

RESTORATIVE JUSTICE IN SOUTH AFRICA: RESOLVING CONFLICT

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Abstract

The purpose of this article is to explore the nature of restorative justice as it appears in the proposed South African Child Justice Bill. Restorative justice has taken different forms throughout the world; it is extremely popular both theoretically and with practitioners but instances of it being codified in legislation are still relatively rare.

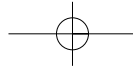
The Child Justice Bill will allow and encourage restorative justice to be used at different stages in the criminal justice process, both as an alternative to prosecution and as a sentence. The enactment of the Bill will result in South Africa joining the list of countries which are seen as world leaders in developing restorative justice initiatives.

This article considers what sort of restorative justice South Africa is developing. It explores some of the main dualities and tensions within restorative justice and outlines how they might be resolved within the new dispensation envisaged by the Bill.

Key words: restorative justice; youth justice; international law; South Africa.

Introduction

The enactment of the Child Justice Bill will see South Africa join the small but growing list of countries that have introduced restorative justice processes into legislation. The Child Justice Bill (SALC, 2000, hereinafter referred to as the Bill) has been approved by Cabinet and is now awaiting parliamentary approval. After a long process of debate and advocacy the Bill is now expected to be enacted later in 2002 or in 2003. This Bill is based upon restorative justice principles, and facilitates the use of restorative justice at all stages of the criminal justice process. The purpose of this article is not to describe these provisions but to reflect upon how the process of incorporating restorative justice into legislation has resolved some of the conflicts and contradictions within restorative justice.² The influence of restorative justice on the Bill has also been described elsewhere, this article considers what sort of restorative justice has emerged.³



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Haines (1998) argues that restorative justice appeals to a wide basis of support not by unifying opinion across a broad social spectrum of views but by sustaining sometimes contradictory values and objectives. One of the defining characteristics of the worldwide movement to advocate for the greater use of restorative justice has been its claim to achieve these apparently contradictory objectives by being both ancient and modern, by meeting the needs of both victims and offenders or by being both punitive and rehabilitative. Daly (2002:32) warns of the dangers of seeing restorative justice in such simplified terms: 'simple oppositional dualisms are inadequate in depicting criminal justice, even in an ideal system. The real story of restorative justice is a more qualified one'.

It also appears to be easier to manage these conflicts at a theoretical level than at a practical one and the successful implementation of legislation requires greater clarity. In this article I will argue that in the conflicts within restorative justice the South African child justice system does not always seek to maintain this precarious balance and has come down on one side or the other.

Definition of Restorative Justice

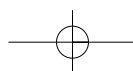
Restorative justice is defined differently by different writers, and the term is sometimes abused, either to refer to any process involving a victim, any process involving rehabilitation or any process originating from a community rather than from the state. Johnstone (2002) identifies four ideas that characterise restorative justice:

- Crime is, in essence, a violation of a person by another person, and this is much more significant than the breach of legal rules
- In responding to crime our primary concern should be to make offenders aware of the harm they have caused, and to prevent them repeating that harm
- The nature of reparation and measures to prevent re-offending should be decided collectively and consensually by offenders, victims and the community
- Efforts should be made to improve the relationship between the victim and the offender and to reintegrate the offender into the community

The Bill itself provides a statutory definition of restorative justice, and it would be suggested that this definition, although less detailed, is congruent with the ideas identified by Johnstone: 'the promotion of reconciliation, restitution and responsibility through the involvement of a child, the child's parent, family members, victims and communities' (SALC, 2000: 221).

Restorative Justice and the Child Justice Bill

Restorative justice has been a significant influence on the development of the Bill and in the provisions contained within it. In a similar way to other African countries, and in line with the recommendation of international instruments, the Bill starts with a statement of principles and objectives. One of these objectives refers to restorative justice:



- The objectives of this Act are to –
- (b) promote *ubuntu* in the child justice system through –
 - (iii) supporting reconciliation by means of a restorative justice approach (SALC, 2000: 6)

The concept of *ubuntu* is explained later in this paper, in the section that considers restorative justice as an ancient tradition. To comply with the stated objectives, the Bill makes specific provision for the use of family group conferences (FGCs), victim-offender mediation and other restorative justice provisions at all stages of the criminal justice process. Restorative justice processes can be used as a diversionary measure or as a sentence; for minor and serious offenders; for first time and repeat offenders; and having previously participated in a restorative justice process will not be a barrier to being allowed to participate in another. Significantly, the Bill does not seek to provide an exhaustive list of possible restorative interventions; it encourages local communities and NGOs to devise their own interventions.

Is Restorative Justice Punitive or Rehabilitative?

Restorative justice perhaps owes a lot of its popularity to its ability to appeal to both sides of the traditional debate in criminal justice and the disposal of offenders. For centuries the two camps have debated whether offenders should be dealt with in a punitive, retributive manner or whether attempts should be made to rehabilitate them.

Restorative justice has the ability to appeal to both these points of view. It claims that by requiring offenders to confront their victims this is sufficiently uncomfortable to satisfy most proponents of punitive measures. The frequent use of the word 'shame' or 'shaming', even when prefaced with re-integrative allows the retributivists to feel that their form of justice is being done. Those on the right of the political spectrum can also be satisfied by the partial transfer of focus from the offender to the victim and by the rolling back of the reach of the state, as communities become more involved in the criminal justice process.

Restorative justice can also justifiably claim to be rehabilitative. Liberal-welfare oriented rehabilitators can be satisfied by the promise of the decrease in the use of imprisonment, the increased involvement of the offender's family and the requirement for the offender to give consent at every stage of the process. Liberals can, at last, support a system that was designed to rehabilitate offenders, without opening themselves up to allegations of neglecting the needs of victims.

The Bill is very clearly rooted in the rehabilitative, penal-welfare tradition. It makes explicit that restorative justice is designed to be a measure that rehabilitates children and does not interfere with their human rights. The South African Constitution protects children from facing any punishment that is violent, or a violation of their human rights. Although the South African Law Commission (SALC) (SALC, 2000) made clear that some serious child offenders would be excluded from the restorative justice and diversion

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elements of the Bill, those children who are dealt with by the Bill itself can expect rehabilitation, not punishment.

The emphasis on rehabilitation reflects the roots of the Bill in the children's rights campaign. There have always been voices in South Africa calling for a more liberal regime in dealing with child offenders, but these have only become a coherent political force in the 1990s, since the fall of apartheid (van Zyl Smit, 1999). Whereas, in other countries there has been a long tradition of penal-welfare advocates, in South Africa a concerted campaign for a more rehabilitative approach has only really emerged recently, at around the same time as the worldwide campaign for restorative justice emerged. In South Africa the penal-welfare tradition and the restorative justice campaign seem to have merged together.

Is Restorative Justice an Ancient Tradition or a Modern Innovation?

Restorative Justice, while a new movement in criminal justice, also makes claims to be rooted in Judaeo Christian history, and in the traditions of indigenous people throughout the world, including Africa (Consedine, 1999; van Eden, 1995).

In the Bill there is little reference either to the roots of restorative justice or to its modern origins. However, in the discourse surrounding the Bill there has been much made of the ancient African roots of restorative justice and the incorporation of traditional methods into the Bill. This has linked to the government's intention in other aspects of public policy to find 'African solutions to African problems'.

As Skelton (2001) describes, restorative justice may be a new concept in South Africa but the similar concept of *ubuntu* is strongly embedded in South African society. *Ubuntu* is a Zulu word, and the closest English translation is 'kindness' or 'brotherhood'. *Ubuntu* describes the individual's relationship to others through the idea that a person is a person through other people:

Ubuntu embodies ideas about the interconnectedness of people to each other, the importance of the family group over the individual, and the value of benevolence towards all others in the community (Skelton, 2001: 104).

The Bill is not the only place where restorative justice is found in contemporary South Africa; it has been an influence on the Truth and Reconciliation Commission (TRC) (Tutu, 1999a) and on the development of township peace committees (Roche, 2002). Skelton (2002) describes how traditional courts and community courts have provided a backdrop for debates in South Africa about modern ideas of restorative justice. The Child Justice Alliance (2001) suggests that the framework of restorative justice merges with African conflict resolution practices. The Alliance describes a series of commonalities between the two approaches including that both have objectives of restoring peace and

harmony, both consider an offence to be primarily against an individual and both employ procedures that are simple and informal, yet powerful.

Recently, however, the claims to ancient roots have become much quieter. Discomfort has been expressed that many traditional, African forms of justice are not necessarily restorative (Skelton, 2002; Roche, 2002). In South Africa, the opposite has been claimed; vigilante group *Mapoga a Mathamaga* has claimed that its style of swift, violent punishment is a true reflection of African culture (von Schnitzler et al, 2001). There has also been concern that much of what is claimed to be ancient African, traditional justice is based upon anecdotal evidence and unsustainable claims. Costa (1998: 526) considers the very idea of customary law to be an oxymoron: 'trapped in the belief that African law is not law per se, but a form of custom, primitive practice which predates law.' Some writers (Daly, 2000; Blagg, 1997) have claimed that to describe ancient justice as necessarily restorative is to romanticise the past and to provide an excuse for recolonising indigenous groups.

However, in South Africa, the advocates of restorative justice have, in the main, managed to describe restorative justice in a way that reflects its roots without unrealistically romanticising either the past or the present in African culture.

Should Restorative Justice Promote the Interests of Victims or Offenders?

This is perhaps the most contentious of the conflicts within restorative justice, in that it is a central claim that unlike punitive or rehabilitative justice, restorative justice does not place the interests of victims and offenders in opposition to each other. Restorative justice claims to be able to meet both these sets of needs at once. However, as Johnstone (2002) points out, professionals have approached restorative justice from different perspectives and backgrounds; some have a background in victims' rights, others have a background in offender rehabilitation.

There is a victims' movement in South Africa, but it is localised and fragmented, and often the interests of victims of crime appear to be used as a device to make wider political points about the failings of the South African government. Despite commitments from government many victims receive very little support, and any services that do exist tend to be delivered to victims of sexual assault or domestic violence (Lutshaba, Semenchuk and Williams, 2002).

Restorative justice in the Bill has originated from an offender's perspective and specifically a child rights perspective. While the interests of the victim are by no means neglected the Bill was drafted with the needs of child offenders in mind; the impetus for juvenile justice law reform sprang originally from concern about the plight of children in prison during apartheid (Sloth-Neilson, 1999). Most of the writers on restorative justice in South Africa are child justice specialists; writing from a victim perspective is much less common. However, as Simpson (1996) warns focussing on the human rights of offenders while

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neglecting the needs of victims could service a popular or governmental willingness to retreat from a commitment to human rights, by again allowing the needs of these two groups to be set in opposition to each other and permitting offenders' rights to be diminished to meet the perceived needs of victims.

As Johnstone (2002) describes, the very fact that restorative justice is available for children and not for adults indicates that it is the needs of the offender that dominate. Restorative justice claims to give a victim a greater role in the criminal justice system; in South Africa, as in England and Wales, a victim has to be fortunate enough to be offended against by a child for that objective to be achieved.

Should Restorative Justice Originate in the Community or be Imposed by the State?

The debate over whether restorative justice is ancient or modern is linked to the debate over whether the main responsibility for implementing it should rest with the community or should remain with the state. Some early advocates of restorative justice (Considine, 1999; Braithwaite, 1999) argue that restorative justice should be community based with the role of the state and of criminal justice professionals being reduced as far as possible. Braithwaite (1999) goes as far as to argue that if a community does not consider an act to be deserving of punishment then it should not be considered a crime. This view is linked to the idea of restorative justice being rooted in ancient tribal cultures, and that communities can best decide what is right and wrong without the interference of the state. This view may be based upon a romanticised view of human history, as previously discussed, and it certainly has roots in criminological history and Durkheim's concept of the conscience collective (Garland, 1990).

The debate between those who advocate for greater or lesser state involvement in restorative justice crystallises around the issue of offenders' rights (Wood, 2000; Braithwaite, 2002). The legal rights of alleged and convicted child offenders in South Africa are protected by the Bill, necessitating a significant involvement of state officials, such as defence lawyers and probation officers. This involvement is seen by some restorative justice advocates as diminishing the possibility of community re-integration and essentially non-restorative (McCold, 1999).

It is clear from the Bill that power within the child justice system will still remain with the state and with criminal justice professionals. Skelton (1995) has described how the state will protect the due process rights of child defendants. However, the South African criminal justice system does not demonstrate the fear of the community that is apparent in Northern Ireland; another transitional society that is introducing restorative justice measures (Gormally, 2000; McEvoy and Mika, 2002). The Bill does allow for initiatives to originate from the community. It specifically provides for restorative justice measures, beyond those outlined in the Bill, to be used. This provision was designed to facilitate the emergence of community based restorative justice and diversion schemes. At this early stage, prior to the introduction of the Bill, it could be argued that through the recognition

of children's procedural rights on the one hand and the willingness to encourage communities to devise their own restorative schemes on the other, there are signs that South Africa might be able to strike an effective balance between the role of the state and that of the community. The intention of the Bill is to create a productive, trusting relationship between the criminal justice agencies and the community.

Should South Africa Implement Restorative Processes or Restorative Values?

There has been criticism of restorative justice in some jurisdictions that the terminology has been misapplied and that allegedly restorative processes have been used that bear little relation to the values on which restorative justice is based (Braithwaite, 2002). These examples include children being threatened with violence or exclusion from their home areas if they do not attend a FGC or children being forced to wear stigmatising signs or t-shirts as a result of such a conference. As Johnstone (2002) suggests, restorative justice has become so popular that many programmes that have little in common with what restorative originally represented have taken on its label. Roche (1992) describes that the weakness of seeing restorative justice merely as a process is that even interventions that produce further trauma might be considered restorative.

In South Africa, there has been a tendency to attempt to acquire the values of restorative justice prior to learning the techniques. This can be seen in the legislation and in the development of projects already described. It can also be seen in the positive participation of South Africa in the relevant international instruments. Most recently South Africa played an active role in the drafting of restorative justice basic principles by the United Nations (UNESCO, 2002). These principles are aimed at protecting the rights of victims and offenders, and encouraging a standard set of values, yet a flexible range of processes. Although these principles are non-binding the willingness of the South African government to participate in their drafting indicates a desire to ensure that the restorative schemes that emerge are in line with restorative justice core values.

Should Restorative Justice be an Addition to the Criminal Justice System or a Replacement for it?

In the early stages of the restorative justice movement the advocates of the approach envisioned that it would replace the existing criminal justice system. It was standard practice for restorative justice advocates to begin their arguments with a detailed criticism of the current retributive approach. McElrea (1994: 34) put it succinctly:

Crime rates keep climbing and prison populations keep growing. The needs of neither offenders nor victims are satisfied. The existing theoretical bases of punishment seem bankrupt.

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There was an evangelistic zeal to sweep away the old system and replace it with something new, radical and effective. In South Africa there was no shortage of zeal, but the arguments were different; there was no discredited child justice system to sweep away. Prior to the implementation of the Bill there was no dedicated child justice legislation and child offenders were dealt with by the same criminal justice system as adults, with a few special provisions (Terblanche, 1999). As Skelton (2002) describes the coincidence in time between the creation of the new democratic South Africa, the TRC, the campaign for new child justice legislation and the worldwide popularity of restorative justice allowed restorative justice to be easily incorporated into the draft Bill. As the Bill allows restorative justice to be used at every stage of the system, and with both minor and serious offenders, it could be argued that it has superseded the retributive model in South Africa. Considering that it was only in 1996 that the Constitutional Court finally abolished whipping as a means of punishment, the Bill could be seen as a significant victory for advocates of rehabilitation, children's rights and restorative justice.

However, as previously stated, restorative justice is only provided for child offenders. Johnstone (2002) describes the vision of restorative justice campaigners as restorative justice being used to supplement the existing criminal justice system, and then as its benefits become apparent, it will start to become the presumptive disposition with trial and punishment the exception. In South Africa this vision could be achieved by restorative justice becoming dominant within child justice, and then spreading to the mainstream criminal justice system. Despite the prevalence of high profile restorative approaches, in the Bill, the TRC and township peace committees, the retributive model remains the dominant way of dealing with adult offenders. Considering the length of time that it has taken to implement the Bill it is unlikely that restorative justice will be widely used with adult offenders for some time to come.

Also, even under the dispensation of the Bill, some children are excluded from the restorative and rehabilitative regime. The SALC itself stated that in order to provide restorative justice for the many it would be politically expedient to exclude the few:

the realisation has grown as the investigation has unfolded against a backdrop of rising public concern about crime, that in order to give the majority of children (those charged with petty or non-violent offences) a chance to make up for their mistakes without being labelled and treated as criminals, the Bill would need to be very clear about the fact that society will be protected from the relatively small number of children who commit serious, violent crime (SALC, 2000: 9).

While this analysis is undoubtedly correct, given the increasing punitive tone of much of the South African crime discourse (Stout and Wood, 2003) it demonstrates that the SALC remains to be convinced by the argument that restorative justice can be effective for even the most hardened criminals and most serious crimes.

Skelton (2002) describes how the South African system, neither expects restorative justice to replace nor supplement the existing system, but to take a third way, a parallel track. There is an implicit acknowledgment in that view that retributive justice, for all its faults, will remain the dominant approach in the criminal justice system.

Conclusion

It would be an over simplification to claim that South Africa has come down completely on one side or the other in each of these debates within restorative justice. However, to summarise, the Bill seems to favour a model of restorative justice that is value-led, rehabilitative, offender oriented, following a parallel track to the criminal justice system and incorporates elements of both the ancient and the modern, the community and the state. When the Bill is introduced and implemented these debates will continue and can contribute to the understanding of restorative justice throughout the world. In particular, the manner in which South Africa manages the tensions between the interests of the state and those of local communities will be closely observed.

Two notes of caution should be sounded, however. Firstly, and most obviously, the Bill is yet to be implemented. The drafting of the Bill and the advances that have been made towards introducing it have been very significant, but it is possible that it may continue to be delayed, or it may eventually be introduced in a diluted form. The progressive, rehabilitative nature of the Bill is at odds with the prevailing popular punitive mood in South Africa (Stout and Wood, 2003) and there is little sign that the government is preparing to invest in the youth justice courts, One-Stop centres or even the extra social workers that the Bill provides for. Some South African criminologists are pessimistic that the Bill will ever be introduced (Van Zyl Smit, 1999). Until such times as the Bill is introduced, restorative justice and child rights advocates should be wary of celebrating anticipated victories.

Secondly, perhaps the greatest weakness in the understanding and implementation of restorative justice in the Bill is the limited way that it provides for the needs of victims. This may not necessarily be a failing of the Bill itself, but may be a consequence of the lack of similar reforms in other areas of the criminal justice system. It would be hoped that as the Bill moves towards implementation the debate on restorative justice which has been dominated by child rights advocates, will increasingly be joined by the supporters of victims' rights. Victims' interests continue to be neglected in South Africa and if the implementation of the Bill is to be truly restorative it should contribute significantly to the process of remedying this.

End Notes

- 1 Brian Stout worked at Fort Hare from May 2000 until December 2002 developing a programme in Probation and Correctional Practice as part of a British Council Higher Education link between Fort Hare and De Montfort Universities. He can be contacted at BrianRStout@yahoo.co.uk. I would like to thank Brian Williams and Catherine Wood for their helpful comments on an earlier draft of this paper.
- 2 For a description of the provisions of the Bill, see Sloth-Neilson (1999).
- 3 For a discussion of restorative justice as a framework for the Bill, see Skelton (2002).

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