



Restorative Justice

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Introduction

Restorative Justice [RJ] provides a new paradigm in response to crime. Advocates see RJ as a promising way to redress problems within the criminal justice system which appeals to the interest of victims and promises reduction of re-offending, satisfaction of stakeholders involved and empowerment. RJ is about building local citizen and community efficiency to respond to crime, holding offenders more accountable, repairing harm and grief caused by the crime and building new relationships that endure to reduce re-offending.

Definition

RJ can be best summed up as follows: A different way of thinking about crime and our response to it. It focuses on the harm caused by the crime: repairing the harm done to victims and reducing future harm by preventing crime. It requires offenders to take responsibility for their actions and for the harm they have caused. It seeks redress for victims, recompense by offenders, and reintegration of both within the community. It is achieved through a cooperative effort by communities and the government.

History

Restorative Justice can be traced several millenniums. Practice of restorative justice has existed throughout human history and is evident in the cultures of New Zealand's Maori community, Australian Aborigines, Native Americans, First Nations of Canada, African customary law and Celtic traditions. Modern roots of RJ can be attributed to many factors, but there is clear driver, which is the limitations of the current criminal justice system and that harsh sentencing practices do not reduce recidivism rates and criminal law does not redress the harms inflicted on victims and society.

Towards Restorative Justice Theory

The modern concept of crime is legalistic, that is considered as an act that is declared punishable by the governing authority. RJ theory differs from the criminal justice paradigm by viewing crime as a primarily a conflict between individuals resulting in harm to victims, communities and offenders themselves. Law-breaking is secondary. Overarching aim of the criminal justice system should be to reconcile parties while repairing harm caused by the crime.

Stakeholders

Restorative processes include stakeholders not traditionally involved in the criminal justice system. RJ practices encourage a variety of stakeholders to come together to discuss the crime, the impact caused and the resulting needs, interest and responsibilities evident. The focus is on a forum that provides an informal structure to discuss the crime and its aftermaths. Mainstream criminal justice processes meet only a small part of victim, offender and community concerns after the crime has been committed.

Programs

RJ in practice is wide and diverse, specifically in the criminal context, through a few select programs are common and represent what RJ hopes to achieve. They are as follows:

- Victim-Offender Mediation
- Family or Group Conferencing
- Healing/Sentencing Circles
- Community Restorative Boards

International Law and Human Rights

Human rights provide the framework in which RJ must operate. It provides safeguards in informal and informal structures and importantly, prevents abuses of RJ practices. International human rights conventions have created and sustained a momentum towards implementing RJ practices. The U.N's *Basic Principles on the use of restorative justice programmes in criminal matters* provides a framework that explains RJ's function in the criminal justice system

Case Studies

Case Study 1: The conferencing programme was used for a sexual assault case. Rosie (victim) and Rick (offender) participated in a forum with their families and a Youth Justice coordinator. The process of the conference revealed that power imbalances were a major setback in the RJ process along with the degree of remorse and admission of guilt from the offender. In general however, Rosie was satisfied from the outcome mainly due to her ability to stand up to her offender and tell her story to others.

Case Study 2: A RJ model of dispute-resolution is explored in the context of the ethnic conflict between Fijians and Indo-Fijians in Fiji. The *Veisorosorovi* [VSS] model is based upon humbling oneself, to surrender and to ask for forgiveness while taking responsibility for the harm caused. It is focused towards the collective in terms of dispute resolution while can be used for individual crimes. The model has faults as it can be used to escape persecution from the harsh punishment dealt in the courts. It however, embodies the ideals of RJ, the community coming together to restore broken relationships and to repair any harm caused.

Discussion

Four main issues in the discussion of the case studies, they are as follows:

- Power Imbalances: represent a crucial aspect of dispute resolution as they can serve to undermine the whole process itself and the process of creating an equitable agreement or solution.

- Justice: Some proponents of RJ claim in order to provide justice punishment of wrongdoers is necessary while other claim that punishment serves only perpetuate crime in the future while not addressing the needs of victims and offenders.
- Definition Problem: A major concern of RJ is the failure of a coherent account of what it is and its aims. The purposed RJ goals are vaguely formulated with no apparent priority or order. The myriad of perspectives on RJ has created many identities that in turn creates theoretical, empirical and policy confusion
- Overall critical perspectives: Assumes remorse, guilt, responsibility, harm etc...are quantitatively and qualitatively measureable. Ignores ethnic, gender, age and socio-economic factors in the justice process.

Recommendations

- *Develop a globally agreed definition on what Restorative Justice is and what it hopes to achieves*
- *Develop a unified restorative justice theory that is concise and encompassing*
- *Develop methods to identify and measure the successes of RJ practices and terms such as restoration*
- *Development of a single body to oversee its development and to implement and enforce safeguards*
- *Further research into the relationship with the principles of human rights*
- *Further research into the relation of RJ to the law and its relationship with the Government*
- *Improve the technical and practical quality of RJ practice to ensure realistic goals and responsiveness to the given context*

“There is no lasting hope in violence, only temporary relief from hopelessness” – Kingman

Brewster (Aertsen & et al. 2008: 3)

This report is about Restorative Justice, a concept that has no single meaning nor has a single application. Despite this, restorative justice has been in the spotlight as both an opponent and a compliment to the current criminal justice system. In many parts of the world, citizens and criminal justice professionals are engaged in devising and exploring new and conceptually different methods to respond to crime. Punishment, offender surveillance and treatment dominate the mainstream criminal justice system. Restorative justice is one of these new and different conceptual models in response to the current criminal justice system. Many see restorative justice as a promising way to redress problems within the criminal justice system which appeals to the interest of victims and promises reduction of re-offending, satisfaction of stakeholders involved and empowerment¹.

Restorative justice differs from the current criminal justice system by applying a ‘*new lens*’². This new lens is less about creating larger and tougher criminal justice systems, punishing offenders and more efficient treatment programs. It is more about building local citizen and community efficiency to respond to crime, holding offenders more accountable, repairing harm and grief caused by the crime and building new relationships that endure to reduce re-offending³. It is not just about crime being a violation of an abstract entity (i.e. the state) but as a violation of people and human relationships and the subsequent restoration of these harmed relationships.

However, defining restorative justice concisely is not a simple task. Restorative justice has encompassed a wide and diverse set of values and ideals, so that a definitive and final definition has not yet emerged. Research and findings on restorative justice is broad and is compared to a *widening river*⁴. According to Zernova, the concept is quite often described by reference to what is

¹ (Zernova 2007):1

² (Zehr 1990)

³ (Bazemore & Schiff 2001):5

⁴ (Zehr 2002):62

not⁵. It is not focused on punishing offenders but rather repairing the harm caused by the crime. Concentration is on the relationship between the victim, offender, community and crime and how best to repair the harm or issues that arise, to restore the relationships between the stakeholders involved. Restorative justice is partly defined by its difference from the mainstream criminal justice system, emphasising its inherent voluntarily and informality aspect.

In practice, restorative justice appears in a diverse way in the form of varying programs and practices: it can be used inside or outside the mainstream criminal justice system: and it provides different levels of restoration. Yet, despite the diversity, restorative justice has a commonality in its participatory process where all stakeholders come together to resolve collectively how to deal with the aftermath of crime⁶.

Many questions arise concerning restorative justice: where does it belong, inside or outside the criminal justice system? Is it applicable on a wide scale or certain crimes? Walgrave claims that the lack of clarity is detrimental for research as the object investigated, if not well delimited, cannot be investigated accurately⁷. These questions and many others are necessary to effectively evaluate restorative justice. This research paper will address restorative justice on many levels to provide recommendations for further research.

3. DEFINITION

Restorative justice [RJ] is not easily defined due to the wide net it encompasses. It can be implemented at a variety of stages in the justice process, and is not only used in adult and juvenile criminal matters but also in civil matters such as family welfare and child protection. RJ has one common facet that is RJ processes are applied to offenders to have admitted or taken some responsibility to an offence. Literature is in abundance on RJ yet there is no clear, defined and common definition used. Rather an amalgamation of previous concepts or entirely new outlooks on

⁵ See note 1:1

⁶ See note 1:2

⁷ (Walgrave 2008):2

what RJ is. Advocates of RJ disagree on what should and should not be considered RJ, but a common and general description is of stakeholders coming together to discuss the situation with the aim being to repair or restore the harm caused by the crime. This however, becomes quite narrow and suggests face to face or mediation in the form of forums only as RJ.

To explore the definition of what RJ really is, one needs to explore the ideals it represents and its aims. This paper will therefore identify definitions of RJ by researchers and institutions and examine which best describes RJ or if a more precise and encompassing definition is needed.

Firstly it is important to discern how RJ is different from the current mainstream criminal justice system. According to Daly & Hayes, three elements emerge when discussing RJ. The greater emphasis on the role and experience of the victim in the criminal process, it allows lay and legal actors decision-making authority and finally it permits more of a free play of discussion between all stakeholders involved. The aim is to repair the harm caused by the crime and not deal out retributive punishment⁸. Strickland claims that RJ is different because it does not focus solely on the crime as a law breaking event rather it looks at it in a broader context and analyses the harm inflicted on the victim, offender and community⁹. It allows empowered by incorporating parties that would normally have no say in the crime and the resulting actions. Finally, RJ measures its success from how well the harm is repaired and restored rather than how many offenders are convicted.

RJ cannot be simply defined by what it is not, because implementation of programs needs a clear and concise definition of what they hope to achieve. In the following section, a few standout and well referred definitions will be cited to build an image of what RJ is.

Tony Marshall, an early pioneer, states RJ is a:

⁸ (Daly & Hayes 2001):1

⁹ (Strickland 2004):1

“Problem-solving approach to crime which involves parties themselves and the community in general, in an active relationship with statutory agencies...A process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of an offence and its implications for the future” - (Tickell & Akester 2004:19)

The above definition has two faults; firstly, it does not mention that the outcome has to be restorative - it can have the same retributive character as in the criminal justice system. Secondly, it implies that the restorative process must bring the parties together. An example would be victim support through community services that can be restorative without the victim having to attend a forum with the offender¹⁰. Howard Zehr proposed an alternative definition focusing more on the idea of restoration.

“Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs and obligations, in order to heal and put things right as possible” – (Zehr 2002:37)

Zehr and Mika try to encompass an over-arching view of what RJ is, where crime is fundamentally a violation of people and interpersonal relationships which results in obligations and liabilities. RJ seeks to heal and put right the wrongs¹¹.

Bazemore and Walgrave, take a simpler approach by describing RJ as:

“Restorative Justice is every action that is primarily oriented toward doing justice by repairing the harm that has been caused by a crime” – (Bazemore & Walgrave 1999:48)

¹⁰ (Walgrave 2008):19

¹¹ (Zehr & Mika 1997): 51

The above definition is the reduction of the most crucial characteristic of RJ, which is restoration and provides the premise for the idea of what RJ is. It is redefined in another publication by Walgrave:

“An option for doing justice after the occurrence of an offence that is primarily orientated towards repairing the individual, relational and social harm caused by that offence” – (Walgrave 2008:21)

It is noted that this definition is preferred by the author as RJ is not a limited set of programmes but an option which inspires different degrees of programmes, initiatives and systems. Simply put, RJ is the compass and not a map¹². However, to simply define RJ outside the scope of practical implementation is insufficient.

Van Ness and Heetderks Strong define RJ as:

“Different way of thinking about crime and our response to it. It focuses on the harm caused by the crime: repairing the harm done to victims and reducing future harm by preventing crime. It requires offenders to take responsibility for their actions and for the harm they have caused. It seeks redress for victims, recompense by offenders, and reintegration of both within the community. It is achieved through a cooperative effort by communities and the government.” – (Van Ness & Strong 2006:50)

Furthermore the United Nations Office on Drugs and Crime claims, RJ is a way of responding to criminal behaviour by balancing the needs of the victims, offender and the community. It is an evolving concept that presents different interpretations throughout the world, inhibiting a global consensus on what RJ really is and what it entails. There are many terms that are used to describe the restorative justice movement. These include “communitarian justice”, “making amends”,

¹² (Zehr 2002):10

“positive justice”, “relational justice”, “reparative justice”, “community justice” and “restorative justice”, among others¹³.

The UN’s paper on RJ, defines RJ programmes as any programme that uses restorative processes and seeks to achieve restorative outcomes. Restorative processes are subsequently defined as any process in which the victim and the offender and if needed, other members and the community affected, participate together actively to resolve matters arising from the crime with the help of a facilitator. Restorative outcomes

Further Reading - Definition

Johnstone. G & Van Ness.D, 2007, *Handbook of Restorative Justice*, Willian, U.K

Pg 1-23: *Focus on the concept of RJ and its internal and external dynamics*

Pg 59-74: *Restorative justice values in detail*

Daly. K, 2002, ‘Restorative Justice – The Real Story’, *Punishment and Society*, 4:55-79

Critique on origins of restorative justice

Aertsen. I & et al, 2008, *Restoring Justice after Large-scale Violent Conflicts*, Willian, U.S

Pg 3-70: *Restorative values such as dignity and responsibility*

are defined to be an agreement reached as a result of the restorative process¹⁴. Thus it is this paper’s stance that a combination of Walgrave’s, Ness and Heetderks’ and the U.N’s definition are the most suitable in describing what RJ is, emphasising its wide scope and diversity.

4.

HISTORY

Restorative Justice can be traced several millenniums. It was practiced in early civilisations such as under the Sumerian Code of UrNammu (c. 2060 B.C), Babylonian Code of Hammurabi (c. 1700 B.C), Roman law of Twelve Tables (449 B.C) and the Law of Ethelbert in England (400 A.D)¹⁵.

“There is another kind of justice, Restorative Justice, which was characteristic of traditional African jurisprudence. Here the central concern is...in the spirit...the healing of breaches, the redressing of imbalances, the restoration of broken relationships” – Archbishop Desmond Tut (

¹³ (Miers 2001):88

¹⁴ (United Nations 2000)

¹⁵ (Bazemore 1998):772

(Archbishop Desmond Tut – Moore 2003:21)

Practice of restorative justice has existed throughout human history and is evident in the cultures of New Zealand's Maori community, Australian Aborigines, Native Americans, First Nations of Canada, African customary law and Celtic traditions¹⁶. This mode of conflict resolution was logical as smaller communities or tribes could not afford constant conflict or division as the struggle for life was a uniting factor. It is here that restorative justice's central component becomes apparent, that is to mend and restore broken relationships, to ensure unity and peace. However, one can then argue that in small groups this is ideal, but to apply it systemically to a large community or state becomes questionable. This question will be addressed later in the discussions of case studies.

Modern roots of RJ can be attributed to many factors, but there is clear driver, which is the limitations of the current criminal justice system and that harsh sentencing practices do not reduce recidivism rates and criminal law does not redress the harms inflicted on victims and society. RJ owes its growth to several movements. They are as follows¹⁷:

- *Informal Justice Movement* – The need for alternative dispute resolutions that include communities and access to the legal system.
- *Movement to use restitutions as a response to crime* – Victims' needs to be addressed rather than ignored.
- *Victims' rights movements* – Inclusion of victims in the legal process.
- *Reconciliation and conferencing movement* – Introduced two practices; victim-offender mediation and family group conferencing.
- *Social Justice movement* – Umbrella term for groups working together for social justice that does not coincide with retributive justice.

¹⁶ (Moore 2003):21

¹⁷ (Van Ness & Strong 2003):1-20

It is only since the late 1980s and early 1990s that RJ began to take off. It has led to a realm of practices, social movements, theory formation, eithical

Further Reading-History

Johnstone. G & Van Ness.D, 2007, *Handbook of Restorative Justice*, Willian, U.K

Pg 113-30: *Traditions of RJ and the concept of hybridity*

Daems. T et al, 2006, *Institutionalizing Restorative Justice*, Willian, U.S

Pg: 49-53: Details on Origins

reflection and empirical research all grouped into the sphere of RJ. Moreover, the application of the wide encompassing RJ is not just contained to the criminal justice system but also applied in schools, neighbourhoods to regulate disputes, child welfare matters and even dispute resolution involving systematic political violence¹⁸. It thus becomes apparent that RJ has diverse roots, and an even broader field of application. Does RJ then have a clearly defined set of thoughts and applications rather than merely being an amalgamation of confused and incoherent ideals and values? To address this to ensure one is able to explore more deeply into what RJ is, the definition of restorative justice must be analysed.

5. TOWARDS RESTORATIVE JUSTICE THEORY

A main proponent of RJ is the ineffectiveness of the current criminal justice system in reducing recidivism and promoting rehabilitation. The modern concept of crime is legalistic, that is considered as an act that is declared punishable by the governing authority¹⁹. As shown in previous sections, crime has not always been viewed simply as legalistic and under the onus of the government to prosecute or punish. In the past, crimes have been shown harm the community or the whole of society but a focus was put upon the harm to the victim and the key was to obtain restitution to

¹⁸ (Walgrave 2008):15-6

¹⁹ (Galaway & Hudson 1996):22

repair harm and to restore peace. To properly delve into what RJ represents in its application, one must explore how it differs from the current criminal justice system and is there a need for it?

According to Currie, there is a curious reluctance to submit the conceptual foundations of the criminal system to close examination or to investigate the empirical data on its functioning²⁰. In the paper by the Australian Institute of Criminology²¹, the annual analysis of crime and criminal justice in Australia showed reductions in property crime, assault and sexual assault between 2007 and 2008. However, long term trends in the crimes of robbery, assault and sexual assault have been increasing since 1996. One specific finding stated that there had been 49 per cent increase in assaults between 1996 and 2008. Interestingly, the number of victims reporting assaults to the police dropped between 2007 and 2008. Government expenditure on the criminal justice system increased from \$9 to \$10 billion. Prison numbers are continuing to rise with a figure of 1.4% increase in 2008 and the number of offenders serving community correction orders decreasing by 18-19%.

The increasing rate of crimes, albeit in specific sectors, along with the increase in prisoners is enough reason to explore alternate ways to tackle crime.

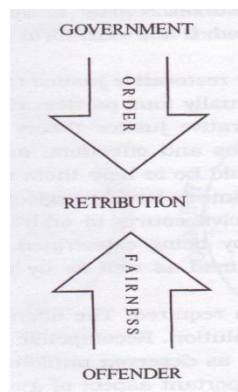


Figure 1: (Hudson 1996:25)

The above diagram illustrates the contemporary criminal justice system, where the focus is upon the offender and the government. The governing authority establishes order by enacting laws and

²⁰ (Currie 2000)

²¹ (AIC 2009)

dealing punishment to those who break said laws. To ensure proportionality against the governing authority, the alleged offender will be tried under court procedures for due and fair process.

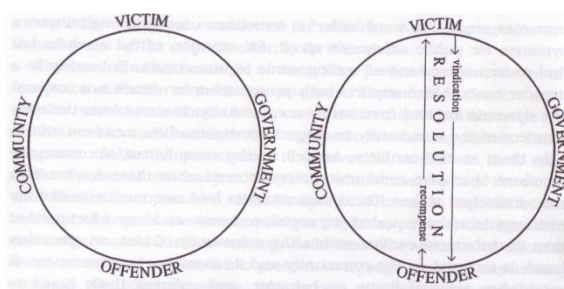


Figure 2: (Hudson 1996:26)

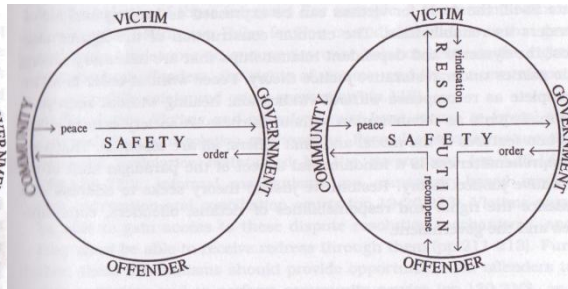


Figure 3: (Hudson 1996:27)

Above is the RJ view on crime in the form of circle: as the circle goes to the right, a fuller and comprehensive account is established. Firstly however, one must identify the foundations of RJ theory. They are as follows²²:

- Crime is primarily a conflict between individuals resulting in harm to victims, communities and offenders themselves. Law-breaking is secondary.
- Overarching aim of the criminal justice system should be to reconcile parties while repairing harm caused by the crime.
- Criminal justice systems should facilitate active participation by victims, offenders and their communities. It should not be dominated by select parties.

In the first two diagrams, RJ represents crime as having four participating parties, the victim, offender, community and the government. The relationship between the offender and victim in the RJ form contains overall resolution and recompense (something done or given to make up for that injury) from the offender rather than simple retribution. Punishment by retribution indicates the offender being a passive participant to the government's sentence rather than repairing harm caused by the crime²³. The third diagram shows the whole process in a macro scale where the peace and order is attained between both the government and community in which an environment of

²² (Van Ness 1993):259

²³ (Galaway & Hudson 1996):27

crime prevention can be encouraged. The combination of the micro (victim and offender) and the macro levels are shown in the fourth diagram.

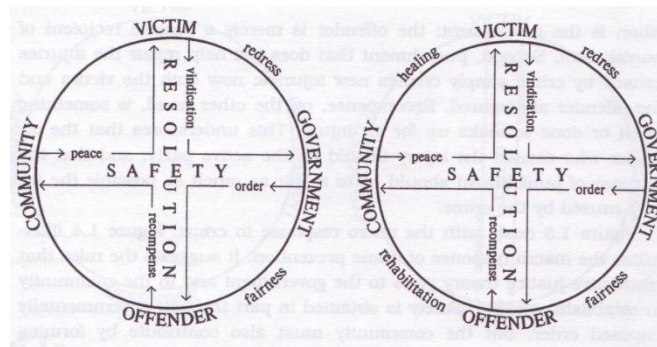


Figure 3: (Hudson 1996:28)

The fifth diagram adds the government’s responsibilities to ensure the reparations takes place while redressing the victim via appropriate restitution and compensation. The last diagram shows the RJ goals in general and completes the RJ view on crime as a whole by adding the community’s role to ensure rehabilitation for the offender and provide a healing environment for the victim. It becomes important to identify the circular relationship of all the parties involved as it implies a dependency on all parties to ensure the process is undertaken effectively and completely.

There is little doubt that a broad consensus exists that the basic structure of the adversarial system should also remain a predominant feature of the administration of Australian criminal justice. However, a range of alternative or complimentary (sic) approaches may also be utilised within this framework” – (Currie 2000)

The above quote represents this paper’s stance that RJ provides a workable framework to ensure a more effective way to deal with the crime. As opposed to searching for a complete alternative, RJ provides a complimentary tool to the current criminal justice system. The next sections will present a

quick overview of the stakeholders involved in RJ and then the programmes and processes that are present in RJ.

Further Reading-Crime

Zernova. M, 2007, *Restorative Justice: Ideals and Realities*, Ashgate, England

Chapter 2: *Restorative Ideals – Alternatives to Criminal Justice*

Gabbay. Z, 2006, *Restorative Justice: A passing trend or a fundamental change in the public response to crime*, Columbia University, U.S

U.S as a case study with a great insight into the current criminal justice system

6.

STAKEHOLDERS

Restorative processes include stakeholders not traditionally involved in the criminal justice system. RJ practices encourage a variety of stakeholders to come together to discuss the crime, the impact caused and the resulting needs, interest and responsibilities evident²⁴. The focus is on a forum that provides an informal structure to discuss the crime and its aftermaths. Mainstream criminal justice processes meet only a small part of victim, offender and community concerns after the crime has been committed. This can be due to the state focusing on establishing law and order through the imposition of guilt and determining the appropriate degree of punishment. Johnstone & Van Ness state the focus is on what laws were broken, who broke them and who needs to be punished. Victims, therefore, are secondary to the effectiveness and efficiency in terms of the justice process. Importantly, the justice system assumes it is the state's responsibility to address all stakeholders' concerns rather than exploring if they can be met by other more appropriate sources. In the RJ approach, stakeholders will express their own needs, interests and responsibilities, an example being the victim is able to voice the harm or consequences of the crime affecting them. To ensure that all the stakeholder's needs are being covered, three principles are introduced as a general framework. They are as follows²⁵:

²⁴ (Johnstone & Van Ness 2007):228

²⁵ See note 24:230

- Repairing the harm caused by the crime
- Involving and including key stakeholders to the greatest extent possible
- Transforming the relationship between government and communities into one of a collaborative effort

There are many key stakeholders involved but this paper will outline the four main stakeholders and identify the immediate, intermediate and long term needs, interests and responsibilities in their respective subcategories.

Victims and Offenders

Immediate needs, interests and responsibilities (those that occur in the immediate aftermath of the crime and during the RJ processes)

- Information about the process, the victim/offender and the offence
- Reassurance and acknowledgment
- A fair, satisfying and just process
- Support from family, friends, community and the justice process
- Full participation in the process
- Apology from the offender
- Reaching a reparative agreement
- Receiving reparation/compensation for material and non-material damage or loss.

Intermediate needs, interests and responsibilities (those that occur in the weeks to months following the RJ process. Usually used as markers to measure success or failure.

- Victim and offender re-integration
- Relationship building
- Complete reparation
- Offender will not harm other – re-offending

Long term needs, interests and responsibilities

These cannot be easily identified as goals in the RJ process; rather they represent the overall goals of what RJ offers. The shift moves from the crime and its aftermaths towards repairing the harm done to the victims, offender and the community. The main goal can be varied but it would be the victim and offenders reintegration into society via the facilitating help of the broader community...plus the ability of the broader community to facilitate an environment to prevent and respond to crime in the future. The long-term goals, however, do not have sufficient empirical evidence to clearly determine if RJ processes result in clear and significant long term changes in the stakeholders involved.

Community

Defining 'community' can be an arduous task, as it can encompass many things. It can be considered geographically as in the local neighbourhood or it can be a social construct such as a church group or work place. Moreover, it can even be a micro-community such as a school, prison or housing project. The definition this paper adheres to is the one usually connected to RJ processes, specifically the 'community of care' that includes anyone who feels connected directly or indirectly to the persons involved or the crime itself. There are three important purposes of including the community in RJ processes. Firstly is it represents people who have been indirectly harmed by the crime and thus are responsible for expressing the harm caused and the necessary restoration needed. Secondly, the community serves an important normative function by developing, communicating and upholding the standards to which its members are expected to adhere. Lastly, the community is responsible for developing a 'collective ownership' of the problem of crime and thus creating an environment of being able to prevent and respond to future crimes²⁶.

Immediate responsibilities (needs and interests are individual and thus only represented for the victim/offender)

- Provide a forum to talk about the crime and its resolution
- Include community members in determining what happened, who should be held responsible and why

²⁶ See note 24:236

- Communicate about the impact of the crime on community members
- Be informed about services and resources for victims and offenders

Intermediate responsibilities

- Create a safe environment for community members, including the victim and offender
- Develop mentorship for offenders and ensure victims are supported
- Follow-up to ensure reparative agreements are fulfilled

Long term responsibilities

- Develop capacity to resolve problems without government involvement
- Develop and support re-integrative strategies for victims and offenders

Government

In the RJ paradigm, the government shifts away from solely upholding the law and punishing offenders towards encouraging community members to take responsibility and make decisions about their own well-being. Specifically the government should provide support, education, resources and oversight to ensure the RJ process

Further Reading-Stakeholders

Johnstone. G & Van Ness.D, 2007, *Handbook of Restorative Justice*, Willian, U.K

Pg 426-45: *Re-offending*

Strang. H, 2002, *Repair or Revenge: Victims and Restorative Justice*, Clarendon Press, Oxford

Pg:8-24, 49-58: *Detailed focus on the Victim's perspective and needs*

Gerkin. P, 2006, *Seeking Justice for Victims and Offenders: A needs-based approach to Justice.*

Great source for Needs-based approach and dynamic in RJ

Strickland. R,2004, *Restorative Justice*, Peter Lang, NY.

Chapter 2-5: *Detailed overview of stakeholders*

is fair and just and to empower its citizens. The government's role is not to simply hand over the justice process to the community but rather to transform the outlook towards community and citizen driven restorative responses. As such the government's responsibility is not related to time but rather its overall transformative power, and its ability to clearly define standards and guidelines and to oversee RJ processes.

Government's Responsibilities

- Address victims' needs irrespective of their offenders' legal status
- Support offenders taking responsibility for their actions
- Create resources for offender competency development
- Recognise community as an integral element in preventing and responding to crime and develop its capacity to do so

7.

PROGRAMS

RJ in practice is wide and diverse, specifically in the criminal context, through a few select programs are common and represent what RJ hopes to achieve. Due to the large extent of literature and empirical data available on such programs, only the dominant ones will be described while others will be mentioned by name and can be followed up in the *Further Reading* section at the end of this section.

A restorative process can be initiated instead of bring the crime directly to the attention of the criminal justice system, usually to deal with minor crimes. Also, police officers can informally integrate RJ programs into their decision-making. However, for more serious crimes the RJ processes are more likely to be implemented later in the criminal justice process. In essence there is not clear direct line to RJ processes in the criminal justice system but rather differing paths. Below is a diagram that illustrates several pathways to enter into RJ processes.



(U.N 2006:14)

Victim-Offender Mediation²⁷

Victim-offender mediation programs are one of the earliest and most common RJ processes. V-O mediations are meant to address the needs of the victims while holding the offenders accountable. They are used in cases that are less serious and can be referred by the police, courts or prosecutors. Like most RJ processes, the victim and offender must both be voluntary participants. The processes can be used before, during or even after the offender is charged. The process is effective when the victims and offenders meet face to face and express their feelings to each other, and thus can develop a new understanding of the situation and the consequences of the crime. A trained facilitator will help the process along for an agreement to be reached allowing “closure” surrounding the crime to be achieved if possible. The facilitator will meet before hand with both parties and will help them prepare to ensure the victim is safe and understand what is expected and to suggest key supporters to join in the process. More will be discussed on this type in the case study later.

Family and or Group Conferencing²⁸

Unlike victim-offender mediation, family/group conferencing involves a larger number of people and allows victims, offenders, and their key supports to meet and decide how to deal the crime and the consequences. A facilitator is chosen who contacts both the victim and offender, describes the process and invites them to the conference. Attending the conference allows both victim and offender to choose who they see as key supports to attend and participate. The whole process, importantly, is *voluntary*: for it to proceed the offender *must* take responsibility for their offense. In this process, the victim can make the offender aware of the harm caused and the ramifications of it while the supporters on either side provide a support network to make amends.

Healing/Sentencing Circles²⁹

²⁷ (U.N 2006):17-8

²⁸ (Umbreit 2000):2

²⁹ (Walgrave 2008):36-7

Healing/Sentencing circles are deeply rooted in indigenous traditions in Canada and the U.S and are used to deal with injustices and conflicts in local contexts. Specifically, healing circles are meant to restore peace within the native community that is affected by particular problems. An example would be family violence. Sentencing circles are communities' co-judgements in the criminal justice procedure in the presence of an official judge. Both circles involve the local community in dealing with the repercussions of the crime (not the crime itself) and aim at restoring peace through healing and reparations. However, translation into urban contexts faces several obstacles for it to be effective such as active and tightly-knit communities to be involved and be prepared to make the time investment.

Community Restorative Boards³⁰

These boards are a prime example of community members becoming actively involved in the justice process. They are small groups of active citizens specifically trained to conduct public, face-to-face meetings with offenders who are *sentenced* by the court to participate. This differs from other programs where the offender has an option to attend. Aims of the process are to provide opportunities for victims and the community to confront offenders in a constructive manner while the offender has the chance to take responsibility. The process involves the crime being placed on the table, and the nature of it and, particularly its effects being examined. The board, victim and offender discuss until an understandable and acceptable agreement which includes the methods, actions and time line of how the harm will be repaired. The process ends when the offender has fulfilled their obligations as per the agreement.

Other

- Victim Support
- Victim-Offender Panels

Further Reading - Programs

Tiff. L & Sullivan. D, 2006, *Handbook of Restorative Justice: A Global Perspective*, Routledge, London.

Pg 52-107: *In-depth focus on Victim-Offender Mediation and Conferencing*

Strickland. R, 2004, *Restorative Justice*, Peter Lang, NY.

Pg 1-13: *General Practices and specific techniques*

³⁰ (Gavrielides 2007):35-6

- Victim Impact Statements
- Prisoner Assistance Programs
- Re-integrative Shaming
- Citizen boards
- Community Service
- Peace Committees

8. INTERNATIONAL LAW & HUMAN RIGHTS

Despite human rights not being in the forefront in discussions of RJ, it provides the framework in which RJ must operate. It provides safeguards in informal and informal structures and importantly, prevents abuses of RJ practices. International human rights conventions have created and sustained a momentum towards implementing RJ practices. Human rights protection is a vital part in the development of RJ practices, the criminal justice system's emphasis on due process rights is a rather narrow construct of rights³¹. Human rights such as dignity and equality can be enhanced through the acknowledgement of responsibility of one's actions in a RJ process. Humbach offers the new perspective that de-personalised rights and rules cannot effectively mediate the intricacies and interactions among human beings. He refutes the idea that justice is achievable solely through the protection of individual rights. Instead, *a justice of right relationships* is what should be strived for. At its core, the justice of right relationships is the intrinsic good that ensure people who live in interaction with others maintain the quality and mutual worth of their relationships, instead of insisting on their individual rights³². Human right encompasses a broader view on the inter-complexities of human relationships and how that translates into the real world. RJ promotes an alternative ideal, which moves away from the individualisation of rights towards collective rights and community unity.

³¹ (Johnstone & Van Ness 2007):591

³² (Humbach 2001):42

What must be explored is how RJ is translated into values that can be introduced into legal frameworks, which involves identifying the legal frameworks in which RJ is present. Braithwaite describes a list of values relevant for RJ and presents them in three categories. First are constraining values, which are fundamental procedural safeguards that prioritise where serious sanction is at risk. They include empowerment, respectful listening, equal concern for stakeholders, accountability, appealability and respect for human rights codified in international conventions³³. The second category is maximising standards, to encourage their promotion. They include healing and restoration that can come in the form of restoring dignity, compassion and social support. The last category is emergent standards, which are the acts of apology, remorse, censure of the act, mercy and the forgiveness of the crime. Unlike the second category these values are not meant to be maximised but left for the stakeholders to reach what is possible. Braithwaite's values are a bottom-up approach in which RJ must be seen as contextual and dynamic in its movement to be able to cater to the nature of the crime and the variables apparent in dealing with a diverse range of stakeholders. He furthers this by identifying the dangers of standardisation of RJ by referring to codifying a set of standards and rules and then implementing such values in a context which conflicts with, say, century old traditions of elders of indigenous groups. Essentially, the positive of standardising RJ is that it allows key elements to be ever-present and to inhibit abuse. The negative is that it can dismiss practices and values that are equally important and effective in certain contexts. The contextual nature of RJ processes inherently encourages a narrow view on what RJ can do and how it should do it. This is still an area that needs to develop and grow. Due to word constraints, the international conventions in which RJ is represented will be listed below; the *Further Research* section provides detailed literature if required.

United Kingdom's Human Rights Act 1998 has introduced many of the principles on the European Convention on Human Rights and the Universal Declaration of Human Rights. Such conventions were produced from the massive human rights violations in history and stress the importance of due

³³ (Braithwaite 2003)

process and protection from arbitrariness, disproportionality and discrimination³⁴. The rights of victims and witnesses were under looked in such conventions, so that RJ provisions have been provided in part to fill this gap. The eleventh session of the UN Commission on Crime Prevention and Criminal Justice, Canada put forward a resolution, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*³⁵, in developing and implementing RJ. The principles in summary are:

- RJ programmes should be available at all stages of the criminal justice process
- Restorative processes should only be used with the free and voluntary consent of stakeholders involved and who should be able to withdraw at any time.
- Agreements should be Reasonable and proportionate
- All parties should acknowledge the basic facts of a case as a basis for participation in the restorative process and not as an admission of guilt to be used in court
- Disparities such as power imbalances, parties' age, maturity or intellectual capacity should be fully taken into account
- If RJ process fails, criminal justice officials should do all they can to encourage the offender to take responsibility for the victim and affected community along with the re-integration of the offender and/or victim into society
- Right to legal advice before and after RJ programmes and parties should be informed of all their rights and protections
- Confidentiality and all proceedings as flagged not to be disclosed unless consented
- Judicial discharges based on RJ agreements should preclude prosecution on the same facts

The following instruments are further examples that reflect RJ values in codified international agreements:

³⁴ (Tickell & Akester 2004):30-1

³⁵ (U.N 2000)

- U.N General Assembly's *Standard minimum rules for the administration of juvenile justice*
- Economic and Social Council's *Victims of crime and abuse of power*
- 8th UN congress' *Prevention of crime and the treatment of offenders, Basic principles for the treatment of prisoners* and the *Development and implementation of mediation and restorative measure in criminal justice*

9.

CASE STUDIES

Two case studies are presented, both deal with the RJ process of conferencing. The first relates to a sexual assault crime while the other relates to ethnic conflict. Both studies reflect a duality, namely, the individual vs. the collective, personal vs. social and inside and outside criminal justice system. The following section will briefly discuss each case study and the *Discussion* section will then evaluate the RJ practices.

8.1

Case Study 1³⁶

Daly & Curtis-Fawley state that studies of sexual assault victims' experiences in the criminal justice system come to similar conclusions. Despite legal reforms, both the court and police continue to fail victims. RJ advocates propose a combination of state and extra-legal intervention in the circumstances where the offender has admitted responsibility for the offence. An example is the RJ process of conferencing. In South Australia, conferences are currently used largely in court diversion for juvenile sexual assault cases (there are no jurisdictions that use the conferencing method for adult sexual assault cases). One sexual assault case will be briefly discussed.

³⁶ (Daly & Curtis-Fawley 2006)

Offender: Rick (male 17 years old)
Victim: Rosie (female 12 years old)
RJ Process: Family Conferencing Programme

Offence:

The crime was committed at an Army cadet training camp. Rosie has injured her ankle during a training exercise and had trouble walking. Rick had ordered the others to go on ahead which left him alone with Rosie. As Rosie and Rick slowly walked back, Rick pushed Rosie on the ground and began to rub Rosie's breasts and her bottom through her clothing and proceeded to push his hand between her legs. This occurred for 4 minutes while Rick attempted to undo her clothes which resulted in resistance from Rosie in the form of Rosie elbowing Rick aside and getting away to report the incident to an older cadet. Police arrived 3 hours later to interview Rosie and she recounted the incident. Rick was taken to the police station with his parents and admitted to touching Rosie on the chest and back region but refuted touching Rosie near her genital area. He was charged with indecent assault.

Leading to the Conference:

The time between the offence and the conference date was extremely long, nearly 15 months. The case took 4 months to reach the court and was listed four times before it was diverted to conferencing. Rick met with a counsellor several times and it was identified that Rick took responsibility for the assault and he did not require long term therapy. The Youth Justice Coordinator [YJC] spoke with Rick three times before the conference and came to the same conclusion. Rick's mother was also spoken to, she was supportive but minimised the assault by referring to the idea that there are worse types of assaults. The YJC recalled she made it a point to counter these views. For Rosie, the YJC claimed she was nervous and intimidated but was calmed by understanding the conferencing process and its difference from court. In typical cases, the YJC would

meet with both the victim and offender but for Rosie this was not possible and so the YJC did not meet with Rick to ensure it be fair.

Conference

The conference participants were:

- Rosie and her grandmother
- Rick, his mother and father, his counsellor
- Male police officer and the YJC

Rosie stated the priority for her was to tell Rick how the crime affected her, to hear his account and for him to apologise and not do it again. During the conference Rosie felt intimidated, 'scared and angry' by Rick's parents, emphasising the power imbalance (by Rosie only having her grandmother and not her counsellor present) against Rick's parents and counsellor. Rick disagreed with the police statement stating there was no vaginal contact. Rosie immediately claimed that Rick was minimising the offence and she was upset that Rick's parents and his counsellor focused on how it affected Rick, "like he was the victim" (Daly & Curtis-Fawley 2006:8). She felt that Rick's parents were ganging up on her and was angry at Rick's counsellor repeatedly defending him. Rick's counsellor had another appointment and had to leave and was allowed to interrupt Rosie's account to discuss Rick. This emphasised the ability of a professional to supersede the victim with their priorities. However, Rosie was surprised to learn how it affected Rick and saw his remorse. The YJC commented on Rick's evasive use of language by not referring to the offence specifically and was corrected by the YJC immediately by making him refer to the offence as 'when he assaulted Rosie'. Combined with the Police officer's support of Rosie the power imbalance was lessened. Moreover, the YJC claimed that:

"Rick didn't see Rosie as a human being at all. He was there for himself, and there were some things...that indicated that if she hadn't have struggled he would gone further...he didn't show empathy to Rosie." (Daly & Curtis-Fawley 2006:9)

Rosie's experience empowered her to confront Rick and state 'you did this' to his face while retelling her account. The YJC commented that Rosie was the winner from this by being able to stand up for herself.

Apology and agreement

Rick did not admit to Rosie's account and this could be seen as re-victimisation on Rosie's part yet all parties believed Rosie's account by the end of the conference. In the end, Rick did not apologise directly to Rosie. Rather regretted it off into some distance corner and spoke only about himself and according to the YJC, *"he talked about it ruining his life...it was all me, me, me"* (Daly & Curtis-Fawley 2006:10). Rick never spoke directly to Rosie until his mother told him to do during the apology yet Rosie continually spoke to him directly. Rosie reacted to the apology by stating *"I'm not afraid of you anymore, I accept your apology, and I know you'll never do this to anyone again"* (Daly & Curtis-Fawley 2006:10).

However, Rosie claimed that the conference was unfair in two respects. It was procedurally unfair as she believe everyone would have an equal say and she did not have any say during the creation of the agreement (Rick's sentence). Instead, Rick's parents and his counsellor were the main group who decided on the content. Rosie claimed what the point of her being there was, if they had already decided what would happen to him without taking her input into account. Rosie wanted Rick to do community service but the YJC was not supportive of her idea. Secondly, she was not able to object to the finalisation of the agreement. The agreement included continued counselling with his Mary Street counsellor and to send a written apology to Rosie.

Post-Conference

Despite Rosie's dissatisfaction concerning the agreement she was generally happy with the procedure and accepted Rick's apology and sentence. She felt she could have a new start and put it all behind her and recommended conferencing to others.

Political tensions in Fiji behave in complex ways, such as the inter-communal relations between indigenous Fijians and Indo-Fijians. Specifically, inter-ethnic conflict has become a part of the 'normal' political culture in Fiji with the potential to erupt into violence which in turn is a threat to stability. This case study will explore the inter-ethnic conflict and the use of a form of RJ to achieve conflict resolution. Inter-ethnic conflict in Fiji is understood through four issues:

- Claims to legitimacy

This refers to the separate claims by Fijians and Indo-Fijians about their legitimate place in Fiji. Indo-Fijians claim stemmed from being an imported colonial labour force to being equal members in Fiji. Fijian claims are based on indigenous primordial rights, as opposed to what they see as the visitor rights of Indo-Fijians. These conflicting claims shape the segregationist communal politics in Fiji.

- Institutionalised Conflict

This refers to the institutionalised and instrumentalisation of ethnic segregation in for of institutes, political parties, constitutions and government policies.

- Socio-economic distribution

Fijians feel a sense of socio-economic disadvantage in relation to other ethnic groups. Indo-Fijians claim the lack of access to land for their basic sustenance which in turn results in economic marginalisation.

- Inter-cultural discourse

Communal relations involve perceptions and the production of stereotypes. Fijians see Indo-Fijians as 'selfish' and 'cunning'. While Indo-Fijians see Fijians as 'lazy' and 'stupid'. These stereotypes reproduce ethnic prejudice in the social and communal sphere.

³⁷ (Dinnen 2003)

Exploration of conflict resolutions possibilities lead to customary practices, namely practices that aim for communal coherence. It is noted that communal practices fall into the realm of RJ by seeing individuals as part of a larger socio-communal setting where whole groups are needed to repair and restore social fractures and rehabilitate individuals concerned.

The *Veisorosorovi* [VSS] is a proposed model for the design of a restorative justice approach to conflict-resolution and peace building in Fiji. The term comes from the Fijian word *soro*, meaning to humble oneself, surrender or ask for forgiveness while taking responsibility for the crime or harm caused. Below are the aspects of the VSS model:

- *The Ceremonial Setting*

VSS involves two parties coming together in an atmosphere of mutual trust and respect, each making presentations to each other. It is the point of convergence for social and political engagement. The presentation (*vakacabori*) represents humility, admission of fault and a request for forgiveness. Acceptance of the apology is referred to *ciqoma* and represents forgiveness and readiness to rebuild fractured relationships. Fijians see this process in a spiritual context, implying broken bonds or mistrust will result in punishment from the ancestral spirits (*vanua*).

- *Admission of mistakes*

VSS requires the admission of mistakes by the wrongdoer (*daukakacala*) (the incident can be intentional or an accident). It is an admission of guilt and responsibility while also an expression of remorse. It is important that the process focuses on the humanity of the offender, reminding the community that everyone makes mistakes.

- *Forgiveness*

An admission of a mistake is followed by a request for forgiveness (*veivosoti*). The collective pronoun 'we' is used even in individual cases where the actions of individuals becomes the responsibility of the whole clan.

- *Reciprocal engagement*

VSS is a reciprocal process where the offender presents their case by taking responsibility and requesting forgiveness and the offended party is obliged to reciprocate in a humble way. It is used to form a mutual trust and bond between the parties.

- *Trust and transformation*

An important pre-requisite is collective trust. Both parties expect trust from each other in the form of consensual resolution, openness and honesty. Transformation occurs through the peace building process, ensuring stronger communal coherence and future peace.

However, the VSS has its disadvantages it can be abused by offenders escaping legal prosecution from serious crimes. This can be addressed by applying the VSS model in a complimentary role to the criminal justice system. It is more effective in addressing conflicts between collective parties rather

than individuals. This can be seen in individual cases where the rights of the individual are harmed (such as abuse) and the responsibility cannot be easily translated to the whole clan or kin group.

To help resolve inter-ethnic conflict in Fiji needs greater recognition to the principles embodied in the VSS model, namely RJ principles. Moreover, a cross-culture synthesis could be provided by examining other traditional forms of conflict

Further Reading – Case Studies

Tiftt. L & Sullivan. D, 2006, *Handbook of Restorative Justice: A Global Perspective*, Routledge, London.

Pg 422-434: *RJ failing in Rwanda*

Dinnen. S, 2003, *A kind of mending: Restorative Justice in the Pacific Islands*, Pandanus Books, ACT

Review of restorative justice practices in the Pacific Islands

Tickell. S & Akester. K, 2004, *Restorative Justice: The Way Ahead*, JUSTICE, U.K

Chapter 4-9: Case studies of Australia, New Zealand, U.S, Austria, Norway, Northern Ireland, Scotland, England and Wales

Gal. T, 2006, *Victims to Partners: Child Victims and Restorative Justice*, ANU, ACT

Children as victims – An indepth case study

Hudson. B, 2002, 'Restorative Justice and Gendered Violence. Diversion or Effective Justice?', *The British Journal of Criminology*, 42:3, pg 616

Gender based case studies

Daly. K, 2006, 'Restorative Justice and Sexual Assault: An archival study of court and conference cases', *British Journal of Criminology*, 46:2, pg.334-56

South Australia Juvenile Justice and Criminal Justice (SAJJ-CJ) Technical Report No. 4: In-Depth Study of Sexual Assault and Family Violence Cases. Brisbane, Queensland: School of Criminology and Criminal Justice, Griffith University, February 2007 (with Brigitte Bouhours and Sarah Curtis-Fawley).

South Australia Juvenile Justice and Criminal Justice (SAJJ-CJ) Technical Report No. 3: Sexual Assault Archival Study (SAAS), An Archival Study of Sexual Offence Cases Disposed of in Youth Court and by Conference and Formal Caution, 3rd edition, revised, expanded, and updated. Brisbane, Queensland: School of Criminology and Criminal Justice, Griffith University, July 2007.

The above two links can be found here:

<http://www.griffith.edu.au/professional-page/professor-kathleen-daly/publications>

resolution within the Indo-Fijian culture. The VSS model lends itself towards communal conflict rather than individual conflict, a stark contrast to the previous case study. Empirical data is needed to truly evaluate the effectiveness of the VSS model to restore and repair relationships.

The two case studies provided an overview on what RJ has to offer, in the first it was shown in the legal context, as a diversionary programme from court and at a personal individual level. The second showed RJ in the collective level as an informal structure used for dispute resolution of a social problem or a single crime itself. Both case studies highlight the positives and advantages of RJ, this paper will focus on four issues that arise; Power imbalances, Justice, problem with definition and an overall evaluation.

Power Imbalances

RJ has been criticised for its potential to perpetuate power imbalances and do not address issues of structural inequality that may be already evident between the victim and offender. According to LaPrairie such imbalances may serve to re-victimise the victim³⁸. Power imbalances present a crucial aspect of dispute resolution as they can serve to undermine the whole process itself and the process of creating an equitable agreement or solution. In the first study, Rosie felt this power imbalance quite strongly in the form of only having her grandmother present while Rick had both his parents and his counsellor. The lack of equal supporters resulted in Rosie stating that she felt Rick's supporters "ganged up" on her and "defended" him rigorously. These power imbalances emphasise the structural inequality, where the victim can be in a position to be ignored or suffer more trauma

³⁸ (LaPrairie 1995)

and fear from the whole process. This goes against the very premise of RJ and more efforts are needed to address this possible fault line. In the second case study, despite definitive empirical evidence the same can be possible. The very notion of the VSS model implies that both parties have mutual trust and will not abuse the process. However, safeguards against abuse of the system must be explored and implemented. Power imbalances can be generated by parties that use the VSS model as a 'way out' from the court or simply use the forum to serve their own needs and goals. In Rosie's case the power imbalance is somewhat adjusted by the presence of the YJC and the police officer who both helped Rosie during the conference. It is essential to the whole RJ process that the goals of RJ are met and are long lasting. RJ worked in Rosie's case, despite the power imbalance she was able to have a say and move on with her life. According to Moore, power imbalances highlight the importance of establishing a relational and systemic context of equality, mutuality and solidarity prior to engaging in the RJ process³⁹. To achieve this, supports should be provided for individuals that can compensate for power differentials and personal needs. This is necessary to create balance and to ensure power relations are equalised.

The Provincial Association Against Family Violence⁴⁰, provides a set of guidelines to encourage equality. They are as follows:

- Recognition of systemic inequality i.e. gender, age, cultural, social, economic and political differences
- Programs dealing with gender and child abuse should provide extra safeguards to protect victims
- Programs should work towards empowerment and participation must be purely voluntarily
- Victim's needs must be responded to as they are defined by the victim. It is *not the victim's responsibility* to encourage the offender to restore the harm done

³⁹ (Moore 2003):30

⁴⁰ See note 39:31

- Programmes should not be seen to replace the current criminal system but provide a complementary service

The above points summarise ways in which RJ practices can improve equality to minimise power imbalances. The last point however, points towards the question, does RJ offer *real justice*?

Real or cheap Justice

Critics tend to see RJ practices as sometimes decriminalising the crime itself by returning it to the status of a 'private matter'⁴¹. It is here an important distinction is made, that RJ cannot replace the current criminal system, it cannot deal with offenders that lack remorse and cannot achieve fact finding. However, in the context of RJ practices, it can *lessen* the crime and as a result provide a *cheap justice* for the victim. Offender's friends and family are the main proponents and this is seen in Rosie's case study. During the trial, Rick's mother and counsellor repeatedly back Rick and lessened the crime by essentially not acknowledging the harm caused to Rosie. At one point Rick's mother claimed "there are worse types of abuse", clearly the crime itself was not seen too seriously. This is furthered by Rosie's claim that she had no say in Rick's punishment, that it was generated by the majority of Rick's supporters input rather than her own input. Again this is a crucial point, RJ proposes to repair harm and restore relationships yet in the first case study, and Rosie's input was disregarded. It is here that the notion of *cheap justice* is emphasised. It is this report's opinion that RJ may focus too much on glossing over and repairing the harm on the surface without addressing the contextual needs of the victim. According to Tift & Sullivan, victims want a sense of vindication for the wrong done to them and they want the offender to stop harming and hurting them or other people. An apology may be the start but it is by no means the end⁴². In Rosie's case, Rick did deliver an apology yet according to the YJC his focus was always on himself and not the harm he did to Rosie. The question has appropriate justice been served? Rosie commented on the leniency of Rick's sentence, but was confident that he would not commit such a crime again. Rosie's satisfaction at the

⁴¹ (Morris 2002):603

⁴² (Tift & Sullivan 2006):139

end of the conference implies justice was evident. However, can RJ be abused to escape court and its severe punishments to RJ practices? This is a dangerous avenue; safeguards must be implemented to ensure that RJ practices are not abused. According to Robison⁴³, in order to provide justice punishment of wrongdoers is necessary. RJ thus plays a supplementary role to punishment. However, RJ proponents' claim offenders can make amends by demonstrating remorse and understanding of the harm caused. What becomes apparent is that neither of these is right or wrong, they can be right in certain contexts and wrong in others, they are contextual. Thus to be effective they must be applied contextually. RJ must incorporate strategies that can accommodate offenders that show genuine remorse and offenders who showed little to no remorse. In Rosie's case, a system should have been in place to ensure to identify if Rick showed genuine remorse and apologised sincerely and if not he would then undergo an agreement to ensure he does realise his wrongs. RJ thus lacks the contextual capability to provide for differing situations, it requires the ability to address offenders the degrees of remorse, regret and understanding shown by offenders to ensure that a proportionate and fair justice is provided.

Problem with Definition

A major concern of RJ is the failure of a coherent account of what it is and its aims. According to Hirsch, this failure is presented in four ways⁴⁴. Firstly, the purported RJ goals are vaguely formulated with no apparent priority or order. Examples include the notion of restoration for the victim, the offender to recognise the conflict and it to be healed, the communities trust to be repaired and the fear of crime diminished. The question of how this is measured is unanswered. Secondly, RJ advocates fail to state or identify the means to which these goals can be achieved and only state vague terms instead of precise methods. Thirdly, stakeholders and the decision making body itself seem to have no strict or concise guidelines. Seemingly, any method or means is allowed to achieve 'restoration'. Lastly, there is a minor focus on the criteria to assess the effectiveness of RJ programs.

⁴³ (Robison 2003)

⁴⁴ (Von Hirsch & et al 2003):22-3

Terms like victim satisfaction are used but not methods on how to measure it. Reference to the two case studies highlights the vast landscape of RJ, in the first study it was shown to be more precise in structure yet failed to measure or achieve restoration in its fullest. The second study showed it to be more traditional and aimed at the collective. One can identify both as RJ practices yet they are very different, raising the question of what really is RJ? Gavrielides claims the discrepancy is evident in the core of RJ, specifically if it is outcome or process based. Outcome based refers to restorative outcomes and thus risk applying RJ to include programmes that may have restorative outcomes but do not share the same procedural rules or values. Process based refers to the narrowing RJ to specific interventions where appropriate and voluntarily; running the risk of omitting practices that are mostly or partly restorative⁴⁵.

The myriad of perspectives on RJ has created many identities that in turn creates theoretical, empirical and policy confusion. Different facets and levels of understanding are reflected in notion of RJ that are presented yet no clear and concise definition is to be found. An example is found in RJ's claim to assist victims in recovering from crime. However, how can one measure this? It will be more for some victims than others; it will depend on the behaviour of the offender. Ideals like restoration, fairness, reparation and justice become subjective terms and forced into objective means. The lack of agreed upon markers or units of measurements put these notions outside of precise measurement. In the first case study, a level of measurement can be found in victim satisfaction yet even this was a mixed situation with Rosie claiming she was satisfied overall yet disappointed by the power imbalances and not able to contribute to Rick's agreement. This is a prime example of RJ offering a lot yet lacking methods to measure successes or failures. It thus recommended that a more comprehensive definition be applied to RJ. The language used must be able to present the definition in abstract ideas that are both precise and suggestive⁴⁶. The lack of precise and specific terms hinders the establishment and implementation of consistent restorative principles, policies and practices.

⁴⁵ (Gavrielides 2007):40

⁴⁶ (Bazemore & Schiff 2001):48

Overall Issues

There are numerous and a diverse range of critical perspectives regarding RJ, they are summarised in the following⁴⁷:

- Proponents make exaggerated and vague claims about what RJ can achieve
- A significant move away from punishment towards RJ will undermine the policy of deterrence
- Assumes that remorse, guilt, responsibility, harm, reparation and restoration are quantitatively and qualitatively measurable
- Assumes community and interested members will play their part without abuse or gender, ethnic, age or socio-economic considerations
- Is inappropriate in more serious crimes where the victim and offender do share fairly equal power relations (*an example being a child abuse case*)

The above discussion has highlighted many of the critical aspect of RJ. Overall, RJ presents a great set of ideas and a worthy paradigm shift. It cannot replace the criminal justice system, yet it doesn't claim to do so. It provides a complementary pathway to be used and provides a framework for victims to have a say. Offers offenders a chance to be responsible for the crime and the people it harmed. RJ focuses on crime at the root level by aiming to repair harm and restore relationships so people can continue to live their lives without harm.

⁴⁷ (Johnstone & Van Ness 2007):598

RJ is a dynamic and complex concept; it encompasses a diverse range of practices and is applicable to wide range of contexts. As shown by the two case studies, it can lie inside or outside the criminal justice system. It can embody concepts that are valuable yet hard to measure. It can be applied to situations where the variables are in the extreme making empirically study a difficulty. Its very definition is a myriad of diverse and ranging ideas and notions. RJ is a vast paradigm that needs to be focused to be effectively implemented effectively. In conclusion, this report identifies several recommendations to further the understanding and implementation of RJ.

- *Develop a globally agreed definition on what Restorative Justice is and what it hopes to achieves*
- *Develop a unified restorative justice theory that is concise and encompassing*
- *Develop methods to identify and measure the successes of RJ practices and terms such as restoration*
- *Development of a single body to oversee its development and to implement and enforce safeguards*
- *Further research into the relationship with the principles of human rights*
- *Further research into the relation of RJ to the law and its relationship with the Government*
- *Improve the technical and practical quality of RJ practice to ensure realistic goals and responsiveness to the given context*

- Aertsen. I & et al, 2008, *Restoring Justice after Large-scale Violent Conflicts*, Willian,
- Australian Institute of Criminology, 2009, *Australian Crime Facts*, Accessed at: <http://www.aic.gov.au/media/2010/march/20100318.aspx>
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