

A BALANCING ACT FOR THE PROSECUTOR

Restorative justice, criminal justice and access to justice

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An international appraisal of prosecutors' perceptions depicts a uniform tendency for prosecutors to see their role as one of 'presenting evidence in court to get convictions, rather than promoting problem solving'.¹ Many young law graduates dream of a courtroom battle similar to those in popular television series, which tend to glorify the role of the prosecutor in a dramatic depiction of good versus bad. However, reality soon sets in regarding the numerous challenges faced in the criminal justice system. Court backlogs, high case loads, delays in processing huge numbers of remand offenders, and overcrowded correctional facilities plague the system. It is probably within this context that restorative approaches to justice in the pre-trial phase became attractive for the South African prosecutor. This article examines prosecutorial engagement with restorative approaches to justice, and more specifically the KwaZulu-Natal Justice and Restoration Programme.

In South Africa, the term access to justice is used fairly widely and loosely; intertwined with the notion of seeking justice for the injustices and inequalities of the past and present. Hence 'access to justice' has come to mean 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. Providing access to justice to all of South Africa's citizens remains one of the country's major challenges. Together with the promotion of the rule of law, access to justice is one of the strategic goals of the Department of Justice and Constitutional Development (DoJCD). The Services Charter for Victims of Crime outlines a number of rights

falling within the ambit of access to justice: being treated fairly, with dignity, and with respect for privacy; the right to protection; the right to offer and receive information; the right to compensation and restitution; and the right to assistance with respect to social, medical, legal and counselling services.² A restorative approach to justice in the criminal justice system is viewed as just one mechanism through which victims (and offenders) may be able to access justice.

Restorative Justice (RJ) has emerged in the midst of the 'culture of control';³ espousing the principle that all participants in the justice process – victims and offenders – 'should be treated in a humane way that values their worth as human beings and respects their right to justice and dignity'.⁴ While its strongest foothold is to be found in the youth justice system, there is increasing interest in its application to adult offenders.

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There is similarity between RJ and justice as practised by African people through community and customary courts, which in turn has found expression in urban areas through forums such as community courts and street committees.⁵ Policy makers and politicians may be attracted to RJ for various other reasons, such as its claims to reduce reoffending, to meet the needs of victims, and its 'communitarian solutions for improving social integration and cohesion in an era of radical and unpredictable transformation'.⁶ Models of practice include victim-offender mediation/conferencing, family group conferencing, victim intervention programmes, sentencing circles, and peace-making circles.

One of the findings in an earlier study on prosecutorial engagement with restorative approaches at the pre-trial phase⁷ was that the criminal justice system (CJS) faces many challenges because of its relative inexperience in actually adopting RJ approaches and providing RJ services, particularly in the context of adult criminal justice. The development, application, and implementation of RJ have been haphazard, inconsistent, lacking consensus, and characterised not only by uncertain engagement by CJS role-players, but also by the hesitant support of victims and community members.⁸

THE KZN JUSTICE AND RESTORATION PROGRAMME

The DoJCD has six demarcated justice clusters in KwaZulu-Natal: Northern KZN, Southern KZN, Durban, Pinetown, Pietermaritzburg and Empangeni. Khulisa's⁹ KZN Justice and Restoration Programme (JARP) began in 2007 with a pilot programme at Phoenix; a township with a predominantly Indian population located about 30km north of Durban. This community-based programme provided alternative methods for dealing with crime, wrongdoing and conflict in the community, and appropriate cases were referred for RJ at the pre-trial phase. A collaborative partnership approach between various stakeholders and government departments such as DoJCD, the National Prosecuting Authority (NPA), South African

Police Service, Departments of Correctional Services, Social Development and Education, and voluntary sector organisations, was integral to the RJ project in KZN, forming the 'backbone' of RJ initiatives in the province.¹⁰

Through funding from the European Union, Khulisa was able to expand and replicate Phoenix JARP to establish 'specialised RJ programmes' at six sites in KZN: Phoenix, Wentworth, Umlazi, Empangeni, Newcastle and Ixopo. The choice of site location was motivated by JARP's ability to reach rural, urban and peri-urban communities in the province and the presence of a court in the close vicinity of the site. Also, communities around the sites were generally those where the scars of apartheid – inequality and discrimination, high levels of unemployment, lack of skills, substance abuse, disjointed and broken families, and high levels of petty crime – were still evident. Apart from the Pietermaritzburg and Pinetown clusters, JARP was able to provide RJ services within the other four justice clusters. Each site was staffed by a site manager, an administrator, an appropriately qualified and trained coordinator, and suitable mediators drawn from the community and trained by Khulisa. The coordinator managed the mediation process by paying attention to the preparation, screening and follow-up of cases, victim support services, referrals from courts or schools, and referral of offenders and victims to appropriate support programmes. While the Phoenix site was already operational as a pilot programme and had processed a total of 3 930 cases during the three year period (2007-2010); Wentworth only began providing services in July 2010; Umlazi in August/September 2010; Newcastle in August 2010; and Ixopo and Empangeni in November 2010.

The main beneficiaries of the programme include not only those directly affected by the crime, but also secondary victims (family and community members of both victims and offenders); vulnerable and marginalised groups (women, children, elderly, disabled, urban and rural poor communities); civil society organisations (non-governmental, community based and faith based

organisations); and government departments. JARP was further supported by the DoJCD through the KZN restorative justice subcommittee which oversaw and guided the implementation of RJ initiatives across all relevant government departments.

A policy framework has since emerged.¹¹ A host of strategic goals for the RJ sector are outlined in the policy; such as the promotion of community based alternative dispute resolution mechanisms to resolve civil disputes in communities; facilitating a protocol for engagement between the Justice, Crime Prevention and Security Cluster and civil society organisations working in the sector; education and training programmes on RJ for communities and civil society; and programmes that will assist with building the capacity of civil society organisations. The 2011 Restorative Justice National Policy Framework¹² sets out the roles and responsibilities of the individual government departments and civil society organisations for the implementation of RJ. The department has recently revised the framework to include the roles and responsibilities of traditional leaders that had been omitted from the original framework.¹³

RJ AND THE PROSECUTOR

Internationally, prosecutors tend to see their role as one of presenting evidence in court to get convictions, rather than promoting problem solving. There is often a reluctance to wholeheartedly engage with RJ.

South Africa does not follow a principle of compulsory prosecution, but if there is a *prima facie* case against the accused and there are no other compelling reasons not to prosecute, the prosecutor has a duty to institute criminal action. A number of possibilities for diversion exist within this discretionary system and the decision to divert is largely dependent on the individual nature of the case or the circumstances of the accused. The terms diversion and RJ are not synonymous or interchangeable, even though many diversion programmes may draw on RJ principles. RJ processes may include diversion,

but diversion on its own, with no participation by the victim, is not necessarily restorative in nature. Victims benefit from restorative processes, especially where the principles of RJ are properly applied; but this is often not possible through the traditional CJS.¹⁴

In line with the NPA's notion of prosecutors 'being lawyers for the people', the prosecutor is expected to become an active participant in decisions on whether cases should be referred for RJ processes at the pre-trial phase or not. While victim centrality is key, this approach seeks to bring offenders back into the 'loop' by also paying attention to their experiences and needs. Typically less serious offences, such as common assault, theft, malicious damage to property and *crimen injuria*, will be referred in this way.¹⁵ However, in certain instances even serious cases have been referred for RJ processes as part of diversion conditions, especially if it involves a youthful first offender, and/or if the parties are known to each other.¹⁶ If after initial assessment the matter is deemed suitable for a RJ process, preparation and facilitation takes place. Such matters require an 'acknowledgement of responsibility' on the part of the offender, but no formal plea is entered: the charge is withdrawn and there is no criminal record. It implies the provisional withdrawal of the charges against the accused, on condition that the accused participates in an appropriate programme and/or makes reparation to the complainant. Diversion is preferable to merely withdrawing a case, as the offender is charged with taking responsibility for his or her actions.

Restorative approaches can also be applied where the offender tenders a guilty plea and the prosecutor decides that the matter will not be withdrawn. In this instance, the prosecutor is obliged to consult with the victim of the crime, and the payment of restitution to the victim may specifically be listed as a possible condition. If the victim is amenable to the idea, a RJ process can be held prior to the plea and sentence agreement.

Prosecutors clearly exert a huge influence over the administration of justice and exercise

considerable discretion in determining which cases are suitable for a particular RJ process. The adoption of restorative approaches at the pre-trial phase depends largely on the innovation and creativity of prosecutors themselves. 'Once the prosecutor accepts his role as gatekeeper, it is a short jump to the paradigm shift from the "trail 'em, nail 'em, jail em" mentality that pervades the traditional CJS, to the RJ mindset that considers every case in light of what outcome best addresses the needs of the victim, community and offender.'¹⁷

METHODOLOGY

The research that this article is based on was motivated by a perusal of Khulisa's evaluation report¹⁸ on the six sites over the two year period. Prosecutorial referrals to RJ for the period March 2010 to April 2012 made up an average of 89,35% across all the sites, followed by referrals from schools (3,49%) and from walk-ins (5,16%).

During May and June 2012, 18 prosecutors – nine male and nine female – at courts located in the close vicinity of the sites, completed a questionnaire that probed their knowledge of and training in RJ, referral patterns, and their interaction with the KZN JARP. The questionnaire comprised a self-report instrument and included open-ended and close-ended items.

Eleven prosecutors at a site not serviced by JARP were interviewed to determine whether and how restorative approaches were being applied in the absence of a dedicated RJ service provider. Semi structured interviews with key informants such as site managers provided valuable information on the content, delivery and challenges experienced by the programme.

The sampling was purposive; targeting only those prosecutors that worked at courts in the vicinity of the JARP sites at Phoenix, Wentworth, Umlazi, Ixopo, Newcastle and Empangeni. Similarly, interviews were held with prosecutors at only one court that was not serviced by JARP.

RESEARCH FINDINGS AND DISCUSSION

Case loads and referral patterns

Data from questionnaires showed that prosecutors generally carried very high caseloads, with the majority (eight) dealing with at least 100-200 cases per month, six dealing with 50-100 cases, and three with 200-300 cases. One prosecutor dealt with over 300 cases per month.

While prosecutors mainly referred cases to the Department of Social Development, Khulisa and NICRO, seven prosecutors indicated that they referred only 'some cases' and 'mediated the rest themselves'. One prosecutor conducted all the restorative mediations himself and did not refer.

In determining which cases were suitable for referral the following criteria were cited: willing candidates; petty matters where parties are known to each other; if the probability of resolving the case through mediation is high; where victims are no longer interested in pursuing the matter, for example in domestic violence cases; in less serious offences; and where parties are amenable to resolving the case outside of the formal court process. According to prosecutors, participants (victims and offenders) were in the main happy for the matter to be resolved through restorative processes; showing a willingness to go ahead with the process once it was explained to them.

Types of crime and reoffending

The most common types of crimes referred for restorative justice were for assault, theft, malicious damage to property, shoplifting, *crimen injuria*, and vandalism. Referrals were mostly for crimes such as common assault and assault GBH (59,54% cumulatively across all sites). The highest number of referrals for these crimes was at Wentworth and Umlazi, areas plagued by high rates of substance abuse, violence, and petty crimes. Only one prosecutor referred domestic violence matters. While the majority (nine) indicated that they did not know of any cases where the offender had reoffended, three indicated reoffending had occurred.

While the draft prosecutorial guidelines specifically excluded domestic violence cases for RJ processes, in terms of the new 'informal mediation directives',¹⁹ domestic violence cases may be dealt with through restorative justice processes on the authority of the Director of Public Prosecutions. Only a senior public prosecutor or person delegated by the DPP may mediate these cases.²⁰ From interviews with site managers and prosecutors it became apparent that many cases of common assault and assault GBH are in fact 'disguised' domestic violence cases, and that the parties involved are close family members.²¹ However, international practice²² indicates that there are opposing views on whether domestic violence issues belong within a RJ paradigm.²³ The main reason for this is that victims of domestic violence may be unable to negotiate for themselves in the way that RJ meetings expect. The power imbalances and dynamics of control that characterise many domestic violence relationships suggest that, in most instances, the victims of violence do not have the capacity to negotiate freely and fairly with the abusers.²⁴ Clearly, the situation in South Africa is quite different, where prosecutors are not averse to either referring these cases to service providers for RJ, or even facilitating mediation themselves.²⁵

RJ processes

Mediations were facilitated at the JARP premises in a separate room or at the court in a separate room. According to site managers, mediations were attended by the offender, the victim, their support person such as a family member, and two mediators. The mediation typically lasted for about an hour.

Prosecutors revealed an eagerness to embrace RJ at the pre-trial phase; with some seeing a particular role for themselves in the screening phase of the RJ process. However, there was a dire shortage of service providers and training. Prosecutors are also willing to make greater use of alternative dispute resolution mechanisms, and participate in crime prevention initiatives to enhance quality of life, through partnerships with

local communities, media, businesses, and schools.²⁶

There are many factors that affect their willingness to do this. They may be motivated by the constant departmental pressure to reduce high caseloads and relieve court backlogs; and if RJ services are not available, might end up facilitating large numbers of cases themselves. It could also be a convenient and 'easy' way for prosecutors to avoid court processes. In the present study, prosecutors were extremely positive about the programme's impact on the functioning of the court, with nearly all citing the 'reduction of court rolls' and 'clearing of backlogs' as the most positive impact; allowing them time to focus on more serious cases.

However, it was encouraging to note from the interviews that prosecutors also recognised the potential of RJ for reconciliation and restoration in communities; especially when dealing with minor and petty offences emanating from conflict within families and between people known to each other that could be dealt with more appropriately outside the 'confines' of court processes and procedures.

These cases are mostly trivial and usually involve neighbours, family members and friends. Many are cases where parties themselves requested or even insisted on mediation. Prosecutors are sometimes compelled to mediate due to the lack of service providers, or if services are only available on certain days. Prosecutors acknowledged that the lack of proper facilities at the courts meant that the quality of RJ processes was being compromised, and emphasised the dire need for dedicated RJ facilities and services at all courts in the country (a separate room staffed by a social worker and other professionals trained in the facilitation of RJ processes).

In the past, prosecutors were not expected to actually mediate cases themselves,²⁷ but rather to refer cases to a social worker or probation officer, who would engage with the accused to determine their suitability for RJ. The reality is that the provision of RJ services in KZN is confined to a

few well-resourced and well established organisations such as Khulisa and NICRO, and a number of courts do not have service providers or social workers to whom cases can be referred. RJ is already being ‘practised’ by prosecutors who take on the role of mediators; performing the functions of screening, preparation, and facilitation of cases. Furthermore, these mediation sessions are held in less than ideal conditions – a disused court room or the prosecutor’s office. In the light of the new NPA directives on restorative justice which ‘allow’ prosecutors to mediate cases under certain conditions, it is imperative that the victim is properly consulted, and his/her needs taken into account, before the prosecutor decides on a course of action.²⁸

Training

Only eight respondents had received training in RJ. Training was provided by the NPA and Khulisa. Most (17) said they were familiar with the general principles of RJ and how it was being implemented by JARP, while four indicated they were not familiar, and three did not respond to this question.

A network of civil society organisations has developed a set of standards to guide the implementation of restorative justice programmes and processes linked to the criminal justice system. However, it became apparent from the interviews that while prosecutors generally ‘knew about’ the NPA guidelines through training provided by the senior public prosecutor, they were unaware of the existence or content of the practice standards; drafted to ensure ‘specific level of quality in relation to service delivery’.²⁹ Unfortunately, this ‘toolkit’ has not been widely disseminated nor incorporated into the existing guidelines. Furthermore, some junior prosecutors had not heard about RJ prior to being employed by the NPA.

Prosecutors’ primary focus is the prosecution of crimes through the courts, and their education and training prepares them for this. The facilitation of mediation requires skills in, among others, psychology, victim support,

communication and facilitation, trauma counselling and crisis intervention, and familiarity with appropriate support programmes for victims and offenders. It is critical that RJ centres are staffed by people who have the skills and experience to deal with all these issues.

CONSTRAINTS OF RJ

All justice practices, including RJ, are constrained in some way. The formal CJS is limited by its inability to listen to victims (and offenders) recounting the circumstances of the crime, and its consequences on those directly involved. Restorative practices are limited by the ability of offenders and victims to think and act in ways that are restorative. Boyes-Watson has argued that ‘[d]espite the likelihood that state involvement will undermine the ideal vision of restorative justice, our greatest hope for achieving RJ in modern societies lies in growing state involvement in RJ’.³⁰

But, on the other hand, as RJ becomes diluted and absorbed into the CJS, its capacity to offer meaningful recourse to a wide range of victims may be compromised. Concerns have been raised about the CJS’s ability to deliver victim centred justice. In current practice there is minimal consultation with the victim because of time constraints and pressure to reduce the number of cases on the court roll.

Since the provision of RJ services straddles various disciplines and departmental roles, the absence of proper coordination in service delivery across departments remains a challenge. Much can be achieved through partnerships, piloting, and engaging with all relevant state departments and civil society groupings in the development of new programmes and strengthening existing ones. Adequate budgetary allocation for RJ services is crucial for the development, accreditation, and monitoring and evaluation of RJ programmes and initiatives. The introduction of modules on the theory and practice of RJ in criminal justice in legal curricula could address the knowledge gap on RJ amongst criminal justice personnel. Funding and resources are also needed

for training and capacity building of all role players in the sector, and for awareness raising and rights education in communities. There is currently still an over-dependency on NGO service providers for both training and services. Since NGOs are heavily reliant on donor funding and/or financial support from the state, this state of affairs means that there is no guarantee of these services being consistently available.

CONCLUSION

It is encouraging to note that many more cases are being referred to restorative processes, rather than merely diverted to programmes that cater only to the needs of the offender, such as substance abuse, anger management, and vocational and skills development programmes, and where a satisfactory outcome for the victim is often absent. Overall, JARP has succeeded in supplementing the conventional justice system by helping to lower the court backlog, allowing the court to utilise existing capacity for serious offences, and thereby improving the efficiency of the courts. It has also provided victims and offenders with an opportunity to participate in a process that attempts to address the harm caused by the offence or wrongdoing in a more holistic way.

In order to further advance and integrate RJ in the criminal justice system, a logical step would be to design a case flow approach that identifies those cases that are appropriate for RJ intervention. A central intake unit, operating under established guidelines, would direct cases in one of two directions: a RJ route or a conventional criminal justice route. While the conventional route would apply to serious cases such as murder, rape and aggravated robbery, the RJ route would apply to all others (a parallel but 'interlinked' track). The decision to divert cases must be informed by the circumstances of the crime, the offender and the victim. This system might also apply to the so-called victimless crimes such as prostitution and drug offences.

The 'mediation movement', which was initially conceived of as a transformative process, is

increasingly understood and practised as a settlement producing, problem solving technology. In the main, RJ interventions, in South Africa and internationally, are evaluated in terms of their potential to satisfy the needs of victims and offenders, prevent reoffending, and achieve some degree of reconciliation. However, it has the potential to do far more. It is a challenge for all those working in this field (advocates, academics, practitioners, and policy makers) to understand why and how, particular restorative programmes work; if and when they do, in specific contexts. The values and practices of restorative justice hold much promise for serving the needs of crime victims, offenders and community members; and when practised with appropriate skill, can impact positively not only on participants' long term healing, but also their overall justice experience.



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NOTES

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