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## "JUST SAY SORRY?" *UBUNTU*, AFRICANISATION AND THE CHILD JUSTICE SYSTEM IN THE CHILD JUSTICE ACT 75 OF 2008

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### 1. Introduction

The history of the development and passage through Parliament of the Child Justice Act 75 of 2010 (the Act) has been reasonably well documented, and the various influences on the process of law making that preceded the Act have enjoyed considerable academic attention.<sup>1</sup>

Various claims are made concerning the overall import and thrust of the legislation that was finally adopted. A non-governmental movement which developed around the Parliamentary processes<sup>2</sup> has been at the centre many of these claims. The authors of this paper are intimately connected to this NGO movement, and one of us was the co-ordinator of the Child Justice Alliance until the end of 2008. We therefore declare at the outset our prior interest in depicting the envisaged new system as constituting a significant advance in human rights and constitutional terms over the *ad hoc* arrangements for children in trouble with the law that prevailed previously.

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<sup>1</sup> Sloth-Nielsen J The Role of International law in Juvenile Justice Reform in South Africa (LLD thesis UWC 2001); Skelton A The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice (LLD thesis UP 2006); Gallinetti J An Assessment of the Significance of the International Labour Organisation's Convention 182 in South Africa with Specific Reference to the Instrumental use of Children in the Commission of Offences as a Worst Form of Child Labour (PhD thesis UWC 2008); Skelton A "The South African Child Justice Bill: Transition as Opportunity" in Jensen E and Jepson J (eds) Juvenile Law Violators, Human Rights and the Development of New Juvenile Justice Systems (Hart Publishing: Oxford 2006); Skelton A and Batley M Charting Progress, Mapping the Future: Restorative Justice in South Africa (Restorative Justice Centre and Institute for Security Studies 2006); Gallinetti J Getting to know the Child Justice Act (Child Justice Alliance Cape Town 2009).

<sup>2</sup> The Act was extensively debated in Parliament in two discrete periods: in 2003, under the chairpersonship of Johnny de Lange, MP, then heading the Portfolio Committee on Justice and Constitutional Development; and later in 2008, under the helm of Yunis Carriem MP after the Bill had been redrafted and debates around the newly tabled provisions were in effect re-opened.

It has been contended that the general thrust of the Child Justice Act renders it a meaningful attempt to give effect to South Africa's constitutional and international law obligations, and that substantial compliance with the overarching norms relating to juvenile justice (as the field is termed internationally) has been brought about. Further, it has been argued that the Act ushers in a new era in the field of dispute resolution insofar as provision is made for restorative justice options as diversionary alternatives,<sup>3</sup> and therefore that the Act is characterised by a restorative justice orientation. Third, it is alleged that the Act "Africanises" child justice proceedings through the incorporation of the values of *ubuntu* in its provisions and its preamble. Fourth, from the opposite side of the fence, as it were, detractors have from time to time suggested that the diversionary preference exhibited in the Act lets children "off the hook" and absolves them from responsibility for their criminal acts. The "just say sorry" reading of the Act as a whole views the Act's scheme as a licence for lenience and an abdication of state responsibility for dealing with the aftermath of children's criminal behaviour.<sup>4</sup>

The paper commences with an examination of the various features of the Act that could be said to contribute to its African flavour. Thereafter, the significance of these features is contextualised within the overall framework of the criminal procedure provided for. The paper explores dispassionately whether the third and fourth claims referred to above, in particular, can truly be substantiated. This task also involves exploring the extent to which the second claim referred to above, namely that the Act furthers a restorative approach to child justice, is borne out.

## **2. The Child Justice Act as an 'Africanised' statute**

### **2.1 The Preamble**

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<sup>3</sup> Diversion of matters away from formal criminal proceedings is a central tenet of the new Act, forming a distinct chapter of the Act, and being strengthened procedurally through a variety of provisions aimed at ensuring that diversion is considered by justice system decision makers at various stages of the criminal procedure. See sections 41 and 42, and Chapter 8 of the Act.

<sup>4</sup> The title is based on the caption to a cartoon that appeared in a South African daily newspaper when the Child Justice Bill was first tabled in Parliament in 2003.

The first characteristic of the Act is an unusually long and detailed Preamble, reminiscent of a treaty or resolution of an international human rights organ.<sup>5</sup> Comprising fully 4 pages (with several bulleted lists interspersed - one needs to read the Preamble to get a full sense of the number of paragraphs involved) the Preamble covers considerable ground. It alludes to the treatment of children under apartheid, where black children in particular did not have the "opportunity to live and act like children", and the overall aspirations of the Constitution regarding values such as social and economic justice and the provision of an improved quality of life for all. The constitutional protection of the rights of children is highlighted by reference to all of the section 28 rights that could have a bearing on children in the justice system;<sup>6</sup> yet the desire to replace existing statutory provisions which do not "address the plight of children in conflict with the law" with a system that "takes into account their vulnerability and needs" is expressly grounded in the "capacity, resource and other constraints which require a pragmatic and incremental strategy".<sup>7</sup>

The Preamble then charts a series of aims and objectives of the new child justice system. Of relevance to this paper are the following: the aim of centralising diversion as an option for children in the criminal justice system (in accordance with the "values underpinning the Constitution and with our international obligations"); the aim of expanding and entrenching the principles of restorative justice (while ensuring children's responsibility and their accountability for crimes committed); minimising the potential for re-offending through placing increased emphasis on the effective rehabilitation and reintegration of children; balancing the interests of children and

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<sup>5</sup> These documents are also characterised by statements of principle prefaced by phrases such as "recognising that", "mindful that" and "acknowledging that"....

<sup>6</sup> Although not cited by section, the rights concerned are section 28(1)(g), 28(1)(b), 28(1)(d), and 28(1)(e). Interestingly the constitutional right to legal representation is not referred to specifically, nor is the principle of the best interest of the child. See the Children's Act 38 of 2005 for an elaborate expression of the principle of the best interests of the child, which is included in section 7.

<sup>7</sup> This is not an ideal model for the legislative incorporation of a realistic and useful standard to which the state must adhere in the implementation of the legislation. Contrast this with section 4 of the Children's Act, which exhorts the state to implement the Act progressively to the maximum extent of available resources, realising that competing priorities exist. This latter provision has already enjoyed judicial recognition in the recent *Nawongo* judgement of the Free State High Court: *National Association of Welfare Organisations and Non-Governmental Organisations and Others v Member of the Executive Council for Social Development, Free State*, unreported, case no. 1719/2010. However, it must be noted that section 97 of the Child Justice Act provides a detailed framework for implementation. It requires policy directives, a national policy framework and monitoring and evaluation of the implementation of the Act, for instance.

those of society and victims; and creating a system which in broad terms takes into account the long-term benefits of a less rigid criminal justice process that suits the needs of children in conflict with the law in appropriate cases. The specific innovations of the new procedure and their alleged compliance with South Africa's treaty obligations under the Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (African Children's Charter) are then also detailed in the final page of the Preamble.

Two obvious questions that arise are what the possible legal status of these righteous intentions, expressed in quasi-legislative form, might be, and the extent to which the actual legislative provisions bear out the stated objectives. The short answer to the first is that the Preamble at least in reality frames the context: it may be that the noble sentiment and background sketched are at most of vague interpretative value, and since each lofty aspiration is expressed with a fair degree of ambiguity, it is unlikely that the elegant wording will play much of a role in shaping the fate of individual children. Traditionally, in fact, the Preamble to an Act may be consulted in only two instances: where the provision to be interpreted is ambiguous or where the intention of the legislature is that the wide language used is required in some way to be limited.<sup>8</sup> However, a Preamble may well play a valuable role in providing future judicial guidance in interpreting specific provisions of the Act and future outcomes at the level of the High Court or the Supreme Court of Appeal. This is borne out by the purposive interpretive approach adopted in the post-Constitution era where the courts have been more willing to interpret statutes in the light of their purposes.<sup>9</sup>

However, in addition, the purpose of a statute or section is especially important in the context of the Constitution: both the statute's purpose and effect are of use in determining its constitutionality.<sup>10</sup> This is evident from the approach of the Constitutional Court in *Centre for Child Law v Minister of Justice and Constitutional*

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<sup>8</sup> De Ville JR *Constitutional and statutory interpretation* (Interdoc Consultants (Pty) Ltd Cape Town 2000) 147.

<sup>9</sup> See for instance *MV Golden North Governor and Bank of Scotland v Fund Constituting the Proceeds of the Judicial Sale of the MV Golden North (Maritime Technical Co Ltd Intervening)* 1999 (1) SA 144 (D) 152.

<sup>10</sup> De Ville (n 10) 249.

*Development and Others*,<sup>11</sup> where the Court stated that "government's objective in enacting legislation is relevant to determining its validity in the face of constitutional challenge. It does not of course determine what the statute means".<sup>12</sup>

As 'academic activists' we must hold the view that the Preamble is not insignificant and that it can play a role in the future interpretation of the Child Justice Act. Whether or not this will in fact occur remains to be seen.

As to the second question, if the actual provisions of the law will achieve all of the goals set out, that is an issue on which commentators may differ, depending on their point of view. The provision in section 77(4) that children may in certain circumstances be sentenced to a period of 25 years imprisonment would attract international disapproval, and arguably offends the principle of deprivation of liberty for the shortest appropriate period of time.<sup>13</sup> But the legislation makes extensive provision for diversion, providing a clear legal framework for 'measures other than criminal procedures' as required by the UNCRC's article 40(3). However, a full discussion of this theme lies outside the scope of this paper.<sup>14</sup>

The Preamble gives some expression, it is conceded, to indigenous values, insofar as the harsh treatment of children in conflict with the law under apartheid is recognised, the intention to comply with the commitments of the African Children's Charter is stated,<sup>15</sup> and the introduction of the principles of restorative justice is featured as a key aim.

However, of far more legal significance, we aver, are sections 2 and 3, detailing respectively the "objectives of the act" and the "guiding principles", which elaborate

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<sup>11</sup> 2009 ZACC 18.

<sup>12</sup> Par 22. Note that this statement is made in the context of the Criminal Law (Sentencing) Amendment Act 2007 and not the Child Justice Act.

<sup>13</sup> Section 28(1)(g) of the Constitution and Article 37(b) of the UNCRC.

<sup>14</sup> See, for one view, Wakefield L "South Africa's Compliance with the United Nations Convention on the Rights of the Child and other International Instruments: Does the new Child Justice Act 75 of 2008 Truly Comply?" in *The Children's Convention at 21: The Rights of the Child come of Age?* 18 – 20 June 2010 University of Ulster (Magee Campus) Northern Ireland (copy on file with the authors).

<sup>15</sup> And the African Children's Charter in turn has a unique provision on the situation of children under apartheid, which was still in force at the time that the Charter was drafted. The provisions of both the Charter and the UNCRC are, in addition to their formative influence as recorded in the Preamble, also guiding principles in the application of the Act. They are referred to directly in section 3(i) as well.

more clearly upon the purpose and aims of the legislation. The authors could not find clear and principled guidance on the role of such provisions as "objectives" and "principles" in the evolution of the statutory interpretation of an Act in the modern era. Justice Cameron's cited dictum in *Centre for Child Law (supra)* seems to indicate that there might be some disagreement as to the weight of government's stated objectives in the interpretative process.

## **2.2 The objectives of the Act**

The objectives clause, scrutinised closely, restates much of the Preamble in another way. Hence, providing for the special treatment of children, contributing to safer communities, encouraging children to become law abiding adults, preventing harsh treatment in the conventional criminal justice system (and so forth) feature in a different form, but cover essentially the same territory. One objective which is framed more strongly in the body of the law (as against the Preamble) is that continued in section 2(e):

To promote co-operation between government departments, and between government departments and the non-governmental sector and civil society, to ensure an integrated and holistic approach in the implementation of this Act.

The most important section for the purposes of the present discussion is section 2(b), which states the commitment to *ubuntu*. This objective is couched in the following terms:

To promote the spirit of *ubuntu* in the child justice system through –

- i Fostering a child'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 interest of victims and the community;
- iii Supporting reconciliation by means of a restorative justice response; and

- iv Involving parents, families, victims and, where appropriate, other members of the community affected by the crime in procedures in terms of this Act in order to encourage the reintegration of children.

It has been stated that the meaning of *ubuntu* is extraordinarily difficult to convey in Western language.<sup>16</sup> The first and most well-known judicial expression of the concept is that articulated in *S v Makwanyane and Another*<sup>17</sup> insofar as the court said that *ubuntu* "envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality".<sup>18</sup> Other philosophers have highlighted "the spirit of community, mutual support, sharing, interconnectedness and respect for one another" that *ubuntu* signifies.<sup>19</sup> The Constitutional Court has also confirmed the critical role *ubuntu* plays in the South African Constitution. Mokgoro J states "[i]n our constitutional democracy the basic constitutional value of human dignity relates closely to *ubuntu* or *botho*, an idea based on deep respect for the humanity of another".<sup>20</sup> This is closely echoed by Sachs J later in the judgment where he states "*Ubuntu - botho* is more than a phrase to be invoked from time to time to add a gracious and affirmative gloss to a legal finding already arrived at. It is intrinsic to and constitutive of our constitutional culture".<sup>21</sup>

The further significance of the *Dikoko* judgment is that Sachs J succinctly describes four elements of restorative justice, thereby establishing what the Constitutional Court understands by the concept. These four elements are encounter, reparation, reintegration and participation.<sup>22</sup> Skelton notes that in the earlier case of *Port*

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<sup>16</sup> Keevy I "Ubuntu versus the core values of the South African constitution" 2009 *Journal for Juridical Science* 32.

<sup>17</sup> 1995 (6) BCLR 665 (CC).

<sup>18</sup> At par 308, per Mokgoro, J.

<sup>19</sup> Keevy (n18) 33.

<sup>20</sup> *Dikoko v Mokhatla* 2006 6 SA 235 (CC) at para 68 per Mokgoro J

<sup>21</sup> At para 113.

<sup>22</sup> At para 114. Sachs J elaborates on each of these elements: encounter enables victims and offenders to talk about the hurt caused; reparation focuses on "repairing the harm that has been done rather than doling out punishment"; reintegration "depends on the achievement of a mutual respect for and mutual commitment to one another"; and participation "presupposes a less formal encounter between the parties that allows other people close to them to participate". More recently this theoretical basis for restorative justice was used by one of the *amicus curiae* in its

*Elizabeth Municipality*,<sup>23</sup> although Sachs didn't specifically refer to the concept of restorative justice he nonetheless promoted some of the key elements he later identified in the *Dikoko* judgment, thereby confirming the centrality of these elements to the notion of restorative justice.<sup>24</sup>

Returning to the notion of *ubuntu*, the Child Justice Act provides a significant legislative statement of the concept. Firstly, insofar as the Child Justice Act is concerned, section 2(b) quoted above clearly demonstrates that the notion of *ubuntu* was not introduced in a vacuum, as the sub-sections of section 2(e) are in fact an explanation of what the legislature means by the word in the context of the child justice system. To extrapolate, the "theory of *ubuntu*" that underlies section 2(b) is characterised, first, by an understanding of the rootedness of child offenders in their families and communities (the expressions *umuntu*, *ngumuntu*, *ngabantu* are apposite). Any resolution to the matter or outcome of the offence must therefore take the child's family and community context into account. Individualised approaches to offending (another well-worn mantra in child justice advocacy) are not *incorrect*, as long as such individualised approaches are characterised by their "whole person" model of understanding of the individual (in social science theory described as the micro- and meso levels of social development).<sup>25</sup> Another way of looking at this issue relates to the communitarianism which is said to differentiate *ubuntu* and African philosophy from Western thought. Sections 2(b)(ii) and (iii) are probably indicative of this dimension. It is apparent, more clearly, in section 2(b)(iv), which reinforces the notion that one's personhood depends on one's relationship with others.

Secondly, the underlying theory encapsulated in section 2 seems to postulate that criminal justice processes and procedures adopted must be oriented towards values that are by definition held to be characteristic of *ubuntu*. These are easily identified in the section where it is stated that *ubuntu* requires the fostering of a child's sense of

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submissions to the Constitutional Court in the matter of *Le Roux and others v Dey and others* CCT 45/2010 in the context of a civil claim of damages against children.

<sup>23</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

<sup>24</sup> Skelton A "Face to face: Sachs on restorative justice" 2010(25) *SA Public Law* 94.

<sup>25</sup> See, for instance, Bronfenbrenner U *The Ecology of Human Development: Experiments by Nature and Design* (Harvard University Press USA 1979).

dignity and worth, and reinforcement of the child's respect for the human rights and fundamental freedoms of others. This broad injunction clearly covers more than merely the end result of a criminal process (eg sanction or sentence) but spans the entire gamut of dealings with the child in the justice system, i.e. from the first contact (or arrest) throughout the procedure.

Thirdly, the Child's Justice Act's *ubuntu* theory steers away from the revenge, banishment, exclusion or retaliation/expiation tradition of criminal procedure under African law which Mutwa, quoted by Keevy, describes as notable characteristics.<sup>26</sup> Crucially the version propagated in the Child Justice Act accords with the well known dimensions of reconciliation and restorative justice, both of which are referred to directly among the objects of *ubuntu* in section 2(b)(iii). Restoration of the equilibrium as a goal is also evident in the wording of section 2(b)(ii) insofar as it refers to safeguarding the interest of victims, and section 2(b)(iv), which highlights the interests of the community affected by the crime (our emphasis). Neither reconciliation nor restorative justice harmonise well with an approach that proceeds from the premise that a child can get away with a crime or simply undertake a minor or insignificant penance ("just say sorry"). Fundamentally, both involve a deep level of personal accountability in restoring the status quo:

as an outcast the offender loses not only his status in the community but also his ability to participate in communal activities until his offence is purged and his status restored.<sup>27</sup>

It is therefore a form of justice which is frequently credited as requiring more of the transgressor than conventional Western justice models, which offer many avenues for watering down or mitigating the acceptance of personal responsibility (plea bargains or the downgrading of charges, agreed sentences, including fully suspended sentences on non-onerous conditions). It is also a form of justice that the Constitutional Court has endorsed for these reasons, as seen most recently in the case of *M v S (Centre for Child Law Amicus Curiae)*<sup>28</sup> where Sachs J discusses correctional supervision as a sentence that allows for restorative justice: "Central to

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<sup>26</sup> Keevy (n 18) 19.

<sup>27</sup> Keevy (n 18) 29.

<sup>28</sup> 2007 (12) BCLR 1312 (CC).

the notion of restorative justice is the recognition of the community rather than the criminal justice agencies as the prime site of crime control".<sup>29</sup>

Fourthly, it is argued that the *ubuntu* of the Child Justice Act leaves out (or glosses over) some important dimensions of *ubuntu*, thereby also shaping the theoretical framework in which it is to be understood and interpreted in terms of this Act. Two notable issues can be cited. First, a reference to the dimension of collective shaming, which is arguably important to the context within which *ubuntu* can be said to have been furthered, is missing. Subjective shame, along with compensation to the victim, are frequent actors on the *ubuntu* stage, because of the capacity they hold to achieve (or regain) the necessary equilibrium at community level, which balance has been disturbed by the commission of the offence.

Collective shame serves as an effective deterrent for potential offenders as it does not only affect the offender but also shames his peer group and family who have to take collective responsibility for him.<sup>30</sup>

It could be countered that the mere reference to the involvement of the affected community (section 2(b)(iv)) gives a clue that shaming is intended; but this is not expressly mentioned nor is it a necessary consequence of the involvement of others in the child justice system's envisaged processes.<sup>31</sup>

Secondly, allied to this is the absence of a public<sup>32</sup> facet to the stated conception of *ubuntu*. Obviously there are good reasons for this. The child's right to privacy under standard international human (child) rights law overrides the interests of the community and South African society in a public acceptance of accountability.

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<sup>29</sup> At para 62. For a thorough discussion of the case see Skelton A "Severing the Umbilical Cord: A subtle jurisprudential shift regarding children and their primary caregivers" 2008 *Constitutional Court Review*.

<sup>30</sup> Keevy (n 18) 29-30.

<sup>31</sup> Maxwell G and Morris A "What is the place of Shame in Restorative Justice", in Zehr H and Toews B (eds) *Critical Issues in Restorative Justice* (Criminal Justice Press and Willan Publishing Monsey 2004), deny that shaming is an essential part of restorative justice. Skelton (2006) (n 3 above) 109, concurs with this view, stating that the concept of "encounter" during which the offender faces his or her victim in the presence of significant others suffices to achieve the objectives of ensuring that the offender is forced to confront his or her wrongdoing.

<sup>32</sup> An acknowledged strength of the South African TRC process (widely heralded as a best practice example of restorative justice) was its public dimension, allowing society at large to experience either first hand or otherwise the confessions of perpetrators of condemned acts and at the same time enabling them to expiate publically their sins.

However, the point is thereby reinforced that the Child Justice Act contains within its provisions a particular view of *ubuntu*, namely one without an overtly (or expressively) public face.

### **2.3 Guiding principles**

Turning from the objects section, the final source for claims to Africanisation that will be adduced here are contained in the section dealing with guiding principles, section 3. Section 3 contains nine principles, ranging from the requirement of proportionality to the requirement of child and family participation in proceedings under the Act.

The "Africanisation" argument is based, first, on section 3(e) which provides that every child should be treated in a manner which takes into account his or her cultural values and beliefs. Other principles are clearly relevant to our context: ensuring that children lacking family support or educational or employment opportunities have equal access to services (section 3(h)); the participation of parents guardians and appropriate adults (defined as any member of a child's family or a child's care-giver) (section 3(g)); the requirement that unreasonable delay (endemic in African criminal justice systems) be avoided (section 3(f)); and the reference to children's obligations, reflecting article 31 of the African Children's Charter (section 3(i)).<sup>33</sup>

It remains, then, to consider the extent which the substantive provisions of the Child Justice Act develop an *ubuntu* approach, in the endeavour to plumb the merits of referring to *ubuntu* as an object of the Act.

### **3. Diversion and restorative sentencing in the Child Justice Act**

Fulfilment of the promise to provide legislatively for diversion, first made in the Issue Paper on Juvenile Justice in 1997, has taken place. Chapter 8 of the Act contains an elaborate chapter on the topic, entrenching mechanisms for the referral of cases away from criminal courts and the known ills of the accoutrements thereof (detention in police cells, contamination of child offenders through contact with more hardened

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<sup>33</sup> The inclusion of children's duties is a unique feature of the African Children's Charter, not found in supranational human rights treaties such as the UNCRC. See too section 16 of the Children's Act 38 of 2005.

adult criminals, undifferentiated sentencing regimes which pay little heed to youth development, over-emphasis on incarceration, etc).<sup>34</sup>

### 3.1 Diversion

The nature, scope, merits, risks and challenge relative to diversion - channelling children away from court-based processes to programmes and developmental measures – have been well described in both academic work, policy documents and lay sources such as the websites of service providers for example NICRO and KHULISA.<sup>35</sup> The history of diversionary service provisioning is one that is still taking shape,<sup>36</sup> and most recent developments include the publication of a national policy framework for the accreditation of diversion service providers<sup>37</sup> which will guide the registration and monitoring of social work and related services to children diverted from the criminal justice system via this Act, and a number of other documents.<sup>38</sup>

The Act itself provides an independent set of objectives to guide the application of diversion. These cover territory that is by now fairly well worn, including promoting reconciliation, encouraging the child to be accountable for the offence, redressing the harm caused, providing an opportunity for victim participation and compensation, preventing stigmatisation of the child and promoting the child's dignity and wellbeing and the development of his or her feeling of self-worth and ability to contribute to society (section 51(a)–(k)). As is the case with the sentencing objectives discussed below, *ubuntu* is not expressly mentioned.

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<sup>34</sup> Sloth-Nielsen (n 3) chapter 5, describes these negative aspects of conventional criminal justice systems for children.

<sup>35</sup> For a summary of relevant literature see Gallinetti (2008) (n 3 above) chapter 6, which includes literature on restorative justice such as Maepa T(ed) *Beyond Retribution, Prospects for Restorative Justice in South Africa: Monograph 111* (Institute for Security Studies 2005) and Steyn F *Review of South African Innovations in Diversion and Reintegration of Youth at Risk* (Open Society Foundation for South Africa 2005).

<sup>36</sup> See Sloth-Nielsen J "A short history of time" in Gallinetti J *et al Child Justice: Children's Rights under Construction* (The Child Justice Alliance and the Open Society Foundation for South Africa Cape Town 2006).

<sup>37</sup> Department of Social Development, 2010.

<sup>38</sup> Practice Guidelines for the Child Justice Act, also issued by the Department of Social Development (2009), the National Policy Framework on the Child Justice Act developed by the Department of Justice and Constitutional Development (May 2010) and National Prosecuting Authority diversion directives developed under section 97(4)(a)(i) (March 2010) elaborate the Act's scheme in abundant (paper) detail.

The real novelty in relation to substantive law is the diversion options, provided for in two levels in section 52.<sup>39</sup> The first area for mention is the group of six new diversion orders, elaborated by means of a series of definitions. Without stretching a point, elements of *ubuntu* can be discerned in some of these orders. For instance, a family time order (an order issued requiring the child to spend a specified number of hours with his or her family) takes *umuntu, ngumuntu, ngabantu* to a new level. Similarly, a good behaviour order, requiring a child to abide by an agreement made between the child and his or her family to comply with certain standards of behaviour would accord well with African values, which recognise the respect of elders and the centrality of the cohesion of the family in African custom and social norms. Even a positive peer association order - requiring a child to associate with persons or peers who can contribute to the child's positive behaviour or to refrain from associating with certain specified persons or peers - is reminiscent of the benign guidance of elders and kin in the extended family, in which communality and interdependence are embedded.

Then in what is the longest substantive provision in the Act, section 53 names these and an array of further avenues available for consideration. Thus the possibility of an oral or written apology (section 53(3)(a)), symbolic restitution to a specified person(s), group of persons or community, charity or welfare organisation or institution (section 53(3)(i)), restitution of a specified object to a specified victim(s), where the object concerned can be returned or restored (section 53(3)(m)), provision of some service or benefit by the child to a specified victim(s) or community service (sections 53(3)(n) and (o)), together with the new diversion "orders" establish a smorgasbord of tantalising possibilities to tailor a "sanction" to suit the circumstances.

Adding to this menu, the level two options which are available for children charged with more serious offences include all of those listed above, as well as more onerous

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<sup>39</sup> The idea of dividing the diversion options into different levels originated in the SALRC draft of the Bill. The three levels signified diversion responses differing in proportion in relation to the seriousness of the offence, and depending on whether or not the child had previously been a beneficiary of diversion. Each level of options is linked to the Schedules listing the applicable offences. During the parliamentary process, the number of levels was reduced from three to two in an effort to simplify the system.

choices for the discerning magistrate: compulsory attendance at a vocational, educational or therapeutic centre (section 53(4)(b)), referral to intensive therapy to treat or manage problems that have caused the offending behaviour (section 53(4)(c)), and placement under the supervision of a probation officer on specific conditions. These certainly do not reflect anything particularly "African", especially as they clearly contemplate residential confinement, which is incommensurable with an African tradition that eschews detention and institutionalisation.<sup>40</sup> However, these options were intended to be reserved for the more serious offences (see section 54 entitled "selection of diversion option", which spells out the framework guiding the use of level two diversion options). A brief discussion of the debates which led to these (arguably) more intrusive diversion options and a more stringent diversion regime overall is provided in section 3 below.

The Act returns to restorative justice terminology in section 55, which is premised on the recognition that individual diversion options, programmes, measures and conditions may take on any hue. Hence, for reasons of maximising consistency, constitutional compliance, developmentally appropriate interventions and so forth, a series of "minimum standards" for diversion is mandated. These include that the diversion programmes must "include a restorative justice element which aims at healing relationships, including the relationship with the victim" (section 55(2)(b)), that they must include an element which seeks to ensure that the child understands the impact of his or her behaviour on others, including the victim(s) of the offence (section 55(2)(c)), and must "involve parents, appropriate adults, or guardians, if applicable" (section 55(2)(h)).<sup>41</sup>

Our assessment is that the substantive provisions on diversion are a true embodiment of restorative principles, and that they indeed give effect to the African values espoused in the Preamble and objectives to the Act. Hence, we suggest that the claim that the Act is restorative in approach is indeed borne out, if regard be had to the abovementioned provisions.

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<sup>40</sup> See for instance Pete S "A brief history of human rights in the prisons of Africa" in Sarkin J (ed) *Human Rights in African Prisons* (HSRC Press Cape Town, 2008) where it is pointed out that penal incarceration as we know it today was largely unknown in pre-colonial Africa.

<sup>41</sup> These minimum standards are additional to the accreditation standards mandated by section 56 of the Act.

It remains to be seen, though, if the same can be said of the sentencing provisions of the Act. It is to this analysis that the paper now turns.

### 3.2 Sentencing

The sentencing chapter, as with the Act as a whole and diversion in particular, has a specific section that sets out the objectives of sentencing under the Act. Section 69(1)(e) reaffirms that imprisonment is a measure of last resort and should be imposed only for the shortest appropriate period of time, while the rest of section 69(1) emphasises an individualised response for the child, a balancing of interests between the child and society, and the need for reintegration of the child into the community. Importantly, section 69(1) reinforces the need for children to be "held accountable and understand the implications of the harm caused" – a basic tenet of restorative justice theory. That restorative justice is a crucial consideration in sentencing, too, is underscored by section 69(2), which specifically encourages a restorative justice approach. *Ubuntu* again does not feature in this section *eo nomine*.

The question here is if the restorative sentencing regime is therefore abstracted from the Africanised introduction to the Act. Our response to this is in the negative, based on the clear elaboration of the underlying principles which seem to be common both to restorative justice and to the philosophy of *ubuntu*: accountability for the harm caused; balancing the circumstances of the child with the interests of society; promoting family reintegration; and ensuring that the supervision, guidance and services provided to the child as part of a sentence assist with reintegration (section 69(1)(a) –(e)).

Significantly, for the first time in South African legislative history, the Act - in section 70 - provides a means whereby the impact of the offence on the victim may be placed before the sentencing court by means of a victim impact statement. This inclusion was deliberated on in Parliament, and the Portfolio Committee on Justice and Constitutional Development envisaged the section as a clear endorsement of restorative justice and the need to afford victims a more prominent status in the criminal justice system. The important relationship between restorative justice and

the interest of victims was emphasised in the *Dikoko* case (albeit in the context of a civil claim for damages), where Sachs J talks of vindication.<sup>42</sup> Writing on the case, Skelton elaborates:

What victims most often seek through a justice process is vindication. This is an instinctive emotional response in human beings, and is often misunderstood as a need for vengeance. In a successful restorative justice process many victims experience a validation of their traumatic experience, and this often commences or advances their healing.<sup>43</sup>

However, the section may well prove to be less promising in practice than the theory would suggest. Firstly, the use of victim impact statements is discretionary, thereby somewhat undermining the intended purpose of their inclusion in the Act. Secondly, the use of victim impact statements is possible only in cases involving children. This in turn raises the spectre of a challenge based on the fact that, guiding principle 3(b) notwithstanding,<sup>44</sup> this part of the sentencing regime in the Act provides an essentially more punitive system for children than the criminal procedure prevailing for adult offenders.

Whereas the guiding principles for sentencing do not specifically refer to *ubuntu*, as already pointed out, the actual sentencing options detailed in the Act must also be reviewed. In so far as section 72 (1) provides that any of the diversion options can be used as sentencing options, so-called "community based sentences" therefore are aligned with the ideals common to both restorative justice and *ubuntu*, as argued above relative to diversion. But this alone is not indicative that sentencing under the Act is reflective of a truly restorative approach.

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<sup>42</sup> At paras 109–112.

<sup>43</sup> Skelton (note 26).

<sup>44</sup> Section 3(b) provides that a child must not be treated more severely than an adult would have been treated in the same circumstances. Whilst this paper does not detail all of the strains of restorative justice theories that abound, it must be noted that a strongly punitive victim's lobby forms one subset of the proponents of a more restorative justice system: see Skelton (2006) (n 3 above) 431. The possibility of strongly punishment-oriented and victim-influenced sentencing decisions for children is therefore not remote.

Section 73 is vital to our argument in this regard. Entitled "restorative justice sentences", it provides for referral to a family group conference, to victim offender mediation and to "any other restorative justice process". The detail as to how this might occur is set out earlier in the Act, insofar as these mechanisms may also be used as diversion options. The difference when they are utilised in the sentencing process relates to how the outcomes may affect the sentence imposed. Where used as a sentencing aid, the plans formulated at a family group conference, or agreed to at a victim offender mediation may be confirmed, amended or replaced by a court (section 73(2)). Section 73(3) emphasises that a court may impose any other sentence, provided that the reasons for replacing the plan of the family group conference (or similar process) with that sentence are recorded.

Some will flag this section as embodying the essence of a restorative approach as promised originally in the Preamble and objectives, especially given the title of the section. In addition, the flexibility of the option, providing for the possibility that the sentencing outcomes can be set by a collective dialogue involving the victim, the victim's family, the community and the offender, illustrates a communitarian approach that is clearly indicative of the notion of *ubuntu*.

However, it could also be argued that the section offends against sentencing practice in that it creates a mechanism for divesting the sentencing officer of the immediate need to formulate a sentence, displacing the "development of a plan" to another setting. Even if the restorative dimensions are successfully achieved there (remotely as it were) – i.e. the acceptance of accountability, readiness to make good the harm caused, involvement of the victim and his or her interests in the identification of reintegrative measures – the sentencing officer is free to accept or reject whatever comes to the table in the form of a plan. Moreover, the sentencing officer is not expected to play a role in the family group conference or mediation itself, as the responsibility for convening the event(s) is "outsourced" to non-governmental organisations or to probation officers. Hence, if any *ubuntu* or restorative outcome does in fact occur, this will take place well outside the courtroom, far from the purview of the criminal justice system, and beyond any means of control of the usual actors (magistrates and prosecutors). The role of the court in providing oversight is

admittedly procedurally provided for; but then the scheme of the Act makes it clear that the court is still free to decide whether or not to refer such a matter at all and, upon receipt of the recommendations, whether to abide by them or not.

Is this then a restorative justice response? Ultimately the answer is yes, but what the legislation provides is an alternative methodology for arriving at the sentencing disposition, which may be debated in future. And if the process of sentencing envisaged in this alternative methodology is called into question, such doubt may impact on whether the sentence can be regarded as having truly produced restoration or promoted *ubuntu*.

#### **4. "Just say sorry"?**

Is the Act, then, too lenient on account of its endorsement of a restorative justice approach and overall objective of fostering a sense of *ubuntu*? That the Act would be perceived in this way was one of the reasons that the Child Justice Alliance was formed in 2001, to ensure an accurate understanding of the nature and purpose of the legislation. While the anticipated outcry about the proposed legislation did not materialise, the passage of the Child Justice Bill through parliament was not easy, precisely on account of the Portfolio Committee Chairman De Lange's concern that diversion for certain children charged with serious offences was not appropriate. Instead of considering diversion in the context of the relevant legal principles and its positioning within the entire scheme of the legislation, the Committee Chairman expressed dismay at the fact that the existing diversion programmes were inappropriate (in content and duration) for certain children charged with rape and murder for instance.<sup>45</sup> Subsequent changes were made to the Bill and these have ultimately had a significant effect on the final version of the Act and have assisted, to an extent, in providing a response to the charge that the legislation is too lenient.

In finalising the Act, the Portfolio Committee on Justice and Constitutional Development accepted that all children would have access to and be eligible for diversion. However, the original concerns about diversion being available for certain

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<sup>45</sup> One of the authors was present at all of the parliamentary hearings on the Child Justice Bill both in 2003 and 2008 and has personal notes on the deliberations and decisions made in the Portfolio Committee.

children charged with very serious offences had an impact on the way in which the provisions on diversion were ultimately fashioned, in particular on the manner in which diversion is to be considered and effected. A number of pre-conditions have to be met In order for a child to qualify for diversion, such as acknowledgement of accountability, consent to diversion by the child, and the existence of a *prima facie* case against the child (section 52(1)). In addition, the prosecution must consider the views of the victim and consult with the investigating officer before deciding on whether to divert or not (section 52(2). For children charged with schedule 3 offences – the most serious - only the Deputy Director of Public Prosecutions in a province may decide to divert (a non-delegable power) and only if there are exceptional circumstances: the victim must have been afforded an opportunity to express a view on whether the matter should be diverted or not and on the proposed diversion option; and the investigating officer must have been consulted (section 52(3)). Finally, the Act introduced maximum timeframes for all diversion orders (up to 4 years in duration) (section 53 (5) and (6)); diversion orders must be monitored for compliance (section 57); and there are extensive provisions for the accreditation of diversion service providers and programmes (sections 56 and 97) – quite apart from the substantive minimum norms and standards developed for diversion programmes. The overall effect of the changes to the original Bill is that diversion is now tightly regulated by the provisions of the Act. While all children are eligible to be considered for diversion, whether they will be diverted or not is dependent on a range of quite stringent conditions being met. Furthermore, if children charged with serious offences are diverted, the diversion options available for selection, the time frames for which orders may be imposed, and ensuring compliance therewith are all far more burdensome than originally conceived by the South African Law Reform Commission and contained in the Bill introduced to Parliament in 2002.

This "new" system of diversion has been subject to some criticism.<sup>46</sup> However, it can also be said that Parliament saw the need for diversion (and restorative justice as a whole) to be a credible system, one which would be acceptable to the South African public given the constant calls for government to be more vigilant and pro-active in

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<sup>46</sup> See for instance Skelton A and Gallinetti J "A Long and Winding Road: The Child Justice Bill, Civil Society and Advocacy 2008 *SA Crime Quarterly* 3-9.

combating crime. The concerns of the Parliamentarians cannot be discounted given the visceral reaction of the public against children who commit serious offences, as has been seen for instance in the Baby Jordan murder case, the Eugene Terreblance murder case, and the case of the 12-year-old Kwa-Zulu Natal girl who commissioned the murder of her grandmother.<sup>47</sup> The reworking of the legislation into its present form has arguably resulted from the legislature's desire for the Act not to be seen to be too lenient – an attempt to be true to the principles and objectives of the Act, while ensuring that children are held appropriately accountable for their actions.

### **5. The Child Justice Act as an Africanised statute?**

In the *Port Elizabeth Municipality* case Justice Sachs remarks on the role of the courts in giving effect to *ubuntu* in the context of evictions:

The inherited injustices at the macro level will inevitably make it difficult for the courts to ensure immediate present day equity at the micro level. The judiciary cannot of itself correct all the systemic unfairness to be found in our society. Yet it can at least soften and minimise the degree of injustice and inequity...<sup>48</sup>

Previously he had referred to the need (albeit in the context of the Prevention of Illegal Evictions Act) for the court to infuse elements of "grace and compassion" into the formal structures of the law. He suggests that courts are

called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern.... the spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational

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<sup>47</sup> *DPP Kwa-Zulu Natal v P* 2006(1) SACR 243 (SCA).

<sup>48</sup> At para 38.

declaration in our evolving new society of the need for human interdependence, respect and concern.<sup>49</sup>

Strands of these lines of reasoning are no less applicable in the child justice sphere as well. Firstly, in the context of an apartheid history in which the majority of child offenders - the largest number of whom were Black - were treated as criminals in an unforgiving and punitive justice system, as referred to in the Preamble to the Child Justice Act, one finds analogies to the inequities of housing distribution wrought by South Africa's divided past.

Secondly, this sphere of judicial concern is no less concerned with the balancing of competing interests, those of the victim and of society. Society cannot let misdeeds go unnoticed, while the child offender requires the development and application of responsive and useful measures aimed at ensuring future maturation into law abiding adulthood. It goes without saying that child offenders are frequently drawn from the most vulnerable and marginalised groups. They are the children of broken families, they live in gang-infested neighbourhoods, they are without satisfactory adult role models, they themselves have been victimised from early in life, they often have proven psychological and psychiatric deficits, low achievement rates at school and so forth.<sup>50</sup> Justice Sachs' references to a (legal) system which "softens and minimises... injustice and inequity" are rather apposite in this regard as well.

Indeed, the context within which children face criminal charges in South Africa has already been eloquently articulated in constitutional jurisprudence:

The Constitution draws this sharp distinction between children and adults not out of sentimental considerations but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer and their ability to make choices generally more constricted than those of adults.

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<sup>49</sup> *Port Elizabeth Municipality*, para 37.

<sup>50</sup> South Africa is not in any way unique in regard to offender profiles. For research done on reintegration in South Africa see for instance Muntingh L *A Societal Responsibility: The Role of Civil Society Organisations in Prisoner Support, Rehabilitation and Reintegration* (Civil Society Prison Reform Initiative and Institute for Security Studies Pretoria 2009) and Muntingh L *Ex-prisoners' Views in Imprisonment and Re-Entry* (Civil Society Prison Reform Initiative and Community Law Centre Cape Town 2010).

They are less able to protect themselves, more needful of protection and less resourceful in self-maintenance than adults. These considerations take acute effect when society imposes criminal responsibility and passes sentence on child offenders.<sup>51</sup>

Thirdly, in relation to neighbourliness and shared concern (the essence of a communitarian philosophy) as highlighted by Justice Sachs, the object, principles, and substantive provisions of the Child Justice Act elaborate these adequately to lay the basis for the assertion that these, too, provide the context of an *ubuntu*-oriented child justice system. The role of families and the community of concern to the child is consistently well articulated in the Act, for instance via the novel diversion orders we have described.

But the excerpts quoted do in fact shape, perhaps obliquely, the primary concern of our analysis in this section, namely the application of the Act at an operational level. The high profile cases usually associated with juvenile justice, and which tend to dominate media attention – the baby Jordan Case, the Eugene Terreblanche case, and *DPP v P*, etc – constitute a miniscule proportion of the overall number of cases which will be dealt with in accordance with the precepts of the new Act. Further, a representative sample they are not, being skewed towards the most serious and attention-grabbing crimes. The vast bulk of children will be appearing in lower courts, charged with far more mundane infractions.<sup>52</sup> Thus the real impact of the restorative justice and *ubuntu* orientation of the Child Justice Act will emerge only from the day-to-day practice of practitioners in the system, largely in the lower courts.

In a presentation to magistrates in 1999, one of the authors referred to the need for engagement, indeed for criminal justice personnel to "bust a gut" to put flesh on the bones of the provisions, such as those we have outlined. This was, it was averred,

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<sup>51</sup> *Centre for Child Law v Minister of Justice*, par 26 and 27.

<sup>52</sup> It is to be noted that there is no clear benchmark of how many children are expected to be channelled through child justice processes annually. Various guesstimates have been proffered, the most well known being around 100 000 children arrested per annum. These figures were presented at the Parliamentary hearings. The baseline study of the Child Justice Alliance (2007) gives an indication of the very wide range of non-serious or ordinary offences for which children appear in courts on a day to day basis. See Gallinetti J and Kassan D *Research on the criminal justice system pertaining to children in three magisterial districts* (Child Justice Alliance Cape Town 2007).

the underlying approach to judicial decision-making desired by the SALRC drafters. Operationalising the innovative diversion options discussed in section 2 above, and implementing on a routine basis restorative justice options such as referral to family group conferencing and victim/offender mediation, not to mention devising inspirational alternatives to the usually crude sentencing menu, are not going to be easy. For this actually to happen, both the substantive and procedural dimensions of the restorative design are going to require presiding officers (and to some extent prosecutors and probation officers) to be imaginative and thorough. They will have to delve deep into the individual child's (and family's and community's) circumstances and explore behavioural change-oriented dispositions, whilst at the same time satisfying the communitarian and victim-centred goals of the *ubuntu* ideal. This represents an extended role for justice officials, going beyond the ordinary application of the black letter of the law, as was the case when the Criminal Procedure Act 51 of 1977 was applicable to child offenders. It may take considerable effort for these officials to come to term with the 'new approach' contained in the Child Justice Act.

However, it is the need for officials to think beyond the black letter of the law that we believe is required for the Act to become a meaningful embodiment of an Africanised approach to criminal offending by children: otherwise, the risk exists that diversion and alternative sentencing will come to be seen only as a way for both children and criminal justice officials to profit from the non-punitive dimensions of the law,<sup>53</sup> without at the same time ensuring that the internalisation of accountability and accompanying reintegrative ideals are realised. Therefore it is our assertion that the legislature has created an Africanised statute, based on the prominence given to restorative justice and *ubuntu*, but that for it to truly benefit the offender and the victim and community, the criminal justice system will have to embrace and operationalise this legislative intent.

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<sup>53</sup> For an early account of how the child justice system might benefit court management by becoming an automatic convenience for the easy processing of cases through diverting them out of the system, see Sloth-Nielsen J, "The Business of Child Justice" in Burchell J and Erasmus A (eds), *Criminal Justice in a New Society*, Juta and Co. Ltd: Lansdowne, 2003.

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