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# An international perspective of restorative justice practices and research outcomes

## Summary

Restorative justice is not a new concept as it was the dominant criminal justice model in ancient Greek, Roman and Arab civilisations as well as indigenous communities in South Africa, Australia, New Zealand and Canada. Western countries re-discovered restorative justice in the mid 1970s and by the end of the 1990s most Western countries had legalised restorative justice programmes. South African legislation also makes provision for restorative justice processes. Restorative justice is a victim-centered response to crime that provides opportunities for those most directly affected by crime — the victim, the offender, their families, and representatives of the community — to be directly involved in responding to the harm caused by the crime. It can be applied at the formal and informal level. At the formal level the criminal justice system can apply it during the pre-trial process, the pre-sentencing process, or in pre-release programmes. At the informal level it can be applied to solve a variety of community conflicts, neighbourhood conflicts, family conflicts and interstate conflicts. Most restorative justice cases are referred by magistrates, prosecutors and probation officers. Common referrals are vandalism, theft of property, car theft, burglary, shop theft, attempted homicide, assault and domestic violence and it is appropriate for males, females and young offenders. A large number of research findings across countries indicate that restorative justice is very effective and that most victims and offenders were satisfied with the outcomes of the process. Most participants indicated that they had been fairly treated and that they would again participate in a restorative justice process. The criminal justice system is criticised for being a European worldview of a retributive justice philosophy that is largely offender focused and guided by codified laws and rules of procedure while ignoring the needs of the victim. Restorative justice is, however, also criticised for adopting the legal framework and definitions of crime and that it can put victims' rights at risk. It is also questioned whether restorative justice empowers victims as the process rather seems to entrench them as victims. It is furthermore argued that restorative justice can widen the net of social control if it is mostly used for minor offences.

## Opsomming

### 'n Internasionale perspektief van herstellende geregtighedspraktyke en navorsingsuitkomst

Herstellende geregtigheid is nie 'n nuwe konsep nie en was die dominante kriminele regsmodel in antieke Griekse, Romeinse en Arabiese beskawings asook inheemse gemeenskappe in Suid-Afrika, Australië, Nieu Seeland en Kanada. Westerse lande het herstellende geregtigheid herontdek in die middel 1970s en teen die einde van die 1990s het die meeste Westerse lande wetlike voorsiening gemaak vir herstellende geregtighedsprogramme. Suid-Afrikaanse wetgewing maak ook voorsiening vir herstellende

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geregtigheidsprogramme. Herstellende geregtigheid is 'n slagoffer-gesentreerde reaksie op misdaad wat geleenthede bied aan diegene wat die meeste daardeur geraak word — die slagoffer, die oortreder, hul gesinne, en gemeenskapsvertegenwoordigers — om direk betrokke te raak by die skade veroorsaak deur misdaad. Dit kan op formele en informele vlak toegepas word. Op formele vlak kan dit deur die regstelsel toegepas word tydens die voorverhoor proses, the voorvonnis stadium, of as deel van voor-vrylatingsprogramme. Op informele vlak kan dit toegepas word om 'n verskeidenheid gemeenskapskonflikte op te los, byvoorbeeld buurtkonflikte, gesinskonflikte en interstaat konflikte. Herstellende geregtigheidsgevalle word meesal verwys deur landdroste, aanklaers en proefbeamptes. Die meeste verwysings is vir misdade soos vandalisme, diefstal van eiendom, motordiefstal, huisbraak, winkeldiefstal, poging tot moord, aanranding en gesinsgeweld en dit is geskik vir mans, vroue en jeugdige oortreders. 'n Groot aantal navorsingsbevindings in verskeie lande toon dat herstellende geregtigheid baie doeltreffend is en dat die meeste slagoffers en oortreders tevrede was met die uitkomst van die proses. Die meeste deelnemers het verder aangedui dat hulle regverdig behandel is en weer sal deelneem aan 'n herstellende geregtigheidsproses. Die kriminele regstelsel word gekritiseer omdat dit 'n Europese wêreldbeskouing van vergelding is wat hoofsaaklik fokus op die oortreder en gerig word deur gekodifiseerde wette en prosedures terwyl die behoeftes van die slagoffer geïgnoreer word. Herstellende geregtigheid word egter ook gekritiseer omdat dit die regsraamwerk en definisies van misdaad aanvaar en dat dit slagoffers se regte kan skaad. Dit word ook bevraagteken of herstellende geregtigheid werklik slagoffers bemaatig aangesien die proses inbreuk kan maak op hulle regte. Verder word geargumenteer dat herstellende geregtigheid die net van sosiale beheer kan verbreed as dit hoofsaaklik gebruik word vir geringe oortredings.

## 1. Introduction

Restorative justice is not a new concept. It was the dominant criminal justice model in ancient Arab, Greek, Roman and Asian civilisations, which all required compensation for the victims of crime.<sup>1</sup> It was also prominent among various Aboriginal communities in Australia, New Zealand and Canada.<sup>2</sup> Traditional African societies also focused mostly on the victims of crime and restitution and reconciliation were considered as crucial to right the wrong caused by crime while imprisonment was not an option.<sup>3</sup> African families took collective responsibility for one another, and in some rural areas, this is still the case. When a matter could not be settled within the family circle, senior relatives, or community members outside the family, were invited to assist with the reconciliation process. The offender was required to compensate the injured party and then share in a ritual meal in which those present ate one of the animals imposed as a fine.<sup>4</sup> Indigenous courts further allowed the victim, the offender and members of the community to participate actively in the justice process although Roche<sup>5</sup> points out that reconciliation was not always sought in cases where disputes involved comparative strangers.

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1 Braithwaite 1998: 1ff.

2 Roach 2000: 256.

3 Nsereko 1992: 21.

4 Kgosimore 2001: 43.

5 Roche 2002: 520.

According to Kgosimore<sup>6</sup> the changes that have taken place in post-apartheid South Africa have not yet permeated the criminal justice philosophy that is largely offender focused. Indigenous people in countries such as Australia hold similar views stressing that colonialism oppressed indigenous practices to maintain social order while justifying European law as an act of domination.<sup>7</sup> In contrast restorative justice places the victim at the heart of the process. Criminal justice and restorative justice processes are both social constructs to maintain order in society and restorative justice proponents regard it as a social movement within the criminal justice system.

## 2. Restorative justice in western countries

Western countries re-discovered restorative justice in 1974 with the establishment of an experimental victim-offender reconciliation programme in Kitchener, Ontario, Canada while the first US programme was established in Indiana in 1978.<sup>8</sup> New Zealand established their first programme in 1989 and Australia in 1999<sup>9</sup> and according to Roach<sup>10</sup> criminologists played a leading role in the modern revival of restorative justice by refocusing on the rights and needs of crime victims. By the end of the 1990s most Western countries had embraced restorative justice programmes and it is currently estimated that there are about 900 such programmes in Europe, 300 in the USA<sup>11</sup> and 100 in Canada.<sup>12</sup> According to Braithwaite<sup>13</sup> China has 155 000 restorative justice programmes in the form of local mediation committees.

Many Western countries have made legislative provision for restorative justice in the 1990s, for example, Britain, Ireland, the US, Canada, Australia, New Zealand, Austria, Germany, Norway, Belgium, Denmark, Sweden, Finland, Spain and France. In South Africa the *Probation Services Amendment Act* 35 of 2002 makes provision for restorative justice processes as do the Child Justice Bill, the Sexual Offences Bill and the Sentencing Framework Bill.

The 2001 *UN Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-First Century*, also stresses the importance of establishing regional, national and international plans in support of victims, such as mediation and restorative justice programmes, the development of support services and awareness campaigns on the rights of victims, and the establishment of compensation funds for victims as well as witness protection policies.

Victim advocacy groups and the legal fraternity were found to be more sceptical and critical of restorative justice. The American Bar Association, for example, only embraced restorative justice conferencing as a viable sentencing option in the late 1990s. Magistrates and prosecutors are regarded as playing a crucial role in the effective implementation of restorative justice.

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6 Kgosimore 2001: 41.

7 Boersig 2005: 117

8 Umbreit 1999: 215.

9 Luyt 1999: 73.

10 Roach 2000: 275.

11 Umbreit 2001: 1.

12 Roach 2000: 253.

13 Braithwaite 1998: 12.

### 3. The objectives of restorative justice

Restorative justice is generally regarded as a way of “humanizing justice, of bringing victims and offenders together in ways that provide opportunity for victims to receive explanation and reparation and for offenders to be accountable to the victim and the community ...” This shift in thinking away from punitive justice is also referred to as community justice.<sup>14</sup>

It can be described as a “victim-centred response to crime that provides opportunities for those most directly affected by crime — the victim, the offender, their families, and representatives of the community — to be directly involved in responding to the harm caused by the crime”.<sup>15</sup> Marshall<sup>16</sup> defines restorative justice as “a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future”. Braithwaite,<sup>17</sup> however, points out that this definition does not define the aims of restorative justice or its core values, which are about healing, moral learning, community participation and caring, dialogue, forgiveness, responsibility and making amends. In a later publication Braithwaite<sup>18</sup> cites the following emerging standards for restorative justice:

- Remorse over injustice
- Apology
- Censure of the act
- Forgiveness of the person
- Mercy

Nevertheless he also warns that it is cruel and wrong to expect a victim of crime to forgive, and he quotes Minow, who avers that “forgiveness is a power held by the victim and not a right to be claimed”.

Zehr and Mika<sup>19</sup> broadened Marshall’s definition of restorative justice by describing the aims as follows:

- Focusing on harms suffered rather than laws broken
- Showing a balanced concern for the victim and offender and involving both in the criminal justice process
- Working towards assisting victims through empowerment and responding to their needs.
- Supporting the offender and simultaneously encouraging him or her to understand, accept and carry out his or her commitments to repair the harm.

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14 Umbreit *et al* 2002: 1.

15 Umbreit 2001: 1.

16 Braithwaite 1998: 5.

17 Braithwaite 1998: 6.

18 Braithwaite 2002: 570.

19 Cavanagh 1998: 24.

The Youth Justice Board of England and Wales<sup>20</sup> avers that an offence is primarily a violation of relationships between the offender and the victim, and those close to them and the first aim of restorative justice is to assess the extent of the harm that has been caused, and to attempt to repair the harm by involving all parties as far as possible. They further describe it as a balanced approach which seeks to address, in a positive way, the needs of everyone affected by the offence by means of dialogue. The victim's involvement is essential in defining the harm and how it might be repaired, while offenders must be held accountable for their actions by taking responsibility for their behaviour and by making reparation. Reparation can be made in a variety of ways, such as a written or verbal apology, financial compensation, or work carried out for the victim, the secondary victims or a third party (e.g. school, old age home, hospital). Direct reparation is any activity directed at those who were actually affected by the offence, while indirect reparation is work carried out for a party other than the primary or secondary victims, for example work at a charity shop or hospital or school. They further define the main objectives of restorative justice as follows:

- To attend fully to victims' needs — material, financial, emotional and social (including the needs of those who are personally close to the victim and who may also be affected).
- To allow the victim the opportunity to view the offender as a person rather than as an "unknown" person who has committed an offence.
- All parties directly affected by an offence are given the opportunity to contribute to decision making about what needs to be done.
- To enable offenders to appreciate fully the consequences of their actions and to give them the opportunity to make amends for their actions.
- To prevent re-offending by reintegrating offenders into communities.
- To create communities that support the rehabilitation of offenders and victims and which are active in preventing crime through positive interventions.
- To provide a means of avoiding the escalation of legal justice and the associated costs.

The Canadian Law Commission<sup>21</sup> regards the following as the three fundamental principles of restorative justice:

- Crime is a violation of a relationship among victims, offenders and the community
- Restoration involves the victim, the offender and community members
- It involves a consensus approach to justice.

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20 [www.rjkbases.org.uk](http://www.rjkbases.org.uk).

21 Roach 2000: 256.

#### 4. Restorative justice processes

Restorative justice processes can be applied in a variety of contexts at the formal and informal level. At the formal level, the criminal justice system can apply restorative justice during the pre-trial process, during the pre-sentencing process as part of a condition for sentence, or in pre-release programmes. Of the 204 cases handled by the Restorative Justice Centre in Pretoria, 87% were referred at the pre-trial phase. At the informal level it can be applied to resolve corporate conflicts and disputes, and to resolve a variety of community conflicts, such as bullying in schools, neighbourhood conflicts, family conflicts and interstate conflicts (alternative dispute resolution). Formal restorative justice processes are initiated by the criminal justice system while informal restorative justice processes are initiated by the community. In informal restorative justice processes, the parties are called disputants as the assumption is that they are all contributing to the conflict and need to compromise to reach a settlement. In formal restorative justice, one of the parties has committed a criminal offence and has admitted guilt, while the other has been victimised. Although restorative justice draws on the wisdom of various indigenous cultures across the world, such as Native American, Canadian Aboriginal/First Nation, New Zealand Maori, Australian Aborigine and African indigenous people, it is adapted to modern needs. It is implemented differently in different countries and regions, thereby reflecting the varying cultural norms and mores underpinning it,<sup>22</sup> and as Ashworth<sup>23</sup> points out there “is no single notion of restorative justice, no single type of process, no single theory”. It is a flexible model which varies from country to country and from area to area, depending on local needs and customs. Various models have been developed in terms of local, regional and national needs and examples include: victim-offender mediation, family-group conferencing, victim intervention programmes, victim panels, sentencing circles, peace-making circles, healing circles, community reparative boards, crime repair crews of which victim-offender mediation is the most frequently used.<sup>24</sup> McCold<sup>25</sup> cites the following models:

- Mediation models: community mediation; victim offender reconciliation programmes; victim offender mediation;
- Child welfare conferencing models: social welfare family group conferences; family-group decision-making;
- Community justice conferencing models: New Zealand’s youth justice conference; The Wagga Wagga police conferences; Canberra’s victimless conferences; Real justice community conferences;
- Circle models: peace circles; sentencing circles; healing circles.

There is also ongoing debate on whether there is a difference between mediation and conferencing and which term is preferable. See, for example

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22 Umbreit *et al* 2000: 216.

23 Ashworth 2002: 578.

24 Umbreit 1999: 1.

25 McCold 1999: 1.

McCold.<sup>26</sup> Umbreit<sup>27</sup> sensibly states that while variations exist in philosophy, design, implementation and terminology all the programmes are far more similar than different and he advocates the term “restorative justice conferencing” as an umbrella term to include all forms of direct restorative communication between crime victims and offenders that are facilitated by one or more impartial third parties. He further points out that all the different models have strengths and limitations and by embracing a multi-method approach it will be possible to draw upon the strengths of the various models while minimising the limitations. He is also of the opinion that a multi-method approach will be far more likely to respond to the unique needs of individuals, communities and their cultures. Although Umbreit<sup>28</sup> seems to exclude indirect forms of restorative justice such as shuttle conferencing where there is no direct contact between victims and offenders this broader term does seem to imply that the focus need not only be on direct meetings between parties which opens up a range of other programme applications, such as victim impact panels, support groups and diversion work which is congruent with the trend that conciliation is increasingly not seen as a condition of restorative justice.<sup>29</sup> It is of interest to note that in 90% of British restorative justice cases there is currently no direct contact between victims and offenders as shuttle conferencing is the preferred method. This method is regarded as very useful in some cases of domestic violence and rape where a face-to-face encounter may put the victim at risk. He further cites the following key elements as central to all models of restorative justice conferencing:

- All of those directly affected by the crime are encouraged to participate.
- The victim and offender choose which family members or support persons should be present, if any.
- The process of conferencing/dialogue is adapted to the expressed needs of the victim and offender.
- Extra deference is shown toward the victim, while still treating the offender respectfully.
- All of the primary parties are thoroughly prepared through in-person meetings prior to the joint conference.

Most countries have developed standards/protocols and ethical guidelines for restorative justice practitioners which deal with aspects such as the training and education of practitioners, the handling of the restorative justice process, victim and offender safety, victim and offender choice, the importance of impartiality and neutrality of the facilitator, confidentiality and the exchange of information, professional advice, how to avoid manipulative or intimidating negotiating techniques, informed negotiations and/or dialogue, costs and fees, advertising, relationship with other professionals, media policy, facilitating when different cultural and racial groups are involved, screening of cases, follow-up procedures and quality control through programme evaluation.<sup>30</sup>

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26 McCold 1999: 1.

27 Umbreit 2001: 33.

28 Umbreit 2001: 33.

29 Braithwaite 2002: 571.

30 Naudé *et al* 2002: 32.

Social workers and social scientists are mostly used as facilitators for formal restorative justice processes and research in Italy<sup>31</sup> has found that the success of restorative justice programmes was at risk where facilitators were inadequately trained in restorative justice processes.

A sensitive issue is whether legal representatives should be present during the restorative justice process and the general consensus is that this may negatively impact on the process, especially if only the offender has a legal representative. In England, for example, legal representatives are not allowed to be present while other countries, for example Germany, allow legal representatives. Legal representatives are currently not trained to be sensitive to the victim's needs or to be impartial and their presence may inhibit the facilitator, the victim and other participants as they only focus on the rights of their client. Although the Service Charter for Victims of Crime in South Africa was adopted by Parliament in December 2004, the rights and needs of crime victims still receive very little attention from a legal training point of view.

## 5. Cases referred to restorative justice conferencing

It should be pointed out that restorative justice conferencing is not appropriate for all crimes and it must always be presented as a voluntary choice to the victim and the offender. Most restorative justice cases are referred by judges/magistrates, prosecutors and probation officers, while victim advocates, defence attorneys and the police can also make referrals to restorative justice. Common referrals in the US are cases of vandalism, theft and burglary and shoplifting cases are also frequently referred although there is now an attempt to rather refer cases where there is a personal rather than a corporate victim. Crimes of serious violence such as rape, attempted homicide, negligent homicide, and survivors of first degree murder are now also beginning to be referred which needs a more advanced form of conferencing as it requires more case preparation and expertise.<sup>32</sup>

In Germany, restorative justice conferencing is allowed for all types of offences where the expected penalty would be a prison sentence of up to one year or a fine and more than 95% of all criminal cases were eligible for restorative justice conferencing or diversionary mediation as it is called in Germany.<sup>33</sup> In Austria, 2 765 restorative justice processes were registered in 1997, while 20 000 juvenile cases were resolved through restorative justice, that is almost 50% of juvenile cases. The legal system in Austria is similar to that of Germany, but there is specific provision for an appeal by the parties in a case where the prosecutor does not initiate a restorative justice procedure. In Germany, one restorative justice process per 64 convictions is initiated, while in Austria the figure is one for every 31 convictions.<sup>34</sup>

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31 Baldry 1998: 738.

32 Umbreit 2001: 5.

33 Kilchling & Löschnig-Gspandl 2000: 309.

34 Kilchling & Löschnig-Gspandl 2000: 324.



In terms of offence type, the outcome for juvenile and adult German offenders was very similar, in that 75% of all restorative justice cases involved violent crimes, while theft, fraud and damage to property cases amounted to 25%. Few robberies, extortions or felonies were referred for restorative justice in the case of adult offenders, while these types of offences made up 20% of juvenile cases. In Austria, violent crimes made up 43% and property crimes 52% of cases referred for restorative justice in the case of juveniles, and 75% and 24%, respectively, in the case of adult offenders.<sup>35</sup>

As violent crimes (murder, rape, serious assault and robbery) globally constitute about 10-15% of reported crimes<sup>36</sup> one would expect that crimes of violence referred to restorative justice would be in proportion to this figure, but it is obvious that Germany and Austria refer a much larger number of violent crimes to restorative justice conferencing. (In South Africa these crimes constitute 31.96% of all crimes according to the SA Police Service). This may be due to the fact that in many violent crimes the victim and offender know each other. Research in seventeen (17) developed<sup>37</sup> and ten African countries<sup>38</sup> found that in about 60% of cases of assault and sexual offences the victim and offender knew each other.

Baldry's<sup>39</sup> study in Italy based on ten restorative justice programmes for juveniles found that a wide range of offences was referred to restorative justice conferencing, from property crimes and extortion to violent crimes, although most cases involved theft (31%), followed by personal injuries (13%), robbery (10%), rape (6%) and attempted murder (4%).

Nova Scotia in Canada has introduced a programme which recognises the role of restorative justice in all types of crimes, although the programme links the seriousness of the crime with particular interventions, with the emphasis being on cases involving minor offences and first-time offenders. Offences such as fraud, robbery, summary conviction sexual offences, spousal assault and impaired driving are not eligible for pre-trial diversion.<sup>40</sup> According to Roach<sup>41</sup> a society which associates imprisonment with taking crime seriously will be more likely to use restorative justice for less serious offences while Cavanagh<sup>42</sup> points out that research is needed on how to communicate the value and effectiveness of restorative justice more effectively to the judiciary.

Of the three pilot victim-offender conferencing projects initiated in Westbury, West Rand, and Alexandria in Gauteng under the guidance of the Centre for the Study of Violence and Reconciliation in 1999/2000, involving a total of 189 cases, 73% involved assault (31%) and common assault (42%). A further 11% of cases involved malicious damage to property and most of the offenders

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35 Kilchling & Löschnig-Gspandl 2000: 326.

36 Newman 2000: 58.

37 Van Kesteren *et al* 2000: 5.

38 Naudé 2004: 177.

39 Baldry 1998: 58.

40 Roach 2000: 259.

41 Roach 2000: 259.

42 Cavanagh 1998: 26.

were males (66%). A study in Canada found that 80% of the offenders were male with an average age of 25, and only 20% were members of minority groups. Of the victims, 59% were male, with an average age of 33, and 14% were members of minority groups.<sup>43</sup>

In the US, a typical participating victim was a mid-thirties, Anglo-male, while most offenders were young Anglo- or Hispanic males. In England, both the offender and the victim were usually males, with an average age of 34.<sup>44</sup> The large number of male offenders can probably be ascribed to the fact that, worldwide, most crimes are committed by young males. Globally only about 12% of crimes are committed by females while about 80% of offenders are under the age of 35.<sup>45</sup> This is also the situation in South Africa.

The greatest controversy involves domestic violence and sexual offences on the grounds that the power imbalances in the relationship are detrimental to restorative justice.<sup>46</sup> It is further pointed out that the structural imbalances between the parties are ignored and that restorative justice programmes that focus on apology and forgiveness are regarded as cheap justice, as an apology can be part of the ongoing cycle of violence resulting in many women negotiating for their safety.<sup>47</sup>

Roach<sup>48</sup> again refers to Braithwaite who argues that victim-centered restorative justice allows a woman to confront the offender in her own words with the harm she has suffered. Minow<sup>49</sup> avers that restorative justice can help victims move beyond the anger and the sense of powerlessness, whereas retributive justice may reinforce feelings of anger and a sense of victimhood and helplessness. Hudson<sup>50</sup> points out that the formal criminal justice system has failed female victims of domestic violence owing to low prosecution and conviction rates and because of the secondary victimisation of women during the proceedings and she argues that restorative justice can empower a woman, as she gets the opportunity to say what she wishes to say and can choose her supporters. In South Australia<sup>51</sup> studies found that victims of domestic violence are better served when their cases are referred to restorative justice as about half of such court cases are dismissed or withdrawn. Research in South Africa<sup>52</sup> also found that the justice system is not performing optimally. Of the 2,58 million crimes recorded by the police in 2000, 24% went to court of which 11% of cases went to trial resulting in a conviction rate of about 8% of cases.

It is evident that countries use different criteria when it comes to the referral of cases for restorative justice. Proper offender screening and victim

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43 Umbreit 1999: 220.

44 Umbreit 1999: 219.

45 Naudé 1997: 26.

46 Presser & Lowenkamp 1999: 337.

47 Koss 2000: 1337.

48 Roach 2000: 272.

49 Roach 2000: 272.

50 Hudson 2002: 625.

51 Daly 2005: 167.

52 Schönteich 2002: 23.

risk assessment are further important to minimise the risks involved and to prevent offenders from exploiting the restorative justice process. Restorative justice is not advocated in the case of child victims of sexual violence.

## 6. Is restorative justice conferencing effective?

Restorative justice may not always be successful, as some victims demand retribution and punishment but this should not be seen as a sign of failure as not all victims and offenders are suitable for this type of process.<sup>53</sup> Braithwaite<sup>54</sup> again points out that there is a large body of international research showing that most victims are not as vengeful or as punitive as those few focused on by the media after a high-profile trial. A Canadian study, for example, found that 87% of serious offenders expressed a need to meet with the offended while 60% of severely traumatised victims indicated that they would like to meet with the offender. This is counter to the general belief that

- Victims of serious crimes do not want to enter into dialogue with the offender
- Violent offenders are lacking in empathy
- The more serious the offence the more crucial it is to keep victims and offenders apart.<sup>55</sup>

Most research focuses on aspects such as

- The willingness of victims and offenders to participate in restorative justice conferencing
- Victim, offender and community satisfaction with the process
- Whether agreements were reached and adhered to, and
- Differences in re-offending or recidivism rates between offenders referred to restorative justice conferencing and those who received a prison sentence.

According to Umbreit<sup>56</sup> forty to sixty percent of persons in the US offered the opportunity to participate in restorative justice conferencing refused mostly because they

- Viewed the offence as too trivial
- Feared meeting the offender or
- Wanted the offender to receive a harsher punishment.

Lawyers sometimes advise offenders not to participate in the process and some offenders simply do not want to become involved in restorative justice conferencing.<sup>57</sup> Research<sup>58</sup> of four programmes in Canada, involving 4 445

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53 Roach 2000: 258.

54 Braithwaite 1998: 24.

55 Gustafson 2005: 196

56 Umbreit *et al* 2002: 2.

57 Umbreit *et al* 2002: 2.

58 Umbreit 1999: 221.

cases, mostly adult, again found that 90% of victims and 83% of offenders voluntarily participated in restorative justice conferencing. Most of the victims (91%) and offenders (93%) indicated that they would again participate in restorative justice conferencing. Successfully negotiated agreements that were acceptable to both parties were reached in 92% of the cases. Satisfaction with the criminal justice system was also significantly higher among victims (78%) and offenders (74%) compared to victims (48%) and offenders (53%) who did not participate in restorative justice conferencing. In the US more than 90% of cases also resulted in restitution agreements.<sup>59</sup>

In Australia it was found that 96% of victims felt that they had been treated fairly, 93% found the process helpful, 98% said the process allowed them to express their feelings without being victimised, 75% felt that the offender was sincere, and 94% indicated that they would again participate in restorative justice conferencing if they were in a similar situation.<sup>60</sup> In the US 89% of offenders experienced the process as fair, while 89% of British offenders expressed a similar feeling.

Communities also seem to be more satisfied with restorative justice processes than with existing criminal justice practices, according to Braithwaite.<sup>61</sup> Members of the community who participated in restorative justice conferencing expressed high rates of satisfaction and in Australia, 93% of parents, 84% of police members and 67% of judicial officers expressed satisfaction with the restorative justice outcome.

In Britain, over 80% of agreements were successfully completed, and, in New Zealand, 58% of agreements were complied with. A Finnish study found that 85% of agreements were completed. Symbolic reparation such as an apology seems to play an important role in victim satisfaction and 74% of Australian victims who received an apology were satisfied with the process, compared to 11% of cases randomly assigned to court. Fear of revictimisation also seems to decline after restorative justice conferencing in terms of a Canadian study.<sup>62</sup> Restitution or what some jurisdictions call reparation is quite varied ranging from monetary compensation to the victim, community service, work for the victim or for a community institution. Victims frequently report that while restitution was a primary factor, many appreciated the opportunity to talk with the offender more. A New Zealand study found that apologies occurred in 70% of cases; work in the community in 58% of cases and monetary reparation in 29% of cases while a US study found the following: apology 62%, monetary restitution 42%, personal service to victim 36%, community service, 24% and other, 57%.<sup>63</sup>

The re-offending rates of offenders referred for restorative justice conferencing have also been researched and a study of 167 youths in the US found that only 18% had committed another offence after a year compared with a 27%

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59 Umbreit *et al* 2000: 224.

60 Braithwaite 1998: 22ff.

61 Braithwaite 1998: 35.

62 Kilchling *et al* 2000: 224.

63 Umbreit *et al* 2002: 9.

re-offending rate of a matched comparison group.<sup>64</sup> Another study of six US restorative justice programmes also found a significant reduction in recidivism, while in Australia the re-offending rate was 20% compared with a 48% rate for juvenile cases that went to court.<sup>65</sup> Umbreit *et al*<sup>66</sup> refer to a large number of studies in the US and England indicating that the offenders referred for restorative justice conferencing have significantly lower re-offending rates than comparison groups of offenders who have received prison or probation sentences. Morrison<sup>67</sup> also found that, on average, restorative justice programmes had lower reconviction rates than conventional criminal justice approaches.

These figures are low when compared to the re-offending rates of released prisoners in the US, Canada, the Netherlands, namely 45-50% on average, while it is 50-55% in the case of West Germany, Australia and Britain within 3 to 6 years of release from prison.<sup>68</sup> In South Africa the recidivism rate for released prisoners is 80% after five years<sup>69</sup> and on average about 54% of prisoners serve a sentence of between 1 to 3 years indicating that many could probably be considered for restorative justice conferencing.

Information on the costs of restorative justice compared with cases that went to court is scarce, although New Zealand claims having saved large amounts while countries such as Germany, Austria, and China which are committed to restorative justice conferencing have reduced their institutional costs significantly.<sup>70</sup> Umbreit *et al*<sup>71</sup> also found that the costs of restorative justice conferencing in the US are about USD250 per case which is significantly lower than the costs of a prison sentence.

## 7. A critical analysis of criminal justice and restorative justice

The criminal justice system is criticised by the proponents of restorative justice, but restorative justice is also not without criticism and some experts criticise the process and the rationale underpinning it as is evident from the following discussion based on the arguments of Kgosimore,<sup>72</sup> Elliott and Gordon,<sup>73</sup> Pavlich<sup>74</sup> and Zehr and Toews.<sup>75</sup>

The justice system is criticised for its European worldview of a retributive justice philosophy that is largely offender focused, hierarchical, adversarial,

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64 Umbreit 1999: 225.

65 Braithwaite 1998: 28.

66 Umbreit *et al* 2002: 12.

67 Morrison 2002: 607.

68 Baumer *et al* 2002: 50ff.

69 Naudé 2002: 20.

70 Braithwaite 1998: 71.

71 Umbreit *et al* 2002: 16.

72 Kgosimore 2001: 41.

73 Elliott & Gordon 2005.

74 Pavlich 2005.

75 Zehr & Toews 2004.

punitive and guided by codified laws and rules of procedure. Many indigenous peoples in settler colonies such as Australia, New Zealand and North America are highly critical of the formal criminal justice system and the negative impact it has had on indigenous communities. The system is seen as ineffective in dealing with crime, rehabilitation and the needs of victims and there is a general distrust in the Euro-centric responses to crime.

Criminal justice is centred on determining the guilt of offenders with little regard for victims although credit is given to current efforts to involve victims more in the justice process by means of crime (victim) impact statements and a greater recognition of their material and emotional needs. The legal process is guided by principles of fair trial (due process), of which the key elements are the presumption of innocence, the right to legal assistance, the right to remain silent and not to testify during the proceedings with the consequence that the offender is not compelled to accept guilt or responsibility for the crime committed. The onus is therefore on the state to prove guilt beyond a reasonable doubt and to determine a suitable sentence. Prosecutors mostly see their task as presenting evidence to sustain a conviction instead of promoting problem-solving restorative options. Legal professionals are seen to intentionally inflict harms as advocates for either offenders or victims as they are trained to pursue the interests of their client to the detriment of the other person. This frequently results in secondary victimisation of the victim.

Research in South Australia, based on 227 court cases and 119 restorative justice cases, found that court cases took twice as long to finalise than restorative justice cases (6.6 months compared to 3.2 months). On average victims had to attend court six times with 20% having to attend ten or more times. In about half the number of instances the case was dismissed and the charges withdrawn. Furthermore only a small percentage of cases reported to the police resulted in a conviction — as was pointed out in paragraph 5.

Many victims of crime feel ignored, excluded and disrespected by the criminal justice system as their participation is narrowly defined, while their physical, financial, and emotional needs are seldom addressed. They are dissatisfied with the manner in which they are treated by the formal justice system as the anger, anxiety and fear they experience as a result of the crime are not addressed. This results in victims feeling alienated and dissatisfied with the justice system.

The state's criminal justice system is seen as impersonal, administered by specialised legal, administrative and penal experts who have no real interest in the case and the goal is to punish, manage and rehabilitate offenders, while restorative justice delegates decision-making and control to the individuals who are directly involved in the incident. Research across three continents found that most victims want:<sup>76</sup>

- A less formal process where their views count
- Participation in their case

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76 Strang 2004: 96.

- More information about both the processing and outcome of their case
- Respectful and fair treatment
- Material restoration
- And most importantly of all, emotional restoration, including an apology.

Restorative justice has been implemented as a result of dissatisfaction with the legalistic-bureaucratic-punitive process and to deal with crime. The dominant force for change came from people outside the justice system who are disillusioned and demoralised by the ineffectiveness of the system and the harm it causes. It is claimed that restorative justice's central idea is communitarian to retain control of community issues within the community and that it is focused on the rights and needs of victims for information, vindication, restitution, safety and support.

However, restorative justice is criticised for adopting the legal framework and definitions of crime and for holding the offender as an individual responsible for the harm caused without taking into account social factors which contributed to the crime. Criminal law reflects the codified norms of civil society and helps to shape that society, whereas restorative justice proponents are silent about which codes or morals offenders have transgressed or who is rightfully charged with making decisions re harmful behaviour. There is no notion of what a crime is in a restorative moral framework. To define crime as a "violation of people and relationships" is too vague. Restorative justice replicates the criminal justice process of individualising offenders and narrows their potential to reforming, reintegrating and restoring individual offenders, victims and individuals within the community. It merely operates within the social settings that contributed to the conflict with the law.

Although restorative justice purports to be an alternative to criminal justice based on different values and processes of justice, it is ultimately based on key aspects of existing justice systems — harm, victims, offenders and community. It claims to be victim-centred geared at problem-solving, whereas criminal justice is retributive and punitive yet punishment is also an aspect of restorative justice and criminal justice can also be seen as restorative.

The claim that the restorative justice process is victim-centred is however disputed as it can only be implemented if the offender admits culpability and agrees to participate in the process. Victims' rights can furthermore be at risk if there is pressure on them to participate — inadequate preparation and lack of information about what to expect during the process can result in the process failing; their personal safety can be under threat; they can be severely traumatised if the process fails, while their right to institute civil proceedings can also be compromised. Other risks are the problem of different restorative justice models which can be both a strength and a weakness, the danger of using volunteers that are not properly trained, inadequate protocols and ethical codes of conduct and failure of continual assessment of programmes and facilitators to improve the process.

A victim is by definition someone who has been disempowered by sacrificing security, autonomy, material possessions, *etcetera*. It is questioned whether restorative

justice empowers victims. The process rather seems to entrench them as victims because they must be identified as victims to be able to participate in the restorative justice process. By defining empowerment as involving individual victims taking control of the aftermath of crime results in a limitation of alternative methods to deal effectively with the conditions that originally contributed to the crime. Restorative justice is therefore unable to deal with the risk factors contributing to crime.

Restorative justice regards the community as central to restorative justice and to control crime. The community is seen as the social context that makes restorative justice meaningful and it is also positioned as a secondary victim because crime destroys the social fabric of the community. A distinction is made between micro and macro communities. Micro communities are family members, friends and others with whom personal relationships are maintained while macro communities are normally defined by geography or membership. Crime is seen as the result of an inadequate community. The paradox is that communities are not harmonious groups based on consensus and fundamental agreement. Community is defined by a process of exclusion resulting in members not accepting responsibility for the excluded. There is no such thing as a universal community.

As was previously indicated (see paragraph 5) the referral of cases for restorative justice is problematic as not all cases are suitable. Criteria to determine the suitability of cases are also lacking. Some countries exclude cases of domestic violence and sexual offences while it cannot deal with white collar crimes and fraud which have enormous impact on communities.

A restorative justice process can furthermore only be implemented if a crime has been reported to the police and if there has been an arrest and a conviction. In Africa only about 40% of all crimes are reported to the police.<sup>77</sup> Consequently only a small percentage of victims will participate in a restorative justice process.

Another criticism is that the restorative justice process lacks due-process protection and procedural safeguards of the more formal adversarial system. The offender's right to be presumed innocent until proven guilty and the right to remain silent are compromised. Legal representatives are generally discouraged from attending the conferencing process, as they are regarded as barriers to the process. It is also argued that the cost of diminished rights negates the benefits of accountability, while others argue that the loss of rights can result in more severe punishment. Some countries, for example England, do allow legal representatives to attend the process.

Offenders may also be coerced into participating in the process because of perceived threats of harsher punishment if they decline. It is also averred that offenders may submit to restorative justice conferencing, especially before sentencing takes place, to lighten the sentence. Victims again may feel threatened by offenders if they refuse to participate in the process. It is, however, believed

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<sup>77</sup> Del Frate 1998: 40.



that these problems can be overcome if cases are properly screened and if facilitators are properly trained.

It is also argued that restorative justice programmes can widen the net of social control, as the increased influence of community sentencing can lead to restorative programmes that target minor offenders in respect of whom the risk of re-offending is low. Roach<sup>78</sup> argues that a society which regards the imprisonment of offenders as a means of dealing with crime effectively will be more likely to use restorative justice for less serious crimes, and that it is therefore up to the judiciary to ensure that restorative justice is used for serious crimes that may result in imprisonment. In New Zealand 4 000 youths were imprisoned in 1991, which has now declined to 1 000 as a result of restorative justice<sup>79</sup> but Umbreit<sup>80</sup> refers to two studies in England and Glasgow indicating that an increase in numbers can occur. Members of the judiciary should be properly trained in all aspects of restorative justice to prevent such an increase.

Another point of criticism is that restorative justice can increase the supervisory requirements that offenders must satisfy and a Vermont Reparative Probation Programme found that offenders perceived the programme to be much more demanding than regular probation. Offenders are often subject to restitution and traditional probation supervision.

It is also feared that as the conditions of probation expand through restorative justice, offenders will not be able to meet these conditions, resulting in more offenders transgressing the agreement conditions, resulting in more offenders being sent to prison, that which restorative justice originally intended to prevent.

Disparity of outcomes is also a concern if conference outcomes are outside the range of penalties normally imposed by courts. Restorative justice may also increase punishment if reforms fail to develop policies and programmes that are able to reintegrate offenders into society.

Some critics also regard restorative justice as a soft option that ignores the need for proper punishment. It should, however, be noted that restorative justice has multiple facets which can serve most of the traditional goals of punishment, including deterrence, crime reduction, rehabilitation and incapacitation. Accepting responsibility and facing a victim can be tougher and more meaningful than other sanctions, including imprisonment. Routine imprisonment is not meaningful, especially where there is prison overcrowding which makes rehabilitation of any kind impossible. According to the Annual Report on Prisoners and Prisons by the Office of the Inspecting Judge, the overcrowding in South African prisons is 70 000 (62%) above capacity as at 1 July 2004.

Another concern is the problem of inequality in terms of class and race, which can be to the disadvantage of poor offenders. Class and racial differences may impact on the ability of offenders to meet the conditions of restorative sanctions, which can result in harsher penalties and the revocation of the

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78 Roach 2000: 259ff.

79 Roach 2000: 261.

80 Umbreit *et al* 2002: 10.

agreement. Poor offenders will also be unable to make monetary restitution to victims, thereby excluding them from discriminatory restorative processes. Another argument is that restorative justice is culturally inappropriate in industrialised countries, and that it is less effective in multicultural societies. However, research indicates that it is very successful in multicultural countries such as the US, New Zealand, Canada and Australia. The challenge is to ensure that victims and offenders are properly screened to avoid discriminatory practices. Research has shown that the majority of victims are satisfied with symbolic restitution and do not insist on monetary compensation.

## 8. Conclusion

Restorative justice is an ancient process which has been adjusted to suit the needs of modern societies. It is a flexible, transportable model which varies from country to country. Some crimes, victims or offenders may not be suitable for restorative justice conferencing, and countries have different approaches in this regard. It can be used for first offenders and repeat offenders and for minor and serious crimes be it property crimes or crimes against the person, and in Germany and Austria it is more often used for violent crimes. There is some doubt about the effectiveness of restorative justice conferencing for domestic violence and sexual crimes, and it is not recommended for child victims of sexual crimes. It is also not suitable for fraud and white collar crimes. Proper screening and risk assessment should be able to detect cases that are not suitable for restorative justice, regardless of the crime involved. It is furthermore important that magistrates, prosecutors and restorative justice facilitators be properly trained about the objectives and appropriateness of restorative justice and the proper screening and assessment of victims and offenders in terms of established standards/protocols and ethical rules of conduct.

It is also evident that both the criminal justice system and restorative justice can be criticised for being inadequate in a number of ways. Many of the risks identified can, however, be managed by adequate training of facilitators, codes of conduct, adherence to national and international standards and protocols and continual assessment of programmes and facilitators. This is important as the Department of Justice and Constitutional Development has adopted restorative justice as official policy in 2005 and a number of new bills make provision for restorative justice processes. However, a recent survey<sup>81</sup> of magistrates and prosecutors at six courts in the Pretoria region found that they had a limited understanding of restorative justice objectives, that they did not support it as a sentencing option for many types of crimes and offenders and that many were uncertain about how to apply restorative justice at the sentencing stage.

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81 Naudé 2006: 16.

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