An investigation into the current development and discourse concerning the legal system.

CHAPTER 6.

Future of the legal system

THE LEGAL SYSTEM

In my investigation into the historical discourse of the legal system and the formation of judicial spaces, it became clear that the spaces are formed and informed by the rituals they contain and the contemporary position of the people that navigate them. As society progresses, the expectations on the legal system and understanding of the role of the judiciary will progress as well. This progression is ultimately expressed in brick and mortar, forming the legal spaces of the future in an ever-changing continuum.

'Courts are undoubtedly a complex building type in which expectations of progress and stability, power and independence, equality and segregation, security and accessibility must all be played out in the mind of the contemporary architect' (Mulcahy 2011:151).

Thus the aim of this chapter is to look towards the future of the legal system. The study focused broadly on the international discourse as to try and identify trends and developments that will have a radical impact on the spatial configuration of the court. Through this process the study will aim to anticipate local developments and speculate on the future design of judicial spaces locally.

A FUTURE

'The law, then, is of primary significance to society because it establishes, to a great extent, the "rules" by which people live and the circumstances under which they will be punished for wrongdoing (as well as defining "wrongdoing" itself).
(Nolan & Westervelt 2000:624).*'*

Judicial processes and legal systems only change with societal reform and as with any paradigm shift these movements happen slowly and are only recognised in retrospect by historians or theorists. Regardless of these limitations one term kept on presenting itself as a possible alternative to the current course of the legal system as we know it. That is the concept of *restorative justice*.

Restorative justice has become a term with much vested meaning and hope. In many corners of society it has been seen as the much needed reformation of the justice system in order to deal with mass incarcerations and apparent racial bias. *Restorative justice* has been perceived to be the opposite of penal or retributive justice, an inevitable successor in an ever-evolving society.

Kathleen Daly (2016:21), who has been researching restorative justice since the early 1990s has formulated a comprehensive understanding of the subject matter. She defines *restorative justice* as follows:

'Restorative justice is a contemporary justice mechanism to address crime, disputes, and bounded community conflict. The mechanism is a meeting (or several meetings) of affected individuals, facilitated by one or more impartial people. Meetings can take place at all phases of the criminal process, pre-arrest, diversion from court, pre-sentence, and post-sentence as well as for offending or conflicts not reported to the police.'

Because of the numerous understandings of *restorative justice* in the contemporary legal discourse, it is important to expound on what *restorative justice* is and articulate what it is not.

Restorative justice is not an umbrella term that incorporates a comprehensive and all-inclusive response to the legal system. Instead it is merely a *'justice mechanism'* (Daly 2016) which can be utilised in the conventional justice system.

Thus *restorative justice* does not stand in opposition to the conventional justice system, but should rather be seen as a contemporary addition. That being said it is important to understand that *restorative justice* does predominantly fall under the term *innovative justice*, which can be seen as a counterbalance to the established conventional justice system.

In order to demonstrate the above mentioned point it is important to draw the distinctions in justice mechanisms and thereby clarify the term.

The conventional justice system utilises justice mechanisms such as criminal prosecution, adjudications, trials, sentencings and investigations. These are familiar to our society as it has been developed throughout the centuries in Europe and subsequently exported to the colonised 'new world'. The *innovative justice* system is not limited to the standard legal practices of the day and instead aims to create a more interactive and participatory process.

These processes are often more informal and draw from a greater pool of academic support. The mechanism utilised includes repatriations, investigations, memory projects, immunity and societal dialogue. In our context the Truth and Reconciliation Commission which was established in 1995 offers a good example of such an *innovative justice* mechanism. As in the Truth and Reconciliation project, the limitations of restorative justice are demonstrated, as it is only effective after the confession of the offender and requires willing participation from both sides of the conflict (Daly 2016).

A further argument to the appropriate definition and application of *restorative*

Figure 6_1 Restorative justice manual
[image online] available at: http://www.justice.gov.za/rj/2011rj-booklet-a5-eng.pdf access on: 2016-10-13

RESTORATIVE JUSTICE

the road to healing

the doj&cd
Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

STAND TOGETHER FOR RIGHTS
Jiyela i Justice

justice comes from the feminist critique thereof. The question arises when the restoration of a relationship is not necessarily the aim of the process and not in the best interest of the victim. This becomes apparent in the case of domestic violence and child abuse. Thus it is made clear that restorative justice should build on the foundation of the conventional justice system instead of attempting to replace it.

In many circles there is confusion between *restorative justice* and the concept of *therapeutic justice*. This study deems it necessary to draw a clear distinction between the two terms in order to clarify the concept of *restorative justice*.

Therapeutic justice as discussed by Nolan & Westervelt (2000) is a broad definition that can be applied to many practisces and in many contexts. In essence the concept therapeutic justice takes into consideration the expanding discourse of the therapeutic ethos and the expanding influence of psychology in society. As the legal system stands, this new development is best illustrated by the *'victimisation defence strategy'*.

This strategy draws from the therapeutic ethos in five distinctive ways. Firstly it sets up the individual as principal authority on self, elevated over any external authority, thus the person becomes his own moral standard. Secondly it elevates the emotive over the rational, positioning feelings as an authoritative judge on truth and morality. Thirdly it elevates the psychologist and psychiatrist as authoritative figures in matters of humanity and morality. Fourthly, the therapeutic discourse increasingly defines human behaviour with disease, disorder and pathology, removing human behaviour from the spiritual to the physical. Lastly, the perpetrator is redefined as victim, making his behaviour subject to past abuse, prejudice and disadvantages (Nolan & Westervelt 2000).

Thus it becomes clear that *therapeutic justice* is a subjective tool in which a world view is expressed rather than an objective justice mechanism of procedure and practice. It becomes a model for moral judgements. Not to be misunderstood, the study recognises the influence that such tools have on society and the societal perception of justice. It is the opinion of this study that this particular discourse will be served by the spatial requirements of restorative justice and may become part of one of the practises within the *restorative justice* mechanism.

Despite the potential and proven successes of *restorative justice* in the legal system it is important to recognise inherent limitations of this mechanism. Wood & Suzuki (2016) see four distinct challenges with *restorative justice* and its future growth within the established legal system worldwide.

Firstly, challenges exist with regards to the definition of restorative. As a concept restorative justice has been exhausted in

adding to definitions of a broad spectrum of practices and in various contexts. Many of these applications have resulted in an increasingly offender-orientated process and the integration of that offender back into a conceptual community. This goes against the initial intent of *restorative justice*.

It is the opinion of Wood & Suzuki (2016) that *restorative justice* is in essence the dialogue between victim and offender and that no restoration is possible if either of the parties are absent or unwilling to participate. If this is not the primary aim of the mechanism being applied, they agree with Daly (2016) that such a practice should rather be classified under the term *innovative justice*.

The second challenge that Wood & Suzuki (2016:154) foresee in the future of *restorative justice* is the increasing institutionalisation. *Restorative justice* in its conception in the 1970s was seen as a:

> *'critique of justice practices as "retributive"; as lacking meaningful redress for victims; and as being "offender focused" without a meaningful way for allowing offenders to admit harms, make amends, and successfully reintegrate into their communities.'*

Thus increased institutionalisation has threatened its initial intentions. One of these threats is the disregarding of best practice principles for systemic goals and outcomes. This can take forms like inadequate victim preparation and expectations of behaviour as well as the rushing of processes. Gatekeepers like police or judges can also influence the dialogue unduly and can break down the process if intended outcomes and principles are misunderstood.

The third challenge Wood & Suzuki (2016) note is the displacement of established processes and procedures. Here there is once again agreement with Daly (2016) that *restorative justice* offers no alternative to any existing structure or procedure, but should instead be seen as

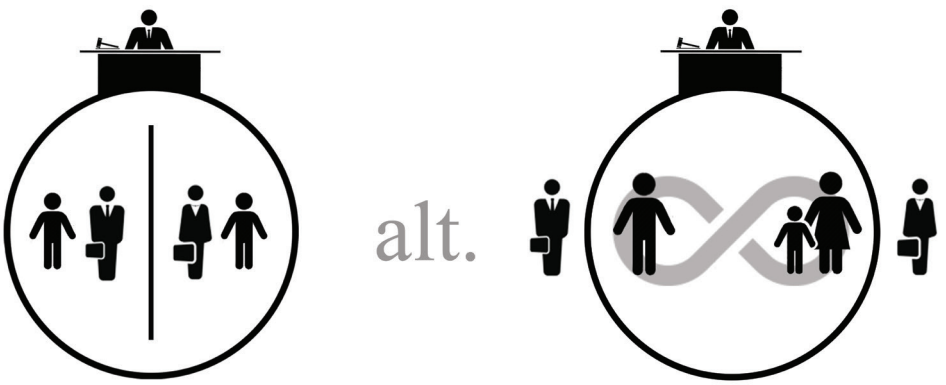

Figure 6_2 Conventional legal system in relation to restorative justice.

an alternative justice mechanism which may be appropriately applied in the right circumstances.

The last challenge Wood & Suzuki (2016:159) identifies is that of continued relevance. Even after 40 years of existence it does not seem that *restorative justice* has made enough progress on the elimination of prejudice and social inequality especially concerning race, gender, poverty and the lack of social capital.

The conclusion is that:

'in term of social reform criminal justice policies are generally poor vehicles of social transformation.'

The next logical step in this study would then be to demonstrate the current and possible future impacts of *restorative justice* on the legal system.

IMPACT ON LEGAL SYSTEM

One of these impacts on the legal system is that of the Family Court Services (FCS) in the United States of America. Fieldstone (2014:628) presents a vision for the legal system surrounding civil domestic cases as a dematerialisation of the traditional court. The result will be a well-linked network of services which can react uniquely to every family's social situation. The aim is :

'...identifying services and crafting solutions that are appropriate for long-term stability and that minimizes the need for subsequent court action.'

Therefore the vision for the future of domestic civil court is to use it only as a last resort, after all other avenues of conflict resolution and family restoration has been exhausted. In order to achieve this goal, alternative approaches are proposed.

One of these would be counselling towards turning an adversarial proceeding into a collaborative process, aiming to restore the relationship instead of terminating it. In turn it is hoped that this approach will reduce the time of official involvement and mitigate the cost associated with the legal process.

It is the vision of this system to become the nucleus of a network that links families with education, social, economic and healthcare services in order to facilitate conflict resolution and family coherence for the upliftment of all involved. In order to achieve the vision, this process would utilise technology more efficientlyin order

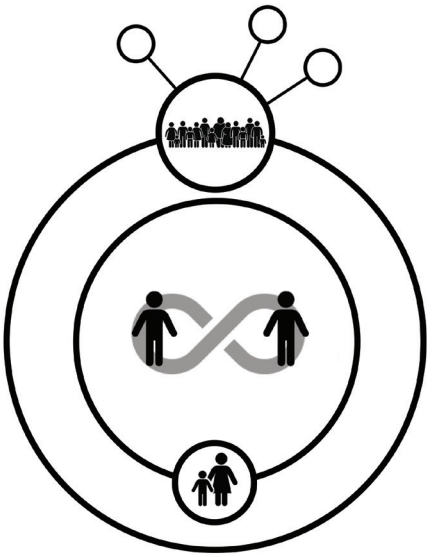

Figure 6_3 Community networks

to serve those who do not have access to the system and to establish collaborative networks for facilitation outside the system.

It is Fieldstone's (2014) hope that a structure like this would allow for a less adversarial family court model, which aims to preserve essential relationships and can react to social discord in a respectful and sensitive way. This alternative structure would allow for adaption and innovation in order to meet future needs resiliently.
Another demonstration of how restorative justice might impact the legal system is provided by Rossner & Bruce (2016) who explores the potential and limitations to community involvement in the judicial process.

The inclusion of lay persons in the justice ritual symbolically refers back to the time when justice was presided over and applied by the community directly. It enforces the ideals of a democratic and open judiciary and an accessible justice system. The involvement of a larger community creates an opportunity for greater emotional support for both victims and offenders and affords the opportunity for the reintegration of the offender back into the community after justice has been served (Rossner & Bruce 2016; Mulcahy 2011).

Rossner and Bruce (2016) aim at defining community in two categories: Firstly the micro-community which usually relates to friend and family of the victims and offenders. These are persons with invested personal interest in the outcome of proceedings. Secondly there is the macro-community, which refers to the broader community with which the victim or offender relates and have a vested interest. These might include community leaders, prominent professionals or organisation volunteers.

This community, both micro and macro, can fulfil a number of roles in the *restorative justice* process ranging from neutral third parties which can facilitate reconciliation, to active participants in the carrying out of mediating sentences. The aim of this process is the:

'incorporation of the offender into a normative moral order of prosocial values and practices'
(Rossner & Bruce 2016:110)

The problem with community participation in this restorative process needs to be stated in order to anticipate the shortcomings of this approach. In western societies communities often lack social cohesion and capital, while being diverse and therefore making it difficult to represent as a whole. Furthermore there exists the potential of vigilantism and the tyranny of the majority. It is therefore difficult to get community buy-in and to maintain enthusiasm for the system, while maintaining an effective and representative participation.

It is important to see the community involvement in this process as a mitigation element of the legal system and not a replacement thereof. The participation of the community in this process aims to enrich the existing process and to enable it for a greater chance of restoration of the society as a whole, clearly in keeping with restorative justice principles set out by Daly (2016) and Wood & Suzuki (2016).

SPATIAL REACTION

The spaces of our contemporary courts should be seen as a continuum in the evolution of the legal system, but it is clear that they are also a result of processes and perceptions that might be out of date and no longer relevant in our current society. Mulcahy (2011:59) defines it well when asking:

'is it appropriate that historical precedents developed in different eras and reflecting different conceptions of due process continue to influence court design and render the courtroom a frozen site of nostalgia?'

While the preservation of historical courts as important examples of past discourses is necessary, it is as important that they change to reflect contemporary approaches to the legal system if they wish to function as active judicial spaces. Therefore court buildings in particular, if active and still serving, must be able and willing to adapt resiliently to the current and future society they aim to serve (Mulcahy 2011).

ACCESSIBILITY

One of the most prominent commentaries on judicial space in our current discourse is the democratisation of legal spaces and the reintegration of the public into proceedings. The attitude towards this movement is reflected by Mulcahy (2011:152) when stating:

'Rather than assuming that their purpose is to interfere with proceedings or to threaten other members of the court it should be remembered that it is the attendance of the public which supposed to legitimate the trial'

In the quote both the aspiration and the resistance to that aspiration is reflected in the continued fear of the judiciary towards the perception of the public. Security concerns outside and inside the court has caused another level of barriers and exclusion to be erected, but is it worth it if we see the public's unhindered access to the judicial proceedings as the legitimising factor?

Greene (2006:72) illustrates this problem further by pointing out that weapon screening technology has placed another barrier by narrowing public entrances, creating a bottleneck were public flow should be encouraged. Finally the change

in national building standards and the increased focus on inclusivity has meant that the classical device of a grand staircase surpassing the ground floor has become obsolete and new public entrances have to be defined.

Although the discourse on accessibility is a necessary one, we should recognise that the development of movement patterns throughout the courthouse has developed for a reason. As stated by Resnik & Curtis (2011:173) the development of the *'public, restricted and secure'* circulation route has its origin in the concerns for security and efficiency. Yet it is the opinion of this dissertation that the relationship between these routes needs to be redefined in order to allow for accessibility and transparency.

TRANSPARENCY

With grandeur often overshadowing humanism, there has been a renewed need to democratise the courthouse and its associated spaces. Therefore there has been an increased use of glass in courthouse design to create literal transparency, which in turn instil a symbolic sense of openness (Greene 2006:64).

While the use of glass has been incorporated into court design symbolising transparency and openness, the symbolic gesture is meaningless if not translated into practise. Its application in public areas is insufficient if it doesn't translate to the entire building.

TECHNOLOGY

The incorporation of information technology has presented the legal system with another set of opportunities and concerns.

The dawn of the internet and the *cloud* has made it possible to separate the administrative functions with legal spaces, no longer requiring it to dominate the public sphere. This simplifies the process and facilitates improved communication. Real-time transcription has influenced the pace of the trial as advocates no longer need to pause for the transcriber to catch up to proceedings, while the judge has immediate access to the transcription as the proceedings progress (Reiling 2006; Mulcahy 2011; Kaur Bhatt 2005).

Yet the most controversial disruption of the traditional judicial process is that of live video link testimonies. Since its gradual acceptance in courts around the world this technology has incurred many opportunities as well as ethical questions.

Figure 6_4 Constitutional court room

In a positive light, a live video testimony gives an opportunity of the exclusionary nature of the courtroom walls to be circumnavigated. By allowing these types of testimonies judges can include a wide range of people that would be excluded by circumstance, and be able to protect and shield vulnerable witnesses. It can prove to make the court more efficient and accessible (Mulcahy 2011; Kaur Bhatt 2005).

Yet Mulcahy (2011:168) is quick to point out that this development threatens the courthouse with dematerialisation. If all have access to the court, either in video uplinks for testimonies or on television screens for witnessing in a type of virtual court, what will be the role of the judicial space? The screen has the ability to separate and remove the participants from reality, creating the possibility of sanitising and scripting evidence. Further it removes participants emotionally from proceedings by the ability of observing without being observed. Won't this very development inauthenticate the entire legal system and contribute to the diminishing of the human condition?

'Pawley predicts the end of architecture as anything other than a heritage or tourist industry and has argued that the importance of buildings today is not as monuments but as terminals for information.'

Mulcahy (2011:170) defends physical presence of people in the legal system and ritual by stating that it still contains considerable cultural resonance. Face-to-face encounters and the orality of the ritual enforce the civic nature of the societal gathering, as well as allowing the judge to observe demeanour and emotion.

'the physical space in which evidence is given plays a critical role in reinforcing the importance of the trial and the role of state-sanctioned adjudication in our society.'

The weight of judgement and the seriousness of the occasion are undermined by the incognito nature of the video link and denies the participants the ritual experience of societal justice.

Figure 6_5 Police counter in Elysium (2013) [image online] available at: http://s1.dmcdn.net/CJxOU/1280x720-T0_.jpg Access on: 2016-10-13

Yet Mulcahy (2011) does not completely dismiss the potential uses of this technology in the court and suggests it be applied considerately. Sufficient reason should be given for departing from the norm of testifying in person, only allowing video testimonies in exceptional circumstances.

The sense of gravity and importance should be impressed on the process, even over video testimonies, and spaces where the testimonies are given should be seen as extensions of the court itself, designed with the same intensity. Finally, video link testimony should never become a matter of mere convenience or efficiency.