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A comparative analysis of models of child justice and South Africa's unique contribution

Summary

This article considers the models of child justice currently applied in various jurisdictions, either in isolation, or in combination with others. It provides a brief theoretical framework for the premise upon which various systems of child justice operate. Models of child justice influence how the child offender is processed through the criminal trial system and the degree to which the offender's conduct may be punished. The author posits that South African child justice, espoused by the *Child Justice Act 75 of 2008*, has potentially created, or inadvertently resulted in the creation of two further models of child justice. For this reason, the article submits that the *Child Justice Act* is *sui generis* in the sense that it incorporates indigenous African traditional justice processes. As such, it has the potential to extend protection for children who are in conflict with the law.

1. Introduction

This article interrogates different models of child justice from a comparative perspective and thus provides a concise theoretical framework for the premise upon which various systems of child justice operate. Models of child justice influence how the child offender is processed through the criminal trial system and the degree to which the offender's conduct may be punished. The author provides insights on how, until the promulgation of the *Child Justice Act 75 of 2008* (hereafter "the *CJA*"), some of these models continued to permeate South African criminal justice, particularly the child justice system, despite the impact of the *Constitution of the Republic of South Africa, 1996* (hereafter "the *Constitution*") and international law. Accordingly, the article presents a critical analysis of contemporary South African child justice – as founded on constitutional imperatives and international conventions – that have culminated in the enactment of the *CJA*.

The *CJA* has introduced a non-punitive model premised on African notions of justice that embrace restorative approaches and principles of *Ubuntu*¹ in the criminal justice process. Thus, the author argues that the *CJA* is *sui generis* by potentially creating, or inadvertently resulting in the creation of two further models of child justice anchored on African traditional justice systems that are likely to extend protection for children who are in conflict with the law.

The ushering in of a new democratic order in South Africa in 1994 had far-reaching implications, not only for South Africans, in general, but also for the legal system. The most significant change in the South African legal system was the adoption of the *Constitution*, which marked a turning point in South Africa's history. This was so particularly, for the purposes of this article, with regard to the rights and entitlements of children. In this regard, the constitutionalisation of children's rights was entrenched by sec. 28 of the *Bill of Rights*,² soon followed by the implementation of a comprehensive legal framework for children's rights. However, it is important to note that all laws or legislation relating to children's rights or entitlements have to be in line with the *Constitution* and must reflect its values and ethos. Moreover, children have been placed at the centre of South Africa's constitutional democracy through the introduction of comprehensive and streamlined legislation dealing with children.³

2. Children's rights in South Africa

2.1 The Convention on the Rights of the Child

South Africa's commitment to changing the lives of children began in earnest when it ratified international instruments relating to children.⁴ In June 1995, South Africa ratified the United Nations Convention on the Rights of the Child (hereafter "the CRC"). The CRC became a powerful yet peaceful agent of social change in South Africa in so far as the rights and entitlements of children are concerned.

The CRC is anchored on four important pillars. The first of these is the right of the child not to be discriminated against, which right includes protections

1 This concept is fully explained in section 6 below.

2 As contained in Chapter 2 of the *Constitution*.

3 Legislation on the protection of children includes the *Children's Act* 38/2005 (which replaced the *Child Care Act* 74/1983), the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32/2007 and the *Child Justice Act* 75/2008.

4 It should be noted though that the history of the development of children's rights in South Africa began long before its ratification of the CRC and the African Charter on the Rights and Welfare of the Child (hereafter "the ACRWC"). In fact, South Africa, then known as "The Union of South Africa", endorsed the 1924 Declaration of the Rights of the Child, which effectively recognised children's fundamental political, social, economic and social rights.

against all forms of harm, exploitation and abuse.⁵ The child's best interests are also affirmed,⁶ a principle that permeates the entire convention and requires that the views of children be taken into consideration. The CRC's right to freedom of expression includes the right to seek, impart and receive information including ideas that may affect the child's well-being.⁷ This right, including the right of children to participate in decisions that affect their rights and the right to be heard,⁸ are important for the purposes of this contribution. For instance, a child's right to be heard is crucial in instances where a child is a victim of a crime or is in conflict with the law. Although children need to possess a certain level of maturity to be able to evoke this provision, it is nevertheless important to note that the CRC acknowledges children's capabilities to form their own opinions and to participate in decisions that may affect their lives. This principle finds expression in some South African laws relating to children.⁹

2.2 The African Charter on the Rights and Welfare of the Child

The transformation of children's rights in South Africa was further boosted when South Africa ratified the African Charter on the Rights and Welfare of the Child (hereafter referred to as "the ACRWC") on 7 January 2000. The ACRWC was adopted by members of the Organisation of African Union in 1990, but only came into force in 1999.¹⁰ The African Union replaced the Organisation of African Union and its member states ensured the implementation of the ACRWC on the African continent. The ACRWC was uniquely drafted to cater for the needs and challenges of African children and it affirms both their rights and responsibilities. The ACRWC prioritises children's lives in Africa by recognising that African children are most vulnerable to human rights abuses.¹¹

The ACRWC espouses three principles, and two of these, the non-discrimination principle¹² and the best interests of the child principle, are

5 Schäfer 2011:90.

6 See UNCRC 1989:art. 3, the best interests of the child principle is contained in ACRWC 1999:art. 4.

7 See UNCRC 1989:art 12 (right to express one's views) and Art 13 (right to freedom of expression and the right to information).

8 UNCRC 1989:art. 12 grants a child the right to express his/her opinion freely and to have that opinion taken into consideration in any matter or procedure affecting the child.

9 See, for example, the *Children's Act* 38/2005:sec. 10.

10 For example, UNCRC1989:art. 3 provides that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration". The South African *Constitution* contains a similar provision: sec. 28(1)(2) confirms that "[a] child's best interests are of paramount importance in every matter concerning the child".

11 Some of the unique challenges identified by the ACRWC include the need to protect girl children from early marriages, child trafficking, child labour and the need to protect children in armed conflict.

12 See ACRWC 1999:art. 4.

similar to those contained in the CRC, with the slight difference that the best interests of the child principle in the ACRWC is articulated in stronger terms. In this regard, the ACRWC states that, in all matters concerning the child, whether undertaken by private or public institutions, the best interests of the child shall be the primary consideration. This principle is mirrored in sec. 28 of the South African *Constitution*.¹³

The ACRWC recognises the role that culture and tradition play in people's lives, including those of children, and how some traditions may affect children and their rights.¹⁴ The self-asserting rights of children under the ACRWC are similar to the participation rights contained in the CRC,¹⁵ which afford children an opportunity to be active participants in judicial proceedings and allow them to express their views on matters that affect them. The interpretation of the best interests principle in both documents is also similar.¹⁶

Participation rights are crucial where a child is a witness to a crime or is in conflict with the law. In this regard, a child's opinion may be sought during sentencing or at any stage during the proceedings where his/her rights or entitlements may be affected. The author is of the view that participation rights are central to the restorative justice model and to African concepts of justice. For instance, the communal rights principle in the ACRWC may be extended to include the child offender's obligation to ensure the safety of his/her community by being asked to provide some form of compensation or service to the victim or his/her family. Art. 12 of the CRC and the self-asserting rights principles of the ACRWC are of particular importance for the purposes of this article. These provide children with an opportunity to express their views freely and to have their opinions taken into account in any matter or procedure affecting them. These participatory rights are embodied in various statutes relating to children. For example, the *CJA* affords victims of serious crimes an opportunity to express their views on

13 See sec. 28(2) of the *Constitution*, as quoted in fn. 10.

14 Art. 12(1) of the CRC. See also ACRWC 1999:art. 11(c), that speaks about the preservation and strengthening of positive African morals, traditional values and cultures. Note, however, that art. 21 protects children from harmful social and cultural practices.

15 Art. 12(1) of the CRC. See also ACRWC 1999:art. 11(c), that speaks about the preservation and strengthening of positive African morals, traditional values and cultures. Note, however, that art. 21 protects children from harmful social and cultural practices.

16 Art. 12(1) of the CRC reads: "State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." According to art. 12(2), "[f]or this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law".

whether a matter before a trier of fact should be diverted or not and they may also express an opinion on the proposed option.¹⁷

The ratification of the above-mentioned conventions also marked the beginning of the development of comprehensive and streamlined laws dealing with the rights and entitlements of children in South Africa. For example, the *Children's Act*¹⁸ came into full operation in 2010. In its Preamble, the *Act* reinforces and reaffirms the rights of children as provided for in sec. 28 of the *Constitution*.¹⁹ The *Criminal Law (Sexual Offences and Related Matters) Amendment Act*²⁰ quickly followed and it affords complainants and victims of sexual abuse maximum protection when giving evidence.

Despite the introduction of these new laws relating to children, many children in conflict with the law did not sufficiently enjoy these changes, although their interests and rights are articulated in the *Constitution*.²¹ For instance, children in conflict with the law were put through a criminal justice system designed for adults, which did not involve their guardians and diversion programmes were used haphazardly.²² Thus, for example, they were exposed to the adversarial system where traditional sentencing options of deterrence, retribution, prevention and rehabilitation were applied. This system was influenced, to a large extent, by Packer's models of justice.²³

Resultantly, the *CJA* was promulgated on 1 April 2010 and it established a criminal justice system framework for children in conflict with the law and for children accused of committing offences. It affords these children a range of procedural and substantive protections in line with the *Constitution* and other international conventions on children that South Africa has ratified.

The part of this contribution that follows commences with an outline of Packer's models of justice as they inform various criminal justice models, including that of South Africa. These models, which are primarily adversarial in nature, have from time immemorial applied in cases involving children in conflict with the law. The inadequacies of these models are highlighted, and the author argues that the diversion and restorative frameworks

17 See discussion below and the *CJA* 75/2007:sec. 52(2); Sloth-Nielsen & Gallinetti 2011:63.

18 *Children's Act* 38/2005.

19 For example, sec. 2 of the *Children's Act* 38/2005 gives effect to the child's right to family care and parental care or appropriate alternative care when removed from the family environment; protection from maltreatment, neglect, abuse or degradation, and so on

20 *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32/2007.

21 For example, sec. 28(2) of the *Constitution* states that "a child's best interests are of paramount importance in every matter concerning the child". This provision extends to children who are in conflict with the law. Sec. 28(1)(g) states that children should only be detained in exceptional circumstances.

22 Badenhorst 2011:3.

23 Karels 2015:162.

introduced by the CJA extend the protection of children who are in conflict with the law. This has led to the transformation of child justice in South Africa, in line with the spirit of *Ubuntu* and reconciliation, and may contribute to a decline in the number of child offenders. The author argues that the introduction of these frameworks underscores the uniqueness of South Africa's juvenile justice system, and has marked, through the ideology and operation of its child justice system, the formation of two new models of child justice, which may be of some benefit for consideration in other jurisdictions.

3. Models of criminal justice

Models of criminal law are essential, because they seek to simplify the complex nature of the criminal justice system.²⁴ Criminal justice systems employ different types of models that exist side by side to account, albeit differently, for the various aspects of the criminal process. Roach²⁵ informs us that models have various functions. First, they are assessment tools; they provide an indication of the effectiveness or otherwise of the criminal justice system. Secondly, models also have normative undertones in that they give expression to values that ought to guide the criminal justice system. Lastly, they reflect the ideologies and discourses that surround the criminal justice process. The last two purposes of models are apparent in some provisions of the CJA.²⁶

Hazel is of the view that referring to "models" in child justice may be somewhat of a misnomer.²⁷ He prefers the term *ideal types* on the basis that existing models, much like the legal family classification, are not replicated exactly in every jurisdiction and because there is a blending of models in all jurisdictions. He states that no jurisdiction operates under a pure model, although some may lean more strongly towards one particular model.²⁸ The author submits that, although Hazel is correct in his argument with regard to replication and blending, there is very little difference between a model and an ideal type.²⁹ For this reason, the term 'model' is preferred, which is to be understood as including Hazel's reservations. Models do not influence policy or rule formation and are simply a reflection of the underlying ideology of a specific child justice system.³⁰ Models of child justice are unfixed and they change over time depending on the prevailing social structure and policy. The United States, for example, started as a

24 Roach 1999:671.

25 Roach 1999:671.

26 For example, the Preamble to the Act states: "Recognising – that before 1994, South Africa, as a country, had not given many of its children, particularly black children, the opportunity to live and act like children, and also that some children, as a result of circumstances in which they find themselves, have come into conflict with the law." See Mosikatsana 1998:341-393; Maguire 2012:68-72.

27 Hazel 2008:6.

28 Hazel 2008:6.

29 Karels 2015:88.

30 They are, therefore, the result of social policy and thus change over time.

welfare model, but has swung in recent years towards a punitive model of child justice.³¹

The two primary models of child justice, specifically where Packer's adversarial models are excluded,³² have formed the basis for the development of all other models. The two primary models are the "welfare model" and the "justice model of child justice". The welfare model is paternalistic and favours protection and intervention over punishment.³³ The justice model closely resembles Packer's due process model, and it imputes procedural formality and accountability for children in conflict with the law. The discussion below proceeds from the Packer models, simply because they underlie the justice model and influence some of the other models.

3.1 Packer's models of criminal justice

3.1.1 Crime control model

Packer's models of criminal justice, commonly known as the "crime control model" and the "due process model", have played an influential role in criminal justice and form the basis for many models of justice across the world.³⁴

Packer's crime control model of criminal justice is based on the pursuit of a single goal, to wit the repression of criminal activity.³⁵ This is an essential function of the criminal process, since it is the ultimate guarantee of society's freedom.³⁶ This model values swiftness and efficiency of process and as such is prone to extrajudicial proceedings, which are simply an administrative platform on which the essential facts are established, and the accused is given the opportunity to plead guilty or otherwise.³⁷ As mentioned, the underlying philosophy of this model is the repression of crime.³⁸ In order to ensure this, the police and prosecution "place a high premium on speed and finality"³⁹ of cases, and all interference with the administrative processes of the police and prosecution is kept to a minimum.⁴⁰

Karels⁴¹ suggests that, in the field of child justice, this model reflects in the practices of the United States, which follows a more punitive approach to child justice. She asserts that the distinction between the practices of the United States and South Africa in applying this model as a measure is that the United States is not always protective of the due process rights

31 Karels 2015:162.

32 The Packer models of criminal justice are discussed in section 3.1 below.

33 Hazel 2008:26.

34 Packer 1968:12.

35 Packer 1968:152.

36 Karels 2015:93.

37 Tulkens 1997:9.

38 Griffiths 1970:363.

39 Roach 1999:67.

40 Griffiths 1970:363.

41 Karels 2015:93.

of child offenders, even though both theoretically recognise these rights. The author concurs with Karels on this point,⁴² as this is evident in the approach to juvenile justice in the United States, which still harks back to the paternalistic doctrine of *parens patriae*.⁴³

The crime control model, as applied in its original form, has exhibited serious short-comings in light of modern forms of crime. Roach⁴⁴ observes that the model is premised on wrong assumptions, in that it assumes that criminal law could control crime. This assumption is erroneous, because it cannot explain complexities engendered by some crimes. Roach observes correctly that the model fails to take into account emerging theories and knowledge about crime victimisation and new approaches to victims of crime.⁴⁵ For example, victimisation studies reveal that victims of sexual offences do not report such crimes to police. In addition, Packer's theory is based on models akin to the adversarial systems, wherein the vast majority of crimes are considered against the state and the individual and where the state's response to crime is usually reactive.⁴⁶ It is also based on the assumption that police who investigate crime are well resourced, possess the requisite skills, and have sufficient time to bring crime investigations to conclusion. In this regard, the assumption undergirding this model was that efficient investigations by police and prosecutions could control crime.⁴⁷

3.1.2 The due process model

This model is grounded on confrontation between the accused and the state, and views criminal procedure as little more than an obstacle that must be navigated by both parties.⁴⁸ The proceedings are highly formalised and guilt is reliably proven only "where the facts are established according to fixed rules before a competent tribunal".⁴⁹ This model holds the presumption of innocence as the most highly regarded presumption and, therefore, excludes evidence at trial that was obtained in an unlawful manner. In addition, the power of the state must be kept in check and must be regarded with scepticism.⁵⁰ This model can be re-defined as the "fair trial model of criminal process", since it calls for strict controls on the judicial process and the extension of fair trial rights over the pursuit of the state's case.⁵¹ Thus, the due process model is concerned with fairness and equality of all accused, regardless of their background or status. Unfortunately, reality dictates otherwise, as many accused come

42 Karels 2015:93.

43 In the juvenile system, the doctrine of *parens patriae* allows the state to step in and serve as a guardian for children and other vulnerable persons who are unable to care for themselves.

44 Roach 1999:674.

45 Roach 1999:686-687.

46 Roach 1999:692.

47 Roach 1999:677.

48 Packer 1968:153

49 Tulkens 1997:10.

50 Karels 2015:93.

51 Karels 2015:93.

from disadvantaged backgrounds and the victims and offender may both come from disadvantaged backgrounds.⁵² Packer further overlooked the fact that not all crimes were between the state and the accused.⁵³

In the context of child justice, this model is often referred to as “the justice model” and takes its lead from the due process model. The underlying aim of the justice model in child justice is the implementation of longer interventions based on the best interests of the child. Accordingly, the model emphasises due process and procedural safeguards as well as the involvement of defence counsel.⁵⁴

Alder and Wundersitz define the justice model, from a child justice perspective, as:

... assum[ing] that all individuals are reasoning agents who are fully responsible for their actions and so should be held accountable before the law. Within this model, the task of the justice system is to assess the degree of culpability of the individual offender and apportion punishment in accordance with the seriousness of the offending behaviour. In so doing, the individual must be accorded full rights to due process, and state powers must be constrained, predictable and determinate.⁵⁵

The justice model of child justice emphasises due process and rights protection, but also creates an adult notion of justice where the child is held accountable for his/her actions. In some instances, this has resulted in higher sentences and tougher approaches to youth crime.⁵⁶ These two Packer models have had an undeniable impact on the development of specific child justice models, and the Packer themes of crime control and due process are evident in all of the models that are briefly discussed below.

4. Child justice models

4.1 Welfare model

According to Alder and Wundersitz:⁵⁷

The ‘welfare model’ is associated with paternalistic and protectionist policies, with treatment rather than punishment being the key goal. From this perspective, because of their immaturity, children cannot be regarded as rational or self-determining agents, but rather are subject to and are the product of the environment within which they live. Any environment. The task of the justice system then, is to identify, treat and cure the underlying social causes of offending, rather than inflicting punishment for the offence itself.

52 Roach 1999:680-681.

53 Roach 1999:681.

54 Karels 2015:93.

55 Alder & Wundersitz 1994:15.

56 Karels 2015:94.

57 Alder & Wundersitz 1994:15.

The welfare model is based almost exclusively on the notion of assisting the child offender and views deviant behaviour as a symptom of social circumstances as opposed to a defect in character.⁵⁸ According to Karels,⁵⁹ this model is premised on the notion that, if the circumstances of the child are improved, so too will behaviour. The most prominent welfare interventions appear to be educational interventions, but in jurisdictions where the socio-economic climate is poor, the welfare approach sometimes extends to removal from the home environment.⁶⁰ Sentences are often indeterminate and depend, to a large degree, on the response by the child offender. The welfare approach typically condones the child's behaviour as opposed to punishing it.⁶¹

Some jurisdictions, such as the United States of America, pay attention to the welfare approach within the context of their juvenile procedures, but it is not the primary concern of the process.⁶² The Netherlands has adopted the welfare model, but has recently begun to implement repressive approaches into juvenile justice. As a result, it cannot be described as a pure welfare model.⁶³ Scotland, on the other hand, can be described as one of the purest welfare models and the use of care is paramount to the Scottish approach to juvenile justice. This is borne out by sec. 16(1) of the *Children (Scotland) Act* of 1995.⁶⁴ German juvenile justice is steeped in the welfare approach and encourages a commitment to educational measures as opposed to sanctions. The welfare approach in Germany is based heavily on the notions that "if a juvenile commits a criminal offence and [is] allowed to get away with it, then the risk of relapse in crime is lower than the risk ... after having him punished".⁶⁵ The welfare approach, which dominates in Europe, is, however, under threat by more justice-based approaches, which emphasise accountability and responsibility.⁶⁶

4.1.1 Mediation model

In some instances, mediation either is a model or forms part of the restorative justice paradigm. Mediation experienced a rise in popularity from the mid 1970s. Hazel stipulates that the use of mediation depends, to a large degree, on whether it is a mandatory process in the pre-trial phase of child justice and whether law enforcement or the prosecution controls its implementation and monitoring.⁶⁷

58 Karels 2015:165.

59 Karels 2015:165.

60 Karels 2015:165.

61 Pruin 2010:1520.

62 Doob & Tonry 2008:12.

63 Doob & Tonry 2008:12.

64 Doob & Tonry 2008:12. This provision states that, "[w]here under or by virtue of this Part of this Act, a court determines, any matter with respect to a child the welfare of that child throughout his childhood shall be its paramount consideration."

65 Albrecht 2004:443, quoting an oft-repeated dictum of Franz von List.

66 Hazel 2008:24.

67 Hazel 2008:9.

4.1.2 Participatory model

Pruin⁶⁸ asserts that Scotland is a prime example of this model, which exemplifies informality and minimum intervention. This model relies on educators and the assistance of communities in correcting deviant behaviour. The participatory model is also applied in Germany, where the youth system is characterised by minimum intervention policies and prioritisation to diversion and non-punitive and rehabilitative responses that include educational programmes and other forms of interventions.⁶⁹ The main objective of educational programmes is to improve the social competencies of youth offenders and engender their economic independence. The participatory model encourages offenders and their families' participation in the resolution of conflict and for offenders to appreciate and take responsibility for their actions.⁷⁰ The author is of the view that this model of justice resonates with that contained in the *CJA*.

4.1.3 Modified justice model

The modified justice model is used by The Netherlands and Germany where the rights of society to protection are weighed against the needs of the child to care and protection. The rights of society reflect the legalistic approach to child justice, but the needs of the child are met by a welfare approach.⁷¹

4.1.4 Corporatist model

Pruin⁷² asserts that this model best describes the model followed in England and Wales. This model relies on the work of interagency cooperation to cater to the specialised needs of children in conflict with the law. In England and Wales, for example, Youth Offending Teams, comprised of representatives from social work, probation services, law enforcement and educational specialists, work together to provide a 'joint attack' approach to the issue of juvenile delinquency. The purpose of intervention under this model is to ensure implementation of policies and to retrain all the parties involved, including the offender. The latter may be taught new ways of living, including taking responsibility for wrongdoing. The primary objective is to help the offenders live with their families without major conflict or risk to themselves or others. Programmes that are part of this model help keep offenders out of jail by changing their behavioural patterns.⁷³

68 Pruin 2010:1520.

69 Dunkel 2014:34-47.

70 Dunkel 2014:69-70.

71 Pruin 2010:1520.

72 Pruin 2010:1521.

73 Pratt 1989:249-250.

4.1.5 Minimum intervention model

This model focuses on intervention from outside of the formal system as opposed to state intervention, which will stigmatise the child. In essence, this model relies on diversion responses to juvenile delinquency, but can be distinguished from the diversionary-justice model by the underlying philosophy of non-state interference.⁷⁴ Germany and Scotland incorporate some of this model into their system of juvenile justice.⁷⁵ Germany has adopted restorative justice processes such as victim-offender reconciliation programmes. The principal object of these models of justice is to ensure increased cooperation between the offender, victim and communities. Germany, like most of the European countries, has introduced independent youth systems underpinned by the use of procedural safeguards that take into account the educational needs of youth offenders. The application of restorative justice processes to juvenile offenders ensures that offenders do not encounter the criminal courts. Courts have established and, in some cases, extended procedural safeguards and entitlements regarded as welfare measures. They ensure that sentences are not unnecessarily harsh or disproportionate to the wrongs committed.⁷⁶ This model of justice is akin to the restorative justice model introduced in South Africa, although the South African juvenile system assimilates African models of justice, as discussed below.⁷⁷

4.1.6 Neo-correctionalist model

This model, according to Pruin, is the quintessential “law and order model” of child justice, which relies on the notion of responsibility for actions.⁷⁸ The child offender is held responsible or accountable for his actions. This model, however, includes the behaviour and accountability of the parent or other caregivers and incorporates them into the child’s accountability. Behaviour that could potentially result in criminal activity is also included in this model and controlled by so-called anti-social behaviour orders.⁷⁹ Evidence of this model can be found in the system in England and Wales.⁸⁰ This model often results in the greater use of deprivation of liberty than the other models, because it places the interests of society above the interests of the child. The model can, however, still be compared to the due process model in that it guarantees due process rights to offenders.⁸¹

74 Pruin 2010:1521.

75 Pruin 2010:1521.

76 Dunkel 2014:36-40.

77 See section 5 below.

78 Pruin 2010:1521.

79 Pruin 2010:1521.

80 Pruin 2010:1521.

81 Pruin 2010:1521.

4.1.7 Conclusion

The above models are applied extensively throughout Europe and the United States of America. They are not applied in isolation in any jurisdiction and often blend into one another when a child comes into conflict with the law.

From an African perspective, South Africa can be viewed as incorporating some of the above models because of its dependence on due process models in the criminal justice system in general. It is, however, the author's contention that South Africa, since the implementation of the *CJA* in 2010, has developed unique and novel models alongside the traditional models thus far described. This assertion will now be considered.

5. South African models of child justice

In the ensuing discussion, the author proffers the "diversionary justice model" and the "restorative justice model" as unique models of child justice, created by, or resultant from the implementation of the *CJA*. The author concedes that the majority of the models thus far discussed offer diversion and restoration, but not to the degree and with the frequency experienced in South Africa. On this basis, the author concurs with Karels⁸² that South Africa contributes two distinct models whereby children in conflict with the law are offered the protection of the best interests standard, within the bounds of a system of criminal law accountability for their actions.

5.1 Diversionary justice model⁸³

The South African diversion scheme was formalised through the *CJA*. The *CJA* draws its inspiration from Canadian and Australian experiences and is, to a large extent, influenced by international perspectives on diversion such as the United Nations Standard Minimum Rules on the Administration of Juvenile Justice (Beijing Rules) adopted in 1985, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty⁸⁴ (adopted in 1990), as well as the CRC.⁸⁵

The deprivation of a child's liberty and the administration of juvenile justice are articulated in arts. 37 and 40(3) of the CRC, respectively. The CRC also promotes the use of alternatives to criminal proceedings

82 Karels 2015:165.

83 The diversionary justice model is not recognised in the literature as a model of child justice and was originally proposed by Karels (see the reference in the preceding fn.).

84 Sec. 3 of the Fundamental Perspectives as stated in the United Nations Rules for the Protection of Juveniles Deprived of their Liberty states that "... the Rules are intended to establish minimum standards accepted by the United Nations for the protection of juveniles deprived of their liberty in all forms, consistent with human rights and fundamental freedoms, and with a view to counteracting the detrimental effects of all types of detention and to fostering integration in society".

85 See Karels 2015:105-107.

for children who have infringed the penal law. Due to this, the use of diversion should theoretically underline any juvenile justice system.⁸⁶ Different systems implement the diversion model at different stages of the process, depending on the jurisdiction. Some territories allow diversion by law enforcement, whilst others restrict its use to prosecutors and courts. The Committee on the Rights of the Child⁸⁷ has, however, emphasised that diversion has limitations:

- Diversion should be used only where there is convincing evidence that the child has committed the alleged offence, that s/he freely and voluntarily acknowledges responsibility, and that this acknowledgement will not be used against him/her in any subsequent legal proceedings.
- The child must freely and voluntarily consent to the diversion; such consent must be based on adequate information on the nature and duration of the measures and on the consequences of a failure to cooperate and complete the measure.
- The law must contain specific provisions indicating in which cases diversion is possible, and the powers of the police, prosecutors and other agencies to make decisions should be regulated and kept under review.
- The completion of the diversionary measure by the child should result in definite and final closure of the case; any information should be retained for a finite period only, and it should not be viewed as a 'criminal record' or equivalent. In addition to setting formal limits to the use of diversion, this guidance states that it is important that those administering such schemes and programmes are appropriately qualified, and receive ongoing training, for example, in international standards, juvenile justice and child development, in order to safeguard the quality of such intervention. It is also important that diversion programmes be monitored by means of up-to-date and transparent record-keeping. Their effectiveness and ongoing compliance with the youth justice principles set out in the CRC and other international standards should be monitored thoroughly and objectively.⁸⁸

5.1.1 Restorative justice model⁸⁹

According to Karels,⁹⁰ not all commentators would view restorative justice as a separate model of child justice, since it is a collection of practices

86 Hammarberg 2009:16.

87 The CRC comprises a body of experts that monitors the implementation of the CRC by its state parties. It also monitors the implementation of its Optional Protocols that deal with the sale of children, child prostitution and pornography, children in armed conflict and the communications procedure. These protocols entered into force in 2014.

88 Commissioner for Human Rights 2009:17.

89 The restorative justice model is not recognised in the literature as a model of child justice and was originally proposed by Karels 2015:167.

90 Karels 2015:167.

that can be used at most of the phases of the process and is not a model in its own right. She, however, submits that restorative justice is not only a sentencing approach or theory and, therefore, cannot be categorised exclusively, or as a stand-alone mechanism, without the support of an overarching superstructure. For this reason, the author concurs that restorative justice is a model of justice on the understanding that it is part of the blended model approach and that it exists alongside other theories of punishment such as retributive, utilitarian, restitutive and rehabilitative punishment.⁹¹ No jurisdiction follows one model exclusively and, therefore, restorative justice will form part of all of their approaches, regardless. In South Africa, however, restorative justice seems to be forming a model in its own right, especially when viewed as a parallel for diversionary processes.

Restorative justice refers to:

[A]n umbrella term for various voluntary, non-adversarial processes that try to bring together offenders, crime victims, and others to repair the material and intangible harms caused by crime.⁹²

It is usually characterised by a host of restorative justice practices such as:

...victim offender mediation induces offenders to speak with their victims face to face about their crimes. Family group conferences use trained facilitators to encourage discussions among the families of offenders and victims. Circle sentencing encourages offenders, victims, their friends and families, members of the community, and criminal justice professionals to discuss and agree upon a sentence. Community reparative boards are panels of citizens that discuss crime with offenders and work out restitution plans.⁹³

Hazel asserts that restorative justice is one of the strongest trends of the past 30 years of child justice practice, but he posits that its use varies according to social policy and prevailing political climate. Resultantly, it is used at both the pre-trial and trial phases and can be used as an alternative to sentencing or as an addition to a formal sentence.⁹⁴

According to Gabbay,⁹⁵ the restorative justice approach centres on the effect of crime on the community, as opposed to the violation of legal norms. This model centres the criminal trial experience on those most affected by the crime – the victim, the offender and the relevant community. The aim is to find solutions, which promote reconciliation and healing, as opposed to punishment and retribution.⁹⁶ By the nature of the process, legal professionals play a minimal role within the model, although Karels suggests that the process is heavily dependent on the intervention

91 Skelton & Batley 2008:40.

92 Bibas 2006:917.

93 Bibas 2006:917.

94 Hazel 2008:9.

95 Gabbay 2007:87.

96 Karels 2015:167.

of social development- and welfare-related agencies.⁹⁷ The restorative justice model is thus premised on the reintegration of the child offender by measures that involve the child, victim, and wider community.

Braithwaite suggests that restorative justice is based on a variety of values, which can be divided into three different groups.⁹⁸

- The first group contains “values that must be honoured and enforced as constraints⁹⁹ such as non-domination and empowerment, specific upper limits on sanctions, respectful listening, and equal concern for all stakeholders as well accountability and respect for fundamental human rights”.¹⁰⁰
- The second group contains values, which legal practitioners “should actively encourage in restorative processes”.¹⁰¹ These values centre on healing and include “restoration of human dignity, restoration of property loss, restoration of damaged relationships, emotional restoration, the prevention of future injustices, and the development of human capacities”.¹⁰²
- The third group centres on the concept of remorse and mercy and includes the use of apology and forgiveness. The values are the hoped-for-result of restorative justice but cannot be expected from participants in a restorative process.¹⁰³

Gabbay suggests that the values expressed above are found in the most commonly used forms of restorative justice practice, victim-offender mediation, group conferencing and circles.¹⁰⁴

According to Karels,¹⁰⁵ restorative justice practices can occur theoretically at any stage of the criminal process, from pre-charging up to the post-sentencing phase, and require only that the offender admits committing the offence – or at least accepts responsibility for the offence – and that the victim and offender voluntarily agree to participate in a restorative justice practice. The offender need not admit guilt, but s/he must at least not contest the facts of the matter at hand.¹⁰⁶

The requirement of acknowledgment is one of the most contentious issues in the restorative justice model. Karels¹⁰⁷ maintains that the practice amounts to adjudication without conviction where the offender is expected to admit, or at least will be benefited by admitting his/her involvement, but

97 Karels 1015:167.

98 Braithwaite 2002:244-247.

99 Braithwaite 2002:253.

100 Gabbay 2007:88.

101 Braithwaite 2002:253.

102 Gabbay 2007:89.

103 See Braithwaite 2002:252.

104 Gabbay 2007:89.

105 Karels 2015:168.

106 Gabbay 2007:89.

107 Karels 2015:169.

stopping short of actually admitting guilt. Considering the “innocent until proven guilty” standard, the use of restorative practices based on these criteria is faulty. An accused would in all likelihood take the opportunity to entertain a restorative justice practice without actually admitting guilt, and thereafter enjoy the benefits of the practice, as opposed to undergoing a criminal trial, which potentially entails much harsher consequences. Karels¹⁰⁸ argues that, where an accused is required (far from the concept of expected) to acknowledge his/her involvement in a matter, or at the very least refrain from contesting the facts, in order to undergo a restorative practice, this is tantamount to asking him/her to self-incriminate.¹⁰⁹ Even where the law of a jurisdiction prohibits the use of such acknowledgment at subsequent trial, as is the case in South Africa, the right is still infringed and the knowledge is nonetheless there, which in inquisitorial jurisdictions is problematic.¹¹⁰ The author agrees with Karels¹¹¹ that perhaps these issues arise when one considers restorative justice as the ‘softer’ option available to the child offender or where one imparts malicious feelings onto his/her actions. Nevertheless, these issues are contentious, and the use of restorative justice approaches may be affected by the prevalence of serious and violent crimes in South Africa.¹¹²

The author further supports Karel's view,¹¹³ who, in quoting Gabbay,¹¹⁴ suggests that the practices of restorative justice remain essentially the same, regardless of their form, but that the number of participants differs. Victim-offender mediation is ordinarily limited to the victim, offender, and some kind of facilitator.¹¹⁵ Group conferencing, as its name intimates, is open to family members and other supporters, as well as social workers, probation officers, social workers and other interested parties.¹¹⁶ The circle is open to both the community and the participants.¹¹⁷ While the names differ in various jurisdictions, these variables are fixed.

In the South African context, restorative justice is an element of *Ubuntu* and as such reaffirms the dignity and humanity of people, including children. It should be noted, as will be seen below, that restorative and *Ubuntu* principles are integrated throughout the *CJA*. In this regard, the *CJA* intends to entrench the notion of restorative justice in the criminal system in respect of children who are in conflict with the law and to provide for matters incidental thereto.¹¹⁸

108 Karels 2015:169.

109 Karels 2015:169.

110 Karels 2015:169.

111 Karels 2015:169.

112 Karels 2015:169-170.

113 Karels 2015:169.

114 Gabbay 2007:89.

115 Gabbay 2007:89.

116 Gabbay 2007:89.

117 Gabbay 2007:89.

118 The Preamble to the *Act*.

Moreover, it is important to note that restorative justice articulated in the *CJA* espouses values enunciated in sec. 28 of the *Constitution* and that both aim to restore the dignity and well-being of children, specifically those in conflict with the law.

6. The *Child Justice Act* 75 of 2008 (“the *CJA*”)

The *CJA* was promulgated in 2010 and it established a criminal framework for children in conflict with the law and for children accused of committing offences. The Preamble explains the reasons for the legislation and does so by referring to injustices encountered or experienced by the majority of children during apartheid, in particular Black children who were denied the opportunity to live and act like children. The Preamble also refers to the *Constitution* and its role in protecting the rights of children and, by so doing, affirming that the provisions of the *CJA* shall be interpreted in line with the values espoused in the *Constitution* and the spirit of *Ubuntu*. *Ubuntu*¹¹⁹ principles permeate the *CJA*, thus introducing a criminal justice system for children that is grounded in African indigenous approaches to justice, based on the values of fairness, reconciliation and compassion. Songca¹²⁰ notes that the concept of *Ubuntu* is recognised by the majority of people in South Africa, especially those who are rooted in indigenous African traditions. Its inclusion in the *CJA* is thus deliberate and intended to change how society perceives offending. The values of *Ubuntu* underpin the *CJA* and safeguard the dignity of child offenders; resultantly, its principles must apply whenever its provisions are applied or interpreted.¹²¹ Embedding *Ubuntu* in the *CJA* promotes a humanist approach to justice that denotes compassion, fairness and tolerance.¹²² Furthermore, the *CJA* seeks to achieve its goals by embedding principles of restorative justice in the criminal justice system, thereby further endorsing African approaches to justice through the promotion of contextualised crime-prevention initiatives.¹²³

119 Although difficult to define in western terms, in relation to this submission, the court in *S v Makwanyane* 1995 3 SA 391 (CC);par. 224 defined *Ubuntu* thus: “[A] culture which places some emphasis on communality and on the interdependence of the members of a community. It recognizes a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.”

120 Songca 2018:88.

121 Songca 2018:86.

122 Khunou “Judging Ubuntu and Africanisation of the Child Justice Act: An approach of traditional justice system”, *Pambazuka News* <https://www.pambazuka.org> 20130919 (accessed on 1 March 2019).

123 Gallinetti 2009:12.

The objectives of the *CJA*¹²⁴ are varied. Of particular importance to this contribution are the protection of the rights of children as provided for in the *Constitution*. The *CJA* attempts to balance the right of the child offender as an individual, whilst ensuring that the rights and fundamental freedoms of the community are respected.¹²⁵ The integration of restorative justice principles, some of which are based on African notions of justice, is a distinguishing characteristic of the *CJA*. For example, restorative justice is defined in sec. 1 as:

[A]n approach to justice that aims to involve the child offender, the victim, the families concerned and the community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident.

The author notes that this definition is rooted in the African ethic of human solidarity and connectedness of its members. Children, as part of the community, have responsibilities and rights towards both their families and communities. As such, they are required to contribute towards the cohesion of their families and communities and to their moral well-being.¹²⁶

Whereas it confers rights on child offenders, it also aims to hold them accountable for their actions to the victims and their families, as well as to the child's own family and the community at large.¹²⁷ In African societies, children have rights and responsibilities, and when a child commits an offence, it may be regarded as an offence against the community, which will justify the involvement of some members of the community, in addition to the family of the child offender and the family of the victim. This practice is based on the African notion of collective responsibility, which requires members of the community to collectively address problems and solutions.¹²⁸

The *CJA* has allowed families and communities to play a central role in the administration of justice, especially when it comes to the reintegration of the child offender into the community after having been dealt with by the criminal justice system.¹²⁹ The *CJA* has thus restated restorative justice principles by putting measures in place to minimise re-offending and creating mechanisms for rehabilitation and reintegration of child offenders.

The uniqueness of the *CJA* can also be gleaned from its substantive provisions. Sec. 2 of the *Act* reaffirms its commitment to the concept of *Ubuntu*, especially as it relates to the management of the juvenile justice system. In this regard, it pronounces on the manner in which the principles of *Ubuntu* will be applied, by:

124 *CJA*:sec. 2.

125 See also Gallinetti 2009:12.

126 The *CJA* promotes the values of the ACRWC by infusing African values and concepts in its provisions, see ACRWC 1999:art. 31(d).

127 Gallinetti 2009:12.

128 See *CJA*:sec.2(b)(iv). See also Songca 2018:89.

129 See Songca & Karels 2016:444-478.

- i. fostering children's sense of dignity and worth;
- ii. reinforcing children's respect for human rights and the fundamental freedom of others by holding children accountable for their actions and safe-guarding the interests 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 [the] Act, in order to encourage the reintegration of children.

The author is of the view that the concept of *Ubuntu* and restorative justice principles, as provided for in the *CJA*, are complementary, with the combined usage of these two concepts underscoring the uniqueness of the *Act*. The use of the concepts marks a clear intention by the legislator to move away from the traditional models of punishment and embrace instead the notions of reconciliation, reinstatement and restoration of the equilibrium that was disturbed by the commission of the offence. Restorative justice and *Ubuntu* introduce other modes of justice based on indigenous justice systems. For example, as stated previously, "restorative justice" is defined as an approach to justice that involves various stakeholders who collectively seek resolution to the matter, in order to prevent the recurrence of the incident and foster reconciliation.¹³⁰

The guiding principles of the *CJA* are important and they include concepts of non-discrimination, participation and proportionality that are borrowed from the CRC, the ACRWC and the *Constitution*. The guiding principles of the *CJA* are an important interpretative tool; thus, both the provisions of the CRC and those of the ACRWC can be used to interpret the provisions of the *CJA*.¹³¹

As mentioned elsewhere, African notions of *Ubuntu* pervade the *CJA*. These concepts play a critical role in humanising the criminal justice system. For example, diversion is a central feature of the *CJA*, and it is defined in sec. 1 thereof as a "diversion of a matter involving a child away from the formal court procedures in a criminal matter by means of the procedures established by Chapter 6 and Chapter 8". Diversion facilitates the peaceful resolution of problems and helps restore the dignity of all parties affected by the harm; these are values underpinning the African ethics of *Ubuntu*.

The objectives of diversion, as enumerated in sec. 51,¹³² include:

130 Songca 2018:89. In *Dikoko v Mokhatla*, 2006 6 SA 235 (CC):par. 114, the court stated the elements of restorative justice as an "encounter, reparation, reintegration and participation".

131 *CJA*:sec. 3.

132 See *CJA*:sec. 51(a)-(k).

- preventing stigmatisation of the child and promoting the child's dignity and well-being and the development of his/her feeling of self-worth and ability to contribute to society;¹³³
- encouraging the child to be accountable for the harm caused by him/her;
- providing an opportunity for victim participation and compensation;
- promoting the reintegration of the child into his/her family and community, and
- promoting reconciliation between the child and the person or community affected by the harm caused by the child ...¹³⁴

The distinguishing characteristic and uniqueness of the *CJA* lies in the fact that some of the diversion options are anchored on indigenous notions of justice. The conditions that need to be present before a child can be considered for diversion are provided in sec. 52.¹³⁵ For example, the child has to acknowledge responsibility for the offence, which assumes that the child is mature enough to appreciate the wrongfulness of his/her act. This requirement helps the child reflect on his/her wrongdoing and appreciate the importance of seeking solutions in an amicable way. It is for this reason that the child should not be unduly influenced to acknowledge responsibility and must voluntarily take responsibility for his/her actions. Moreover, the guardian of the child must, in appropriate circumstances, consent to the diversion.¹³⁶

The modes of diversion are hierarchical and are linked to the seriousness of the offence. A child who has committed a Schedule 1 offence is likely not to be incarcerated, even though s/he might be 10 years or older.¹³⁷ The *CJA* identifies six different diversion orders, and defines each of them.¹³⁸ For example, a "family time order" requires the child to spend a specific amount of time with his/her family, which may include extended family. Family cohesion is very important in the majority of African communities. A "good behaviour order" requires the child to abide by the order and may extend to the African notion that requires children to respect their parents, including members of their extended family. These options are rooted in African systems of justice.

Sec. 53¹³⁹ sets out two diversion options in two levels. Level 1 diversion orders include an oral or written apology to those affected by the child offender's crime, which may be interpreted as an order requiring the child to take responsibility for restoring the equilibrium in his/her community that was disturbed by his/her offence. Other options that can be considered

133 See Sloth-Nielsen & Gallinetti 2011:74.

134 *CJA*:sec. 51(a)-(k).

135 See *CJA*:sec. 52.

136 See *CJA*:sec. 52(1)(a)-(e). The CRC and the ACRWC are similarly worded.

137 Schedule 1 offences are regarded as less serious than schedule 2 offences and include crimes such as perjury, defamation, trespass, blasphemy, and so on.

138 See *CJA*:sec. 53(1)(a)-(f). See also Sloth-Nielsen & Gallinetti 2011:75.

139 *CJA*:sec. 53(2)(a)-(b).

include providing the child offender with a caution with or without conditions,¹⁴⁰ and placement under a reporting order, where a child may be required to report either to the chief in the community in which s/he lives or any specified authority.¹⁴¹

Level 2 diversion options include level 1 orders¹⁴² and apply to crimes of a more serious nature stated in Schedules 2 and 3 of the *Act*.¹⁴³ To be considered, inputs from the victim(s), persons who have a direct interest in the affairs of the victim, and/or police officer(s) are required.¹⁴⁴ The diversion options include compulsory attendance at a specified centre or place for a specified vocational, educational, or therapeutic purpose, which may include (a) period(s) of temporary residence.¹⁴⁵

Victims and interested persons should be afforded an opportunity to express a view whether or not the matter should be diverted, as well as regarding the nature and content of the diversion option being considered. The police official who was responsible for the investigation should also be consulted.¹⁴⁶

The *CJA* articulates minimum standards for the application of the *Act*.¹⁴⁷ These standards are intended to ensure compliance with the objectives of the *CJA*, the *Constitution* and the international conventions referred to in the *CJA*. Diversion options must all be structured in a manner that will ensure a balance between the circumstances of the child, the nature of the offence and the interests of society.¹⁴⁸ The *CJA* stipulates, for example, that the diversion programme must, wherever reasonably possible, impart useful skills, and include a restorative justice element, the aim of which should be the healing of relationships, including the relationship with the victim.¹⁴⁹ Healing relationships broken by the alleged offence, reconciliation and empathy are all elements of *Ubuntu*, which is the hallmark of the *CJA*.

The author agrees with those researchers¹⁵⁰ who express the view that the substantive provisions of the *CJA* illustrate entrenchment of restorative justice principles and African values pronounced in the Preamble and objectives of the *Act*. In addition, the author is of the view that the process of diversion is taking root in the South African child justice system. The jurisprudence is rapidly emerging in this regard, and some courts have

140 *CJA*:sec. 53(3)(b).

141 *CJA*:sec. 53(3)(d).

142 *CJA*:sec. 53(3)(a)-(q), read with sec. 53(4)(a).

143 Schedule 2 offences include crimes such as public violence, culpable homicide, sexual assault, compelled sexual assault (as referred to in secs. 5, 6 and 7 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32/2007*, respectively), where grievous bodily harm has not been inflicted.

144 *CJA*:sec. 52(2)(a) and (b). This also applies to level 1 offences listed in schedule 1.

145 *CJA*:sec. 53(4)(a)-(d). For more options, see also Maguire 2012:77.

146 *CJA*:sec. 52(3)(b)(l)-(ii).

147 *CJA*:sec. 55.

148 *CJA*:sec. 55(1)-(2).

149 *CJA*:sec. 55(2)(a)-(h).

150 Sloth-Nielsen & Gallinetti 2011:76.

re-affirmed the centrality of diversion in child justice. For example, in *S v Gani*,¹⁵¹ the court stated:

The objectives of diversion are set out very clearly in s 51 of the Act. It is now incumbent on the criminal justice system, including the presiding officers, to consider the objectives of diversion and to remove children from the system where appropriate. The jurisdictional principles to be applied are clearly set out.

The success of the diversion programme will depend partly on the skills of the professionals responsible for the implementation of the Act and their commitment in implementing the provisions of the CJA.

The mechanisms, processes and procedures envisaged for children in conflict with the law are also informed by restorative justice principles and values. For instance, interventions have to take into account, where appropriate, long-term benefits of a less rigid criminal justice process that will suit the needs of children in conflict with the law whenever appropriate.¹⁵² The benefits may include diverting the child offender away from the formal criminal justice system. In *S v CKM*,¹⁵³ the court held that the Act:

[I]ntroduced a comprehensive system of dealing with child offenders and children coming into conflict with the law that represents a decisive break with the traditional criminal justice system. The traditional pillars of punishment, retribution and deterrence are replaced with continued emphasis on the need to gain understanding of a child caught up in behaviour transgressing the law by assessing her or his personality, determining whether the child is in need of care, and correcting errant actions as far as possible by diversion, community-based programmes, the application of restorative-justice processes and integration of the child into the community.

Restorative justice is a tenet of the CJA, and it ushers a change in child justice by moving away from traditional models of punishment to an appreciation of the need for reconciliation, thereby buttressing the *Ubuntu* values in the Act.

In South Africa, restorative justice has been applied mainly in relation to child offenders. Some researchers argue that restorative justice principles should not only be confined to diversionary processes, but should also be applied throughout the criminal process and be adopted as an approach to sentencing.¹⁵⁴ The author supports this view, given that the CJA is a vanguard of alternative approaches to justice, as informed by indigenous approaches. To date, we have witnessed both successes and failures as courts have applied restorative justice principles unevenly.¹⁵⁵

151 *S v Gani* 2012 2 SACR 468 (GSJ);par. 18.

152 See, in general, the aims of the CJA as elucidated in its Preamble.

153 *S v CKM* 2013 2 SACR 303 (GNP);par. 7.

154 Skelton & Batley 2008:45.

155 A detailed discussion of jurisprudence from court judgments falls beyond the scope of this article. Restorative justice principles were considered in the

From a South African perspective, Skelton opines that restorative justice and the restorative approach are particularly apt, due to the nature of South Africa's past and its acceptance of narrative approaches and indigenous knowledge in the resolution of conflict.¹⁵⁶ She, however, remarks that the use of restorative justice practices may be affected by the degree of serious and often violent crime prevalent in South African society.¹⁵⁷ Despite the apparent acceptance and understanding of restorative justice practices in South Africa, the courts, as stated above, are beginning to take into consideration restorative justice principles in cases where children are in conflict with the law.¹⁵⁸

7. Conclusion

The discussion above provided a comparative analysis of different models of criminal justice, paying specific attention to child justice models. The author thus provided insights into how, prior to the promulgation of the *CJA*, some of these models continued to permeate the South African child justice system, despite the values espoused by the *Constitution* and international law.

South Africa has a hybrid model of child justice in that it has retained traditional models of punishment, such as deterrence and incarceration, although these models of justice only apply in exceptional circumstances. Parallel to this model, the *CJA* has introduced a non-punitive model anchored on African notions of justice, wherein restorative justice approaches and principles of *Ubuntu* are central to the criminal justice process. This new approach to justice allows for the involvement of a broader range of role players such as the offender, the community, and probation officers. In addition, this approach to justice focuses on reducing the harm caused through healing, compensation, and restorative justice that promote the values of *Ubuntu* and infuse the child justice system with indigenous African traditional systems and values that seek solutions to offending based on children's lived experiences. The author believes that this collective approach to crime, if fully developed, will contribute significantly to crime prevention. It was further argued that the South African use of restorative justice and diversion has directly (or perhaps inadvertently) created two new models of child justice, which are premised on African notions of justice, intervention and protection, as opposed to strict formal procedure. Using *Ubuntu* as a lens, this approach has opened the door to providing an alternative approach to criminal justice where child offenders are in conflict with the law. In the author's view, this approach is founded on South Africa's unique history and resultant social policy. Although existing models of child justice cater for this, the South African experience

following cases: *S v Maluleke* 2008 (1) 49 (T) and *S v Shilubane* 2008 (1) SACR 295 (TPD).

156 Skelton 2007:228.

157 Skelton 2007:228.

158 *CJA*:sec. 521(a)-(e).

is unique, because it is not only welfare based but also rather coheres with indigenous African traditional justice systems.

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