

Restorative Justice, the African philosophy of *Ubuntu* and the Diversion of Criminal Prosecution.

A.M. Anderson¹

Introduction

In South Africa there has in recent times been a greater emphasis on exploring possibilities to divert criminal prosecution and to reach out-of-court settlement of certain cases. At the same time a new constitutional dispensation operates that guarantees certain rights and freedoms. At this time, with alarmingly high crime statistics, some people bemoan the absence of *ubuntu* in society. They argue that high crime is brought about by the permissiveness that they ascribe to the new Constitutional dispensation². This paper discusses the movement towards the diversion of criminal prosecution, and will investigate whether Restorative Justice or *Ubuntu*, or both, can be helpful in motivating this phenomenon.

South Africa today is a multicultural society where indigenous law and legal structures exist side by side with modern (Western) structures and procedures. In addition, South African society is a society in transition – not only the obvious political and constitutional transition – but also on social and economic level. The new Constitutional order is seen to be a bridge from a culture of oppression to a culture of justification³.

Diversion of criminal prosecution

Diversion is defined as:

The election – in suitable and deserving cases – of a manner of disposal of a criminal case other than through normal court proceedings. It usually implies the provisional withdrawal of the charges against the accused, on condition that the accused participates in particular programs and/or makes reparation to the complainant.

¹ Senior Lecturer – School of Law, University of the North, South Africa. andersona@unorth.ac.za

² J.Y. Mokgoro: *Ubuntu* and the law in South Africa, P.E.R. 1998 (1)

³ E Mureinik: A Bridge to Where: Introducing the Interim Bill of Rights (1994) 10 SAJHR 31

Diversion is preferable to the mere withdrawal of cases⁴ as the offender is charged with taking responsibility for his or her actions⁵.

Diversion of prosecution can also be called out-of-court settlement – an agreement between the accused and the prosecution whereby the trial against the accused is discontinued or withdrawn in exchange for the accused complying with the conditions agreed upon between the parties.

The settlement of criminal cases out of court is a trend in transnational as well as many national criminal justice systems. Out-of-court settlement in one or the other form has been around in most European justice systems at least since the sixties. In this development, South Africa is no exception. Also, not unlike other jurisdictions, diversion in South Africa was mostly spearheaded by developments in juvenile justice.

Diversion in some international jurisdictions

Diversion of criminal trials is a broad trend⁶ in criminal law reform in European Criminal Justice Systems which also includes greater emphasis on mediative and compensative measures and the rise of acceptance of community service as a sentencing option for criminal conduct. The reasons for this phenomenon have also been described elsewhere⁷. Various methods of diversion is found:

1. Conditional discharges

Many countries adhering to the principle of legality, amongst which Germany, Austria, the Czech Republic, Slovenia etc, have created exceptions to mandatory prosecution. Others, like the Netherlands, Belgium and France have the principle of expediency⁸ as part of their criminal procedure that gives the prosecuting authority the discretion to refrain from prosecution where such restraint would be in public interest. These methods have the result that the criminal charge is dropped on the condition that the accused complies with certain conditions – of which the payment of a fine,

⁴ One should only speak of “diversion” in instances where there is indeed a *prima facie* case against the accused. Withdrawals for lack of proof do not form part of this discussion.

⁵ Part 7 of the Prosecution Policy of the South African National Prosecuting Authority

⁶ For other contemporary trends see also H J Albrecht: Settlements out of court: a comparative study of European Criminal Justice Systems. Report done for the South African Law Commission Project 73.

⁷ Albrecht supra, p 7, G.J.M van den Biggelaar: De buitengerechtelijke afdoening van strafbare feiten door het openbaar ministerie, dissertatie RUL, Arnhem, 1994

⁸ “Opportunitetsbeginsel” in Dutch

rendering of community service and the compensation of the victim are the most common. Deferred prosecution, as is fairly common practice in the USA, is closely related to out-of-court settlements and has received institutional formalisation⁹. Prosecution is suspended pending the accused's compliance with prescribed conditions.

2. Simplified procedures

These methods mostly deal with either administrative procedures to deal with high-frequency, uncomplicated offences by way of a fine¹⁰ (also known as “penal orders”) or quicker procedures for confessing offenders which can also take the form of charge or sentence bargaining. In the latter the necessity of leading evidence is dispensed with and the accused normally gets a “discount” for confessing to the offence.

3. Decriminalization of certain conduct

A further method of dealing with high-frequency (criminal) conduct is to totally remove it from the realm of the criminal justice arena. The criminal sanction as a means of influencing and controlling behaviour is abandoned. In effect this amounts to a repeal of the particular crime¹¹. This will not be the focus of this paper.

Existing methods of diversion in South Africa

South Africa does not as principle follow a system of compulsory prosecution, but if there is a *prima facie* case against the accused, and no other compelling reasons not to prosecute, then the prosecutor has a duty to institute criminal action¹². Within this discretionary system the following diversion possibilities have always been available:

⁹ S J Rackmill: Printzlien's legacy, the “Brooklyn Plan” (1996) Federal probation 60(2)

¹⁰ This procedure is largely applied where a monetary fine is deemed to be the appropriate punishment. If the offender accepts the suggested fine, then no further criminal proceeding follows.

¹¹ A good example of this is the Constitutional Court case of National Coalition for Gay and Lesbian Equality v Minister of Justice 1999(1) SA 6 (CC) which decriminalised consensual same-sex sexual conduct between adults.

¹² The *Prosecution Policy* issued by the NDPP prescribes (para 4(c)) that prosecution should normally follow if there is sufficient evidence to provide a reasonable prospect of a conviction, unless public interest demands otherwise.

- ? Admission of guilt and the payment of a fine. This can occur without the accused having to appear in court, but is also a possibility at the court appearance itself.
- ? Compounding of certain minor offences¹³
- ? Conversion of trial into enquiry in terms of the Drugs Act
- ? Conversion of trial into enquiry in terms of the Child Care Act
- ? Non-prosecution in public interest - where the prosecutor may refuse to prosecute even if there is a reasonable prospect of successful prosecution if “public interests” demands it. A number of different factors play a role to determine whether the prosecution will be against public interest:
 - ? *de minimus non curat lex* - this “rule” applies in matters of such trivial nature that criminal prosecution and trial is deemed to be inappropriate¹⁴. The effect of this “rule” is that, where an accused commits an act which is unlawful but the degree in which he contravenes the law is minimal (of a trifling nature), the court will not convict him of the crime but bring out a verdict of not-guilty. In some cases it has succeeded as a defense¹⁵ whilst in others it was rejected as a defense, but taken into account as a ground for mitigation of sentence¹⁶. Whether it will be regarded as a defense or not will depend on the circumstances of each case. The prosecution is expected to anticipate the classification of the seriousness of the case by the court and refrain from prosecution where appropriate.
 - ? the advanced age or very young age of the accused
 - ? the antiquated nature of the offence¹⁷
 - ? the tragic personal circumstances of an accused
 - ? where a plea-bargain has been struck between the State and the accused - then certain charges may be withdrawn
 - ? any circumstance where the consequence of a prosecution will be out of all proportions with the gravity of the offence committed¹⁸.

¹³ These first two possibilities closely resemble the penal order that has been described earlier.

¹⁴ see J.M.T. Labuschagne “*De minimus non curat lex* as strafregtelike verweer in ‘n regstaat: Opmerkinge oor strafsinnolheid en die groeiende rasionele dimensie van geregtigheid” THRHR 2003, for an in-depth analysis of the origin and application of the *de minimus*-rule in South African criminal law.

¹⁵ *S v Kogong* 1980 3 SA 600 (A)

¹⁶ *S v Nedzamba* 1993 1 SACR 673 (V)

¹⁷ *S v Steenkamp* 1973 (2) SA 221 (NC) – the accused was charged and convicted in the magistrates court of an antiquated piece of Cape of Good Hope statute dating from 1856 and 1873 – “diensverlating”. On review the Supreme Court quashed the conviction and sentence.

¹⁸ P Yutar, “The Office of Attorney-General in South Africa” SACC 1977 1 p 135

All of these methods of diversion have one thing in common – the decision to divert is largely dependent on the individual nature of the case or the circumstances of the accused. There has not yet been any specific policy with regard to diversion of standard cases in SA law.

In addition to the above methods of conditional or unconditional discharge, the South African criminal procedure provides for a expedient method of dealing with confessing offenders – the so-called “guilty plea”¹⁹. In conjunction with the guilty-plea there has also, for many years, existed an informal practice of plea-bargaining²⁰ between the accused and the State with regard to the acceptance by the latter of a plea of guilty, usually on a “lesser” charge and the recommendation of a mutually acceptable sentence to the court. The Court was never (formally) part of this agreement or bound by it. A new legislative amendment of the Act now provides for a legislative basis for formal plea-bargaining that, although the presiding officer is still not a party to, binds the court in sentencing²¹.

Extension of diversion and compulsory diversion in South Africa.

Juvenile justice:

The draft new Child Justice Bill²², which is expected to become law sooner rather than later, introduces a compulsory preliminary inquiry in all criminal proceedings of children under the age 18 years. This inquiry is conducted by an inquiry magistrate and must take place prior to the plea. One of the objectives of this inquiry is to establish whether the matter can be diverted before plea and to identify a suitable diversion option. The court can then make an order of diversion. The court may even develop an individual diversion option that meets the purposes of the particular matter. Family group conferences and victim-offender mediation, classic restorative justice instruments, are some of the diversion options created by the Bill. The Bill further creates a legislative framework for a whole host of diversion options

¹⁹ Section 112 of the Criminal Procedure Act, Act 51 of 1977

²⁰ See: A.M. Anderson: The Practice of Plea-Bargaining in Comparative Perspective, African Legal Studies Vol 1 (1998) p 39

²¹ Section 105A Criminal Procedure Act, Act 51 of 1977. This new procedure is not confined to certain offences or certain courts only. The judicial officer does not participate in the negotiations and can refuse to accept the plea-agreement if (s)he is not convinced of the guilt of the accused. The court may also refuse to accept the suggested sentence if the court is not satisfied that it would amount to a “just” sentence. In that case the parties can withdraw from the agreement and a trial *de novo* commences before another judicial officer.

²² [B49-2002] Government Gazette No 23728 of 8 August 2002

that include: school attendance orders, family time orders, good behaviour orders, positive peer association orders, reporting orders, supervision and guidance orders etc.

Adult diversion:

Part 7 of the Policy Directives of the National Prosecuting Authority indicates that, although diversion is primarily employed in the case of juvenile offenders, other diversion programs (for adult offenders) are also in operation like victim-offender mediation programs and performance of community service as an alternative to prosecution.

- ? Diversion is not deemed to be appropriate where the charge is murder, robbery with aggravating circumstances, rape or a similarly serious offence.
- ? Offenders with a criminal record and persons to whom the opportunity has been granted previously should only be included in diversion programs in exceptional circumstances.
- ? The prosecutor has a discretion to determine whether or not an offender qualifies for the program but factors like willingness to acknowledge liability and preparedness to participate in the program should serve as a guideline.
- ? A screening by a probation officer is required who advises the prosecutor on the suitability of the (possible) candidate.
- ? Participation is voluntary and the offender must be made aware that the case will not be withdrawn should the offender not meet all the requirements.
- ? After the offender has completed the diversion program, a social worker must submit a report to the prosecutor. If it is clear that the offender has cooperated and benefited from the program, the matter is withdrawn. If not, the prosecution is to proceed.
- ? If a diversion program was not followed, and at the sentencing stage of the trial it appears that the accused is a suitable candidate for a program the court can impose a suspended sentence with participation in the program as one of the conditions of suspension. If the offender does not successfully complete the program, the prosecutor must apply in the normal manner for the suspended sentence to be put into operation.
- ? A register must be kept regarding all offenders screened for diversion programs. The reason for the decision to divert or not must be recorded as well as the way in which the matter was eventually disposed of.

The policy directives also stipulate that, whilst the establishment of diversion programs is primarily the responsibility of the Dept of Welfare, prosecutors should take some initiative in this regard. One can thus assume that out-of-court settlement of criminal trials could become more frequent or more structured.

Restorative justice

This is a fairly recent²³ movement in (criminal) justice²⁴, which can be defined as follows:

Restorative justice is a process whereby parties with a stake in a specific offence resolve collectively how to deal with the aftermath of the offence and its implications for the future²⁵. The aim is offender accountability, reparation to the victim and full participation by all those involved.

Restorative justice attempts to repair the damage, re-establish dignity and re-integrate those who were harmed or alienated by the offence. It is based on the assumption that within society a certain balance and respect exists, which can be harmed by crime. The purpose of the justice system is then to restore the balance and to heal the relationships. It is not so much about punishment but about healing the wounds caused by crime and repairing the relationships that have broken down. It enables all the parties to the crime (victim, offender and affected members of the community) to be directly involved in responding to it with the State and legal professionals playing the role of facilitators.

The result of restorative efforts is an agreement on how the offender will make amends for the harm caused by the crime. The traditional criminal justice sanctions of restitution²⁶ and community service²⁷ are used to restore the balance. The UN's International Handbook on Justice for Victims notes

²³ this is indeed not a new concept in the reaction to crime, but a recent return to traditional responses to crime which were community based and had the reparation of harm as central element.

²⁴ More specifically in criminology and victimology

²⁵ Restorative Justice Online: <http://www.restorativejustice.org>

²⁶ Payment of a sum of money by the offender to the victim to compensate for financial losses caused by the crime.

²⁷ Work performed by the offender for the benefit of the community without compensation. In a restorative setup the service to be rendered could be aimed specifically at repairing harm caused by the offending conduct.

that “the framework for restorative justice involves the offender, the victim, and the entire community in efforts to create a balanced approach that is offender-directed and, at the same time, victim-centered.” The “starting point” is the acknowledgement by the offender of the conduct (and its harm for the victim), the means is the meeting between offender and victim, and the aim of the process is to remove the harm²⁸. The measure of success of the process is whether the harm is repaired (or prevented) rather than any punishment meted out to the offender. Various methods exist to allow the parties to participate:

- ? family (or community) group conferencing²⁹
- ? victim-offender mediation³⁰
- ? peacemaking circles³¹

Community based responses to crime are increasingly being used since it is more cost effective than the traditional trial procedure. However, it is also being used because the offender is forced to take responsibility for his conduct, thereby having a positive impact on recidivism. International standards for community based justice have also been developed inter alia by the Council of Europe Recommendations on the Simplification of Criminal Justice³² and the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power³³. Both these documents give new recognition for the position of victims of crime and the importance of restitution for the harm suffered.

Restorative justice is not without criticism. A number of issues come to play – for example the (lack of) guarantee of procedural and constitutional (or “due process”) rights of offenders, questions regarding which entity should have the authority to decide the course of a particular case. Another concern is with the guarantee of equal protection or non-discrimination and the possibility of inequities when essentially public duties are left in the hands

²⁸ S Gutwirth & P de Hert: Grondslagtheoretische variaties op de grens tussen het strafrecht en het burgerlijk recht. In De weging van ‘t Hart – Idealen, waarden en taken van het strafrecht, Kluwer 2002.

²⁹ this aims to expand the actors involved to also include family, friends and supporters on both sides thereby engaging the support systems to also connect to the problem at hand.

³⁰ This allows the meeting to take place in a structured setting under guidance of a trained mediator.

³¹ Also called “sentencing circles” and deals mostly with the determination of appropriate punitive responses to transgressing conduct.

³² adopted by the Committee of Ministers on 17 September 1987

³³ A/Res/40/34 General Assembly 1985

of interested parties to conclude. The role (or lack) of counsel for the defence is also a matter of contention.

Community based responses are often (from an abolitionists viewpoint) not seen as merely alternatives to traditional sanctions, but as procedural alternatives to the traditional concept of a criminal trial. As Albrecht points out, the traditional and alternative should not necessarily be mutually exclusive, and could find a way of successful co-existence³⁴. This can be done by integrating restorative ideas into existing justice procedures, or by setting up (and funding) restorative programs that operate side-by-side with regular procedures³⁵.

Ubuntu

The concept of *ubuntu* is not easy to define and it would certainly not do justice to simply translate it into English in abstract. A brief attempt to illustrate will have to suffice:

Ubuntu (a Zulu word) is a lifestyle or unifying world-view (or philosophy) of African societies based on respect and understanding between individuals. *Ubuntu* has been translated as “humaneness”, and is derived from the expression: *umuntu ngumuntu ngabantu* [a person is a person because of other people / a person can only be a person through others]. It envelops values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity³⁶.

Mokgoro also calls it a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources. The concept *ubuntu* is a very expansive notion – its social value depends on the purpose for which it is sought to be applied. It can be a basis for morality but is not merely a social ideology – it should rather be seen as “the potential of being human” that articulates a basic respect and

³⁴ Albrecht supra p 27

³⁵ The 1990 Amsterdam mediation (“dading”) experiment is a good example of such voluntary mediation process existing alongside the regular justice procedure. See Wiewel (ed): *Dading in plaats van strafrecht*, Gouda Quint, 1993

³⁶ Justice Mokgoro in *S v Makwanyane* 1995 – at 308

compassion for others³⁷. *Ubuntu* is not a criminal justice term, or even a legal instrument for that matter, but is a determining factor in the formation of perceptions that influence social conduct in a society.

Pre-colonial African societies (and their legal systems) were family based, linked together in clans and ruled by chiefs who consulted senior members of the community in all matters of consequence³⁸ and were obliged to always act in the interests of the collective. Decision-making was characterised by lengthy deliberation with consensus reached through negotiation rather than voting. Indigenous justice in Southern Africa, before the introduction of European concepts of law, was determined by groups of people who included both the alleged offender as well as the victim. The decolonisation of Africa and the dismantling of apartheid in South Africa have led to greater recognition of the variety of traditional legal institutions and remedies of old. There've been, of late, calls for some aspects of traditional justice, based on *ubuntu*, to be reintroduced into the mainline criminal justice system of South Africa.

Ubuntu no doubt has admirable social values as consequence. The question is what influence this has, or should have on South African Criminal Justice? Although indigenous law is not featured in (reported) jurisprudence, the constitution specifically enjoins courts (all courts, not only traditional courts) to apply indigenous law where it is applicable. Therefore *ubuntu* not only shapes indigenous legal institutions, but also has the potential to shape our jurisprudence as a whole. Mokgoro argues that, if we wish to create a legitimate system of law for all South Africans, then it is imperative to align historical cultural experiences with present day legal notions and techniques³⁹. The inclusion of *ubuntu* in the postamble⁴⁰ of the (interim) Constitution indicates that the notion of *ubuntu* is an integral part of the new value system, which has been established by the constitutional framework.

³⁷ As Louw indicates (D.J. Louw; *Ubuntu: An African assessment of the Religious Other*, paper delivered at the 20th World Conference of Philosophers), *ubuntu* in the African understanding is far more than just a general appeal to treat others with dignity and respect – it also has a deeply religious meaning. The “other” persons through whom one becomes a person include ancestors (the extended family which include relatives who have passed over) *Ubuntu* therefore also implies a respect and regard for religious beliefs and practices.

³⁸ D Johnson, S Pete & M du Plessis: *Jurisprudence: a South African Perspective* Butterworths p 204

³⁹ Mokgoro, PER 1998

⁴⁰ “The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation”.

The Constitutional Court in the (abolition of the death penalty)Makwanyane case⁴¹ also aligned itself with the positive *ubuntu* values. The traditional values of *ubuntu* undeniably have an enormous potential for influencing the development of new South African law and jurisprudence. The young South African democracy requires more responsive legal institutions and procedures.

Conclusion

There seems to be a fairly general need to redefine and reframe traditional criminal justice procedures. The current Western criminal justice system that applies in South Africa creates many dilemmas. Often neither offender nor victim believe that justice has been done when a verdict is pronounced. The procedural system requires that an accused must plead either guilty or not guilty. When an accused pleads not-guilty in circumstances where the victim knows that he is indeed responsible for the offence, this is seen as unjustly denying responsibility. The nature of the (accusatorial) criminal trial allows for little dialogue between the victim and the offender. Prosecutors and investigating officers, fearful that the offender may compromise the case often insist on stringent bail conditions, prohibiting the offender from having any contact with the victim. The case is regarded as a “legal battle” and interaction and participation between the two parties is stifled.

Restorative justice is a specific type of response to crime. *Ubuntu* is much more than that – but both focus on restoring an imbalance created by someone’s conduct and on building peace within communities. Both achieve this through co-operative efforts.

This brings us to the role that *ubuntu* and restorative justice could play in decisions to divert criminal trials. There is a move towards methods designed to alleviate the burden placed on the judicial system by increasingly penal and incarcerative responses to crime. The arguments in favour of diversion are based primarily on considerations of

- ? cost efficiency (conserving scarce resources)
- ? limiting the stigmatisation effect of criminal conviction
- ? leniency
- ? and lessening the burden on or reducing the workload of the overextended criminal justice system.

⁴¹ S v Makwanyane [1995] 3 SA 391 (CC)

This paper proposes another, more philosophical basis for out-of-court settlements, namely

- ? the responsibility of the system to redress and restore the harm caused by crime and
- ? to reconcile the members (and the community) involved.
- ? to assist in the rehabilitation or reform of the offender

Ubuntu and restorative justice underscore the importance of consensus and agreement and reconciliation. The procedures and results of a criminal trial are a far cry from this, but the idea of a settlement (which could rely on the consensus of the victim) is really what these alternative methods are largely about.