Developing a juvenile justice system for South Africa: International instruments and restorative justice*

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I Introduction

South Africa has never had a separate system for dealing with persons under the age of 18 charged with criminal offences. The justice system has generally treated juveniles as smaller versions of adult offenders, with sections of various Acts¹ allowing for some differentiation of treatment. So in devising a juvenile justice system we are in a sense starting from the beginning. Fortunately, issues concerning children are high on the agenda of the democratically elected government, and South Africa has now committed itself to transformation in this field by ratifying the United Nations Convention on the Rights of the Child.²

The challenge for those involved in developing a new juvenile justice system in South Africa is to draw on the collective experience of other countries, whilst at the same time finding solutions which are workable in South Africa. An appropriate starting point is the corpus of international instruments dealing with children in conflict with the law. These instruments were drafted broadly in order to encompasses the varying conditions in the countries involved in their creation. They are flexible enough to suit a variety of situations.

In addition to this wealth of information, there is a trend emerging in juvenile justice development in post-colonial countries which South Africa needs to be cognisant. It is based on the ideal of restorative justice which eschews retribution and punishment as primary motivators for exacting compliance and behavioural change and relies on the innate capacity of individuals, families and communities to work out solutions which suit their situations.

This article examines the relevant international instruments, drawing out those aspects useful for developing a policy framework for a new juvenile justice system for South Africa. It discusses restorative justice, and

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¹ See, for example, the Criminal Procedure Act 51 of 1977, the Child Care Act 74 of 1983, the Correctional Services Act 8 of 1959 and the Probation Services Act 116 of 1991.

² United Nations Convention on the Rights of the Child, adopted by the UN General Assembly on 20 November 1989, Resolution 44/25. Also known as the ‘CRC’. The CRC was ratified by the South African Parliament on 16 June 1995, whereafter the formal instrument of ratification was deposited with the Secretary General of the UN on 30 June 1995, and has been in force in South Africa since 30 July 1995.
describes experiments with this model in New Zealand, Australia, and Canada. The article concludes that the development of a restorative justice approach to the juvenile justice system in South Africa could take us beyond the standards set by the international instruments and set us on a path to an effective and fair new system of juvenile justice system for South Africa.

II INTERNATIONAL INSTRUMENTS

Although the rights of young people in conflict with the law should be seen against a wider backdrop of human rights, there are four international instruments which have a direct bearing on the subject. These are the United Nations Convention on the Rights of the Child,\(^3\) the United Nations Guidelines for the Prevention of Juvenile Delinquency,\(^4\) the United Nations Standard Minimum Rules for the Administration of Juvenile Justice,\(^5\) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.\(^6\)

The United Nations Convention on the Rights of the Child (the CRC) is a treaty and according to international law is binding upon parties to it and must be performed by them in good faith.\(^7\) Guidelines and rules are generally considered non binding. However, there is a growing view that it is an over-simplification to regard these instruments as having no legal force.\(^8\) Some refer to these instruments as ‘soft law’, implying that through being read together with other related instruments the rules or guidelines take on a strongly persuasive quality akin to law.\(^9\) Additionally, some aspects of the Beijing Rules,\(^10\) the Riyadh Guidelines\(^11\) and the JDL's\(^12\) have been incorporated into the CRC, and these aspects are therefore now legally binding. The rules and guidelines set out in these instruments are detailed, and provide specific suggestions for how the broader concepts of the CRC might be realised.

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\(^3\) The CRC (n 2).


\(^5\) United Nations Standard Minimum Rules for the Administration of Juvenile Justice, adopted by the UN General Assembly on 29 November 1985, Resolution 40/33. Also known as the ‘Beijing Rules’.

\(^6\) United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by the UN General Assembly 14 December 1990, Resolution 45/113. Also known as ‘the JDL’.

\(^7\) M Akehurst A Modern Introduction to International Law (1982) 23.


\(^10\) (n 5).

\(^11\) (n 4).

\(^12\) (n 6)
This important Convention deals with a broad range of children's rights and provides a comprehensive framework within which the issue of juvenile justice must be understood. In this article, particular attention will be paid to arts 40 and 37 which refer directly to juvenile justice. However, the phenomenon of juvenile offending should not be seen as a pathology which can be separated from other developmental issues regarding children, and therefore the CRC should ideally be read in its entirety.14

Article 40 deals with the administration of juvenile justice, providing at art 40(1) that:

'State parties recognise the right of every child alleged as, accused of or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.'

This provision reflects a child-centred approach15 and sets a high standard. The second part of art 40(1) highlights reintegration and the child assuming a constructive role in society. This hints at a more restorative justice approach, which will be discussed in more detail below.

Several due process rights are set out in art 40(2). These are guaranteed to every child accused of a criminal offence.16 These provisions, together with ss 25 and 30 of the interim Constitution of the Republic of South Africa17 provide a protective armoury for children charged with crimes in South Africa. Thus efficacy can be enhanced by writing such protections into law. In fact, art 40(3) obliges states to establish laws, procedures, authorities and institutions specifically applicable to children in conflict with the law. This means that by ratifying the CRC, South Africa has undertaken to develop a specialised legal framework and infrastructure for dealing with juveniles.

Article 40(3)(b) states that whenever appropriate and desirable, measures should be established for dealing with children in conflict with the law without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. This article refers to the

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13 (n 2).
14 Whilst not detracting from the fact that the CRC should be read in its entirety, a number of articles (besides arts 37 and 40) can be identified as being of particular reference to juvenile justice. These are art 2: non-discrimination, art 3: best interests of the child must be a primary consideration, art 6: the right to life and maximum development, art 12: the right of a child to participate.
15 The CRC sets the child centred approach out clearly at art 3(1) which states: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'
16 The rights listed include the presumption of innocence, to be informed promptly of charges, a fair hearing according to law, not to be compelled to give testimony or confess guilt, review procedures, free assistance of an interpreter and privacy.
process of diverting children out of the mainstream criminal justice system into other programmes or procedures. Diversion is a central feature of all progressive juvenile justice systems in the world today, and is set out fully in the UN Standard Minimum Rules for the Administration of Juvenile Justice, to be discussed below.

The need for alternative sentences is set out in art 40(4). This indicates the importance of the development of programmes which can serve as positive alternatives to the sanctions presently used. Currently in South Africa there is an insufficient number of options available, and those existing are clustered in urban areas.18

Article 37 of the CRC is also central to the rights of children in conflict with the law. It specifies that no child shall be subjected to torture, cruel, inhuman or degrading treatment or punishment, and that neither the death penalty nor life imprisonment without possibility of release should be imposed upon persons under the age of 18 years. Further, it states that any child deprived of liberty shall be separated from adults unless it is considered in the child’s best interests not to do so. The article also requires prompt legal and other appropriate assistance for every child deprived of his or her liberty, as well as contact with the family.19

The CRC is of great significance in the struggle for a new juvenile justice system. As South Africa has ratified the Convention, future policy or legislation pertaining to juvenile justice should be brought in line with it. A steering committee chaired by the Minister of Health has been established to develop a national plan of action to give life to the Convention, and the justice sectoral working group linked to the National Plan of Action has identified the drafting of composite juvenile justice legislation as a priority.20

(2) The United Nations Guidelines for the Prevention of Juvenile Delinquency.21

The United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) set out guidelines which should be followed by States in order to prevent juvenile offending. The Riyadh Guidelines do not provide quick or easy answers. They present the long answer to the big question of what to do about juvenile offending within the context of development. Real efforts must be made to provide a continuum of services which tackles the problem of juvenile offending before it occurs, and then provides follow up services based in the family and the community. Without this developmental approach, any new juvenile justice system will not be effective.

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18 See S v Sikunyana 1994 (1) SACR 206 (Tk) at 211.
19 The rules pertaining to children deprived of their liberty are set out fully in the JDL’s (n 6) and discussed later in this article.
20 Justice sectoral working group report back to the national plan of action steering committee on activities of the justice sectoral group, (September 1995).
21 (n 4). The label ‘juvenile delinquency’ has been rejected by the child rights movement. Ironically, within the Riyadh Guidelines, at I(5)(f), there is a warning against labelling a young person as ‘deviant’ or ‘delinquent’.
The Riyadh Guidelines propound a social policy focusing on the centrality of the child, the family and the involvement of the community, which are pivotally important to the development of a juvenile justice system. The Guidelines are characterised by a wordy drafting style, with many complex ideas being linked together in intricate statements. This makes it difficult to distil the information into a succinct form. Schüler-Springorum points out that the idea of prevention is so burdened with patterns of social philosophy that it inevitably needs more words to formulate provisions on this issue.

The heart of the document is the chapter headed 'Socialisation Processes', which looks at involvement of the family, education, the central role of community and community based prevention programmes.

The involvement of the family is emphasised at guideline 12; 'Since the family is the central unit responsible for the primary socialisation of children, governmental and social efforts to preserve the integrity of the family, including the extended family, should be pursued. The society has a responsibility to assist the family in providing care and protection and in ensuring the physical and mental well being of children.'

To this end, governments should establish policies conducive to the raising of children in stable family environments—and families in need of services to achieve this goal should be granted such services. The Guidelines make the point that special attention should be given to children of families affected by problems brought about by rapid and uneven economic, social and cultural change.

Education is the second focus of 'Socialisation processes'. Interesting suggestions are provided for a much more varied curriculum, involving the cultural, emotional and psychological life of the child. The Guidelines specify that educational systems should seek to work together with parents and community organisations.

The Guidelines also recommend the avoidance of harsh disciplinary measures in schools, particularly corporal punishment.

Community involvement and community based solutions are vital. At guideline 32, the following is stated; 'Community based services and programmes which respond to the special needs, problems, interests and concerns of young persons and which offer appropriate

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22 See N Queloz 'More prevention—Less detention' (1990) 7 International Children's Rights Monitor 8-9 for further discussion.
23 For example, guideline 1.
24 'The prevention of juvenile delinquency is an essential part of crime prevention in society. By engaging in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young persons can develop non-criminogenic attitudes.'
25 Schüler-Springorum (n 9).
26 (n 4) 10–44.
27 Guideline 13.
28 Guideline 22.
29 Guideline 22.
counselling and guidance to young persons and their families should be developed, or strengthened where they exist.'

The Guidelines require that particular attention be paid to homeless children and that voluntary organisations providing services for young people should be given financial and other support by the government.\textsuperscript{30}

The Guidelines also encourage the participation of young people within their communities. They state that youth organisations should be created or strengthened at local level and that such organisations should become involved in management and decision making within the community.\textsuperscript{31}

The South African government has taken a firm step in this direction with the drafting of The Youth Commission Bill\textsuperscript{32} which allows for the setting up of structures which will allow young people to have a say in community development issues. However, the fact that the draft Bill defines 'youth' as persons between the ages of 16 and 35 means that this mechanism will not be utilised by children under 16. There remains a need for development of structures for participation by this lower age group.

The final aspect of the 'Socialisation processes' relates to the mass media and the role it should play in portraying the positive contribution of young people to society.\textsuperscript{33} In addition, the media should minimise scenes of violence, pornography, drug taking, and degradation of women, children and interpersonal relationships.\textsuperscript{34} Although laudable, the difficulty with this aspect of the guidelines is that the independence of the media will make it difficult to enforce, particularly in the light of the protection of freedom by the interim Constitution.\textsuperscript{35}

Guidelines 45 to 51 set out the social policy framework within which governments should strive for prevention of juvenile offending. Sufficient funds should be provided for medical services, nutrition, housing, counselling and substance abuse prevention. In South Africa these issues fall within the mandates of the Ministries of Health, Education, Welfare and Housing, as well as being part of the Reconstruction and Development Programme—again highlighting the fact that prevention is closely linked to broader social development issues.

The concept of separating prevention efforts from a focus on pathological behaviour and linking them instead to a general social policy is very refreshing. Because of this feature, Geert Cappelaere\textsuperscript{36} describes the Riyadh Guidelines as being amongst the most advanced proposals within the field of criminology. In South Africa we are fortunate that social policy is also undergoing transformation. If policy developers in the

\textsuperscript{30} Guidelines 34 and 36.
\textsuperscript{31} Guideline 37.
\textsuperscript{32} The Bill has not yet been gazetted.
\textsuperscript{33} Riyadh Guidelines (n 4) guidelines 10-44.
\textsuperscript{34} Guidelines 40-44.
\textsuperscript{35} (n 17).
relevant government departments include the suggestions made in the Riyadh Guidelines in their general policy and planning, the framework for effective prevention will be put in place.

The Guidelines also give guidance on implementation. Much recognition is given to the importance of research, policy development and coordination. Guideline 57 suggests:

'Consideration should be given to the establishment of an office of ombudsman or similar independent organ which would ensure that the status, rights and interests of young persons are upheld and that proper reference to available services is made. The ombudsman or other organ designated would also have to supervise the implementation of the Riyadh Guidelines, the Beijing Rules and the Rules for the Protection of Juveniles Deprived of their Liberty. The ombudsman or other organ would at regular intervals publish a report on the progress made and on the difficulties encountered in the implementation of the instruments.'

This is an important suggestion, and South Africa will certainly need to consider this or some other appropriate measure for implementation in the future.


The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) provide a blueprint of the essential elements of a good juvenile justice system. The Rules are set out with commentaries following each section. These commentaries are intended to be read as an essential part of the document.

(a) *Minimum Age of Criminal Capacity*

In a section on general principles, the Beijing Rules require that the minimum age of criminal responsibility should not be fixed too low, bearing in mind the emotional, mental and intellectual maturity of the child. In South African law, only children below the age of 7 years are irrebuttably presumed to lack criminal capacity. This represents one of the lowest ages of criminal capacity in the world. Children between the ages of 7 and 14 years are rebuttably presumed to lack criminal capacity. Although this presumption is designed to protect children under 14, it is too easily rebutted in our courts. In contrast to South African law, many other countries have opted for a clear cut-off age of 12 or 14 years.

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37 Beijing Rules (n 5). Although the Beijing Rules were written before the CRC, a number of the fundamental principles have been incorporated into the Convention, and the Beijing Rules are expressly referred to in the preamble of the Convention. For further information on the background and status of the Beijing Rules see G Van Bueren and A.M Tootell 'Introduction to the UN Standard minimum Rules for the Administration of Juvenile Justice' (1995) 4* Defence for Children International: Publications on the International Standards Concerning the Rights of the Child* 1.

38 Beijing Rules (n 5) rule 4.

A balanced approach should be adopted in determining an appropriate minimum age for criminal capacity. It is submitted that the minimum age of 7 years, which currently applies in South Africa, is unacceptably low. Furthermore, should South Africa wish to retain the doli incapax presumption, then better safeguards should be adopted so that the presumption will be more difficult to rebut. This might include a requirement that the State lead expert testimony in order to achieve rebuttal.

(b) Aims of juvenile justice—the proportionality principle

The Beijing Rules describe the aims of juvenile justice in the following terms:

'The Juvenile Justice system shall emphasise the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offender and the offence.'

The proportionality principle is important when dealing with young offenders, not only regarding the handling of the case and the outcome of a trial, but even when children are being dealt with outside the criminal justice system. The commentary following this rule warns that reactions designed to ensure the welfare of the young offender should not be disproportionate for the offence as this would infringe upon the fundamental rights of the young individual.

(c) Scope of discretion

Rule 6 of the Beijing Rules envisages more discretion being granted to officials at all stages of proceedings involving juvenile offenders, including the investigation, prosecution, adjudication and follow up stages. A corollary to such discretion is a system to ensure accountability on the part of officials, and the requirement that officials exercising such discretion be specially trained to exercise it judiciously.

The purpose of this increased discretion is to allow for the most appropriate action in each individual case. It presents an opportunity for a creative approach, so that officials are not bound by precedents, and are able to develop new approaches to deal with the cases coming before them.

Under the rubric of 'Investigation and Prosecution', the Rules require that initial contacts between the police and the juvenile offender shall be managed in such a way as to respect the legal status of the juvenile, promote his or her well-being and avoid harm being done to him or her. Legislation can go only so far in ensuring this. The training and attitude of the officials concerned will be the pivotal factor in the success of any system.

40 Beijing Rules (n 5) rule 5.1.
41 The issue of proportionality is classically expounded in In Re Gault 387 US 1.
42 Beijing Rules (n 5) rule 10.3.
The immediate contacting of parents and guardians and the consideration of release as soon as possible after arrest are also stressed in rules 10.1 and 10.2 which deal with initial contact. With the promulgation of the amended s 29 of the Correctional Services Act in May 1995, South African law has been brought into line with these rules, at least on paper.

(d) Diversion

Mechanisms for diverting children away from the criminal justice system lie at the heart of any good juvenile justice system. The Beijing Rules centralise the principle of diversion. Rule 11.1 provides that:

‘Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority.’

The involvement of the individual and of the community in the diversion process is also envisaged. In this regard rule 11.3 states that diversion involving community service or other services shall only be done with the consent of the juvenile or his or her parents or guardians, and rule 11.4 requires that efforts must be made to provide for community programmes such as temporary supervision and guidance, restitution and compensation.

In South Africa there is a legislative mechanism allowing for diversion, namely the conversion of a criminal case involving a child to a children’s court inquiry. This can be done if it is brought to the attention of the presiding officer that the child is a child whose parents are unable or unwilling to take care of him or her properly. Once the conversion has been ordered (and this can occur at any stage of the criminal proceedings prior to sentence), the criminal proceedings fall away. The children’s court inquiry does not concern itself with guilt or innocence, but rather with the welfare of the child. This procedure could be used in a large number of cases coming before the courts, certainly all those in which parents cannot be traced, or where parents state that they are unwilling or

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43 Rules 10.1 and 10.2.
44 Section 29 of the Correctional Services Act 8 of 1959 (as amended), requires that unconvicted persons under 18 cannot be held in a prison or police cell or lock up for longer than 24 hours after arrest, although regarding more serious offences (as listed in a schedule to the act) this can be extended to 48 hours in the case of juveniles who are over 14. They should be released into the care of their parent, guardian or other suitable person, and only where this is not possible, held at a place of safety. The promulgation of the section has been controversial due to a lack of infrastructure to underpin its operation. See A Skelton ‘The new law on arrest of children in South Africa’ (1995) 7 The Child Care Worker 3; J Sloth-Nielsen ‘No child should be caged—Closing doors on the detention of children’ (1995) 8 SACJ 47.
45 A Private Members Bill (B9-96) has been tabled which allows for juveniles charged with serious offences to be detained awaiting trial. The Bill does not in essence detract from the principle that the contacting of parents or guardians and the speedy consideration of release remain priorities. The Bill is a temporary measure with a built in savings clause to ensure that the legislation can remain in operation for only one, or with parliamentary approval, two years.
46 In terms of s 254 of the Criminal Procedure Act 51 of 1977 and s 11 of the Child Care Act 74 of 1983.
unable to take responsibility for their children. However, although this possibility has been on our statute books for many years, it is largely under-utilised. Any future juvenile justice system for South Africa should definitely include a reliable mechanism for diverting cases out of the criminal justice system and into the welfare system in all appropriate cases.

Although the law does not expressly provide for any other form of pre-trial diversion, experimental diversion programmes, devised and run by NICRO⁴⁷ (and in some areas by the Welfare Department), have been adopted in various magisterial districts in the country. This has been made possible by encouraging prosecutors to exercise their prosecutorial discretion in an appropriate way. The prosecutor exercises his or her discretion and withdraws the charges against an accused on condition that the accused completes a diversion programme⁴⁸ set up by NICRO or the State. If the accused person fails to complete the course to the satisfaction of the supervisor, then criminal charges may be reinstituted against him or her.

It is submitted that diversion should be the central principle of any future juvenile justice system. The possibility of diversion should be considered in every case, and only rejected in cases where the interests or the safety of the community demand that the case be taken through the criminal justice system.

Under such a system it is important to maintain the balance between diversion and due process. Experience in other countries has shown that if a process develops in such a way that children are dealt with outside the criminal justice system without constant vigilance over their rights, due process may be put at risk. It is therefore necessary for mechanisms for protecting rights to be built into the process of diversion.⁴⁹

(e) Specialisation within the police service

Rule 12 provides that police personnel who deal with juvenile offenders should be specially trained, and that in large cities special police units should be established for that purpose.

In South Africa at present there is no specialisation within the police service regarding the handling of juvenile offenders. The Child Protection Unit deals solely with child victims of crime. Because of the lack of police personnel in rural areas it would be difficult to allow for specialisation in these areas. Additionally, because young people can be arrested by any police officer, it is necessary for every police officer to be trained how to deal with young people whom they arrest. However, it may be advisable to set up specialised units in larger centres where the incidence of juvenile crime requires it.

⁴⁷ National Institute for Crime Prevention and Rehabilitation of Offenders.
⁴⁸ NICRO offers the following diversion programmes: youth empowerment schools, community service, and in some areas, victim offender mediation and family group conferencing.
⁴⁹ See A Skelton 'Diversion and Due Process' in L Munting (ed) Perspectives on Diversion (1995) 31–7 for a discussion on how this might be achieved.
(f) Adjudication and sentencing

The Beijing Rules provide that where a young person has not been diverted he or she shall be dealt with by the competent authority. The proceedings must aim to serve the best interests of the child and be conducted in an atmosphere of understanding. The young person should be encouraged to participate. The atmosphere of courts in South Africa will have to change substantially to fit these criteria. In areas where the number of young people coming through the courts warrant it, specialised juvenile courts should be created. Specialised training for all personnel dealing with young offenders is important.50

Access to legal representation is a requirement in terms of the Rules51 and free legal aid must be granted in those countries where there is provision for such aid. The Legal Aid Board in South Africa would therefore be the suitable provider of such representation.52

Guiding principles of sentencing are provided53 which include the need for proportionality, and the well-being of the juvenile as central to the consideration of his or her case. The least possible use of measures which restrict or remove the personal liberty of the young offender is stressed, and corporal punishment for juveniles is prohibited. With regard to corporal punishment, the Constitutional Court judgment in S v Williams54 brings South Africa in line with this requirement.

The Beijing Rules conclude55 with rules which stress the importance of research as a basis for ongoing planning and policy formulation. This indicates that even when South Africa has enacted a new juvenile justice system, it is imperative that research and evaluation of the new system be carried on so that the system may be constantly redeveloped to meet changing realities.

(4) United Nations Standard Minimum Rules for the Protection of Juveniles Deprived of their Liberty.56

The JDL's deal with a range of children who have been deprived of their liberty. This includes those held in custody during the pre-trial and trial stage as well as those sentenced to imprisonment. Deprivation of liberty is defined as meaning any form of detention or imprisonment or the placement of a person in a public or private custodial setting from which this person is not permitted to leave at will.57 In the South African

50 Beijing Rules (n 5) rule 22.
51 Rule 15.1.
52 Section 25 of the Constitution of the Republic of South Africa Act 200 of 1993, provides that legal representation should be provided by the State where a 'substantial injustice' would otherwise occur. A strong argument can be made that in any criminal case involving a person under 18, a substantial injustice would occur if he or she is denied legal representation.
53 Beijing Rules (n 5) rule 17.
54 S v Williams and others 1995 (7) BCLR 861 (CC).
55 Beijing Rules (n 5) rules 30.1–30.4.
56 JDL's (n 6).
57 (n 6) rule 11(b).
situation this definition would include children awaiting trial in places of safety, those placed in schools of industry and those sentenced to reform school.

The overriding message of the JDL's is that young people under the age of 18 should not be deprived of their liberty except as a measure of last resort, and that where this does occur, each young person must be dealt with as an individual, having his or her needs met as far as is possible. There is an emphasis on preparing the young person for his or her return to society from the moment of entry into the detention facility.

The JDL's begin with a number of fundamental principles, the first of which states that the juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. It is further stated that imprisonment should be used as a last resort and for the minimum period necessary and should be limited to exceptional cases. This is an important point, stressed by all of the instruments. The challenge will be to ensure that this principle is applied whilst at the same time interfering as little as possible with Judicial discretion.

Rules 17 and 18 deal with juveniles under arrest or awaiting trial. The presumption of innocence is emphasised, as well as the right to legal representation.

A major portion of the JDL's governs the management of juvenile facilities, including their administration, the physical environment and services they offer, and disciplinary procedures considered appropriate. Compliance with all of the above is assured through the requirement of regular and unannounced inspections and an independent complaints procedure. The JDLs conclude with a section on the appointment and training of specialised personnel to deal with young people deprived of their liberty.

The JDL's are extremely comprehensive, with detailed reference to a large number of issues which may be of importance to the daily lives of young people in prison set out in its 87 rules. In South Africa it is likely that we will continue to see a number, hopefully a dwindling number, of persons under 18 sentenced to terms of imprisonment. Section 30 of the interim Constitution requires that children should be held in a manner which is appropriate to their age. In determining what is meant by these words, the JDLs will be of great assistance.

(5) The overall message of the instruments

The international instruments discussed above give us a clear picture of what we should be including in a future South African juvenile justice

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58 Rule 1.
59 Rule 2.
60 Rules 19 to 80.
61 Rule 72 requires that these inspections should be carried out by qualified inspectors or equivalent authority not belonging to the administration of the facility.
62 The suggestion of a special ombud is made, at rule 77.
63 JDL's (n 6) rules 81–87.
64 (n 17).
system. The approach we adopt should aim at promoting the well-being of the child, and at dealing with each child in an individualised way. The central focus of the system should be on diversion out of the criminal justice system as early as possible, either to the welfare system, or to suitable diversion programmes run by competent staff. There should be a vigilant approach to the protection of due process rights. The involvement of family and community is of vital importance. If a child does go through the criminal justice system, he or she should be tried by a competent authority (with legal representation and parental assistance) in an atmosphere of understanding conducive to his or her best interests. The child should be able to participate in decision making. The proceedings should take place within time frames which are appropriate to children and there should be no unnecessary delays.

In deciding on the outcome of any matter involving a young offender, the presiding officer should be guided in the decision-making process by a set of principles, including the principle of proportionality; the best interests of the child; and the least possible restriction on the child's liberty. Depriving children of their liberty, either whilst they await trial or as a sentence, should be a measure of last resort and should be restricted to the shortest possible period of time. Mechanisms for ensuring all of this need to be built into the juvenile justice system.

It is of great importance that the principles underpinning the instruments should be carried through into the practice of juvenile justice in South Africa. Dissemination of the principles to all role players is essential. But to make these principles into something more than a set of good ideas to which we occasionally return, a set of guiding principles should be set out at the beginning of the new Act, and guiding principles of sentencing at the relevant place in the text.65

III A NEW INTERNATIONAL TREND IN THE APPROACH TO JUVENILE JUSTICE

The instruments which have been examined above recognise that when dealing with young offenders, the standard control and punishment response to crime is not acceptable.

The developing trend in juvenile justice is based on the philosophy of restorative justice. This is a theory of justice which relies on reconciliation rather than on punishment. It begins with the notion that a society which is functioning well operates on a balance of rights and responsibilities. When an incident occurs which upsets this balance, methods must be found to restore the balance, so that community members, including the offender and the victim, can come to terms with the incident, and can continue to live their lives normally. In order for this to occur the offender must accept responsibility for the fact that his or her behaviour caused damage or harm to the victim, and the victim must be prepared to

65 There is a precedent for this in the New Zealand Children, Young Persons and their Families Act 24 of 1989 which sets out general objects, principles and duties at Part I and youth justice principles at Part IV.
negotiate and accept restitution or compensation for the offender’s wrongdoing. In this way ‘justice’ becomes a negotiated agreement between those directly involved.\(^{66}\)

Although this may sound foreign to lawyers trained in the modern western legal system, it is not a new idea in Africa, where the idea of restorative justice goes back a long way:

> 'At the heart of African adjudication lies the notion of reconciliation, of restoration, of harmony. The job of a court or an arbiter is less to find the facts, state the rules of law and apply them to the facts than to set right a wrong in such a way as to restore harmony'.\(^{67}\)

In this system there was not much of a distinction between criminal and civil matters. The issue was that a wrong had occurred for which amends must be made.\(^{68}\)

Howard Zehr\(^{69}\) gives a wider historical perspective on restorative justice in which he traces the history of a struggle between state justice and community justice. While state justice currently predominates, community justice actually preceded it.

What is now beginning to emerge in a number of jurisdictions is a return to the ideas of community justice.\(^{70}\) This trend is particularly evident in the juvenile justice systems in the countries discussed below.

(1) **New Zealand**

During the 1980s the juvenile justice system in New Zealand was beleaguered with the same ineffectiveness, negativism and discrimination that many other systems in the world suffer today. The first bold step towards reform came from the Maori leaders who, frustrated with the way in which the criminal justice system disempowered communities in dealing with their children, presented a hard-hitting report which became the springboard for a dramatic change in the New Zealand juvenile justice system.\(^{71}\)

The Children, Young Persons and their Families Act\(^{72}\) came into operation in New Zealand in 1989. The thrust of the legislation is to involve communities directly in the decision-making process and to aim for a negotiated solution to the conflict, which is restorative in nature.

The central mechanism for achieving this process is a ‘family group conference’ which effectively diverts a young person out of the criminal

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\(^{68}\) C Dlamini *The role of the Chiefs in the Administration of Justice* (unpublished LLM thesis University of Pretoria 1988).


\(^{71}\) J Braithwaite *Resolving crime in the community: Restorative justice reforms in New Zealand and Australia* (address presented at a workshop on Restoring Crime in the Community, London, September 1994).

\(^{72}\) (n 64).
justice system. The procedure involves a youth justice co-ordinator, who convenes a meeting of all the people who are significant in the young person's life, such as members of the immediate family, friends and teachers. The victim of the alleged offence and/or a representative of the victim (usually a family member) and a police representative are also present at the meeting. The aim of the meeting is to discuss the incident and to decide how best to respond to it. The young person must accept responsibility for his or her actions. The meeting will negotiate an agreement through a process of consensus decision-making. The agreement might require the offender to apologise to the victim; to work in the community or for the victim; to make reparation or to make a donation to a charity or whatever the family feels is appropriate.

The family group conference has been successful in that over 95 per cent of family group conferences have resulted in agreement being reached, with 84 per cent of the young people and 85 percent of their families reporting that they felt satisfied with the result. However, only 49 per cent of the victims expressed satisfaction.

The number of young offenders coming before the courts has dropped from 13,000 cases a year to 1800. In the first five years of the operation of the Act the number of young people prosecuted fell by 27 per cent.

(2) Australia

In Australia, experiments have been done with family group conferences (called community conferences), notably in an area called Wagga. This experiment has been more successful in terms of victim satisfaction. Braithwaite makes the point that the Wagga programme is more victim-centred, whereas the New Zealand system centres around the well-being of the young offender. This difference is also indicated by the fact that the New Zealand approach defines ‘community’ as the community of people surrounding the young offender, whereas the Australian model concentrates on the community of people around the incident. Thus, while both models include the victim, the Australian model results in a stronger emphasis on victim needs.

Various community conferencing programmes are under way in different parts of Australia, some of which follow the New Zealand model, and some the Wagga model. The outcomes of these experiments

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73 Accountability is a very important aspect of the process, see F W M McElrae Accountability in the community: Taking responsibility for offending (unpublished paper presented at a conference on Re-thinking Criminal Justice: A Conference on New Initiatives in Criminal Justice, Auckland, New Zealand, May 1995). See also J Braithwaite & S Mugford ‘Conditions of successful reintegration ceremonies’ (1994) 34 British Journal of Criminology 139 in which family group conferences are described as a ceremonial opportunity for reintegrative shaming.


76 Consedine (n 69) 106.

77 Braithwaite (n 70) 8.
will provide very useful data on which to model an improved community conferencing system.\(^{78}\)

(3) **Canada**

Canada has also recently been experimenting with community conferencing. Since 1992 in the Yukon territory, Judge Barry Stuart has been using a process called 'community sentencing circles', which is based on the traditional approach of Native Canadians. Circle sentencing lays emphasis on collective responsibility, consensus decision-making and on healing relationships. Judge Stuart describes the results of this process as 'startling'. Communities have made great strides in changing the well-being of offenders, victims and communities.\(^{79}\)

(4) **Can a restorative justice model work in South Africa?**

Proposals for a new juvenile justice system for South Africa, written by a group of representatives of non governmental organisations\(^{80}\) suggest that it is possible to develop a juvenile justice system for South Africa which centres on restorative justice. The proposals are based on a set of principles gleaned from the international instruments. The proposed system is framed within the restorative justice paradigm. The central feature of the proposed system is diversion of children away from the formal criminal justice and penal system, either at arrest, or at the pre-trial or pre-sentence stages. Diversion can take place in a number of ways, by means of caution, by transfer to the welfare system, or by means of a family group conference. The idea is that community conferencing would be the mainstream method of dealing with children who come into conflict with the law. The formal criminal justice will serve as a back up only in cases where community conferencing fails through lack consensus or is not appropriate (such as in cases of serious or violent offences).

**IV Conclusion**

The discussion of the international instruments above set out the building blocks with which a future juvenile justice system for South Africa should be built. The Convention on the Rights of the Child, written most recently, sums up the overall intention of the instruments at art 40(1), which stresses the importance of promoting the child's sense of dignity and worth and reinforcing the child's respect for the rights of others. Other aims included recognising the importance of the child's reintegration into society and the importance of him or her assuming a


\(^{79}\) McElrea (n 72).

constructive role in that society. These aims are entirely in keeping with the ideals of restorative justice.

Restorative justice in the form of community conferencing allows for participation of the young person, and stresses the centrality of the family and community (including the victim.) It offers an informal alternative to intervention by the courts and allows for differentiated programmes suited to the particular needs of each individual as well as cultural appropriateness. If South Africa seizes the opportunity of creating a system which centres on diversion in as many cases as possible to community based restorative justice processes we may be able to unlock innate conflict resolution skills existing in our communities. If we can use this community source of justice, and still be guided by the international instruments and the fundamental rights set out in the Constitution to ensure compliance with human rights protections we will be well on our way to a fair and effective juvenile justice system for South Africa.