CHAPTER THREE

THE HISTORY OF RESTORATIVE JUSTICE IN SOUTH AFRICA

INTRODUCTION

Restorative Justice is recognised as being closely linked to African traditional justice systems. This traditional form of justice preceded colonisation and still exists in South Africa today. Modern restorative justice practice has its roots in victim-offender mediation (VOM), which became popular in the Western world during the 1970s. The term “restorative justice” was initially applied to such practices during the 1980s, and was first comprehensively presented as a theorised model in 1990 with Zehr's *Changing Lenses.* This chapter will examine how the modern theory of restorative justice reached South Africa, and found its way into practice models and policy documents, then finally into law reform initiatives.

RESTORATIVE JUSTICE PRACTICE IS ESTABLISHED

South Africa’s participation in the modern international movement of restorative justice began in 1992. The first initiatives were taken by NICRO in 1992 to establish and later evaluate South Africa’s first VOM project. A study visit to the United States hosted by the Mennonite Central Committee took place. The visit included attendance at a training conference in San Francisco, Los Angeles, to observe a VOM project, and then on to Elkhart, Indiana, to observe the Victim Offender Reconciliation Programme (VORP) there.

NICRO’s first VOM project was established in Cape Town. The results were published in a report describing Zehr’s model of restorative justice as the theoretical framework for the project. The report also gave several examples of VOM projects in North America and Europe, as well as a brief description of the Japanese legal system, which includes a parallel mediation track. The project targeted referrals at both the pre-trial and pre-sentence stages. The report indicated that prosecutors had been reluctant to refer serious cases to the project, and, further, had referred a majority of juvenile offenders, as opposed to adults. Another concern reported was that the project might be seen as “elitist”, because it was available only to those who were
“employed, committing first minor offences and leading a stable life”. The evaluation of the project’s future prospects was that, whilst it would be naïve to expect that VOM would gain rapid acceptance in a society “as violent and adversarial as ours”, it would still be useful to set up mediation structures, utilising them in criminal and other conflicts. NICRO continues to run VOM programmes throughout the country, although FGCs have gained in popularity as a diversion option for child offenders.

In 1995, the Centre for the Study of Violence and Reconciliation (CSVR) and Wilgespruit Fellowship Centre convened a Survivor-Offender Mediation (SOM) network, which aimed to serve as a practical measure to complement the TRC’s express purpose of dealing with the processes of reconciliation. The practical application of this was to offer a service of mediated interaction between survivors and offenders. The network also tried to play a role in the public debate, “helping to translate the emotional and psychological transformation that was occurring in the mind of South Africa as it moved through this historic metamorphosis”. The original plan of the SOM network had been to establish a clear referral process from the TRC and expand the programme to each of the four provincial offices, but this did not materialise. The work of the SOM network was ambitious, but it received fewer referrals than had been hoped for. It lasted for the duration of the TRC and then closed owing to lack of funding.

Support for VOM has arisen from other sources. In 1997, Palmer proposed institutionalised mediation in the criminal justice system, with a view to promoting the participation of victims. Later, in 1999, Van Rooyen described experiments with VOM as an alternative to trial.

In 1995, an Inter-Ministerial Committee (IMC) for Young People at Risk was established, and restorative justice was adopted as a “practice principle” for the transformation of the child and youth care system. A study tour to New Zealand was authorised by the IMC in 1996, and four South Africans travelled there to consider the applicability of the New Zealand youth justice system to South Africa. Following the study tour to New Zealand, the IMC established in Pretoria a pilot project on FGC. This handled 42 cases in 1997, some of which dealt with relatively serious offences. The project was evaluated and the findings were published in a document that is both a practice research study and an implementation manual.

The Restorative Justice Centre (RJC) was established in Pretoria in 1998. From the start, the organisation set out not only to offer VOC as an alternative to the criminal justice system, but also to build capacity within South Africa for the delivery of restorative justice programmes. The Centre’s vision at inception was described as follows:
We believe we need to build a movement that encompasses the values of Restorative Justice and that challenges the prevailing values, cultures and customs of society – particularly in relation to punishment.

The Centre has forged links with other organisations in a network called the Restorative Justice Initiative. This was later known as the Restorative Justice Initiative Southern Africa (RJISA).

The Restorative Justice Initiative launched a VOC pilot project in 1999. It was conceived as a community-based restorative justice project, with the express aim of formulating a restorative justice model more familiar to African customary values. This was done by involving members of the community and the victim's and offender's supporters in the process. The project allowed for the participation of anyone relevant to the offending, to the outcome or to providing support to either of the parties. The project sought to be community-based so that disputes could be resolved at community level. Mediators were selected from the communities in which the courts were situated and from which the majority of referrals were received. Although most of the project sites received their referrals from the criminal justice system, one of the project sites also received referrals from the tribal authorities.

The residential care sector has been involved with promoting the “real justice” model of restorative justice, which relies on a scripted model of restorative conferencing. The National Association of Child Care Workers (NACCW) made a connection with “Real Justice” in the late 1990s, which culminated in 1999 in a visit to South Africa by Ted Wachtel, when he provided training in FGC for numerous groups involved in residential care and community-based work. The course material was adapted to residential care settings in South Africa, and further training was undertaken in the Northern Cape in 2001. Further, a training manual was developed by the NACCW. Their efforts to roll out restorative justice to residential care settings throughout South Africa stalled owing to lack of funding. Pockets of innovative work remain.

NON-STATE JUSTICE INITIATIVES

A different strand of restorative justice practice in South Africa appeared in what is known as the “non-state justice” sector. It arose from the development of street committees, following a collapse in the legitimacy of the criminal justice system during the apartheid years. An offshoot of the street committees can be observed in the development of community court projects in the Western Cape during the post-apartheid era. The community courts have been run mainly by non-governmental organisations, which have struggled to obtain funding for their work. The community courts are not political in nature, nor are they anti-state. They aim simply to provide locally-driven com-
munity courts as a grass-roots alternative to the criminal justice system. The projects began in the 1990s, but have not had a coherent strategy for spreading their model until recently.

Since 2003, the non-governmental organisations working on these issues have joined forces. The Restorative Justice Initiative has secured funding from the Western Cape police department, which is called the Department of Community Safety (DCS). This has brought the community courts into a direct relationship of co-operation with the state. The Community Court in Gugulethu receives referrals from the formal justice system, the SAPS and the civic organisations. Cases are tried “in a manner similar to the African traditional way that involves the community in decision making”. The organisations and individuals involved consciously identify their work as being that of “restorative justice”. They also describe it as being “community justice” and “peace building”.

In 1997, the Community Peace Programme launched a “model building experiment” aimed at mobilising local knowledge and capacity around issues of dispute-resolution and community-building. The project was concerned with a local community in Zwelethemba, a township near Worcester. The peace committees are made up of local township residents who undertake both peace-making and peace-building. Peace-making concerns the resolution of specific conflicts, whilst peace-building aims to address the underlying problems in the community, such as poverty and lack of access to services. The peace-making activities deal with a range of legal disputes, including both civil and criminal matters. The peace committees initially received almost all their referrals directly from the community, not from the police or courts. As the project has developed, however, there has been increased interaction with state agencies, notably the SAPS. Cartwright and Jenneker explain that, whilst the Community Peace Programme insists on the full participation of civil society, this is matched by an insistence on pursuing mutually respectful partnerships with the state. It is not a requirement that anyone should make direct admissions of guilt or responsibility, which makes these forums different from most modern forms of restorative justice processes. The process does not follow strict procedural rules, although there are “steps in peacemaking” that are followed as guidelines rather than rules. The peace-making committees have developed their own code of good practice, and all problem-solving techniques must be legal as well as adhering to the code. The peace-making process does not involve adjudication, but rather focuses on discovering what can be done to reduce or eliminate problems. The outcomes of the peace-making meetings are restorative in nature, taking the form of apologies, restitution and compensation.
The peace-building initiatives take the process even further, looking at the wider issues affecting the community and trying to resolve these problems in an attempt to avoid a recurrence of conflict. The project has been extended and now operates in a number of areas in the Western Cape and Eastern Cape. While the promoters of the project tend to characterise it as a governance project, several authors have expressly described the work as restorative.

RESTORATIVE JUSTICE POLICY IN SOUTH AFRICA

The South African government has displayed openness to restorative justice, at least in theory. Restorative justice is an attractive concept to policy makers in South Africa. Batley has described commitments to restorative justice in numerous policy documents. These were initiated in 1996 and continue to the present day. Skelton has expounded on law reform within the field of child justice.

At an international level, South Africa was one of the state parties that co-sponsored the basic principles of the use of restorative justice at the ninth session of the Commission on Crime Prevention and Criminal Justice in April, 2000. The government has thus committed itself to ensuring the introduction of restorative justice practice where appropriate. Tshehla points out a drawback to this. In his opinion, the South African government has yet to develop a common understanding across all departments about how to define and practice restorative justice. On 3 December 2005, the Department of Justice and Constitutional Development hosted a “colloquium” on restorative justice, at which it revealed a three-year project for establishing a national restorative justice programme that would develop restorative justice responses by government in partnership with civil society. The project has not yet been established, but indications are that this is likely to take place during 2006.

TRAINING

Several training initiatives have also played an important role in helping to establish restorative justice in South Africa. Some of these came from outside the country. Already noted earlier is the training carried out in 1999 by Ted Wachtel. Howard Zehr also visited South Africa on two occasions in the 1990s and gave training sessions during both. Gabrielle Maxwell visited in 1994 to address numerous meetings and conferences. Following the study tour to New Zealand by four South Africans in 1996, Evan Kiernan travelled to South Africa, and assisted with training in FGC.
The Durban Institute of Technology has incorporated the real justice model of conferencing into their degree course on child and youth care. Since 2003, the study of restorative justice has been among the requirements for a degree in criminology, following the formulation of a unit standard on the concept in the Standards Generating Body (SGB) for Criminology. Law faculties and Social Work departments appear to have been slower to incorporate restorative justice into their mainstream teaching programmes. The SGB for Probation and the SGB for Victim Empowerment are currently engaged in developing unit standards dealing with restorative justice.

Since its inception in 2000, the Restorative Justice Centre has offered a three-day workshop on the theory of restorative justice and conferencing skills. This package was adapted for probation officers, first in 2001 for the North West province, and later, in 2003, for the whole country, as a project of the National Department of Social Development (DSD) funded by the Royal Netherlands Embassy. In these projects, the Restorative Justice Initiative arranged training by several of its members for community-based facilitators. In its second phase, this included a module on the application of restorative justice in the context of domestic violence.

In October, 2003, the Association of Regional Magistrates in South Africa arranged a two-day conference on restorative justice, at the conclusion of which a number of resolutions endorsing the concept were taken. Since 2004, Justice College, the facility in the Department of Justice and Constitutional Development responsible for training of prosecutors, magistrates and criminal justice personnel, has included presentations on restorative justice in a number of its courses. These presentations have usually utilised a video made for the Department of Justice and Constitutional Development by the Restorative Justice Centre.

During 2002, a group from Queens University, Ontario, Canada, under the auspices of the International Chaplains’ Association, visited the country and instructed a group of trainers from the Department of Correctional Services. A psychologist and a chaplain from the Department also visited Queens College and participated in further training. It appears that this training has been used as the basis for an introduction to restorative justice at the departmental training academy.

During 2005, the Reverend Jonathon Clayton and his wife, Jenny, visited Queens University and completed a diploma in restorative justice. They have used this as a basis for developing their programmes, described in Chapter Four, in the project ‘Hope Now’.
ENDNOTES

2 The kernel of the idea for the project appears to have been developed by Jane Keene, who worked for the Cape Town office of NICRO, and Lorraine Glanz, who was then working for the Human Sciences Research Council (HSRC). They established a co-operative research agreement, which led to the appointment of Lukas Muntingh.
4 L Muntingh, ibid, p 24.
5 Ibid, p 25.
9 Stauffer’s analysis, 2000, is that the reasons for this failure were closely connected to what he views as the shortcomings of the TRC itself; namely the “impotence of legal impunity”. He observes that, although the TRC claimed to be victim-centred, amnesty became the “centrepiece”.
12 Van Rooyen is a criminal court magistrate in Greytown, KwaZulu-Natal.
14 This was not the first pilot project on FGCs in the country. For an account of the first project, limited in scope, which took place in Wynberg, Cape Town, in 1995, see A Skelton and C Frank, op cit, p 109.
15 N Branken and M Batley, *Family Group Conferences: Putting the Wrong Right*, Inter-Ministerial Committee on Young People at Risk, 1998.
16 The RJC was the vision of two social workers, Nigel Branken and Michael Batley. Branken was previously employed by NICRO, and Batley was a
probation officer in the employ of the Department of Social Development. During 1997-1998, Branken and Batley had jointly managed a pilot project of the Inter-Ministerial Committee on Young People at Risk, which tested the idea of FGCs in South Africa. This experience inspired them to set up the Restorative Justice Centre. Branken left the Centre in 2001, but Batley continues to direct the Centre at the time of writing.

17 See Chapter Four for full details on the RJI.
19 A Dissel, Giving a Face to Crime: Report on the Second Phase of the RJI Initiative Victim-Offender Conferencing, unpublished paper, 2003. Available on www.csvr.org.za/papers/papdis11.html. This report indicates that the project operated in the following districts: Newlands, Wynberg and Dobsonville in Gauteng, and Odi in the North West Province. 436 cases were recorded by the CSVR as having been referred to the VOC project at the various sites during the 12-month period November 2001 to October 2002.
20 A Dissel, op cit, 2003, p 7, records that the site was Odi in Garankuwa in the North West Province, which serves an area comprising 68 rural and peri-urban villages.
23 Sipho Citabatwa, interview in Cape Town, 30 March, 2005.
25 Clifford Shearing established the Community Peace Foundation in 1992. The Community Peace Programme is now located at the School of Government, University of the Western Cape.
27 Ibid.
28 Ibid.


31 A set of recommendations arising from a conference organised by government held in Pretoria in September 2005, on the reduction of prison overcrowding features the mobilisation of restorative justice options as part of a broader plan to reduce the number of people being sentenced to imprisonment.


37 B Tshehla, ibid, p 10, describes a conference on Restorative Justice hosted by government and held in Boksburg, 18-20 November 2002. He observes that a lack of co-ordination by government was “embarrassingly apparent” and that the NGO representatives present were similarly lacking in a cohesive vision: “One could be forgiven for saying that restorative justice means anything that is done outside the state-justice system”.

38 Personal communication with Pieter du Rand, Department of Justice and Constitutional Development, 20 November 2005.

39 B Tshehla, op cit, p 1.