

CHAPTER 2

RESTORATIVE JUSTICE IN THE SOUTH AFRICAN CONTEXT

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This chapter discusses the concept of restorative justice, and considers the benefits of adopting this approach in the current criminal justice environment in South Africa. Given the high levels of crime in the country, and particularly of violent crime, it is likely that restorative justice will be seen by some as being 'soft on criminals'. In an effort to illustrate the benefits of this alternative approach to offending, this chapter sets out the arguments for and against restorative justice.

What is restorative justice?

Simply put, restorative justice is about addressing the hurts and the needs of both victims and offenders in such a way that both parties, as well as the communities which they are part of, are healed.¹⁴

Three principles

Although there are a number of definitions of restorative justice, they all contain the following three principles:

- Crime is seen as something that causes injuries to victims, offenders and communities. It is in the spirit of *ubuntu* that the criminal justice process should seek the healing of breeches, the redressing of imbalances and the restoration of broken relationships.
- Not only government, but victims, offenders and their communities should be actively involved in the criminal justice process at the earliest point and to the maximum extent possible.
- In promoting justice, the government is responsible for preserving order and the community is responsible for establishing peace.¹⁵

The Five R's

Rev Don Misener has conceptualised "five R's" that are central to restorative justice which, when considered together, connect the offender with those who

have been offended and make the healing of the broken relationships possible to the degree that victims are prepared to forgive.¹⁶ These constitute the cost of restoration to an offender, and there is no shortcut. The five R's are:

- **Facing reality:** this is the first step on the road to freedom, and is where the cost of restoration begins.
- **Accepting responsibility:** while facing reality acknowledges the truth of a situation, accepting responsibility goes a step further in recognising that a personal response is required.
- **Expressing repentance:** accepting personal responsibility for the consequences of one's actions leads to an expression of repentance. This constitutes sorrow and sincere regret for the actions – a realisation that the actions were wrongful and should not have occurred. The usual way in which this is done is by making an apology to the person who has been wronged, and by asking forgiveness from the supernatural being that the offender relates to.
- **Knowing reconciliation:** being willing to face the full force of wrongfulness, and refusing to take refuge in excuses or rationalisations make it possible to know reconciliation with the person who has been wronged. While there is no guarantee that the person who has been wronged will be willing or able to offer reconciliation, full reconciliation is not possible if the wrongfulness has not been faced.
- **Making restitution:** this is a practical way of facing the consequences of behaviour. It is a way of demonstrating the credibility of the words that were expressed when making an apology and of expressing thankfulness for reconciliation.

As a way of 'delivering justice', restorative justice provides opportunities for the five R's to be practiced and nurtured. Although these principles were formulated from a specifically Christian perspective, they resonate well with many other religions, including traditional African beliefs, Judaism, Buddhism, Taoism, Hinduism, and Islam. In that sense they can be regarded as some universal principles that constitute justice and that are informed by these various traditions.¹⁷

There are a number of other definitions of restorative justice that express similar principles to those listed above, such as Zehr's understanding of the

retributive and restorative paradigms as different lenses,¹⁸ Marshall's definitions,¹⁹ the objectives of restorative justice,²⁰ and Wachtel and McCold's six principles.²¹

There is a balance to be struck here, however. On the one hand it is important to give sufficient definition to the concept so that it does not lose its meaning. On the other hand, the definition should not be so tight that it excludes new applications. Howard Zehr has suggested a framework for this purpose (see box below).

Framework for determining whether initiatives are restorative

Key questions include:

- Does it address harms and causes?
- Is it victim oriented?
- Are offenders encouraged to take responsibility?
- Are all three stakeholder groups involved?
- Is there an opportunity for dialogue and participatory decision-making?
- Is it respectful to all parties?²²

What does restorative justice offer South Africa?

Restorative justice can add significant value to the practice and experience of criminal justice in South Africa at present in two ways:

- Restorative justice can provide a practical, coherent and sound response to the moral challenge presented by crime and the focus given by the Moral Regeneration Movement. It provides feasible ways of applying and nurturing the Five R's and in doing so, gives effect to moral regeneration while drawing on the spiritual and indigenous roots on which it is based.
- This form of justice offers a practical way for families and communities to get involved in responding to crime and to heal its effects. In this sense, it enriches democracy and provides an avenue for the expression of participatory democracy.²³

The charges against restorative justice

In order to verify the important role that restorative justice can play in South Africa's crime prevention and criminal justice efforts, it is necessary to consider the charges against this approach. These include that:

- restorative justice does not fit the thinking of legal practitioners;
- restorative justice is a soft option that ignores the need for punishment;
- restorative justice leads to net widening in that more offenders get drawn into the system than would otherwise be the case;
- restorative justice has generally not been creative and sophisticated enough in its applications to address the issues it claims to;
- many individual victims are not prepared to participate in restorative justice processes but are prepared to settle for compensation directly – victims want retribution, not restoration;
- the level of anger in South African communities at present is so high that people are not ready for restorative justice processes – they want quick fixes;
- restorative justice is not appropriate for dealing with more serious cases such as rape, murder and domestic violence;
- restorative justice overlooks and minimises the seriousness of crime.

Each of these charges against restorative justice is briefly discussed below.

‘Restorative justice does not fit the thinking of legal practitioners’

Many restorative justice practitioners seem to have a sense that the whole paradigm is so contrary to the way most legal practitioners – especially prosecutors and magistrates – think, that there is little common ground to be found. Legal practitioners often perceive restorative justice as not taking seriously the fundamental concerns of a criminal justice system. While restorative justice certainly is a very different lens to the one that is usually used in western criminal courts, it does in fact take the traditional concerns of criminal justice seriously and in fact responds more adequately to them than the traditional theories.

Conrad Brunk, for example, lists the following as the fundamental concerns that a system of criminal justice should accomplish:

- It should *protect* innocent, law abiding citizens by encouraging them to obey the law or deterring them from breaking it, and in so doing maintain a morally acceptable community.
- Offenders should receive their *just desert*. Punishment that is inflicted should fit the crime, and be neither more nor less than the offenders deserve.
- It should redress the injustice done by the criminal. Justice requires that a wrong be made right, and it is the wrongdoer who should do this.

- Punishment should not make the offender a worse person; ideally it should make him/her a better one. This concern has had far less influence in policy and debate than the previous three.²⁴

Brunk describes how four theories have dealt with these concerns, what their shortcomings are and how restorative justice addresses some of the shortcomings.

The retributive approach

This is probably the oldest theory, and has its roots in religious and theological ideas. There is a strong influence of viewing a criminal offence as ‘sin’ – as wrongdoing against the deity. In many religions, sin can only be atoned for through the suffering of the offender or a substitute. This is the origin of the retributive theory’s focus on punishment. The theory takes the primary aim of criminal punishment to be that of responding to the second and third concerns identified above. The point of punishment is to right the wrong done in the criminal offence. The offenders’ suffering or loss is what constitutes the ‘pay back’ to society and the victims.

Despite many attempts to explain how the infliction of harm on offenders actually makes things right, retributive theorists have not offered a persuasive account. The theory simply blinds itself to the fact that the real injustice of an offence is the loss and harm suffered by the victims. This injustice is not addressed by the suffering of the offender – the loss is not restored, the suffering is not compensated, and the broken relationships with victims and society are not mended. The amount of harm in the world has in fact been increased, and the injustice remains.

The strength of the retributive theory lies in its view that offenders be treated as morally responsible members of society, not as instruments for deterring others and not as if they are ‘sick’ and irresponsible.

In contrast to these abstract responses, restorative justice holds that the way an offender ‘rights the wrong’ done to victims is by taking responsibility for the actual, material harm done to them. As was pointed out under the ‘Five R’s’ of restorative justice, this acceptance of responsibility and reconciliation become the pre-conditions to full restoration. There is no dichotomy of choosing mercy and forgiveness over justice; these elements become inherent in the very definition of justice.

The utilitarian deterrence approach

In this view, the concern that punishment should protect society from offenders is regarded as primary. The theological and metaphysical assumptions of the retribution theory are rejected. The state is viewed as having a monopoly on the use of force, which it is justified in using to obtain obedience to the legal and moral order. However, the utilitarian deterrence approach retains a preoccupation with pain and suffering as a means of deterring potential offenders. Because of its focus on protection, the theory claims to be victim focused. However, in reality it focuses entirely on the *potential* victims of crime, but ignores almost completely the *actual* victims. It also provides no mechanism for righting the wrong.

Brunk points out a number of practical shortcomings in the application of this theory. There is no agreement about the relationship between the severity of punishment and its efficiency. When considering general deterrence – the effectiveness of the system of sanctions in deterring criminal offences among the general population – it is impossible to assess accurately how much punishment is required. When it comes to specific deterrence – what is required to prevent a specific offender from offending again in the future – imprisonment may be an effective short term strategy, but it has proved to be a notoriously bad long term strategy.

Furthermore, there is an inherent injustice involved in punishing an individual offender in a certain way because of the effect it may have on other potential offenders – it violates the principle that the punishment should fit the crime.

Deterrence is a legitimate aim of law enforcement. Restorative justice can accomplish this aim without using the offender's punishment as an occasion to teach other potential offenders a lesson. By providing a way back into constructive involvement for society, restorative justice can plausibly claim to meet the objective of social protection and deterrence more effectively than the utilitarian approach. As far as general deterrence is concerned, there is nothing to suggest that the sanctions of restorative justice, including restitution, are any less effective than the infliction of harm or deprivation.

The rehabilitation approach

The classical debate about the justification of punishment has been between the two theories above. During the 20th century the prevailing language of penal theory and practice drew heavily on the rehabilitation model. This

model is rooted in the rise of the social and behavioural sciences. The offender tends to be viewed either as a patient or a victim or both. Either way, the person is not viewed as morally responsible for the offence she or he has committed. As a patient, the offence is the product of an illness for which treatment is required. As a victim, the offence is the product of a dysfunctional social environment – a larger social illness.

The rehabilitation approach has been heavily criticised. It has been widely recognised that enforced behavioural therapy is rarely successful. Conditions in the average prison are far more detrimental to rehabilitation than any good served by therapeutic programmes. There is also little agreement about what approaches are appropriate or successful. The general public also view rehabilitation as 'too soft' and that to treat offenders as non-responsible moral agents is to deny them their dignity as persons. As with the previous two approaches, this approach has little to say about the victims of crime.

Restorative justice is sometimes aligned with rehabilitation theory. However, restoration is not the same as rehabilitation. The term rehabilitation is far too weak to capture the profound changes that take place in those who participate in restorative justice processes. Restorative justice emphasises the need to accept responsibility, and so treats offenders as responsible moral agents, not as sick patients needing treatment – unless of course that is clearly the case. An offender who has taken responsibility for repairing the harm done, and now has restored the trust and confidence of the community is 'rehabilitated' in a far broader sense than can be said of individualised therapeutic measures.

The restitution approach

This approach is far more recent than the preceding three. It has its roots in economic and political schools of thought that are committed to a strong view of the minimalist state – that government should intervene as little as possible in society. It essentially reduces criminal law to civil law and removes the moral concept of wrong. Criminal offences are not really wrongs against a victim but simply the cost of doing business in society. Every harm or loss is compensable; if compensated adequately, the wrong is removed.

While this approach is sometimes appealing to advocates of restorative justice because it is the only other approach that addresses the needs of the immediate victims, it must be recognised that it places far too narrow an interpretation on an essentially sound idea. From a comprehensive

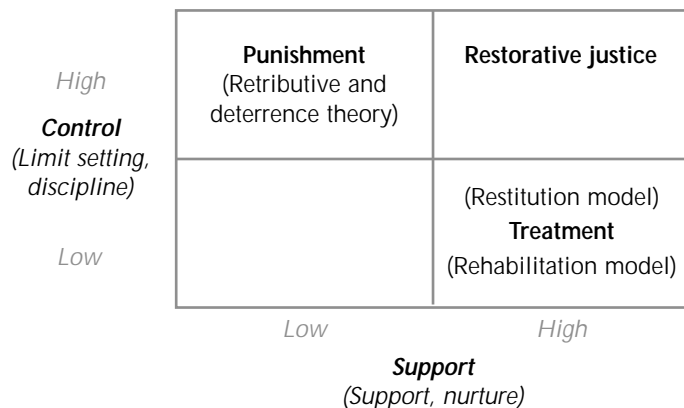
perspective of restorative justice, the following shortcomings of the restitution approach become clear:

- It reduces the idea of restitution to that of financial payback, whereas there are many other creative ways of involving offenders in compensatory activities.
- The restitution approach removes the need for an offender to acknowledge the wrongfulness of his/her actions and to take responsibility for them. This is one of the keys to enabling victims to experience healing, and for offenders to experience reconciliation (see the discussion on the ‘Five R’s’).
- The restitution approach has nothing to say about the restoration or reintegration of offenders into the community.
- The restitution approach greatly favours the wealthy in society, who can ‘afford’ their crimes.
- The restitution approach can only recognise individuals as victims, and ignores the ways in which a community can be wronged and therefore also need reconciliation and restitution.

Brunk points out that restorative justice is the only approach that provides a formal basis for the wide use of discretion in sentencing. By removing the preoccupation with pain and suffering, a restorative justice approach makes possible far greater flexibility, creativity and discretion in sentencing without being perceived as compromising justice.

The diagram below shows how, in the latter half of the 20th century, debate has been locked into an ‘either/or’ paradigm: punishment or rehabilitation.

The social control window²⁵



Restorative justice makes it possible to break out of this thinking by holding offenders accountable for their actions and addressing their underlying needs that contributed to the offence or may lead to its recurrence.

‘Restorative justice is a soft option that ignores the need for punishment’²⁶

In a society which associates imprisonment with taking crime seriously, restorative justice is likely to be used for less serious crimes than for crimes which normally involve a prison sentence. However, as has been shown above, restorative justice has multiple faces, which can serve most of the traditional goals of punishment, including deterrence and crime reduction, rehabilitation and incapacitation. In some countries restorative justice is used in combination with conditional and suspended sentences, which are punitive, such as house arrest and curfews.

‘Restorative justice leads to net widening in that more offenders get drawn into the system than would otherwise be the case’

Net widening is a complex and provocative subject. Some argue that crimes such as domestic violence, corporate crime and school bullying justify restorative justice interventions to intensify social control. This is not necessarily negative, as it may indicate greater community involvement and caring, leading to improved social integration of a perpetrator and a reduction of problem behaviour.

If restorative justice is linked to the charging and sentencing process, the risk of net widening by the state becomes greater. This was the case in Canada where an additional 28,000 conditional sentences were ordered within two years without it decreasing the prison population. On the other hand, restorative justice has the potential to reduce nets of state control if it provides a means to deal with cases that would have resulted in imprisonment. In New Zealand the use of prison for young offenders decreased from 4,000 to 1,000 between 1986–1991 since family group conferences were instituted.

It seems that net widening depends on whether criminal justice professionals and the public accept restorative justice as a legitimate means to deal with serious cases. If it is accepted, it may decrease the use of imprisonment. But if it is deemed inappropriate for serious crimes, then it may well increase social control imposed on offenders who commit less serious crimes.

‘Restorative justice has generally not been creative and sophisticated enough in its applications to address the issues it claims to’

Restorative justice is not an empty concept that can mean all things to all people. It is creative in the sense that it promotes accountability of offenders and can bring about rehabilitative healing and reintegration. This process of accountability and acceptance of responsibility means that restorative justice is not easy on offenders. Accepting responsibility and facing a victim can be tougher and more meaningful than other sanctions, including imprisonment. The routine passing of short terms of imprisonment is not meaningful. The biggest problem is that the community and the criminal justice system can perceive restorative justice as appropriate only for less serious crimes. Any shortcoming in creativity says more about the preparation and facilitation of an individual process than about the general process and principles of restorative justice.

‘Many individual victims are not prepared to participate in restorative justice processes but are prepared to settle for compensation directly – victims want retribution, not restoration’

What should be restored will depend on the concerns and abilities of those who participate in a particular restorative justice process. Some victims may be content with apologies while others may want and need more tangible forms of reparation. Failure to reach agreement in a given process is not necessarily a sign of failure.

Restorative justice creates opportunity for the participation of victims and for addressing their needs in ways that would never happen in the usual justice process. People may also have needs that they are not aware of: participating in a process that restores dignity and respect and gives a sense of ownership are needs that many people may not be able to conceptualise but may feel good about after having experienced them. This, however, does not mean that some victims may not demand retribution and punishment.

‘The level of anger in communities at present is so high that people are not ready for restorative justice processes – they want quick fixes’

South Africa’s Truth and Reconciliation Commission demonstrated that restorative justice can be used in a wide variety of contexts and that it is effective not only in the case of ‘ordinary crime’. The ability of South African victims to forgive their perpetrators for the most atrocious crimes is a shining example to all South Africans.

Restorative justice processes also provide a safe place in which to express anger in a constructive way, which the formal justice process generally does not do. This is valuable in itself. Treating victims with dignity and respect is central to restorative justice. If practitioners understand this principle well, they will never force a victim to participate in a process with which they are not comfortable. This argument is thus an over-generalisation: there may be some people to whom it does apply, but it cannot be presumed to apply to everyone and thus mean that restorative justice processes are invalid.

‘Restorative justice is not appropriate for dealing with more serious cases such as rape, murder and domestic violence’

Some feminists are against restorative justice in domestic violence situations in which a serious power imbalance exists between the genders. The argument is that it cannot be presumed that reconciliation with the offender who committed the violence is desirable. Some feminists propose that restorative justice be ‘victim centred’ and allow women to confront the offender in her own words with all the hurt she has suffered.

Applying restorative justice principles and processes in rape and murder cases does not imply minimising the seriousness and tragedy of such incidents, nor does it suggest that perpetrators should be let off the hook simply because they have apologised. Serious cases present excellent opportunities for victims to feel that they have been heard, and for perpetrators to be confronted with the real consequences of their actions. Specific steps can also be taken to ensure that victims are not dealt with insensitively, as restorative justice seeks to promote the respect and dignity of all concerned, especially those who have been hurt.

‘Restorative justice overlooks and minimises the seriousness of crime’

This argument is based on a limited understanding of what forgiveness is. Archbishop Desmond Tutu, writing his account of the Truth and Reconciliation Commission had this to say on the matter:

Forgiving and being reconciled are not about pretending that things are other than they are. It is not patting one another on the back and turning a blind eye to the wrong. True reconciliation exposes the awfulness, the abuse, the pain, the degradation, the truth.... Forgiveness does not mean condoning what has been done. It means taking what has happened seriously and not minimising it, drawing out

the sting in the memory that threatens to poison our entire existence. It involves trying to understand perpetrators and so have empathy, to try to stand in their shoes, and to appreciate the sort of pressures and influences that might have brought them to do what they did.²⁷