

Race, class and restorative justice in South Africa: Achilles heel, glass ceiling or crowning glory?

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ABSTRACT

This article reports on a research project aimed at assessing the impact of race and class disparity in restorative justice processes in South Africa. It was conducted against the backdrop of the inclusion of family group conferencing and restorative justice policy in the Child Justice Bill 49-2002 and in various governmentally supported initiatives. All known facilitators who had convened family group conferences in the preceding year were requested to complete a questionnaire and to report on specific cases in which a family group conference had been held where victims and offenders were from different class or racial backgrounds. Six of the returned case studies are detailed in the article. The authors conclude that, while inter-race and inter-class restorative processes occur less frequently than might be predicted, the fact of these differences is not necessarily an impediment to success. However, numerous other factors, including language differences and transport difficulties, can limit the effectiveness of this method of resolution of criminal justice disputes.

Introduction

The emergence of restorative justice principles and the links between this development and the evolving child justice system in South Africa have been fairly well documented over the last decade in both academic and policy documents. Skelton,¹ for example, describes how, in 1996, policy initiatives of the Inter-Ministerial Committee on Young People at Risk aimed at the reform of the child and youth care system include references to the need for approaches which would be directed towards 'restoring societal harmony

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¹ A Skelton 'Restorative justice as a framework for juvenile justice reform' (2002) 42 *Brit J of Crim* 496 at 501.

and putting the wrongs right rather than on punishment'.² The Child Justice Bill³ provides for concrete provisions designed to advance the use of family group conferences in the child justice process, and further enshrines restorative justice principles as key objectives underlying the application of the proposed legislation as a whole.⁴

It must be conceded, though, that examples of sustained practice in this field are not easy to locate, even though restorative justice terminology and philosophy have been reasonably well articulated through academic papers,⁵

² Quoting from the Draft Policy Proposals of the Inter-Ministerial Committee on Young People at Risk (1996). This Committee, established by Cabinet to address the crisis around children awaiting trial in prisons, broadened its mandate to include a review of the child and youth care system more generally, including the alternative care system for children in need of care and protection. These draft proposals have never been finalized, although the recently released Report on the Review of the Child Care Act and its accompanying draft Children Bill give substantial effect to the policy proposals first articulated by the Inter-Ministerial Committee on Young People at Risk (South African Law Commission Report on the Review of the Child Care Act (2003)). For one analysis of the influence of the Inter-Ministerial Committee on child justice and law reform, see J Sloth-Nielsen *The Role Of International Law in South Africa's Juvenile Justice Law Reform Process* (unpublished LLD Thesis, University of the Western Cape, 2001).

³ 49-2002. Tabled in August 2002, and currently (December 2003) being debated in Parliament.

⁴ Clause 2, entitled 'Objects of the Act', originally read as follows:

'The objects of this Act are to: –

- (a) protect the rights of children as contemplated in section 28(1)(g) and (b) of the Constitution;
- (b) promote *ubuntu* in the child justice system through –
 - (i) fostering children's sense of dignity and worth;
 - (ii) reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safeguarding the interests of victims and the community;
 - (iii) supporting reconciliation by means of a restorative justice response; and
 - (iv) involving parents, families, victims and communities in child justice processes in order to encourage the reintegration of children; and
- (c) promote co-operation between all government departments and other organisations and agencies involved in implementing an effective child justice system.'

It is, at the time of writing, uncertain whether an objects clause of this nature will survive the parliamentary process. Debates in the Portfolio Committee on Justice and Constitutional Development over the course of 2003, however, point to the likelihood of restorative justice begin retained as a form of diversion, and its principles underlying some forms of sentencing.

⁵ See, for example, A Skelton and C Frank 'Conferencing in South Africa: Returning to our future' in A Morris and G Maxwell (eds) *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (2001); Skelton op cit (n1).

conferences⁶ and even in Departmental mission statements for quite a while.⁷

Efforts to experiment with family group conferencing in South Africa commenced with a limited early project (conducted in the Wynberg criminal magistrate's court in Cape Town),⁸ intended to test early law reform suggestions which advocated that family group conferencing should be required prior to court proceedings in all juvenile justice cases.⁹ This particular project was based on a crude sampling, whereby the first case on the juvenile court prosecutor's desk every Tuesday morning was referred for family group conferencing for a ten week period. Amongst the overall conclusions drawn were that this method of selection (perhaps unsurprisingly) yielded a sample of trivial matters unworthy of the effort and intensity of the family group conferencing process.

Next, a more extensive experiment was conducted in Pretoria in 1996 and 1997, enjoying the official status of a pilot project under the auspices of the Inter-Ministerial Committee on Young People at Risk.¹⁰ This initiative, although managed under a quasi-governmental banner, was actually implemented by contract staff seconded from the non-governmental sector, based on their expertise in this area. Some limited work to compile a training manual for government-employed probation officers running family group conferences arose from this pilot project, and some training of social workers in the non-governmental sector¹¹ also resulted after the pilot project was completed in 1998.¹²

⁶ Such as the conference on restorative justice held by the Institute of Criminology (University of the Cape Town) together with NICRO in 1999 and one in November 2002 convened by the Department of Correctional Services (see D Kgosimore 'Restorative Justice as an alternative to dealing with crime' Report of a National Conference held on 18-20 November 2002, available at www.childjustice.gov.za).

⁷ For example, the Department of Social Services of the North West Province has restorative justice as part of its mission and vision, as does the National Department of Correctional Services (see www.dcs.gov.za).

⁸ See, for an unpublished review of the findings, J Sloth-Nielsen 'Theory and practice of family group conferencing in South Africa: An overview of general principles, and report on the pioneering Wynberg Pilot Project' (1996) (Unpublished paper available from the Institute of Criminology, University of Cape Town).

⁹ Juvenile Justice Drafting Consultancy for South Africa: *Proposals for Policy and Legislative Changes* (1994).

¹⁰ N Branken and M Batley 'Family group conferences: Putting the wrong right' Inter-Ministerial Committee on Young People at Risk Pretoria (1998).

¹¹ Principally NICRO, the National Institute for Crime Prevention and the Reintegration of Offenders, also the largest provider of diversion services, and which has sound relationships with the criminal courts and staff there.

¹² This momentum does not appear to have been sustained: one social worker who reported having knowledge of 30 family group conferences having been convened in the rural districts of the Western Cape in 2000, was unable to provide any recent information concerning

Thereafter, over the period 2001-2, social workers and other child justice personnel, (including police officers) in the North West Province were given 'hands-on' training on the actual mechanics of implementing family group conferences as part of a broader training programme on child justice processes. Approximately 50 government workers received such training, which led in many instances to successful implementation of family group conferences in that region, some examples of which were profiled in a special edition of the South African child justice journal entitled *Article 40*.¹³ The experiences of some of these trainees in the family group conferencing sphere are detailed later in this study.

The family group conferencing endeavours in South Africa should be seen (at least in part) against the complementary backdrop of ever-expanding access to diversion in the youth justice system. From a base of 200 referrals in 1992 when diversion services commenced, the National Prosecuting Authority recently reported¹⁴ that their prosecutorial staff had, in 2002, diverted 30 000 cases involving children in conflict with the law to a variety of formal and informal diversion programmes. Family group conferencing should be seen as part and parcel of the move to expand access to diversion services in the youth justice system more generally. However, it appears that increased referrals to a somewhat conventional 6-week life-skills programme form the bulk of the apparent escalation of diversion practices, and that family group conferences constitute a miniscule proportion of completed diversions.¹⁵

These scattered endeavours to implement the theory and principles of family group conferencing in South Africa have been hailed as groundbreaking by various players in the child justice reform advocacy movement.¹⁶ Indeed, notwithstanding limited evidence of the practice of family group

completed family group conferences when approached for the purposes of this research. See also Skelton and Frank op cit (n2) at 113.

¹³ Vol 4 No 2 (July 2002).

¹⁴ During the presentation by government on the Child Justice Bill to the Justice and Constitutional Development Portfolio Committee, March 2003. No official report to this effect has been published, however.

¹⁵ The total number of family group conferences convened countrywide is not known. However, we do know that NICRO, the primary diversion service provider for child offenders in South Africa, dealt with 13 785 diverted children in the 2000/2001 financial year. Of these, about 3%, that is just over 400, were diverted into NICRO's family group conferencing programme. We can therefore estimate that, in the year under consideration (2002/2003), a broadly similar number were run by NICRO. There is no organisation at present that runs more family group conferences than NICRO in South Africa.

¹⁶ These include the Community Law Centre's Children's Rights Project, The Restorative Justice Centre, NICRO, Lawyers for Human Rights, the CSIR Crime Prevention Unit, IDASA and others.

conferencing taking root in any sustained way, there is still much enthusiasm and excitement in South Africa about the potential that this alternative method of dispute resolution holds. There appears to be broad support from religious organisations, the peace and reconciliation sector, as well as government.¹⁷ Despite this evidence of overall goodwill, however, it is difficult to obtain an overarching picture of consistent and regular use of conferencing on a national scale and at a practical level.

From the very initial phases of implementation of family group conferences in this country, some underlying scepticism has been evident about the ability of the conferencing process to overcome the barriers posed by the race and class diversity issues that prevail in South Africa. For instance, the results of the Inter-Ministerial Committee on Young People at Risk pilot project in Pretoria indicated that, of the 42 family group conferences that were convened, only three involved cases where victim and offender were drawn from different race groups, leading Skelton and Frank to comment cautiously that 'the appropriate handling of issues of race and culture will be of vital importance to the future of family group conferencing in South Africa'.¹⁸ Language difficulties, in a country with eleven official languages, seemed to pose additional constraints.

The Inter-Ministerial Committee on Young People at Risk report on the findings of the pilot project offered little comment on the difficulties that may have surfaced as a result of class disparity between victims and offenders in their sample of cases, noting that only one case involved middle class 'white' victims and poverty stricken 'African offenders', and referring to the question of the impact of class on conferencing initiatives as an 'unexplored issue'.¹⁹

Race, class and disparity in South Africa

South Africa's apartheid legacy, the deep divisions occasioned by racial stereotyping, and lingering perceptions in some quarters of society that crime is predominantly a cross-racial affair (with black perpetrators and white victims), are hardly disputed in contemporary discourse. Indeed, although noble constitutional aspirations to equality prevail, and progressive legislation abounds to give recognition to the equal worth and the dignity of all members of its population, our country is still deeply fractured along race and class lines. Whilst post-democracy developments have laid a foundation for a less discriminatory society, the full effects of this will take time to bear fruit.

¹⁷ These initiatives were endorsed at the Department of Correctional Services National Restorative Justice Conference, held in November 2002 in Gauteng.

¹⁸ Op cit (n5) at 112.

¹⁹ Op cit (n10) at 115.

As regards class, South Africa is characterized as a country with one of the highest differentials between rich and poor, second only to Brazil. According to World Bank data, the top 10% of earners in the country enjoy 45.9% of the gross national income, whilst the top 20% have 64.8%. While the South African October Household Survey from 1996 – 1999 shows that employment is on the increase, this has mainly occurred in the category of 'skilled' employees. The wider picture indicates that even though South Africa has experienced greater economic activity, unemployment is still growing and there is an increasingly slow demand for 'unskilled' labour.²⁰ It is submitted that income remains in South Africa an important indicator of class, in the absence of other data.

The impact of poverty on the prevalence of crime is also indicated by the numbers of persons serving prison sentences for economic crimes. After aggressive offences, economic crimes account for the next largest category of prisoners, totalling 30,000 sentenced and 20,000 unsentenced prisoners at April 2003.²¹

At the widely publicised 'Speak Out on Poverty Hearings' held by the South African Human Rights Commission over the period March to June 1998, many participants reported on how poverty forced them and others to engage in criminal activities:

'If I can get a job, I'll work, I am tired of stealing people's firewood'.

'If government does not take care of us, and we don't get a reply, we shall become discouraged and maybe steal and some even get killed'.

are two telling comments in this regard quoted in the Campaign Report.²²

While this is a thumbnail sketch of the broader context of race and class disparity in South Africa, it is important to bear the specifics of South African race and class diversity in mind for the purposes of this article, in order for certain conclusions to be drawn based on the research findings.²³

In South Africa 77% of the population is black, while 11% is white, 9% coloured (or mixed race) and 3% Indian/Asian, according to data from the latest available census.²⁴ A rough calculation based on the ratios 77:11:9:3 of

²⁰ S Cassiem and J Streak 'Budgeting for child socio-economic rights: Government obligations and the child's right to social security and education' (2001) Idasa.

²¹ Statistics presented to the National Council on Correctional Services, July 2003 (on file with the authors).

²² Commission on Gender Equality, South African Human Rights Commission and South African NGO Coalition The People's Voices: National Speak Out on Poverty Hearings (1998) 70.

²³ While the authors of this study find racial classification (in particular) repugnant, categorisation of victims, offenders and interviewees on the basis of their race or class has been deemed essential for the purposes of this research.

²⁴ Census 96.

the main race groups in South Africa predicts that race differences should be present in 39% of crime situations, where one chooses one victim and one offender at random from South Africa's total population. The pie chart below shows the predicted racial composition of possible victim-offender populations in South Africa.

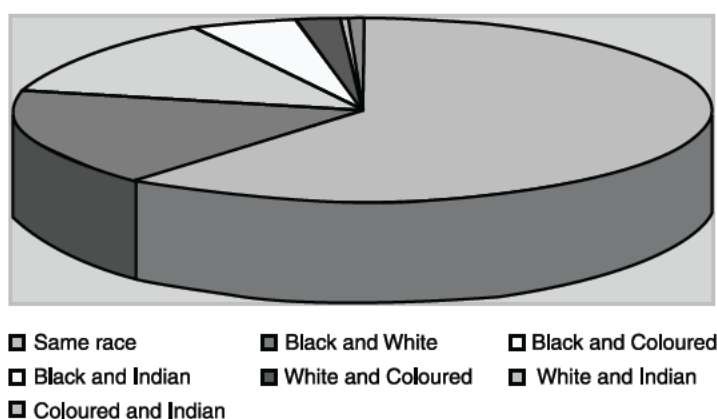


Figure 1: Predicted ratio of victim-offender populations in South Africa by race

Further, it may be important to note that the ratio of the population groups to each other varies greatly from province to province. For example, in the Western Cape, coloured people are the most populous and the ratio is 54:21:21:3:1, coloured: black: white: other: Indian (this is the only province which has a significant population from groups outside of the four main race groups usually identified). This profile is very different from the pattern for South Africa as a whole. Another example of different provincial population patterns is KwaZulu-Natal, with the ratio 82:9:7:2 of black: Indian: white: coloured. More importantly, the North-West Province, from which 38% of the respondents in our study hailed, and in which 35 (36%) of the family group conferences considered in our sample took place, is 91% black, which implies that more than 80% of victim-offender situations in that province are likely to be black-black situations.

One key predictor of class difference in South Africa, apart from quantitative information on the number of households living below accepted poverty data lines, is between the employed and the unemployed. However, it must be borne in mind that the employment indicator is a very rough and broad indicator of class difference. According to Census

96,²⁵ only 66% of the economically active population aged 15-65 is employed. Therefore a simple calculation on the rough ratio 66:34 would suggest that in 45% of situations where one chooses one victim and one offender randomly from the economically active population of South Africa, should reveal a difference in class (unemployed-employed), and 55% should comprise parties of the same employment status. In this regard, of the 55% of the same employment status, 45% of the victim-offender encounters should statistically involve employed-employed persons, and the remaining 10% unemployed-unemployed.²⁶ The pie chart below shows the predicted composition of victim-offender populations based on the ratio of 66:34 of employed: unemployed in South Africa.

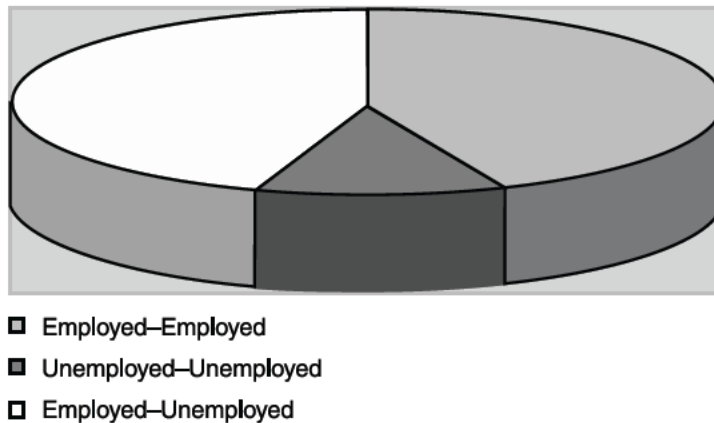


Figure 2: Predicted ratio of victim-offender populations in South Africa by employment status

Accordingly, the aims of this study were to conduct a preliminary survey to examine the effects of race and class on the ability of the facilitators to successfully convene, conduct and finalise a family group conference, based on an untested assumption that race and class may well play a significant role in family group conferencing, both as regards process factors and (possibly) the outcomes reached at such conferences.

²⁵ The results of Census 2002 are not yet available, which means that the only data that exists at present is the Census 1996 information.

²⁶ The 1998 National Victims of Crime Survey (Statistics South Africa) 41 found that the percentage of persons which had experienced at least one non-violent crime in 1997 was amongst the highest household income category (22%), which was significantly higher than in any other annual household income category. A relatively small percentage of those in the lowest income category (6%) had experienced a non-violent crime. This is obviously due to higher income households being in possession of more valued household goods. However, violent crime was highest amongst the lower income classes in the survey results.

Since race and class appear to be material factors in victimisation rates in South Africa – or at least in popular perceptions of victimisation – some preliminary data²⁷ on the efficacy of the family group conference procedure where victim and offender are drawn from significantly disparate racial or economic groups in society was thought likely to be a valuable predictor of the potential future efficacy of family group conferencing. The study was undertaken to examine whether race and class disparity in a country such as South Africa were such serious impediments as to nullify the chances of successful resolution of matters through conferencing;²⁸ whether in fact the restorative justice process rendered influence of race and class so immaterial as to transcend the divisions in our society;²⁹ or whether the reality lay somewhere in between.³⁰

Methodology

The inquiry was a broad one, which first sought to obtain an understanding of the actual dynamics of restorative justice practice in South Africa. For the purposes of this social inquiry, a picture was obtained of ordinary restorative justice practice, and the role which race and class disparity play in family group conferences run by restorative justice practitioners on a day-to-day basis.

Although the question of the *influences* of race and class is an extremely broad one,³¹ the focus during the course of the research was narrowed to the following research questions:

- How prevalent are cross-race and cross-class situations in South African restorative justice practice? Are they more or less prevalent than would be expected with reference to the demographics of South Africa?
- Does the data suggest that race or class disparity is an impediment to the holding of a restorative justice intervention?
- Do practitioners undertake special or different preparations or follow alternative processes when race and class disparity are involved, and if so, what do any reported differences involve?

²⁷ The smallness of the sample eventually obtained precluded a more detailed statistical evaluation of the results.

²⁸ The 'Achilles heel' result.

²⁹ The 'crowning glory' result.

³⁰ The 'glass ceiling' result.

³¹ When one is considering race or class disparity in South Africa, it should be recognised that these factors are often correlated with disparity in other factors that have an impact of their own. These other factors include language, literacy and educational attainment, age, and health. In particular, language differences, as mentioned above, are very often an additional factor where there is a disparity in race.

- Does the data suggest that race and class disparity have an impact on the outcome of a restorative justice intervention?
- What are practitioners' views on the impact of race and class disparity?

A second part of the study profiles actual case studies furnished by our respondents. These are presented in order to illustrate more directly the practical application of restorative justice interventions involving race or class issues. They may well deal with case studies that are not ordinary or everyday, and may even constitute exceptions among the actual population of all restorative justice conferences held in South Africa. They are nevertheless explored in order to illustrate the application of restorative justice principles even in exceptional circumstances. It must, however, be borne in mind that drawing inferences from real life case studies is potentially problematic as variables other than race and class (which were not directly elicited from the respondents via the questionnaire) may have influenced either the conferencing process or its outcome.

For the proper consideration of the research question ('what is the influence of race and class disparity on restorative justice practice'), the group under consideration should be all family group conferences that have occurred in South Africa since their introduction in this country. However, we have limited ourselves to all those which have occurred in the last year, in order to capture more closely the position as it is today. Instead of tracing actual conferences, as comprehensive data in this regard does not exist, this research attempted to identify the practitioners who have facilitated family group conferences. However, another complicating factor was that we did not know how many such practitioners there are in South Africa.³² There are a limited number of formal practitioners in South Africa, and they fall into the following categories:

- (1) Social workers based at NICRO, which employed 42 'service deliverers' across South Africa at the time that this research was conducted;
- (2) Employees of NGOs promoting restorative justice, such as the Restorative Justice Centre. There are fewer than 20 such known employees;
- (3) Probation officers, police officers and other functionaries of provincial departments that have received training in restorative justice practice, particularly social workers and police officers, many of whom are from the North West Province.

Approximately thirty practitioners throughout South Africa who had (or who were thought to have) facilitated a family group conference in the last year were identified and contacted telephonically. This was not a random sample:

³² Traditional society in South Africa also makes use of restorative-justice type conferences and dispute resolution processes, without recourse to the formal criminal justice system. However, this project limited itself to restorative justice practitioners operating in conjunction with the formal criminal justice system.

the researchers used known contacts and networks in an attempt to track down facilitators who would be likely to provide concrete evidence that they had personally conducted family group conferences within the last twelve months. As the number of practitioners working in this area is so limited, it was considered inappropriate to draw a random sample. These practitioners, drawn from all the groups listed above, were requested to assist by completing a questionnaire. Some were contacted indirectly through their organisations, but only those contacted directly ultimately responded to the questionnaire.

A semi-structured questionnaire was developed and forwarded to potential respondents. Given that the answers required of respondents may have necessitated their looking up details in their files and counting cases, and that many appeared to be unable to talk on the telephone during the day, the questionnaire supplied to them was completed and returned to the field worker at the respondents' convenience. Where any information provided was unclear, the field worker made follow-up telephone calls to the respondents.³³ Of particular importance was the fact that, where respondents recorded having been involved in cross-race or cross-class family group conferences, they were asked to provide one case study of such conference if it occurred in the past twelve months.³⁴ The study yielded both quantitative and qualitative data, the former chiefly (but not exclusively) being derived from the case studies described by the respondents. The statistical data supplied by the respondents was entered into an Excel spreadsheet and analysed, in the context of available data on South Africa. The qualitative examples provided were also analysed in juxtaposition with each other, and in further juxtaposition to the subjective comments made by respondents concerning their own opinions on the impact of race and class on the practice of family group conferences.

Limitations

As noted above, although family group conferences were officially piloted in South Africa in Pretoria and subsequently in other provinces, the number of family group conferences held in South African and across provinces fluctuates. In addition, it was extremely difficult to identify any respondents with recent experience. Indeed, one pioneer in the Western Cape commented that, over the last year, very few family group conferences were held in that province, despite the fact that she herself was involved in

³³ Some pioneers of restorative justice practice in South Africa, who no longer facilitate family group conferences, were also asked to give their comments.

³⁴ The field research showed that many pioneer family group conference facilitators no longer work in the field of direct facilitation.

more than 40 in previous years. The research is therefore based on a relatively small sample of respondents.

Results

A total of thirteen respondents returned their questionnaires, which is 43% of those targeted. Although this number may at first appear to be small, this small number of respondents is, given the number of practitioners in South Africa, likely to constitute a fair proportion, perhaps in the region of 10%, of such practitioners, and possibly an even larger proportion of practitioners with experience in the last year. Furthermore, amongst them they had facilitated 96 conferences over the last year.

The thirteen respondents came from six provinces, with five (38%) coming from the North-West Province. The respondents themselves were from three different race groups, with six (46%) being black, four (31%) white, and three (23%) coloured. The majority of respondents were social workers (61%). Since the 13 respondents had between them facilitated 96 family group conferences over the last year, the average number held by each facilitator would be just over seven each. However, this average masks great differences among the respondents, with the range being from one to 32, the median being five and the mode four conferences each.

Among them, respondents had conducted only twelve family group conferences in which race or class differences or both were present (13%). Of these, five (5%) involved race difference, eleven (11%) involved class difference, and four (4%) involved both race and class difference. Only one case (1%) involved race difference without class difference, while seven (7%) involved class difference without race difference.

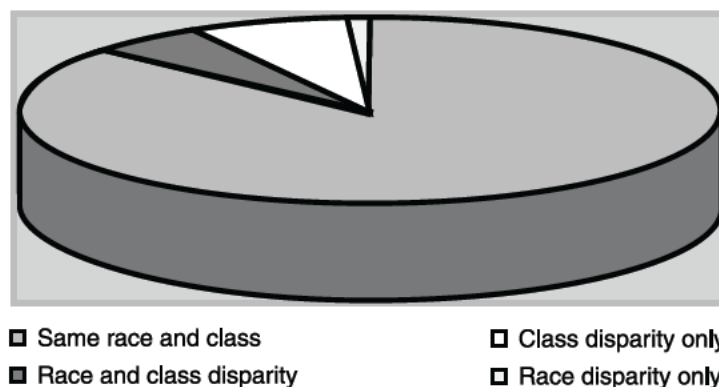


Figure 3: Composition of family group conferences by race and class disparity.

These results tend to suggest that situations leading to a restorative justice family group conference very seldom involve different races, and somewhat more frequently (but still seldom) involve differences in class.

In other words, these results suggest that cross-race and cross-class situations are not very prevalent in family group conferencing, and where such situations are present, they are often present together, making it difficult to isolate the influence of race alone or class alone.

The obvious question is how this prevalence rate compares to the prevalence that would be predicted by the demographic composition of South Africa's population, as established above. The results in our sample show that there were proportionally fewer cross-race cases than would be suggested purely on the basis of the numerical make-up of South Africa's population (6% as compared to 39%, ie more than six times less than predicted).

Having established that the prevalence of race disparity in restorative justice practice appears to be lower than predicted by demographics, the question arises as to the situation in respect of class difference. Based on the 'employed-unemployed' indicator suggested above as a criterion for distinguishing class differences, such differences were present in fewer cases than would be predicted purely by the numerical make-up of South Africa (12% as compared to 45%, more than three times less than predicted).

However, it must also be mentioned that class difference is still largely correlated with race difference in South Africa. This is starkly illustrated by the unemployment rates of the four race groups: 43% of blacks are unemployed, 21% of coloureds, 12% of Indians and only 5% of whites, according to Census 96. It is therefore not surprising that all except one of the cross-race family group conferences alluded to by the respondents also involved class differences, illustrating the persisting deep divide between the 'haves' and the 'have-nots' in the new South Africa.

A third of the respondents said they had never conducted a family group conference in which race or class differences were present and that, in the area in which they worked, communities were homogenous in terms of race and class and both victims and perpetrators tended to be from the same community.

'The people we deal with are mostly those living in squatter camps. The kinds of cases that come up a lot for us, is rape among children, and housebreaking, where a child breaks into someone else's shack and cooks food for himself. These involve people from the same race group and class.'

(Social Worker, North West Province)

'We mostly work in the coloured community, victims and perpetrators are the

same, both coloured, and from the same class. None of my family group conferences have been of a cross-cultural nature.’
(Social Worker, Western Cape Province)

‘Our clients are black, but from different cultural groups (eg Tswana or Xhosa). The majority of our clients are from low economic class.’
(Social Worker, North west Province)

‘Race and class differences have not played a role in the family group conferences that I have done, mainly because the parties have been of the same class and race (all black, all white, all coloured).’
(Social Worker, Eastern Cape Province)

Some possible explanations for this outcome are worthy of exploration. First, this result may be affected by the South African phenomenon that members of particular geographic communities, within which victim-offender events occur, are often of the same racial and (broadly similar) economic class. South Africa is, as stated earlier, still characterised by physical (geographic) segregation of citizens along race and class lines in their daily lives, and phrases such as ‘location’, ‘neutrality of venue’, and ‘transport’ had a unsurprising recurrence in the responses to our questionnaire. Although not directly equatable with race and class difference, the emphasis on residential separation bears testimony to the realities of post-apartheid life in both urban and rural society.

Further, what remains unanswered from our survey is the extent to which cross-race or cross-class situations are simply not even considered in making the initial decision to hold a family group conference. The fact that some cross-race and cross-class family group conferences were held at all suggests that race or class disparity does not completely exclude the consideration of an family group conference as an appropriate intervention, but the low incidence of actual cross-race and cross-class conferences reported in our sample cannot but give rise to the question whether conferencing is not excluded *ab initio* by diversion decision makers when seemingly intractable problems of difference surface.³⁵ It must be conceded, however, that overall, the qualitative responses to our study do not support this contention. An exception is the view expressed by a figure involved in promoting restorative justice in South Africa, who said:

³⁵ A previous study has already found that there may be a tendency toward racial bias in South Africa in a prosecutor’s decision whether to divert a matter (LM Muntingh ‘A quantitative analysis of two diversion programmes’ in *Perspectives on Diversion* (NICRO, Cape Town, 1995). Further research beyond this article would be needed to understand the extent to which the type of diversion recommended by a prosecutor, social worker or probation officer is influenced by race and class.

'[Race and class] certainly impact on organising and facilitating. Building a shared understanding between parties about the incident, the meaning it had for them, and what appropriate outcomes are, is complicated by race and class differences. Because these factors make such a huge impact, I think they are more important than other factors such as the offence itself, or logistical factors.'

(Social worker, Gauteng Province)

A third possible factor is that family group conferences would only be recommended if the victim is prepared to participate: if the victim is not amenable, the conference will not happen. The following comment drawn from our sample illustrates this point:

'Most of the victims have a choice if they want to attend the family group conference. Some just lay a charge in some instances to cover their insurance claim and do not show any interest in the family group conference. Some do not want to take part as they are still in the punishment mode and do not know anything about restorative justice. Some victims do not want to become involved and are quite happy if the youth attend other (diversion) programs.'

(Social Worker, Eastern Cape Province)

Finally, we have already alluded to the challenges posed by language difference in South Africa, with its eleven official languages. Generally speaking, a white, coloured or Indian person will speak English or Afrikaans as a first language, while a black person, for example in Kwa-Zulu Natal or the Eastern Cape, will speak one of the seven other African languages as a first language. Most respondents conflated race issues with language difficulties in their written responses to our questionnaire. However, it is understandably difficult to separate language and race, in the researchers' view, in a country where tribe, culture and skin colour are most commonly reflected through the prism of language. In the words of a respected community leader (and family group conference facilitator), who responded along these lines:

'I think that [race and class] can make the process of restorative justice more difficult because it's difficult for people from different race or class to understand each other.'

(Social worker, Eastern Cape)

It is interesting to note that, of the ten family group conferences that respondents said they had attempted but had been unable ultimately to pull together, only one of the respondents said they had been unable to do so for reasons stemming from race or class differences. (Equally though, one must take cognisance of the ongoing tendency amongst many South Africans to downplay the impact of race and class in our society.) Other reasons given for the inability successfully to convene family group conferences involving race and class included logistical problems; for instance the relocation of a

party to another province, or the negative attitude of the victim towards a restorative justice process:

'The other one could not hear of diversion because he was very angry.'
(Social worker, North-West Province)

As regards the remaining responses, though, we have no data to support the hypothesis that the attempts to convene the conference failed due to race or class difference. Nevertheless, the fact that some cross-race and cross-class conferences were held at all suggests that race or class disparity do not completely exclude the consideration of a family group conference as an appropriate intervention. But overall, our results suggest clearly that the kinds of cases diverted to family group conferencing tend to occur within discrete communities in which all members are of a similar race and class. Also, our findings tend to confirm the scarcity of successfully completed inter-class family group conferences, first illuminated by the Inter Ministerial Committee on Young People at Risk in the Pretoria project in 1997.

Case studies

The case studies considered below provide some insight as to what kinds of cross-race and cross-class cases reach a family group conference, and what happens when the such conference is actually held between different race and class groups, as well as how race or class disparity appears to affect practice and outcome.

Although respondents identified twelve family group conferences involving race or class difference, respondents provided only six case studies. Only one of the five cross-race case studies involved race difference without class difference, and this was an incident of theft. Four of the five cross-race cases involved black victims and white offenders. Three of these involved incidents of assault or assault with intent to cause grievous bodily harm, and in all these cases the offenders were more affluent than the perpetrators.

The road rage incident

This case took place in Gauteng and involved a charge of assault with intent to cause grievous bodily harm where the victim was black and the offender was white. The best way to describe the circumstances of the case is to term it a 'road-rage' incident. The victim was a gardener from Malawi. It should be noted that poor black foreigners are even further stigmatised on a class and race basis, and possibly from the most marginalised social class in South Africa. The offender was a self-employed, Afrikaans speaker then living in Centurion, an affluent suburb of Pretoria. It is noteworthy that these two

persons would otherwise not have come into contact with each other, coming from such different backgrounds. This was a random confrontation.

According to the respondent social worker, the main barrier to the holding of the restorative justice conference was the problem of language as neither was proficient in English. An added difficulty was the selection of a venue that was accessible to both victim and offender: transport costs had to be paid on behalf of the victim who otherwise would not have been able to attend. As stated, although neither victim nor offender spoke English as a first language, they both chose this language as the conferencing medium. As special preparation, the facilitator engaged a second facilitator, so that a white male and a female black person could carry out the facilitation together; this was explicitly to neutralise any perception of racial bias. Furthermore, the facilitators held long preparatory meetings with both participants and their supporters. The supporters for the victim were, from the outset, very sceptical of the aims and objectives of the conference:

‘The victim’s supporters were more of the opinion that the conference was aimed at “getting the offender off”.’

The conference took five hours to conclude, mainly due to the fact that the conference was facilitated in English.

With respect to the class disparity, the respondent noted in her formal response that difference in economic class had no effect on the process. However, she also commented:

‘The victim wanted the outcome to be purely monetary restitution. This nearly stopped the process.’

Clearly, this attitude of the victim was related to the difference in class. Would he have been so insistent in this attitude had the offender not been wealthy? Hence, in our view there was indeed an impact unacknowledged by the facilitator on the process that arose as a result of the class difference between the victim and the offender.

The outcome of the conference was not entirely satisfactory: the victim did not understand some of the outcomes and further meetings had to be held after the conference to clarify issues with him.

The respondent’s own view on the impact of race and class disparity:

‘My personal opinion is that race and class differences have a potential to make restorative processes more difficult. The main reason for this is that communities have lost trust in justice processes and restorative justice is seen as a way to “get off” the more privileged. I believe that it depends on circumstances around a particular case and also on the personal circumstances of both the victim and offender.’

The scholars and the unemployed man

This case took place in the North-West Province and involved two white scholars who assaulted an unemployed black man. The man originally laid a charge of attempted murder, which was then changed to one of common assault. The victim's original charge is an indication of the seriousness with which he at first viewed the incident. Accordingly, the victim was initially reluctant to participate in the conference.

Special preparation made by the facilitator (who was coloured) was to include the investigating officer, who was black, to act as a co-facilitator and interpreter. In addition, the purpose of the conference was fully explained to both parties prior to the conference, and a central venue was chosen.

The main effect of the race difference was that the language problem led to a very time-consuming process. Difference in culture and background of the participants also made explanation across languages of what was being said even more difficult. However, consensus was ultimately reached and the respondent was of the view that the race difference had no impact on the outcome of the conference.

This respondent's own view on the impact of race disparity:

'Race difference might be difficult sometimes, especially when there is a further cultural or race difference between the facilitators and the parties. However, the greater problem is when there is a difference between the two parties. Misunderstandings and misinterpretation might arise.'

The fighting boys

This incident is also derived from the North-West Province and involved a case of common assault. The victims were a group of coloured boys and the offenders a group of white boys who shot at the victims with a pellet gun. The original charge was one of attempted murder, but there were no serious injuries sustained by the victims. But, here again, the charge laid by the coloured boys indicates the seriousness with which they at first viewed the matter, and their families were, according to the facilitator, initially very angry and suspected that the incident was motivated by racial hatred.

However, the respondent said there were no special barriers to the conference arising from the race difference. Special preparation included careful explanation to both parties of the purpose of the conference, and choosing a central venue. The only effect of the race difference on the process was the need to use an interpreter. The race difference had no impact on the outcome and consensus was reached.

This respondent, who reported being 'delighted' with the outcome, provided the following comment on the impact of race disparity:

'In my own view race and class difference does not hamper restorative justice process so much. The only important thing is professionalism on the part of the facilitator. It is of paramount important that the facilitator acts in a professional way in order to win the confidence of the parties concerned. Since people are not aware of the concept of restorative justice, they are truly impressed if they are involved in solving their own fate.'

The farmer and the children of the neighbour's labourers

An incident in the North-West Province, an area of intense agricultural activity – often characterised by polarised labour relations between white farm owners and black farm workers – has indicated more clearly than the other case studies the extent to which race and class have the potential to impact on the successful outcome of a family group conference. The fact that a satisfactory result was achieved is largely attributable to the sensitivity of the facilitator to the race and class tensions existing between the parties.

The case involved the theft (over time) of household groceries allegedly to the value of R10 000. A white farmer was the victim, and the offenders were the children of the neighboring farmer's labourers. The children were under ten years of age. Clearly in this case, there is a large disparity in race, class and relative power of the persons involved.

Although this was not a properly and formally convened conference, all the parties and their families were present and the social worker acted as facilitator. It was a kind of 'emergency conference' held at the police station where the victim was attempting to lay a charge, while the children's families were there protesting the laying of a charge. The victims were initially reluctant to participate. However, the social worker explained to the victim and his family the near impossibility of convicting the children concerned. She also got the children to admit guilt and to apologise for their actions, and to promise not to continue with the theft. She felt that the situation was adequately resolved.

This respondent's view of the impact of race and class:

'Race and class difference can and cannot make a difference restorative justice processes more difficult, depending on the individual involved, their stereotypes of people, and their views on the escalating crime rate.'

The cell phone theft

This case, occurring in the Free State Province, involved the theft of a cell phone, worth about R1 200, from a young white working class person by a group of perpetrators consisting of four young white persons and one coloured person. The principal difficulty in setting up the conference revolved around obtaining transport for the coloured offender as he was

from a lower income group than the victim and his co-accused. Special preparation undertaken by the facilitator prior to this conference took the form of a home visit to the coloured person and his family.

The main problem in the actual conferencing process was that the working-class victim and parents wanted full monetary compensation for the loss of the cell phone. According to the respondent, this was difficult to achieve as the perpetrators could not, even collectively, repay the full amount and other alternatives to compensate the victim had to be considered. The victim and victim's parents were not pleased with this as their initial expectation of the conference was full compensation for the loss suffered. However, eventually consensus was reached and the solution obtained was for the four white offenders to pay R200 each while the poorer coloured person agreed to work at the shop belonging to the victim's parents' shop for a specified amount of time, as he could not afford the R200 that the others were to pay to the victim.

The potential stumbling block in this case study seemed to be the lack of means of the offenders, and the particular lack of income of one member of the group in comparison to the others. Race appears not even to have been considered here. Indeed, the respondent supplied this case study as an example of the impact of class disparity, rather than a case dealing with race.

This respondent's own view of the impact of class disparity:

'Class disparity makes it difficult for restorative justice processes. For example, people might be living far away from the venue. As a result, during preparation you have to make home visits, and if you are working for an organization without resources, this might be a problem. Poor victims are also sometimes not completely happy because they are not fully compensated. As a result, there is a feeling of unfairness.'

The cell phone swindle

This occurred in the Eastern Cape Province and involved theft of a cell phone from an employed middle class black woman, by a 14-year old white boy from a middle-class white family. The youth asked the victim if he could show the phone to his father. The victim gave him the cell phone, as he looked trustworthy. The youth was influenced to take the phone by an adult (19-year-old) 'friend' who threatened him with injury if he did not do so. The adult friend was in custody on this charge.

According to the respondent, normal procedures were followed in this conference, such as the separate preparation of each party. Further than this, no special preparation was undertaken. Expressing the view that race difference had no impact on the process, the respondent ascribed this absence of impact to the attitude of the victim and her level of education:

'The victim was a well-educated person and did not have a negative attitude towards the offender. She was positive towards the process, as she wanted her cell phone back. This was the main factor in her attending the family group conference.'

The main aim was to resolve the situation in a restorative manner. The family was motivated to examine their financial situation and to see if they could contribute to a cell phone. The outcome was that the family agreed to donate R500-00 towards the purchase of a new phone.

This facilitator had incidentally had convened more family group conferences than any other respondent (32), of which only this case study involved a cross-race situation. Nevertheless, he did furnish his views on the characteristics of different same-race family group conferences:

[In my experience, with family group conferences] in the Xhosa [the main black cultural group in the Eastern Cape] culture ... [there is a tendency] ... to use the family group conference as a 'get rich quick scheme' for the 'blood' that was lost during the incident. This [cultural attitude] is addressed in preparation, but does arise in the final meeting. This is not relevant to all Xhosa family group conferences done, but [does happen regularly].'

With the coloured culture it seems that societal norms like the absence of respect and dignity has caused family group conferences to be very challenging. Problems between extended families also cause the family group conferences to focus sometimes on irrelevant issues that do not concern the people in the current meeting.

With the white culture the dysfunctional relationships in the family plays the biggest role in a challenging family group conference. The weak relationships (in these white families) are normally characterized by weak communication skills, divorced parents and the inability to manage conflict.

Further insights obtained from the qualitative data which inform the findings

This section highlights supplementary comments obtained during the course of this research that contribute to the overall picture concerning the influence of race and class in the family group conferencing process. Thus, one of the pioneers of conferencing in South Africa (having facilitated more than 40 such conferences in the Western Cape since their introduction in South Africa, albeit none recently due to a career change), gave some perspective on the kinds of cross-race or cross-class family group conferences that she convened:

'In the rural areas, the kinds of cross-race or cross-class situations we came across were children of labourers or children from the community stealing from landowners or farmers, so there is both a disparity in race and class at the same

time. The thefts occurred because of poverty-related reasons. In the metropolitan areas, 90% of cases were cases of shoplifting, again involving a very wealthy and powerful usually white victim and very poor black offender.'

'Race and class only becomes an obstacle in these kinds of situations if you make it into an obstacle. The base to work from is an understanding of the victim. Special preparation is crucial. This is not simply mediation or facilitation, as we are dealing with very unequal power relations. Of course, one needs to speak the languages of all concerned as a starting point.'

'In rural farming areas, the family group conference can become a tool to actually create relationships and understanding between groups of people who never had understanding of each other's position before. Rather than restoring a community fabric that has been broken, the beginnings of community can actually be created by the conference, if it is done properly.'

Another respondent who had conducted 21 family group conferences in the last year, none of which were inter-racial but which she said were often cross-cultural (in the sense of being among black people, but from different language or cultural groups) had the following comment to make:

'Race and class difference cannot be allowed to make family group conferencing processes more difficult. As a facilitator, one needs to be neutral, and properly prepare the participants for the conference. They need to be fully informed about the purpose of the conference. There are still people who discriminate against others, and have negative attitudes towards others. The role of the facilitator is crucial. It is his or her duty to assist participants to change their attitudes.'

One additional respondent, who had not done any inter-racial and inter-class family group conferences, and who works with children only, provided these remarks:

'The values parents have in raising their children are similar across races. All parents want what is best for their children so race or class difference should not influence the process.'

Observations derived from the case studies

Our case studies and the supplementary qualitative data gives rise to the following observations. Where the victim is poor (irrespective of race) and has suffered patrimonial loss, there appears to be a tendency on the part of the victim to demand monetary compensation particularly where the offender is wealthy, but even where the offender is not wealthy. This has the potential to frustrate the whole process, as the victim is not concerned with understanding the offender, and will furthermore be almost entirely focused on the monetary compensation he or she stands to gain from the process.³⁶

³⁶ Case studies one and five.

Where the victim is less powerful in an unequal power situation, there may be a tendency for the victim to initially view the process with suspicion and see it as a means of 'getting the offender off'.³⁷ In such situations clear communication is essential. The conference itself may resolve the primary issue and look 'on paper' to have been successful, but feelings of unfairness may remain, and the essential aim of healing of the restorative process then may not have occurred.³⁸ Where the victim is poor, there may also be an inclination to demand monetary compensation for the hurt sustained, even where the victim has not suffered actual direct patrimonial loss.³⁹

It appears that a greater potential exists for successfully convening a family group conference in situations where the victim is the more powerful person (eg a shop-owner or farm owner).⁴⁰ However, where the crime concerned appears to be motivated by racial hatred or is perceived by the victim to be motivated by such hatred, this possibly leads to reluctance on the part of the victim to participate (irrespective of whether the victim is black or white).⁴¹ If poverty or some less emotive reason is shown to be the underlying motivation for the crime, there is less reluctance on the part of the victim to take part in the conference.⁴² Instances where children, rather than adults, are the perpetrators may also have a greater chance of a satisfactory conclusion.⁴³

Conclusions

What appears to arise from the quantitative data, the case studies and the other information furnished above tends to lead towards the following overall conclusions.

First, it can be discerned from the study as a whole that cross-race and cross-class criminal incidents that might give rise to a family group conference seem not to be as common in South Africa as could have been expected. In addition, it can be concluded that the majority of family group conferences are held among members of homogenous communities, based on our quantitative survey. This confirms earlier predictors of this finding in the pilot projects that have taken place in South Africa.

Cross-race and cross-class situations appear not to be an outright impediment to holding a family group conference, nor to holding a

³⁷ Case studies one and two, and three.

³⁸ Case study one.

³⁹ Case study one.

⁴⁰ Case study four and supplementary views of other respondents.

⁴¹ Case studies one, two and four.

⁴² Supplementary views provided by the respondents to the study.

⁴³ Case studies two, three and four as well as the supplementary insights.

successful conference, based on our results, and race and class cannot properly be viewed as an 'Achilles heel' in the attempt to increase the use of conferencing in South Africa. However, cross-race and cross-class conferences do pose special problems, especially if language differences are involved. They may require more than one facilitator, not only for language reasons, but so that the facilitator is not her- or himself identified with only one of the participants based on his or her own racial profile. It appears that an exceptional degree of professionalism is called for on the part of the facilitator, who must gain the confidence of all parties (as reflected in the comments of most respondents).

Location, venue and travel arrangements are further complicating factors, not to mention the possibility of suspicious attitudes from victims towards restorative justice processes, language problems and the victim's preoccupation with monetary restitution. Although none of these are necessarily directly attributable to race and class, they are all to a degree affected by the manner in which race and class is played out in South African society generally.

Our results therefore tend to suggest that insofar as race and class differences prevail in victim-offender encounters, restorative processes cannot yet be regarded as the 'crowning glory' of conflict resolution in the criminal justice context. Rather, we are faced with a 'glass ceiling', linked to this multifaceted array of impediments that may frustrate future conferencing endeavours.