

Chapter 5

A developmental social work approach to crime prevention through restorative justice

Thulane Gxubane

By the end of this chapter you should be able to:

- ▶ Comprehend the South African policy and legislative framework that informs a developmental social work response to crime prevention
- ▶ Compare and contrast different approaches to justice
- ▶ Define and describe the concept of restorative justice
- ▶ Identify the values, principles and philosophy underpinning restorative justice
- ▶ Understand the advantages and possible benefits of restorative justice
- ▶ Be aware of critical issues in the application of restorative justice
- ▶ Be familiar with basic guidelines that can help you in giving effect to restorative justice

Introduction

This chapter focuses on restorative justice as a developmental social work approach to crime prevention. The South African policy and legislative framework for a developmental approach to crime prevention is outlined. The conceptual framework, values and principles underlying restorative justice are explored and the advantages and possible benefits of restorative justice are outlined. The chapter will also look at some of the critical issues that restorative justice practitioners need to be mindful of when applying restorative justice. Guidelines to help give effect to restorative justice are offered to social workers in the criminal justice system.

South African policy and legislative framework

Probation practitioners provide mainly remedial support services to the courts. Little or no attention is given to the long-term interests of the child offender, the victim and the community. Whilst providing support services for the courts, which are mainly offender oriented, the probation officers should not lose sight of the social and professional imperatives to align their interventions with the national developmental agenda of the country relating to the prevention of crime. Probation officers and all social workers

working within the criminal justice system have the professional responsibility of translating the constitutional mandate into policy and professional practice.

The mandate of the developmental approach in probation and social work practice is derived from the Constitution of the Republic of South Africa of 1996 and from various other international and regional standard setting instruments, which were adopted by the South African government (Patel, 2005). A developmental approach to social work practice is defined as:

the practical and appropriate application of knowledge, skills and values to enhance the well-being of individuals, families, groups, organisations and communities in their social context (Patel, 2005: 206-7).

This approach aims to promote social change through a dual focus on the person and the environment, as well as on the interaction between the two (Patel, 2005). In the child justice system, this would entail holistic and multi-disciplinary interventions that are not only focussed on changing the symptomatic criminal behaviour of the child offender, but also on ascertaining the underlying causal factors and systems that have an impact on the child's social functioning.

The White Paper for Social Welfare (1997) and the Inter-Ministerial Committee on Youth at Risk (1998) (hereafter referred to as IMC) proposed that restorative justice, diversion programmes, prevention and early intervention programmes should be the key principles to inform criminal justice thinking in managing young offenders in South Africa. This implies a paradigm shift from the retributive justice system, which focuses on punishment, to a restorative justice approach, which promotes accountability and reconciliation. Both the IMC and the White Paper for Social Welfare emphasised diversion within the restorative justice framework because this approach seeks to channel young offenders away from the criminal justice system and provide them with an opportunity to be accountable for their unlawful behaviour, whilst they make amends to their victims rather than just being punished.

The philosophical framework of restorative justice is very much the cornerstone of the Child Justice Act 75 of 2008 (hereafter referred to as 'CJA'). The CJA defines restorative justice as:

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 or the incident, and promoting reconciliation.

Restorative justice is entrenched in the CJA across different levels of criminal procedure. For example, the CJA makes provision for early interventions of diverting young offenders; while sections 61 and 62 refer to family group conferencing and victim-offender mediation respectively. Section 73 of the CJA also makes provision for restorative justice sentencing as one of the options that could be considered for convicted child offenders.

The CJA states that one of its main objects is to promote the spirit of ubuntu in the child justice system through:

- ▶ fostering children's sense of dignity and worth;
- ▶ reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safe-guarding the interests of victims and the community;
- ▶ supporting reconciliation by means of a restorative justice response; and
- ▶ involving parents, families, victims and, where appropriate, other members of the community affected by the crime in procedures contemplated in this Act in order to encourage the reintegration of children.

Konopka (1972) identified 'social justice' and 'responsibility' as key values that should underpin the profession of social work. For Konopka (1972) social justice means that as human beings we need to accept each other regardless of any specific attribute, such as race, sex, economic status, and so forth that might differentiate one person from the other. Responsibility is:

the awareness of the interdependence of human beings, of the acceptance of the rights of others as well as one's own, and of the concept of the brotherhood of all people (Konopka, 1972: 56).

These core social work professional values are in line with the African philosophy of *ubuntu*, which is described by Wood (2003) as encompassing issues of human dignity and respect with the understanding that an individual's humanity is wrapped up in the dignity and humanity of others. Hence, *ubuntu* promotes human worth and dignity for all the members of the community, which has been felt by the victims and offenders alike as missing in the retributive criminal justice system.

Skelton and Frank (2001) believed that it is important to note that while the concept of restorative justice maybe relatively new to some South Africans, the spirit of the concept is strongly embedded in the history of African society through the notion of *ubuntu*. *Ubuntu* embodies ideas about the interconnectedness of people to each other and the importance of the family group over the individual and the value of social responsibility towards all others in the community. Therefore if one member of a family has been harmed the entire family and community has been harmed.

Why do we need a new approach to prevention of crime?

Crime is a huge problem in South Africa. People tend to hope that through locking the criminals away in prison the criminal justice system will help to get rid of crime or at least reduce the high levels of crime in South Africa. People easily forget that these 'criminals' that are locked away will sooner or later be released back to the community. Prisons are overcrowded. The prison environment engenders violence as inmates have to fight for few available resources relating to basic human needs such as a bed to sleep.

Prison inmates that have served a quarter of their sentences who also meet the requirements of the parole board such as good behaviour and satisfactory participation in rehabilitation programmes often qualify to be released on parole in South Africa. According to Skelton and Batley (2006: 116) the Department of Correctional Services statics state that '(a)n average of 27 600 inmates were released conditionally and

unconditionally every month during 2005' in South Africa. This shows that sending people to prison does not solve the crime problem not even for a short period. It has been pointed out by many scholars, including Batley and Maepa (2005) that imprisonment has been shown internationally to have little success in preventing crime. Instead it has long-lasting and devastating effects on offenders who would often struggle to adjust back to the society once they are released from prison.

The retributive criminal justice system has failed: to protect the community, to prevent crime, and; to rehabilitate offenders. The offender, the victim (the person who has been harmed) and the community are alienated throughout the criminal procedure and processes. The community is abstractly represented by the state. The criminal justice system has failed mainly because:

- ▶ *It is impersonal and authoritarian.* It lacks humanity and respect in the manner that it deals with the victims, the offenders, and the witnesses including professionals that testify as expert witnesses
- ▶ *It has a wrong conception of human nature.* It is punishment-oriented and not solution-oriented. It is based on the assumption that punishment can change human behaviour.
- ▶ *It is offender oriented and ignores the rights and needs of the victims.* Victims are therefore left with a sense of powerlessness, confusion, vulnerability and anger.
- ▶ *It does not redress wrongs and does not promote healing nor restoration of relationships.* Offenders are not made to really understand the consequences of their behaviour. On release from prison they remain hostile to the victim, the 'system' and society in general.
- ▶ *The conflict that was created by the crime remains unresolved.* When offenders are sent to prison, the needs of the victims are not necessarily satisfied. Both the victim and the offender would not have had a platform to talk about what initially led to the offence and what would need to be done to avoid similar situations in the future.

In light of many shortcomings of the retributive criminal justice system a restorative justice approach and response to crime was proposed by scholars such as Zehr (1990). Zehr proposed a different way to understand crime and the response to it. He argued that when crime has been committed the retributive justice system will first ask 'Who did it?' and 'What should be done to them?'. He felt that through restorative justice approach, what needs to be asked first is 'Who has been harmed?', 'How have they been harmed?' and 'What are their needs?' (Zehr, 1990: 191).

Crime should not be conceived as merely an offence against state. Crime needs to be conceived as a violation of people and relationships. If this lens is used to perceive crime then our approach to the criminal justice system needs to promote healing and repairing harms that have been caused by crime particularly the relationship between the victim and the offender. If left unresolved, the hostile relationship will in turn affect the well-being of the victim, the offender and their families. Justice is more than just the punishment and incapacitation of offenders. Justice creates obligations to make things right and it needs to involve the victim, the offender, and the community in search for solutions which promote repair, reconciliation, reassurance and healing (Zehr, 1990).

Locating restorative justice amongst other approaches to justice

In this sub-section four other approaches to justice, namely; retributive, utilitarian deterrence, rehabilitation, and restitution are briefly discussed.

Retributive approach

The retributive approach is probably the oldest theory of justice and it has its roots in religious beliefs. This approach views an offence as a 'sin' and therefore a 'sin' can only be paid for by punishment. This viewpoint led to the development of the retributive theory's focus on punishment. Punishment is to right the wrong done in the criminal offence. The offender's suffering is what constitutes the 'pay back' to the society and the victims of the offence. The strength of this approach lies in that offenders are viewed and treated as morally responsible members of the society. Offenders are not viewed as instruments for deterring others, and not as if they are 'sick' and irresponsible.

Utilitarian deterrence approach

The utilitarian deterrence approach to justice prioritises the protection of the society from the offenders. The state is perceived to be the only institute that is justified to have power which needs to be enforced to obtain obedience to the legal and moral order of the society. It also views punishment, pain and suffering as a means for deterring the potential offenders. Since it is focused on punishment, the approach claims to be victim focused. In reality it focuses completely on the potential victims but completely ignores the direct victims of crimes. The approach uses imprisonment to deter others even though it was pointed out earlier that it is a short term and ineffective strategy which also fails to deter the 'would be' offenders. It has an inherent component of injustice. By punishing an offender in a way that will have an impact on potential offenders, the punishment is not likely to fit the crime committed by the actual offender.

Rehabilitation approach

The rehabilitation approach is rooted in the rise of the social and behavioural sciences. The offender is viewed as either a 'patient' or a 'victim' or both. The offender is not viewed as morally responsible for the offence he or she has committed. As a patient, the offence is the product of a dysfunctional social environment, that is, larger social illnesses. This approach has been criticised in that it seeks to impose behavioural change through treatment. It has been widely recognised that enforced behavioural therapy is rarely successful. Conditions in prison are far more detrimental to rehabilitation than any good served by any therapeutic programme. The general public views this approach as a 'soft option'. It also ignores the victims of crime. Restorative justice is often aligned with rehabilitation theory although some scholars argue that restoration is not the same as rehabilitation. Restorative justice emphasises the need for offenders to take responsibility. Restorative justice treats offenders as responsible and moral human beings and not as 'sick patients' needing treatment.

Restitution approach

The restitution approach is a far more recent approach. It has its roots in the economic and political schools of thought. It is based on the view that the state needs to intervene as little as possible in the society. Criminal offences are not seen as wrongs against the victim but as a general cost of doing business in society. Every loss or harm is compensable and if compensated adequately, the wrong is removed. This approach has been appealing to some scholars in the field of restorative justice since it is the only approach that addresses the needs of the immediate victims. This approach has been criticised for the following reasons:

- it reduces the idea of restitution to that of financial payback;
- it removes the need for an offender to acknowledge the wrongfulness of his or her actions and to take responsibility for them;
- it does not address restoration or reintegration of offenders back into the community;
- it favours the wealthy in the society who can afford their crimes; and
- it only recognises the person who has been directly harmed as a victim and ignores secondary victims like families and the community.

Conceptualising restorative justice

Van Ness and Strong (2002: 27) assert that the term ‘restorative justice’ must have been coined by Albert Eglash in 1977 in an article where he distinguished three types of criminal justice system (some of which have already been discussed above), namely; retributive justice which is based on punishment, distributive justice (also known as rehabilitation approach to justice), based on therapeutic treatment of offenders, and restorative justice, based on restitution. On the other hand, Skelton (1999) argues that restorative justice is nothing new to South Africa. Restorative justice is a theory of justice which promotes reconciliation rather than punishment of offenders. Skelton further argues that long before apartheid and colonisation, restorative justice was known and understood by people living in South Africa such that ‘(r)conciliation, restoration and harmony lie at the heart of African adjudication’ (Skelton, 1999: 93-94).

Sharpe (2004) notes that restorative justice is still a new field of study and the rapid growth of restorative justice has led to increased confusion on what restorative justice is, and what kinds of practice can be included or excluded from restorative justice. It has been emphasised by this author in other writings (Gxubane, 2008 and 2010) that a focus on the philosophy underlying restorative justice is very important, because it has implications for its practice. For instance, it was proposed by the SA Law Commission (2000) that diversion needs to promote a restorative justice frame of reference in dealing with young people in conflict with the law. However many diversion programmes do not involve the victims at all as part of the programme. Instead, most of them consider the involvement of the youth offenders’ parents in the first and last sessions of the diversion programme as application of restorative justice. Hence such diversion programmes have been strongly criticised by scholars such as Cupido, Kritzinger and Aswegen (2005) and Shearar and Graser (2005) for their lack of a sufficient restorative justice orientation in their overall design.

Even though people cannot precisely describe what justice is, they are very much aware of what does not constitute justice. Rawls (2001) theorised that justice is about fairness. He based his theory on a fair system of social cooperation and social contracts. This theory proposes that as members of a society we have social contracts which serve as presumed agreements about how we will behave in relation to each other and what kinds of behaviour we can expect from each other. These agreements are often subconscious and unspoken although sometimes they are codified into laws and policies. What shows that there is a social contract amongst members of any given society is when the contract is violated. It provokes a sense of outrage amongst other members of the society often expressed as 'that's not fair' (Sharpe, 2004: 23).

Sharpe (2004) also asserts that based on the above notion of justice it will therefore imply that there is justice between us so long as our interactions allow each of us equal opportunity to seek what is important to our own good. She goes on to argue that there is injustice when one of us has much more freedom than the others. Some injustices are minor, easily corrected and quickly forgotten whilst others cause serious and sometimes lasting harm. Injustices debilitate to the extent that they suspend the functional social contract by limiting a person's quality of life and the ability to get his or her needs met (Sharpe, 2004).

Sharpe (2004) also points out that in the restorative justice literature there seems to be more focus on the 'restoration' part of restorative justice and little attention is given to the justice part of the concept. Therefore to be able to locate and understand how restorative justice contributes to achieving the goals of justice she argues that:

... we need to be sure we understand the justice dimension of restorative justice as well as the restorative dimension (Sharpe, 2004: 22).

This author could not agree more with Sharpe because there is a tendency amongst social workers in the criminal justice system to be mainly focussed on the offenders. Victims are often neglected throughout the process of the offender rehabilitation. When they are invited to participate in restorative justice processes they are often not prepared for such encounters. This clearly does not seem fair to the victims of these offenders. It is such biased approaches to justice that have been questioned by some scholars. The question is whether restorative justice is capable of promoting justice that is fair to all parties. More charges against restorative justice are discussed later in this chapter.

Various scholars define restorative justice according to the specific aspects of the concept that they want to emphasise. Liebmann (2007) notes, for instance, that some scholars proposed that the term 'restorative justice' needs to be replaced with the term 'restorative approaches', because 'restorative justice' has been used in various other contexts, such as in schools for disciplinary hearings. She argues that the central tenet underlying all definitions of restorative justice is that they all generally point to the restoration of the victim and the community, rather than merely punishing the offender. She states that, in the criminal justice context in its simplest terms, '(r)estorative justice aims to restore the well-being of victims, offenders and communities damaged by crime, and to prevent further offending' (Liebmann, 2007: 25).

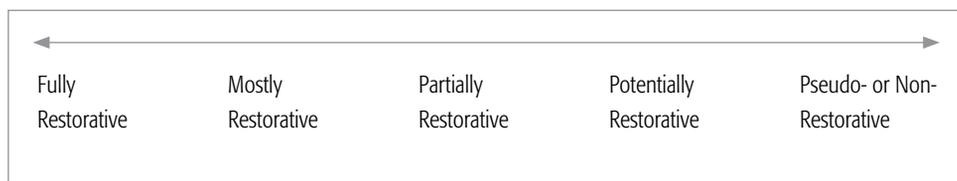
Van Ness and Strong (2002: 37-42) believe that central to all definitions of restorative justice there seems to be three important principles and philosophies underlying the concept:

1. Crime is seen as something that causes injuries to victims, offenders and communities;
2. Not only government, but victims, offenders and their communities should be actively involved in the criminal justice process at the earliest point and to the maximum extent possible; and
3. In promoting justice, the government is responsible for preserving order and the community is responsible for establishing peace.

Zehr (2002: 54-57) on the other hand proposed that the following questions can be used as pointers in evaluating whether a process or a programme is restorative in nature or not:

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

It may not be possible or even desirable for every restorative justice programme or process to address all six questions above, but that it should include at least some of them (Skelton and Batley, 2006). It is therefore emphasised by this author that restorative justice has to be conceptualised as an approach, a mindset, or a way of thinking about justice rather than a particular process or programme (Gxubane, 2008 and 2010). Therefore the application of restorative justice processes according to Skelton and Batley (2006: 7) can be conceptualised as illustrated in the diagram below.



The continuum framework means that restorative justice processes and programmes can be placed along the continuum with those processes at one end being fully restorative, while others at the other end being pseudo or non-restorative. In between, along the continuum, there may be other processes and programmes which may be partially and or potentially restorative.

Values and principles of restorative justice

Restorative justice is informed by a number of values and principles that underpin the application of restorative justice processes. A justice process may be considered restorative only in as much as it gives expression to key restorative justice values and principles. Pranis (2007) theorised that restorative justice values can be divided into process values and individual values. Process values refer to qualities that characterise

the restorative justice process. Individual values refer to qualities that a restorative justice process needs to nurture within the individuals who are participating in a restorative justice process.

Process values that need to characterise a restorative justice process should amongst others include: democracy, responsibility, reparation, safety, healing, inclusion, reintegration, humility, respect, participation, interconnectedness, hope and empowerment. Individual values that need to be nurtured in individuals that are participating in a restorative justice process should amongst other include: honesty, respect, responsibility, compassion, patience, fairness, open mindedness, creativity, consideration, and accountability. Zehr (2002) believed that if he had to sum up different values and principles of restorative justice into one core concept he would choose respect. He argued that respect underlies all restorative justice principles and must guide and shape their application. This is the same core principle that is embodied in the African philosophy of *ubuntu* which refers to the belief that we need to treat others the way we would like to be treated.

Restorative justice values and principles in practice

Values and principles of restorative justice in the criminal justice system are often applied within a context of a victim offender mediation (hereafter referred to as VOM) or in a family group conference (hereafter referred to as FGC). Therefore according to the Restorative Justice Network (2003) any such meeting may be considered 'restorative' if:

- ▶ *It is guided by competent and impartial facilitators.* This is to ensure that the process is safe and guided by neutral, impartial and trusted facilitators. It is also essential that pre-conference preparation be given to all the individuals that will participate in the restorative justice gathering.
- ▶ *It strives to be inclusive and collaborative.* This is to ensure that the process is open to all people that have been directly and indirectly affected by the offence. The process is not restorative if key participants are required to remain silent or passive or where their contribution is suppressed by a facilitator who might have a personal agenda.
- ▶ *It entails voluntary participation.* No one should be forced to participate or remain in the restorative justice process, or be compelled to communicate even if they do not want to. Agreements would be ideal in such gatherings but they are not obligatory.
- ▶ *It fosters confidentiality.* This is to ensure that information is disclosed in confidence. No information will be relayed to people who were not part of the gathering as this has the potential to cause harm to the participants who might have shared very personal information about them or others in good faith.
- ▶ *It recognises and respects different cultures.* Participants should not be forced to participate in processes that violate their cultural or spiritual beliefs.
- ▶ *It focuses on needs.* The process needs to foster awareness of how participants have been affected by the offence. Therefore discussion should aim to clarify the emotional, material and consequential harm that has been caused by the offence.
- ▶ *It fosters genuine respect for all the participants.* Every participant should feel respected even if they are the offenders. The process needs to uphold the intrinsic dignity of every participant present in the gathering.

- ▶ *It validates the victim's experience.* The victim's feelings and interpretation of the offence needs to be accepted and respected. It should not be minimised or ignored. The victims should not be forced to forgive when they are not willing or not ready.
- ▶ *It clarifies and confirms the offender's obligations.* The process should invite but not compel the offender to accept obligations identified. The offender needs to willingly identify and address the consequences of their criminal behaviour.
- ▶ *It aims at transformative outcomes.* The process needs to aim at outcomes that meet the present needs and obligations. When these needs are met they should empower both offender and victim for the future. The outcomes should promote healing for the victim and reintegration for the offender. Therefore the process is not restorative if the outcomes are not helping the victim to heal or are aimed solely at punishing the offender.
- ▶ *It observes the limitations of the restorative justice processes.* Restorative justice is not a substitute for the criminal justice system. It is a compliment. Participants should be made aware of how the restorative justice process fits in with the wider criminal justice system. The outcomes of a restorative justice process may or may not be taken into account by the referring court.

Advantages and possible benefits of restorative justice

Different scholars in the field of restorative justice have highlighted a number of advantages restorative justice has over retributive justice. In this sub-section a discussion will focus on some of those that were identified by Considine (1997: 185-192).

Restorative justice is indigenous

In countries such as Australia, South Africa, and New Zealand the concept of restorative justice is not a foreign one. In South Africa, for instance, the principles of restorative justice date back to the traditional forms of indigenous approach to justice prior to introduction of the western legal system by the colonial powers. The traditional courts were conducted by Chiefs and their assistants in the rural areas. In Sotho practices the traditional leader would invite the victim, the offender, their families and members of the community in general to the *Lekhotla* (a community conflict resolution gathering). The traditional approach to dealing with crime places more emphasis on putting the wrong right, and in promoting peace and reconciliation between the offender and the victim. Community involvement is based on the belief that if one member of the community has been harmed, the entire community has been violated. In addition to that, the victim will need assistance and support from the community. The move to entrench restorative justice in the child justice system in South Africa is basically going back to the traditional forms of indigenous approach to justice.

Restorative justice places victims at the centre of the justice

In the current criminal justice system victims are mere witnesses throughout the criminal justice process and procedure. They are not involved in deciding what will

happen to the offender. Victims find themselves as mere footnotes in the process of justice. The offender has taken power from them and the criminal justice system further disempowers them. In the restorative justice system, victims take centre stage. They have a chance to say how the crime has affected them and are also afforded the opportunity to negotiate with the offender as to how they would prefer their needs to be met.

Restorative justice offers healing to all involved

Just as victims need an experience of forgiveness, so do offenders. Offenders also need to put the offence past behind them and move on with their lives. In a retributive justice system, offenders are not granted a platform to confess, take responsibility, express remorse, and make things right. Whilst in the restorative justice approach, offenders are encouraged to have dialogue with those they have harmed and to ask for forgiveness. This process does not aim only re-empower the victim but has a mutual healing benefit for all those that have a stake in the offence.

Restorative justice places the responsibility for crime in the hands of those who commit it

The western judicial system takes the offence away from the victim, his or her family and the community and makes it the responsibility of the state. The community and the victim are abstractly represented by the state in the court of law. Cases are sometimes finalised even without the victim's awareness. When the offender has completed his or her prison term they will often feel that they have paid their debt to the victim and community. The victim and the community on the other hand will often find it difficult to accept the offender, as they may not be assured that he or she has been reformed. Restorative justice recognises that we are all part of a human family. We are responsible for each other. If any member of the community has offended another we all need to be involved in dealing with the aftermath of the crime since both the victim and the offenders are members of the community. The process of dealing with the crime needs to support the reintegration of both the victim and the offender back to the community.

Possible benefits of restorative justice

Many scholars have magnified the possible benefits of restorative justice in advocating for this approach to dealing with crime. The following are some of the major possible benefits of restorative justice that have been identified by Liebmann (2007: 28-29).

Victims have an opportunity to:

- learn about the offender and put a face to the crime:
- ask questions of the offender:
- express their feelings and needs after crime:
- receive an apology and (or) appropriate reparation:
- educate the offenders about the effects of their offences:
- sort out any existing conflict:
- be part of the criminal justice process; and
- put the crime behind them.

Offenders have the opportunity to:

- ▶ take responsibility for their crime;
- ▶ find out the effect of their crime;
- ▶ apologise and (or) offer appropriate reparation; and
- ▶ reassess their future behaviour in the light of the above knowledge.

Courts have the opportunity to:

- ▶ learn about how victims are affected; and
- ▶ make more realistic sentences.

Communities have the opportunity to:

- ▶ accept apologies and reparation from offenders; and
- ▶ help reintegrate victims and offenders.

Critical issues in the application of restorative justice

This section looks at some of the shortcomings and pitfalls of restorative justice that were identified by Herman (2004) and Batley (2005). It is crucially important for social workers in the criminal justice system to be mindful of these challenges when applying restorative justice processes.

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

Restorative justice is likely to meet with resistance from the community mainly because it does not fit well into how they have conceptualised the phenomenon of justice. In the beginning of this chapter, it was illustrated that justice is generally conceived as the application of harsher punishment to offenders such as sending them to prison for a long time. There is the belief that the imprisonment of offenders indicates that crime is being taken seriously by the criminal justice system. In the years that the author has worked with young offenders many of them used to confessed that they would rather go to prison to serve their jail terms rather than going through the torture of facing their victims. This dispels the misconception that restorative justice is a soft option. This realisation is also supported by Consedine (1997: 187) where he states that in his many years prison ministry he has observed:

how little remorse there is among inmates simply because they never have to meet their victims and see the devastation they have caused. This hardening of the arteries of emotion and repression of shame and grief are the principal causes of recidivism and in so many committing even greater crimes upon release. Prison guarantees re-offending and offers victims nothing.

Therefore prison is in fact a soft option for the offenders.

Skelton and Tshela (2008: 4) noted that South Africa too has shown signs of opting for the American zero tolerance and 'get tough' approaches which have begun to

permeate other youth justice systems in the world. Even though it has been proven that such an approach is not effective in reducing crime (Skelton and Tshehla, 2008).

Restorative justice does not fit the thinking of legal practitioners

Restorative justice does not always fit in with how some justice officials have been trained to administer justice. Gantana (2006) found in her research that magistrates, prosecutors and probation officers were familiar with the concept of restorative justice and its value when dealing with young offenders in the Western Cape. She did however notice that in the charge sheets, justice officials still preferred the traditional way of sentencing. She interpreted this to mean that her respondents did not completely believe in the benefits that restorative justice would offer to the parties involved. She concluded that a holistic approach that involves the victim, offender and community, with more interdisciplinary cooperation between different role players would be imperative in the actual application of restorative justice to sentencing.

Victims want retribution and not restoration

Zehr (1990) noted that most people assume that retribution is high on victims' agenda. Studies that have been conducted in this area however reveal a totally different picture. Zehr found that victims were often open to non-custodial and reparative sentences. Victims considered the rehabilitation for the offenders as an important value because such help to the offenders 'is one way of addressing the problem of safety and the prevention of future wrongs' (Zehr, 1990).

In another study conducted in central Johannesburg on victims' views regarding a desirable response to criminals, the results indicated that the public might be more reasonable than politicians believe when it comes to the treatment of offenders (Leggett, 2005). Surprisingly, the study showed that victims were not as single-mindedly retributive as many would believe, particularly considering that this area has one of the highest crime rates in South Africa. Although many victims did express a desire for vengeance, they also consistently expressed an interest in telling the offender how they felt. Leggett (2005) therefore concluded that his findings support the belief that victims in South Africa are open to creative and restorative approaches to resolving crime.

Restorative justice is inappropriate for serious offences

Skelton and Batley (2006) argued that the assessment of whether a case is suitable for invoking restorative justice options should not only focus on the seriousness of the offence but also on the circumstances surrounding the offence. Cases in which there is an identifiable victim are all suitable for restorative justice (Skelton & Batley, 2006). The fact that restorative justice is available across the range of criminal justice system processes is also an important factor in understanding that it can be applied to serious offences (Skelton & Batley, 2006). Even where the offender has served a part or all of his or her prison term, restorative justice can still be applied as part of the resolution. Batley (2005: 31) provides a comprehensive response to the question of whether restorative justice is appropriate in dealing with serious offences. He states that:

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

Restorative justice processes are offender-centred

One criticism of restorative justice is that restorative justice processes are offender oriented and only seek to address the needs of the offender and do not necessarily have the needs of the victims at heart. Herman (2004) - although a proponent of restorative justice - also confirms this critique. This is a valid criticism to which the author can testify based on his experience as a novice practitioner in the field of restorative justice. It is often easy and sometimes unintentional to ignore the needs of the victims by pressing ahead with FGCs even when the victim has never been prepared for the encounter. For instance in a case of sexual offence, the encounter may trigger painful memories about the incident and re-traumatise the victim.

Herman (2004) asserted that neither restorative justice nor conventional criminal justice system fully meet the needs of the victims. As a way to address this short-coming Herman proposed a parallel system of justice. That is, two separate but related responses to crime, one focused on the offender and one focused on the victim.

Guidelines for giving effect to restorative justice approach to crime

Restorative justice is practiced mostly within the diversion framework, although it can also be used as a sentencing option. A probation officer has an important role to play in giving effect to restorative justice through both direct and indirect methods of social work interventions. The indirect methods of social work interventions that are often-neglected but equally important include research, advocacy and policy development. These indirect methods of social work interventions do not always sit well with many social workers who perceive themselves as practitioners. Sadly such social workers fail to see the relationship between research and their daily direct methods of social work interventions. It is therefore recommended that employers of social workers in the criminal justice system need to embark on a strategic drive to provide resources and incentives that will encourage and enable probation officers and social workers to participate in their other equally important roles. These roles include research, advocacy and the policy development necessary for advancing the restorative justice philosophy, policy and practice framework.

Restorative justice is often perceived as a lenient approach to dealing with offenders. Due to such misconceptions, an essential starting point at a macro- level is to change mindsets. Effectively, the probation officers and social workers in the criminal justice system need to assume the roles of educator, consultant and advocate and at the same time act as catalysts in helping to eradicate fear, misunderstanding and ignorance about

restorative justice. Education and training in restorative justice needs to be conducted across different direct forms of interventions in the community, with professionals as well as with para-professionals.

At the community level, it would involve developing workshops and awareness campaigns clarifying why the retributive justice system has failed and why a new approach to combating crime is needed, and amplifying the potential benefits of restorative justice. When dealing with professionals, this involves facilitating training workshops for social workers, probation officers, justice officials, and others involved in applying restorative justice. In addition to training in the policies and principles of restorative justice, para-professionals need to receive training on how to offer support and guidance with regard to the practical implementation of restorative justice in the field.

At a micro level, it would include mainly direct forms of interventions with the offender, the victim, their families, and the community in general. The roles that the probation officer and social workers will assume at this level include those of mediator, therapist, advocate, facilitator and coordinator. The CJA makes provision for the application of restorative justice across different levels of criminal procedure from early intervention in the form of diversion to the final stage as a sentencing option. The Inter-Ministerial Committee on Young People at Risk (1998) proposed an early intervention framework, which states that children in conflict with the law need to be offered the option of diversion in a manner that protects their rights and involves them and their families in decision making.

The CJA makes provision for children in conflict with the law to be considered for diversion by the presiding officer at a preliminary inquiry as well as by the prosecutor or by the Director of Public Prosecutions at a pre-trial stage of criminal procedure. When a child has been arrested, an important part of the assessment phase is exploring possibilities of diversion with the family of the child, particularly if the child accepts responsibility for their criminal behaviour and if it is their first offence. In cases where the child is diverted, the probation officer needs to be aware of various diversion programmes available in the community so that he or she can refer the child to a specific one that will address the particular needs of that child.

FGC and VOM place the social worker in a central role, ranging from planning, convening, facilitating and reporting and making recommendations back to the court, based on the outcomes of the FGC or VOM. An essential prerequisite - particularly in working with child offenders and their victims - is the involvement of their families. It is therefore vital for their families to be encouraged to participate in these restorative justice processes and to do so willingly. If it is found that even after careful persuasion they are not prepared to participate in the restorative justice processes, their decision needs to be respected. Similarly, where FGC is considered as a sentencing option, the probation officer and the families of both the child in conflict with the law and the victim are central in the process. The VOM processes are thus more suitable for adult offenders and not for child offenders.

Family group conferencing

FGC is one form of restorative justice that is convened by a social worker to promote dialogue, reconciliation and closure wherever possible between the offender, his or her

victim, and their social support systems. FGC needs to be carefully considered prior to bringing the different stakeholders around the table for discussion since it may not always be possible at a certain given time.

Social workers seeking to apply FGC need to do so with caution and careful consideration on the readiness of both parties to engage in such an encounter. Pre-conferencing preparation is therefore essential for both parties since it will have an impact on the outcomes of an FGC process. Parties should not be forced to participate against their will.

Some of the observations made by Steyn (2005: 39) after reviewing the FGC programme of the Restorative Justice Centre based in Pretoria (South Africa) include the following:

- ▶ The importance of assessing the needs of all participants in the FGC process is essential given the fact that the success of it will depend to a larger extent on the cooperation of everyone who was affected by or had a stake in the offence.
- ▶ FGC provides an opportunity for the victims of crime and the parents of the offenders to participate in addressing the consequences and sometimes even the causes of youth offending.
- ▶ FGC is particularly valuable for promoting accountability because it directly confronts offending youth and their behaviour and ensures their active participation in decisions that affect them.
- ▶ FGC can be implemented in a variety of settings where interpersonal relationships have been damaged by the offence and where scope exists for the young person to make amends for his wrong doing.
- ▶ A FGC programme definitely has the potential for addressing the causes of family-based crime and conflict. They need to be strengthened by additional support such as after-care and follow-up activities.

Case Study

Paul, Sam, Percy and Abdul are a group of friends enrolled in a Grade 10 classroom. Paul is 16 years old and the eldest of the four. The other three are all 14 years old. Paul is a bully in class. Every learner in class is scared of him including his three close friends. One day their classroom teacher was absent. The principal was not aware that their classroom teacher was not going to be coming to school on that particular day and the class remained unsupervised the entire morning. Paul got to mischief that morning in class. He asked his three friends to help him hold down one of their female classmates so he could have sex with her. Some classmates watched the act with enjoyment, others with fear whilst others tried to run to the principal's office to make him aware about what was going on in class. The principal came to the classroom and found Paul with his pants down trying to force himself on the girl whilst his friends held the girl down. The principal was shocked and quickly called the police. The police came to the school and arrested Paul and his three other friends.

Discussion questions

- ▶ Based on your understanding of the five approaches to justice, how would the boys be punished by presiding judges – each of whom has a different approach to justice? Explain why their approaches differ.
- ▶ Assume that the case has been referred to you as a probation officer stationed at court. You have done your assessment of the boys and the circumstances surrounding their offence. What developmental social work approach plan of action would you recommend to the court and why?
- ▶ Assume that you are a social worker working in a youth secure care centre where these boys have been referred by the court to await trial due to the seriousness nature of their offence. What developmental social work approach plan of intervention would you apply in working with these boys and why? Would you anticipate any challenges to your plan of intervention? If no, why? If yes, outline the challenges and describe how you would attempt to overcome them.
- ▶ Do you think the four boys should be given the same punishment by the court of law and why? If not, what punishment would you recommend for each and motivate why.

Conclusion

This chapter has looked at restorative justice as a developmental social work response to crime prevention. The South African policy and legislative framework for restorative justice approach was presented together with a discussion on the necessity of a developmental approach to crime prevention. The concept of restorative justice was firstly located amongst other approaches to justice. Thereafter a discussion on conceptualisation of restorative justice together with the principles and values underlying it were discussed. The advantages and possible benefits of restorative justice were outlined together with the critical issues that restorative justice practitioners need to be mindful of when applying restorative justice. Finally, guidelines were offered that could help social workers in the criminal justice system in giving effect to restorative justice.

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