

CHAPTER 11

THE CHILD JUSTICE BILL FROM A RESTORATIVE JUSTICE PERSPECTIVE

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Juvenile justice is a field in which experimentation with restorative justice has often preceded the use of such ideas in the remainder of the criminal justice system. This is the case in many countries and is equally true in South Africa. Support for restorative justice in the handling of juvenile offenders could arise because criminal justice personnel are more prepared to suspend their commitment to the standard retributive process when it comes to children, and will allow for some new approaches to be applied. Many people are more prepared to 'forgive' children when they commit offences, believing that they can still get back on the right path.

'Giving children a chance' is the title of the first journal article published in South Africa about the opportunities that restorative justice could offer for dealing with children accused of crimes.¹⁴² The article described proposals that were published in 1994 by a group calling itself the Juvenile Justice Drafting Consultancy, which was made up of organisations from civil society.¹⁴³ The proposals suggested a legal framework for children accused of crimes, which had as its centrepiece family group conferencing, based on the New Zealand model. Although these proposals did not enjoy any official status, they certainly influenced the field of juvenile justice strongly, and provided the framework for pilot projects on family group conferencing.

Early applications of diversion

The National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO) pioneered diversion of children away from the criminal justice system in the early 1990s.¹⁴⁴ The organisation used the language of restorative justice in this work, which helped to pave the way for including restorative justice in policy and practice. When the democratically elected government came to power, policy documents such as the Welfare White Paper, the National Crime Prevention Strategy and the Interim Policy Recommendations for the Transformation of the Child and Youth Care System

all reflected that when dealing with children, systems should allow for diversion to more restorative options.

In 1997 and 1998 the Inter-Ministerial Committee on Young People at Risk ran a pilot project on family group conferences (FGCs). In this project, FGCs were established as diversionary alternatives for juvenile offenders, with the aim of testing the model in 80 cases in the Pretoria area. This project specifically sought to divert cases involving offences considered to be relatively serious, such as assault, theft of and out of motor vehicles, housebreaking and robbery. These categories of offences were not ordinarily considered to be 'divertable' by the criminal justice system, which was accustomed only to the diversion of cases involving minor offences such as shoplifting and injury to property.

The project attempted to insert FGCs as a diversion option at the earliest stage of a young person's interaction with the criminal justice system by obtaining referrals directly from the police. This was unusual as all diversion in the country until this stage was done through referrals from prosecutors just prior to a young person's first appearance in court. It was found that seeking referrals directly from the police did not yield cases as successfully as was hoped, and the project reverted to working directly with prosecutors to obtain referrals.

Working directly with prosecutors proved to have its own problems. The project struggled to obtain 'the right kind' of cases as prosecutors continued to consider only very minor offences to be suitable for diversion. The implementation manual makes the following observations in this regard:

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 socialised firmly within a retributive philosophy.¹⁴⁵

The document goes on to say that prosecutors see diversion as 'doing nothing' or as a 'soft option' and concludes that in order to ensure appropriate referrals, the prosecutor doing the referrals must be fully informed of and convinced about the process and value of conferencing.

Despite the difficulties described, the project did process some fairly serious offences, including housebreaking and theft, assault with intent to do grievous

bodily harm, common assault, malicious injury to property, theft from a motor vehicle and possession of an unlicensed firearm. The project managed to undertake 42 FGCs whereas it had planned for 80 conferences. In addition to the problems experienced in obtaining referrals from the police and prosecutors, the study also identified the lack of a legislative framework for family group conferencing as a major problem.

The current South African law does not include any legal provisions regarding diversion; all diversion is done at the prosecutors' discretion to prosecute.¹⁴⁶ In this regard, the study made specific recommendations for consideration by the juvenile justice project committee of the South African Law Reform Commission. These included:

- suggestions that legislation should address the assessment of children;
- that the criteria for diversion and the types of programmes deemed appropriate for different levels of offending behaviour should be formalised;
- that family group conferences should be specifically provided for in legislation;
- a confidentiality provision; and
- an enabling provision to allow for the referral of cases to a family group conference at any stage of the court process.¹⁴⁷

Law reform

The law-making process began when the (then) Minister of Justice and Constitutional Development, Dullah Omar, requested the South African Law Reform Commission (SALC) to include in its programme an investigation into juvenile justice. He appointed individuals from civil society whom he knew to be advocates for restorative justice, to the juvenile justice project committee. These nominees had been part of the non-government lobby group calling for substantial reform to the juvenile justice system.

The SALC project committee 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 and Constitutional Development in August 2000.¹⁴⁸ The Department's legislative advisors scrutinised the Bill and made very minor changes, none of which alter the Bill's restorative justice nature. The Child Justice Bill no. 49 of 2002, was introduced into parliament in November 2002.¹⁴⁹

South Africa has a participative style of law making, with every Bill being deliberated on by portfolio committees made up of elected representatives

from various political parties. Public hearings were held on the Bill in February 2003 and the deliberations on the Bill by the Portfolio Committee on Justice and Constitutional Development followed in March 2003. The Bill is not yet complete, and any comments on the Bill must thus be made with caution, as the Committee may make further changes.

Overview of the Child Justice Bill

An overview of the Bill is provided below as a basis for discussion on 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 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 safe-guarding the interests of victims and by means of a restorative justice response;
- 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.

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.

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 multi-disciplinary 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 options

As has been explained above, 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 organisations.

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 options in this way is to encourage those working in the system to use diversion in a range of different situations, even for relatively serious offences. Victim-offender mediation and family group conferences are available at levels two and 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.

Sentencing

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.

Family group conferences

The Bill includes detailed procedures for setting up and running family group conferences. The family group conference is empowered to regulate its own procedure and to make such plans as it sees fit, provided that these are appropriate for the child and family and consistent with the principles contained in the Bill. The plan must:

- specify the objectives for the child and the family;
- specify the period in which the objectives are to be achieved;

- contain details of the services and assistance to be provided for the child and family; and
- include matters relating to education, employment, recreation and welfare of the child if these are relevant.

According to the Bill, family group conferences can take place as diversion options prior to trial, although a court can stop the proceedings in the middle of a trial and refer the matter to a family group conference. A court can also, after conviction, send the matter to a family group conference or victim offender mediation to determine a suitable plan, which the court can then make into a court order for the purposes of sentencing.

Does the Child Justice Bill promote restorative justice?

The extent to which the Child Justice Bill lives up to its self-description of being ‘aimed at promoting *ubuntu* by means of a restorative justice response’ can be evaluated against the models suggested by a number of authors.¹⁵⁰

In *Changing Lenses*, Zehr describes three different “system possibilities”.¹⁵¹ The first is the possibility of “civilising” 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 anywhere in the world.¹⁵²)

The second possible system, according to Zehr, 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 through the criminal justice system, there are no sanctions linking it back to that system.

Zehr’s third system is a parallel but inter-dependent or inter-linked track. In this type of system a separate restorative justice track is created but is linked to, or is inter-dependent 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 inter-dependent of the formal criminal justice system. The decision about whether or not to divert 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 willfulness or negligence on the part of the child, the charges may be reinstated. In relation to sentencing, the inter-relatedness is more pronounced, because outcomes decided upon at family group conferences and victim–offender mediations must be referred back to the court for the approval of 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 both coercive sanctions and voluntary processes. While such a restorative justice system should prioritise the voluntary processes that involve face-to-face meetings between offenders and victims, if these are not possible or appropriate then the formal criminal justice system would need to take over, but should still aim for restorative justice outcomes.¹⁵³

The proposed child justice system described in the Child Justice Bill generally meets the version of restorative justice described by Walgrave. In terms of the Bill, 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 are necessary. The voluntary aspect of the decision to opt for diversion may be somewhat illusory as the alternative would be that the child would be taken through the criminal justice system. Nevertheless, the idea is 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, as it would still be on offer at other stages of the formal criminal justice process.

Some pitfalls

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 may be sentenced to a lengthy period of imprisonment. As much as the Bill gives discretion to prosecutors and judicial officers to utilise 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.¹⁵⁴ 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 would almost certainly result in a “soft-hard bifurcation” in which the ‘soft’ cases will be diverted, and the ‘hard’ cases put beyond the reach of a restorative solution.¹⁵⁵ This can very easily result in discriminatory practices in which those who are better off can access restorative justice while the disadvantaged cannot. In a country like South Africa, with its history of discrimination and the legacy of poverty, such possibilities 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 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 and family group conferences 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, the 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 juvenile offences brought to the formal criminal justice system will be diverted once the Bill is passed and put into operation.¹⁵⁶ As the system develops and restorative justice results are demonstrated throughout the country, the numbers of diversions to restorative justice options are expected to increase.

Conclusion

Although the Child Justice Bill is not a purely restorative model, it contains many elements of restorative justice. Most importantly, *ubuntu* and restorative justice are built into the objectives clause, and, in this way, set the purpose and the tone of the entire child justice system.

Time will tell how restorative it will be in practice, and the key to that will be the training of criminal justice personnel in the aims and outcomes of restorative justice. Because of the way that lawyers receive their criminal justice training within a retributive and adversarial paradigm, what will be required of criminal justice personnel working in the future child justice system is a change of hearts and minds. They will need to grasp what restorative justice can offer in terms of behaviour change and the reduction of recidivism, and they will need to believe that restorative justice is indeed justice.