Restorative Justice in South Africa: For the offender, for the victim, or for criminal justice?

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Introduction

- Development and growth of RJ in SA is linked to the wider access to justice movement.
- The term is used fairly widely and loosely.
- Justice for the injustices and inequalities of the past and present.
- ‘Access to justice’ > the right to exercise a wide range of human rights that are enshrined in the Constitution, including access to economic, social, political, and legal rights.
Background

- Common and popular claim is that
  - RJ can be traced to ancient or indigenous justice practices
  - It was the dominant form of pre-modern justice.
- Informal justice has a long history in SA
- Indigenous and customary practices placed great emphasis on reconciling disputing parties and restoring harmony within communities.
RJ in South Africa

- SA is a typical example of what Daly (2016) refers to as
  - “variation over time in a jurisdiction’s practices”
  - hybrid practices emerge that are based partly on RJ and partly on other justice activities.

- In SA this trend has resulted in the term “restorative” being applied to many activities or outcomes in criminal justice, which may be only distantly related to it.
Agendas of the RJ movement

In 2008 Johnstone identified 5 agendas of the RJ movement.

- **Agenda 1**: Changing social response to crime
- **Agenda 2**: The ways in which “crime” and “a good solution” to it are defined
- **Agenda 3**: Extends RJ practices to other organizational sites such as schools and workplaces, and to community conflicts.
- **Agenda 4**: Extends RJ to “projects of political reconciliation” in responding to mass violence, state violence, and genocide.
- **Agenda 5**: Uses a transformative concept of RJ.
RJ and criminal justice

- Most countries have moved beyond the stage where RJ exists wholly outside the criminal justice system.
- In SA restorative approaches to justice appear at various phases of the criminal justice system.
- Restorative approaches to justice have entered the CJS at various phases.
  - Initially through collaborative arrangements with civil society organisations as service providers
  - and later through the inclusion of a restorative ethos in legislation and policy.
Legislation and policies

- South African Constitution
  - The right to dignity and equality
  - Everyone is equal before the law and has the right to equal protection and benefit of the law

- Integrated Victim Empowerment Policy
  - Important recognition that victimisation constitutes a human rights violation.
  - Services Charter for Victims of Crime
  - Minimum Standards for Service Delivery in Victim Empowerment (Minimum Standards)

- Children’s Act 38 (2005)
- White Paper of the Department of Correctional Services (2005)
- The 2011 Restorative Justice National Policy Framework
What is RJ in South Africa?

- South Africa was quick to adopt a ‘Maximalist’ definition: includes every action that is primarily oriented toward doing justice by repairing the harm that has been caused by the crime.

- In SA a wide variety of services falls under this ‘tent’-including ADR and victim services; whether or not an offender is involved or even known to the system or community.

- However, its development, application, and implementation have been haphazard, inconsistent and lacking consensus.
RJ at pre-trial phase

- Used mainly for less serious offences, such as common assault, theft, malicious damage to property and crimen injuria.

- In some serious cases where parties known to each other or youthful offender.

- What was promoted as RJ was in fact pre-trial diversion.

- Benefitted mainly the offender and the CJS to ease congestion and relieve court backlogs.
RJ and sentencing

- Various ways in which RJ approaches have been incorporated at the sentencing phase
  - Incorporating a restorative element in the type of sentence
  - Referring cases to restorative fora as condition of sentence
  - Suspend sentence pending the outcome of a restorative process – can include this as a recommendation in pre-sentence report.
  - Restorative jurisprudence is growing.
RJ in custodial settings

- Increased RJ activity in correctional facilities in SA
- But there is skepticism and ambivalence.
- The prison in the ‘new’ South Africa is ‘chameleon-like in its symbolism’ with a ‘seemingly endless capacity to reform’.
- A **major gap** is the lack of proper policy guidelines on how RJ should be implemented in the correctional environment.
Victim Offender Dialogue Programme

- VOD programme, launched on 28 November 2012,
- Adopted a broad definition of victim
  - Include not only the family and community of victims, but those of the offender as well.
  - At the heart of the process are the values of *ubuntu*.
  - It attempts to hold offenders accountable for what they have done, help them understand the real impact of their crime, take responsibility, and make amends.
RJ, VOD and Parole:

- Parole provides for the conditional release of offenders before they have served their entire sentence of imprisonment.
- RJ elements have been incorporated into the parole decision making phase by the Correctional Supervision and Parole Boards (CSPBs).
- It is a placement option from a correctional centre into the system of community corrections.
- Various factors are taken into account when an offender is being considered for parole.
Victim participation and parole

- RJ processes in correctional setting is largely offender focused and offender initiated.

- Question? Do RJ practices at the parole or release phase really prioritize the needs of victims?

- Is it more about using victims to help reform and reintegrate offenders back into society?

- Many risks to victims in the way RJ is currently implemented in correctional facilities.
Challenges

- Tracing of victims, especially in the case of offenders serving life sentences.
- No structure for victim tracing, keeping victims informed about the rehabilitation pathway of the offenders, or of upcoming parole hearings.
- Perception among offenders that eligibility for parole is enhanced if they have engaged in some form of RJ.
- Offenders and their family members also get involved in trying to locate victims.
- Victims may only wish to participate in the parole process but have nothing to do with the offender.
- Lack of specially trained RJ facilitators for programmes and processes is a major challenge.
Some challenges facing RJ in SA

- Wide maximalist definition has led to many challenges:
  - The rapid growth of RJ has led to ambiguity of what RJ is.
  - The term restorative is use to describe any activity that is not concerned with prosecution or conviction, or that does not intend to be adversarial, punitive or a type of punishment.
  - In SA and elsewhere RJ’s foray into criminal justice was originally juxtaposed with retributive justice.
  - Better contrast is between conventional criminal justice and restorative justice.
  - In SA there is another layer of binary > i.e. restorative meaning African indigenous justice AND vengeance defined retributive justice – Western
  - Therefore any avoidance of retributive approaches was called restorative.
  - As a result, in SA all these practices in many different contexts have fallen into the same basket of alternatives to conventional criminal justice > and the name for it is RESTORATIVE JUSTICE
  - Actually, as pointed out by Daly, these represent a variety of justice mechanisms that do not have the same aims and processes.
Why define?

- It has been almost 50 years since RJ originated.
- The debate over its definition has yet to be settled and it remains a challenge.
- In the past the lack of consensus over the definition of RJ was not seen as a problem because it reflected a variety of ideas, interests and ideologies of justice.
- However, recently it has been noted that a concrete definition of RJ is needed because without a concrete definition it is almost impossible to define its effectiveness (Daly).
- Daly proposes the umbrella term “innovative justice”
Daly’s definition

- Daly (2016) defines RJ as a contemporary justice mechanism to address crime, disputes, and bounded community conflict.

- The mechanism is a meeting (or several meetings) of affected individuals, facilitated by one or more impartial people.

- Meetings can take place at all phases of the criminal process, pre-arrest, diversion from court, pre-sentence, and post-sentence, as well as for offending or conflicts not reported to the police.

Some final thoughts…

- The rapid growth of RJ has led to ambiguity of what RJ is.
- SA’s journey cannot be separated from her transition to a democratic state premised on the culture of human rights.
- The move to RJ must be seen as part of a larger process of redress for victims, for offenders and for communities.
- It is time to commit to a separate path for victims, one which stands apart from the criminal justice system, yet at the same time, is related to it?
- Question is whether SA has evolved from the research and development phase to the empirical assessment phase?
- If so, it might become imperative to define RJ.
  - “Without a definition of RJ that can be applied and assessed empirically, we are bobbling on a raft in a sea of hopes and dreams”?
Conclusion

- Over the past decade or so restorative approaches to justice in South Africa have benefitted in varying degrees the offender, the victim and the criminal justice system.

- However, to large extent, processes are initiated by either the offender or the criminal justice system.

- Despite, many policies and pieces of legislation intended to cater for both the needs and rights of victims, the RJ agenda has largely failed the victim in South Africa.
Thank You!

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