

# **Restorative Justice As Reaction to Crime: Development and Conceptualisation**

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## **INTRODUCTION**

In the 1950s the psychologist, Eglash, (Van Ness & Strong 1997:28) spoke of the concepts "creative restitution" and the "second mile", about healing and not depending only on the punishment of offenders. A decade later Schafer (Schmallegger 1996:298) introduced the paradigm of restitution of victims. Although the term "restorative justice" is often attributed to modern authors like Barnett (1997:279), it is not a new concept or a new "move" in the history of reactions to crime. In many respects, the so-called "new" paradigm of restorative justice represents a return to traditional responses to crime that had victim reparation as a basic premise.

The purpose of the article is

- to discuss the development of restorative justice as a traditional/non-western and as a modern/western reaction to crime; and
- to explore the basic premise of restorative justice by means of a conceptual analysis.

## **DEVELOPMENT OF RESTORATIVE JUSTICE**

Braithwaite (1997:3) points out that restorative justice has been the dominant model of criminal justice throughout most of human history. People traditionally have been very reluctant to call in the state for dispute resolution, even when the state claimed that role. For centuries the role of the state in prosecution was minimal. Instead it was widely accepted that the community had to solve its own disputes.

In the following paragraphs we will look at the occurrence and development of restorative justice as a reaction to crime in traditional/non-western and modern/western criminal justice systems.

### **Restorative justice as a traditional/non-western reaction to crime**

Bazemore and Umbreit (1995:301-302) are of the opinion that in the traditional reaction to crime or disputes between individuals that were regarded as belonging to the group, these were settled without interference by the state. It was acknowledged that members of the community were injured by the crime and that restoration of the relationships, reconciliation between parties and reparation to the victim or the injured party were

necessary.

Not only can the origin of the principles of restorative justice be tracked to traditional reactions to crime, they also emerged clearly in the strongly established traditions of non-western societies. The indigenous law of some African legal systems is aimed mainly at:

- settling relationships between individuals mutually and not between individuals and the state;
- achieving harmony in the community;
- communal interests as opposed to the more individualistic western law;
- mediation rather than prosecuting in the courts; and
- the restitution of the injured party.

One of the most important functions of the indigenous African legal systems is ".....the restoration of the disturbed social equilibrium within the community" (Mqoke 1995:364).

The African concept of *ubuntu* as the philosophy of personhood underlies the concept of restorative justice as a reaction to crime. Mbigi (1995:1-2) identifies the following outstanding values that are emphasised in the concept *ubuntu*:

- group solidarity
- conformity to group values
- compassion
- respect
- human dignity
- collective unity.

The *Ubuntu* view of humanity influences the interpretation of justice and people's reaction to crime. Two principles, in particular, emerge strongly, namely that every individual is affected by the injury(harming) of another, and reactions to injury or harm must be aimed at the restoration of the victim's damage.

### **Restorative justice as a modern/western reaction**

Restorative justice as a reaction to crime in the modern age took shape mainly in an earlier community-based experiment in North America with mediation between victims and offenders. Zehr (1990:6-7) is of the opinion that this experimentation led to alternative programmes for the disposition of offenders, which developed for various reasons, including:

- that the criminal justice system had become too complex;

- community needs were not being met;
- handling disputes is better put in the hands of the community than in centralised state organs.

Marshall (1998:3) maintains that officials' frustrations at the limitations of traditional approaches in criminal justice (e.g. the one-sided emphasis on the retributive or the rehabilitation approach) contributed further to the development of principles and procedures underlying restorative justice. Officials began to experiment with new approaches to the crime problem in their daily criminal justice practice. Procedures developed through experimentation with "what works" in terms of impact on offenders, victims' satisfaction and public acceptability. In particular, they came to the conclusion that -

- the needs of victims, offenders and the community are not separate from each other; and
- the criminal justice system must become actively involved in all three these interest groups to succeed in the fight against crime.

Van Ness and Strong (1997:4) isolate five developments or movements that made the biggest contribution to the establishment of restorative justice:

- The movement for *informal justice*, which calls for more informal procedures that can assure better access to and participation in the criminal justice system.
- The proponents of *social justice* which have the promotion of the social welfare of the community in general as their goal.
- *Restitution* as a reaction to crime aroused new interest in the 1970s. Restitution is a process in which the offender is held accountable for the financial losses the victim suffered as a result of the crime.
- The champions of victims' rights focus on the *victims' needs*. Their goal is to generally empower the victim and promote the right of victims to participate in the criminal justice system. It must, however, be made clear that the restorative justice perspective does not make provision for a "victims' right" approach. The action of supporters of victim rights often stems from underlying retributive values: "[S]ome of the more vocal groups advocating victim rights have often define these as an absence of offender rights in a zero-sum game and have promoted political efforts to 'get tough' with offenders through mandatory and determinate sentencing and retributive policies."(McShane & Williams 1992:260). In contrast to this the supporters of restorative justice (and victim needs) promote a victim-centred approach that does not require decision-makers to choose sides between victim and offender (Lawrence 1991:450). The concept "victim rights" is thus not synonymous for the concept "victim needs".
- Experiments with *victim/offender mediation* and *family group conferencing*. Victim/offender mediation is a process that makes provision for victims and their offenders to meet on a voluntary basis and in the presence of a mediator to discuss the crime and develop a plan together to restore the damage of the crime. Family group conferencing involves the group of people most affected by the crime - the

victim, the offender, and the family, friends and supporters of both parties - in working out a plan, under the guidance of a mediator, in the interests of the victim, the offender and the community.

Truth commissions have come forward over the past two decades in reaction to serious human rights abuses and as a (restorative) alternative to criminal trials. The South African Truth and Reconciliation Commission (the TRC) is a modern restorative justice model within which serious human rights abuses of the past are dealt with. Public hearings (trials) and statements offer victims, witnesses and offenders the opportunity to reveal the truth of incidents to society. In this way those involved gain insight into each other's experiences and the way is paved for remorse, forgiveness, reparation and reconciliation. Zehr (1996: 1-2) summarises the comprehensive task of the Commission up as follows:

- The construction and publication of a complete picture of the violations of human rights under the apartheid regime.
- recommendations for the reparation and rehabilitation of victims and families (the survivors).
- Amnesty to offenders who reveal the full truth and show genuine remorse.
- Recommendations to prevent similar violations.

## **CONCEPTUAL ANALYSIS**

To shed more light on the question "What is restorative justice?" we will draw attention to a definition, the purpose, basic principles, and advantages and limitations of restorative justice.

### **Definition of concepts**

Criminologists tend to emphasise different aspects of restorative justice in the description of the concept:

- Bazemore and Umbreit (1995:302) hold the view that restorative justice seeks to respond to crime at the *micro* and *macro* level. At the micro level the emphasis is on the damage of the crime and the restoration of the victim, while the macro level refers to community safety and criminogenic circumstances in communities.
- Conner (1998: 1) focuses on crime as a violation of personal relationships that have to be restored. She further points out that the offender returns to the community, and this forms the rationale for the involvement of the broad community in the restorative justice process.
- The description of the South African Law Commissions (1997:6-7) is closely linked to Van Ness's (1993:259) exposition. Emphasis is placed on the fact that
  - a crime is harming or damaging to another person and is not so much a breach of law;
  - the victim and offender must be encouraged to put aside differences and conflicts together;
  - the victim and offender should occupy a central position in the criminal justice system;

- the criminal justice system functions in a facilitating role in regard to offender responsibility and the participation of both the offender and the victim in the process of putting matters right.

### **The purpose of restorative justice**

The primary purpose of restorative justice is to

- give attention in a meaningful way to the *victims'* needs at material, financial, emotional and social levels;
- enable *offenders* to accept responsibility for their actions;
- activate *community involvement* in order to be actively involved in initiatives to promote community safety;
- prevent recidivism and promote community safety by making the successful *reintegration* of offenders into the community possible; and
- prevent the *escalation* of case loads in the various sectors of the criminal justice system with concomitant delays and financial implications.

### **Underlying principles**

Upon further analysis and reflection on the definition of concepts and the purpose, certain basic principles of restorative justice can be distinguished.

Kurki (1999: 2) mentions five important principles, namely:

- Crime is a more comprehensive concept than law-breaking or deviant behaviour.
- Crime is a disruption in the three-dimensional relationship between victim, offender and community.
- Because crime harms the victim and the community, it ought to be a primary objective to restore the damage and heal the victim and the community.
- The victim, offender and community must be involved in establishing the content of the reaction to crime; the state must give up its monopoly in this area.
- Case disposition must be based on victim and community needs - not only on the offenders' needs, responsibility, dangerousness or criminal past.

While Kurki in her exposition emphasises victims' needs, it does not always enjoy priority in the criminal justice process. An example is the success achieved with collecting fines from offenders in contrast to the inability to sanction the implementation of restitution orders by courts in favour of victims. The prosecution authority leaves no stone unturned to promote victim involvement in order to obtain a conviction, but very little time and resources are spent on developing victim services, mediation and reparation programmes.

## **Advantages and limitations of restorative justice**

Restorative justice has definite *benefits* that may include the following:

- Individuals who participate experience a feeling of involvement and also insight into the criminal justice process. The practice of restorative justice is mostly accessible and attractive to people because of its flexible and less formal nature.
- It enables the victim to negotiate satisfactory solutions.
- The community becomes involved and that provides an inclusive and supportive framework for promoting community safety.
- Offenders are confronted with demands in the sense that they have to accept responsibility and become actively involved in fulfilling obligations to victims and the community.

Emphasis is placed on certain *limitations* of restorative justice:

- The principle of the model inevitably rests on the cooperation of the parties concerned. If the offender, for instance, refuses to accept responsibility for the crime and to fulfil his or her obligations to the victim and the community, there can be no talk of restorative justice.
- A certain level of competence and the availability of infrastructure, such as a trained mediator, are prerequisites for community participation in restorative justice programmes. However, the skills and resources are not always available.
- In modern society, community bonds are not always so strong and aspects like the privacy of the individual and autonomy are strongly emphasised. A significant shift to community participation and involvement in restorative justice programmes will necessarily put a high premium on community education and the development of community sources.
- Any existing social injustices in and between communities could have a negative influence on the implementation of restorative justice. Social division can prejudice the cooperation of parties in the criminal justice process.
- Some people are of the opinion that restorative justice is a "soft" option for the offender.
- A perception that restorative justice only applies in the case of juveniles and minor offences is quite common.

## **CONCLUSION**

The traditional destination in criminal justice was often aimed at the so-called three "Rs", which were expressed as "revenge", "retaliation" and "retribution". Gradually, in the 1960s and 1970s, a fourth "R" was added in the form of "rehabilitation" and in the last decades of the twentieth century the contemporary criminal justice map was completed with the fifth "R", namely "restorative" justice.

Those who support the perspective of restorative justice usually have four fundamental views in common, namely:

*Restorative justice takes a new look at crime and the reaction to crime by the intervention of the criminal justice system.*

- Crime is an impairment of the victim and not just an offence against the state.
- Crime may be interpreted as any wrong action that violates relationships between people or harms community life.
- In the restorative justice perspective the offender is held accountable for the damage caused. Justice is done to the victims, the victimised communities, and offenders.

*Restorative justice provides an extended role for the victim in the criminal justice process.*

- Many victims feel excluded when their cases are handled in the criminal justice system. There is a need, for example, to talk freely about their pain and feelings toward the criminal, but the present procedures leave little room for that. From the restorative justice perspective, programmes are developed or adjusted to hear the victim. Victims are empowered by the opportunity to state their needs and indicate how these needs can be satisfied.

*Restorative justice offer broader possibilities for community involvement in the reaction to crime.*

- The restorative justice perspective involves community members on an individual basis as well as community institutions, such as schools, businesses and religious groups, in a variety of proactive and reactive programmes to reinforce community bonds between people and organisations.
- The point of departure is that the community has the right to feel safe.
- The feeling of community safety and community capacity for collective action (reaction to crime) is reinforced by actively involving members in restoration processes.

*Restorative justice requires offenders to accept responsibility for crimes and to fulfil their obligations to the victim and community.*

- Offenders must actively work at restoring the damage they caused to victims and the community - to "make things right".
- For many offenders, just a fine or a short term of imprisonment is easier, for example, than making personal reparation to victims.
- In restorative justice programmes the offender becomes aware of the personal detriment to the victim and the opportunity arises to restore the damage to the victim and the community.

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