CHAPTER SEVEN

WHOSE BUSINESS?
THE RESPECTIVE ROLES OF STATE AND CIVIL SOCIETY IN RESTORATIVE JUSTICE

The debate about distinguishing between the roles of government and civil society in the context of restorative justice practice has generated considerable interest. In their book *Critical Issues In Restorative Justice*, Zehr and Toews devote an entire section to this issue (one of six) under the heading “Government and systems”.

In the introduction to this section, they present the following as an overview of the current aspects of the debate:

In a further chapter, Jantzi goes on to outline a number of possible roles the state can play. These are summarised below.
THE STATE AS ENABLER

The State plays a significant enabling role when it provides a legal framework for restorative justice alternatives and structures. New Zealand is cited as a prime example of this. In 1989, the government passed legislation and other policies to establish restorative justice practice. More recently, in its Sentencing Act of 2002, it included provisions obliging sentencing officers to take into account the outcomes of restorative processes, even if they did not occur within the state system. Other countries provide further examples in this vein, such as a mandatory requirement to offer a restorative justice option.

THE STATE AS RESOURCER

While the lack of resources for programmes is a common theme throughout the restorative justice community, New Zealand and Australia provide examples of how the State finances the provision of services via subcontracts with private providers. The State thus maintains significant influence and power over these programmes, but it is not necessary for all practitioners to be State employees, and programmes can seek additional funding from other sources.

THE STATE AS IMPLEMENTER

In Canada, New Zealand, Australia, the United Kingdom, Ireland, France and Spain, the State is the direct provider of restorative justice programmes. While such an arrangement is likely to ensure the greatest sustainability of a programme, it does raise a number of other concerns. As pointed out in Chapter Two, the involvement of victims, offenders and communities is regarded as a key characteristic of restorative justice. According to Jantzi, state-run programmes tend to minimise efforts to involve civil society groups and thus become more individualised. It seems typically difficult for bureaucracies to achieve synergy with local and regional efforts to address the social roots of crime.

THE STATE AS GUARANTOR OF QUALITY PRACTICE

Recognising the need to continually strive for good practice and to protect the beneficiaries of services, the state can fulfil the role of guarantor or encourager of good-quality practice. This need not be achieved by imposing a set of standards. Instead, the state can facilitate a process involving practitioners and civil society generally and can reach mutual agreement.

South Africa is a young democracy, with a history of active civil society
involvement in matters concerning justice and conflict. On the other hand, there are demands on the State for the delivery of services across a wide field. In view of this, it is our contention that the cause of restorative justice would be best served by civil society’s playing an active role in direct service delivery, with the State fulfilling the roles of enabler, resourcer, and guarantor of quality practice. The role of the State as implementer should be kept to a minimum. Our reasons for this position are set out below.

CIVIL SOCIETY AND THE STATE

The following attributes are important indicators of the specific role that civil-society organisations can play in restorative justice:

- They are more likely to be accountable to communities. This, in turn, creates more trust on the part of victims, offenders and communities, and leads to further public education and participation;
- They can identify clients’ needs;
- It is a comparative advantage to be able to deliver at local level, thus allowing the participation of marginalised groups like people living in rural areas and poor people;
- Being closer to the ground, they are more likely to have context-appropriate responses;
- They are generally more efficient, so the services can be delivered cost effectively;
- They are more likely to mobilise volunteers;
- They tend to be more innovative;
- They are more flexible when implementing programmes or processes;
- They are more able/likely to take risks.

The reasons for the efficiency and effectiveness of NGOs lie in the fact that these organisations work from a values base. According to Lorgen, an NGO develops its policies through a process of interaction between the values it espouses and pragmatic considerations like assessment of needs and optimal use of scarce resources.

This values base from which civil society organisations work also ensures that they will always be more than mere service deliverers. Their commitment to the values base will also ensure their involvement in advocacy and public education. They are in a position to agitate for structural change. As Braithwaite says, “the most important way this happens is when the justice of the people puts pressure on the justice of the law to change”.

The above list notwithstanding, and given that the field of crime and justice tends to be dominated by the state, it is worth asking why more community
involvement is regarded as desirable, and exactly what this entails. First, it is part of the history of the modern restorative justice movement to regard the involvement of the state and other professionals as ‘stealing’ the conflict from the actual participants. Christie’s somewhat radical statement in 1977 that conflicts were property that had been stolen captured the attention of criminologists all over the world, and is often cited as one of the root concepts of the modern theory of restorative justice. Christie’s argument was that, in criminal cases, the state removes the right of participation from the victim. In Christie’s view, it is not just the protagonists in the conflicts who are losing, but the whole of society, which would normally define what is or is not acceptable behaviour. Christie argued that this theft of the conflict by the state deprives the community of “opportunities for norm-clarification”. He proposed a justice process that would be victim-oriented, with appropriate reparation by the offender. The involvement of experts should be kept to an absolute minimum.

Secondly, according to Jantzi, in his writing on restorative justice practice in the New Zealand context, the value of civil-society organisations is being increasingly recognised: in the past decade or so, the rise of community-based, non-governmental organizations has been hailed as the unleashing of democratic forces in society that would propel it forward as civil society carried out more efficiently services that had traditionally been the purview of the state. Authors like Clark, Flora and Flora, Korten, Putnam and others maintained that as communities acquired the ability and social infrastructure to address many of their own needs participatory democracy would be strengthened. Hence, the role of the state was to spin off as many functions as possible to the community and provide the infrastructure and freedom to make it possible for communities to pick up those responsibilities. Among the most important provisions was the opening of a dialog between communities and regions and the state that would enable grassroots voices and interests to influence public policy—participatory democracy at work.

Some of the basic assumptions regarding civil society follow:

- Civil society is the non-governmental and non-production sector of society—often referred to as the third sector;
- The stronger the civil society sector, the more productive and democratic the society;
- Decentralisation and devolution of power to the local level will contribute to a strong civil society.

The extent to which this perspective holds true in South Africa at the present time will be commented on later.
STRENGTHENING DEMOCRACY

Jantzi refers to civil society organisations as “strengthen(ing)...participatory democracy”. Not only is this particularly relevant for South Africa as a young democracy, but it has been regarded by a number of writers as a critical way of reviving ailing democracies. Braithwaite, for example, believes that democratic participation requires “active responsibility” on the part of the citizens, saying that restorative justice processes can be “one crucial vehicle of empowerment where spaces are created for active responsibility in civil society to displace predominantly passive statist responsibility”. In other words, restorative justice gives power to the people in the justice process. Civil society organisations are more likely than state institutions to create the space for this to happen.

Active involvement by civil society organisations does not only strengthen democracy in the general sense: it also builds a sense of community. Kurki and Pranis argue that:

restorative justice promotes not only individual accountability of offenders, but also collective accountability of communities. While offenders need to be responsible for their choices that harm others, communities need to take responsibility for social conditions that are linked to crime.

Offenders have to find ways to repair the harm, and citizens have to find ways to improve and strengthen their communities. We believe that community ties and collective commitment are developed through restorative justice practices, since every participant has a stake in success and most will not want to let the others down.

The premise is that communities are strengthened when people have more opportunities to interact, create personalized relationships, establish support networks, and exercise informal social control. Completion of the restorative agreement no longer rests solely on the offender's shoulders, but becomes a community matter, and, as a result, community members regularly want to help the offender to complete his agreement. Likewise, they offer emotional and sometimes material support to the victim. When all the facts of the crime as well as past histories and current circumstances of the victim and the offender are open to discussion, ordinary people seldom view crime as an isolated incident. They draw connections to other collective problems and patterns of life, and want to address them as well.

Besides the direct and short-term goal of repairing the harm caused to the
victim and the community, restorative justice encompasses an indirect and long-term goal of building communities. Borrowing from the terminology of the community development literature, we believe restorative justice builds social capital. Social capital can be defined as the social good embodied in the structure of relations and shared values among people, and thus differs from human capital (individual skills, knowledge) and physical capital (material improvements). Social capital provides support through relationships, but also creates informal social control. Informal social control is conventionally, but too narrowly, described to include blockwatch groups, neighborhood patrols, property marking, community meetings, and such. These activities typically are initiated formally and externally by government or by organizations outside the communities. They tend to focus on individual failures and produce conformity to community norms by negative collective pressure, while they could instead focus on individual assets and produce conformity through a shared sense of responsibility for community conditions. We see the promise of informal social control in connections that arise naturally and internally within the communities—in networks of relationships, which help to create, understand, and monitor community norms and values.

**BALANCING THE ROLES OF STATE AND CIVIL SOCIETY**

If involvement by the community is regarded as desirable because it provides opportunities for participation by the parties themselves, and creates space for civil society organisations to strengthen democracy and build communities, what is the role of the state in relation to all this?

Shearing advances the argument that the correct balance between state and non-state partnerships is reached when the state provides the overall direction and control of governance as well as a regulatory environment that will encourage non-state participants to engage in the ‘rowing’ of governance. He points out that the word government comes from the Greek word *kybernan* which means ‘to steer’. Steering is the work of government, but for efficient governance, non-state role players should be doing a lot of the rowing. In restorative justice, the rowing would be mostly about facilitating the dispute resolution process, whether it be a traditional model or a victim-offender conference.

Although some models of restorative justice may receive their referrals directly from the community, the predominant pattern in South Africa at present is for referrals to come from the criminal justice system. An immediate basis for partnership arises from this reality.
Turning to the question of resources required to deliver restorative justice services, it follows from our conviction that restorative justice can be applied at every stage of the criminal justice process (see Chapter Two) that, in a very real way, restorative justice adds value to the justice system. If we begin to envisage a system of widespread implementation of restorative justice in every court jurisdiction by a range of civil society organisations supported by the state, our justice system would begin to look very different and would begin to deliver very different outcomes from those at present.

Two points arise from this vision. First, it is unrealistic to expect civil society to develop the level of human and financial resources to undertake such a task on the basis of raising funds from the community alone. An investigation of any social service civil-society organisation currently delivering ongoing services will bear this out. For this reason, we contend that the state should recognise that civil society can add value to the criminal justice system and should pay for this contribution on the basis of entering into a contract that clearly defines the service to be rendered by the organisation in return for a specified sum. The majority of social services in most provinces are already funded in this way through the provincial Departments of Social Development. We see no reason why this arrangement should not be extended to include the departments of Justice and Correctional Services. The second point to be noted is that the state does not have a monopoly of the resources required for these services, even if it is often the major provider. If certain levels of expertise and consistency are in place in civil society organisations, it has been shown that they are able to lever significant other financial and human resources.

While noting the concerns raised in the table at the start of this chapter about state involvement, it is difficult to see how restorative justice practice can be expanded without the state’s providing some legitimacy to the approach. As Boyes-Watson has noted, “our greatest hope for achieving restorative justice in modern democratic societies lies in growing state involvement in restorative justice”. Although the South African Criminal Procedure Act of 1977 as amended currently provides considerable scope for the integration of typical restorative justice outcomes, these could be strengthened by more explicit provisions directing sentencing officers to such options. Legitimacy could further be provided by policy directives from government, as well as by developing restorative justice jurisprudence and setting appropriate precedents in the higher courts. Such endorsement, encouragement and financial provision do not, in the context of active democracy, have to mean that the state exercises direct power over restorative justice processes and programmes. Pelikan and Trencz have pointed out that it is possible to afford programmes “tempo-
rary autonomy”, that is, the freedom to conduct a process without direct interference.\textsuperscript{16} Furthermore, as outlined earlier in the chapter, the state can fulfil the crucial role of guarantor of good-quality practice without imposing standards; it is possible for the state to act as facilitator and guardian of these standards among practitioners.

**THE FEASIBILITY OF CIVIL SOCIETY’S PRIMARY ROLE**

The status of South Africa’s non-profit sector as a whole has been described by Russell and Swilling as a corporatist regime, in that it is “characterised by extensive state expenditure on social development, but in partnership with segments of the non-profit sector. NPOs act as the conduits for delivering services, in place of or in partnership with state agencies”.\textsuperscript{17} The authors argue that, since 1994,

the state and the non-profit sector have negotiated an impressive and sophisticated public space that serves their respective interests: the state is able to harness resources (financial and institutional) to realise its developmental goals, and NPOs are able to access financial resources and shape delivery processes in a way that helps sustain them in the new democratic order.\textsuperscript{18}

This approach defines all NPOs as integral elements of the public space normally occupied exclusively by the three traditional guarantors of the public good: the legislative, judicial, and executive branches of the state. The Non-Profit Organisations Act effectively defines NPOs as the fourth branch of a new system of participatory governance. The authors also point to the framework for financial support for NPOs: a centralised agency for funding NPOs through the National Development Agency Act of 1998 and the Lotteries Act of 1997. The government has also provided tax incentives for private-sector donors to increase support for NPOs, and has substantially reduced the tax burden on NPOs through the Taxation Laws Amendment Act of 2000.

The scenario sketched above makes it clear that, in theory at least, the current South African context is more positive than it has hitherto been for civil society organisations. However, Russell and Swilling warn:

we must emphasise, however, that like so much else at the policy and legislative level in South Africa since 1994, it is only really the potential that has been created. There are already complications with the implementation of the framework, most of which have to do with a dearth of managerial and institutional capacity in the National Development Agency, the Depart-
ment of Social Development, and the South African Revenue Service. Much will depend on how the new mechanisms are put to use. And, more importantly, whether they are sustainable in a neo-liberal macro-economic environment. Will they simply become mechanisms for co-opting NPOs?19

That this apparently extremely positive environment does not fully match reality on the ground is further borne out by the threat made by the Gauteng Department of Social Development in April 2005 to cut funding to social service NGOs by 25%.20 Although this never happened, the whole matter highlighted the debates about mutual roles and responsibilities, and about each partner, making it clear that there is less consensus about the matter than is suggested by the above analysis. Commenting on the proposed cuts, Swilling remarks:

This sector has been delegated a large number of tasks for which the state carries the ultimate responsibility. Examples include protective and preventive services to vulnerable groups such as children, elderly people, and others who face severe challenges to their survival and development. Such services have to be targeted at all who need them, regardless of where they live or their socio-economic status, and NPOs can only carry such responsibilities to the extent that they are financially supported for this purpose. They cannot be expected to ensure full coverage of all regions within a public and private funding dispensation that does not allow for this. Many corporate donors will not fund activities which they regard as being the responsibility of the state, and much of the work of this sector is viewed in this light.21

At present, the handful of NGOs operating in the justice, safety and security sector who are funded by the Department of Social Development are entirely exposed to these realities and accompanying uncertainty. This situation further highlights the reality of typical relationships, as suggested by Tandon, that relationships between the State and NGOS tend to be:22

- dependent and client oriented;
- adversarial, where the state may encourage NGO dependency, attempt to co-opt the NGO, enforce regulations or resort to intimidation tactics; and
- collaborationist.

Tandon further observed that, if the NGO accepted the role of the state in defining the development framework, government showed greater tolerance
towards the NGO. Bratton identified the key issue in the relationship between state and NGOs as the political tension between the state’s quest for order and control and the NGOs’ quest for organisational autonomy.  

In considering the implications of their research, Russell and Swilling suggest that:

the image conveyed by the notion of ‘public-private partnerships’, which defines the state and the private sector as the only relevant actors in policy making and delivery, should be questioned. Although it is already present in a number of policy documents, more needs to be done to emphasise and strengthen the notion of the three-way relationship between the state, the private sector, and the non-profit sector.

It should be noted that Russell and Swilling’s study deals with the non-profit sector as a whole, and specifically reviews data from the education, health, welfare and housing sectors. Justice, safety and security are not included, an indication that this is not a sector with a strong civil society presence, at least in relation to the other sectors. However, for the reasons listed earlier in the chapter, it is clear that there is much consensus internationally that it is desirable for civil society to be involved more directly in responding to crime. The current difficulties notwithstanding, the context in the country outlined above suggests that this is definitely a viable option for the justice, safety and security sector. This is further borne out by the history of the implementation of restorative justice in South Africa, as well as current initiatives within the Department of Justice and Constitutional Development. These include a “round table discussion with stakeholders” arranged by the Court Services Chief Directorate in the Department in October 2005, at which restorative justice, victim support, dispute resolution, alternative sentences and diversion are listed as key performance areas, as well as a project to develop a national implementation plan for restorative justice. The stage does indeed seem set for a new era in state-NGO relations in the justice, safety and security sector. It is up to government officials and NGO staff to make this a reality.

ENDNOTES

2 V Jantzi, in H Zehr & B Toews (eds), op cit, pp 189 -199.
3 V Jantzi, in H Zehr & B Toews (eds), op cit, p 197.
4 H Zehr, The NGO Role in Restorative Justice: Promises and Challenges,

5 Ibid.

6 C Logen, Dancing with the State: the Role of the NGOs in Health Care and Health Policy, *Journal of International Development*, 1.

7 Our emphasis.


11 J Braithwaite, Democracy, Community and Problem Solving, unpublished paper on file with the author.


14 S Matala and D Husy, NGOs Do it Better: An Efficiency Analysis of NGOs in Development Delivery, article drawn from a research project commissioned by the Non Profit Partnership, 2001, funded by USAID. See also J Carter, Cornerstone Economic Research, *Impact of Decreases to NPOs on their ability to provide services*, unpublished report compiled for Gauteng Funding Crisis Committee, 2005.

15 C Boyes-Watson, in H Zehr & B Toews (eds), op cit, p 216.

16 Christa Pelikan and Thomas Trenczek, Victim Offender Mediation and Restorative Justice – The European Landscape, document on file with authors.


18 Ibid, p 80.

19 Ibid, p 80.


21 M Swilling, Statement Regarding Social Service Organizations Within the Non-Profit Sector, July 2005.

22 Quoted in S Matala and D Husy, op cit, p 6.
23 Quoted in S Motala and D Husy, op cit, p 7.
24 B Russell and M Swilling, ibid, p 84