pointed out that although a total shift to restorative justice seemed utopian, at one stage the abolition of slavery seemed unrealizable, but it was achieved. In South Africa we have an even more recent example that we can set out sights by—not so long ago the peaceful end of apartheid seemed an unlikely outcome to South Africa’s problems. But that has happened, and the process of healing the nation, though not complete, is well underway. A recommitment to ubuntu, generated by the involvement of communities in restorative justice processes, will hopefully take us further on that journey.

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