

# The politics of youth justice reform in post-conflict societies: mainstreaming restorative justice in Northern Ireland and South Africa

DAVID O'MAHONY

*Durham Law School, Durham University*

JONATHAN DOAK

*Durham Law School, Durham University*

KERRY CLAMP

*Sheffield Hallam University, Sheffield*

## Abstract

*Criminal justice reform plays a pivotal role in helping to foster reconciliation and peace-building in post-conflict societies. In the wake of their respective political transitions, both Northern Ireland and South Africa have formulated proposals for reform of their youth justice systems based upon restorative principles. This article analyses the attempts to roll out these reforms in both jurisdictions. It considers why new youth justice arrangements have largely been well received in Northern Ireland, yet have struggled to be implemented successfully in South Africa and reflects on possible lessons to be learnt in the context of post-conflict transformations.*

## 1 Introduction

The political conflicts, and subsequent peace processes, in Northern Ireland and South Africa have received considerable international attention in recent years, with commentators apparently eager to draw comparisons between the two jurisdictions.<sup>1</sup> Whilst such comparative scholarship is not without its caveats because of the very different cultural influences and demographic dynamics at play,<sup>2</sup> both societies share a history of conflict that they have sought to overcome through the introduction of new constitutional settlements. As in other transitional societies in Eastern Europe and Latin America,<sup>3</sup> criminal justice reform was seen as a vital component of both the Northern Irish and South

---

1 See e.g. M McDonald, *Children of Wrath* (Cambridge: Polity Press 1986); J Alderdice, "If talks can work in South Africa, why not here?", *Sunday Times*, 22 January 1995; T G Mitchell, *Native versus Settler: Ethnic conflict in Israel/Palestine, Northern Ireland and South Africa* (Westport CT: Greenwood Press 2000); B Hamber, *Past Imperfect: Dealing with the past in Northern Ireland and societies in transition* (INCORE/University of Ulster: Derry/Londonderry 1998); J McGarry, "Political settlements in Northern Ireland and South Africa" (1998) 46 *Political Studies* 854.

2 For example, it has been suggested that studies are often paraded as comparative when they fail to adequately investigate the historical, social, economic, political and legal context of the country under investigation: P Legrand, "European legal systems are not converging" (1996) 45(1) *ICLQ* 52. Legrand proceeds to argue (at p. 238) that law "is inevitably socially, historically, culturally and epistemologically situated" and that it does not "exist in a vacuum" because "it operates within society". See also D Nelken, (2004) "Using the concept of legal culture" (2004) 29(1) *Australian Journal of Legal Philosophy* 1; M D Dubber, "Comparative criminal law" in M Reimann and R Zimmermann (eds), *Oxford Handbook of Comparative Law* (Oxford: OUP 2006).

3 See D Bayley, *Changing the Guard: Developing democratic police abroad* (Oxford: OUP 2006); M Hinton, *The State on the Streets: Police and politics in Argentina and Brazil* (Boulder: Lynne Rienner 2006); P Messitte, "Expanding the rule of law: judicial reform in central Europe and Latin America" (2005) *Washington University Global Studies LR* 617.

African peace processes. It was recognised by the key players in the peace processes that large sections of the population perceived the state machinery as being inextricably entangled with the conflict. Thus, without the introduction of fresh criminal justice structures and processes, the long-term prospects for the success of the political settlements and societal reconciliation would undoubtedly have been severely hampered.

The youth justice arena has always proven fertile ground for introducing new and innovative approaches,<sup>4</sup> with restorative approaches in particular being rolled out worldwide. Northern Ireland and South Africa have been no exception to this trend, and both have sought to prioritise restorative principles in the respective reforms of their youth justice systems. To some extent, the eagerness to make use of the restorative paradigm is unsurprising, since there is a clear paradigmatic overlap between restorative justice and transitional justice. Both discourses share common themes and objectives, such as accountability, the acknowledgment of truth, symbolic reparation, restoration of dignity, healing, reconciliation, conflict resolution and democratic participation. Transitional justice, like restorative justice, is increasingly conceived in terms of “a form of dialogue between victims and their perpetrators” rather than a punitive blame allocation exercise.<sup>5</sup> Moreover, both transitional and restorative models place considerable emphasis on supportive and non-adversarial frameworks,<sup>6</sup> and the core *raison d'être* of both processes is, essentially, to engineer a moral transformation in making amends for a past injury or wrongdoing. Arguably, the archetypal transitional mechanism in recent times, the South African Truth and Reconciliation Commission (TRC) had the self-proclaimed moral objective of promoting “the restorative dimensions of justice”.<sup>7</sup> Yet in the years since its inception in 1995, the extent to which the TRC delivered restorative justice in practice has been open to debate.<sup>8</sup> Whilst no comparable truth recovery process has been established in Northern Ireland, the political transition has been accompanied by a number of independent inquiries into the role of the state during the conflict, which has included investigations into the

4 K Haines, “Some principled objections to a restorative justice approach to working with juvenile offenders” in L Walgrave (ed.), *Restorative Justice for Juveniles: Potentialities, risks and problems* (Leuven: Leuven UP 1997).

5 R Teitel, “Transitional historical justice” in L Meyer (ed.), *Justice in Time: Responding to historical injustice* (Baden-Baden: Nomos 2004), p. 80.

6 A du Toit, “The moral foundations of the South African TRC: truth as acknowledgment and justice as recognition” in R Rotberg and D Thompson (eds), *Truth v. Justice: The morality of truth commissions* (Princeton NJ: Princeton UP 2000).

7 The TRC was established by the Government of National Unity to help deal with what happened under apartheid. One of its aims was to afford victims with “an opportunity to relate the violations they suffered; the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights”. See, generally, TRC website [www.doj.gov.za/trc/](http://www.doj.gov.za/trc/) (last accessed 4 June 2012).

8 See further J Llewellyn and R Howse, “Institutions for restorative justice: the South African Truth and Reconciliation Commission” (1999) 49 *University of Toronto Law Journal* 355–88, who argue that the TRC lacked any mechanism that would enable perpetrators to make amends to victims. See further H Klug, *Constituting Democracy: Law, globalism and South Africa's political reconstruction* (New York and Cambridge: CUP 2000). The most cynical analysis of the function of the TRC is offered by R A Wilson, *The Politics of Truth and Reconciliation in South Africa* (Cambridge: CUP 1999), who argues that restorative justice was used as a transformative mechanism through which to challenge approaches and attitudes to dispute resolution and increase the legitimacy of state institutions, particularly the criminal justice system. Furthermore, Claire Moon's analysis, *Narrating Political Reconciliation: South Africa's Truth and Reconciliation Commission* (Lanham: Lexington Books 2008), demonstrates that the TRC had political reconciliation as a goal, despite its promotion of reconciliation on the basis of interpersonal acknowledgment and forgiveness, not restorative measures.

alleged collusion of the security forces in a number of high-profile murders,<sup>9</sup> and perhaps most notably, the judicial inquiry into the events of Bloody Sunday.<sup>10</sup> In January 2009, the Consultative Group on the Past published a report (known as the Eames-Bradley Report) which proposed the establishment of a “legacy commission” to investigate deaths and past atrocities which had occurred.<sup>11</sup> The proposals differed considerably from the South African TRC in a number of ways, not least insofar as the proposed process would be conducted with a view to prosecuting perpetrators rather than simply recovering facts. There was also a restorative component to the proposals, insofar as they proposed that an “ex gratia recognition payment” of GB£12,000 should be offered to all the families of all those who were killed in the Troubles.<sup>12</sup> Whilst the prospect of direct engagement between victims and perpetrators was always unlikely, the payment of a sum of money to victims by the state was intended as a form of official acknowledgment of their plight rather than direct recompense for the death. Perhaps more important than the payment of compensation for many victims’ families was the prospect of receiving information about what precisely happened to their loved ones.<sup>13</sup> This also formed a core element of the proposals, but more than three years on from their publication, they seem to have become stuck in the long grass and there remains no consensus as to the best means to deal with Northern Ireland’s troubled past.<sup>14</sup>

In both South Africa and Northern Ireland, the potential for restorative principles to bolster peace-building has been acknowledged. By the same token, it has been tentatively suggested that the adoption of a more restoratively orientated framework of criminal justice reform may help boost general confidence in the justice system and thereby assist in peace-building and forging inter-community trust.<sup>15</sup> Put more simply perhaps, the restorative paradigm may both reflect and propel the values of the political transition. In contrast to the norms that traditionally underpin conventional criminal justice which

- 
- 9 As part of the peace process a, retired Canadian judge, Peter Cory, was appointed jointly by the British and Irish governments to investigate allegations of state-sponsored collusion in six high-profile murders. His report, published in 2003, called for public inquiries to be established in five of the six cases. Four such inquiries were subsequently established by the British government, and one by the Irish government.
  - 10 The Saville Report was finally published on Tuesday 15 June 2010. See further <http://www.bloody-sunday-inquiry.org/> (last accessed 4 June 2012). See also D Walsh, *Bloody Sunday and the Rule of Law in Northern Ireland* (Basingstoke: Palgrave Macmillan 2000); A Hegarty, “Truth, law and official denial: The case of Bloody Sunday” (2004) 15 *Criminal Law Forum* 199.
  - 11 Report of the Consultative Group on the Past (Eames-Bradley Report) (2009), available at [www.publications.parliament.uk/pa/cm200910/cmselect/cmniaf/171/171.pdf](http://www.publications.parliament.uk/pa/cm200910/cmselect/cmniaf/171/171.pdf) (last accessed 4 June 2012).
  - 12 The Eames-Bradley Report was launched in Belfast in January 2009. The extent to which it will be implemented remains to be seen. The previous government had already ruled out making any *ex gratia* payments. The level of controversy surrounding the report reflects the fact that there is a profound lack of consensus within Northern Ireland as to how to deal with the legacy of the Troubles. See further C Lawther, “Securing the past: policing and the contest over truth in Northern Ireland” (2010) 50(3) *British Journal of Criminology* 455.
  - 13 There is a vast body of literature evaluating the benefits and drawbacks of truth commissions and other truth recovery mechanisms. See, generally, R Teitel, *Transitional Justice* (Oxford: OUP 2000); J-P Lederach, *Building Peace: Sustainable reconciliation in divided societies* (Washington DC: US Institute of Peace 1997); N Roht-Arriaza and J Mariezcurrena (eds.), *Transnational Justice in the Twenty-First Century: Beyond truth versus justice* (Cambridge: CUP 2006); P B Hayner, “Fifteen Truth Commissions – 1974 to 1994: a comparative study” (1994) 16 *Human Rights Quarterly* 597; Rotberg and Thompson, *Truth v. Justice*, n. 6 above; T Borer (ed.), *Telling the Truths: Truth telling and peacebuilding in post-conflict societies* (Notre Dame IN: University of Notre Dame Press 2006).
  - 14 See further “Talking about the past as the present erupts on the streets”, *Belfast Telegraph*, 23 June 2011.
  - 15 J Doak and D O’Mahony, “In search of legitimacy: restorative youth conferencing in Northern Ireland” (2011) 31(2) *Legal Studies* 305–25.

conceptualise crime as an offence against the state,<sup>16</sup> restorative justice views crime primarily as a breakdown between private relationships.<sup>17</sup>

In theory at least, the ownership of disputes is thereby devolved more towards the victim, the offender and the community. Members of the community participate directly within the decision-making process, and in doing so help lay down norms of acceptable and unacceptable conduct.<sup>18</sup> This holds clear potential in post-conflict environments, since communities may feel as though they (as opposed to the state) are being offered the chance to take charge of criminal justice. In practice, this inevitably means that the traditional role afforded to state agencies, such as the police, the courts and civil service, is radically altered. As noted below in respect of Northern Ireland, the contraction of the state role can potentially ignite fierce tensions around the question of who “owns” criminal justice.<sup>19</sup> The roll-out of alternative justice schemes also highlights an ongoing debate as to whether the role of the state should be limited to mere facilitation and some degree of oversight of restorative processes, or whether leadership and operational management is compatible with the concept of restorative justice at all.<sup>20</sup>

This article considers the reforms introduced to the youth justice systems of Northern Ireland and South Africa in the wake of their new political settlements. In particular, it probes some of the reasons as to why the new youth justice arrangements in Northern Ireland appear to be operating relatively successfully, whilst those in South Africa have struggled to be passed into legislation and implemented. Examining each jurisdiction in turn, we highlight the background to criminal justice reform and the extent to which policymakers have attempted to mainstream restorative values in devising new juvenile justice arrangements. We argue that the system established in Northern Ireland is both more developed and mainstreamed than that in South Africa and explore possible reasons for this divergence. While the relative success of the Northern Ireland scheme certainly holds lessons for South Africa, and many other jurisdictions besides, a number of social, economic and cultural differences mean that South Africa still faces challenges in seeking to further develop restorative justice.

## 2 Developments in Northern Ireland

Reform of the Northern Ireland youth justice system came about as part of a package of criminal justice reforms introduced in the wake of the 1998 Belfast Agreement (or Good Friday Agreement), which was a core constituent of the peace process. A central element of the Agreement was the establishment of a fundamental review of the criminal justice system (known as the Criminal Justice Review), with one of its aims being to make the criminal justice system more accountable and acceptable to the community as a whole and to

16 See further N Christie, “Conflicts as property” (1977) 17(1) *British Journal of Criminology* 1; J Doak, *Victims’ Rights, Human Rights and Criminal Justice: Reconceiving the role of third parties* (Oxford: Hart 2008).

17 H Zehr, *Changing Lenses: A new focus for crime and justice* (Scottsdale, PA: Herald Press 2005).

18 A Dzur and S Olson, “The value of community participation in restorative justice” 35(1) *Journal of Social Philosophy* 91–107 (2004).

19 See further K McEvoy and A Eriksson, “Who owns justice? Community, state, and the Northern Ireland transition” in J Shapland (ed.), *Justice, Community and Civil Society* (Cullompton: Willan Publishing 2008).

20 Some commentators argue that the state has a vested interest in promoting and controlling structures which support hegemony; see e.g. C Boyes-Watson, “In the belly of the beast? Exploring dilemmas of state-sponsored restorative justice” (1999) 2 *Contemporary Justice Review* 261. Those advocating a more central role for the state include J Dignan and K Lowey, *Restorative Justice Options for Northern Ireland: A comparative review* (Belfast: TSO 2000); J Shapland, “Restorative justice and criminal justice: just responses to crime?” in A von Hirsch, J Roberts, T Bottoms, K Roach and M Schiff (eds), *Restorative Justice and Criminal Justice: Competing or reconcilable paradigms* (Oxford: Hart 2003).

encourage community involvement and be responsive to the community's concerns.<sup>21</sup> The Criminal Justice Review, published in March 2000, made a total of 294 recommendations. Included in these, it advocated a wholly new restorative approach in virtually all criminal cases involving young offenders. To this end, the Review Group proposed a model of youth conferencing, somewhat similar to that which had been relatively well established in New Zealand and parts of Australia. The scheme was to be contained in statute, and was to become the primary method of dealing with juvenile offenders.<sup>22</sup>

The introduction of youth conferencing constituted a paradigmatic shift in the juvenile justice system.<sup>23</sup> Although the police had begun to use restorative techniques as alternatives to the traditional cautioning process since 2000,<sup>24</sup> disposals beyond caution were largely effected in an orthodox fashion through the courts system. The new legislation, the Justice (Northern Ireland) Act 2002, provided for the establishment of an independent Youth Conferencing Service to organise and facilitate conferences. The legislation provided for two types of conferences, "diversionary" and "court-ordered". In both instances, the conferences are organised with the goal of providing a recommendation to either the prosecutor (in the case of a diversionary conference) or the court (in the case of a court-ordered conference) on the appropriate disposal for the young person.

A diversionary conference, as its name suggests, aims to divert young people away from the criminal justice system in order to avoid net-widening.<sup>25</sup> These are convened following referral to the Youth Justice Agency from the Public Prosecution Service. The prosecutor is expected to make a referral where they would otherwise have instituted court proceedings. Therefore, they are not intended as a disposal for first-time offenders or offenders who commit minor criminal acts – who should normally be dealt with by the police, by way of caution or warning. Rather, diversionary conferences are intended for young people who may have offended and may have been cautioned in the past or where formal action is deemed necessary. For the diversionary conference to take place, the young person must admit to the offence and must consent to the process. If either of these conditions is not met the young person will not be dealt with through this process and may be referred through the court for prosecution.

For court-ordered conferences, the young person is referred for conferencing through the court. Again, the young person must admit to the offence and consent to the conferencing process. If there is a dispute of the facts, these will be heard by the court and following a finding of guilt the case may then proceed to conferencing – with the young person's consent. The distinctive feature of the Northern Ireland system is that the court *must* refer a young person to a youth conference and the court-ordered conference is not a diversionary intervention, it is part of the sentencing process. The mandatory nature of referrals highlights the intended centrality of conferencing to the new youth justice process.<sup>26</sup>

---

21 Criminal Justice Review Group, *Review of the Criminal Justice System* (London: HMSO 2000).

22 Ibid. p. 205. Juvenile offenders include all young people aged 10–17 years.

23 See D O'Mahony and C Campbell, "Mainstreaming restorative justice for young offenders through youth conferencing: the experience of Northern Ireland" in J Junger-Tas and S H Decker (eds.), *International Handbook of Juvenile Justice* (New York: Springer 2006).

24 See D O'Mahony and J Doak, "Restorative justice – is more better?" (2004) 43(5) *Howard Journal of Criminal Justice* 484–505.

25 On the potential dangers of net-widening, see S Levrant et al., "Reconsidering restorative justice: the corruption of benevolence revisited?" (1999) 45(1) *Crime and Delinquency* 3; O'Mahony and Doak, "Restorative Justice", n. 24 above.

26 O'Mahony and Campbell, "Mainstreaming restorative justice", n. 23 above. Only offences with a penalty of life imprisonment, offences which are triable under indictment only and scheduled offences (terrorism) are not automatically eligible for youth conferencing.

The conferencing process typically involves a meeting to which the young person is invited to reflect upon their actions, offer some form of reparation to the victim and complete requirements to address their offending. The conference is chaired by a professionally trained conference co-ordinator, employed by the youth conferencing service. The victim, who is encouraged to attend, can explain how the offence has impacted them and can gain an understanding of why the offence occurred. This process is designed to give the offender an understanding of the impact of their actions and to understand the victim's perspective. It also gives the victim the opportunity to understand why they were victimised. Following a group discussion a conference plan will be drawn up which takes the form of a negotiated "contract" which is enforceable and requires the offender to complete acts, such as reparation to the victim, requirements to address their offending and/or restrictions on the young person's conduct or whereabouts.<sup>27</sup> The agreement process, like participation in the conference, is voluntary and the young person must consent before the contract becomes enforceable.

A major evaluation of the youth conferencing arrangements was published in 2005.<sup>28</sup> From an orthodox criminological perspective, the findings were largely positive, with high levels of victim and offender participation<sup>29</sup> and engagement with the process.<sup>30</sup> Victims generally felt positively about the process, and appreciated the opportunity to put questions to the young person. For offenders, it was evident that the conferencing process held them to account for their actions, insofar as they were expected to explain to the conference and victim why they offended and they had to complete specific requirements as part of the conference plan. The majority of offenders stated that they had wanted to attend to "make good" for what they had done, or to apologise to the victim.

A recent qualitative study by Maruna et al. (2007) of the longer-term impacts of the youth conferencing process on young offenders in Northern Ireland has also found "many of the post-conference outcomes were positive",<sup>31</sup> and an independent report produced by the Criminal Justice Inspectorate in 2008 corroborated these findings.<sup>32</sup> By the same token however, it would be foolhardy to suggest restorative youth conferencing works well all the time and in all cases. Both the Campbell et al. and Maruna et al. studies noted difficulties in the practice of delivering restorative conferences effectively. Furthermore, an evaluation of police-led restorative cautioning practice in Northern Ireland observed some evidence of

27 A conference plan can include a wide range of requirements, for example, to take part in offending programmes, complete unpaid work, or be excluded from particular places or activities. The conference plan may even recommend a custodial sentence, the length of which will be determined by the court. See Justice (Northern Ireland) Act (2002), s. 57.

28 C Campbell, R Devlin, D O'Mahony et al., *Evaluation of the Northern Ireland Youth Conference Service* NIO Research and Statistics Series, Report No 12 (Belfast: NIO 2006).

29 Over two-thirds of conferences (69%) had a victim in attendance, which is high compared with other restorative-based programmes. Of these, 40% were personal victims and 60% were victim representatives (such as in cases where there was damage to public property or there was no directly identifiable victim). Indeed, nearly half of personal victims attended as a result of assault, whilst the majority (69%) of victim representatives attended for thefts (typically shoplifting) or criminal damage. These results compare favourably with other research focusing on victim participation in restorative processes. Cf. G Maxwell and A Morris, "Restorative justice and reconviction" (2002) 5 *Contemporary Justice Review* 133–46; A Crawford and T Newburn, *Youth Offending and Restorative Justice: Implementing reform in youth justice* (Cullompton: Willan Publishing 2003).

30 83% of victims were rated as "very engaged" during the conference and 92% said they had said everything they wanted to during the conference. See Campbell et al., *Evaluation*, n. 28 above

31 S Maruna, S Wright, J Brown, F Van Marle, R Devlin and M Liddle, *Youth Conferencing as Shame Management: Results of a long-term follow-up study* (Belfast: Youth Conferencing Service 2007), p. 2.

32 Criminal Justice Inspectorate, *Inspection of the Youth Conferencing Service* (Belfast: CJINI 2008).

“net-widening”, whereby the process sometimes drew relatively petty offenders into very challenging interventions.<sup>33</sup> Notwithstanding these caveats, the research evidence has been largely positive and there is now a considerable international body of research evidence demonstrating some of the advantages of restorative justice, particularly over “traditional” and retributive models of criminal justice.<sup>34</sup>

However, one further disconcerting issue to emerge from Campbell et al.’s research was that there was very little evidence of co-operation with either of the Northern Ireland community-led restorative schemes, Community Restorative Justice Ireland (CRJI) or Greater Shankill Alternatives (GSA).<sup>35</sup> These community schemes developed largely as alternatives to “self-policing” by paramilitary organisations in the mid-1990s, particularly in some divided working-class communities in Belfast.<sup>36</sup> They deal mostly with low-level offences and neighbourhood disputes, and sometimes involve juveniles. Until very recently, they operated entirely independently of the formal criminal justice system due to the ongoing legacy of suspicion and mistrust – despite the end of the political conflict and apparent success of the subsequent peace process. Relations between these groups and the police and Northern Ireland Office were highly strained at the time the research was undertaken.<sup>37</sup> While both the statutory and community schemes have adopted a similar approach to juvenile offenders, with, presumably, the same restorative-based goals in mind, there was little active consultation or exchange between them and ownership of justice in areas that were traditionally self-policing became hotly contested.

On a purely theoretical level, however, there was reason to be optimistic about the potential for the youth conferencing scheme to overcome these difficulties. Commentators have pointed to the potential of restorative justice to reinvigorate democracy through creating new community bonds and strengthening existing ones,<sup>38</sup> though it is worth underlining that this is only likely to be achieved if the new structures are perceived by all communities as a fair and effective means of delivering justice. However, there are three particular aspects of the Northern Ireland scheme that hold legitimating potential and have

33 O’Mahony and Doak, “Restorative justice”, n. 24 above.

34 See, for example, D Miers, *An International Review of Restorative Justice* (London: Home Office 2001); L Sherman and H Strang, *Restorative Justice: The evidence* (London: The Smith Institute 2007); J Shapland, G Robinson and A Sorsby, *Restorative Justice in Practice* (London: Routledge 2011). However, Goldson is critical of restorative youth conferencing, especially as a model for criminal justice reform as proposed by the Commission on Youth Crime and Antisocial Behaviour (2010) in England and Wales: B Goldson, “Time for a fresh start” (2011) 11(1) *Youth Justice* 3. Whilst Goldson provides a thoughtful critique of the Commission’s report, his specific thoughts on the drawbacks of restorative youth conferencing have limited evidence or empirical support.

35 Campbell et al, *Evaluation*, n. 28 above, p. 117.

36 For a good description of the community schemes in Northern Ireland, see, generally, H Mika and K McEvoy, “Restorative justice in conflict: paramilitarism, community, and the construction of legitimacy in Northern Ireland” (2001) 4 *Contemporary Justice Review* 291–319; K McEvoy and A Eriksson, “Restorative justice in transition: ownership, leadership and ‘bottom up’ human rights” in D Sullivan and L Tiffit (eds), *Handbook of Restorative Justice: A global perspective* (London/New York: Routledge 2006). For a useful comparison between these structures and those in South Africa, see R Monaghan, “Community-based justice in Northern Ireland and South Africa” (2008) 18 *International Criminal Justice Review* 83–105.

37 See further McEvoy and Eriksson, “Restorative justice in transition”, n. 36 above; A Eriksson, *Justice in Transition: Community restorative justice in Northern Ireland* (Cullompton: Willan Publishing 2009).

38 A Alfieri, “Community prosecutors” (2002) 90 *California LR* 1465. See also J Braithwaite and C Parker, “Restorative justice is Republican justice” in G Bazemore and L Walgrave (eds), *Restorative Juvenile Justice: Repairing the harm of youth crime* (Monsey, NY: Criminal Justice Press 1999); J Braithwaite, “Building legitimacy through restorative justice” in T Tyler (ed.), *Legitimacy and Criminal Justice: International perspectives* (New York: Russell Sage Foundation 2007).

already shown some evidence of assuaging lingering difficulties that exist in terms of legitimacy and ownership.

First, the model that has been adopted envisages a wide range of stakeholders participating in the process. By law the young person, the conference coordinator, a police officer<sup>39</sup> and an appropriate adult must attend a conference.<sup>40</sup> The victim of the offence is entitled to attend with a supporter, but is not required to do so.<sup>41</sup> Crucially, however, it should be underlined that the coordinator is empowered to widen the ambit of the conference: he or she is able to include anyone else who they feel may be “of value” to the process. For example, because the offenders were juveniles, all of the conferences observed included parents or guardians, and some included other supporters, such as social workers or probation officers, who had been working with or knew the young person. Campbell et al.’s research showed that 77 per cent of supporters were engaged to some extent when discussing the crime. Many, by invitation of the coordinator, described positive aspects of the offender’s life and several supporters were seen to actively step in when the young person was having difficulty expressing him/herself. In addition, supporters often spoke of their feelings of regret, disappointment and shame which no doubt added to the restorative impact of the conference on the young person.

A second major form of wider engagement was through the participation of victim representatives or “proxy victims”. Here, if appropriate, a representative of local business or a community could attend a conference if the direct victim was unable or unwilling to attend. For the most part, victims’ representatives were keen to play a proactive part in discussions. As representatives of local businesses or community organisations/groups, they were able to inject fresh community perspectives and understandings into the conference and thus helped to reinforce on the offender the wider impact of their actions.<sup>42</sup> In addition, it was apparent that the Youth Conference Service had established networks with a range of community organisations and service-providers. These included voluntary, statutory and non-statutory bodies and community organisations which provided services to youth conferencing, such as one-to-one mentoring services, drug and alcohol awareness, voluntary and community-based work programmes, victim and offence awareness sessions, peer education and diversionary programmes. The reliance upon the voluntary and

39 There has been some debate as to whether having police officers present at a restorative conference is desirable or whether their presence might stifle proceedings. For example, in an evaluation of the police restorative cautioning programme in the Thames Valley, Hoyle et al. noted in the early stages of their research that some police officers tended to dominate proceedings: C Hoyle, R Young and R Hill, *Proceed with Caution: An evaluation of the Thames Valley Police initiative in restorative cautioning* (York: JRF 2002). However, Campbell et al. found that having a police officer present at the conference often provided a rare opportunity for the young person to engage with a police officer, allowing some dialogue to take place and may even have been an opportunity to break down barriers and hostility towards the police: *Evaluation*, n. 28 above. This modest opening-up of a dialogue may even help foster a greater respect for the police and the law, see L Sherman et al., *Experiments in Restorative Policing: A progress report on the Canberra reintegrative shaming experiments* (Canberra: Research School of Social Sciences, Australian National University 1998).

40 Criminal Justice (Children) (Northern Ireland) Order 1998, Article 3A. The young person is entitled to have legal representation at the conference, but they may only attend in an advisory capacity and cannot speak on the young person’s behalf.

41 Where victims choose not to attend, they may still opt to participate indirectly. This can be achieved through the use of a telephone link, a written statement, letter or tape-recording in which the victim can express the impact of the crime.

42 It should be noted that the use of a “proxy victims” is generally less effective than integrating the actual victim into the restorative process. However, see J Dignan, *Understanding Victims and Restorative Justice* (Maidenhead: Open UP 2005), who describes how a victim’s perspective can be helped to be brought to a conference through the use of vicarious stakeholders, especially in cases where there was no actual or identifiable victim – such as in a case of criminal damage to public property (p. 101).

community sector was significant and 83 per cent of conference plans included activities or programmes which were usually provided through the community and voluntary sector. This would seem to suggest that the programme has been successful to some extent in further encouraging community participation and civic engagement.

The third – and potentially most significant – legitimating factor is the capacity of the scheme to forge new and mutually beneficial links with the various community-based restorative schemes that had hitherto existed with very little contact with the established criminal justice system. Yet, after several years of stalemate in which disputes over policing and criminal justice reform precluded political progress, the St Andrews Agreement of 2006 heralded a fresh era of devolved government, with Sinn Féin offering its support for the police and new criminal justice structures. In January 2007, the Northern Ireland Office published a Protocol for Community-Based Restorative Justice Schemes which marked the beginning of a process which eventually resulted in ten CRJI and four NIA (Northern Ireland Alternatives) schemes being accredited by the Criminal Justice Inspectorate.<sup>43</sup> Subsequently, the Northern Ireland Office accepted that community restorative justice projects have a valuable role to play in dealing with low-level criminality in Northern Ireland, and limited government funding and a promise of mutual co-operation was announced which should help secure the future of the projects, at least in the short term. In the years since Campbell et al.'s research was carried out, relationships have been forged between the Youth Conferencing Service and the community-based schemes as well as other state and non-state actors who may not have engaged with each other at all in years gone by.

In summary then, Northern Ireland has seen a relatively successful process of mainstreaming restorative justice principles in its youth justice system. The ideals of restorative justice have, in many respects, been also intertwined with the process of transitional justice, and while by no means providing a panacea, the two appear to be at least contributing to the process of peace-building and inter-community trust. It is against this backdrop that we consider reforms to the youth justice system in South Africa.

### 3 Developments in South Africa

Even before the establishment of the South African transition, the treatment of juveniles by the criminal justice system had become a major cause for concern.<sup>44</sup> Although the political detention of children drew to an end in the late 1980s,<sup>45</sup> large numbers of children continued to be held in custody awaiting trial.<sup>46</sup> This issue came to a head in 1992 with the high profile brutal murder of a 13-year-old boy in custody by older cellmates.<sup>47</sup> As a result, there was considerable pressure to address the basic rights of children caught up in the criminal justice system. South Africa responded by ratifying the United Nations Convention

43 The Northern Ireland Office has now agreed funding for the projects which should secure their future in the short term – see “Goggins to fund restorative justice plan, despite row”, *Belfast Telegraph*, 30 July 2008.

44 SALRC, *Juvenile Justice*, Issue Paper 9, Project 106 (Pretoria: SALRC 1997); L Ehlers, *Child Justice: Comparing the South African child justice reform process and experiences of juvenile justice reform in the United States of America* (2006), available at [www.childjustice.org.za/publications.htm](http://www.childjustice.org.za/publications.htm) (last accessed 4 June 2012).

45 Concern about the political detention and possible torture of children held in custody is well documented, for example, see UN Commission on Human Rights reports, especially *Detention, Torture and Other Inhuman Treatment of Children in South Africa*, 22 February 1991, E/CN.4/RES/1991/8, available at UNHCR Refworld, [www.unhcr.org/refworld/docid/3b00f0b440.html](http://www.unhcr.org/refworld/docid/3b00f0b440.html) (last accessed 4 June 2012).

46 SALRC, *Juvenile Justice*, n. 44 above.

47 D Pinnock, R Shaprio, A Skelton et al., “New juvenile justice legislation for South Africa: giving children a chance” (1994) 3 *South African Journal on Criminal Justice* 338; A Skelton, *Children and the Law* (Pietermaritzburg: Lawyers for Human Rights 1998).

on the Rights of the Child (UNCRC) in 1995 and enshrined a series of specific rights for young people in the South African Constitution the following year.<sup>48</sup>

The increasing sense of urgency surrounding criminal justice reform also resulted in the establishment of a Project Committee on Juvenile Justice in 1997. Drawn broadly from non-governmental organisations (NGOs), the committee was set up under the auspices of the South African Law Reform Commission (SALRC) and was charged with drafting legislative proposals for a new justice system dedicated to children. Following an intensive period of consultation, the SALRC produced a draft Child Justice Bill, which contained a number of sweeping proposals designed to radically overhaul the existing system. This draft Bill was accompanied by a discussion paper that set out in considerable detail the rationale for the recommendations put forward.<sup>49</sup>

It was apparent from the discussion paper that the SALRC was guided by a number of factors that influenced the decision to improve the existing system for dealing with children accused of crimes in South Africa. The first of these factors was the intention to further the protection of children's rights as espoused in both the UNCRC and the passing of the South African Constitution. Secondly, the drafting process of the Bill was strongly influenced by the notion of restorative justice.<sup>50</sup> The SALRC identified reconciliation, restoration and harmony as being at the heart of African approaches to the adjudication of disputes and the proposed objectives section explicitly linked the indigenous concept of *ubuntu* to the values underpinning the juvenile justice system.<sup>51</sup> As previously noted, these very concepts of reconciliation and restoration have been regarded as central to the transitional process of South Africa following the establishment of the TRC. Essentially, the SALRC's vision of the new youth justice system thus constituted an "Africanisation" of established international principles, which embraced restorative ideals through placing core emphasis upon the roles to be exercised by the family and the broader community. A third rationale for the reforms proposed was the need to legislate for diversion. It had been normal practice for prosecutors to channel children away from the criminal courts on a purely discretionary basis. However, this practice was infrequently and inconsistently used throughout the country and it was hoped the provision of a legislative basis for diversion would create a greater degree of certainty and effectiveness.<sup>52</sup>

In the aftermath of the discussion paper, a consultation took place with police, prosecutors, magistrates, judges, NGOs and academics, together with a specially designed consultation process with children. The final report of the SALRC was submitted to the Minister of Justice in August 2000. The proposals largely echoed the core objectives of reform outlined in the discussion paper, and to this end, the Child Justice Bill (B49 of 2002) was introduced to the National Assembly in 2002. Despite early debate by the Portfolio

48 S. 28 of the constitution granted specific rights to children for the first time. In addition, the African Charter on the Rights and Welfare of the Child and a number of other international instruments relevant to juvenile justice have also influenced deliberations and policymaking regarding juvenile justice in South Africa – particularly the drafting of the Child Justice Act.

49 SALRC, *Juvenile Justice*, n. 44 above..

50 South Africa's connection with modern ideas of restorative justice began in the non-government sector. As early as 1992, the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO), a national NGO, took the lead in seeking to frame its diversion and sentencing programmes firmly within a restorative justice paradigm: Skelton, *Children and the Law*, n. 47 above.

51 Whilst *ubuntu* is not easily translated into English, Mafeje suggests that the concept includes "human sympathy, willingness to share, and forgiveness" (A Mafeje, "Africanity: a combative ontology" 1 *CODESRIA Bulletin* 67 (2000) as cited by A Skelton, "Africa" in G Johnstone and D Van Ness (eds), *Handbook of Restorative Justice* (Cullompton: Willan 2007).

52 Skelton, *Children and the Law*, n. 47 above.

Committee on Justice and Constitutional Development, and a series of government briefings and public hearings in February 2003, the Department of Justice and Constitutional Development failed to redraft the Bill or take any steps to ensure that it was reintroduced by Parliament. Although the proposed legislation had reached an advanced stage of the Portfolio Committee deliberations, Parliament had, in the meantime, continued to busy itself with other legislation.<sup>53</sup> In effect, the draft legislation was left in a state of limbo for a further five years. Only in January 2008 was the Bill tabled again in Parliament, and eventually became law on 11 May 2009.

Section 2 of the Child Justice Act expounds its five major objectives: to protect the rights of children; to promote *ubuntu* in the child justice system;<sup>54</sup> to provide for the special treatment of children in a child justice system designed to break the cycle of crime, which will contribute to safer communities and encourage these children to become law-abiding and productive adults; to prevent children from being exposed to the effects of the formal criminal justice system by making use of disposals that are more appropriate to the needs of children, including diversion; and, finally, to promote co-operation between all government departments and other organisations and agencies involved in implementing an effective child justice system. These objectives are to be achieved through the formulation of an entirely new system of procedure for young people with diversion being a central aspect of the new regime.<sup>55</sup>

Under the system, the police are expected to release young offenders into the care of their parents or guardians, with probation officers then expected to undertake an assessment of the child.<sup>56</sup> The probation officer therefore exercises a central role and must prepare an assessment report, which should be passed to the magistrate presiding over a preliminary inquiry within 48 hours. This inquiry is defined in s. 43(1)(a) as “an informal pre-trial procedure which is inquisitorial in nature”. It should be noted that the age of criminal responsibility has been increased from seven to 10. However, the rebuttable presumption of *doli incapax* remains for those aged 10 to 14.

The prosecutor may divert children who commit minor offences,<sup>57</sup> before appearing at the inquiry. However, the preliminary inquiry is compulsory for *all* children who are 10 years or older<sup>58</sup> who have allegedly committed an offence and who have not been diverted by the prosecutor or had the case against them withdrawn. It should nonetheless be underlined

53 A Skelton, *The Influence of Restorative Justice on South Africa's Developing Child Justice System*, unpublished LL.D thesis (University of Pretoria, 2005).

54 S. 2 envisages that *ubuntu* will be promoted through “(i) fostering children’s sense of dignity and worth; (ii) reinforcing children’s respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safeguarding the interests of victims and the community; (iii) supporting reconciliation by means of a restorative justice response; and (iv) involving parents, families, victims and communities in child justice processes in order to encourage the reintegration of children”.

55 The Portfolio Committee has chosen to link diversion to schedules of offences, which would work as follows: for Schedule 1 offences where the assessment recommends diversion and the prosecutor agrees, the child will automatically be diverted. Schedule 1 offenders who are not automatically diverted, Schedule 2 offenders, and Schedule 3 offenders will participate in the preliminary inquiry to determine the suitability of diversion as a disposal.

56 A Skelton and C Frank, “Conferencing in South Africa: returning to our future” in A Morris and G Maxwell (eds.), *Restorative Justice for Juveniles: Conferencing, mediation and circles* (Oxford: Hart 2001). A child is defined in s. 28 of the constitution as a person under the age of 18 years. Any child between the ages of 14 and 17 (and, exceptionally, those aged 10–14 where the doctrine of *doli incapax* has been rebutted, and those aged 18–21) may be considered for diversion.

57 These are contained in Schedule 1 of the Bill.

58 Unless a child who is 10 years or older but under the age of 14 years where criminal capacity is not likely to be proved cl. 5(3)(b).

that a child may only be considered for diversion if he or she voluntarily acknowledges responsibility for the offence; has not been unduly influenced to accept responsibility; there is a *prima facie* case against the child; the consent of the child and his or her parent(s) is obtained; and the prosecutor or Director of Public Prosecutions indicates that the matter may be diverted.<sup>59</sup>

Although diversion is a central feature of the new system, the magistrate is not confined to the range of options listed in the Act. He or she may also tailor any diversionary measure to suit the individual child, as long as such measures are in keeping with the objectives and standards of diversion set out in ss. 51 and 55 respectively. Section 55(2)(b) of the Act also states that diversion options must, where reasonably possible, include a restorative justice element which aims to heal relationships, including the relationship with the victim; and an element of “responsibilisation” which may include compensation or restitution.<sup>60</sup> One key difference with the Northern Ireland scheme is that in South Africa such restorative processes are only a *possible* disposal or diversion mechanism. By contrast, in Northern Ireland, restorative justice processes are a *mandatory consideration* in the vast majority of cases. Whether or not such arrangements are put in place will depend upon the particular circumstances of the individual case;<sup>61</sup> as Stout points out, there is no indication that restorative justice interventions are any more likely to be used with child offenders than any other diversion option.<sup>62</sup>

Restorative justice disposals are available as a diversionary option, a sentence or as a process through which a sentence may be decided on for the court after conviction.<sup>63</sup> Where such an option is taken up, any subsequent victim–offender mediation or youth conference is to be convened by a probation officer, appointed by the inquiry magistrate, no later than 21 days after the referral has been made.<sup>64</sup> In each of these processes, the probation officer may regulate the procedure to be followed and facilitate the meeting so that participants can reach an agreement on a plan to which the child must adhere. The plan has to specify the objectives for the child and his or her family, the period in which the agreement has to be completed, the details of services and assistance, and other matters relating to education, employment, recreation and the welfare of the child.

While the Child Justice Act seeks to “expand and entrench the principles of restorative justice in the criminal justice system” and to “balance the interests of children and those of society, with due regard to the rights of victims”<sup>65</sup> the extent to which such restorative justice principles will be a defining feature of the system remains to be seen. Whilst the Northern Ireland programme places a strong emphasis on victim participation and may be said to be victim-centred, only very limited reference is made to the role of the victims in the South Africa legislation.<sup>66</sup> Victim participation is widely regarded as a *sine qua non* of

59 Child Justice Act 2008, cl. 52.

60 Ibid. cl. 55(2)(c).

61 K Johansson and T Palm, “Children in trouble with the law: child justice in Sweden and South Africa” (2003) 17(3) *International Journal of Law, Penal Policy and the Family* 308. Skelton notes that it is unlikely that cases involving murder and rape will be diverted: Skelton, *Children and the Law*, n. 47 above.

62 B Stout, “Is diversion the appropriate emphasis for South African child justice?” (2006) 6 *Youth Justice* 129. Children who are not diverted will proceed to plea and trial in conventional fashion at the Child Justice Court (cl. 52(6)). In terms of sentence, there are many sanctions available to Child Justice Courts, varying from community-based sanctions to restorative justice disposals such as conferencing and victim offender mediation (VOM), and finally imprisonment (ss. 47–9).

63 Child Justice Act 2008, s. 73.

64 Ibid. s. 61.

65 See “objects” and “principles” of Child Justice Act 2008.

66 See ss. 10; 48(1)(b)(iii); 52(2)(a); 53(3)(b)(i); 55(1)(e); 69(4); 70.

restorative justice theory, without which schemes might not be considered properly “restorative” at all.<sup>67</sup>

Moreover, although the South African legislation enshrines the principle of victim consent to participate in any restorative process, it also leaves open a series of important unanswered questions concerning how informed consent will be obtained and what safeguards will be in place to protect victims from being used merely as information providers.<sup>68</sup> It is not apparent which agency is responsible for contacting victims and taking steps to familiarise them with the process, nor are victims conferred with any specific rights to attend or participate within such proceedings. In this sense, South Africa seems to be adopting a system similar to that of the Scottish Children’s Hearing system, by focusing more on the best interests of the child.<sup>69</sup> When a victim does not participate, either directly or indirectly, questions clearly arise as to just how “restorative” the process is.<sup>70</sup> This is not only an issue for the South African system, as the problem of securing victim participation does occur in other jurisdictions such as New Zealand and England. Resolving the issue of how to encourage victims to participate, whilst being mindful of their right not to do so, is something of a conundrum which confronts policymakers worldwide.<sup>71</sup>

Perhaps the most difficult challenge to overcome is that the promotion of restorative justice as a means of dealing with offending, especially in serious cases, is often at odds with the current penal climate. South Africa’s criminal justice system is overburdened and currently fails to generate a sense of security and legitimacy amongst the population that it serves. This has had a direct impact on the extent to which the government could proceed with liberal reforms in this area of justice and President Jacob Zuma has shown an increasing tendency to follow crime control methods featuring zero tolerance, minimum sentencing tariffs and tougher bail laws.<sup>72</sup> It is therefore not surprising that a strong element of punitivism has remained in the Child Justice Act with restorative disposals as only one of a long list of considerations for dealing with young people who offend. While there is evidence, following the first year of implementation of the Act that the number of children being detained prior to trial and sentenced to imprisonment has decreased, there is no further detail about what diversionary mechanisms are being used.

The tension between elites within the government and those within the criminal justice community are longstanding. Nevertheless, a number of examples may be cited where restorative justice has been successfully forced onto the agenda following the country’s first democratic elections, namely: the National Crime Prevention Strategy (1996), which for a variety of reasons was never fully implemented; the Welfare White Paper (1996) and Correctional Services White Paper (2005); a number of policy recommendation reports by the SALRC; the Probation Services Amendment Act (35 of 2002); and the Service Charter for Victims of Crime (2007). In addition to this, reference has been made to restorative justice in the country’s superior courts.<sup>73</sup>

---

67 See Doak, *Victims’ Rights*, n. 16 above, ch. 6.

68 P McCold, “Primary restorative justice practices” in Morris and Maxwell, *Restorative Justice for Juveniles*, n. 56 above.

69 S McVie, “Doing children justice? A longitudinal review of the children’s hearing system” (paper presented at the Centre for Criminological Research, University of Sheffield, 15 November 2006).

70 McCold, “Primary restorative justice practices”, n. 68 above.

71 Campbell et al, *Evaluation*, n. 28 above,

72 See further D van Zyl Smit, “Criminological ideas and the South African transition” (1999) 39 *British Journal of Criminology* 198.

73 See Bertelsmann, *Joyce Mahuleke and Others vs The State* Case No CC 83/2006; Pickering, *Antoinette Saayman vs The State* Case No CA&R 82/2007.

The production of such documents has proved to be a contentious exercise because of the disjuncture between hard-line, punitive rhetoric, on the one hand, and an almost dogged determination to transform the approach to dispute resolution on the basis of a vision of African justice under the banner of restorative justice or *ubuntu*, on the other. Notwithstanding some of the altruistic intentions, there are a number of issues that will make the translation of these restorative justice ideals difficult to fulfil and, combined with practical obstacles, the implementation of such radical changes will be a major challenge for South African society. In the following discussion, we attempt to unpick some of the reasons why restorative principles have been successfully integrated and mainstreamed in the Northern Ireland youth justice system, yet have struggled to become embedded in South Africa.

## 4 Discussion

In analysing the efforts of Northern Ireland and South Africa to pursue a restorative agenda in their youth justice reform, there are three key factors that merit closer analysis. These relate to the political context of the reforms, the different legal cultures and ideologies, and the impact of differing crime rates.

### 4.1 THE POLITICAL CONTEXT OF THE REFORMS

As the burgeoning body of transitional justice scholarship continues to expand, it is becoming increasingly clear that there are many different forms a transition can take. Altruistic concepts such as “peace-building”, “democratisation” and even the idea of “transition” itself remain contested terms and are fraught with difficulty.<sup>74</sup> Scholars have proposed various models or genealogies of transitional justice, based on the nature of the conflict, the parties involved and the means used to resolve it.<sup>75</sup> While the particularities of such modelling are open to debate, it is clear that transition progresses at different rates, with divergent issues and obstacles are likely to arise in relation to any law reform process. Thus, political priorities and moral principles will differ, and so too will the substance of particular reforms be affected by a range of localised, domestic and international pressures.<sup>76</sup>

There are a number of differences in the nature of the transitions which go some way to explaining why the Northern Ireland reforms have taken root so much quicker than their South African counterparts. In much of the South African discourse, the concept of transition implies a much deeper, transformative process than a mere regime shift from authoritarian to democratic rule.<sup>77</sup> The apartheid state had to be dismantled and rebuilt. While the Northern Ireland process resulted in power-sharing under new constitutional arrangements, the basic state apparatus remained intact (i.e. with Northern Ireland

74 See e.g. E Cousens, C Kumar, K Wermester (eds), *Peacebuilding as Politics* (London: Lynne Rienner 2001); T Carothers, “The end of the transitions paradigm” (2002) 13(1) *Journal of Democracy* 5; C T Call and S Cook, “On democracy and peacebuilding” (2003) 9(2) *Global Governance* 233; C Bell, C Campbell and F Ni Aoláin, “Justice discourses in transition” (2004) 13 *Social and Legal Studies* 305; N Roht-Arriaza, “The new landscape of transitional justice” in Roht-Arriaza and Mariezcurrena (eds.), *Transnational Justice*, n. 13 above.

75 See e.g. R Teitel, “Transitional justice genealogy” (2003) 16 *Harvard Human Rights Journal* 69; P Harrell, *Rwanda’s Gamble: Gacaca and a new model of transitional justice* (New York: Writers Club Press 2003); G Adler and E Webster, “Challenging transition theory: the labor movement, radical reform and transition to democracy in South Africa” (2003) 23 *Politics and Society* 75; M Nalepa, “Punish all guilty or protect the innocent? Designing institutions of transitional justice” (2003) 20(2) *Journal of Theoretical Politics* 221.

76 See further M du Plessis and J Ford, “Transitional justice: a future truth commission for Zimbabwe?” (2009) 58 *ICLQ* 73; R Teitel, “Transitional justice globalised” (2008) 2 *International Journal of Transitional Justice* 1; H W Jeong, *Peacebuilding in Postconflict Societies: Strategy and process* (Boulder: Lynne Rienner 2005).

77 H Brocklehurst, N Stott, B Hamber and G Robinson, “Lesson drawing: Northern Ireland and South Africa” (2001) 18 *Indicator S.A* 89.

remaining under the ultimate control of the British government, as part of the UK). Moreover, for the time being at least, it was recognised that the criminal justice system would not immediately fall under the remit of the new power-sharing executive; it would still be managed and operated by the British government – a party to the conflict.<sup>78</sup> Thus, in Northern Ireland, criminal justice reform had to be afforded greater priority and was widely perceived to be systemically interlinked to the overall political picture.<sup>79</sup>

Indeed, since a well-developed institutional framework was already in place in Northern Ireland, even bold and innovative changes could be implemented relatively smoothly. Having invested so heavily in developing a new criminal justice system that sought support from all sections of the community, it would have been inconceivable that the government would not have invested a considerable amount of effort and resources in ensuring that the major recommendations of the Criminal Justice Review Group were fully implemented.<sup>80</sup> In the years after the Good Friday Agreement, Northern Ireland's so-called "peace dividend" heralded massive financial investment. This enabled the government to establish a new youth criminal justice agency, the Youth Conferencing Service,<sup>81</sup> which received substantial investment to roll out the new arrangements and to train prosecutors and defence lawyers on how the new system would operate. In the intervening time period, the arrangements have clearly made a contribution to the stated objective of the Criminal Justice Review of enhancing community involvement and support for the criminal justice system. It is evident that the programme has been effective in broadening participation of parties other than individual victims and offenders, and in doing so has engaged with community and voluntary organisations that have not traditionally worked in close partnership with criminal justice agencies.

On the other hand, in South Africa the need to reconstruct core state structures from afresh and to put in place a process to deal effectively with the past were afforded priority over and above immediate reform of the criminal justice system. Youth justice reform, whilst flowing from years of campaigning by NGOs and the subsequent report of the SALRC, were not conceived as part of a package that was linked directly to the transition from apartheid to democracy. This can be attributed to a number of factors. For a start, fears governing the prevalence of youth crime or low-level crime tended to be overshadowed by a widespread surge in serious crime. As such, an effective and legitimate reconstituted police force would inevitably be the most pressing criminal justice issue. In other words, while many South Africans perceived a need for radical change in the way the wider criminal justice system was organised, it was assumed that this would follow in the years after a new majority government came to power. Moreover, with economic resources considerably more stretched than in Northern Ireland, a radical overhaul of the youth justice system was simply not a political priority.<sup>82</sup>

78 Policing and criminal justice was finally devolved to the Northern Ireland Assembly in April 2010.

79 Recommendations of the Criminal Justice Review in relation to youth justice were interlinked with the core objectives of making the criminal justice system better able to deliver a fair and impartial system of justice to the community. See the preface to the *Review*, n. 21 above.

80 Considerable investment was made in ensuring the recommendations of the Criminal Justice Review were implemented. The government accepted almost all of the recommendations and published an "Implementation plan" and "Updated implementation plan", as well as establishing a Justice Oversight Commissioner to ensure progress. See [www.nio.gov.uk/criminal\\_justice\\_review\\_implementation\\_plan\\_june\\_2003.pdf](http://www.nio.gov.uk/criminal_justice_review_implementation_plan_june_2003.pdf) (accessed 10 June 2012).

81 The Youth Conferencing Service is part of the Youth Justice Agency, which was launched as a new executive agency following the recommendations of the Criminal Justice Review.

82 As the preamble to the Child Justice Act 2008 explains, "there are capacity, resource and other constraints on the State which may require a pragmatic and incremental strategy to implement the new criminal justice system for children".

Indeed, as far as restorative justice is concerned, the public hearings of the TRC also exposed the South African public to this different understanding of the concept. Despite an initial sense of optimism, the use of this particular form of restorative justice may have blighted the public's sense of fairness. Victims were seen to be required to tell their stories in lieu of any compensation while some offenders appeared to escape justice.<sup>83</sup> This context, coupled with the fact that under the new scheme restorative justice is conducted largely in the context of diversion for young offenders, has arguably served to create a perception of restorative justice that it is a "soft option", suitable only for less serious offences.<sup>84</sup> For Northern Ireland, the language of restorative justice was entirely new, and as such the public did not associate the concept with the sense of despondency that the TRC had created for many South Africans.

#### 4.2 DIFFERENCES IN LEGAL CULTURES OR IDEOLOGIES

Both the Northern Ireland and the South African youth justice systems are broadly modelled on the family group conferencing approach that originated in New Zealand. Although this model has been readily adapted for use elsewhere, including Northern Ireland, Skelton and Frank note that there has been "little analysis on the part of practitioners or policy makers about whether family group conferencing is really suitable for the South African context".<sup>85</sup> Comparative lawyers and legal sociologists have long emphasised that what works well in one set of circumstances will not necessarily work in another.<sup>86</sup>

The importance of "legal culture" has been the subject of extensive academic inquiry in recent years;<sup>87</sup> Nelken defines it as the product of the ideas and practices of legal professionals,<sup>88</sup> whereas Sanders and Hamilton adopt a broader definition in viewing legal culture as the "attitudes, values and opinions about not only law per se but also the appropriate way to resolve disagreements and process disputes".<sup>89</sup> Indeed, there have been a number of unsuccessful experiments where South African policymakers have rushed to import policy initiatives from other jurisdictions, with undesirable consequences following.<sup>90</sup>

Notwithstanding the transitional setting of both societies, the cultural norms, legal traditions and population profiles of these countries are extremely divergent. For its part, South Africa has an ethnically diverse population of some 48 million, with considerable cultural and linguistic variations within the Black population, and geographically it is a very

83 See further C C Byrne, "Benefit or burden: victims reflections on TRC participation" (2004) 10 *Peace and Conflict* 237.

84 Skelton, *Children and the Law*, n. 47 above.

85 A Skelton and C Frank, "How does restorative justice address human rights and due process issues?" in H Zehr and B Toews (eds), *Critical Issues in Restorative Justice* (Monsey, NY: Criminal Justice Press 2003), p. 16.

86 Most comparative lawyers and legal sociologists agree that rules and institutions cannot be neatly separated from their purpose or from the circumstances in which they are made. See e.g. O Kahn-Freud, "On use and misuse of comparative law" (1974) 37 *Modern Law Review* 1.

87 Lawrence Friedman is frequently credited with first introducing the notion that law is essentially a product of the society in which it operates: *The Legal System: A social science perspective* (New York: Russell Sage Foundation 1975).

88 Nelken, "Using the concept", n. 2 above. Nelken proceeds to draw a distinction between *internal* legal culture which encompasses the ideas and practices of legal professionals, and *external* legal culture which refers to opinions, interests and pressures brought to bear on the law by wider social groups.

89 J Sanders and L Hamilton, "Legal cultures and punishment repertoires in Japan, Russia, and the United States" (1992) 26 *Law and Society Review* 117, p. 120.

90 G Simpson, B Hamber and N Stott, "Future challenges to policy-making in countries in transition" (presentation to the workshop Comparative Experiences of Policy-making and Implementation in Countries in Transition, 6–7 February 2001, Derry/Londonderry, Northern Ireland). Available at [www.csvr.org.za/wits/papers/papdipp1.htm](http://www.csvr.org.za/wits/papers/papdipp1.htm) (last accessed 4 June 2012).

large country.<sup>91</sup> By contrast, Northern Ireland is a small jurisdiction, relatively homogenous in cultural terms, with a population of just 1.7 million.<sup>92</sup> Likewise, in contrast to Northern Ireland's "peace dividend",<sup>93</sup> South Africa had to weather a number of severe economic difficulties in the years following the transition to democracy.<sup>94</sup> Such differences inevitably have had an impact on how the respective reforms to the youth justice system could be operationalised by criminal justice agencies.

One such difference lies in the role played by prosecutors. In South Africa, prosecutors have traditionally exercised a broad ad hoc discretion to divert and prosecute as they see fit – and this discretion is largely retained (albeit subject to certain statutory factors) under the Child Justice Act 2009. In particular, the fact that the prosecutor retains *dominus litis* raises questions about the volume and types of cases that will be referred to restorative justice processes.<sup>95</sup> Research conducted in South Africa by Naudé and Prinsloo found that magistrates did not support restorative justice in cases involving sexual offences, repeat offences and serious assault.<sup>96</sup> This may explain low referral rates in South Africa, as traditional retributive sanctions still feature heavily in each stage of the criminal justice process and it remains questionable whether a judge will refer a case to a restorative justice process if it has already been rejected by the inquiry in favour of prosecution. Against this backdrop, it seems somewhat doubtful whether the legislation is capable of translating broad policy aspirations that promote and seek to integrate restorative ideals into criminal justice practice.

This appears to be supported by evidence concerning the use of restorative schemes in relation to other diversion programmes. In the 2006/2007 financial year, the National Institute for Crime Prevention and Rehabilitation of Offenders (NICRO) provided services to a total of 17,786 diverted young people; however, only around 10 per cent of these were involved in a conference or victim–offender mediation.<sup>97</sup> While it is very difficult at this stage to predict what will happen as the Act is rolled out, the extent to which the prosecutor will alter practice to divert more cases and offence types to these processes is questionable – the trend to divert to offender-focused disposals for low tariff, first-time offences may well continue. Indeed, research conducted by Stout has yielded further intriguing results in South Africa on the attitudes of magistrates, probation officers and prosecutors towards diversion.<sup>98</sup> By using four hypothetical cases at the preliminary inquiry, Stout investigated both the decisions that practitioners would make and the reasoning that led them to those decisions. Findings indicate that emphasis was put on previous clear records to such an extent that first-time offenders were more likely to be diverted than those who had records

91 Statistics South Africa, *Mid-year Population Estimates* (2007), available at [www.statssa.gov.za/publications/P0302/P03022007.pdf](http://www.statssa.gov.za/publications/P0302/P03022007.pdf) (last accessed 4 June 2012).

92 Registrar General for Northern Ireland, *Annual Report* (2008), available at [www.nisra.gov.uk/demography/default.asp132.htm](http://www.nisra.gov.uk/demography/default.asp132.htm) (last accessed 4 June 2012).

93 See further D O'Hearn, "Peace dividend, foreign investment, and economic regeneration: the Northern Irish Case" (2000) 47(2) *Social Problems* 180.

94 See M Nowak, "The first ten years after apartheid: an overview of the South African economy" in M Nowak and L Ricci (eds), *Post Apartheid South Africa: The first ten years* (Washington DC: International Monetary Fund 2005).

95 The prosecutor has the right to proceed with criminal charges against children at his or her discretion in the face of alternatives.

96 B Naudé and J Prinsloo, "Magistrates' and prosecutors' views of restorative justice", in E Maepa (ed.), *Beyond Retribution: Prospects for restorative justice in South Africa* (Pretoria: Restorative Justice Center 2001).

97 See K Clamp, "Assessing alternative forms of localised justice in post-conflict societies – youth justice in Northern Ireland and South Africa" in D A Frenkel, and C Gerner-Beuerle (eds.), *Selected Essays on Current Legal Issues* (Athens: ATINER 2008).

98 Stout, "Is diversion the appropriate emphasis?", n. 62 above.

for minor offences, despite committing much more serious offences.<sup>99</sup> It is noteworthy that the only case where restorative justice was explicitly stated was in the case of a white offender, who had no previous criminal history, but who had committed a relatively serious offence.<sup>100</sup> While the study was largely hypothetical and conducted on a relatively small scale, the findings tend to indicate that the Act may lead to a bifurcated system,<sup>101</sup> whereby relatively minor first offences are diverted and serious offences, or those where the offender has more than one conviction, proceed through to the courts. The wide discretionary authority enjoyed by prosecutors could also result in race, class and gender prejudices influencing which children are afforded access to diversion interventions.<sup>102</sup>

International experience indicates that, where referrals are discretionary, restorative programmes tend to flounder on the periphery of the criminal justice system.<sup>103</sup> By contrast, in Northern Ireland, the power to make decisions by professionals is curtailed by conferencing as decision-making is achieved through consensus by those participating in the process. In addition, under the Northern Ireland scheme, there is considerably less potential for the scepticism among criminal justice professionals to thwart the operation of the youth conferencing arrangements. The scheme is mandatory in nature, with both the Public Prosecution Service and the courts having a duty to refer the vast majority of cases to conferencing. Thus, even where magistrates or prosecutors feel unsure whether a particular case is suitable for conferencing, there is little room for discretion to interfere with statutory stipulations. Previous studies from elsewhere in Europe have shown that attitudinal resistance can act as a major obstacle to restorative justice initiatives, thereby producing a chasm between “law in the books” and law in practice.<sup>104</sup> The potential for this gap to expand is clearly exacerbated where decision-makers are given maximum scope for manoeuvre; this is clearly not the case with restorative youth conferencing in Northern Ireland.

### 4.3 THE IMPACT OF RISING CRIME

A third differential between the two jurisdictions relates to the public perception of crime. Crime rates in South Africa increased very dramatically in the early 1990s and, despite the fact that they have stabilised in recent years, they remain at exceptionally high levels,<sup>105</sup> with one international survey ranking South Africa second in the world for assaults and gun violence and first for firearm-related homicide and rapes per capita.<sup>106</sup> The callousness of

99 Stout, “Is diversion the appropriate emphasis?”, n. 62 above. Stout reports that these findings are supported by figures from NICRO, which state that 94% of children diverted to its services are first-time offenders (p. 137).

100 His class and relative wealth were also identified as affecting the lenient approach taken.

101 M Cavadino and J Dignan, *The Penal System: An introduction* 4th edn (London: Sage 2007).

102 C Wood, *Diversion in South Africa: A review of policy and practice, 1990–2003* Occasional Paper 79 (Pretoria: Institute for Security Studies 2003).

103 J Dignan and K Lowey, *Restorative Justice Options for Northern Ireland: A comparative review* (Belfast: The Stationery Office 2000); J Shapland et al., *Implementing Restorative Justice Schemes* Online Report 32/04 (London: Home Office 2004); Crawford and Newburn, *Youth Offending*, n. 29 above.

104 See e.g. A Mestitz and S Ghetti, “Victim-offender mediation and young offenders: the Italian experience” in A Mestitz and S Ghetti (eds), *Victim-Offender Mediation with Youth Offenders in Europe* (Dordrecht: Springer 2004); K Edgar and T Newell, *Restorative Justice in Prisons: A guide to making it happen* (Winchester: Waterside Press 2006).

105 See further A Altbeker, *A Country at War with Itself: South Africa's crisis of crime* (Johannesburg: Jonathan Ball 2007). See also P Burton, A Du Plessis, and T Leggett, *National Victims of Crime Survey: South Africa 2003* (Pretoria: ISS Monograph Series 2004) and *The Independent*, 1 July 2008. Note, however, that concerns have been raised about the reliability of South African crime data: see B Dixon, “Introduction” in B Dixon and E van de Spuy (eds), *Justice Gained? Crime and crime control in South Africa's transition* (Cape Town: UCT Press 2004), p. xxi.

106 United Nations, *Eighth Survey on Crime Trends and the Operations of Criminal Justice Systems* (New York: UNODC 2002).

such crimes has received considerable attention in the media, resulting in something of a moral panic. Policymakers have faced increased calls from community activists and sections of the media for harsher penal measures to be introduced, including the death penalty.<sup>107</sup> For its part, the government has found itself in something of a quandary, being eager to be seen to both promote human rights and restorative justice, whilst simultaneously responding to calls for more punitive measures to be put in place.<sup>108</sup> Since the end of apartheid, all political parties have been keen to adopt law-and-order rhetoric, with election manifestos adopting terminology such as “zero tolerance” and “nail and jail”.<sup>109</sup> While the South African government is far from alone in its shift towards a harsher form of penal policy, it does mean that the state may be less ready to engage in the promotion of restorative practices for fear of being perceived as being “soft” on crime. This is particularly salient given the rise of well-known vigilante groups such as People against Gangsterism and Drugs (PAGAD) and Mapogo a Mathamaga. Despite state opposition to both groups, their willingness to deal with crime and anti-social behaviour (often in a brutal manner) means that they enjoy a degree of support in sections of the community.<sup>110</sup>

On the other hand, Northern Ireland appears to have comparatively lower levels of crime, despite the high-profile and serious terrorist-related offences that have been in the media in the recent past.<sup>111</sup> Police-recorded crime statistics show that recorded crime levels in Northern Ireland have generally been lower than those recorded in England and Wales.<sup>112</sup> While making direct comparisons between different jurisdictions is problematic because of differing counting rules, definitions of crime and the contrasting ways criminal justice systems operate and measure crime, the most reliable evidence supports the view that Northern Ireland has comparatively lower levels of police-recorded crime.<sup>113</sup> For example, if we consider offences defined as “crime index offences” that are used in America, and which are normally included in data from Northern Ireland, it is evident that from the seven categories included, Northern Ireland has lower levels of crime per 100,000 population than the USA or England and Wales. The rates of all recorded serious offences in Northern Ireland are considerably lower than those of South Africa.<sup>114</sup>

Victimisation surveys support the comparatively lower levels of police-recorded crime in Northern Ireland. Recent results of the Northern Ireland Crime Survey show that Northern Ireland has comparatively low victimisation rates, about 14 per cent of those

107 S Swart, ‘The Appeal of Restorative Justice to Policy Makers’ (unpublished paper presented at the Ancillary Sessions on Restorative Justice, 10th United Nations Crime Congress, Vienna, 10–17 April 2000).

108 L Camerer, “Crime, violence and punishment? Putting victims on the agenda” (1997) 6 *African Security Review* 46.

109 Dixon, “Introduction”, n. 105 above.

110 See, generally, B Dixon and L-M Johns, *Gangs, Pagad and the State: Vigilantism and revenge violence in the Western Cape* (Pretoria: Centre for the Study of Violence and Reconciliation 2001).

111 For a good discussion of crime rates and policing issues in Northern Ireland, see J Moran, *Policing the Peace in Northern Ireland: Crime and security after the Belfast Agreement* (Manchester: Manchester UP 2008). See also Northern Ireland Statistics and Research Agency (NISRA), *Digest of Information on the Northern Ireland Criminal Justice System* (Belfast: NISRA 2011).

112 When 2009/2010 recorded crime rates per 100,000 population are calculated for each jurisdiction, it is apparent that the rates in England and Wales are higher than those in Northern Ireland for overall crime (7970 versus 6149). See *Digest of Information on the Northern Ireland Criminal Justice System* (Belfast: Department of Justice 2011).

113 However, it should be acknowledged that national data can hide local crime problems and no doubt many local communities suffer considerably higher levels of crime and disorder. See D O’Mahony, K McEvoy, R Geary and J Morrison, (eds), *Crime, Community and Locale: The Northern Ireland communities crime survey* (Aldershot: Ashgate 2000).

114 United Nations, *Eighth Survey on Crime Trends*, n. 106 above.

questioned in the 2009/2010 survey had been a victim of crime.<sup>115</sup> Similarly, a comparison of the Northern Ireland Crime Survey with the British Crime Survey (2009/2010) also shows that the risk of becoming a victim of crime is lower in Northern Ireland (14 per cent) than in England and Wales (21 per cent).<sup>116</sup> Thus, unlike South Africa, the introduction of restorative youth conferencing was able to take place without the backdrop of exceptionally high crime rates.

Undeniably one of the biggest challenges for the South African government, post-apartheid, has been transforming the role of the criminal justice system from “enforcer” to service provider.<sup>117</sup> Although this has also been a major issue for Northern Ireland, the situation in South Africa is much more acute, as it has experienced dramatic increases in crime levels and fear of crime in its period of post-apartheid transition.<sup>118</sup> As a result, South Africa’s criminal justice system has been overburdened and is failing to generate a sense of security and legitimacy amongst the population that it serves. The new legislation seeks to divert young offenders away from formal criminal justice institutions, arguably, to alleviate some of the pressure and backlog. Although tight deadlines have now been imposed upon key criminal justice stakeholders, it is questionable how effective these will be in turning around an overburdened and under-resourced system of criminal justice which comes into contact with around 10,000 children every month. If the Act is to make a real difference in terms of diversion, not only do its provisions require adequate financing and effective management, but it also needs to be perceived within the wider society as a just and legitimate response to crime. So long as government policy continues to be driven by an undercurrent of popular punitivism,<sup>119</sup> any prospect that South Africa’s youth justice system may have entered a new and progressive era seems fraught with difficulty.

### Conclusions

It is now more than ten years since it became clear that both youth justice systems faced the prospect of a radical overhaul. However, only in Northern Ireland have the reforms been fully implemented (and, indeed, generally positively received). While South Africa’s legislature has recently passed a quasi-restorative set of reforms, it is some 12 years after the draft Bill was first published by the SALRC. In a sense, the greatest challenge is still to come for South Africa, as criminal justice institutions seek to roll out a radical programme with limited resources against a climate of popular punitivism.

There are a number of important lessons to be drawn concerning the adoption of restorative justice measures in societies going through a transitional justice process. First, it is clear that restorative programmes are more likely to operate effectively if they are both mainstreamed and victim-centred. In Northern Ireland, the scheme is anchored in legislation and imposes an obligation on the courts to use them for particular types of cases, with an emphasis on victim participation. This largely reflects findings from other societies,

115 See NISRA, *Experience of Crime: Findings from the 2009/10 Northern Ireland Crime Survey* (Belfast: NISRA 2010).

For an international comparison see, L Hague, “International crime survey 2000: key findings for Northern Ireland” (2001) 1 *Research and Statistical Bulletin*.

116 NISRA, *Experience of Crime*, n. 115 above.

117 M Brogden and C Shearing, *Policing for a New South Africa* (London: Routledge 1993).

118 Altbeker, *A Country at War*, n. 105 above.

119 “Popular punitivism” is a label coined by Bottoms to describe a drift toward harsher punishment in public policy: see A Bottoms, “The philosophy and politics of punishment and sentencing” in C Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (Oxford: Clarendon Press 1995). See also D Garland, “The limits of sovereign power, strategies of crime control in contemporary society” (1996) 36 *British Journal of Criminology* 460, where it is argued that punishment has become highly fashionable and is much more readily embraced by the public than in previous times.

which show the adoption of such schemes is more successful if they are rooted in legislation and mainstreamed.<sup>120</sup> Yet even while children's rights activists in South Africa celebrate the implementation of the Child Justice Act, questions remain as to whether the new scheme can properly be said to be "restorative" given its discretionary platform and apparent lack of capacity to engage with victims. From an international perspective, the use of these types of "quasi-restorative" schemes is not necessarily undesirable: such programmes can often represent a significant improvement on the status quo. However, when rolled out in a post-conflict environment, it should be borne in mind that schemes that pay lip service to restorative principles may fail to deliver a broader transformative potential that some have argued is an inherent component of the restorative paradigm.<sup>121</sup>

It has been contended that restorative justice mechanisms may not only hold the potential to restore individual victims and offenders, but may be a particularly useful tool in a transitional society to restore a degree of trust among the citizenry in the capacity of the state to address crime in a fair and legitimate manner. In terms of bolstering legitimacy in a divided society, there is thus something inherently attractive in adopting restorative justice models, as opposed to state-centred or retributive models. On a normative level, the restorative paradigm is designed to bolster the capacity of both individuals and communities to engage in hitherto exclusionary criminal justice processes. Through encouraging lay participation, restorative programmes should, in theory at least, act as a social catalyst for broader inter-communal reconciliation.<sup>122</sup> This perhaps explains why, as noted above, restorative models are so commonly adopted as a tool for transitional justice and truth recovery. In short, the ideology that underpins the restorative paradigm broadly reflects the core values that should help to propel and sustain the political transition.

In Northern Ireland, there is evidence that the new restorative youth conferencing arrangements have already begun to enhance levels of community participation in criminal justice. Although there are still some concerns about the extent to which any state-led programme can genuinely be considered a form of community justice, the creation of new networks between people of different social and cultural identities can assist in building democratic values and reducing collective prejudices.<sup>123</sup> Over time, a broader range of actors from former conflict-ridden communities will have some degree of interaction with the conferencing process, be that as a victim, offender, supporter or service-provider. In this way, restorative schemes hold the potential to further act as both a vehicle for and beneficiary of peace-building, and thus may have a modest role to play in boosting the overall legitimacy of any given criminal justice system.

Thus, while Northern Ireland and South Africa have embarked on major reforms of their youth justice systems in a period of post-conflict transition, the impact of their reforms has been vastly different. The contrast between these two jurisdictions clearly

---

120 See e.g. A Morris and G Maxwell, "Restorative justice in New Zealand: family group conferences as a case study" (1998) 1 *Western Criminology Review* 1; L Trimboli, *An Evaluation of the NSW Youth Justice Conferencing Scheme* (Sydney: NSW Bureau of Crime Statistics and Research 2000); New Zealand Ministry of Justice, *Court-Referred Restorative Justice Pilot: Evaluation* (Wellington: Ministry of Justice 2005).

121 See D Sullivan and L Tifft, *Restorative Justice: Healing the foundations of our everyday lives* (Monsey, NY: Willow Tree 1999).

122 C Cunneen, "Reviving restorative justice traditions?" in Johnstone and Van Ness, *Handbook*, n. 51 above. Cunneen cites the example of the Queensland Murri Court, where indigenous elders sit on the bench alongside magistrates and have an input into the sentencing process. Some offenders will thus receive customary punishments or work within the community as alternatives to a prison sentence.

123 D C Mutz, "Cross-cutting social networks: testing democratic theory in practice" (2002) 96 *American Political Science Review* 111. See, generally, R D Putnam, *Bowling Alone: The collapse and revival of American community* (New York: Simon & Schuster 2000).

shows that, while restorative justice principles have the potential to contribute to post-conflict transition and transitional justice, it is by no means inevitable that restorative principles will actually develop into strong practices in such different circumstances. Yet, the experience of Northern Ireland shows the potential of reforms which embrace restorative justice as a method of bolstering post-conflict transformation. Prior to its peace process, Northern Ireland was a society in which secrecy, suspicion and mistrust interacted to undermine public confidence in the criminal justice system. The Belfast Agreement, along with the Criminal Justice Review and devolution of power which followed, served to establish fresh normative themes and values such as reconciliation, inclusivity, accountability and healing, similar to the communitarian values as espoused in restorative justice theory and practice. It is these same themes and values which, it is hoped, will continue to influence governance, transitional justice and criminal justice reform for the future – not only in Northern Ireland – but also in other divided societies as well.