

RESTORATIVE JUSTICE: A CONTEMPORARY SOUTH AFRICAN REVIEW

A Skelton
Faculty of Law
University of Pretoria

M Batley
Restorative Justice Centre
Pretoria

ABSTRACT

Restorative justice is a well understood concept. Internationally, its theory and practice have been substantially documented, and it has withstood critical analysis. There has been a movement amongst even those that would be expected to be its harshest critics, just deserts theorists, to engage in a good faith attempt to reconcile the competing paradigms. In South Africa, restorative justice has moved from the margins to take its place as a subject of serious academic debate in criminal justice. It has also featured in a promising jurisprudence that is emerging from the country's superior courts. The article explains how certain local developments in practice, as well as the Child Justice Bill, promote the application of restorative justice across all stages of the criminal justice system. Restorative justice and sentencing policy is explored against the South African Law Reform Commission's proposals for a sentencing framework. Rehabilitation is the final issue tackled. Despite its loss of credibility in recent decades, rehabilitation as a concept still looms large on the South African criminal justice landscape. Restorative justice offers a different view on how to promote the aim of a crime-free life for the offender, and South African criminal justice practitioners and researchers are urged to engage in the discovery of realistic community centred models.

INTRODUCTION

An understanding of restorative justice has been quietly developing in South Africa over the last fifteen years. The restorative justice movement has travelled some distance since the early experiments with the concept by civil society organisations in the early 1990s (Muntingh 1993). Endorsement of the concept in policy documents of government came early in the Welfare White Paper (1996), the National Crime Prevention Strategy (1996), and several reports issued by the South African Law Reform Commission. The legislature has provided two legal definitions of restorative justice. Internationally there has been a plethora of research and writing about restorative justice, which has subjected not only the theory of restorative justice to robust analysis, but which has also amassed impressive evidence of specific benefits of restorative justice when compared to the mainstream criminal justice system. In South Africa, the debates have developed gradually. Academia has grappled with the concept for a decade, and the 2007 edition of the legal journal *Acta Juridica* was dedicated entirely to the subject. Less well known to non-lawyers, but undoubtedly profound, is the development of a restorative justice jurisprudence in reported judgments of South Africa's superior courts.

This article spells out all of these developments in response to a claim made in an article published in this journal (Bezuidenhout, 2007) that there is no consensus about the definition and meaning of restorative justice, that it has not been exposed to critical analysis. In addition to explaining what restorative justice is, we also take some time to talk about what it is not. It does not focus on forgiveness as one of its key objectives. Bezuidenhout's article examined restorative justice within the context of rehabilitation. In the latter part of this article we take up that theme and we conclude that restorative justice is likely to be a more effective catalyst than rehabilitation to create possibilities for a crime-free life for the offender.

UNDERSTANDING RESTORATIVE JUSTICE

In his article "Restorative Justice with an Explicit Rehabilitative Ethos: Is this the Resolve to Change Criminality?", published in this journal in 2007, Bezuidenhout stated that there is no consensus amongst scholars regarding the definition and scope of restorative justice (2007:43). He claimed that those advocating restorative justice are subjective, and implied that restorative justice theory has not been critically evaluated. In our view, this is not a valid claim. There is now widespread agreement on a definition of restorative justice – there is even a set of United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (2002). The Basic Principles include the following definition of a restorative process: "[A]ny process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles." (UN Basic Principles, 2002: article 2). The South African courts have begun to expound on their common understanding of restorative justice, a matter to which we will return later in this article. The South Africa legislature has twice defined restorative justice: the first time was in the Probation Services Act no 116 of 1991 (as amended by Act 35 of 2002), where it was defined as follows: "The promotion of reconciliation, restitution and responsibility through the involvement of a child, and the child's parents, family members, victims and the communities concerned." The second time was in the Child Justice Bill (B 49B 2002), which was passed by the National Assembly on 25 June 2008. The definition of restorative justice in this Bill is as follows:

"An approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation".

Bezuidenhout claims that "[i]t appears that the key objective of restorative justice is restoration and addressing harms after the victim has granted forgiveness" (2007: 43). It should be noted that none of the definitions noted above say anything about forgiveness. In fact, the leading restorative justice scholar Howard Zehr has pointed out that it may be more important to state what restorative justice is not, in order to prevent bad practice masquerading as restorative justice (2002). Restorative justice is not forgiveness, the

theory does not require forgiveness, nor does a restorative justice process seek it.

Australian criminologist John Braithwaite has written convincingly about values for restorative justice practice, which he has separated into three categories (Braithwaite 2003: 8-14). The first category he describes as “constraining values”, which are fundamental procedural safeguards that take priority where any serious sanction is at risk. They include non-domination as a fundamental value in restorative justice practice, empowerment, honouring legally specific upper limits on sanctions, respectful listening, and equal concern for stakeholders, accountability, appealability and respect for the fundamental human rights specified in international instruments. A second category of values proposed by Braithwaite, are “maximizing values”, meaning that they should be promoted and encouraged. These values relate to healing and restoration. It includes very basic kinds of restoration such as returning property, and more abstract ones such as the restoration of dignity, compassion, social support and the prevention of future injustice. The third group of values are described as “emergent values”. They are remorse over injustice, apology, censure of the act, forgiveness of the person, and mercy. Unlike the second category, participants should not be actively encouraged to bring these values to the fore; they should simply be allowed to emerge. So although forgiveness may, and sometimes does emerge in restorative justice process, it is neither a key value nor an aim of restorative justice.

At the level of direct practice in South Africa, a network of civil society organisations has developed a set of standards to guide the implementation of restorative justice programmes and processes linked to the criminal justice system (Frank and Skelton, 2007). The standards were developed from a review of the international literature in the field of restorative justice, and consultations with stakeholders in South Africa. The completion of these standards once again testifies to the fact that the definition and scope of restorative justice is clear.

RESTORATIVE JUSTICE AND CRITICAL ANALYSIS

The early years of restorative justice debates were marked by intense exchanges highlighting the differences between the retributive and restorative justice approaches. Former critics now claim to be seeking a way to reconcile the two approaches, a move that culminated in the publication of a book by von Hirsch and others (von Hirsch et al (eds), 2003). Braithwaite was persuaded to write a chapter for the book. He finds himself at odds with many of the other contributors to the book, particularly on the issue of whether restorative justice embraces retribution, and the question of whether restorative justice includes punishment. He nevertheless finds some common ground: what liberal modern retributivists (such as Ashworth and Duff, also contributors to the book by von Hirsch et al (2003) - both mentioned in Bezuidenhout’s article (2007) have in common with most restorative justice advocates is that they are all reductionists when it comes to punishment. They would all wish to place upper constraints or limits on the kinds of punishments that can be meted out for certain kinds of crimes, so that severe punishments, such as the use of imprisonment, should only be used for serious crimes. However, just deserts theory would also require the setting of lower limits, so that

proportionality can be maintained, whilst restorative justice theorists would not require punishment, relying instead on the participants in the process to decide on the outcome (Skelton, 2006).

With dyed-in-the-wool just deserts theorists engaging in a good faith exercise to find synergy between their own views and those of restorative justice advocates, it is clear that restorative justice has been engaged critically by those who one would expect to be its harshest critics, and has stood up favourably to the analysis. Certainly the theories will never be merged into one - the idea is that restorative justice is a different way of looking at crime and justice – but restorative justice advocates have long since moved away from crude simplifications of contrasting retributive justice and restorative justice (Zehr, 2002). The important issue is that restorative justice has taken its place alongside the competing theories of approaches to crime and punishment: retributive, utilitarian, rehabilitative and restitutive (Brunk, 2001). Large volumes of writing have been dedicated to exploring its theoretical and practical anatomy. According to Van Ness and Johnstone “[t]he rise of restorative justice has been accompanied by the development of a large, diverse and increasingly sophisticated body of research and scholarship” (2007:xxi). Interest in serious research about restorative justice has finally taken root in South Africa, with the 2007 volume of the legal journal *Acta Juridica* being dedicated entirely to scholarly articles on the topic of restorative justice.

Restorative justice has withstood critical analysis not only at the theoretical level, but also at a practice level. Criminologists Lawrence Sherman and Heather Strang, both longtime researchers on the effectiveness of restorative justice, have recently published a major study called “Restorative Justice: The Evidence” (2007). They analyzed the results of 36 studies from Australia, New Zealand, the US, Canada and the UK, which all measured the effectiveness of restorative justice practices by drawing direct comparisons with the conventional criminal justice system. Using scientifically sound research methods, Sherman and Strang concluded that restorative justice has resulted in substantially reduced repeat offending for some offenders (but not all) and doubled the number of offenders brought to justice as a result of diversion from the criminal justice system, which in turn has reduced the costs of the criminal justice system. The study discovered that restorative justice has reduced recidivism more than imprisonment (for adults) or as well as imprisonment (for youths). Restorative justice was found to have reduced crime victims’ post-traumatic stress symptoms and related costs and reduced crime victims’ desire for violent revenge against their offenders. It also provided both victims and offenders with more satisfaction with justice than the criminal justice system. Sherman and Strang conclude that the evidence on restorative justice is more extensive, and more positive, than it has been for many other policies that have been rolled out nationally, and they recommend that it be put to broader use.

SOUTH AFRICAN JURISPRUDENCE REGARDING RESTORATIVE JUSTICE

In South Africa, restorative justice has been slow to get underway in practice, but a study conducted in 2006 showed that there is some restorative justice work conducted in all provinces of the country (Skelton & Batley, 2006). The growth of restorative justice has

not gone unnoticed by the judiciary. In October 2003 the Association of Regional Court Magistrates of South Africa arranged a two day conference on restorative justice, at the conclusion of which a number of resolutions endorsing the concept were taken (Bekker, 2004).

The South African jurisprudence on restorative justice is promising. The year 2008 has seen the reporting of a number of decisions relating to restorative justice in the South African Criminal Law Reports. Two of the judgments were penned some time ago, but came to prominence through reference in subsequent judgments. The first such judgment was *S v Shilubane* 2008 (1) SACR 295 (T) which dealt with the theft of seven fowls. Notwithstanding the accused's genuine remorse, he had been sentenced to nine months imprisonment. On review, Bosielo J (with Shongwe J concurring) set aside the sentence and replaced it with a suspended sentence. The court remarked that "in line with the new philosophy on restorative justice, the complainant would have been more pleased to receive compensation for his loss". The court commented further that retributive justice has failed to stem the rise of crime, and that more innovative solutions had to be sought by the courts.

This lead was followed by Bertelsmann J in *S v Maluleke* 2008 (1) SACR (T). The judgment arises from a case in which a woman was found guilty of murder in that she and her husband (who died before the trial commenced) beat to death a young intruder who had broken into their house. She was a destitute mother of four. The victim's mother was hurt by the fact that no-one from the offender's family had come to their house to apologise for the wrongdoing, and she expressed a desire for this type of interaction. The sentenced imposed was 8 years imprisonment, suspended for 3 years on condition, inter alia, that the offender should apologise to the victim's family. Judge Bertelsmann's judgment concluded with the following words:

"Eventually, legislative intervention may be required to recognise aspects of customary law – but this should not deter courts from investigating the possibility of introducing exciting and vibrant potential alternative sentences into our criminal justice system."

Restorative justice has twice been referred to in recent cases judgment of the Constitutional Court. The first was the case of *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), which referred approvingly to both *Shilubane* and *Maluleke*, which were at that time unreported. The *Dikoko* case dealt interestingly enough not with a criminal matter, but a civil claim for damages arising from defamation. Whilst the majority court awarded a hefty claim of financial damages, the two separate but concurring minority judgments by Justices Mokgoro and Sachs, focused instead on a restorative justice approach, making the point that dignity could not be restored through disproportionate punitive monetary claims, and that apology would have been a more powerful tool, more in keeping with African notions of *ubuntu* and our constitutional commitment to dignity. Sachs J stated that the key elements of restorative justice have been identified as encounter, reparation, reintegration and participation.

The second case was *S v M (Centre for Child Law Amicus Curiae)* 2007 (12) BCLR 1312 (CC), which dealt with the duties of a sentencing court when sentencing a primary caregiver of children. Sachs J, writing for the majority, characterised correctional supervision as providing better opportunities for a restorative justice approach. He found that restorative justice recognises that the community, rather than the criminal justice agencies, is the prime site of crime control. He also spoke about the significance of making repayments of defrauded money on a face-to-face basis, because “restorative justice ideally requires looking the victim in the eye and acknowledging wrongdoing.” (para 71).

In the case of *S v Saayman* 2008 (1) SACR 393 (E) restorative justice came in for some careful examination regarding the concepts of “shaming” and the constitutional right to dignity. In the commercial crimes court of Port Elizabeth, the court had pleaded guilty and was convicted of the six counts of fraud amounting to a total value of R13 387,21. The frauds committed by her led the black-listing by the Credit Bureau of certain of the complainants (whose identities she had fraudulently used), thereby causing them embarrassment and inconvenience.

In sentencing the accused the regional magistrate indicated that he wanted the sentence to provide some measure of relief to the victims of the crime. To a suspended sentence linked to correctional supervision, he added a further condition that she should stand out in the open, to ask for forgiveness from the victims, by standing in entrance to the commercial crimes court, under supervision of a police official. She was required to stand there for fifteen minutes on a specified date, holding a placard bearing an apology to victims. When an application for leave to appeal was brought before the magistrate he explained that what the Court was attempting to achieve was “to try and restore the relations between the parties by assisting the accused to tender an apology in public to the complainants.” The questions that were central to the review proceedings were whether the condition imposed by the magistrate accorded with restorative justice principles and whether it passed constitutional muster. On both counts, the Court found that the order, as creative and well-intentioned as it may have been, was not consonant with restorative justice principles, and that it was unconstitutional on the basis that it infringed the right to dignity. The court, with reference to Braithwaite (1989), distinguished between “stigmatising shaming” and “reintegrative shaming”, and found that the condition of sentence had the effect of stigmatising and of violating the accused’s right to dignity.

This emerging jurisprudence proves beyond any doubt that restorative justice is no longer an academic debate on the margins of South African society. It is a living issue in our criminal justice system, and is being dealt with and developed by our courts.

PROMOTING RESTORATIVE JUSTICE AT ALL STAGES OF THE CRIMINAL JUSTICE PROCESS

Hargovan (2008) has observed that both internationally and in South Africa, restorative justice has been applied mainly in relation to child offenders, and in matters concerning

petty offences. This general observation is correct, although there are some international research findings regarding the use of restorative justice in serious offences (Umbreit et al 2003, Gustafson 2004). Whilst restorative justice is undoubtedly valuable in the context of youth crime and diversion, the focus on these areas appears to rest on an underlying assumption that it has nothing to offer at other levels of the system, and that it is only relevant to less serious cases. However, there is no reason why restorative justice cannot be effectively used at the stages of pleadings, pre-sentence, sentence and post sentence. Many references to restorative justice across the system can be found in international literature (see for example Raye and Roberts (2007) and UN Handbook on Restorative Justice Programmes 2006). Hargovan (2008) poses the question as to whether restorative justice initiatives will remain confined to diversionary processes or whether restorative justice will be used more broadly across the criminal justice system – even in more serious crimes. She observes a recent trend in South Africa towards a “parallel but inter-linked track” model, in which restorative justice is available alongside the mainstream justice system, with various referral points. We now move on to a description of how restorative justice is being utilised at different stages of the criminal justice system. We suggest some points of connection on the “inter-linked” tracks, where a restorative justice approach can be engaged.

Pre-trial stage

Under South African law, prosecutors have a discretion whether or not to prosecute in a particular case. This discretionary power is the basis on which all pre-trial diversion currently takes place. Current diversion practice is informal, and is regulated only by prosecutorial guidelines. The Child Justice Bill ((B49-B of 2002) recently passed by the National Assembly) will make diversion a central feature of the child justice system. The Bill also specifically lists family group conferences and victim offender mediation as diversion options. This is in addition to the wide range of life skills programmes that can be utilised for developing the competencies of children.

The use of restorative justice at the pre-trial stage in South Africa is not limited to child offenders. Increasingly, and particularly in the light of the National Prosecuting Authority’s Strategy 2020, it is being used for adults. A research report by the NPA (2008) details the numbers of cases and types of offences at three pilot sites in Atteridgeville, Mitchell’s Plain, and Phoenix. In all the cases at these sites the following procedure is followed. Initially, the prosecutor identifies a matter that can possibly be resolved by means of a restorative justice process. He or she then informs both the offender and the victim accordingly; the matter is postponed for a suitable period (typically 6-8 weeks) and kept on the role for this period. It is typically less serious offences that will be referred in this way. The matter is subsequently referred to a suitable service provider (either a probation officer employed by the Department of Social Development or a civil society organization) for further assessment. If, after initial assessment the service provider is of the opinion that the matter is suitable for a restorative justice process, preparation and facilitation takes place. Thereafter, a report is tabled in court on the date to which the matter was postponed.

The process described above relates to pre-trial processes, where the restorative justice intervention takes the place of prosecution. Although such matters require an “acknowledgement of responsibility” on the part of the offender, no formal plea is entered, the charge is withdrawn and there is no criminal record.

Restorative justice can also be applied where the prosecutor decides that the matter will not be withdrawn, but the offender tenders a guilty plea. Under South African law, an accused person who is legally represented and the prosecution may enter into a plea and sentence agreement in terms of Section 105 A of Criminal Procedure Act, no 51 of 1977 (as amended). The prosecutor is obliged to consult with the victim of the crime, and payment of restitution to the victim is specifically listed as a possible condition that can be set. This is fully congruent with integrating a restorative approach into the administration of justice. If the victim is amenable to the idea, a restorative justice process could be held prior to the plea and sentence agreement, and the results thereof can be recorded in the plea and sentence agreement. The advantages of disposing of cases in this way at this stage refers to the direct participation of the victims (as opposed to merely being consulted) without them having to testify in a trial. While the formal system provides oversight, the time required for a full trial is saved, and this is an excellent example of “inter-linked” tracks.

Pre-sentence and sentencing stage

This brings us to the next stage of the criminal justice system at which restorative justice can be utilised. Once a person has been convicted, a magistrate is empowered to request any information that will assist in the determination of a suitable sentence, as provided for in section 274 of the Criminal Procedure Act. This is also the point at which a pre-sentence report or other testimony can be arranged. The matter would be postponed for a suitable period (typically 6 -8 weeks) and referred to a service provider. If a restorative justice process is convened and the participants reach an agreement, the details of this can be returned to the court as a set of recommendations. They could be set as conditions for postponement or suspension of a sentence or of a caution or reprimand in terms of Section 297 of the Criminal Procedure Act, 1977 as amended or as conditions of correctional supervision (Section 276 (h)). The typical outcomes of a family group conference or victim offender conference include: an apology, restitution, performance of service for the victim or community service for the benefit of the community, referral of the offender to some form of assistance programme to address some of his or her needs.

In the Child Justice Bill, family group conferences and victim offender mediation have also been specifically listed as sentence options. The cases that are referred for a restorative justice process at this stage would typically be more serious than those referred at a pre-trial stage. A major benefit of using restorative justice processes at this stage is that all the parties concerned participate in generating outcomes to the incident. If these are accepted and endorsed by the court this is likely to raise the credibility of the system in the eyes of the participants. It is also more likely to be regarded as a satisfactory outcome than a sentence simply imposed by the court without the participation of any of the parties.

Post-sentence stage

A restorative justice process can be convened during the serving of a sentence of imprisonment or correctional supervision. In such cases, the process would not have any impact on the sentence, although it may affect a decision about parole. The emphasis is more likely to be on answering questions a victim may have with a view to assisting in the process of healing and closure than on outcomes such as restitution or service to the victim. Perceived this way, even individuals affected by the most serious offences can benefit from restorative justice processes. While still at an embryonic stage, there are some promising signs of development in South Africa. The Department of Correctional Services has adopted restorative justice as an approach in 2001. A specific policy on restorative justice was approved in 2007 and recently discussions have taken place with potential service providers to increase the level of implementation. There has also been some micro research comparing practice at this level between South Africa and North America (Sharpe & Lai Thom, 2007)

RESTORATIVE JUSTICE AND SENTENCING POLICY

The above outline has described practical engagement points for restorative justice in a model which is parallel to and interlinked with the mainstream criminal justice system. In the area of sentencing policy, restorative justice as an approach to sentencing has gained some recognition, and may be set to play a more central role. The South African Law Reform Commission (hereafter SALRC) issued a Discussion Paper on A New Sentencing Framework in the year 2000. In the paper, a new framework is advocated that will give explicit attention to restitution and compensation for victims of crime. These measures were to entrench the principles of restorative justice in the South African criminal justice process (South African Law Reform Commission, 2000: xxii-xxiii).

However, since the SALRC published its findings in 2000, there has been no move to implement any of its recommendations. A recent study of the SALRC proposals for a new sentencing framework by Terblanche (2008:11-12) summarises the goals and principles of sentencing, as stated in the SALRC's proposed Bill. The purpose of sentencing is declared as being 'to punish convicted offenders for the offences of which they have been convicted'. Sentences will have to be proportionate to the seriousness of the offence, not in the abstract but relative to other offences. Proportionality is the central requirement; all further principles are subservient to it. The seriousness of the offence is further refined in the following terms: The seriousness of the offence committed is determined by the degree of harmfulness or risked harmfulness of the offence and the degree of culpability of the offender for the offence committed. In place of the current four 'purposes of sentencing', (that is, deterrence, prevention, reformation or rehabilitation and retribution) the SALRC proposed that every sentencer should attempt to find an optimal combination of restoring the rights of the victim, the protection of society and a crime-free life for the offender. Terblanche goes on to point out that the statement is at least as notable for what it does *not* state as for what it does state. Deterrence and rehabilitation are not included in the purposes of sentencing.

In support of the departure from deterrence as a central principle, Terblanche (2008) quotes research to substantiate the fact that apart from the general deterrent effect of having a criminal justice system, there is no evidence to show that sentences have a deterrent effect. Similarly, he substantiates the position that punishment does not change behaviour. Terblanche (2008) recommends that the SALRC's proposal that every sentencer should attempt to find an optimal combination of the three effects of the sentence, namely restorative justice, the protection of society and a crime-free life for the offender, be regarded as sound and should be implemented without delay. However, he is of the opinion that there is room for more specific guidance of the sentencers' discretion. Although one finds the same limited understanding of the usefulness of restorative justice in more serious cases that was referred to earlier in Terblanche's (2008) discussion about the optimal combination of the three effects, he has clarified and reinforced the recommendations of the SALRC. It is to be hoped that this will give new impetus to sentencing reform in South Africa.

The concepts of an optimal combination of restorative justice, the protection of society and a crime-free life for the offender suggest an innovative approach to address some of the shortcomings of the traditional modes of thinking. At the very least, it provides a platform for increased implementation of restorative thinking and processes. It is also an indication of the extent to which restorative justice is influencing leading thinkers in the field of sentencing in South Africa. Furthermore, implementation of the SALRC's recommendation in this regard would go a long way to address some of the problems the sentencing system is facing, namely "that imaginative South African restorative alternatives are not being provided for offenders that are being sent to prison for less serious offences and that sufficient attention is not being paid to the concerns of victims of crime". (South African Law Reform Commission, 2000: xxix).

We now turn to an examination of rehabilitation, and pick up on the themes introduced by Bezuidenhout in his 2007 article where he poses the question whether restorative justice with an explicit rehabilitative ethos is the resolve to change criminality.

RESTORATIVE JUSTICE AND REHABILITATION

Bezuidenhout (2007) is critical of the impact restorative justice processes have on rehabilitation and regards restorative justice activists as being far too idealistic in their approach to rehabilitation, although he does not detail or substantiate this. According to rehabilitation advocates Cullen and Gilbert (1982:170), "[t]he most devastating blow to the viability of criminal justice rehabilitation was delivered in 1974 by Robert Martinson." A study by Martinson of a range of rehabilitation programmes resulted in the conclusion that "nothing works". Martinson's article is famously linked to the demise of the rehabilitative approach, and to the renaissance of the just deserts movement. Despite the loss of credibility in rehabilitation due to this article, and the ensuing "nothing works" debate, the concept of rehabilitation refuses to disappear. In South Africa it remains a central feature in criminal justice. Furthermore, South Africa's Department of Correctional Services states clearly in its White Paper (2005:3) that "rehabilitation is central to all our activities". The dream of offenders mending their ways

remains alive despite having been broken repeatedly. Cilliers and Smit (2007) for example, refer to the overcrowding of South Africa's prisons and conclude that although statistical analysis of the recidivism rate in South Africa could not be found a study on prison health care during 2002 estimated that the reoffending rate after release could be as high as 94%.

Does restorative justice have anything to offer this depressingly bleak outlook? First, a consideration of terms is essential. As Cilliers and Smit (2007) point out, the words rehabilitation, rehabilitative, rehabilitate and rehabilitated appear in total 250 times in the White Paper. The word "treatment" is also often found in the literature - see for example Bazemore and Bell (2004): "What is the appropriate relationship between restorative justice and treatment?"). Muntingh (2001) uses the word "reintegration", drawing on the reintegration theory put forward by Reitan. The terms "rehabilitate" and "treat" are based on a medical model, suggesting that offenders have a certain "illness" that needs to be cured. Brunk (2001) is highly critical of a therapeutic approach to punishment as it denies the need, even the possibility, of taking personal responsibility for one's actions.

The rehabilitation approach, whilst it moved away from a focus on punishment, also had its limitations in theory and in practice. Johnstone (2002:94) makes the point that "[j]ust as most restorative justice advocates want to distinguish restorative justice from retributive justice, many insist on distinguishing it sharply from the therapeutic response to offenders which was favoured by progressive opinion until the early 1970s, when faith in therapy began to wane". The problems stem from the departure point of viewing the offender less as a moral agent who can make choices, and more as a person who needs to be helped through a therapeutic model of rehabilitation. This is seen as problematic because it "robs" the offender of his or her essential morality, it has not succeeded in rehabilitating the majority of offenders. Furthermore, like the retributive and utilitarian approaches it focuses almost entirely on the offender, with little concern being paid to the victim. This offender focus is something that a restorative justice approach would eschew, as it always aims to place victims at the core of the process.

Restorative justice is both backward-looking, in that it includes dealing with the "aftermath of the offence", and forward-looking, in that it is a process that looks at the implications for the future. This introduces a crime prevention element in that an effort is made to identify how future incidents may be avoided. The standard criminal justice response is rarely forward-looking. It generally aims to incapacitate the offender as a strategy to avoid future crime – chiefly through imprisonment. Alternatively, general deterrence in the criminal justice system aims to prevent crime through instilling fear in others unconnected with the crime, hoping that by dealing harshly with one offender, a lesson is learned by others that will cause them to avoid committing crimes. The fresh approach presented by a restorative justice process is that those with a stake in the crime must look at implications of that crime for the future, meaning that those who are personally and directly involved can formulate targeted strategies to avoid further incidents (Skelton, 2007).

The White Paper on Corrections in South Africa (2005) provides a vision for viewing correction as a societal responsibility requiring the engagement of all social institutions and individuals (starting within the family and educational, religious, sport and cultural institutions), and a range of government departments. Reconciliation of the offender with the community is listed as a key objective, and the principles of restoration are stated as a correctional management objective.

This vision resonates well with the various writings of Bazemore and others. Bazemore (1999: 155–184) refers to the concept of “relational rehabilitation”. He criticizes treatment programmes that are insular and one-dimensional, and makes a plea for them to nurture relationships. He advocates for the use of “sanctioning needs” (imposing constructive consequences, setting limits and reparations) as well taking public safety into account. Taking this thinking further, Bazemore and Bell (2004) have developed a restorative model of rehabilitation. They concur with the view of Brunk that it is difficult to reconcile the “strengths-based” assumptions of a restorative approach with a “medical model” perspective that views offenders primarily in terms of deficits and “thinking errors”. A restorative model of rehabilitation would have the following features: A *collective* approach to offender reintegration that focuses on building or strengthening relationships damaged by crime, or on building new, healthy relationships; a *naturalistic* focus that does not always assume the necessity of formal intervention; an organic process of informal support and social control that emphasises the *community* role in offender transformation and increased reliance on the role of citizens as “natural helpers”; and when specifically needed, professional treatment would be utilised.

Bazemore and Bell (2004:129) conclude that “a blend of restorative justice and effective treatment principles builds on the assets of offender, victim and community by broadening the rehabilitative context to include victim and community, emphasizing the non-punitive accountability for harms in a way that reinforces reciprocity in human relationships, and finally by connecting the offenders with informal supports and controls.”

From the perspective of the White Paper on Corrections as well as the above “restorative view of rehabilitation”, we should broaden our view of rehabilitation to include all efforts prior to imprisonment, such as the range of life skills programmes that are available to children in trouble with the law at a pre-trial and pre-sentence stage. It is submitted that this view of restorative justice and rehabilitation is particularly apposite for South Africa at the present time. Restorative justice advocates do not ignore the importance of a therapeutic and rehabilitative approach, but they do not view these as the central or most important aims of a justice process, especially as they are entirely offender focussed. Restorative justice emphasises the harm done to the victim and the accountability of the offender for repairing that harm. Thus the offender is held responsible, and the aim is to restore him to the status of a moral being who can make and act on choices, although he or she may need assistance to do so.

Apart from its doubtful record, a highly professionalised approach to rehabilitation is entirely unfeasible, given our current crime levels and scarce professional human

resources. Furthermore, the collective nature of South African society as opposed to the highly individualised nature of Western societies, suggests that restorative justice is a more appropriate approach. We should aim to understand how a restorative justice approach can be a catalyst to create possibilities for a crime-free life for the offender, and by doing so create a safer environment for all. The prospects of this appear to lie in the way that restorative justice changes dynamics in relationships, and creates space in the community for offenders to connect with opportunities. This has multiple implications for the development of both restorative justice and rehabilitation in South Africa, as well as the research agendas attached to each. Researchers need to turn their attention to assisting practitioners and policy makers discover what rehabilitative programmes work under what circumstances and what the exact relationship is between these programmes and restorative justice processes.

CONCLUSION

Restorative justice has emerged clearly in South African writing, practice and jurisprudence. It has done so against a well-documented backdrop of international experience and analysis of the concept. Restorative justice is not vague, nor is it based on the ideas of apology and forgiveness, although these may well up in restorative justice processes. The advocates of restorative justice are not unrealistic, nor are they nervous about debating its merits or demerits with critics. Restorative justice is here to stay. The theory has stood up to criticism, and has even been engaged by its critics in a charitable exchange of attempts to find synergy between restorative justice and more mainstream criminal justice approaches. Restorative justice does promote a new way of doing justice. It should not be understood as a “programme”, nor as always confined to be a diversion from or an alternative to the criminal justice system. This discussion has demonstrated how restorative justice can be effectively utilised at all stages of the system, sometimes as an alternative to the criminal justice system, and sometimes as a useful technique within or alongside such system. With regard to sentencing, restorative justice offers new insights that have already received recognition at the highest level of South African courts.

Lastly, the discussion on restorative justice and rehabilitation demonstrates that apart from the general loss of faith in the effectiveness of rehabilitation, it fails to capture what can occur in a restorative justice process. Rehabilitation is offender focused, but it sends a confused message regarding accountability. Restorative justice is clear on this: the victim is at the centre of the process, and the offender must be held accountable. It is accepted that the offenders will sometimes need assistance to take responsibility, and that professional therapeutic approaches will play a role in such cases. Restorative justice is both backward looking (in that it seeks to uncover the cause of the conflict and find solutions) and forward looking (as it often includes plans to prevent re-offending). In this way it creates social space in which the offender may find opportunities to live a crime-free life in the future.

REFERENCES

- Bazemore, G. 1999. *After shaming, whither reintegration: restorative justice and relational rehabilitation*. In G Bazemore and L Walgrave (eds) *Restorative juvenile justice: repairing the harm of youth crime* (p155-194). Criminal Justice Press, Monsey, New York, USA.
- Bekker, A. 2004. *Restorative Justice: A Viable Option for the Regional Court?* Sabinet Online. Retrieved on August 18, 2008 from <http://www.sabinet.co.za>.
- Bezuidenhout, C. 2007. Restorative justice with an explicit rehabilitative ethos: is this the resolve to change criminality? *Acta Criminologica*, 20(2): 43- 60.
- Braithwaite, J. 1989. *Crime, Shame and Reintegration*. Cambridge: Cambridge University Press.
- Braithwaite, J. 2002. Standards for Restorative Justice. *British Journal of Criminology*, 42 (3): 563-577.
- Braithwaite, J. 2003. *Principles of Restorative Justice*. In A von Hirsch, J Roberts, A Bottoms, J Roach and M Schiff (eds) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms*. (pp 1-20). Oxford Hart Publishing.
- Brunk, C. 2001. *Restorative justice and the Philosophical Theories of Criminal Punishment*. In M Hadley (ed) *The Spiritual Roots of Restorative Justice* (pp 31 – 56) Albany: State University Press.
- Cullen, F. & Gilbert, K. 1982. *Reaffirming Rehabilitation*. Cincinnati: Anderson Press.
- Frank, C. & Skelton, A. 2007. *Practice Standards for Restorative Justice: A Practitioner's Toolkit*. Pretoria: Restorative Justice Initiative Southern Africa. Available on <http://www.restorativejustice.org/resources/docs/frankcheryl/view?>
- Gustafson, D. 2004. *Is Restorative Justice Taking Too Few, or Too Many, Risks?* In Zehr H and Toews B (eds) *Critical Issues in Restorative Justice*. Monsey: Criminal Justice Press and Willan Publishing.
- Hargovan, H. 2008. Knocking and Entering: Restorative Justice Arrives at the Courts. *Acta Criminologica Crimsa Conference Special Edition 1: 22-40*.
- Johnstone, G. 2002. *Restorative Justice: Ideas, Values, Debates*. Cullompton: Willan Publishing.
- Martinson, R. 1974. What Works? Questions and Answers About Prison Reform. *The Public Interest*, 22.
- Muntingh, L. 2001. *After prison, the case for offender reintegration*. Pretoria: Institute for Security Studies, Monograph 52.
- Muntingh, L. 1993. *The Development of a Victim-Offender Mediation Project*. Pretoria: Human Sciences Research Council.
- Raye, B. & Roberts, A. *Restorative Processes*. 2007. In G. Johnstone and D. Van Ness (eds) *Handbook of Restorative Justice*, Cullompton: Willan Publishing, p211-227.
- Sharpe, S. and Lai Thom, G. 2007. Making Sense of North American and South African Differences in the Practice of Restorative Justice. Available at <http://www.restorativejustice.org/editions/2007/dec07/comparesaandusa>.
- Sherman, L., and Strang, H. 2007. *Restorative Justice: The Evidence*. London: The Smith Institute.
- Skelton, A. 2006. *Response from a Restorative Justice Perspective*. In *Sentencing in South Africa*. (pp10-23). Conference Report of a conference held 25-26 October

- 2006, Cape Town. Cape Town: Open Society Foundation. Available at <http://www.osf.org.za>.
- Skelton A. & Batley, M. 2006. *Charting progress, mapping the future: restorative justice in South Africa*. Pretoria: Institute for Security Studies and Restorative Justice Centre.
- Skelton, A. 2007. Tapping indigenous knowledge: Traditional conflict resolution, restorative justice and the denunciation of crime in South Africa. *Acta Juridica*, 228.
- Terblanche, S. 2008. *Research on the Sentencing Framework Bill*. (2008) Cape Town: Open Society Foundation.
- Umbreit, M., Bradshaw, W. & Coates, R. 2003. *Victims of Severe Violence in Dialogue with the Offender: Key Principles, Practices, Outcomes and Implications*. In Weitekamp, E. & Kerner, H.J. (eds) *Restorative Justice in Context: International Practice and Directions*. Cullompton: Willan Publishing.
- United Nations Economic and Social Council. *Basic principles on the use of restorative justice in criminal matters*. E/cn.15/2002/1.2/18 April 2002.
- Van Ness, D. & Johnstone, G. (eds). 2007. *Handbook on Restorative Justice*. Cullompton: Willan Publishing.
- Von Hirsch, A., Roberts, J., Bottoms, A., Roach, K. & Schiff, M. (eds). 2003. *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigm*. Oxford: Hart Publishing.
- United Nations Office on Drugs and Crime. 2006. *Handbook on Restorative Justice Programmes*. Criminal Justice Handbook Series available at http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf
- Zehr, H. 2002 *The Little Book of Restorative Justice*. Intercourse: Good Books.

Case References

- S v Rabie* 1975 (4) SA 855 (A)
Dikoko v Mokhatla 2006 (6) SA 235 (CC)
S v M (Centre for Child Law Amicus Curiae) 2007 (12) BCLR 1312 (CC)
S v Saayman 2008 (1) SACR 393 (E)
S v Shilubane 2008 (1) SACR 295 (T)
S v Maluleke 2008 (1) SACR (T)