

NOTES / AANTEKENINGE

FAMILY CONFERENCING

1 Introduction

The notion of propagating children's rights and developing the aspirations of youth has developed internationally since the 1960s (United Nations Declaration of the Rights of the Child 1959). Although it is difficult to give a precise definition of the term "children's rights", there is a general acceptance of the idea that children have rights, which can be concluded from the fact that 192 countries have ratified the United Nations Convention on the Rights of the Child (1989) (hereinafter "the Children's Convention", ratified by South Africa on 16 June 1995). Section 28 of the Constitution of the Republic of South Africa Act, 1996 gives effect to the acceptance of the idea that children have rights by providing a list of nine specific rights for children. In addition, children are also entitled to all other rights in the Bill of Rights that are applicable to them, with the exception of the right to vote in section 19(3), which explicitly refers to "every adult citizen" (Bekink and Brand "Constitutional Protection of Children" in Davel (ed) *Introduction to Child Law in South Africa* (2000) 178). Moreover, section 28(2) of the Constitution provides that "a child's best interests are of paramount importance in every matter concerning the child".

Article 3(1) of the Children's Convention and article 4(1) of the African Charter on the Rights and Welfare of the Child (1990) (hereinafter "the African Charter", ratified by South Africa on 7 January 2000), both recognise that the "best interests of a child" shall be "a" or "the" primary consideration in all actions concerning children. The Children's Act 38 of 2005 (hereinafter "the Children's Act"), which has not come into operation yet, also refers in sections 2(b)(iv) (Objects of Act), 6, 7 and 9 to the "best interests of the child standard". Thus every decision which may impact on the child must be guided by the "child's best interests".

The duty to secure this right lies with the legislature and the implementation lies mainly with the courts. However, the Children's Act also provides for alternative mechanisms, thereby improving the right of children to participate in decisions affecting them. This paper focuses on one alternative, namely family conferencing. Some aspects of the Children's Act and the Child Justice Bill will be discussed (par 2) and then the focus will shift to family conferencing: What is it about (par 3)? Will it suit the South African context (par 4)? How should it be applied (par 5)?

2 A new focus on the participation of children; suitable in Family Law as well as Juvenile Justice

The Constitution recognises that children have specific needs and interests and therefore deserve special protection. In the preamble to the Children's Act (which falls within the field of Family Law) it is stated, *inter alia*, that it will give effect to certain rights of children as contained in the Constitution.

Chapter 2 of the Children's Act contains the general principles that guide the implementation of all legislation applicable to children, including all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general. According to section 6(2) all proceedings, actions or decisions in a matter concerning a child must respect the child's inherent dignity and treat the child fairly and equitably. Section 6(4) calls for an approach which is conducive to conciliation and problem-solving: that is, a confrontational approach should be avoided in any matter concerning a child.

A process of decision-making or problem-solving that aspires to do justice to the child's dignity, and adhere to the values of fairness and equity, would have to involve the child and his or her family. This is in line with article 12 of the Children's Convention and article 7 of the African Charter, which both deal with the right to express one's opinion or view. Section 10 of the Children's Act provides for child participation and states that "every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child, has the right to participate in an appropriate way and views expressed by the child must be given due consideration". The aforementioned section should be read in conjunction with section 61, instructing the presiding officer how to ensure the participation of children.

From the above it is clear that the Children's Act, in accordance with the said international documents, values participation of children. In an attempt to focus on conciliation and avoiding a confrontational approach (see s 6(4) as already mentioned) where children are involved, the Act also provides for alternatives regarding procedure, for example, "pre-hearing conferences" (s 69) or "family group conferences" (s 70). In this paper, however, the focus will merely be on family group conferencing. It is interesting to note that the Children's Act does not outline in detail the "how" and "when" of family group conferencing.

In the past decade or two, juvenile justice (as part of criminal law pertaining to children) has also undergone many changes, with a specific focus on "restorative justice", which means: "the promotion of reconciliation, restitution and responsibility through the involvement of a child, the child's parents, family members, victims and communities" (s 1 Child Justice Bill [B49-2002]). The adoption of the abovementioned Children's Convention and the inclusion of section 28 of the Constitution, dealing with "children's rights" have made some impact: one of the major developments has been

the attempt to divert a child offender away from the formal criminal court to suitable alternative programmes. Family conferencing is one of the mechanisms to be used in order to achieve this and is explicitly mentioned in the Child Justice Bill [B 49-2002] (hereinafter “the Child Justice Bill”).

Article 40 of the Children’s Convention requires states parties to treat children who have infringed the penal law in a manner consistent with the promotion of the child’s sense of dignity and worth. It also deals with the desirability of promoting the child’s reintegration into society while encouraging him/her to assume a constructive role. States parties are furthermore required to promote the establishment of laws and procedures specifically applicable to such children, and, where appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings. A variety of orders should be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence. Article 17 of the African Charter corresponds to a certain extent with article 40 of the Children’s Convention. It states explicitly that the essential aim of the treatment of every child found guilty of infringing the penal law should be his or her reformation, reintegration into his or her family, and social rehabilitation.

On a domestic level, the Child Justice Bill provides for the establishment of a criminal justice process for children accused of committing offences so as to protect the rights of children entrenched in the Constitution and provided for in the aforementioned international instruments. It also incorporates diversion of cases away from formal court procedures, and extends the sentencing options available in respect of children.

From the above it is evident that in the past 10 to 20 years, in both family law and criminal law, recognition has been granted to the specific needs of children.

3 Family conferencing in the proposed legislation

The Children’s Act and the Child Justice Bill provide for alternatives regarding the (law of) procedure. Both provide for family conferencing. In this regard it might be useful to analyse and compare the (proposed) legislation.

Firstly, in section 70 of the Children’s Act it is mentioned that:

- “(1) The children’s court may cause a family group conference to be set up with the parties involved, in a matter brought to or referred to a children’s court, including any other family members of the child, in order to find solutions for any problem involving the child.
- (2) The children’s court must:
 - (a) appoint a suitably qualified person or organisation to facilitate at the family group conference;
 - (b) prescribe the manner in which a record is kept of any agreement or settlement reached between the parties and any fact emerging from such conference which ought to be brought to the notice of the court; and
 - (c) consider the report on the conference when the matter is heard.”

The above-mentioned section pertaining to family group conferences is very limited. It does not outline in detail when or how proper use could be made of this method; it merely speaks about “finding a solution for any problem involving the child” and that “the court may prescribe how and by whom the conference should be set up, conducted and by whom it should be attended” (s 70 of the Children’s Act). It is submitted that there are definite advantages to leaving a wide discretion to the court, but a serious concern could be a lack of consistency between the application and use of the method of family conferencing. Who will meet the criteria of being a “suitably qualified person or organisation” to facilitate the process? Would that be a family advocate or a social worker or someone else? Moreover, specific training in facilitating a family conference is indispensable. But who should provide it? Should it be the Arbitration Foundation of Southern Africa (AFSA), or the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO), or someone else? And who should carry the financial burden? Should it be carried by government or non-governmental organisations (NGO’s), or both? (Skelton and Frank “Conferencing in South Africa: Returning to Our Future” in Morris and Maxwell (eds) *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (2001) 107). Finally, family group conferences tend to sideline professionals that were traditionally fully involved in the arbitration of juvenile cases: courts, family advocates, social workers and psychologists. The role of these professionals needs to be redefined or re-evaluated.

This brings us to the Child Justice Bill and the way that it accommodates family conferencing. Clause 2 sets out the Objects of the Act, which are, amongst others, to promote *ubuntu* in the child justice system through fostering children’s sense of dignity and worth; to support reconciliation by means of a restorative justice response; and to encourage the reintegration of children through the involvement of parents, families, victims and communities in child justice processes.

Diversion seems a core component of the Bill (Chapter 6). The purposes of diversion are, amongst others, to encourage the child to be accountable for the harm caused; to provide an opportunity to those affected by the harm to express their views on its impact on them; to promote reconciliation between the child and the person or community affected by the harm caused by the child; and to prevent the child from having a criminal record (clause 43).

Family group conferencing can take place prior to trial but the court can also stop the proceedings in the middle of a trial and refer the case to a family group conference. The court can also, after conviction, send the case to a family group conference, to determine an appropriate plan pertaining to the sentence. This plan can be made part of a court order (clause 47).

Clause 48 briefly outlines the pre-family group conference phase, by stating that “if a child has been referred to appear at a family group conference, the probation officer appointed by the inquiry magistrate must within 21 days convene, by setting time and place of the conference; and taking steps to ensure that all persons who may attend are timeously notified

of the time and place". It is submitted that a probation officer should merely be one of the professionals participating in phase 1 (the phases will be outlined later) but *not* the facilitator of the process. This should be done by an independent co-ordinator who is specifically trained to facilitate a family group conference.

Clause 48(2) outlines who may attend: (a) the child and his or her parent or an appropriate adult; (b) any person requested by the child; (c) the probation officer; (d) the prosecutor; (e) any police official; (f) the victim, and if under 18, his or her parent or an appropriate adult; (g) the legal representative of the child; (h) a member of the community in which the child normally resides; and (i) any person authorised by the probation officer.

With regard to "any person authorised by the probation officer" (i), the question arises whether the probation officer should be the authority to decide on whether other parties with an interest in the matter will be allowed to attend. It is submitted once again that a specifically trained independent co-ordinator should have the final say in this regard (in co-operation with the probation officer).

Clause 48(4) allows for true participation. Participants in a family group conference must follow the procedure agreed upon by them and may agree to such a plan in respect of the child as they deem fit. Clause 48(5) states the requirements of the plan that the participants come up with. It, amongst other things, should specify the objectives for the child and the period within which they are to be achieved. It should also contain details of the services and assistance to be provided to the child and a parent/appropriate adult. Moreover, it should state the responsibilities of the child and of the child's parent/appropriate adult. If the participants in a family group conference cannot agree on a plan, the conference must be closed and the probation officer must refer the matter back to the inquiry magistrate for consideration of another diversion option (clause 48(7) of the Child Justice Bill).

4 Family conferencing within the broader context of South African mechanisms for problem resolution

Family group conferencing is inspired by the approach of the Maori culture in New Zealand (Van Lieshout "Op Zoek naar een gewenst Draagvlak" in Van Pagée (ed) *Eigen Kracht: Family Group Conference in Nederland* (2003) 16), where family-related problems are discussed and solutions sought within the family. Various countries have developed the model to suit their needs. But does it fit in with aspects of South African mechanisms for the resolution of problems?

As mentioned, one of the objects of the Child Justice Bill is to promote *ubuntu* in the Child Justice system. The idea of family conferencing, of consensus through dialogue, and, ultimately, of restoration rather than retribution, resonates with the traditional African mindset (par. 4 partially overlaps with Louw "The African Concept of *Ubuntu* and Restorative Justice"

in Sullivan and Tifft (eds) *Handbook of Restorative Justice: A Global Perspective* (Routledge, 2006) 161-173). In fact, for prominent Africans like Archbishop Desmond Tutu, restoration is characteristic of traditional African jurisprudence in so far as its “central concern is not retribution or punishment but, in the spirit of *ubuntu*, the healing of breaches, the redressing of imbalances, the restoration of broken relationships” (as cited by Roche *Accountability in Restorative Justice* (2003) 27). The word “ubuntu”, as used by Tutu, means “humanity”, “humanness”, or even “humaneness”. These translations involve a considerable loss of culture-specific meaning. But, be that as it may, generally speaking, the traditional African maxim, *umuntu ngumuntu ngabantu* (that is, “a person is a person through other persons”) articulates a basic respect and compassion for others. As such, it is both a factual description and a rule of conduct or social ethic. It not only describes human beings as “being-with-others”, but also prescribes how we should relate to others, that is, what “being-with-others” should be all about. The 1997 South African Governmental White Paper for Social Welfare officially recognizes *ubuntu* as:

“The principle of caring for each other’s well-being ... and a spirit of mutual support ... Each individual’s humanity is ideally expressed through his or her relationship with others and theirs in turn through a recognition of the individual’s humanity. *Ubuntu* means that people are people through other people. It also acknowledges both the rights and the responsibilities of every citizen in promoting individual and societal well-being” (<http://www.welfare.gov.za/Documents/1997/wp.htm> (2001)).

Ubuntu also features in the postamble of the (interim) Constitution of the Republic of South Africa, which points out 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 victimization” (<http://www.info.gov.za/documents/constitution/93cons.htm> (2001)). Hence the South African Constitutional Court’s abolition of the death penalty (in 1995) and its upholding (in 1996) of the constitutionality of the Truth and Reconciliation Commission’s practice of granting amnesty to perpetrators of gross human rights violations during apartheid in exchange for truthful accounts of these violations. These rulings and the values that underpin them resonate with what has come to be called “restorative justice” (Anderson “Restorative Justice, the African Philosophy of *Ubuntu* and the Diversion of Criminal Prosecution” <http://www.isrcl.org/> (2004) 10-11).

Restorative justice has been defined in a variety of ways to the extent that it would perhaps be more accurate to speak of restorative *approaches* to justice than of *the* restorative approach (Johnstone *A Restorative Justice Reader: Texts, Sources, Context* (2003) 1). However, for present purposes it suffices to note that the process of restorative justice involves the reaching of an agreement or consensus through dialogue and negotiation with a view to reintegrate a community violated by crime. “Consensus through dialogue” is also indicative of the *ubuntu* approach to the restoration of community. That is, “consensus through dialogue” could be used as a point of departure (or, if you like, hermeneutical key or lens) for identifying connections or overlappings between restorative justice and *ubuntu*. More specifically, it could be argued –

and we shall do so presently – that *ubuntu* both demonstrates and instructs us toward restorative justice as exemplified by family conferencing.

4 1 *Ubuntu and consensus*

A first important overlap between *ubuntu* and the process of family conferencing pertains to the extremely important role that agreement plays in this process. Family conferencing requires that the victim, offender and community (including the family) must find a common understanding of the offence and its resolution, including, among other things, how the offender will make amends for the harm caused by the crime to the victim and the community, and how the offender will be reintegrated into the community (Dzur and Wertheimer “Forgiveness and Public Deliberation: The Practice of Restorative Justice” 2002 *Criminal Justice Ethics* 4-8 and 10-11). *Ubuntu* underscores the importance of agreement or consensus. African traditional culture, it seems, has an almost infinite capacity for the pursuit of consensus and reconciliation (Teffo *The Concept of Ubuntu as a Cohesive Moral Value* (1994) 4). Traditional African democracy operates in the form of a (sometimes extremely lengthy) discussion, whether it is an *indaba* (open discussion by a group of people with some or other common interest), a *lekgotla* (discussion at a secluded venue), or an *imbizo* (mass congregation for discussing issues of national concern) (Broodryk *Ubuntu: Life Lessons from Africa* (2002) 77). These discussions, in so far as they may also involve the settlement of criminal cases, overlap in varying degrees with what advocates of restorative justice call “peacemaking circles”, “victim-offender mediation” and, especially, “family group conferencing” (Anderson <http://www.isrcl.org/> (2004) 8).

In fact, it is important to note that indigenous restorative justice was traditionally applied in small, close-knit communities or extended families. This means that the victim knew the offender and thus probably still held him/her in some positive regard. The victim was therefore reluctant to take an adversarial stance towards him/her. One would expect victim-offender reconciliation and mediation programmes to be more effective in such a setting than in a “faceless, individualistic society” (Sarnoff “Restoring Justice to the Community: A Realistic Goal?” 2001 *Federal Probation* 35). Because of this intimate setting, restorative practices, like the shaming of offenders, also had an impact (Moore and O’Connell “Family Conferencing in Wagga Wagga: A Communitarian Model of Justice” in Johnstone (ed) *A Restorative Justice Reader: Texts, Sources, Context* (2003) 220-221). For example, just pretending not to hear or understand an offender was often sufficient to shame his or her offence in a Khoisan community (Booyens *Die San en Khoisan Vandag* (1980) 55-57).

4 2 *Ubuntu and dialogue*

This brings us to the process of dialogue as an important overlap between family conferencing and *ubuntu*. The importance of dialogue in the process of family conferencing can hardly be overemphasised. Within this process

dialogue is best understood as “restorative communication”: it fosters interpersonal reconciliation between victims and offenders, and social reconciliation between offenders and the family or community. It vents harmful emotions, repairs relationships, and, importantly, *challenges any stereotypes* that the partners in dialogue (that is, the victim, offender, and family or community) may harbour (Dzur and Wertheimer 2002 *Criminal Justice Ethics* 3-7). Such dialogue epitomises the conduct prescribed by *ubuntu*. *Ubuntu* inspires us to expose ourselves to others, to encounter the difference of their humanness so as to inform and enrich our own (Sidane *Ubuntu and Nation Building* (1994) 8-9). Thus understood, *umuntu ngumuntu ngabantu* translates as: “To be human is to affirm one’s humanity by recognizing the humanity of others in its infinite variety of content and form” (Van der Merwe “Philosophy and the Multi-cultural Context of (Post)apartheid South Africa” 1996 *Ethical Perspectives* 1). This translation of *ubuntu* attests to a respect for particularity, individuality and historicity, without which the deconstruction of stereotypes and the healing of relationships will not materialise.

The *ubuntu* respect for the *particularities* of the beliefs and practices of others, is especially emphasised by a striking, yet lesser-known translation of *umuntu ngumuntu ngabantu*, viz.: “A human being is a human being through (*the otherness of*) other human beings” (Van der Merwe 1996 *Ethical Perspectives* 1 (*own italics*)). *Ubuntu* dictates that, if we are to be human, we need to recognise and respect the otherness of others. This dictate links up closely to *ubuntu’s* respect for *individuality*. But, it should be noted, the individuality that *ubuntu* respects directly contradicts the Cartesian conception of individuality in terms of which the individual or self can be conceived without necessarily conceiving the other. Within the *ubuntu* perspective the self only exists *in* his or her relationships with others, that is, “I think, therefore I am” is substituted with “I participate, therefore I am” (Shutte *Philosophy for Africa* (1993) 47). Or, as Ndaba puts it: “African subjectivity develops and thrives in a relational setting provided by ongoing contact and interaction with others” (Ndaba *Ubuntu in Comparison to Western Philosophies* (1994) 14). “Ongoing-ness” points to a final important ingredient of the “restorative communication” prescribed by *ubuntu*, viz respecting the *historicity* of the other. Respecting the historicity of the other means respecting his or her dynamic nature or process nature. The flexibility of the other is well noted by *ubuntu*. Or, as is sometimes claimed: “For the [African] humanist, life is without absolutes” (Teffo 11). This accords with the grammar of the concept *ubuntu*, which denotes both a state of being and one of becoming. As a process of self-realisation *through* others, it enhances the self-realisation *of* others (Broodryk *Ubuntu Management and Motivation* (1997) 5-7).

The important overlap between *ubuntu* and family conferencing – with regard to both consensus and dialogue – shows exactly why it might be used to explain, motivate or underscore family conferencing, and why *ubuntu* could add a distinctly African flavour and momentum to it. The concept of *ubuntu* gives a distinctly African meaning to, and a reason or motivation for, a restorative attitude towards the other. As such, it adds a

crucial *African appeal* to the call for family conferencing – an appeal without which this call might well go unheeded by many Africans (Ndaba 18-19).

5 Family conferencing in practice: a basic example from the Netherlands.

The fact that family conferencing overlaps in important respects with *ubuntu* does not imply that it exclusively belongs to African or so-called “third world” cultures. The practice of family conferencing can also be traced in the “first world”, not least of which the Netherlands. For a proper understanding of family group conferencing in the Dutch context a distinction must be made between its manifestation in family law and in criminal law.

In the case of a family law-related problem, a family gathers with the people close to it. These can be relatives, neighbours, a teacher, *etcetera*. The family decides on the place and time of the family group conference. The conference is facilitated by an independent co-ordinator, who is specifically trained for this task by the NGO/organisation *Eigen Kracht in Zwolle*, the Netherlands. (S)he invites all the participants, as directed by the family (on average the group consists of 16 people). The process consists of three phases (Van Pagée “De eerste Ervaringen en Resultaten” in Van Pagée (ed) *Eigen Kracht: Family Group Conference in Nederland* (2003) 41-49):

- Phase 1: The independent co-ordinator introduces everyone (if necessary) and makes sure that everything takes place according to the “rules of order” as determined by the family at the beginning of the meeting. A social worker or other professional, for example a psychologist or probation officer, explains which problems the family has and what they as professionals can do to assist the family. Everyone is given the opportunity to ask questions.
- Phase 2: This phase is about the family’s private meeting: all professionals (including the independent co-ordinator) leave the venue. The family discusses the problem with the aim of drafting a workable plan that outlines the responsibilities of various participants. There is no time limit: a conference may be adjourned and resume later on the same or the following day. The co-ordinator remains on stand-by in case the family needs guidance.
- Phase 3: The plan is presented in writing to the co-ordinator and other professionals, who usually accept it unless it is unsafe or against the law. After some time an evaluation of the implementation of the plan can take place, which again involves the family.

With regard to criminal law, family group conferencing offers an opportunity for real accountability by offenders. Victims play an important role in the process, since one of the purposes is to heal the relationships affected by delinquent behaviour. Therefore, victim and offender are brought together with their families and social network. The conference is facilitated by a trained, independent co-ordinator. The above-mentioned three phases

again apply (Van Beek "Uit dezelfde inspiratie: Echt-recht conferentie" in Van Pagée (ed) *Eigen Kracht: Family Group Conference in Nederland* (2003) 126-136):

Phase 1: Introduction and formulation of the problem.

Phase 2: All participants are encouraged to reflect on what happened.

Phase 3: Coming to an agreement about how to restore the damage caused.

In 80% of the researched cases in the Netherlands the participants came up with a so-called "healing plan" containing agreements and intentions. In 20% of cases participants agreed that the matter was sufficiently resolved by the conferencing process itself (Van Beek 133).

6 Conclusion

Every family experiences difficulties at some time or another: an illness of a family member, divorce, domestic violence, or an offence by a family member, often one of the children. The family could then benefit from the assistance of others, such as friends (including the child's friends), acquaintances, a neighbour or a teacher. Through family conferencing a proper plan is put in place to resolve the child's problems (which now become the family's problems). This provides safety. Instead of the usual scenario, namely simply turning to professional help, family group conferencing ensures that the family themselves take responsibility. It is not about looking for someone to blame, but about finding a solution for the child's problems with his or her co-operation. It is about allowing children to participate in a decision-making process that affects *them*. It is about doing justice to the rights of children. As one of the children who participated in a family conference put it: "At first I thought it was going to be another boring meeting. Why invite me? But it was different, all the family members were there, and they all came for me. I would not have missed it". Or, as the flyer of *Eigen Kracht*, the Dutch organisation dealing with family conferencing, says: "Making a plan together, deciding together, about *your* future". Family conferencing recognises the specific needs of children. It constitutes a movement away from the notion that "a child should be seen and not heard" towards the notion that the participation of children in matters concerning themselves is invaluable. This notion lies at the heart of both the Children's Act and the Child Justice Bill. Moreover, it resonates with both "third world" and "first world" mechanisms for restoration, as the African *ubuntu* and the Dutch experience respectively show.

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