

Towards transforming a system

Re-thinking incarceration for youth (and beyond)

Lisa Marqua-Harries, Grant Stewart and Venessa Padayachee*

lisamarqua@hotmail.com
grant.stewart@r-cubed.co
venessa@nicro.co.za

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Rethinking crime and punishment, especially with regard to youth,¹ is a priority for South Africa; a country with high crime rates, recidivism and an overburdened criminal justice system. The present punitive and retributive system often only exacerbates many underlying causes of crime and violence, especially in young people. The failure of the existing system suggests that the time is right for a paradigm shift in society's response to crime and punishment. A challenge to implementing any alternative justice model is to ensure that it does not continue to prop up the under-resourced, overburdened and dysfunctional criminal justice system it seeks to reform. The current systemic crisis demands radical reform, not merely adopting a few well-meaning tweaks to a broken system. This article argues that the system and its various forms (including residential options but with an emphasis on community-owned interventions) need to be both trauma-informed and infused with an ethos of restorative justice. We articulate our explanations with youth as the focus and make proposals in light of this and suggest a path towards implementation.

South Africa, in common with most other nations, uses imprisonment as the norm for the execution of serious criminal justice sanctions.² In addition, remand detention is used excessively and for long periods without justification.³ South Africa's criminal justice system has undergone reforms aimed at

reflecting the tenets of the Constitution and undoing the legacy of our oppressive past. The direction of these institutional changes, therefore, has placed greater emphasis on human rights and included a more restorative vocabulary in policy documents.⁴ The Department of Correctional Services (DCS) states that its mission is to contribute 'to a just, peaceful and safer South Africa through effective and humane incarceration of inmates, rehabilitation and social reintegration of offenders.'⁵ However, with prisons continually struggling with the recurring issues of

* Lisa Marqua-Harries is Director of the NGO Restore and has her MA in Restorative Justice with the University of Hull, UK. Grant Stewart is a youth development and trauma-informed process facilitator and trainer with Restore Reconnect Rebuild (Pty) Ltd. Venessa Padayachee is the national advocacy and lobbying manager at NICRO. She has a degree in Social Work and a MA in Criminology.

overcrowding and accompanying violence, these ideals have not been met.⁶ This should not be surprising: it is a global problem. What follows is relevant to all age cohorts, however, the focus here is on youth due to their vulnerability and the significance of developmental needs.

An incarceration legacy

Incarceration, for many, is synonymous with criminal justice, even though it is a relatively recent phenomenon as penal policy.⁷ Prior to incarceration, corporal and capital punishment were the practiced norm,⁸ with prisons predominantly used for those awaiting trial, the execution of sentences or housing of debtors, vagabonds and others that were considered as social undesirables.⁹

Without delving into the complex evolution of incarceration, it is worth noting that the generally accepted purpose of imprisonment is to deprive the individual, who has transgressed, of their liberty and thereby achieve the goals of retribution, incapacitation, deterrence and rehabilitation.¹⁰ Purpose, though, is best determined by practice rather than by stated intention. Thus, prisons in fact function primarily as a tool for maintaining the socio-economic stratifications in a society, with the overwhelming majority of those incarcerated being the poor and oppressed.¹¹ Another way of stating this is that prisons serve the role of 'hiding' the poor, providing cheap labour and preserving the racial hierarchy.¹² We can see this in South Africa's past, where housing compounds for African migrant labourers provided a blueprint for many of the prisons still in operation today.¹³

It is well known that the apartheid justice system was a repressive tool in the hands of the state and that incarceration made little, if any, distinction between activists, criminals, children and adults.¹⁴ Since 1994 there have

been moves to reform the criminal justice system away from the apartheid legacy. Guided by a constitutional demand for safe, secure and humane incarceration, prisons were demilitarised (although, it is interesting to note, that a military-like staff uniform was retained) and corporal punishment banned.¹⁵ Restorative justice vocabulary and practice has also become part of the discourse with, for example, this model being officially adopted by the national government's Justice Crime Prevention and Security Cluster as a policy objective to be included in criminal justice, civil law, family law and African traditional justice.¹⁶ The White Paper on Corrections¹⁷ and the Child Justice Act 2008 (Act 75 of 2008) perhaps best defines this shift. Grounded in restorative justice, these policy documents aimed to fundamentally change the way in which children in conflict with the law were to be treated.¹⁸

There is a gap, though, between intentions, policies and practice. Despite the encouraging changes, incarceration has remained the de facto penalty for crime and, in addition, has not been sufficiently reformed, remaining largely unchanged within an increasingly punitive criminal justice system.¹⁹ This is evident in recurring issues of, inter alia, rights violations, corruption, lawlessness, overcrowding, violence and a lack of access to services.²⁰ The Child Justice Act has provided notable changes and successes, however, it has not been sufficiently resourced and has faced challenges in implementation.²¹ Poor or misunderstood application of the law has meant that the police may be arresting fewer children;²² diversion programmes and secure care facilities often do not distinguish between the different needs of youth;²³ and secure care facilities for young offenders face issues of rights violations, violence and poor conditions and operate as incarceration in all but name.²⁴

A different way of thinking

Regardless of location or how they are labelled, prisons do not work. They have a tendency towards abuse – a feature that may even be inherent to the system.²⁵ Walgrave, for example, argues that '[r]elying on punishment for dealing with crime leads to more imprisonment, more human and financial costs, weaker ethics and less public safety.'²⁶ And when we consider the suffering experienced by many in marginalised and oppressed communities, prison is often an extension of community experience, including a space for gang organisation and networking.²⁷ Reguillo describes that '[w]hen death, instability, uncertainty, hopelessness and detachment become rooted as everyday experiences, punishment by example is irrelevant.'²⁸

And yet, despite the evidence of their ineffectiveness, the use of prisons is expanding across the globe.²⁹ If we hope to remedy the problems with the system, mere programmatic or policy change will not suffice. What is needed is a different way of thinking about crime and punishment – a more ambitious vision that not only changes prisons but transforms the criminal justice system as a whole and which challenges its role in reinforcing poverty, inequality and violence. Interventions require a broader understanding of the origins of crime and violence and must provide programming that is spiritual, psychological as well as social in nature.³⁰ To make these changes would be no small feat: we only need to look at how long it took to pass the Child Justice Act for proof.³¹ We acknowledge the complexity of the sometimes divergent goals of safety for citizens, the pursuit of justice and social development. We argue, however, that it starts by ensuring that the system itself becomes trauma-informed and restorative justice infused, with an emphasis on youth.

Trauma-informed and restorative justice-infused

Trauma-informed

Using the word 'trauma' can be controversial as doing so too often assumes that the problem lies within the individual rather than the environment in which the individual lives.³² Behaviour, even criminal behaviour, can be viewed in a different way if one takes into consideration the real and ongoing external threats experienced by many people, coupled with their historical oppression.³³ In these environments, aggression, callousness and hyper/hypo arousal can be understood as a natural and adaptive survival response in threatening environments, rather than as symptomatic of a disorder.³⁴ Furthermore, using a 'disease' approach can obscure the agency³⁵ in individuals' actions in the face of oppression, exclusion and marginalisation.³⁶ For the purposes of this article and to incorporate these dynamics we define trauma as 'the subjective experience of loss, threat, powerlessness and exclusion that results in a negative change in how we view ourselves, our relationship to others and our place in the world.'³⁷

Research has shown that people in South Africa, especially those from socio-economically marginalised communities, have been exposed to multiple forms of violence across multiple settings over extended periods.³⁸ This has massive implications for human development: the field of neuroscience has recently highlighted the profound impact that these lived realities can have on the brain.³⁹ The problems and challenges that result manifest across the different domains of society, including the criminal justice arena.⁴⁰ These problems often are related to a dysregulated or sensitised state of threat that manifest in, among other things, impulsive and/or aggressive behaviour as well as in learning challenges.⁴¹ Numerous studies have demonstrated that these challenges are present

in the majority of youth involved in the criminal justice system.⁴²

When we include the practices and discourses of racial and economic exclusion and racial profiling we see how these situational factors play a significant role in why many young people come into conflict with the law.⁴³ Punitive practices and threatening environments are therefore often ineffective, especially since prison is another threatening space.⁴⁴ More often incarceration will result in worse behaviour.⁴⁵ It is crucial, then, that we develop a justice framework that factors in the lived realities of violence and exclusion of many who enter the system.⁴⁶

Restorative justice

Restorative justice is a natural fit with a trauma-informed approach. While there is no universally accepted definition of restorative justice, often leading to confusion and even misuse,⁴⁷ a simple definition that draws on several elements of the paradigm is that it is 'a theory of justice that emphasises repairing the harm caused or revealed by criminal behaviour. It is best accomplished through inclusive and cooperative processes.'⁴⁸ There is far more agreement on the values and principles that makes restorative justice distinguishable from other approaches to crime and punishment, including that:⁴⁹

- crime is fundamentally a violation of people and interpersonal relationships;
- violations create obligations and liabilities; and
- restorative justice seeks to heal and put right the wrongs.⁵⁰

The goals of restorative justice are also pertinent. These include putting key decisions in the hands of those most affected by crime and violence; making justice more healing and ideally more transformative; and reducing the likelihood of future offences.⁵¹ Restorative justice offers a more participative, reconciliatory,

healing and problem-solving approach to crime and punishment than the current overly-punitive criminal justice system. The punitive approach is founded on a faulty belief that incarceration, with degradation, humiliation and dehumanisation will transform the offender into a more honest or docile person upon release.⁵² Instead, we argue, it only adds to the disconnection and brokenness of society.

Restorative justice should not merely be seen as an alternative to punishment but should instead be adopted as a foundation upon which justice is administered. It should not be an ad hoc programme to be implemented at any specific stage in the criminal justice process, but should rather be an underlying philosophy and guiding practice. Unless restorative justice is grounded in a set of clearly articulated values and principles, there is real danger that its potential can be subverted by the conventional justice system.⁵³ Furthermore, we argue that this model is not limited to criminal justice, but can be applied in various settings such as schools, using a variety of restorative processes and interventions.

In light of the above, we recommend that the South African criminal justice system be re-conceptualised such that its foundation is trauma-informed and restorative justice-infused. Over the long term that would mean that all players along the criminal justice spectrum, from police to prosecutors, judges to correctional officials, act in ways that are grounded in this philosophy. The system can then still be tough on crime, but do so through a practice that is more restorative in the way that it deals with those who offend and their communities. We believe that community-based processes should be the primary focus of the criminal justice system in South Africa, with institutional care being kept as the option of last resort.

To work towards a more appropriate criminal justice system model for youth we suggest the

following guiding principles for its development:⁵⁴

- *A system-wide understanding of trauma and restorative practices.* This means the broader justice system integrates this understanding into policy, practice and implementation at relevant institutions.⁵⁵
- *Safety.* This is a constitutional imperative. In addition, from a neuroscience perspective we know that individuals who feel safe are less likely to overreact and more able to engage with new skills and behaviour.⁵⁶ We should therefore be seeking to expand safe spaces within the wider criminal justice system beyond children's courts and sexual offences courts. We should develop strategies to ensure that the police and law enforcement can become trusted actors in communities.
- *Supportive and respectful relationships.* Punitive approaches do not work, especially with youth.⁵⁷ Therefore, at an organisational and institutional level we should ensure that trauma-informed strategies and restorative practices inform the responses of adults and/or those in authority.⁵⁸ Perry et al. suggest that '[p]romoting relational health by increasing the quality, number and density of supportive, nurturing and trauma-informed people is the most effective and enduring form of intervention.'⁵⁹
- *Self-regulation.* Encouraging self-regulation is a major task, particularly with those individuals who are more aggressive and impulsive. The ability to be aware and respond appropriately when a situation is escalating, requires engagement with higher brain functioning to enable a change in thinking processes and learn new skills.⁶⁰ It also includes the ability to resist actions that will compromise future goals – in other words, developing a sense of purpose. This requires not just teaching but modelling regulation.

- *Strength-based behaviour.* This is not just about eliminating negative behaviour but building up areas of strength and developing aspects such as problem-solving skills; viewing people as assets and not liabilities; and providing encouragement and positive feedback.

Empowering communities as frontline responders

The empowerment of communities is key to successful implementation of our proposed model. Communities must be empowered with the capacity to act as frontline responders to transgressions and conflicts that take place within their own community. This could mean working with community leaders, elders and/or those with 'street cred' to enable them to be effective mediators in conflict and for community building. This could take the form of restorative circles, restorative conferences, diversion and victim-offender dialogues. Marginalised communities in South Africa have a history of policing themselves and thus the energy and desire is already present.⁶¹ We agree with Community Connections for Youth that '[t]he community is central not peripheral...too often the communities in which young people reside, and will ultimately return, are engaged only as an afterthought...'⁶²

A prime example of success in this regard is that of the Zwelethemba model or Community Peace Programme, started in Worcester, that aimed to practice civil policing and conflict resolution outside of the criminal justice system.⁶³ This community model has been widely cited but it was shelved due to lack of resources (or rather, we argue, a lack of political will).

Institutional care where necessary

Without being naïve, we also need to acknowledge that there will still be those people who pose a threat to society, as well as to

themselves. A need for residential care therefore remains, even though for youth under 18 it should always be a last resort (as per the Child Justice Act).⁶⁴ Residential care institutions, especially for youth, must also be designed according to trauma-informed restorative justice principles and values. An example is the monastic model for violent youth proposed by Garbarino, since it 'emphasizes contemplation, reflection, service, cooperation, meditation and peace, instead of confrontation, dominance and power assertion.'⁶⁵ These principles must also be incorporated into the architectural design, colour, light and composition of spaces.⁶⁶ The architect and designer Deanna Van Buren posits that '[t]he built environment forms the containers for nearly all the activities of our lives. These containers have a profound impact on how we feel and behave... values are inherent in its materials, forms and layout.'⁶⁷ In saying this we therefore acknowledge that a redesign of the physical spaces of prisons and the Child and Youth Care facilities is needed.

Conclusion

As far as we are aware, trauma-informed restorative-oriented options are not currently in practice in South Africa, even though legislation such as the Child Justice Act 2008 has brought a much-needed emphasis on a restorative approach along with an awareness of the impact of context. Making the shift to a more restorative system will require the willingness to accept the inherent failings of a systemic legacy inherited from our past and enable us to see that being 'tough on crime' does not require punitive and violent measures.

The integration of trauma-informed and restorative justice principles and values can help lead the way in re-conceptualising the South African criminal justice system. It must form the foundation and basis of thinking in every decision in the system, from policing, to arrest, through to the courts and the decisions made

from there. The chequered history of prison reform in South Africa suggests that changes that are viewed as merely just another reform, will be compromised in their efficacy because of the deep and seemingly intractable problems in the system. Furthermore, the violent nature of imprisonment only exacerbates the trauma of young, and adult, offenders. The criminal justice system can no longer continue doing what it is doing and expect a different result.

We therefore propose a way forward that is based on strengthening community-owned interventions, as well as constructing more transformational structures, especially for youth, where it is necessary. We believe that by using a framework that is trauma-informed and based on restorative justice principles we can rebuild a criminal justice system that can more effectively reduce the levels of crime and violence. Adopting this approach could facilitate opportunities for young offenders to heal and develop healthy ways of being and relating in the world.



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Notes

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