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Source: *Agenda: Empowering Women for Gender Equity*, 2005, No. 66, Gender-Based Violence Trilogy Volume 1,1: Domestic Violence (2005), pp. 48-56

Published by: Taylor & Francis, Ltd. on behalf of Agenda Feminist Media

Stable URL: <https://www.jstor.org/stable/4066536>

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Restorative justice and domestic violence: some exploratory thoughts

Hema Hargovan

abstract

Restorative justice as a framework for working with victims and offenders in the aftermath of crime has been adopted in a variety of processes and contexts over the years. This *focus* critically examines the restorative justice approach in criminal justice with special reference to its applicability to domestic violence cases. Despite the implementation of the Domestic Violence Act of 1998, violence against women in South Africa continues unabated. The second part of the *focus* outlines specific provisions in the Act and proposes possibilities for integration of restorative principles. The *focus* concludes that a prerequisite for successful integration of restorative options is the development of regulatory frameworks and minimum standards in restorative justice practice.

keywords

restorative justice, victims, offenders, criminal justice, domestic violence

Introduction

Restorative justice (RJ), a social movement seeking to introduce reform to the operation of the traditional criminal justice system, has seen a marked proliferation of its initiatives over the last decade. Restorative processes are those in which offenders, victims and others affected by a crime participate, often with the help of a facilitator, in resolving matters arising from that crime. RJ straddles a diverse range of practices and programmes. Mediated meetings between victims and offenders, victim impact statements, and court ordered community service are some examples of restorative practices. A basic goal of the restorative approach is to establish new fora and mechanisms to which many criminal cases currently dealt with by the conventional criminal justice system can be diverted, either at the pre-trial or sentencing stage. Its distinctive feature is the promotion of restorative outcomes, such as reparation for

harm, re-establishing relationships, healing of victims, and reintegration of offenders into the community. Protagonists of RJ espouse the adoption of RJ processes as complementary to the formal justice system, empowering victims to make informed choices and holding offenders accountable for their transgressions. While RJ draws on existing traditional, indigenous and religious ways of dealing with disputes, effective RJ practices depend on a well-functioning and credible criminal justice system. Effective and innovative integration of restorative processes into the formal criminal justice system is just one of the many challenges facing criminal justice systems worldwide.

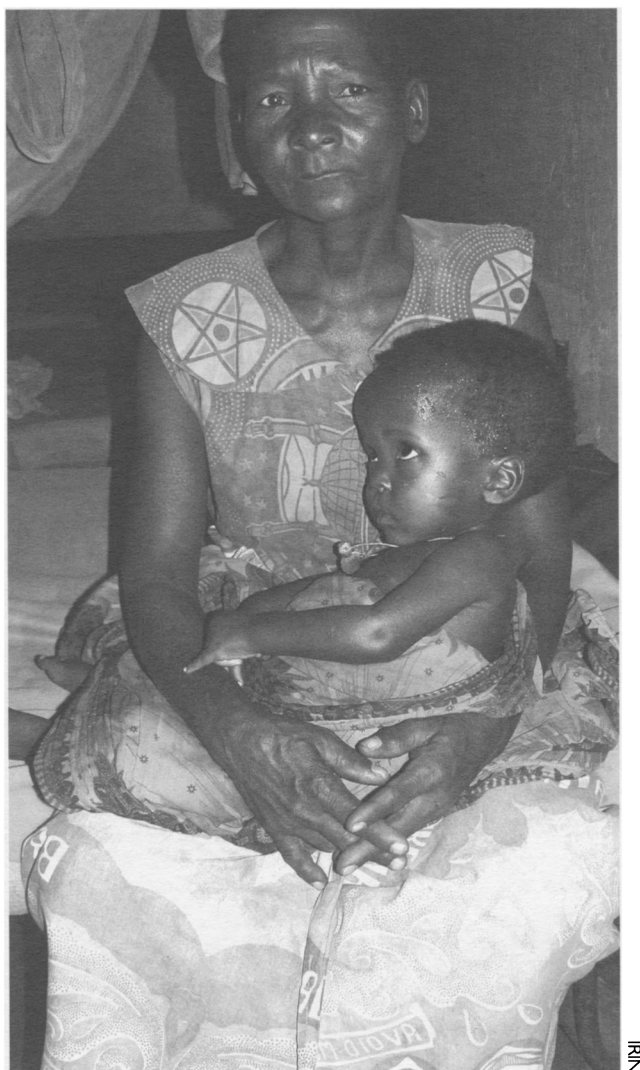
RJ sallies into the arena of domestic violence remain a contentious issue with legal experts and feminists alike. Those critical of this approach argue that it may trivialise domestic violence, thereby returning it to the private sphere, and exposing victims to

continued victimisation. This *focus* examines the appropriateness of restorative interventions in domestic violence cases; it proposes that possibilities do exist for integration of RJ principles at different stages in the formal criminal justice response to domestic violence. However, it is imperative that guidelines and minimum standards are in place so that secondary victimisation of the victim may be avoided.

Developing a restorative approach to criminal justice

The growth of the RJ movement may be seen as part of the 'victimological turn' in criminal justice policies since the early 1960s. In its evolution, the movement has seen a host of innovations: calls for victim compensation; victim impact statements; Victim Charters; and the establishment of regional, national and international plans in support of victims, such as mechanisms for mediation and restorative justice. The nascent RJ movement has had links with both the victim movement and the informal justice movement. RJ as a framework for working with victims and offenders in the aftermath of crime has been adopted in a variety of processes and contexts over the years. Like the informal justice movement, RJ has capitalised on the perceived deficiencies of the courts, and this has certainly contributed to its rapid development.

Most significantly, juvenile justice legislation in countries such as Australia, New Zealand and Canada, has incorporated the restorative approach very successfully. Drawing mainly from the New Zealand approach, South Africa's Child Justice Bill seeks to entrench the notion of restorative justice and makes provision for family group conferencing as a diversionary measure for young offenders whose cases are formally dealt with by the criminal justice system. Similarly, Canadian sentencing circles are an attempt to provide a sentencing context more culturally appropriate for Canadian indigenous peoples (McEvoy and



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Newburn, 2003:8). The National Crime Prevention Strategy (1996) recommended that 'a state centred system should give way to a greater emphasis on a victim centred, restorative justice system'. The Services Charter for Victims of Crime in South Africa (2004) specifically refers to RJ and the importance of placing victims at the centre of the system.

In the early days of the RJ movement, the relationship between the emerging RJ approach and the traditional criminal justice

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system was delineated in highly dichotomous terms – ‘restorative’ as opposed to ‘retributive’. Daly (2003:364) is sceptical of this approach and suggests instead that we need to consider how this emerging justice form will articulate with the ‘old’, both in terms of the aims of restorative justice (ie repair of harm) and the modality of RJ as an informal legal process. Recent research indicates that the inquiry has now shifted to the crucial distinctions within the restorative model itself, its integration into the existing formal criminal justice system, and the development of models of implementation of restorative practices.

Dignan (2004:169-171) proposes that it would be helpful to think in terms of a continuum of restorative approaches; that the restorative model is not homogenous and that there are different strands in restorative thinking, referred to as ‘fault-lines’. The ‘process vs outcome’ or ‘definitional fault-line’ argument highlights the fact that different jurisdictions have adopted different definitions and policies with regard to the meaning and implementation of restorative processes. Tshehla (2004) also highlights the general lack of agreement between state departments and NGOs in South Africa on the meaning of RJ.

The ‘separatist vs integrationist’ argument looks at the relationship between ‘restorative justice’ and ‘criminal justice’ (Dignan, 2004:178). One proposition is a separate RJ system which would serve as an alternative to the formal criminal justice process and which operates completely outside the existing criminal justice system in a supplementary capacity – ‘a parallel track’. There are already various ‘non-state forms of ordering and justice in existence outside the orbit of the state’s regulation’ in South Africa (Scharf, 2001:11). Many of these structures function within a RJ framework. However, the decision to use non-state

structures is informed by geographical, economic and psychological barriers that affect access to the criminal justice system (Tshehla, 2004). This is particularly true for women from poor, marginalised communities who enjoy little job security and live far from courts or police stations. Even though informal justice and dispute resolution mechanisms are being practised among many South Africans in townships and rural areas, these mechanisms do have the tendency to dispense with formal rules and rights and do not necessarily conform to constitutional principles.

Dignan (2004) proposes an alternative enforcement model in which restorative justice operates as a systemic and fully integrated part of the normative criminal justice system which Johnstone (2005:164) refers to as a ‘parallel but interlinked track’. This model would be eminently workable in the South African context. An important feature is its emphasis on reformation of the criminal justice system according to restorative precepts. Significant factors to consider would be: seriousness of the crime; the willingness of the offender to acknowledge guilt, express remorse and repair harm; and the victim’s willingness to accept reparation and to forgive. Such a system would require an understanding of and commitment to the principles of RJ by those working in the formal criminal justice system. The extraordinarily high rates of violent crimes in South Africa clearly suggest that RJ cannot replace current penal law and procedure. Instead, the aim should be for restorative processes to inform a greater proportion of criminal justice system activity.

Restorative justice and domestic violence

Violence against women continues to be widespread, frequent and under-reported. Feminists point out that the crimes are

committed on victims who, within the crime relationship, are at the lower end of the power relativity scale (Hudson, 2002:623). The most common argument **against** the extension of RJ into the domestic violence arena is that the gravity and frequency of these offences demand judicial adjudication processes. Furthermore, restorative interventions may be viewed as a 'soft' response that would fail to punish, and possibly recast the offence as a relationship problem.

Feminist opponents of restorative justice for gendered crimes submit that domestic violence warrants a powerful response, which combines elements of 'meaningful censure of the behaviour, and the protection of the victim against further abuse' (Hudson, 2002:623), as well as measures to reduce the likelihood of re-offending and to reintegrate the offender into society. Edwards and Haslett (2003) maintain that RJ programmes generally lack credibility for domestic violence cases for a number of reasons:

- Lack of an informed and detailed analysis of gendered harms;
- Lack of the requisite training in restorative justice practice. Those interested in the field need to access quality training in the realities and complexities of domestic violence, the dynamics of power and control, the particularities of domestic trauma and the difficulties of holding abusive men accountable for their actions; and
- Practitioners also need to explore trends, patterns and circumstances of abuse incidents. Highly recommended is an extensive screening model which takes into account victim safety and offender accountability (Edwards and Haslett, 2003).

According to Roche (2002), two assumptions that underpin RJ can be identified:

- Victims will be able to negotiate a

satisfactory response to acts of violence; and

- Community norms will be invoked in RJ meetings to express disapproval for offending acts.

However, Hooper and Busch in Roche (2002:525) state that victims of domestic violence may be unable to negotiate for themselves in the way that RJ meetings expect:

[T]he power imbalances and dynamics of control which characterises 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.

Furthermore, 'any intervention that relies upon the mobilisation of community norms when those norms may not necessarily condemn the use of violence against their wives or partners' may be met with scepticism (Roche, 2002:525).

In South Africa women still face a patriarchal value system which sustains abusive actions where it is seen as a deliberate strategy to gain relational power and control. The Domestic Violence Act recognises that domestic violence is 'a serious social evil and that there is a high incidence of domestic violence within South African society'. In the words of the preamble, the Act was enacted:

... to afford victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of state give full effect to the provisions of this Act, and thereby to convey that the State is committed to the elimination of domestic violence.

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A window of opportunity does exist for restorative interventions to be integrated into the formal process

The Act makes provision for a civil remedy, namely the issuing and enforcement of protection orders. In the protection order, the court may impose prohibitions, conditions, orders or obligations on the respondent to ensure the safety and wellbeing of the complainant. Section 5 provides for an interim protection order where the applicant is required to give full details of the nature of the abuse, whether physical, emotional or psychological, or economic. The Act does not criminalise domestic violence, but rather criminalises the breach of the protection order. When the protection order is violated, an offence is committed and criminal proceedings may be instituted (Section 7; 17(a)).

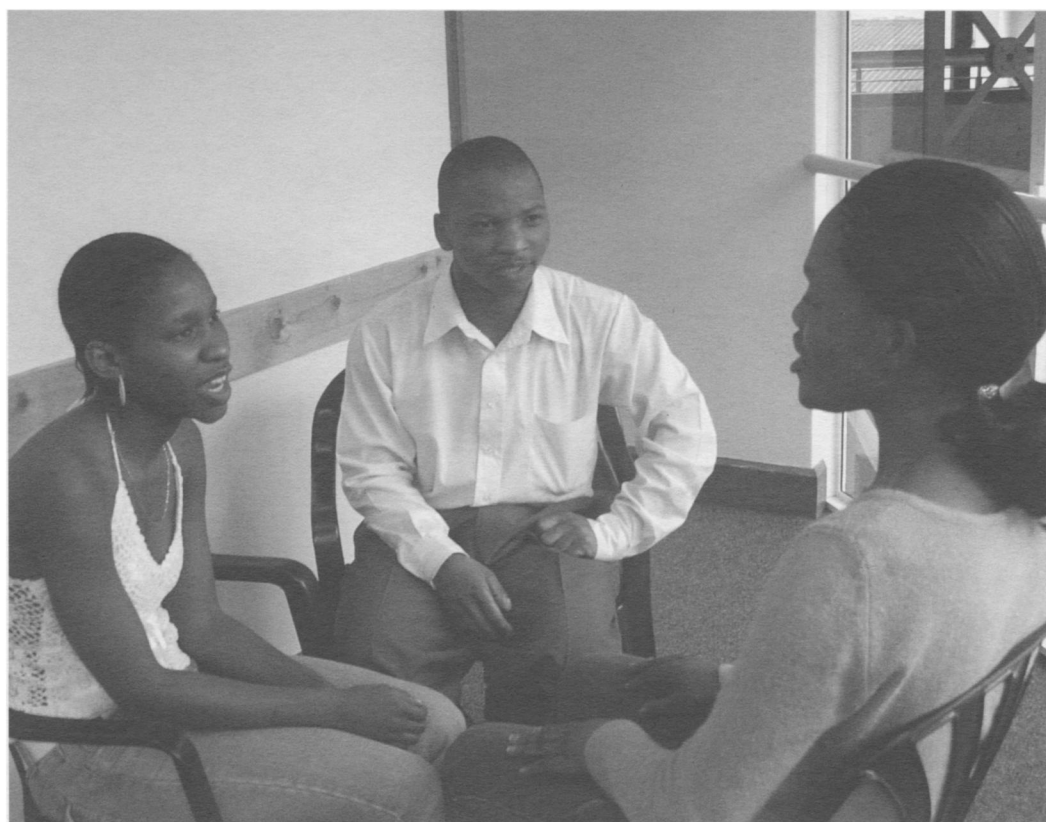
Ironically, research into the implementation of the Domestic Violence Act conducted by the Consortium on Violence against Women, revealed a 'worrying disjuncture'. There was a lack of correlation between the abuses described, the protection requested and the remedy granted. Magistrates did not pay much attention to the abuse described by complainants in the affidavit submitted in support of their applications or the remedies they requested. For example, applicants who had described no physical abuse were granted protection against it by magistrates (Smythe and Parenzee, 2004).

The Act provides for the imposition of a fine or imprisonment of up to five years where the respondent does not comply with the protection order. While this may deter further abuse, it might have an unintended consequence: punishing not only the perpetrator but also the victim. For many women who depend largely or entirely on economic support from their abuser, the imposition of criminal sanctions that lead to incarceration and/or unemployment brings with

it the possibility of impoverishment and homelessness for themselves and their children. Successful implementation of the Act is also dependent on the provision of shelters for victims who have made use of the legal remedy. While many NGOs currently provide a network of resources in the community that victims of domestic violence can turn to, state initiatives are few and located mainly in urban areas. Problems have also been experienced with the quality and the nature of training that criminal justice personnel have received thus far. Resource constraints force police to prioritise complaints and in many instances, women who opt to use the state system are turned away (Kruger, 2004). Despite several years of consciousness raising, training of criminal justice personnel on the implementation of the Act and publicity by various NGOs, domestic violence is still under-reported.

The Act refers neither to RJ nor to any form of 'restorative punishment' that may encompass support and compensation for victims. A window of opportunity does exist for restorative interventions to be integrated into the formal process, where both parties voluntarily request this option. In the light of the numerous constraints women face in accessing justice, there are possibilities for integration of RJ processes as a 'parallel but interlinked track'. More research needs to be done as to whether women would opt for the current remedies provided for in the Act, or prefer a more restorative intervention. Victim offender mediation facilitated by the formal criminal justice system may be an option for less serious domestic violence or where it is an isolated incident. In these cases, it is still possible to incorporate punitive elements into the RJ outcomes and resolutions. However, the potential for further and ongoing harm must be an important consideration when decisions about the most appropriate intervention are made by the criminal justice officials.

RJ practices range from those that are 'fully restorative' to 'partially restorative'. Fully



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restorative practice may include the participation of all direct stakeholders: the victim, the offender, family and friends, community members and a trained mediator appointed by the formal justice system. A restorative practice with only the victim or offender is a partially restorative practice, which may also offer important benefits. Restorative processes directed towards offenders, and sanctioned by the formal criminal justice processes, may result in positive outcomes, namely the prevention of further violence. Presiding officials need to explore innovative and appropriate sentencing options, such as community service and correctional supervision. According to Barton (2002), the notion that punitiveness and retribution are incompatible with restoration, is a myth. The sentence can include an order which

requires the offender to pay medical and other services that the victim may need to access. A suspended sentence, with conditions that the perpetrator attends an appropriate therapeutic programme that is focused on the multiple aims of rehabilitation, retribution, reintegration and restoration, is another option.

The National Institute of Crime Prevention and Reintegration of Offenders (NICRO) has proposed conditions of sentence incorporating, inter alia, assessments, intensive psycho-educational, cognitive-behavioural group work programmes, combined with individual and community work and a follow-up programme. These are currently being piloted by NICRO nationally in partnership with formal justice structures. These restorative interventions are primarily focused on the offender; victim participation is

voluntary, gradual and much later in the process. An important feature of the NICRO programme is the criteria for admission which includes potential harm to victim, previous incidents of excessive violence, the possibility of psychopathic tendencies and willingness to take responsibility for actions.

Many cases mediated by the Restorative Justice Initiative, an NGO based in Gauteng, were cases referred by the criminal justice system. In the Victim Offender Conference Project undertaken by Amanda Dissel of the CSV, 61% of referrals came from the magistrates' courts. In all cases referred, the

offenders and victims were adults and the majority were cases of domestic violence (Dissel, 2003). In fact, magistrates in the project supported mediation in domestic violence cases as mediation presented them with the opportunity to look beyond the crime and at its causes. However, in recent research it was found that while the judiciary had positive views towards RJ, a great deal of uncertainty and misconceptions about the process was still evident (Prinsloo et al, 2003).

The fundamental difference between the conventional and restorative justice approach can be most usefully articulated by the concept of empowerment, ie empowerment of key stakeholders in the responses of the criminal justice system to wrongful and criminal acts so that the matter is resolved in ways that are meaningful and right for them (Barton, 1999). Where restorative processes are preferred by the abuser and the victim, or just one of the parties, empowerment might very well be the outcome. The victim is given a chance to be at the centre of events, in control and telling her story in her own way, in her own words. The perpetrator is given an

opportunity to change his behaviour, perform community service, or even compensate the victim. In this way, the multiple justice aims may be achieved.

If the aims and principles of retributive and restorative justice are integrated, with the targets of restorative justice (reintegration, empowerment of victims, reduction of offending, building of cohesive, peaceful communities) being pursued within the constraints of due process safeguards and standards such as proportionality and equitable treatment, then a better justice will be possible.

(Hudson, 2002:631)

Conclusion and recommendations

The social significance of crime and its control is pervasive, complex and contentious. Not only does crime (and crime control) play an integral role in the politics of contemporary society, but it has become inextricably linked with our daily routines, emotional lives and imagination. As South Africa enters the next era of its democracy, it will be imperative for justice practitioners to take cognisance of the possibilities that exist in the field of restorative criminal justice.

While possibilities for integration of restorative elements in the judicial response to domestic violence do exist, recourse to formal criminal justice is still the recognised way of demonstrating that society takes domestic violence seriously. One cannot expect women to forego the protection offered by the law and condemnation of the wrongful action by the most authoritative source: the public court of law. At the same time, the high rate of deaths and extreme violence that victims of domestic violence continue to endure indicate that current domestic violence legislation has had minimal effect in reducing domestic

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violence. South Africa has come a long way in setting up victim empowerment initiatives which largely focus on victims of domestic violence. Parallel work with perpetrators, and inter-sectoral cooperation with community initiatives and state (criminal justice system) should be viewed as an important prevention strategy.

New strategies in prevention need to be sought. The integration of restorative interventions into the current legislation can pave the way for the development and evolution of best practice in this relatively new area. If RJ is to be considered a valuable intervention in domestic violence cases in South Africa, much would need to be done to ensure that all interventions are done by informed practitioners who demonstrate a thorough understanding of the risks and benefits of doing this work. Criminal justice officials play a crucial role in the incorporation of restorative principles in the sentencing process. RJ practices may be envisioned as a more creative and individualised form of sentencing which can achieve the multiple aims of retribution, rehabilitation, reintegration and restoration. Whilst not stifling the innovative and flexible approaches which are the cornerstone of restorative justice, regulatory frameworks such as the proper screening of participants, risk assessment, training of practitioners and accreditation of service providers, is essential. Guidelines and protocols should be in place to detect victims and offenders who are **not** suitable for RJ processes regardless of the crime involved. The focus should be on the suitability of the participants rather than on the type of crime per se. In the words of Edwards and Haslett (2003), RJ practice in the area of domestic violence would have to be 'rooted in a clear set of values and principles: Victim safety, victim choice, offender accountability and system accountability'. Therefore, quality assurance and the setting of minimum standards of

practice are essential.

Despite the fact that restorative processes are being adopted in the context of informal communitarian processes, there are numerous challenges which make the integration of RJ in the formal response to domestic violence, difficult. A lack of resources, proper skills and training are already major problems with implementation of the Domestic Violence Act. Nevertheless, as the influence of RJ grows stronger and increasingly attracts the interest of criminal justice and policy-makers, it is important to be aware of the possibilities for RJ to operate within and as a fully integrated part of the regular criminal justice system. The promotion of restorative outcomes should be the primary goal. Ultimately, it would require initiative and commitment on the part of government, together with sustained collaboration with and support for community-based and grassroots initiatives.

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