



THE DEVELOPMENT OF RESTORATIVE JUSTICE IN LESOTHO

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I. INTRODUCTION

The instruction of this conference is a simple and straight forward one, to describe how restorative justice (RJ) developed or **revived** in Lesotho. I assume therefore, rightly so I hope, that this paper should be less of an academic exercise and deal mostly with the practicals of the matter at hand. The word revival is used because it is common feeling in the country that only the name is new to Basotho while the practice has always been there. Braithwaite (Johnstone 2003: 89) argues that he was ...'to discover a culture which does not have a culture which does not have some deep-seated restorative traditions'. This practice is believed to have been replaced by the western model which came with the British when Lesotho became their Protectorate in the 19th century. Traditional justice is still being practiced in many Basotho villages, more especially in the rural areas.

II. A Brief Historical Background To Justice In Lesotho

The Pre-colonial Era

Moshoeshoe the Great founded the Basotho nation with remnants of refugees from other clans during the *Lifaqane* wars some two hundred years ago. He was known for his outstanding diplomacy, tolerance, generosity and compassion. According to Casalis (1861: 12) he learned all this from his mentor, chief Mohlomi, who is a very prominent figure in Basotho history because of his unparalleled wisdom during his time. He had taught Moshoeshoe to;

'deal justly with all, especially the poor; to love peace more than war and never kill anyone accused of witchcraft'.

As a result of this tutoring, Moshoeshoe paid tribute to King Shaka when he learned that the latter was preparing to attack him. Together with other gifts he sent Shaka ostrich feathers. (*Today Basotho refer to bribery as ostrich feathers*). Moshoeshoe also gave cattle to the cannibals who had devoured his grandfather – *because they must have been too hungry* – instead of viewing them as enemies. He even performed the traditional burial rites on their stomachs. Basotho also believe that if there is peace there will be rain and plenty, hence the slogan “*Khotso, Pula Nala*” (*Peace, Rain and Plenty*).

According to Sanders (Challa 2004: 5), both law making process and the dispensation of justice were entrusted to the chiefs while every man in the community had the right to participate. Sentences were mild and fines and death were the two main modes of punishment while juveniles were flogged in the privacy of their homes. Ellenberger (1912:267) states that Basotho rarely used the death penalty because -

'their national sense was always keenly averse to it and people met with mysterious fatal accidents. Witches were “eaten up (their property was confiscated) and driven from the community.

The concept of imprisonment was unknown and those who were banished from their communities always found a new home with another chief in some far away villages.

Characteristics of Traditional Basotho Justice

The characteristics that are listed below will show whether Basotho traditional justice was restorative or not. The cornerstone of the system was the same as reported by Marianne O. Nielsen (Considine 1999: 159) of the First Nations that justice system that

‘it was not a separate institution but an integral part of the socialization process and the social, religious, economic and organizational functioning of the group, for the common good of all’, and as Achtenberg (2000) adds *‘therefore, when a person strayed, it was the responsibility of everyone in that society to re-integrate him/her’*;

- perpetrator(s) were automatically expected to take responsibility for their acts and no plea was entered. If one had wounded another, they were expected to expectorate on the wound to speed up the healing process to show that they had no intention of causing harm, (Ellenberger 1912; 267)

- the focus was mainly on the determination of the most appropriate compensation for victim and reconcile the parties concerned. Quite often a mere verbal apology was sufficient.

- the perpetrator was expected to *‘itiha’* or drop himself down – meaning that he has to show remorse. This is similar to the Western Samoan practice of *‘ifoga’* or bowing. (Considine 1999:122)

- the victim was also expected to show compassion and agree to a peaceful settlement. statements like *‘thupa shapa fats’e’* or stick beat the ground not the person, etc were

often directed to the victim at the close of the deliberations, (Zehr, 1990) gives a very good description of how repentance and forgiveness may benefit, both parties.

- both the criminal and the civil aspects of the case were dealt with together without distinction (Fattah 2000: 88) also argues that '*crime is not different from tort.*'

- every man was entitled to take part in the deliberations including passersby. Individual opinion was respected regardless of one's social status. Anything that occurred in the community was regarded as the business of and affecting all. Sanders (Challa 2004: 5) affirms that any man had the right to speak his mind without fear while the chief listened very carefully.

It should be noted however, that very harsh words, even harsher punishment such as community service could also be engaged where it was deemed fit. For very serious offences involving death, the family of the perpetrator had to pay ten head of cattle. For other serious offences, an offender would be fined a sheep or goat. At the end of it all however, both parties were expected to part in peace.

Colonial to Post-colonial

Lesotho, then Basutoland, became the colony of England when Moshoeshe sought British protection against an imminent attack by the Afrikaners (Boers). This resulted in the dual legal system, - **Roman Dutch Law and Sesotho Customary Law** – which is still in operation in Lesotho today. Roman Dutch Law was brought to the Cape by the Dutch East India Company between the 13th and 17th Century.

The former was intended for the protection of whites while the latter catered for Basotho (blacks). The British High Commissioner, who lived in the Cape, established this legal dualism through the famous Proclamation No.2B of 29 May, 1884. The Proclamation declared that The Cape Colonial Common Law was to operate in Basutoland. It also

provided for the continued use of Sesotho Customary Law which was administered by the Chiefs. The proclamation reads as follows:

In all suits, action or proceedings, civil or criminal, the law to be administered shall as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope: Provided, however, that in all suits, actions or proceedings in any Court to which all of the parties are Africans, and in all suits, actions, or proceedings, whatsoever before any Basotho court, African law may be administered.

Roman Dutch Law has great influence of the principles English common law because the majority of the judges and lawyers were British and had access to English tests and law reports. (Kasozi, 1999: p7)

Customary law was initially administered by the chiefs and change in the structure of court took place in 1938 through Proclamation No.62 of 1938, when chief's courts were replaced by the Local and Central Courts. The jurisdiction of these courts is derived from the 1884 Proclamation 2B. The Judicial Commissioner's Court is an intermediate appeal court before the High Court in matters of Sesotho Law, which emanates from the Local and Central Courts Proclamation 25 of 1950. The Jurisdiction of the Subordinate Courts Is established by Proclamation 16 of 1988 while Act No.5 of 1978 establishes the High Court and Act No.10 of 1978 establishes the Court of Appeal.

III. The Development of Restorative Justice In Lesotho.

Juvenile Justice in Lesotho

Initially RJ in Lesotho was about Juvenile Justice. This has been a lengthy process and a chain of coincidences were involved in its development. After the 1993 second democratic elections in Lesotho, Probation approached the then new Principal Secretary (PS), of the Ministry of Justice to discuss the poor state of juvenile justice in the country. She was, fortunately, already aware of the inadequacies of the **Children's Protection Act No6 of 1980 (CPA)** therefore, in 1994 she instructed Probation to draft proposals for the revision of the CPA. The new juvenile justice legislation was to be both *child rights based as well as Basotho culture specific*. Though she was a lawyer, the PS had very strong conviction that many elements of Basotho culture would be most appropriate to address juvenile delinquency effectively. This was good news because for a long time Probation had been greatly disturbed by -

- (a) the lack of interest in juvenile justice by the justice system,
- (b) the number of juvenile offenders who were unnecessarily incarcerated,
- (c) lack of facilities and programmes for the rehabilitation of juveniles,
- (d) lack of understanding of the justice system and its disempowerment of the . communities western justice model, especially where children were concerned.

In July of the same year, South Africa hosted a Probation Services conference and Lesotho was invited. The then Director of Probation could not attend and her Deputy (the author of this paper) attended in her place. This is where she first heard of restorative Justice from Dr Gabrielle Maxwell's presentation on juvenile justice in New Zealand. In fact South Africa has provided Lesotho with invaluable support throughout the whole process of formulating child justice legislation, especially agencies such as the Child Rights Project of the University of the Western Cape, Restorative Justice Centre in Pretoria and the One Stop Child Justice Centre in Bloemfontein.

International Assistance

At the time, Probation had technical (in the form of Probation Adviser), financial assistance and two Suzuki 4x4 vehicles from Save the Children Fund-UK (SCF-UK)

Both the Director and the Adviser welcomed the news on RJ and it was agreed that the proposals of the new legislation should be based on RJ principles. (But we did not have sufficient information of RJ). Probation was not discouraged in the least and drafting was begun. The author and the Probation Adviser make numerous routine field visits during which they tested the RJ concept on the community. There was unexpected acceptance by all those communities they visited.

Mini seminars - (three or four guests) at a time, were held to enable intensive and in-depth review of Basotho culture and RJ. Sectors consulted included the criminal justice system, the Department of Chieftainship Affairs; chiefs and headmen, members of the society who are regarded as experts on cultural matters, etc.

In 1996, the Director was invited to undergo a Human Rights course at the Danish Human Rights Centre. This coincided with the UN 5th Commission on Crime Prevention and Criminal Justice in Vienna. Again the author joined the Lesotho delegation which comprised of the Minister of Justice and his PS, the now Director of Prisons and a Senior Police Officer. This gave her the opportunity to meet people from New Zealand (NZ) to learn more about RJ. She met the head of NZ delegation, Professor Roger Clark from the State University of New Jersey, and Mr. KS Allan (Criminal Justice Policy Group.) They in turn introduced her to Mr. Yvon Dandurand of the *International Centre for Criminal Law Reform and Criminal Justice Policy at Vancouver*. On their return to their respective countries, they sent the author much valued material on RJ, which included the NZ *Children, Young Persons and their Families Act 1989* and relevant part of the Canadian report of the Royal Commission on Aboriginal Peoples, "***Bridging the Cultural Divide***". This additional information went a long way to assist Probation with their drafting.

In 1998, the zero draft was disseminated to a wider audience comprising of representatives of various sections of the police, prosecutors, Drafting Section, Dept of Social Welfare, magistrates, probation officers, Ministry of Education (including the First Lady). Tremendous contribution was made by all the above sectors. SCF-UK financial assistance had expired in 1997 and this meant that the process was also halted here.

In 1999 the then Minister of Justice, after discussions with the author, acquired funds from the Department of Justice (Canada) and the Irish Consulate, for a study tour to Winnipeg, Manitoba. The trip took place in September, 2001 and the delegation comprised of a Principal Chief, a Senior Superintendent of Police (lawyer), the Chief Magistrate, a Crown Counsel and the Deputy Director of Probation. The visit coincided with the holding of the Canadian National Conference, *Restorative Justice 2001*, which the delegation attended. This presented a golden opportunity for the delegation to meet representatives from all over Canada.

SC-UK was concerned with the halting of the process and in the year 2000, consulted with Lesotho Law Reform Commission (LLRC) to resume it. A committee, the **Child Legislation Reform Project Committee (CLRPC)**, was formed with representatives from The Dep't of Social Welfare and Probation (**two lead agents**); Ministry of Education; Dept of Youth Affairs; Juvenile Training Centre –Prisons; prosecution, magistracy; police, Dept of Labour, FBO's, Law Reform Commission, UNICEF; SC-UK and NGO-C (a coalition of child rights organizations). The process was sponsored by SC-SWEDEN, UNICEF and SC-UK (Lesotho). The process included simultaneous capacity building for all future implementers of the new legislation, which included training workshops on welfare and juvenile justice issues, round table discussions, study tours and community sensitization. Both MPs and members of the House of Senate were included in the later exercise.

In 2003, Prison Fellowship International (PFI) held the Convocation 2003 in Toronto, Canada and the Director of Probation was invited by PF-Lesotho. A special course on RJ was also prepared by Queen's University, at Kingston, Ontario, for a select group of participants from the Convocation and the author was one of them. (PFI is among the lead promoters of RJ in the world). She also met some of RJ greats such as Howard Zehr, Dan Van Ness, Jonathan Burnside (Relational Justice), Chuck Colson and a number of NZ representatives.

South Africa provided constant support throughout this process in the form of facilitators, All these opportunities meant more information and knowledge about RJ for Lesotho.

Redrafting of the proposals was completed in June 2004 with the production of the **Child Protection and Welfare Bill 2004**. The Bill is divided into two main parts i.e. Child Welfare and Child Justice (Restorative Justice orientated). The Child Legislation Reform Project Committee is now called The Child Legislation Advisory Committee.

IV. RESTORATIVE JUSTICE FOR ADULT OFFENDERS

The Ministry of Justice has already given an instruction for the establishment of a bigger RJ Task force to undertake the formulation of restorative justice legislation for adult offenders. This process will be overseen by the National Community Service Sentence Council, of which the Chief magistrate is the National Coordinator while the author, as Director of Probation, is a member.

Two villages in the urban areas is already piloting restorative justice. They handle a wide spectrum of issues which include domestic violence, non-payment of rent by tenants, child abuse issued, minor conflicts between neighbours, petty theft, paternity issues involving young girls who have fallen pregnant out of wedlock, etc.

Lesotho Justice Sector Development Programme

Lesotho has established the Lesotho Justice Sector Development Programme (LJSDP) with the assistance of DFID under the Ministry of Justice. General dissatisfaction about the effectiveness of the Sector has prevailed for some time now and the Programme aims at the transformation of the criminal justice system. Promotion of RJ DFID is one of Secretariat's main interests. They have already funded sensitization workshop for members of the House of Senate. These include the 22 Principal Chiefs who make the second highest level of the traditional leadership of Lesotho after the king. Both the Chief magistrate and the author facilitated at this workshop.

LJSDP has also engaged the services of TADI, a training organization to conduct an assessment of the training needs of the chiefs in the area of RJ. The author took part in this exercise which was conducted during the month of February. This is, in the main, to prepare the chiefs for the implementation of the Child Justice legislation. The training will commence as soon as the needs have been analysed.

V. LESSONS LEARNED

Dissatisfaction with the Western Model of Justice

Probation has learned a lot during their daily work with both juvenile and adult offenders, victims, traditional leaders and the communities at large. Many Basotho, especially in the rural areas, still prefer to handle their conflicts in their communities. Most of them are not even aware that, according to the legal system prevailing in Lesotho, chiefs are not supposed to handle criminal matters anymore.

The chiefs feel that the present situation promotes individualism where people do not share their problems with other members of the community anymore. This also makes their duty as custodians of societal unity very difficult to perform.

Neighbours feel intimidated and confused when even minor offences are taken to the police. This makes them feel as if the offended party is declaring permanent feud with the offender. Therefore they are instruments of alienation.

The offenders themselves believe that the sentences that are passed by the court are unreasonable and unjust. Even the Local and Central Courts – which are supposed to be Basotho customary courts, are regarded as oppressive and too impersonal.

Child offenders do not want to be incarcerated and do not understand why they are not punished in their homes instead of being dragged into the formal justice system. Their

parents feel disempowered as they are regarded as non-existent as soon as their children come into contact with the law.

What Melanie Achtenberg states (Forum 2000:32 Vol12,No1) the imposed British colony's legal system is failing the indigenous people all over the world, and that the failure should be attributed to the ...'*relationships of force rather than justice*'. Many Basotho feel that their need for justice is hardly addressed by the conventional justice system. Restorative Justice is the preferred approach, especially where not so serious offences are concerned. The communities believe that RJ would revive the spirit of humanity which the western model is blamed for destroying.

Constraints Encountered

Probation introduced RJ via juvenile justice. As already stated, juvenile justice is highly under-developed in Lesotho. The main constraint was the reluctance of the criminal justice sector to accept restorative justice principles. This was mostly so with the prosecution and magistracy. The two agencies wield most power and are the most instrumental for the success for any transformations in the criminal justice system.

Although this was frustrating, it was to be understood that they would not take easily to an issue of law which was introduced by 'lay persons', in this case Probation Officers. We were aware that even in countries where the lawyers are now comfortable with RJ, its adoption was not an overnight thing. The Hon. E.D. Bayda of Canada (Chief Justice of Saskatchewan) states that '*it has been something of a struggle in the judicial world to have the RJ approach recognized and accepted as legitimate, let alone the principal approach to achieve fairness andprotection for our society – all via the criminal justice system . Why? Because lawyers are rained to believe that the way they see justice is the right way.* (Forum 2000: Vol. 12, No.1).

Probation also lacked funds to conduct the necessary sensitization workshops for the relevant sectors. It also took Probation several years before they could collect sufficient information to pass around.

Many places in Lesotho are only accessible by a 4x 4 drive vehicle. In late 2003, the government ordered a vehicle moratorium and our 4x 4 was removed and Probation had to make do with a 2x 4 bakkie. In addition to the transport problem, the two Probation officers who manned the northern and southern regional offices left to furtherer their studies at the beginning of 2003. The two factors have led to the total collapse of the processes that were begun by the two officers. Presently, the Service is without a vehicle as the small bakkie has also been taken away.

Probation Service is also terribly understaffed; therefore it is not possible to make any meaningful practical impact in the communities.

Achievements

The greatest achievement of all for Probation is the acceptance of the concept of RJ by the communities, because of its potential for re-empowerment of parents and communities in combating both juvenile delinquency and crime in general.

Probation had the support of some of the magistrates and prosecutors in the Northern and Southern regional offices. This gave Probation the opportunity to pilot diversion through use of both Victim Offender Mediation and FGC's 1999 and 2002, with very positive results. Probation is now using the RJ strategies with adult offenders on Community Service Sentence.

In January 2004, the author received an International Award on Community Justice – offered by England and Wales Probation - for her incessant effort to revive RJ in Lesotho

The concept of RJ is now taking root at an encouraging rate and the Minister of Justice, the PS and the DPS are among the key persons who are showing great interest in it. The Chief magistrate who went to Canada is now actively involved in the advancement of RJ in Lesotho. This has gone along towards the conversion of the lawyers onto the RJ wagon. He has also assisted in the establishment of RJ in two villages on the outskirts of Maseru.

A considerable number of key persons including criminal justice sector, MP's and Senators and child rights NGO's have now received some basic education on RJ during the LLRC capacity building exercise for the future implementers of the proposed child legislation.

The first ever RJ seminar was organized by Probation in June, 2003 under the CLRPC. Among the participants were two MP's, two judges of the High Court and two Senators. The Snr Inspector of Police who visited Canada facilitated the process with the author. The co-founder of the Restorative Justice Centre in Pretoria was the main facilitator.

Both the Snr Superintendent and the author made presentations on RJ at a training seminar, organized for the police who work in the newly established **Police- Child and Gender Protection Unit**, in August 2004.

CONCLUSION

The development of restorative justice in Lesotho has been a long and rocky road to travel. Basotho welcomed the concept of RJ as they regard it as the revival of their old approach to justice, which was effective and unifying. The western model is frustrating to the man in the street, whether literate or not. Many constraints which include finance, manpower, resistance to change, lack of transport and others have slowed down the development of RJ.

On the other hand a lot has been achieved under, at times, very discouraging circumstances. Many organizations both international and national, as well as individuals, have contributed towards the development of RJ in Lesotho. The most important thing is that further development of RJ in Lesotho in the near future is promising.

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