

PART 1: CONTEXT

CHAPTER 1 INTRODUCTION

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One of the features of the past decade in South Africa has been the problem of crime. Since 1994 recorded crime has increased throughout much of the country, although statistics indicate a turnaround in this trend in the past year. Nevertheless, crime rates in South Africa remain high; in particular the country has among the highest murder rates of all those reporting their figures to Interpol. This explains to some extent why public feelings of safety remain low.¹

Negative perceptions about crime and safety have no doubt influenced government policy as much as the actual crime rate. Policy approaches soon after 1994 were dominated by the National Crime Prevention Strategy (NCPS). The Strategy proposed developmental and law enforcement programmes to not only improve the effectiveness of the criminal justice system, but also deal with the longer term causes of crime.

By 1999 however, rapid increases in crime and public fear of crime, together with a new emphasis in government on delivery, resulted in a concentration on tough law enforcement.² This has been exemplified by the police's Operation Crackdown which focused on affecting as many arrests as possible through highly visible search-and-seizure operations and roadblocks.³ Other measures include making it more difficult for accused to be granted bail, enacting mandatory minimum sentencing legislation, and changing early release policies to ensure that prisoners serve more of their sentence before being considered for parole. The impact of these measures is clearly evident in the massive overcrowding in South Africa's prisons.⁴

Some NCPS projects have remained in place, but with few exceptions – notably the 1998 Domestic Violence Act and the Child Justice Bill (see Chapter 11) which are both victim focused – government's response to crime in recent years has been characterised by two approaches: more arrests and

prosecutions on the one hand, and increasing the punishment for those convicted of crime, on the other. While improving the efficiency of the criminal justice system is necessary, applying harsher punishment to offenders has been shown internationally to have little success in preventing crime. Moreover, both these approaches are flawed in that they overlook important requirements for the delivery of justice, namely:

- considering the needs of victims;
- helping offenders to take responsibility on an individual level; and
- nurturing a culture that values personal morality and encourages people to take responsibility for their behaviour.

Considering that crime rates in South Africa remain high and that government's current focus appears to be on punishment rather than justice, a different approach is needed. In this regard, the paradigm of restorative justice can make a new and valuable contribution. One of the basic tenets of restorative justice is that crime prevention is more likely to be achieved through social reintegration rather than ostracism and punishment. This is achieved through conferences between offenders and victims where guilt is admitted, hurt is revealed, restitution is explored, commitment about future behaviour is made, and the responsibility for carrying out obligations is shared.

A new approach?

Although restorative justice may be considered a fairly new approach to criminal justice, a number of countries such as Canada and New Zealand have discovered that the ethnic heritage of their indigenous people has much to offer the modern criminal justice system. This heritage typically addresses major shortcomings in the modern system, such as the need to ensure that an offender really does acknowledge personal responsibility, that he or she is reintegrated back into society, and that the needs of those who have been affected by crime are addressed.

Although it is generally not well integrated into the South African criminal justice system, our African heritage is relevant. While there are a number of differences between ethnic groups in this country, some of the central features of African legal systems that become evident are:

- a concern to shame the offender and then to reincorporate him or her back into the community once the initial expression of community repugnance had been demonstrated;

- avoiding as far as possible the segregation of the offender or his or her marginalisation into a sub-community of similar social rejects;
- a recognition that the supernatural plays a part in justice;⁵
- a focus on community affairs aimed at reconciling the parties and restoring harmonious relations within the community;⁶ and
- ensuring that the families of the involved parties are always fully involved.⁷

In addition to the African legal traditions that South Africa has to draw on, several post-1994 initiatives indicated government's intention to incorporate restorative principles into policy development. Key among these was the 1996 National Crime Prevention Strategy which advocated a shift away from the state centred approach to justice towards one that gives greater emphasis to victims and restorative justice. One of the NCPS' more successful products – the Victim Empowerment Programme – has laid a sound basis for furthering this aim. Other important initiatives during this period were the 1996 Interim policy recommendations of the Inter-Ministerial Committee on Young People at Risk, and the 1997 White Paper for Social Welfare: Crime Prevention through Development and Restorative Justice. The Child Justice Bill, introduced to parliament in 2002, is the clearest legislative manifestation of these early policy developments.

There are other indications that government recognises the importance of restorative justice principles in dealing with crime generally, and not just in relation to young offenders, as is the case in much of the policy noted above. The role of moral degeneration as a risk factor for criminality has been emphasised in recent years. The importance of this has been pointed out by Australian criminologist, John Braithwaite: "where conscience is not fully developed, approval of others is the primary motivator [for committing crime], not punishment or fear of punishment".⁸

In his State of the Nation address at the opening of parliament on 8 February 2002, President Thabo Mbeki stated that:

Trends in crime incidents as well as other problems in society, including white-collar crime, call for partnership across society to improve our moral fibre, to strengthen community bonds, to pull together in the direction of hope and success...Moral regeneration also means inculcating in us and our youth that service to the people, selfless commitment to the common good, is more valuable than selfish

pursuit of material rewards...Payment for honest work is more fulfilling and sustainable than theft.⁹

A report leading up to government's launch of the Moral Regeneration Movement in April 2002, stated that:

The fight against crime...is a futile exercise unless we help the crime prevention units by helping our people to make the right decisions from the start, that is, to distinguish between good and bad, right and wrong.¹⁰

Furthermore, participants to the above process concluded that "murder, robbery and theft, rape, women and child abuse, domestic violence, drug trafficking, fraud and embezzlement of public funds and crooked business dealings" were some common manifestations of the present moral crisis.¹¹ In its implementation strategy, one of the priorities listed by the Moral Regeneration Movement is "restoration of the family as a fundamental social institution".¹²

Beyond analysing the problem from a new perspective, however, few programmes aimed at preventing crime have flowed from the Moral Regeneration Movement.¹³ Nevertheless, the Movement represents a significant new perspective in government on the importance – for society as a whole and offenders in particular – of acknowledging the 'wrongs' inflicted by criminal behaviour, and the need to repair these through means other than courts and prisons. This could assist in building a platform of support for the use of restorative justice options in the formal justice system. Such support, coupled with extensive awareness raising and training, will be essential considering the focus on offenders that now characterises the criminal justice system.

In most countries, the state assumes responsibility for criminal justice. This is based on the age-old view that the primary responsibility of any state is to protect its citizens from both foreign and domestic enemies, and to adjudicate criminal offences and civil disputes. In this approach, the state is seen as the victim while the actual victims of particular incidents are displaced from any meaningful role in the justice process. Instead the state and the offender are the main parties. Rather than repairing the past harm, this approach focuses on upholding the authority of the state and making offenders and would-be offenders law abiding. This approach to criminal justice has been challenged

in recent years, with restorative justice instead defining the wronged party as the victim and not the state. This is not to suggest an overhaul of the entire system, however.

In reviewing international and local perspectives and practice of restorative justice, this monograph proposes that the approach should complement rather than replace the current retributive justice system. With contributions by leading practitioners and researchers in the field, the monograph aims to:

- explore the nature of restorative justice in South Africa;
- examine and locate its role in the criminal justice system through an analysis of international trends, lessons and experiences;
- comment on the feasibility of restorative justice through selected case studies;
- review the existing policy framework; and
- make recommendations that will inform policy and practice.

The monograph hopes to broaden the understanding of restorative justice in the South African context. It is aimed at all those with an interest in the subject, and in particular the researchers, practitioners and policy makers in the field.

Outline of the monograph

The monograph is divided into three parts. The first provides the context for the discussion, beginning with Chapter 2 that presents a definition and motivation for restorative justice. The chapter also covers some of the widely accepted principles of restorative justice and the arguments both for and against the approach. Chapter 3 explores the experiences and lessons drawn from international practices. Chapters 4 and 5 provide empirical data from various sites in Gauteng on the perceptions of victims, as well as prosecutors and magistrates, towards restorative justice.

Part 2 of the monograph considers some of the ways that restorative justice is currently being practiced in South Africa. Chapter 6 explores the Truth and Reconciliation Commission as the country's best-known model of restorative justice. Chapter 7 considers the extent and nature of diversion programmes, and the challenges facing the sector in this regard. Chapter 8 discusses a pilot project on victim-offender conferencing in Gauteng, illustrating the success of the project in terms of several restorative justice principles. Chapter 9 considers the extent to which non-custodial sentences are used in South

Africa, and challenges whether these sentences can be considered 'restorative' by nature.

Part 3 provides a brief analysis of the policy environment. Chapter 10 outlines policy developments relevant to restorative justice since 1994. Chapter 11 focuses on the Child Justice Bill as the piece of legislation that most clearly applies restorative justice principles. Chapter 12 concludes the monograph and provides specific recommendations to practitioners, researchers and policy makers on points in the criminal justice process where restorative justice can be applied.