

RESTORATIVE JUSTICE WITH AN EXPLICIT REHABILITATIVE ETHOS: IS THIS THE RESOLVE TO CHANGE CRIMINALITY?

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ABSTRACT

Despite ongoing research there is no consensus amongst scholars regarding the definition and meaning of restorative justice. While various ideas have been advanced on what restorative justice is supposed to be, the literature is unclear as to whether it should be a mainstream role-player in criminal justice. In this contribution it is envisaged that all the different arguments regarding restorative justice will be addressed to position it in relation to mainstream criminal justice and rehabilitation. It appears that the key objective of restorative justice is restoration and addressing harms after the victim has granted forgiveness. However, some victims will take a long time to forgive while others will never forgive. Some scholars believe that a restorative justice conference is much more effective in preventing further crime i.e. promotes (rehabilitation) than the formal threats of the Criminal Justice System. This contribution takes a critical look at restorative justice and whether we should be optimistic that this new trend will make a contribution towards resolving crime and whether it should replace existing punitive measures in the Criminal Justice System. Proper research findings are required to determine whether restorative justice could address the current limitations of the existing Criminal Justice System.

INTRODUCTION

Restorative justice is a topical issue amongst penal reformers and therefore requires further attention. Despite ongoing research there is no consensus amongst scholars regarding the definition and meaning of restorative justice (Hoyle & Young 2003:680). While various ideas have been advanced on what restorative justice is supposed to be, the literature is unclear as to whether it should be a mainstream role-player in criminal justice. Furthermore should the question arise whether it replace the current retributive justice system and whether restorative justice mediation be used for all crimes or only for certain crimes and only under certain circumstances. It is also unclear where the mandate for restorative intervention should lie and at what time the mediation conference should take place. While restorative justice has

not been fully incorporated into the Criminal Justice System (Daly 2003:363), it is also pointed out by Garland (2001: 104) that this format of the rehabilitation model has been contentious since the 1970s. The role of restorative justice in rehabilitation and mainstream justice is therefore unclear. In this contribution it is envisaged that all the different arguments regarding restorative justice will be addressed in order to position it in relation to mainstream criminal justice and rehabilitation.

OPPOSING VIEWS AND VAGUENESS REGARDING RESTORATIVE JUSTICE

Regarding the vagueness of the restorative justice literature, Hoyle and Young (2002:527) state that “a review of the literature suggests that there are more definitions of restorative justice than there are programmes. Some emphasise core values and principles; some focus on outcomes and aims whilst still others apply the term to specific processes or programmes”. Cox and Wade (2002:257) identify four programmes in the restorative justice domain, namely: “Victim-offender mediation, sentencing or peacemaking circles, family group conferencing, and reparative probation or boards”. To complicate matters, legal practitioners’ views differ with regard to the procedures, implementation, conceptualisation, purpose and future prospects of restorative justice.

Without disregarding any of the viewpoints on restorative justice, the author will refer to it as a general programme. For the purposes of this contribution, the following operational definition of restorative justice was formulated: Restorative justice is a philosophical paradigm for responding to crime and an effort to repair the damage caused by a wrongdoing. It is a prognostic process based on past indigenous fundamentals in which the victim and offender are brought together in an effort to solve the problem instead of meting out re-punishment to the offender. The restorative effort is an attempt to give the victims an opportunity to voice their feelings and to afford the offenders the opportunity to explain their actions and to repair the damage they have caused. The process aims to bring closure to all the parties concerned and to collectively formulate a plan of action to deal with the wrongdoing. It aims to repair the status quo in the relationship between the victim (society) and the offender. If this intervention prevents future crime or serves a rehabilitative purpose, it is supplementary to the outcome of the restorative justice conference.

Rehabilitation implies that an offender's motivation to commit crime is prevented by altering his attitudes, values, skills and negative personality features. Once his behaviour is modified, he will not reoffend. Brown, Esbensen and Geis (2001:53) maintain that rehabilitation may incorporate diverse forms of treatments such as job training, psychotherapy and methadone maintenance for heroin addicts. Rehabilitation is a complex process and it is difficult to ascertain beforehand how long it will take to reform offenders and what caused their behaviour. Various academics have, however, indicated that some offenders cannot be rehabilitated (Zimring & Hawkins 1973:97).

In responding to the reservation whether an explicit rehabilitative ethos as the focus of restorative justice could rehabilitate offenders, some academics (Braithwaite 2003:320) are of the opinion that it is already an effective rehabilitative method and will be more effective with a rehabilitative ethos. Others (Duff 2003:382) are more hesitant and opine that restorative justice could be more effective with an explicit rehabilitative ethos but that "we must restore through retribution". Some authors (Ashworth 2002:1081) are more sceptical and advise us to "see what the future holds for Restorative justice". Critics (Levrant et al 2003:417) of restorative justice believe that it is doing more harm than good. The perception of the second (Duff) and third group (Ashworth) of scholars seems to portray a modicum of hesitancy and trends to support restorative justice as a definite rehabilitation mechanism since it cannot, as yet, claim to be an effective model of intervention per se. One can, however, advocate for future adaptations of current official justice policy to incorporate unassailable and research-based restorative justice principles as part of a rehabilitation programme. If restorative justice is to be established in the mainstream legal playing field, it is imperative to develop policies that address the widely accepted mainstream criminal justice goals of rehabilitation, retribution, deterrence and incapacitation, without sacrificing restorative justice principles (Bazemore & O'Brien, 2002:31). Currently scholars and practitioners speculate about the effectiveness of restorative justice as a rehabilitation mechanism. Some scholars (such as Braithwaite) initially claimed that restorative justice was the missing link in the rehabilitation of offenders. Speculating that restorative justice would be more effective in preventing repetitive offending when there is an added rehabilitative ethos is equal to celebrating a philosophical conundrum without substantive evidence.

Since the restorative justice movement is still in its infancy it would be premature to proclaim it as the answer to the rehabilitation and recidivism problems experienced within the

Criminal Justice System. Before the claim can be made that the restorative justice paradigm and its rehabilitative qualities are an overwhelming success, concrete scientific data is needed that will support it. In support of this the “old school” retributivists, such as Von Hirsch and Ashworth, also disregard the new restorative justice approach as a full constituent of the Criminal Justice System. Furthermore, Ashworth (2002:1082) opines that restorative theories are not theories of punishment and rehabilitation and therefore cannot be accredited as such in the Criminal Justice System. In discord with this Johnstone (2003:3), postulates that retributive justice obtained through punishment is not the only possible manifestation of justice. He regards retributive justice as an impoverished conception of justice. Cavadino and Dignan (2002:36) characterise first-world retributive systems such as the English penal system as an immoral one as they feel that the English system punishes too harshly and that this “overkill” causes unnecessary suffering to the offender. It seems as if retribution is not working as a rehabilitation mechanism as the rate of re-offending after punishment is alarmingly high in most countries. These re-offending rates prove that harsh punishment does not necessarily serve a rehabilitative purpose.

In the new millennium most prison systems employ various programmes with multidisciplinary professionals intervening in a prisoner’s life during imprisonment. It is erroneous to characterise some first-world prison systems as warehouses where people are imprisoned for punishment and forgotten without humanistic intervention, although a vast array of rehabilitative interventions occur during imprisonment (Andrews 1995:35). However, high re-offending rates are still common after these humane interventions. This poses a dilemma, as it seems that retribution and rehabilitative interventions are still questionable globally as the answer to the question regarding the rehabilitation of offenders. The question that arises now is whether restorative justice can be perceived as the resolve to change criminality?

The above viewpoints can be seen as points of departure in any discussion on restorative justice and rehabilitation. It is also essential to position restorative justice on a continuum in order to establish its position in the official justice machinery. Only then can its possible contribution as a justice alternative be properly adjudicated.

In summary it seems that the mainstream justice role-players are hesitant about the possible role of restorative justice in the Criminal Justice System. Although some critics characterise restorative justice as disastrous, they seem to be in the minority. Another school of thought holds the opinion that restorative justice can play a significant role in mainstream justice. Yet others are radical and advocate that restorative justice should be the only way forward in the mainstream rehabilitation machinery.

In what is to follow, the meaning and effectiveness of restorative justice as a formal justice alternative for rehabilitation will be addressed. Also, restorative justice vis-à-vis the problem of recidivism will be discussed. Finally, an interpretation of restorative justice's future prospects in an official justice process, with or without an explicit rehabilitative ethos, will be canvassed.

RESTORATIVE JUSTICE AS A FORMAL JUSTICE ALTERNATIVE

The objectives of Restorative justice as a formal justice alternative confront one with the unassailable fact that the objectives of restorative justice are materially different from those of the formal Criminal Justice System. Zedner (2002:445) postulates that "in principle the victim is a central actor in restorative justice", whereas in the formal Criminal Justice System the victims are viewed as secondary actors. Restorative justice therefore positions victims at the forefront enabling them to participate and have some control over their conflict with the offender (Christie 2003:59). The victims face the perpetrator and participate in "responsibilising" the offender. According to Marshall (2003:29), the primary objectives of restorative justice are to attend fully to the victim's needs; to prevent re-offending by reintegrating the offender into the community; to enable offenders to assume active responsibility for their actions; to recreate a working community that supports the rehabilitation of offenders; and to provide the means of avoiding the escalation of legal justice processes.

The restorative justice objectives Marshall (2003:29) promotes already appear to be an alternative to the formal Criminal Justice System. The key objective of restorative justice is restoration and addressing harms, not the duplication of existing practices. Stern supporters of restorative justice (e.g. Braithwaite; Consedine; Crawford; Umbreit; Walgrave; Marshall; Morris; Zehr and Maxwell) are painting a picture of a "new justice" that will address the

problems the official retributive system is struggling with. The restorative justice “in-group” usually reports on conferencing in the following manner: The offender and victim meet; the neutral mediator grants them both opportunities to vent their feelings; sorrow is usually evident from the offender; the victim forgives; and the parties are reconciled. After the conference the offender who is supposed to be shamed by this procedure is again reintegrated into the community. If necessary, compensation to the victim will also be forthcoming. The shame and realisation of the harm the offender has done will prevent him from re-offending (implying or hoping that rehabilitation took place). The victim should therefore forgive and the offender should change in order to be accepted back into the community.

Daly (2003: 365), however, fears that some victims will take a long time to forgive while others will never forgive. She warns, “that there is too quick a move to ‘repair the harm’, ‘heal those injured by crime’ or to ‘reintegrate offenders’”. In view of this Daly postulates that restorative justice advocates often negate the accountability of the offender. She insists that restorative justice supporters are mostly vague on punishment and retributive issues. Ashworth (2003: 428) reports that English pilot projects indicated no great psychological benefits to participant victims but rather detected an element of disillusionment. Advocates of restorative justice see rehabilitation as an instant response after shaming and the recognition of the harm that was caused. The subjectivity demonstrated by those who advocate restorative justice is a cause for concern, as objective scholars will not accept restorative justice as the answer to the problems of the Criminal Justice System without verified facts.

Regarding the operational mechanism of restorative justice, Gehm (2003:283) and Zehr (2003:70) allege that “forgiveness” is the way forward for victims involved in restorative justice conferences. According to Gehm, forgiveness helps the individual to forget the painful experiences and to reconcile, decreases the likelihood that his anger will be misdirected in other relationships and lessens the subconscious fear of being punished because of unconscious violent impulses. Daly (2003: 374), on the other hand, maintains that many victims reported that they felt worse after the restorative conference. No professional support mechanisms are in place for the victims when they confront their offenders during the conference and this is an obvious pitfall of restorative justice. In an interview with a secondary victim in a murder case in South Africa the researcher was told that forgiveness is a biblical issue and a very difficult emotion to demonstrate in these circumstances. After a restorative justice conference the respondent was asked whether the conference had helped

her and whether she believed that the offender truly realised the impact of the crime. The respondent indicated that she was empowered because she suddenly realised that she could contribute to the workings of the Criminal Justice System. She could also face the offender for the first time and the insecurities she experienced could be dealt with in a more relaxed manner. However, she didn't believe that the offender realised what the impact of the murder was on the family (secondary victims). She also questioned the way in which conferences are prepared. The research participant explained that the restorative justice team properly prepared the offender emotionally for the conference. At some stage she (the victim) actually believed that she was difficult and negative not to accept the situation as the restorative team continuously emphasised the change that had taken place in the offender. She also indicated that she was briefed about the conference but wasn't emotionally matched on the same level as the offender to take part in the conference. According to her a restorative conference is not necessarily a win-win situation. She also decided to appeal against the parole board's decision for earlier release of the offender as she was of the opinion that the offender had not been rehabilitated at all. The appeal in question was successful (2006) and can be seen as a watershed case in South Africa. It will probably be used as a precedent in future.

In addition, current indications are that between 50 percent and 80 percent of victims participate voluntarily in a conference (Walgrave 2003:261). It could therefore be that only half of the victims in a small selected group willingly participates. This implicates that only certain cases can be processed by means of a restorative justice process. Furthermore, it is not really possible to measure abstract emotions such as regret and shame, while true rehabilitation can only be measured if no crime is ever committed again. Another problem is that many re-offenders are not detected (Maguire 2002:325), implying that it remains unknown whether those who participated in the process are rehabilitated after the restorative justice conference at all. In small micro-level studies restorative justice advocates report lower re-offending rates compared to traditional Criminal Justice System programmes. However, this is done without explaining the correlated factors that could have played a significant role in their findings.

Another problem identified by Hoyle and Young (2002: 528-529), which casts doubt on the effectiveness of restorative justice as a formal justice alternative, is the issue that role-players have the freedom to attend or to abstain from attending a conference, in which case "rehabilitation" is impossible. Furthermore, it is misleading to describe restorative processes

as involving voluntary participation as many victims and offenders don't want to participate in these conferences but are requested repetitively to consider participation. Hoyle and Young (2003: 681) claim that "fully restorative encounters remain relatively rare events". Forcing people to participate in restorative processes constitutes a breach of their human rights. No agreement has been reached on whether coercion is an appropriate method of enforcing restorative outcomes. It is an extensive administrative and time-consuming exercise to set up a proper conference, as many role-players are involved. Available literature is also vague on the follow-up procedures after the conference. The research participant in the current study indicated that she had made use of air travel to attend the conference without any financial assistance. She was informed that the restorative session would be taking place at 12:00 the next day at 22:30 the previous evening. She had to arrange an aeroplane ticket and transport to and from the respective airports hastily. She indicated that she was willing to go through the trouble, as she was "ready" to meet the murderer of her father after 14 years.

RESTORATIVE JUSTICE AND RECIDIVISM

Reporting on research findings in connection with re-offending and restorative justice is a mammoth task because of conflicting perceptions on rehabilitation and what rehabilitation entails. Braithwaite (2003:320), a leading advocate of restorative justice, maintains that the prospects of shaming by the offender's significant others, society and the victim in a restorative justice conference are much more effective in preventing further crime (rehabilitation) than are the formal threats of the Criminal Justice System. He argues that successful socialisation within the family implants a conscience that will always be alert. This will act as immediate punishment whenever a transgression occurs (Brown, Esbensen & Geis 2004:216). This is peculiar because a restorative justice conference is called because of a past wrongdoing. If the conscience that was "implanted" during the shaming process of the conference, only surfaces "whenever a transgression" takes place, rehabilitation was unsuccessful. Braithwaite assumes that offenders enter the restorative justice conference with a "damaged" conscience or a moral awareness. The shaming experience will nurse the conscience back to "health", enabling it to help the individual to refrain from committing further offences. He, however, omits to mention that the social fabric and collective conscience of society have been changed by modernity.

According to Garland (2001: 154-155), modernity caused modern life to be more porous and open-textured. The major trends include the movement of women into the labour market, the rise of the two career-family, an increased divorce rate and the outsourcing of household tasks. Before the emancipation of women, the mother was generally responsible for “implanting” a shaming mechanism during upbringing. However, in modernity it is almost impossible for their children to individualise and to copy the “shaming” process successfully (Rutter & Madge 1976:140). In conjunction with this, Garland (2001:155) believes that the changes in modernity weakened traditional situational controls and relaxed some of the constraints that led to group conformity. Nowadays the mother is often absent from the household due to career responsibilities. A significant number of children are left at day-care facilities that also prevent the parent from instilling a “shaming” mechanism. It is therefore impossible to compare indigenous close-knit families and their ability to teach and to use shame with the fractured open-textured modern family. In homogenous societies where families lived intimately and shaming worked as a punishment, “rehabilitation” was possible. In modernity, children view shaming or labelling differently. As soon as children are labelled as “wrongdoers” they find it difficult to overcome this “master status”. Shaming during a restorative justice process can therefore “implant” a negative master status that could in fact enhance non-rehabilitation. Because shaming is not socialised into children by their absent, career-driven parents to the same extent as before, shaming has less impact than it had in a homogenous close-knit family of bygone eras when rehabilitation may have resulted from the values instilled by social norms and inclusion (Lea 2002:2).

Contrary to Braithwaite enthusiasm regarding the rehabilitative quality of restorative conferences, Martinson (1974) concludes his research on rehabilitation by stating that, with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism (Brown et al 2001:194). In addition Garland, (2001:69) compares the sudden negativism towards the rehabilitation ethos of the 1970s as “something akin to a stock market crash”. The “nothing works” sentiment became very popular during the 1970s and sometimes still surfaces in the 21st century whilst the retributive era has also been questioned. McGuire and Priestley (1995:5) find it apparent that punitive measures have not effectively stabilised the increasing crime rates and re-offending. They argue that rates of re-offending can be reduced, but not by punitive methods. They claim that effective measures to reduce recidivism are those that address the factors that have played a causal or contributory role in an offending act and would place the offender at risk of re-offending in future. Zedner

(2002:354), on the contrary, claims that punitive strategies in West Germany impacted substantially on re-offending. Raynor (2002:1199) advocates a system which seeks to “include an explicitly reparative element in a wider range of community sentences, perhaps with some community involvement, or involvement where appropriate of victims, in determining what the reparative content should be”. Rehabilitation is restorative in such a system and benefits both the community and the offender. However, assuming that this will presently serve as “rehabilitation” where communities are diverse, social norms differ from those of the past and families are often disintegrated, is too optimistic.

The abovementioned opposing arguments illustrate that one approach should not replace another, as all have value. Ashworth (2002:1079) argues that the debate about rehabilitation and its effectiveness has a long history. The most convincing argument he puts forward is that “certain rehabilitative programmes are likely to work for some types of offender in some circumstances”. Restorative conferences can therefore probably work for some offenders in some circumstances.

A major challenge is to find an appropriate combination of restorative justice, based essentially on informal deliberation, and the mainstream law. The restorative justice which is referred to here should exist in tandem with other justice philosophies such as rehabilitation. The specific strengths of restorative justice are its inclusionary approach and human rights dogma. When policy is formulated, restorative justice should be incorporated in future justice practices. Policymakers can only be influenced by verifiable scientific research at a macro level. Current research on restorative justice and rehabilitation is inadequate and largely at a micro level — therefore it cannot be generalised. The needs of offenders are usually discussed in detail whilst restorative justice professionals seldom elaborate on the sanctions to be imposed on the offender and what is being done to protect the community (Bazemore 1999: 159). Stakeholders across the justice spectrum support restorative justice but there are even more who are sceptical about its potential as “justice partner”. The only way to convince critics and policymakers is with research findings.

Current studies will not convince policymakers that restorative justice is effective as a mainstream criminal justice element, which would even be more effective if it is given a stronger rehabilitative ethos. The Maxwell and Morris (2000) study is an example of the scientifically inadequate reporting of findings by restorative justice advocates. In their study

on restorative justice and re-offending, they include everybody they “could get hold of” (n = 108). This indicates a poor sampling technique. Moreover, their sample of youth offenders has probably matured out of crime (correlation to rehabilitation), as they were an average age of 20 to 24 years. Merely assuming that the family conference impacted on abstaining from future crime is subjective. They claim that “perhaps the most exiting result from this study is the evidence that successful family group conferences can have an impact on future offending behaviour”. To their credit, they did recommend that further research is necessary to determine “whether or not the use of shame in conferencing can ever be regarded as a necessary component in inducing remorse or preventing re-offending” (Maxwell & Morris, 2000:100). They identified factors such as “having criminal associates”, “an unstable life style” and “not having training” as predictors of re-offending. These factors have been identified in criminology textbooks (Barkan 1997; Conklin 1998) as high-risk factors in predicting re-offending, proving that they are duplicating existing knowledge and not really that restorative Conferences prevented re-offending.

Restorative justice is a reactive strategy, as the wrongdoing must first occur whereafter conferencing can be arranged. Restorative justice is a philosophical approach aiming at assisting victims to put the past behind them and to afford offenders the opportunity to repair their wrongdoing. It is the duty of a government to identify and address high-risk factors (poverty, unemployment, etc.) that “caused” the wrongdoing. Restorative justice advocates usually imply that the most effective strategy in prevention of offending is early intervention. This is general knowledge and not the aim of restorative justice. It is therefore unclear how a reactive restorative justice group can intervene before the offence is committed (Maxwell & Morris 2000:101). Advocates depart from the aim of restorative justice in an effort to convince others of its potential. This leads to major mistakes and scientifically unreliable reports on their part. The mainstay research (Braithwaite 2003:88; Consedine 2003:152; Weitekamp 2003:113) that is currently used to drive the Restorative justice argument never illustrates the causal mechanism of “restoration” or “rehabilitation” that occurs after the restorative justice conference. Findings are usually based on studies where small homogeneous groups (e.g. Maoris or Aborigines) were used. “Significant” findings are then generalised and franchised internationally (Blagg 1997:481-482). This is presently the biggest downfall of restorative justice. Poor research designs, assumptions based on micro level non-representative homogeneous groups and philosophical speculations are used to drive the restorative justice movement.

The adherents of Restorative justice tend to rely on the value of forgiveness, stemming from the Christian dogma of forgiveness (i.e. to turn the other cheek), in order to convince themselves and others of the “good” of the average man. Braithwaite attempts to “give shaming a universal currency“ (Blagg 1997:484). In other words, he sees shaming as an inherent characteristic of all communities. Furthermore, Braithwaite (2003:85) claims that “all Western Criminal Justice Systems are brutal, institutionally vengeful, and dishonest to their stated intentions”. According to him, reintegrative shaming can rectify this in that the evil of the deed is disapproved, while the wrongdoer is treated as an essentially good person. He hypothesises that the societies with the lowest crime rates are the societies that shame criminal conduct, such as the Maoris and Aborigines. Weitekamp (2003: 112-113) blames the western system as completely ineffective and claims that it has destroyed the lifestyle of the Aborigine and their way of handling crime. He argues that “the Aborigines’ high crime rate constitutes 1 percent of the total rate in Australia, yet this group represents 30 percent of the prison population”. Examining literature of these leading restorative justice advocates; one almost experiences the “injustice” of the Criminal Justice System and starts looking at restorative justice through their eyes. However, their writings are subjective. They use grand sociological constructs and support their assumptions with inadequate research. Restorative justice activists discuss behaviour and its modification (rehabilitation) as if it were a superficial attribute that could change after one session of deliberation. They omit the positivist criminology and psychology of criminal conduct as well as important research regarding the behaviour of certain groups in society. Behaviour in general is difficult to explain and behavioural scientists are still grappling with the explanations of criminal behaviour. A restorative conference focuses on shaming and behaviour related to this but other aspects such as hormones and other outside factors are rarely taken into consideration at a conference.

Weitekamp (2003: 112-113), for example, blames the current system as being prejudiced and unfair towards the Aborigines but fails to report that the manganese toxicity level is very high amongst the aboriginal inhabitants of Groote Eylandt, located in the Northern territory in Australia. In this area there are large deposits of this metal and the arrest rate of Groote Eylandters for violent crimes is also the highest in Australia. Gottschalk and co-workers (1991) showed a relationship between manganese and the modulation of brain chemistry. Affected persons show a variety of symptoms that include “psychiatric excitement” and violent behaviour (Brown et al 2001: 267). In a traditional community this might have been

treated as “normal” but in a Western system assaulting someone whilst you’re psychologically excited will be regarded as “abnormal” and the person will be deemed to be in need of help — hardly something that could be “repaired” with reintegrative shaming. This example illustrates that a restorative justice meeting wouldn’t impact on chemically influenced behaviour and that certain groups of people are arrested for more serious behaviour because of this influence. Therefore, it is an unconvincing strategy to give restorative justice a more explicit rehabilitative ethos, while for example there is a hormone imbalance. Bazemore (1999:158) argues that current “treatment program interventions have been effectively decontextualized because they are based on a ‘closed-system’ paradigm that is both *insular* and *one-dimensional*”. According to Bazemore and O’Brien (2002:32), “it is simply too early to make the determination about the overall effectiveness of restorative justice in reducing recidivism based on a handful of studies limited primarily to one intervention”. They envisage the future of restorative justice as being based on scientifically sound research, linked to the mainstream justice policy and its goals. These authors do not intend to make restorative justice primarily an offender-oriented approach. Bazemore and O’Brien (2002:31-32) criticise current restorative justice movements as being too offender-based and question its rehabilitative potential. Restorative justice attempts to repair the harm of crime; therefore, it falls squarely in the category of victim-oriented interventions. However, they believe that the effort to repair the harm can lead to rehabilitation, and in fact, is necessary for rehabilitation. They insist that it is unacceptable “to ‘sell’ restorative justice practices primarily as an effective new approach to rehabilitation“. Thus a change in thinking and practice needs to occur in order to develop the potential for restorative values and principles in current treatment and rehabilitation approaches.

FUTURE PROSPECTS

The retributive era will eventually be replaced by a new penal system era. Throughout history penal eras have been replaced by “new” ethos or paradigms. The modern penal era can, for example, be divided into the industrial era (1900s to 1930s), the rehabilitation era (1930s to 1970s) and the retributive era (1970s to present). The restorative era is therefore the likely paradigm to follow the current retributive era (Reichel 2001:122). Certain crimes will, however, always be punishable by incapacitation. Incapacitation based on a sound proportionality ethos will never give way to restorative justice conferencing as the only punitive intervention in certain crimes. Gruesome crimes such as terrorist attacks, serial

murder and rape are crimes *mala in se* and extremely difficult to deter (Brown et al 2001: 201). To insist that these offenders will be rehabilitated after a restorative justice conference without imprisonment and intense intervention is unrealistic. We thus need a balanced correlation between retribution, restorative justice and rehabilitation. Even before the end of the rehabilitation era, Marcel Mauss (as cited in Garland 1998: 385) advocated the need for a synthesis and consolidation of perspectives. The 21st century penal scholars must therefore endeavour to develop a new approach guided by theoretical pluralism. Garland (1998:385) sees this as “a willingness to draw on more than one interpretive perspective and to construct multidimensional accounts of the phenomenon being investigated”. Even with the lack of consensus about specific programmes it, is non-debateable that victims must have an increased role in the justice process and that offenders must take responsibility for their acts. Some form of victim-offender mediation and restitution must be included in the “restorative penal era” and the sanctions meted out must emphasise offender accountability.

The approach Duff (2003:382) suggests can serve as the basis to work from in developing such a “golden middle way” for the future. He argues that “our responses to crime should aim for ‘restoration’, for ‘restorative justice’: but the kind of restoration that criminal wrongdoing makes necessary is properly achieved through a process of retributive punishment”. Duff insists that both restorative justice advocates and retributivists have a stake in the modern penal system, as we need to seek restoration, reparation and reconciliation. It is also the state’s responsibility to punish wrongdoing. He feels that “both ‘restorative’ and ‘retributive’ theorists are wrong insofar as they suppose ... that we must choose *between* restoration and retribution as our primary aim” and perceives this as “a false dichotomy” (Duff 2003:390). The criminal law must address the legal wrong committed between people and the restorative mediation must take place to achieve the three R’s of apology (recognition, repentance and reconciliation). The offender owes an apology and reparation to the victim and society proportionate to the seriousness of the wrongdoing. An adequately forceful expression of regret is needed to have public impact. In this regard Duff (2003:393) postulates that “the kind of mediation that is an appropriate response to crime ... should therefore aim to bring the offender to recognise and repent the wrong she has done — which involves censuring her; and to make some suitable moral reparation for that wrong”. Once such an integrated system has been established, the aims of the current retributive system and restorative justice can be addressed.

Both these approaches can be bolstered with verified findings regarding rehabilitation. However, rehabilitation is too abstract and complex to be “added” to a restorative justice paradigm that is still to be fully implemented into mainstream penal thinking. Most restorative justice projects are pilot projects and the reports on a decrease in re-offending after restorative justice mediation is not based on sound research methods. The challenge is to incorporate best practices from the current system and from restorative justice by using a framework like Duff suggests. Existing “what works” programmes can be used to guide research on rehabilitation. As soon as best practices in rehabilitation are identified, all the best practices could be consolidated to create the best restorative penal system yet.

If restorative justice treats people with respect and encourages them to treat others similarly, it would be an improvement on the current Criminal Justice System. Reductions in offending and rehabilitation achieved through Restorative justice are welcome bonuses. Given the complex factors that cause crimes, it is realistic to assume that restorative justice interventions will have little impact on re-offending, and even less on crime rates. Restorative justice could however have a significant impact on a community’s perception that crime is responded to justly by holding offenders accountable for their actions.

CONCLUSION

The question of how society should respond to wrongdoers is problematic. To suggest that restorative justice will be more effective when accompanied by an explicit rehabilitative ethos before it has been settled and accepted as the future of criminal justice, is premature. Rehabilitation is a complex process and would usually not be accomplished after one restorative justice meeting. Proper macro-scale research is needed before the question is answered and policymakers can be influenced. The key to restorative justice’s future lies in a modified Criminal Justice System policy and a move away from one-dimensional approaches to a synthesis of best practice. This policy must emphasise reparation, rebuilding and reintegration and must address the needs of the victim, the offender and the community. A Criminal Justice System that follows these principles will manage crime more effectively and will be based on fundamental human rights. According to Crow (2001:215), “such an approach also holds out the best prospects for the development of treatment and rehabilitation”. It should exist in tandem with other justice philosophies such as deterrence,

rehabilitation and incapacitation. Finally, restorative justice should complement rather than be an alternative to the Criminal Justice System.

The effectiveness of restorative justice has not yet been verified in a scientifically accountable manner. A dearth in research exists regarding its rehabilitative qualities. Restorative justice with an explicit rehabilitative ethos might sacrifice the emphasis on restitution to the victim and will be largely duplicating existing Criminal Justice System procedures. Rehabilitation should be incidental to restorative justice rather than explicitly dominating its underlying philosophy. Rehabilitation resulting from the restorative justice conference should be regarded as a bonus to the mediation process. When the focus of restorative justice becomes the rehabilitation of the offender, its original purpose, namely bringing the offender and victim together to discuss their experience of the crime, will be contaminated. The aim of the meeting between the parties is to repair the damage caused to the victim and society, rather than rehabilitating the offender.

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