

**CASE STUDY REPORT:
KHULISA'S APPROACH TO RESTORATIVE JUSTICE**

An exploratory examination of Khulisa's approach to Restorative Justice as applied by its Newcastle and Phoenix offices in the Kwazulu Natal Province

KHULISA PROJECTS STUDIED (KZN)

1. **Diversion Projects (a) Newcastle
(b) Phoenix pilot project (Justice & Reconciliation)**
2. **Rehabilitation Project**
3. **Make it Better (MIB)**

Study commissioned by the Danish Embassy, Pretoria.

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ABSTRACT

This paper examines Khulisa's contribution to RJ as exemplified by four projects funded by the Danish Embassy and implemented by their Newcastle and Phoenix offices in Kwazulu Natal. The study is by its nature a thin analysis of Khulisa's approach while attempting to contextualise it within 'the contemporary embrace of restorative justice' in South Africa.¹

Since this was an exploratory study, and since various definitions of restorative justice abound in the literature and amongst practitioners around the world, this analysis was simply framed by open ended questions based on the dictionary definitions and thesaurus synonyms of 'restorative' and 'justice' found in *Roget's New Millennium™ Thesaurus, First Edition (v 1.3.1)*, *Oxford concise and Merriam-Webster dictionaries*. These questions were followed up by questions of clarification. Within this frame, respondents were free to emphasise any aspect of RJ from their subjective perspective.

This paper does not set out to offer any definitive answers to the questions it raises, but is primarily concerned to lay bare some of the promising aspects, contradictions and gaps that can be detected within the criminal justice and community based application of RJ. It takes a hybrid reporting form to accommodate Khulisa and the Embassy's needs for (i) an analysis that *could* inform policy and Khulisa's need that (ii) recording of '*best practices*' and successes be documented in some way. This writer attempted to find the middle ground using the 'restorative' lens described above. The paper is therefore structured according to the themes that emerged from the framing questions.

¹Term borrowed from Sandra Walklate Manchester Metropolitan University, UK *Journal Critical Criminology* Publisher Springer Netherlands Issue Volume 13, Number 2 / January, 2005

1. Introduction

1.1 Background

While the term 'restorative justice' is relatively new in South Africa, its vision, principles, and practices are contained within the concept of 'ubuntu', a term woven into the fabric of the African worldview, which has found currency within the wider South African society after apartheid. It also resonates with many other religious and spiritual traditions reflected in the multi-cultural South African environment. Many indigenous communities around the world, including in South Africa, have for centuries used non-adversarial means of dealing with crime and offering victims and offenders a pathway back to harmonious relationships.

The constitutionally sanctioned response to apartheid crimes was phrased as follows -

'... there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.' (Interim Constitution 1993).

The Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995) enabled the TRC to, promote national unity and reconciliation; to grant amnesty to offenders; to give a voice and reparations to victims; and very importantly, to make recommendations of measures to prevent future human rights violations.

A civil society organisation introduced restorative programmes such as 'offender reintegration' to South African society as early as 1910 and later 'diversion programmes' were added. Khulisa's vision, principles, practices, processes and programmes can therefore be located within an established mode of humane approaches to the causes and consequences of criminal behaviour within South Africa. At a recent criminal justice sector conference on prison overcrowding held in East London (November 2006), a traditional leader stated that incarceration was never an option in traditional conflict resolution practices.

Many 'modernised' versions of RJ processes and practices can be traced back to traditional and religious ways. These practices can essentially be characterised as being (i) tough on the issues (harm), (ii) compassionate with the offender and the victim(s) and (iii) concerned with social harmony and reciprocal relationships.

1.2 Context

While this analysis is of necessity very narrowly focused, the study takes cognisance of the context within which RJ is expanding –

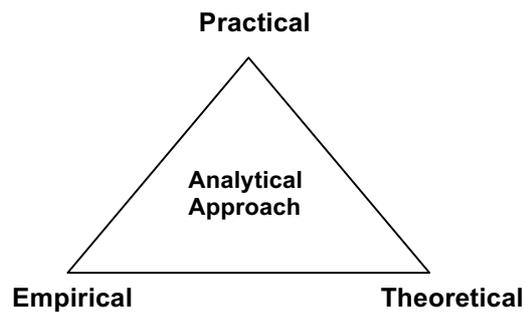
- a) where the Criminal Justice System and society still largely understand the ‘war making’ (adversarial) approach as standard practice to deal with crime;
- b) where the Truth Commission, through wide media coverage, publicly demonstrated the application of restorative principles;
- c) where State institutions exhibit an incremental acceptance of the restorative (peacemaking/ubuntu driven) approach to crime reduction;
- d) where the levels of overt harm and violence are unacceptably high and perceptions of peace and justice unacceptably low;
- e) where the more subtle phenomenon of structural violence and the link to high crime levels are under-researched in the criminal justice arena and therefore generally delinked from crime prevention policies and programmes;
- f) where the constitution and state institutions advocate co-operative governance and ‘partnership’ with civil society organisations;
- g) where the local crime prevention discourse is rich with references to ubuntu, unity, equality, repairing harm, justice and peace and is deployed with varying degrees of evidence to support the fruition of these claims;
- h) where globally an inherently adversarial capitalist system widens the gap (and its consequences) between rich and poor within and between nations – South Africa being no exception.

1.3 Approach

All of the above influences prefigure the proliferation of restorative practices, processes and programmes we witness in South Africa today. However, the ‘map is not the territory’. In order to understand how restorative principles are applied on the ground, it was deemed necessary to gather empirical evidence against which to test the stated restorative ‘intentions’ of Khulisa projects that are being implemented under the banner of Restorative Justice.

The emphasis was on Khulisa projects funded by the Danish Embassy, and includes an analysis of a ‘storytelling circle’ funded by the Finnish government. The aim is to get an objective insight into Khulisa’s general approach to restorative justice and how this is conceptualised and articulated in the context of state/civil society partnership. For this reason an exploratory, triangulated approach to gathering documentary, interview and observation data is used, as illustrated hereunder.²

² The triangulated approach is preferred because it provides an (a) empirical, (b) practical and (c) theoretical lens through which to maximise understanding of what is essentially a multi-disciplinary, multi-agency, state/civil society co-operative effort which defies one single emphasis definition.



1.3.1 Data Collection

This study was approached with humility and an open mind. Instead of going into the study with a rigid quantitative grid to measure if Khulisa's approach 'fits' conventional criteria, the approach was qualitative in nature and the writer chose to observe, consult, compare, participate, ask clarifying questions and then to research if similar things were done and researched elsewhere under the rubric of restorative justice. The study had to be exploratory bearing in mind what Brookes suggests about evaluating RJ programs -

We don't really know what kind of data would show that a victim experienced a sense of forgiveness during an encounter with his or her offender. But our suspicion is that whatever data is relevant -- it would be far too difficult and expensive to collect and analyse on a large scale; and the results would, in any case, be far too complex for most stake-holders to digest. Fortunately, there are certain things we can measure which do not have these sorts of obstacles, such as recidivism rates, victim satisfaction and restitution payments. And if we can persuade those who matter, that restorative justice programs are highly successful using such criteria . . . why not leave it at that? Well, there is a very good reason why we ought to reject this approach³. ...what we are leaving out in our research -- what we don't (or don't know how to) measure is essential to a truly restorative outcome.⁴

The following data collection process was followed in an attempt to include those things that defy 'measurement' by quantitative means to enhance the quantitative means already in use -

1. Khulisa documents studied:

- Agreements
- Phoenix proposal
- Reports (funders and workshop, Imbizo, evaluations etc.)
- My path workbooks
- Files
- Brochures

2. Email Questionnaires

3. Correspondence with various Khulisa staff members in Newcastle,

³ Caveat: This writer would argue that quantitative and qualitative methods should be combined to fit the research question, rather than to give preference to one method by default.

⁴ Brookes, Derek. Evaluating Restorative Justice Programs, <http://www.restorativejustice.org>. Site visited on 20 August 2007

Phoenix and Johannesburg consulting and clarifying

3. Interviews with MIB, Diversion and Rehabilitation project staff, facilitators, mediators and mentors (Newcastle and Phoenix).
4. Interviews with victims and offenders (Newcastle and Phoenix)
5. Observation – mediation (Phoenix)
6. In loco visit to a MIB crèche and Ubuntu club (Majuba Forest, Newcastle)
7. In loco interviews – Ekhuseni prison (Newcastle)
8. Participation in Storytelling Circle.

1.3.2 Data Analysis

Since this was an exploratory study, and since various definitions of restorative justice abound in the literature and amongst practitioners, this analysis was simply framed by open-ended questions based on the following dictionary definitions and thesaurus synonyms of 'restorative' and 'justice'⁵ –

Restorative⁶

Main Entry: corrective

Part of Speech: *adjective*

Definition: healing

Synonyms: antidotal, counteracting, curative, curing, disciplinary, palliative, penal, punitive, reformatory, rehabilitative, remedial, restorative, therapeutic

Source: *Roget's New Millennium™ Thesaurus, First Edition (v 1.3.1)*
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Justice⁷

Main Entry: justice

Part of Speech: *noun 1*

Definition: lawfulness

Synonyms: amends, code, compensation, consideration, constitutionality, correction, creed, decree, due process, equity, evenness, fair play, fair treatment, fairness, hearing, honesty, impartiality, integrity, judicatory, justness, law, legal process, legality, legitimacy, penalty, reasonableness, recompense, rectitude, redress, reparation, review, right, rule, sanction, sentence, truth

Notes: **revenge** is personal and **justice** is societal

The stipulative definition guiding this study was therefore 'Restorative Justice is a fair process or practice that promotes social justice and facilitates healing at the personal, interpersonal, inter-group and societal levels'.

⁵ Two other sources were consulted, (Oxford concise and Merriam-Webster dictionaries). These definitions and synonyms are in line with some of the terms above. Roget's have a wider scope and assists better in bringing Khulisa's approach into focus through a restorative justice lens.

⁶ *Roget's New Millennium™ Thesaurus, First Edition (v 1.3.1)*, Copyright © 2007 by Lexico Publishing Group, LLC found at <http://thesaurus.reference.com/browse/justice>

⁷ *Roget's New Millennium™ Thesaurus, First Edition (v 1.3.1)*. Copyright © 2007 by Lexico Group, LLC found at <http://thesaurus.reference.com/browse/justice>.

1.3.4 Report Structure

The paper will be structured according to four restorative models that surfaced during interviews and observations and draws on RJ literature to explain, modify and/or construct these models. The conclusion will be systematised according to a levels of analysis method to give a clear outline of how Khulisa's approach fits into the bigger picture presented by RJ practices.

2. Analysis of Khulisa's approach to Restorative Justice

An analysis of the data collected during this study and interviews with Khulisa representatives during the Danish Embassy's DGG review in November/December 2006 reveals that Khulisa's Restorative vision exhibits four analytically distinct features embedded in an approach which '...includes primary, secondary and tertiary crime prevention initiatives'.⁸ This approach more or less links up with three types or models of restorative processes found in RJ literature, which depend '...on the relation they bear to the traditional criminal justice system'. These are (i) an *integrated* model, where victim-offender mediation is part of the criminal justice system as is evidenced by Khulisa's diversion projects, (ii) an *additional* model where victim-offender mediation is situated adjacent to the conventional system of criminal justice, as applied in Khulisa's rehabilitation projects (iii) an *alternative* model, where victim-offender mediation is used instead of the system, as exemplified by mediations performed by Khulisa staff, with family members and victims of imprisoned offenders as part of their reintegration⁹ and (iv) what this writer would describe as a *preventative* model which does not necessarily include a restorative *process* such as mediation that is a feature of the above models, but is informed by a restorative *vision* and *principles*.

This model coheres with the emerging field of "restorative practices" as discussed by Wachtel and McCold, which '...offers a common thread to tie together theory, research and practice in seemingly disparate fields, such as education, counselling, criminal justice, social work and organisational management. These authors suggest that the *restorative paradigm* is expanded far beyond its origins in *restorative justice* based on 'the fundamental hypothesis' that when authorities and other agencies do things *with* them, rather than *to* them or *for* them,

⁸ Presentation by Dr Charmaine Badenhorst of UNISA during the Storytelling event 'Restoration through Reintegration on 27 July 2007.

⁹ Groenhuijsen, 2000; p.72) quoted in An International Review of Restorative Justice by David Miers Crime Reduction Research Series Paper 10, ISBN 1-84082-693-2 © Crown Copyright 2001. While Groenhuijsen specifically refers to victim-offender mediation, this report will apply the three models beyond the mediation event to other restorative practices within the Restorative Justice paradigm.

people are happier, more cooperative and productive, and more likely to make positive changes in behaviour.¹⁰

The four models can be recognised in different aspects of the Diversion, Rehabilitation and MIB projects studied.

2.1 The Integrated Model

Khulisa's Diversion Projects (Newcastle and Phoenix)

This discussion about diversion covers both projects. Where they differ, specific reference will be made to each project. The chief difference between the two projects is that the Newcastle project only deals with juveniles and is covered by the Child Justice Bill. The Bill has three levels – each one with options more onerous than the level below. In Skelton's opinion, this is intended to ensure that a wider range of cases are referred for diversion and the fact that RJ options are set out at levels two and three, are according to her, an indication that they are seen as being suitable for more serious matters.

The Phoenix project is a pilot which deals chiefly with adult cases such as Crimen Injuria, Assault Common, Defamation of character, Intimidation, Theft, Vandalism, Shoplifting, Malicious damage to property and Statutory offences as set out in the agreement between Khulisa, the National Prosecuting Authority (NPA) and the Department of Justice (DOJ).

It could be argued that where no legislative framework exists, restorative justice is rendered vulnerable to marginalisation. Batley however, is more upbeat about the possibilities for restorative justice in South Africa. He argues that the '...framework of restorative justice has moved from a marginal concept to one that is being seriously examined by government as a whole and by key role players in the criminal justice system'¹¹. An examination of government websites confirms this observation. What is not clear, is how restorative justice is conceptualized and applied, what types or models of restorative justice are under examination, why restorative justice is being deployed by the different departments and how power is distributed in what is essentially intended to be a 'balanced' approach.

The question of power lurks in Ann Skelton's suggestion that diversion in South Africa currently operates in a legislative vacuum and is dependent on 'the sole discretion of a prosecutor'. One wonders what legislation would indeed look like and how discretion/decision-

¹⁰ [From Restorative Justice to Restorative Practices: Expanding the Paradigm](#), by Ted Wachtel and Paul McCold, a paper presented at the IIRP's Fifth International Conference on Conferencing, Circles and other Restorative Practices, August, 2004, Vancouver, British Columbia, Canada

¹¹ Batley, M, Ch. 10 Outline of relevant policies, in *Beyond Retribution Prospects for Restorative Justice in South Africa*, 2005.(ed) T Maepa

making power, amongst other issues will be dealt with in a situation where, to use Batley's term, a 'framework of restorative justice' will be injected into the criminal justice system. Given the current politicised nature of crime and indeed the high levels of crime, it can be expected that 'criminal justice processing' by whatever name, will remain under the control of the state.

With or without a legislative framework, what Khulisa's current projects have in common with other pilot projects in partnership with government, is that state officials, with no alterations to their 'job descriptions' can plead ignorance and tend to carry out these 'grey' activities on an *ad hoc* basis. It is this writer's experience, which is backed up by Skelton's observation, that much of what does in fact take place in a 'pilot environment', is overly reliant on 'activist minded' state officials for state/civil society partnerships to work.¹² Restorative Justice is promoted as a 'balanced approach'. In this instance, there is an imbalance of power where the prosecutor's discretion effectively gives him/her the power to 'define' what restorative justice' becomes. This transition period requires vigilance on the part of all stakeholders.

This implicit power to define, based on one person's discretion, can amongst other things, lead to a rather *ad hoc* split (bifurcated) approach to criminal justice. It has been argued

*'that allowing a system in which some cases go through a restorative process and others through the formal criminal justice process would almost certainly result in a "soft-hard bifurcation" in which the 'soft' cases will be diverted, and the 'hard' cases put beyond the reach of a restorative solution. This can very easily result in discriminatory practices in which those who are better off can access restorative justice while the disadvantaged cannot. In a country like South Africa, with its history of discrimination and the legacy of poverty, such possibilities must be taken seriously.'*¹³

As a counter to the above statement, it could be argued that organisations like Khulisa are idealistic, that restorative justice is balanced and victim centred and that these factors would in and of itself provide balance in a state/civil society partnership. However, closer examination reveals that both juvenile and adult diversion, as currently practiced is neither 'oppositional' nor an 'alternative' to retributive (hard) justice, it functions as a 'soft' sub-process *within* the retributive paradigm. According to Khulisa staff in Newcastle and Phoenix, cases referred to them remain on the court roll pending a 'successful' restorative outcome. If during this period Khulisa informs the court of a successful outcome, the case is removed from the role. If the process 'failed' for whatever reason, it is returned to the retributive process.¹⁴ In the real world, things are more blurred and cannot be as clear and analytically distinct as theorists would have us believe. In deploying theories to 'locate' this study, this writer remains aware that many theories were crafted in countries with vastly different 'ground

¹² Ann Skelton, Ch 11. The Child Justice Bill from a Restorative Justice Perspective in *Beyond Retribution Prospects for Restorative Justice in South Africa*, 2005 (ed) T Maepa .

¹³ skelton, op cit.

¹⁴ Reasons for returning cases to court vary from one of the parties refusing to go through the process at pre-mediation phase; alternatively during any stage of the mediation; or if the terms of the agreement are not fulfilled.

truths', political, social and economic arrangements. Theories and research done elsewhere are simply used as a guide and a means to subject practices to rigorous scrutiny.

Notwithstanding the above questions, blurred boundaries and theoretical luxuries, Khulisa's diversion projects function in the real world in the following way –

In most instances the prosecutor and in isolated cases the magistrate, divert individual cases for a restorative process (Phoenix JARP project: victim offender mediation or conferencing); or either an 8 or 16 week¹⁵ restorative programme (Newcastle project).

The Child Justice Bill, however, frames cases referred to the Newcastle office. In the absence of a legislative framework for diversion of adult offenders in Phoenix, the criteria for selection is not clear. The project manager in Phoenix sends matters '...back to court...' that do not fit her criteria. The agreements signed between Khulisa, the Department of Justice and the NPA are silent on selection criteria. In cautioning against the illusion of a common language and the assumption of a common understanding of restorative justice, Kathleen Daly argues that -

*It is worth observing that these differences are not merely contingent on the subsisting (sic) legal culture, nor the product of purely pragmatic choices as to the best way of running a restorative justice or a victim-offender mediation programme, but flow from ideological assumptions about the nature of unwanted conflicts and the way in which communities should respond to them.'*¹⁶

and

*Commentators would do well to shift their rhetorical claims away from an oppositional (and adversarial) framing of retributive and restorative justice and move towards a more complex reading of justice principles and practices that reflects what conference participants (not just the professionals) are thinking and doing.'*¹⁷

Lack of explicit criteria and academic debates aside, there is a reasonably clear process by which cases are referred to Khulisa with a few exceptions. The Newcastle office offer diversion programmes of 8 weeks and 16 weeks respectively, based on the levels discussed above. In addition, activities include Family Dialogue and Parent workshops, Ubuntu in Action, and Detention Centre visits as well as 'mediated apologies'¹⁸ where possible. In addition to facilitators who administer the workshops, Khulisa also employ mentors who have individual sessions with divertees. The mentors are usually about the same age as the divertees and are in most cases able to gain their trust. This assists Khulisa staff to understand how to deal with different divertees. The question of confidentiality is dealt with

¹⁵ Child Justice bill levels 2 and 3

¹⁶ Restorative Justice in Diverse and Unequal Societies. October 1999. Kathleen Daly, Law in Context (forthcoming, 2000) Special Issue on Criminal Justice in Diverse Communities, Vol. 17 (June).

¹⁷ *ibid*

¹⁸ Term used by Susan Theunissen during interviews with Newcastle staff, facilitators and mentors on 5 July 2007.

as the mentor first seeks the divertee's permission before disclosing information to Khulisa staff.

In Phoenix, provision is also made for victims and offenders to have a say in whether they want to proceed with a restorative process at various stages of (in this case) mediation.

During the observation of a mediation process in Phoenix, the writer used the following grid to assess whether Khulisa mediators applied basic mediation phases and stages during the RJ process¹⁹ -

RESTORATIVE PROCESS THREE MAIN PHASES	OBJECTIVES
A. PRE-MEDIATION PHASE	To - <ul style="list-style-type: none"> • Explain the phases of the RJ process • Ascertain willingness of parties to undergo process • Gather Information • Understand History(ies) of the Conflict • Initiate Analysis (cause and consequence) • Draft Agenda
B. MEDIATION PHASE: FOUR STAGE MODEL <ol style="list-style-type: none"> 1. Introduction stage 2. Storytelling (Narrative) Stage 3. Problemsolving Stage 4. Agreement 	To create structure (formal or informal) To- <ul style="list-style-type: none"> • Put parties at ease • Explain the stages in mediation process • Facilitate groundrules • Facilitate controlled communication • Facilitate Agreement on issues/agenda formation • Facilitate dialogue • Facilitate Joint Problemsolving • Facilitate a Just and Fair outcome
POST MEDIATION PHASE Follow-up/review/M & E	<ul style="list-style-type: none"> • To monitor and evaluate Implementation of the Agreement • To revert back to Court

In addition, the writer assessed mediator characteristics, strategies, skills, techniques, and tactics insofar as this was possible to observe during the mediation process and during interviews.

Information about the post mediation phase was gleaned during interviews with mediators and the project manager.

¹⁹ This generic mediation model is used by conflict resolution organisations in South Africa and was used extensively during the Peace Accord days. The model is also used for international conflict resolution and was popularised at that level by R. Burton, a diplomat turned academic and is known in International Relations literature as a 'problem-solving workshop'.

All the Mediators interviewed and observed were female and paired during each process. Both mediators covered different questions. There was no clear lead facilitator. On enquiry after the observation, the writer was informed that this method is employed for mediators to gain experience and to learn from each other's strengths. Arguably pairing of mediators can be maximised if there is a clear lead person for different stages of the mediation. This would allow for one mediator writing and the other keeping eye contact, listening and communicating with body language and observing the body language and non-verbal communication from the parties. The seating arrangement should allow for dialogue between the parties and not only be set up for dialogue with the mediators. At present, the seating arrangements and observed interaction do not allow for maximum communication – it might be better in the rooms with round tables which are also set up and used for mediation²⁰.

Mediation is essentially meant to be dialogic in nature. In the mediation observed the offender was on several occasions encouraged to speak directly to the victim, but this was not done in the case of the victim whose body language and eye contact was directed towards the mediators instead of the offender. This was completely opposite to the verbal communication, which indicated acceptance of the apology and offered ways towards a better future relationship, including acknowledgement that his behaviour provoked the offender. The dissonance was obvious to me as an observer – yet there was absolutely no coercion whatsoever, not from the mediators, nor the offender. One can conclude that the surface issues were successfully dealt with and an amicable agreement was reached, however, one is left with a niggling feeling that much more lurks beneath the surface. This raises questions about what the possibilities were for referral, which, in this writer's opinion was not adequately explored. It also raises questions about how deep this type of intervention is meant to go. Is the goal to reach only negative peace (absence of violence) or also positive peace (attempting to deal with the root causes of conflict)? Is this type of mediation intended to be palliative (dealing successfully with symptoms) or curative (dealing with proximate and root causes)? What is the purpose of cases being referred to mediation? To heal individuals; relationships and by extension the community? Or simply to relieve the burden on the criminal justice system which is set up to deal directly with symptoms only and *might* regard causes as a plea in mitigation? These are some of the questions that cannot be answered easily, but that does not mean that it should not be raised. There is cold comfort in the fact that dedicated peacemaking criminologists still struggle with these questions as Gregg Barak illustrates in more lofty language:

Of course, the question still remains: "How do we get from a world dominated by negative peace to one dominated by positive peace?" A radical transformation of this magnitude depends, in part, on criminologists and other people developing a fundamental appreciation for the dialectics of war and peace, violence and

²⁰ It is conceded that the observation happened in an office that is not ordinarily set up for mediation. However, in such a case, the chairs can be arranged to create a 'safe space'.

*nonviolence, and injustice and justice. It also depends, almost totally, on developing the appropriate strategies and policies of social exchange that flow from the dialectical analyses of adversarialism and mutualism.*²¹

Notwithstanding the above fundamental questions, the mediators observed and interviewed had a clear grasp of practical application of the mediation process. It is understood that further training on RJ, related information on referrals, and regular refresher courses are offered. For example, some mediators have more knowledge about protection orders, interdicts and so forth in Domestic Violence cases than others²². The opportunity exists for this knowledge to be shared in regular meetings, including discussions about lessons learnt in different mediations.

The option of referrals, community service and other forms of 'reparation' as a by-product of the RJ process need to be more clearly explained to parties. On average more offenders were referred for interventions after the process than victims. In any event, a small percentage of referrals were made. This could be a function of the short period of operation of the project; or of the fact that the Phoenix court which serves as feeder to the project, only deal with petty and one-off cases which might not require referral or community services. This might change when other sources of referrals to the project comes into effect. The following list of referral agencies was supplied to the writer.

Phoenix Referral List

1. Referrals into local youth leader organizations or Khulisa's MIB program
2. Counseling:
 - Phoenix Crisis Centre
 - Alcoholics Anonymous
 - Department of Social Welfare
 - Local religious institutions (at choice of participants)
3. Community Services:
 - Cleaning of schools
 - Filing, cleaning or washing vehicles at the Phoenix Police Station
 - Mowing the grass at schools
 - Cleaning local grounds
4. Behavioural change programs such as the "Alternate to violence project" (AVP)
 - 3 h/r sessions and Silence the Violence
5. Rehabilitation for substance abusers.
6. Victim support groups (held internally by Kim/Cindy)
7. Medical evaluations including psychiatric etc

The opportunity exists to link crime prevention to the RJ process as suggested by Braithwaite who argues that --

²¹ Barak, G. *A Reciprocal approach to Peacemaking Criminology: Between Adversarialism and Mutualism*, 2005 found at http://www.greggbarak.com/whats_new_2.html and *Theoretical Criminology*, Vol. 9, No. 2, 131-152 (2005)© 2005 SAGE Publications

²² Interviews with mediators on 15 August 2007.

*'Restorative justice can remove crime prevention from its marginal status in the criminal justice system, mainstreaming it into the enforcement process. It can deliver the motivation and widespread community participation crime prevention needs to work...'*²³

Some examples of how to mainstream crime prevention through RJ are already evident in Khulisa's work with ex prisoners and divertees in Newcastle. It is understood that the Phoenix project will follow the trajectory of other Khulisa projects and incrementally add crime prevention aspects to their work.

Security is also a factor that has to be considered since the police had to be called in on one occasion when parties became abusive towards each other and the mediators. According to the project manager this was an isolated incident. It is worth considering security issues given that there appears to be a feminisation²⁴ of RJ processing with women being more available to volunteer during the times that parties are referred to Khulisa's offices.

In sum, only time and available resources will tell what the long-term impact of an integrated model will be on victims, offenders, communities, levels of crime, the criminal justice system and society at large. Judging by the comments of the victims interviewed, they appear to be pleased that such an option exists. An offender who had been through the process in Phoenix, offered to make a monthly donation – in exchange for possible future mediation services for his business!²⁵

2.2 The *Additional* and *Alternative* models

Khulisa's Rehabilitation Programme (Newcastle)

Khulisa's Rehabilitation programme exemplifies both contemporary and forward-looking features of Restorative Justice in that it has an 'emotionally intelligent' approach to criminal justice *and* it places an emphasis on social reintegration of offenders. The approach is informed by restorative principles and exhibits the features described by Sherman -

Restorative justice (RJ) is the prime but not only example of the recent trend towards a more "emotionally intelligent" approach to criminal justice (Sherman, 2003) ...[it] is

²³ John Braithwaite Linking Crime Prevention to Restorative Justice Australian National University

²⁴ For an interesting article on women's roles in building more peaceful societies see Cheryl de la Rey, Susan McKay (2006) Peacebuilding as a Gendered Process, *Journal of Social Issues* 62 (1), 141–153. doi:10.1111/j.1540-4560.2006.00443.x

²⁵ While this offer was the cause of private mirth and the suspicion that 'he wants to use the service to avoid getting a criminal record', it is not inconceivable that small business in the community might want to make small contributions – as long as it is understood that they cannot abuse the service.

*distinctively contemporary in its emphasis on feelings and bonds among people, both within offenders' families and in their connections to victims and their families.*²⁶

Khulisa's 'My Path' programme is a self-help learning programme which sets offenders 'on a path of exploring who he or she really is and preparing for re-entry into a positive, productive and meaningful lifestyle'. It is organised into three Phases (Exploration of self; Consolidation of strategies and skills which focus on self management; and a Preparation phase in which business skills and entrepreneurship are imparted). This is a year long course with 36 modules. Each module is facilitated by part time facilitators who use interactive methods to impart knowledge. Facilitators appear to have a sound understanding of RJ principles and focus on 'the victim, healing, apology and reintegration into the community' arguably the core focus of restorative justice.²⁷ In addition, the workbooks are supplied for homework assignments and participants discuss the topics amongst themselves when they return to their cells²⁸. Khulisa also offers Pre-release, and Drug Abuse, and HIV AIDS courses to selected offenders who become peer educators within the prison context and upon release.

An article by the United Nations of Drugs and Crime describes what is required for social reintegration –

*'Probation services, where they exist, or similar bodies, have a key function in all of these areas – helping ex-offenders rebuild their relationships with their families, with finding a job, encouraging professional treatment for problems such as drug addiction and in general enabling a positive life strategy. But success, to a large extent, depends on community support; and in countries where a probation service does not exist (which will be in a majority of cases in developing countries) the role of other organizations of civil society is central. Unfortunately, due to factors that include lack of resources, prison overcrowding, and inadequate attention given to the post-release needs of ex-offenders, the social reintegration needs of offenders are often a low priority in practice.'*²⁹

After a careful examination of Khulisa's programme and its implementation, it can be argued that Khulisa plays this central role referred to above. The organisation does indeed give high priority to the social reintegration needs of offenders, but the problem of inadequate resources due to the current funding environment is a real threat to the work they are able to perform. For example, the project where videotaped apologies were taken to and from offenders to families and victims has been discontinued in the Newcastle project. It can be argued that cheaper means of reaching the same goal is possible, but even with cheaper means, such as a tape recorded message, the problem remains vast in that time is needed to track down

²⁶ Lawrence W Sherman and Heather Strang 'restorative justice: the evidence', © The Smith Institute 2007. www.smith-institute.org.uk

²⁷ Questionnaire responses by Ms Collette Yeh and Mr SCP Ngcobo

²⁸ Interview with six offenders on 26 July 2007.

²⁹ UNODC, Criminal Justice Reform Unit CUSTODIAL AND NON-CUSTODIAL MEASURES Social Reintegration, 2006.

families and victims and this adds to the costs.³⁰ Garnering community support, in the current environment where crime levels are high, is a full-time occupation and resources are needed to retain staff to fulfill these functions.

Interviews with 3 released and 6 incarcerated offenders in Newcastle and testimonies by 10 offenders at a storytelling event held at Unisa on 27 July 2007 revealed the following themes-	
a)	The majority of offenders come from broken homes or single parent families (absent fathers are a big feature), unemployed mothers, estranged family
b)	Many lived in overcrowded environments
c)	Many of them lived with their grandmothers or other family
d)	Many of them simply 'slipped into crime'
e)	Many of them suffered emotional, verbal and or physical abuse at the hands of parents or guardians
f)	Many of them left school early as a function of domestic instability
g)	Many of them succumbed to peer pressure
h)	Many of them have used or abused one or other substance
i)	Quite a few of them 'wanted flashy things'
j)	Many of them felt that if they had learnt 'the things they learnt from Khulisa sooner, they might not have slipped into crime'
k)	Many feel that their lives have changed as a result of the courses
l)	Many of them have sought forgiveness from their victims and families via video messages
m)	A few had face to face meetings with victims
n)	Many understood the need to also forgive themselves – acknowledge that what they did was wrong
o)	Many of them did not previously consider the emotional effect their action had on victims
p)	Only three of the group came from 'regular' families
q)	Many of them are involved in crime prevention activities (post release)
r)	All of them have changed their behaviour from anti-social to pro-social
s)	Most feel that their criminal record is a barrier to employment
t)	Of the released group (12), only two are currently in full-time employment, others are volunteers.
The types of crimes committed by this group were – Rape, attempted murder, murder, fraud, housebreaking and theft, theft (car), robbery, armed robbery and hijacking	
Ages ranged from 16 to 31 at the time the crimes were committed	

The scope of this paper does not allow for an in depth analysis of the above data. Keeping to a thin analysis based on Khulisa's approach to Restorative Justice, the following comments are in order –

The evidence of structural causes of crime are overwhelming, so too the fact that many offenders have been victims themselves. Restorative Justice, in addition to healing, responsibility, apology and reintegration, requires social justice. Civil Society organisations can only go so far to contribute to social justice. Structural causes of crime remain the responsibility of the entire society. Structural violence and victimology remain marginal in criminal justice research. In a report on Restorative Justice, Alicia Victor suggests that '[t]he growth of the restorative justice (RJ) movement may be seen as part of the 'victimological turn' in criminal justice policies since the early 1960's.³¹ Clearly this society is also in need of a 'structural turn'.

Khulisa's work with offenders must be applauded. Given the load that Khulisa carries, and given the funding constraints, these gaps will continue to give us less than optimal results in attempting to drastically reduce the levels of crime.

³⁰ Interview and conversations with Kleintjie Nel on 5 and 26th July 2007.

³¹ Alicia Victor, Sub-Report on Delivery: Restorative Justice September 2006

The fact that the business community is reluctant to employ ex offenders is another constraint. This is an area where minds should be applied because it is a barrier to successful reintegration and a factor in re-offending.

While Khulisa's success rate is high, the recidivism rate is of concern, even for those who have attended these courses. It is clear that skilling and emotional intelligence have a positive effect on the majority of offenders, however, research is required to assess what the determinants of recidivism and relapse triggers are for the minority on whom these courses had no effect.

2.3 The Preventative Model

Khulisa's MIB (Make it Better) Programme

In a recent Mail & Guardian Article, Jody Kollapen, head of the Human Rights Commission, made the compelling argument that –

*Advancing social justice, pushing back poverty and improving the material conditions of our people are all central features of government policy. Ensuring that such interventions are properly resourced and competently executed is the best investment we can make in a safer society.*³²

This article goes to the heart of what Khulisa is attempting to do with the projects that flow out of the Make it Better (MIB) programme. Conceptualised as a project to deal with facilitators of criminal behaviour such as boredom, inactivity and unemployment amongst 18-35 year old youth.³³ The project set out to empower youth, build their capacities, foster social responsiveness and the practice of Ubuntu, and activating social entrepreneurship. In addition youth are helped to establish and manage sustainable community development initiatives, and mobilising community support by taking leadership roles in the community.

Given that the National Crime Prevention Strategy (NCPS) (1996) attributes the increase in crime to the '...destruction of social control mechanisms, enormous social and economic disparity, unemployment and underdevelopment, the legitimacy crisis in state institutions related to the slow transformation from the old order, and the "culture of violence" in South Africa'³⁴, MIB projects go some way towards dealing with the issues of underdevelopment.

The writer visited a crèche and Ubuntu Club in the Majuba Forest. The crèche was started by two of the participants in the MIB course. Participants were required to design a project based on specific community needs for which they received 'seed money' from Khulisa via Danish Embassy funding. On the day of the visit, approximately 20 children were present with the

³² Jody Kollapen: POLOKWANE BRIEFING. Mail & Guardian, 24 June 2007 11:59

³³ Email from Lesley Ann van Selm dated 20 June 2007.

³⁴ Brandon Hamber 'Dr Jekyll and Mr Hyde: Violence and transition in South Africa' In Bornman, E., Van Eeden, R., & Wentzel, M. (eds.), Violence in South Africa, pp. 349-370, Pretoria: Human Sciences Research Council, 1998.

MIB participants in charge. The area is marked by abject poverty and high unemployment. Most children are brought to the crèche so that they can receive a meal, which they otherwise might not have had.³⁵

A visit to the Ubuntu Club on the same school premises revealed that facilitators attempt to teach learners the importance of continuing with their education, amongst other things.³⁶ The nearest high school is many kilometers away and learners tend to drop out of school after grade 7 rather than walk the distance. Even if transport were available, families cannot afford the fare.

Chapter 5 of the *National Juvenile Justice Action Plan* of the Office of Juvenile Justice and Delinquency Prevention of the U S Department of Justice states³⁷ -

Due to the disproportionate number of neglect cases in comparison to abuse cases, youth who were neglected as children are almost as likely to be arrested for violent crimes as those who were physically abused. Consistent with this finding, of the maltreated children who were arrested for violent acts, 8 out of 10 were neglected as children.

and

Structural violence -- harm inflicted on individuals by social institutions or the social and physical environment -- also has a major influence on children. Children living in economically deprived areas are more likely to engage in crime than other children and are more susceptible to violent and other criminal behaviour.

This underscores the need for projects such as those developed by the MIB project. Intervention at an early stage can break what in some cases becomes a cycle of violence and criminality. Poverty in and of itself does not lead to crime; many poor people have positive resilience and refrain from criminal activity. It is the consequences of poverty such as impoverished and overcrowded neighbourhoods, violence, shame, humiliation, frustration, unemployment, marginalisation and other ills that cause crime.

In an evaluation of the Newcastle MIB project in January 2004, Margaret Roper observed that 50% of the MIB participants found employment because of the skills they learnt in the MIB project. While this had the effect of leaving the other 50% 'daunted', by the fact that they had to carry out their activities alone, the project had the unintended (?) consequence of giving these youth some dignity and a path away from crime.

³⁵ Susan Theunissen, explaining the function of the crèche other than its childcare role during visit on 27 July 2007.

³⁶ Provision of a safe social and recreational milieu, peer education on issues of violence and HIV AIDS including community services.

³⁷ Break the Cycle of Violence by Addressing Youth Victimization, Abuse, and Neglect found at <http://ojjdp.ncjrs.org/action/sec5.htm>

In sum, projects such as these are infused with Restorative principles and are in line with Khulisa's restorative vision and pragmatic approach., However Sherman's caution should be heeded, he argues that -

Ironically, a central tenet of community prevention programs has been the empowerment of local community leaders to design and implement their own crime prevention strategies. This philosophy may amount to throwing people overboard and then letting them design their own life preserver. The scientific literature shows that the policies and market forces causing criminogenic community structures and cultures are beyond the control of neighborhood residents, and that "empowerment" does not include the power to change those policies'.³⁸

This sobering observation is a reminder that South African Society needs to move from a delinked palliative approach to a curative approach that combines work done on the ground with policies that are directly linked to the structural changes that are being implemented by diverse departments. Kollapen reminds us that the policies are in place. It seems all that remains is to make those links.

3. What does this study teach us about Khulisa's approach to Restorative Justice?

Taken together, the lessons from the four projects studied show that Khulisa's approach to restorative justice –

- a) is characterised by pragmatism.
- b) is situated largely within the crime prevention/reduction paradigm.
- c) in keeping with this paradigm, the focus is largely on reintegration of the offender this is exemplified by both diversion projects and the rehabilitation project studied.
- d) in the Newcastle project, the victim comes into focus in one of the modules where a 'mediated apology' is encouraged, arranged and facilitated by Khulisa staff.
- e) In Phoenix, more offenders than victims have been referred for any kind of programmes.
- f) As part of smoothing their return to their communities, offenders are encouraged to apologise to their families and to victims.
- g) One victim was invited to what is known in the literature as a 'victim panel' – consisting of seven offenders and one victim. While the impact of this panel was positive for offenders – in that they gain insight, are prompted towards an apology etc. there is no record of follow up with the victim.

³⁸ Lawrence W. Sherman Communities and Crime Prevention

- h) Of the projects studied, except for the victim offender process, Khulisa does not have any programmes directly involving victims or directly addressing their needs beyond the victim offender mediation, they do however offer a workshop on victim empowerment.
- i) Communities where crime is rife, receive a lot of attention through ex offenders who act as volunteers and fulfil various other crime prevention functions.
- j) It can safely be argued that most, if not all civil society organisations working under the RJ banner, focus more on offenders than on victims because of factors outside of their control these are -
 - a. Urgency of high crime levels
 - b. State centred RJ
 - c. Emphasis on prison overcrowding
 - d. Court roll overload
 - e. Country strategies of foreign donors

These factors dictate what projects are funded and since Civil Society Organisations are largely dependent on external funding to continue their work, it becomes clear how crime prevention work in South Africa has been shaped by the country strategies of foreign donors.

RJ as currently practiced in SA will most likely remain palliative and not curative. For it to be curative we need bold moves from government *and* a civil society sector that becomes self-sustaining to tackle structural violence head on.

4. CONCLUSION

Given the complexity of Restorative Justice on the one hand, and its application in the South African context on the other, this paper concludes with a levels of analysis approach to isolate the areas where Khulisa's current strengths and weaknesses lie. This analytical method reveals that Khulisa's approach has several analytically distinct but practically interlocked areas –

4.1 At the individual/personal level

4.1.1 Offenders:

From the personal testimonies of ex offenders at a storytelling event³⁹, personal interviews with inmates and ex prisoners, including information accessed in various documents and

³⁹ Held at Unisa Campus, Pretoria, on 27 July 2007.

reports, it appears that Khulisa is making a positive impact on the behaviour of the majority⁴⁰ of offenders who have attended their courses.

Research on the reasons for reoffending by some offenders who have been through Khulisa programmes will shed light on what the determinants of recidivism and relapse triggers are.

4.1.2 Victims

In the environment created by funding constraints, high crime levels, court roll overloads and overcrowded prisons, the victim is not at the centre. Given the fact that many offenders claim to have been victims themselves at one time or another it is clear that this area needs attention.

4.2 At the interpersonal level

In the rehabilitation project, many relationships have been repaired with families and some victims through video messages and face-to-face mediation.

4.3 At the community level

As exemplified in the MIB project, Khulisa's role is defined by a preventative approach and MIB participants are required to develop projects according to the needs in their community. Judging from the fact that many of the people interviewed said that if they knew before what they know now, they would not have offended or they would have sought intervention earlier. This suggests that primary prevention at community level is understood as a vital component in the crime prevention repertoire, as alluded to by Kollapen. From the variety and proliferation of projects via volunteers, it appears Khulisa's approach is limited only by imagination –characterised by a pragmatic approach that suggests the sky is only the beginning. Many participants catch this un-measurable can do 'spirit', ex offenders volunteer in their communities, some have started their own projects independent of Khulisa.

Capacity is built within communities by recruiting and training locals as mediators (Phoenix), facilitators and mentors (Newcastle).

4.4 At the Societal level

⁴⁰ In various documentation and during a speech at the UNISA storytelling event, Khulisa state that approximate 70% of offenders who have attended their courses, do not re-offend. According to Dr. Denis Yomi Tanfa, a Khulisa employee, their definition for re-offending is arrived at as follows - '...recidivism occurs when "any individual who has been convicted and sentenced and later released from incarceration is subsequently incarcerated having been found guilty of a new offense(s) and/or failure to successfully complete the terms of a previous sentence of probation, or a sentence for which they had been paroled." Recidivism covers the broadest range of criminal behavior or activity. It includes both patterns of behavior that are linked to re-offending e.g. arrest or breach of probation order' (email to writer dated 7 August 2007).

4.4.1 Approach defined by relationship to and with the State.

In the partnership with the state, Khulisa's role is defined by the state, with the state having a *steering* function and, Khulisa a *rowing* function. RJ is an emerging approach to justice and only the future can tell what impact this approach will have on criminal justice. The overall shared goal is to reduce crime and its consequences to society. However, the immediate objective is to strengthen the criminal justice system and RJ is seen as a means to reduce court roll overloads and to relieve prison overcrowding.

4.4.2 Approach defined by relationship to and with society.

Khulisa attempts to deal with causes and consequences of crime on society. They are limited by resource constraints beyond the control of Ngos. Structural causes remain delinked from crime prevention practices worldwide and the attempts made by Khulisa are rendered palliative in the real world context. Curative measures require a 'radical transformation' of society as suggested by Barak.

4.5 At the international/global level

Khulisa intends to start projects in several countries. Only the future can tell what the cumulative effect of reflexive practice and co-operation will be with those who share a restorative vision. The areas where the gaps are need to be strengthened and firmed up, particularly with regard to balanced attention to victims (bearing in mind that many offenders were themselves victims at some point) and the more subtle structural violence exerted by the economic world order.

In conclusion, Khulisa's restorative vision and practices are characterised by their pragmatic approach which (i) is grounded in a response to some of the material realities that shape criminal behaviour in South Africa; (ii) practically engages with some of the consequences and facilitators of criminal behaviour; (iii) contributes to the expansion of the RJ paradigm; (iv) assists us to consider experiments outside the current criminal justice paradigm, and (v) shows up the weaknesses and gaps that points us towards a more comprehensive approach in future.

We live in an interdependent world that produces complex problems. Complex problems require complex analyses that in turn produce complex solutions. Complex solutions can only be arrived at when there is genuine horizontal⁴¹ and vertical⁴² co-operation, which requires the marshalling of ideas and resources towards one super-goal – a safer, more peaceful society in a more just world.

⁴¹ *Between state departments as well as between civil society actors*

⁴² *Between spheres of government as well as between the state and civil society actors*

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