

**RESTORATIVE JUSTICE AS AN ALTERNATIVE SENTENCING OPTION IN SOUTH AFRICA: A
DIFFERENT APPROACH TO CRIME**

by

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DECLARATION

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Exact wording of the title of the dissertation as appearing on the electronic copy submitted for examination:

RESTORATIVE JUSTICE AS AN ALTERNATIVE SENTENCING OPTION IN SOUTH AFRICA: A DIFFERENT APPROACH TO CRIME

I declare that the above dissertation is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I submitted the dissertation to originality checking software and that it falls within the accepted requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.

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ABSTRACT

Concerns with the current criminal justice system in many countries around the world have triggered an interest in alternative methods of dispensing justice. This is because of its failure to effectively reduce crime and to meet the needs of those who are affected by crime. The search for alternative ways of dispensing justice has led to the emergence of restorative justice. Restorative justice is, in fact, not a new concept in the history of dealing with crime. It is similar to African traditional processes of justice. Restorative justice has gained popularity worldwide as an approach to justice that does not only emphasise a different response to crime, but as also having the potential to address the shortcomings of the current criminal justice system. This study examines restorative justice as an alternative sentencing option in South Africa.

KEYWORDS

Sentencing; punishment; imprisonment; restorative justice; restoration; conventional criminal justice system; consistency, proportionality; principles of sentencing; restitution; apology; forgiveness

ABBREVIATIONS AND ACRONYMS

CPA	Criminal Procedure Act
FGC	Family Group Conferencing
TRC	Truth and Reconciliation Commission
SALC	South African Law Commission (now called the South African Law Reform Commission)
SCA	Supreme Court of Appeal
UN	United Nations
VOM	Victim-Offender Mediation

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CHAPTER ONE

INTRODUCTION

1.1 Introduction

The penal system is as good as its effectiveness in responding to the problems of crime. The better a criminal justice system functions, the better it will be for economic growth, social balance, and political stability.¹ Crime is one of the serious problems confronting South Africa. Crime is seen to be so endemic that claims are often made of South Africa as being the world's most crime-ridden society. These claims are indicative of how crime has reached crisis levels.

The 2017/18 crime statistics show an alarming increase in violent crimes. The number of murders recorded were 20,336, 1,320 more than in the previous financial year. This shows that an average of 57 people are murdered every day, the figure which has been described by the Minister of Police, Bheki Cele, as bringing South Africa close to a war zone. An increase is also been recorded in sexual offences and cash-in-transit heists respectively. The former category of crimes increased from 49,700 in 2016/17 count to 50,100 in 2017/18 count, while in the latter category, the number rose from 152 to 238.²

Crime statistics suggest that an effective criminal justice system should be a very high priority in South Africa. The question is, how effective is our criminal justice system in dealing with crime. This issue is addressed in this chapter. The hypothesis that it is very ineffective, is made and discussed in what follows.

1.2 Shortcomings in the current criminal justice system

Concerns have been raised with the current criminal justice system. Escalating levels of crime have cast doubt on the effectiveness of the current methods of dispensing justice in responding to crime and its consequences.³ This is more so considering the fact that it is not the first time that South Africa has had to deal with the burgeoning crime problem. Increasing levels of crime (coupled with the fear among the public) have in the past led to the government's adoption of

¹ Solomon and Nwankwoala 2014 *Asian Journal of Humanities and Social Sciences* at 126.

² See Phakathi 2018-09-11 *Businesslive*.

³ See Cameron "Imprisoning the Nation" 1-33; Louw and van Wyk 2016 *Social Work* at 490.

a tough stance on crime by focusing more on arrests and prosecutions, as well as prescribing harsher punishments for convicted offenders.⁴ An example of this approach can be seen from the enactment of the Criminal Law Amendment Act 105 of 1997, which prescribes mandatory minimum sentences.⁵ The Act essentially prescribes lengthy terms of imprisonment in respect of certain serious offences, including murder and robbery. Deterrence is suggested as one of the aims of the Act.⁶

These increased sentences have not affected crime rates. Imposing harsher punishment on offenders has been shown internationally to have little success in crime prevention.⁷ Research shows that most offenders who commit crimes do not weigh their decision against possible punishment they may get for their crimes.⁸ As such, harsh sentences will have little impact if not at all on these offenders since they do not consider the severity of what punishment they may get before committing the crime.⁹ More importantly, the use of imprisonment has not shown any marked impact on reoffending rates.¹⁰ This echoes a shared view among authors that prisons have very little or no deterrent effect on criminal behaviour.¹¹ Most prisoners are repeat offenders who had previous contact with the criminal justice system.¹² Many of them went to prison as petty criminals and returned as hard-core criminals.¹³ In 2013, it was estimated that 80 percent of sentenced offenders are repeat offenders and a substantial number of them are hard-core offenders,¹⁴ whereas in 2014, it was estimated that a quarter of

⁴ Batley and Maepa *Introduction* at 15-16; Louw and van Wyk 2016 *Social Work* at 490.

⁵ See section 51 of Act 105 of 1997.

⁶ *S v Eadie* 2001 (1) SACR 185 (C) at 186J-187A; *S v Mofokeng* 1999 (1) SACR 502 (W) at 526H; *S v Willemse* 1999 (1) SACR 450 (C) at 454A; *S v Homareda* 1999 (2) SACR 319 (W) at 325F; *S v Kgafela* 2001 (2) SACR 207 (B) at para 23; *S v Montgomery* 2000 (2) SACR 318 (N) at 322H-I.

⁷ Batley and Maepa *Introduction* at 16. See also *S v Maluleke* 2008 (1) SACR 49 (T) at para 26; *S v Seedat* 2015 (2) SACR 612 (GP) at para 44; Venter 2011-04-11 *IOL News*; Louw and van Wyk 2016 *Social Work* at 495.

⁸ Pointer available at <https://lindseypointer.com/2016/07/06/how-effective-is-restorative-justice-when-followed-by-a-punitive-sentence/> (accessed 13/07/2018); Cameron "Imprisoning the Nation" at 16; Muntingh *Sentencing* at 191.

⁹ Cameron "Imprisoning the Nation" at 16.

¹⁰ Hargovan 2015 *SA Crime Quarterly* at 55.

¹¹ Muntingh 2017-03-02 *Daily Maverick*; Nevin 2017-03-13 *Mail & Guardian*; Fagan 2005 *Advocate* at 35; Fagan 2004 *SA Crime Quarterly* at 4; Stamatakis and Van der Beken 2011 *Acta Criminologica* at 45; Louw and van Wyk 2016 *Social Work* at 490; Moss *et al* 2018 *Victims & Offenders* at 1. See also Terblanche *Sentencing* at 174 onwards, where he highlights different views on the deterrent effect of sentences.

¹² Singh 2007 *New Contree* at 152; Kgosimore 2002 *Acta Criminologica* at 69.

¹³ Davis 2017-05-17 *Eyewitness News*.

¹⁴ Makoni 2013-08-02 *Free State Times*. Cf Chikadzi 2017 *Social Work* at 290.

sentenced offenders would reoffend within five years of release.¹⁵ The frequency with which people reoffend clearly demonstrates that imprisonment only serves retributive and community protective functions.¹⁶ It confirms that harsh punishment does not serve a rehabilitative purpose.¹⁷

As Cameron¹⁸ notes, the introduction of the harsh mandatory minimum sentences has given us a false belief that we are actually doing something about crime. The reality is that a punitive approach to criminal justice has failed to stem the rise of crime.¹⁹ As has long been observed by Beccaria, one of the most influential scholars of the 18th century, “it is better to prevent crimes than to punish them”.²⁰ Given this observation, the view is that instead of fixation on the punishment of offenders, the focus should be on addressing the underlying root causes of crime.²¹ It is argued that we need to move towards a new conceptual approach on crime prevention and rehabilitation.²² This notion is in alignment with concerns around the world regarding the current methods of dispensing justice.

Another aspect of concern with the current criminal justice system is that the needs of victims are not sufficiently taken into account.²³ Several factors account for this. One of these factors can be attributed to its approach in dealing with crime. As can be seen from the above, the current justice system is seen as mainly focused on the offender, hence it has often been criticised as primarily concerned with punishing offenders.²⁴ There is less concern about the needs of those who have been affected by crime. As Tshehla succinctly puts it,

“The legal battle between the state and the individual accused person starts off with the state being faced with the burden of proving the case against such an accused and ends

¹⁵ De Wet 2014-10-16 *Mail & Guardian*.

¹⁶ See Vermaak 2009 *Advocate* at 28.

¹⁷ Bezuidenhout 2007 *Acta Criminologica* at 46.

¹⁸ Cameron “Imprisoning the Nation” at 3-5.

¹⁹ *S v Shilubane* 2008 (1) SACR 295 (T) at para 5; *S v Maluleke* 2008 (1) SACR 49 (T) at para 37; Venter 2011-04-11 *IOL News*. This is in full agreement with the crime statistics as noted above.

²⁰ Beccaria *Crimes and Punishments* at 148. See also Paternoster 2010 *Journal of Criminal Law & Criminology* at 769; National Research Council *The Growth of Incarceration in the United States* at 132.

²¹ Cf Davis 2017-05-17 *Eyewitness News*; *S v Makwanyane* 1995 (2) SACR 1 (CC) at para 122; Terblanche 2003 *Acta Juridica* at 219.

²² Nevin 2017-03-13 *Mail & Guardian*.

²³ Naudé 1997 *Consultus* at 57; Kgosiore 2002 *Acta Criminologica* at 70; Batley and Maepa *Introduction* at 16; Makiwane 2015 *Obiter* at 79.

²⁴ Tshehla 2004 *SACJ* at 3; Batley *Restorative Justice in South Africa* at 119; Kgosiore 2002 *Acta Criminologica* at 70; Makiwane 2015 *Obiter* at 79.

with the accused, if found guilty, being punished. In the main the person who may have suffered as a result of the accused person's action or omission does not feature in the legal battle save as a witness to help the state prove *its* case against the accused.”²⁵

In response to concerns with the current criminal justice system, it has been suggested that there is a need for a different approach. One approach that has been proposed to improve criminal justice is restorative justice.²⁶

1.3 What does restorative justice entail?

The concept of restorative justice is fully discussed in chapter three. At this stage it is sufficient simply to describe restorative justice as an approach to justice that emphasises a different conceptual approach to crime. It sees crime as conduct that causes harm to people and their relationships.²⁷ If crime does indeed result in harm, then justice cannot be achieved by simply imposing punishment on offenders.²⁸ Restorative justice argues that the focus of the justice process should be on repairing the harm caused by crime. It is premised on the notion that those who are affected by crime should decide themselves how to deal with it.²⁹ In essence, the view is that the most effective way of dealing with crime is by involving those who are close to the conflict of crime.³⁰ One of the arguments for the use of restorative justice in the sentencing system is that it has the potential to reduce the level of reoffending and ultimately promote community respect for the law and justice system.³¹

As in many countries around the world, restorative justice is not a new concept in South Africa. It is seen as similar to traditional African methods of dispensing justice,³² which is one of the

²⁵ Tshehla 2004 SACJ at 3.

²⁶ Kgosimore 2002 *Acta Criminologica* at 75; Batley and Maepa *Introduction* at 16; Batley *Restorative Justice in South Africa* at 117-118.

²⁷ Zehr *Changing Lenses* at 181; Batley *Restorative Justice in South Africa* at 115; Mcold 2000 *Contemporary Justice Review* at 363; Presser and Van Voorhis 2002 *Crime and Delinquency* at 164; Allan *et al* 2014 *Psychiatry, Psychology and Law* at 176.

²⁸ Zehr *Changing Lenses* at 186; Bazemore and Schiff *Juvenile Justice Reform and Restorative Justice* at 48; London *From the Margins to the Mainstream* at 16.

²⁹ Zehr *The Little Book* at 24; Latimer *et al* 2005 *The Prison Journal* at 128; Johnstone *Introduction* at 3; McCold 2000 *Contemporary Justice Review* at 373; Johnstone and Van Ness *Restorative Justice* at 14; Gavrielides 2017 *Restorative Justice: An International Journal* at 383.

³⁰ Kgosimore 2002 *Acta Criminologica* at 73.

³¹ Mollema and Naidoo 2011 *Journal for Juridical Science* at 62.

³² Tshehla 2004 SACJ at 13; Kgosimore 2002 *Acta Criminologica* at 71; Skelton 2007 *Acta Juridica* at 288; Hargovan 2007 *Acta Criminologica* at 80; Mangena 2015 *South African Journal of Philosophy* at 4; Skelton and Batley *Mapping Progress, Charting the Future* at 19; Louw and van Wyk 2016 *Social*

reasons it is supported in South Africa.³³ The claim that there are similarities between the two approaches is therefore examined in the discussion of the conceptual framework of restorative justice in chapter three.

Besides the above connection, a legislative framework for restorative justice practice already exists in South Africa. Some authors in the field are of the view that section 299A of the Criminal Procedure Act 51 of 1977 (which requires certain victims to be informed when the offender's parole will be considered)³⁴ and section 105A (which governs plea and sentence agreements)³⁵ demonstrate the applicability of restorative justice in South Africa. Other restorative justice schemes within our criminal justice system include the conditions of correctional supervision³⁶ and the Probation Services Amendment Act 35 of 2002, where it refers to restorative justice as one of the functions of probation officers.³⁷ One of the most prominent of such "schemes" is now in the Child Justice Act 75 of 2008.³⁸

Although no further action has been taken regarding its recommendations, one of the attempts to introduce restorative justice in dealing with crime can be seen from the South African Law Commission's report on sentencing (the SALC's report).³⁹ The SALC's report included proposed legislation that would give effect to recommendations of the Commission. The main principle of sentencing, in terms of these proposals, is that sentences need to be proportionate to the seriousness of the offence committed, relative to other offences.⁴⁰ Subject to the proportionality principle, the Commission recommended that sentences need to achieve the optimal combination of restoration, the protection of society and the opportunity

Work at 491; Department of Justice & Constitutional Development available at www.justice.gov.za/rj/2011rj-booklet-a5-eng.pdf (accessed on 25/10/2016).

³³ Department of Justice & Constitutional Development available at www.justice.gov.za/rj/2011rj-booklet-a5-eng.pdf (accessed on 25/10/2016).

³⁴ Terblanche *Sentencing* at 191.

³⁵ Skelton and Batley 2008 *Acta Criminologica* at 44; Terblanche 2018 *ECAN Bulletin* at 6; Bauer 2011-09-13 *Mail & Guardian*.

³⁶ See section 52(1)(g) of the Correctional Services Act 111 of 1998.

³⁷ See Section 2 of the Probation Services Amendment Act 35 of 2002.

³⁸ See the Child Justice Act 75 of 2008. This will be discussed in more detail later.

³⁹ See South African Law Commission *Sentencing Report*.

⁴⁰ South African Law Commission *Sentencing Report* at para 3.1.12; Skelton and Batley 2008 *Acta Criminologica* at 45. Cf Nesor 2001 *Acta Criminologica* at 46.

for the offender to lead a crime-free life.⁴¹ This indicates that the ideal sentencing system should allow for restorative interventions.⁴²

There is also emerging sentencing jurisprudence in the field of restorative justice. South African courts have from time to time introduced the principles of restorative justice into the sentencing process.⁴³ These cases are examined in the discussion of restorative justice practice in South Africa. Such an examination shows the potential of restorative justice, and the challenges that need to be considered.

1.4 Objectives of the study

The aim of this study is to examine restorative justice as an alternative sentencing option. Therefore, principles of restorative justice and its practices are evaluated with a view of establishing restorative justice as an alternative way of dealing with crime and its consequences. It is also the aim of the study to assess the claim that restorative justice is similar to African traditional methods of justice. Such an assessment will provide good argument in favour of restorative justice practice in South Africa. The study also examines the current legislative framework for restorative justice practice in South Africa.

An investigation of an alternative sentencing mechanism requires profound knowledge and understanding of both sentencing principles and traditional purposes of punishment. Such an understanding will also be crucial for an objective assessment of restorative justice as an alternative sentencing option. Therefore, this study also provides an overview of these sentencing principles and some criticisms against them.

1.5 Research questions

In order to achieve the objectives of the study, the following questions are raised:

- What is restorative justice, and how does it provide for a different approach to dealing with crime?

⁴¹ *Ibid.*

⁴² South African Law Commission *Sentencing Report* (Executive Summary) at para 7; Terblanche *Research on the sentencing* at 21.

⁴³ *S v Tabethe* 2009 (2) SACR 62 (T); *S v Shilubane* 2008 (1) SACR 295 (T); *S v Maluleke* 2008 (1) SACR 49 (T); *S v M* 2007 (2) SACR 539 (CC); *S v Saayman* 2008 (1) SACR 393 (E); *S v Seedat* 2015 (2) SACR 612 (GP).

- What is the nexus between restorative justice and traditional African methods of justice?
- To what extent does the legislative framework promote restorative justice in sentencing?
- How does restorative justice address shortcomings of the current criminal justice system?

1.6 The research methodology

The research is based on an extensive literature review. This method consists mainly of analysing legislation, case law, books, journal articles, and conducting internet-based research. The study adopts qualitative research techniques, as it is appropriate for the purpose of obtaining necessary information in order to answer the research questions. According to Mason, qualitative research is “based on methods of analysis, explanation and argument building which involve understandings of complexity, detail and context”.⁴⁴ Therefore, sources pertaining to the topic are thoroughly analysed to achieve the objectives of the study.

Although the study endeavours to give a South African perspective on the topic, reference is made to foreign lessons where necessary and applicable. South Africa is not the only country in which dissatisfaction is expressed with the current criminal justice system. Growing dissatisfaction with current criminal justice has led many countries to consider an alternative approach to crime.⁴⁵ These failures have positioned restorative justice as an alternative approach to crime.⁴⁶

1.7 The structure of the study

This study comprises of five chapters. This chapter (ch 1) has provided the introduction to the study. Chapter 2 provides an overview of the sentencing principles in South Africa and some criticism of the current sentencing system. Chapter 3 deals with the concept of restorative justice. It also analyses the claim that restorative justice is similar to African traditional methods of justice. Chapter 4 deals with the practice of restorative justice in South Africa. It examines the legislative framework for restorative justice practice, as well as the sentencing jurisprudence

⁴⁴ Mason *Researching* at 3.

⁴⁵ United Nations Office on Drugs and Crime *Restorative Justice Programmes* at 5.

⁴⁶ Tshehla 2004 *SACJ* at 7-8.

in the field of restorative justice. Chapter 5 contains the research conclusions and recommendations

CHAPTER TWO

A CRITICAL OVERVIEW OF THE SENTENCING PRINCIPLES IN SOUTH AFRICA

2.1 Introduction

Sentencing is a criminal justice process that falls within the province of the courts. This process begins once an offender has been convicted of a criminal offence. It then becomes the function of the court to impose an appropriate sentence on the offender. In determining an appropriate sentence, the court is required to consider the triad principles consisting of the crime, the personal circumstances of the offender and the interests of society.¹ Moreover, when assessing the appropriateness of a sentence, consideration should also be given to the main purposes of punishment namely, deterrence, prevention, rehabilitation and retribution.²

Although the court exercises a discretion when determining an appropriate sentence,³ it is important to note that certain offences carry minimum sentences.⁴ Therefore, when deciding upon an appropriate sentence to impose, the court is required to consider any sentence prescribed for such offences. The minimum sentences scheme has become a prominent feature in the sentencing process. The question is how it fits into the basic principles of sentencing.

However, it should be noted that despite the above guiding principles, and the fact that sentencing happens almost daily in South African courts, the passing of a sentence is by no means a clear-cut process. It is conceded to be difficult,⁵ if not inherently controversial.⁶ There is no scientific calculation or formula of arriving at an appropriate sentence.⁷ Sentencing

¹ *S v Zinn* 1969 (2) SA 537 (A) at 540G; *S v Samuels* 2011 (1) SACR 9 (SCA) at para 9; *S v De Villiers* 2016 (1) SACR 148 (SCA) at para 29; *S v M* 2007 (2) SACR 539 (CC) at para 10.

² *S v Khumalo* 1984 (3) SA 327 (A) at D-E; *S v De Villiers* 2016 (1) SACR 148 (SCA) at para 30; *S v M* 2007 (2) SACR 539 (CC) at para 10; *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA) at para 13.

³ See *R v Mapumulo* 1920 AD 56 at 57; *S v Dodo* 2001 (1) SACR 594 (CC) at para 18.

⁴ See section 51 of Act 105 of 1997.

⁵ *S v M* 2007 (2) SACR 539 (CC) at para 66; *S v Kok* 1998 (1) SACR 532 (N) at 551; *S v EN* 2014 (1) SACR 198 (SCA) at para 14; *S v Pillay* 2018 (2) SACR 192 (KZD) at para 3; Vermaak 2007 *Advocate* at 51; Watney 2015 *TSAR* at 844.

⁶ *S v M* 2007 (2) SACR 539 (CC) at para 10; South African Law Commission *Sentencing Report* at para 1.1; Terblanche *Research on the sentencing* at 10; Watney 2015 *TSAR* at 844.

⁷ *S v Martin* 1996 (2) SACR 378 (W) at 382E-F; *S v RO* 2010 (2) SACR 248 (SCA) at para 30.

remains largely dependent on the exercise of judicial discretion.⁸ What is crucially important is that the court should strive to achieve a balance of all the legally relevant factors relating to the particular case.⁹

This chapter provides an overview of the sentencing principles. It also highlights, briefly, the impact of the minimum sentences legislation on the courts' sentencing process. The aim is neither to provide an exhaustive survey of the courts' approach in this regard nor to examine the literature but to reflect on the approach followed when determining sentences in terms of this legislation. It is also important to highlight what sentencing seeks to achieve. Therefore, the chapter briefly looks at the traditional purposes of punishment. The last section of this chapter provides some of the criticisms against the sentencing system. The chapter therefore provides a basis for the next chapter (chapter three) which examines restorative justice as an alternative sentencing option.

2.2 The triad: the principles of sentencing

2.2.1 Introduction

The basic principles of sentencing are based on the *dictum* by Rumpff JA in *S v Zinn*.¹⁰ In this case, the court stated that “what has to be considered is the triad consisting of the crime, the offender and the interests of society”.¹¹ This approach is regarded as the starting point in the sentencing process.¹² The next discussion provides a brief overview of these principles.

2.2.2 The crime

The first component of the triad that is taken into account when determining an appropriate sentence is the crime. In this regard, the court considers the nature and seriousness of the crime. According to Terblanche, “the crime has always been an extremely important ingredient of any sentence. In fact, no other factor has the same influence on the nature and extent of the sentence”.¹³ This relationship is also explained by the requirement that punishment should be

⁸ Terblanche 2013 *THRHR* at 95.

⁹ Terblanche and Roberts 2005 *SACJ* at 189. See also *S v EN* 2014 (1) *SACR* 198 (SCA) at para 13.

¹⁰ *S v Zinn* 1969 (2) SA 537 (A).

¹¹ *S v Zinn* 1969 (2) SA 537 (A) at 540G. See also *S v Samuels* 2011 (1) *SACR* 9 (SCA) at para 9; *S v M* 2007 (2) *SACR* 539 (CC) at para 10; *S v De Villiers* 2016 (1) *SACR* 148 (SCA) at para 29.

¹² *S v M* 2007 (2) *SACR* 539 (CC) at para 10; South African Law Commission *Mandatory Minimum Sentences* at para 2.43.

¹³ Terblanche *Sentencing* at 163.

proportionate to the seriousness of the crime.¹⁴ The seriousness of the crime is the point of departure in an objective determination of the severity of the sentence.¹⁵ In essence, an appropriate sentence should reflect the severity of the crime.¹⁶

However, determining a sentence that reflects the seriousness of the crime is considered to be a difficult task in the sentencing process.¹⁷ This is due to the fact that any crime can be labelled as a serious crime.¹⁸ In determining the seriousness of the crime, our courts are often guided by society's view of a particular crime.¹⁹ The SALC's report has proposed the quite specific criteria for determining the seriousness of the crime. The factors to be considered are the harm caused by the crime, and the offender's culpability in respect of the crime.²⁰ These considerations offer more valuable guidance to an assessment of the seriousness of the crime than any principles currently in place.

2.2.3 The criminal

In this second component of the triad, the court takes into account a number of relevant factors when the person of an offender is considered. This includes age, marital status, the presence of dependents, level of education, employment,²¹ the presence or absence of remorse, and whether the person is a first time offender.²² The approach that looks specifically at the person of an offender is also known as individualisation.²³ This approach requires the sentencing officer to have knowledge about the character and motives of the offender.²⁴ It is mentioned elsewhere that it little assists the court to determine guilt or innocence of the offender according to long

¹⁴ *Ibid.*

¹⁵ Terblanche and Roberts 2005 SACJ at 201.

¹⁶ Terblanche *Sentencing* at 151.

¹⁷ *Ibid* at 164.

¹⁸ *Ibid* at 163.

¹⁹ *S v Mhlakaza* 1997 (1) SACR 515 (SCA) at 518B-C (The more horrendous a crime is in the eyes of the public, the heavier the punishment must be); *Director of Public Prosecutions, Transvaal v Venter* 2009 (1) SACR 165 (SCA) at paras 30-31.

²⁰ South African Law Commission *Sentencing Report* at para 3.1.4.

²¹ *S v Ngcongco* 1996 (1) SACR 557 (N) at 557G-H; Van der Merwe *Sentencing* at 5-4B. See also Vermaak 2007 *Advocate* at 51.

²² *S v Pillay* 2018 (2) SACR 192 (KZD) at paras 18-19; *S v Tabethe* 2009 (2) SACR 62 (T) at para 35.

²³ *S v Scheepers* 1977 (2) SA 154 (A) at 158F-G; *S v Toms*; *S v Bruce* 1990 (2) SA 802 (A) at 806I.

²⁴ Terblanche *Sentencing* at 165.

established principles of fairness and then base its assessment of punishment on absent or insufficient information.²⁵

As with the first component above, it can be difficult for a judicial officer to obtain the necessary information about the offender.²⁶ This is partly because most offenders are reluctant to have their personalities known.²⁷ Moreover, an average offender usually appears before the court for a short time.²⁸ This makes it difficult if not impossible for the judicial officer to obtain such information.²⁹ In this regard, it has been found that a pre-sentence report could be of vital importance in assisting the court to obtain the necessary information about the offender.³⁰

2.2.4 The interests of society

In terms of this component of the triad, the courts need to consider the interests of society when deciding upon an appropriate sentence. Despite it being one of the factors on which a fair sentence rests, our courts have not been consistent in describing the term “interests of society”. It is sometimes referred to as the interests of the community,³¹ and in some instances as the public interest.³² Terblanche submits that the interests of society should be understood as meaning serving “the interests of society”.³³ He therefore holds the view that society is generally served by a sentence that fulfils one or more of the purposes of punishment.³⁴

The phrase the interests of the community has been interpreted as giving expression to the likelihood that the offender will repeat his criminal behaviour.³⁵ This supposition is exemplified

²⁵ *S v Maxaku, Williams* 1973 (3) SA 248 (C) as cited by Rabie *et al Punishment* at 291. Cf *S v Samuels* 2011 (1) SACR 9 (SCA) at paras 7-8.

²⁶ Terblanche *Sentencing* at 165.

²⁷ *Ibid* at 166.

²⁸ *Ibid*.

²⁹ *Ibid*.

³⁰ See *S v Dlamini* 1991 (2) SACR 655 (A) at 667E-G (the court mentioned that although a pre-sentence report is used in the case of juveniles, its use should also be extended to the matured offenders. It further acknowledged the importance of a sentence report in enabling the court to obtain relevant information about the offender).

³¹ *S v Flanagan* 1995 (1) SACR 13 (A) at 16D (it was stated that when determining a fair and appropriate sentence, the interests of the community must be considered); *S v Mhlakaza* 1997 (1) SACR 515 (SCA) at 518D (the court mentioned that the interests of society deserves absolute priority).

³² *S v Mhlakaza* 1997(1) SACR 515 (SCA) at 518E (it was mentioned that the purpose of sentencing is to serve the public interest); *S v Samuels* 2011 (1) SACR 9 (SCA) at para 8 (the court mentioned that public interest calls for the court to play active inquisitorial role).

³³ Terblanche *Sentencing* at 170.

³⁴ *Ibid*.

³⁵ *S v Benneti* 1975 (3) SA 603 (T) at 605E.

by society's expectation of harsh punishment for certain offences,³⁶ and our courts often impose severe sentences for this purpose.³⁷ While this seems to be the case, it has also been held that a sentence that is too severe is not appropriate.³⁸ Furthermore, that the interests of society are not served by a sentence that is disproportionate to the seriousness of the crime.³⁹ They are well served by a sentence that has deterrent or rehabilitative effect on the offender.⁴⁰

2.3 The minimum sentences legislation

Sections 51 to 53 of the Criminal Law Amendment Act⁴¹ came into force on 1 May 1998.⁴² Initially, the provisions of this Act were intended to operate for period of two years.⁴³ Section 51 was finally made permanent by the Criminal Law (sentencing) Amendment Act 38 of 2007.⁴⁴ Section 51 specifically prescribes the minimum sentences that the court should impose for various serious crimes, unless there are substantial and compelling circumstances which justify the imposition of a lesser sentence.⁴⁵ It has been pointed out that subsequent to the commencement of this legislation it was no longer "business as usual" when determining a sentence for specified crimes and that the legislature has provided a new benchmark against which the sentence to be imposed must be assessed.⁴⁶

The approach the court should follow when determining an appropriate sentence where the minimum sentences legislation applies was enunciated in *S v Malgas*.⁴⁷ The basic approach is

³⁶ *S v Mhlakaza* 1997(1) SACR 515 (SCA) at 518 B.

³⁷ See discussion below at 2.4.3.

³⁸ *S v Holder* 1979 (2) SA 70 (A) at 80D-E. See also *S v Samuels* 2011 (1) SACR 9 (SCA) at para 9.

³⁹ *S v Van Deventer* 2011 (1) SACR 238 (SCA) at para 17; *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) at para 35; *S v Baartman* 1997 (1) SACR 304 (E) at 305D (the public interest is not served by sentences that are out of proportion to the gravity of offence); *S v Ingram* 1995 (1) SACR 1 (A) at 9A-B (the interests of society are neither served by a too harsh nor too lenient sentence)

⁴⁰ *S v Maki* 1994 (2) SACR 414 (E) at 419H ("society is best served if offenders are reformed, or at least deterred from committing offences"); *S v Bezuidenhout* 1991 (1) SACR 43 (A) at 51D-E (the court seeks to protect the interests of society by preventing a repetition of the crime); *S v Reay* 1987 (1) SA 873 (A) at 877D (it would be in the interests of society to rehabilitate the offender rather than sending him to prison). Act 105 of 1997 (hereafter the minimum sentences legislation).

⁴¹ Proc R43 GG 6175 of 1 May 1998.

⁴² *S v Malgas* 2001 (1) SACR 469 (SCA) at para 7; *S v Vilakazi* 2009 (1) SACR 552 (SCA) at para 9.

⁴³ See Act 38 of 2007. Sections 2 and 3 of this Act repealed sections 52 and 53 of the minimum sentences legislation.

⁴⁴ See sections 51 of the minimum sentences legislation.

⁴⁵ *S v Malgas* 2001 (1) SACR 469 (SCA) at paras 7-8; *S v Price* 2003 (2) SACR 551 (SCA) at 561G-I; *S v Matyityi* 2011 (1) SACR 40 (SCA) at para 11; *S v Vilakazi* 2009 (1) SACR 552 (SCA) at para 51.

⁴⁶ See *S v Malgas* 2001 (1) SACR 469 (SCA). This approach has subsequently been followed by the courts as authority when imposing sentences in respect of the offences covered by the legislation. For some of the recent judgments, see *S v Matyityi* 2011 (1) SACR 40 (SCA) at para 11; *Director of Public Prosecutions, Transvaal v Venter* 2009 (1) SACR 165 (SCA) at para 17; *S v Brown* 2015 (1) SACR

that the courts still have discretion when determining appropriate sentences in respect of the specified crimes. All factors that are traditionally taken into account when determining an appropriate sentence are still considered. However, courts are required to approach sentencing mindful of the fact that the legislature has prescribed particular sentences to be imposed for such crimes. The court highlighted that the aim of the legislature was to elicit a severe, standardised and consistent response from courts when imposing sentence unless there were truly convincing reasons for a different response.

In deciding on an appropriate sentence to impose, emphasis has shifted to the objective gravity of the type of crime and the need for effective punishments against it. The court also stressed that the prescribed sentences should not be departed from lightly and for flimsy reasons. As to what constitutes substantial and compelling circumstance (when prescribed sentences may be departed from), it was stated that “if the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence”. When imposing a lesser sentence than that prescribed in the Act, the court should take into account the fact that such crime has been singled out for severe punishment and the sentence should be assessed in consideration of the benchmark set by the legislature.⁴⁸

In *S v Dodo*⁴⁹ the Constitutional Court affirmed the constitutionality of the minimum sentences legislation and the approach articulated in *Malgas* case on how courts should approach sentencing. Most importantly, the court held that the legislation does not have the effect of depriving the courts of their sentencing powers in such a way and to such extent that they can no longer operate as “ordinary” courts.⁵⁰ In the same vein, the Constitutional Court in *Centre for Child Law v Minister of Justice and Constitutional Development*⁵¹ embraced the *Malgas* approach and stated that under the minimum sentencing regime the discretion given to courts was not taken away, but substantially constrained.

211 (SCA) at para 119; *Director of Public Prosecutions, Gauteng v Tsotetsi* 2017 (2) SACR 233 (SCA) at para 26; *DPP, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) at para 30.

⁴⁸ See *S v Malgas* 2001 (1) SACR 469 (SCA) at para 25.

⁴⁹ *S v Dodo* 2001 (1) SACR 594 (CC) at para 40.

⁵⁰ At paras 44-45.

⁵¹ *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (2) SACR 477 (CC) at para 16.

2.4 The purposes of punishment

2.4.1 Introduction

A sentence is imposed to serve a specific purpose. It is generally aimed at achieving the purposes of deterrence, prevention, rehabilitation and retribution.⁵² What follows is a brief overview of these purposes.

2.4.2 Deterrence

Deterrence is the use of punishment to deter the offender from reoffending and to demonstrate to other potential offenders what will happen to them should they commit the same crime.⁵³ The first-mentioned aspect relates to individual deterrence, whereas the latter refers to general deterrence.

2.4.2.1 Individual deterrence

Individual deterrence is concerned with deterring the particular offender from reoffending.⁵⁴ According to Rabie *et al*,

“The underlying idea is that a person who has once been subjected to the pain which punishment brings about, will be conditioned thereby in the future to refrain from criminal behaviour. By means of punishment the offender is to be taught a lesson so that he will be deterred from criminal behaviour. It does not mean that the convicted offender must necessarily serve his punishment; a suspended sentence is also a form of individual deterrence”.⁵⁵

In order to achieve its aim, individual deterrence relies mainly on the severity of punishment.⁵⁶ The courts usually impose a severe sentence on an offender in an attempt to deter him from committing further crimes.⁵⁷

⁵² See discussion above at 2.1.

⁵³ Meyer 1968 *Journal of Criminal Law, Criminology & Police Science* at 596.

⁵⁴ Ashworth *Sentencing* at 83; Terblanche *Sentencing* at 172; Rabie *et al Punishment* at 27; Snyman *Criminal Law* at 15.

⁵⁵ Rabie *et al Punishment* at 28.

⁵⁶ Ashworth *Sentencing* at 83; Greenawalt 1983 *Journal of Criminal Law & Criminology* at 352.

⁵⁷ See Terblanche *Sentencing* at 177.

2.4.2.2 General deterrence

General deterrence on the other hand aims at deterring the public from committing crime.⁵⁸ Sentence of an offender is used as an example and warning to potential offenders.⁵⁹ It is an advertisement of punishment to induce fear in potential offenders.⁶⁰ The belief is that the threat of similar punishment will deter potential offenders from committing crime.⁶¹ The underlying assumption is that man, as a rational human being, would refrain from the commission of crimes if he knows that the unpleasant consequences will ensue from the commission of certain acts.⁶² It is the inhibiting effect of the threat of punishment or its imposition that creates a sense of caution in the mind of an offender.⁶³

This leads to the question of whether the offender should be punished in excess of his just deserts, in order to deter potential offenders.⁶⁴ Notably, our courts have held that unduly severe or disproportionate sentence cannot be imposed as deterrent to potential offenders.⁶⁵ In essence, there is a limit to which punishment of an offender can be used to benefit society.⁶⁶

⁵⁸ Ashworth *Sentencing* at 83; Terblanche *Sentencing* at 172; Snyman *Criminal Law* at 16.

⁵⁹ *R v Swanepoel* 1945 AD 444 at 455; Terblanche *Sentencing* at 172.

⁶⁰ Meyer 1968 *Journal of Criminal Law, Criminology & Police Science* at 597. See also Skelton and Batley 2008 *Acta Criminologica* at 47.

⁶¹ Terblanche *Sentencing* at 172; Van Ness *Crime and Its Victims* at 190; Skelton 2007 *Acta Juridica* at 234; Skelton and Batley 2008 *Acta Criminologica* at 47.

⁶² Rabie *et al Punishment* at 39. See also Ashworth *Sentencing* at 84; Greenawalt 1983 *Journal of Criminal Law & Criminology* at 351.

⁶³ Rabie *et al Punishment* at 39.

⁶⁴ Meyer 1968 *Journal of Criminal Law, Criminology & Police Science* at 597.

⁶⁵ *S v Sobandla* 1992 (2) SACR 613 (A) at 617G (it was accepted that the offender “was sacrificed on the altar of deterrence, thus resulting in his receiving an unduly severe sentence. Where this occurs in the quest for an exemplary sentence, a trial court exercises its discretion improperly or unreasonably”); *S v Maseko* 1982 (1) SA 99 (A) at 102E (the court warned that when imposing exemplary sentences, a “furtherance of the cause of deterrence may so obscure other relevant considerations as to result in very severe punishment of the offender which is grossly disproportionate to his deserts”); *S v Collett* 1990 (1) SACR 465 (A) at 470F-G (there is no principle which could justify, for the sake of deterrence, the sentence which is grossly in excess to what would amount to a just and fair punishment); *S v Khulu* 1975 (2) SA 518 (N) at 521F-G; *S v Hermanus* 1995 (1) SACR 10 (A) at 12E. See also *S v Dodo* 2001 (1) SACR 594 (CC) at paras 35-40; *S v Fhetani* 2007 (2) SACR 590 (SCA) at para 5; *S v Samuels* 2011 (1) SACR 9 (SCA) at para 15.

⁶⁶ Meyer 1968 *Journal of Criminal Law, Criminology & Police Science* at 597; Terblanche *Sentencing* at 177.

2.4.3 Prevention

The concept of prevention is based on the idea that punishment should make offenders to become law-abiding citizens (individual prevention) and citizens to remain law-abiding (general prevention).⁶⁷

2.4.3.1 Individual Prevention

Individual prevention is premised on the notion that the offender should be prevented from committing further crimes, by either incarceration or intimidation of punishment.⁶⁸ Terblanche⁶⁹ regards the aspect of incarceration as prevention in a narrow sense. He postulates that when prevention is used in conjunction with other three purposes, it is used in its narrow sense to mean the incapacitation of the offender so that can be prevented from committing further crimes in society.⁷⁰ The simplest way of preventing further crimes would be a permanent or temporary incapacitation of an offender.⁷¹ This could be achieved by imposing a sentence of life imprisonment or other incapacitative sentences, such as imprisonment and detention in a rehabilitation centre.⁷²

The notion of incapacitation is particularly important if the offender poses a danger to society and society can be protected only by the imprisonment of that offender.⁷³ The assumption is that this offender will repeat his criminal behaviour unless he is somehow restrained.⁷⁴ Therefore, the imprisonment of such an offender is considered to be in the interests of society.⁷⁵

⁶⁷ Rabie *et al Punishment* at 25.

⁶⁸ *Ibid* at 26.

⁶⁹ Terblanche *Sentencing* at 177.

⁷⁰ *Ibid*.

⁷¹ Rabie *et al Punishment* at 26.

⁷² Terblanche *Sentencing* at 177.

⁷³ Terblanche *Sentencing* at 178. See also Rabie *et al Punishment* at 62 (Incapacitation remains a consideration when dealing with dangerous offenders)

⁷⁴ Rabie *et al Punishment* at 27.

⁷⁵ *S v Jibiliza* 1995 (2) SACR 677 (A) at 680I (the sentence should afford society long-term protection from the offender's depredations); *S v Brand* 1998 (1) SACR 296 (C) at 306B-C (in certain circumstances, the interests of society require the imposition of imprisonment); *S v Mhlakaza* 1997 (1) SACR 515 (SCA) at 519H-I (the purpose of a lengthy sentence of imprisonment is the removal of a serious offender from society); *S v C* 1996 (2) SACR 181 (C) at 186D-F (when the offender is a serial rapist); *S v Koopman* 1993 (1) SACR 379 (A) at 381H-I (society's need for protection would only be achieved by the imposition of imprisonment); *S v Banda* 1991 (2) SA 352 (B) at 356E-H (when the offender is a psychopath or a danger to society).

However, there is a limit to which the offender may be removed from society for this purpose. The length of imprisonment should be proportionate to the seriousness of the crime.⁷⁶

2.4.3.2 General Prevention

On the other hand, general prevention relates to the belief that punishment of a specific offender should be able to prevent others from committing similar crimes.⁷⁷ People are therefore restrained from committing crime because of the threat of punishment as opposed to its actual imposition.⁷⁸ It is similar to the concept of general deterrence as in both a sentence is intended to prevent potential offenders from committing crime.⁷⁹

2.4.4 Rehabilitation

In terms of rehabilitation, punishment is aimed at influencing the offender to become a law-abiding citizen.⁸⁰ The concept of rehabilitation may also be understood from a religious point of view as using punishment to help the wrongdoer to cleanse himself of sins.⁸¹ It emphasises an individualistic approach, which enquires into the personality and behaviour of an offender in order to have an understanding of the problem and find solutions.⁸² A basic premise is that crime is a result of some cause that can be identified and treated with the relevant therapeutic measures.⁸³ An appropriate type of a rehabilitative measure is therefore determined by the personality of the offender.⁸⁴

Although rehabilitative measures are often coupled with punishment,⁸⁵ rehabilitation of an offender presupposes that more emphasis should be placed on treatment rather than on punishment.⁸⁶ This is because the emphasis is not on the infliction of suffering on the part of

⁷⁶ *S v Makwanyane* 1995 (2) SACR 1 (CC) at para 129 (“punishment must to some extent be commensurate with the offence”); *S v Dodo* 2001 (1) SACR 594 (CC) at para 37 (the length of punishment should be proportionate to the offence); *S v Radebe* 2013 (2) SACR 165 (SCA) at para 15.

⁷⁷ *Rabie et al Punishment* at 36.

⁷⁸ *Ibid.*

⁷⁹ *Terblanche Sentencing* at 177; *Rabie et al Punishment* at 39; *Snyman Criminal Law* at 15.

⁸⁰ *Rabie et al Punishment* at 29. See also *Snyman Criminal Law* at 17.

⁸¹ *Meyer* 1968 *Journal of Criminal Law, Criminology & Police Science* at 597; *Batley South African Context* at 25.

⁸² *Meyer* 1968 *Journal of Criminal Law, Criminology & Police Science* at 598.

⁸³ *Terblanche Sentencing* at 179; *Snyman Criminal Law* at 14; *Rabie et al Punishment* at 29; *London From the Margins to the Mainstream* at 162.

⁸⁴ *Meyer* 1968 *Journal of Criminal Law, Criminology & Police Science* at 595.

⁸⁵ *Rabie et al Punishment* at 33.

⁸⁶ *Terblanche Sentencing* at 179. See also *Van der Merwe Sentencing* 3-13-14.

an offender, but rather on interventions aimed at making him a better person.⁸⁷ In essence, the aim is to effect positive change in the offender's fundamental behaviour.⁸⁸

Rehabilitation has been found to be an important consideration in sentencing provided that a sentence is capable of achieving it.⁸⁹

2.4.5 Retribution

Retribution is based on the premise that punishment is justified because of the commission of the offence.⁹⁰ Punishment restores the imbalance caused by the commission of the crime.⁹¹ Retribution is neither an enforced expiation intended to remove the evil from man,⁹² nor to deter the offender from committing further crimes,⁹³ but is aimed at ensuring that the offender receives punishment because he deserves it.⁹⁴ The infliction of pain on the offender to the extent that it is deserved⁹⁵ is an expression of society's condemnation of the offender's actions.⁹⁶ This view was confirmed in *S v Nkambule*,⁹⁷ where it is held that retribution should not be considered in isolation, but in conjunction with denunciation to show society's abhorrence of crime.

The fact that punishment must be deserved also reflects that a sentence should be proportionate to the seriousness of the offence.⁹⁸ In *S v Rabie*⁹⁹, retribution was found to be related to the principle that punishment should fit the crime. The imposition of punishment that is deserved in proportionate to seriousness of the offence is seen as one of the basic principles

⁸⁷ Snyman *Criminal Law* at 18.

⁸⁸ Cilliers and Smith 2007 *Acta Criminologica* at 84. See also *Rabie et al Punishment* at 29.

⁸⁹ *S v Nkambule* 1993 (1) SACR 136 (A) at 147F. See also *S v Birkenfield* 2000 (1) SACR 325 (SCA) at para 7; *S v RO* 2010 (2) SACR 248 (SCA) at paras 38-39; *S v MM* 2010 (2) SACR 543 (GNP) at 546G-I; *Terblanche Sentencing* at 180.

⁹⁰ *Rabie et al Punishment* at 20; *Terblanche Sentencing* at 188.

⁹¹ *Rabie et al Punishment* at 20; Snyman *Criminal Law* at 11; Singh 2007 *New Contree* at 158.

⁹² Meyer 1968 *Journal of Criminal Law, Criminology & Police Science* at 595.

⁹³ Meyer 1968 *Journal of Criminal Law, Criminology & Police Science* at 595; *Rabie et al Punishment* at 20.

⁹⁴ *Rabie et al Punishment* at 20; *Terblanche Sentencing* at 188.

⁹⁵ *Rabie et al Punishment* at 21.

⁹⁶ *Rabie et al Punishment* at 20-21,46; *Terblanche Sentencing* at 183; *Bonta et al Restorative Justice and Recidivism* at 109.

⁹⁷ *S v Nkambule* 1993 (1) SACR 136 (A) at 147C-E.

⁹⁸ *Terblanche Sentencing* at 188; *Rabie et al Punishment* at 21.

⁹⁹ *S v Rabie* 1975 (4) SA 855 (A) at 861A-B.

of justice.¹⁰⁰ Therefore, whatever the correct view of retribution, its essence is that the court is required to impose an appropriate sentence on an offender.¹⁰¹

However, the relevance of retribution in the modern approach to sentencing is subject to divergence of judicial approach. Our courts have not been consistent in emphasising this aspect of punishment. At one time, the view has been that retribution had lost ground to other traditional objectives of punishment and was therefore considered to be of lesser importance in sentencing.¹⁰² Yet in some other instances, retribution has been found to be an important consideration in sentencing,¹⁰³ depending on the circumstances of the case.¹⁰⁴ Regardless of the judicial position, the inevitable need for retribution in punishment has been stressed by Rabie *et al* as follows:¹⁰⁵

“As long as the criminal law is concerned with punishment – and this must inevitably be the case – the validity of retribution cannot be denied. After all, the essence of punishment cannot be explained without reference to retribution. As long as criminal punishment is regarded as an instrument through which society expresses its condemnation and disapproval of the offender’s act, and is associated with the authoritative infliction of suffering on account of a crime which has been committed, retribution is the only true theory of *punishment*. It is only with reference to retribution that the criminal sanction can be adequately distinguished from other sanctions. In short, criminal law – and punishment, with which it is inextricably interwoven – derives its very essence from retribution”.

2.5 Some of the criticisms against the sentencing system

Our current criminal justice system is often characterised as retributive in nature. This is because of its greater emphasis on punitive justice. As previously shown, the approach in South Africa has been to prescribe harsher punishments for offenders, in particular, lengthy terms of

¹⁰⁰ See Rabie *et al Punishment* at 49.

¹⁰¹ Terblanche *Sentencing* at 185.

¹⁰² *S v Karg* 1961 (1) SA 231 (A) at 236A-C; *S v Rabie* 1975 (4) SA 855 (A) at 862A-C; *S v Khumalo* 1984 (3) SA 327 (A) at 330E; *S v Skenjana* 1985 (3) SA 51 (A) at 55A-B; *S v Makwanyane* 1995 (2) SACR 1 (CC) at para 129; *S v Williams* 1995 (2) SACR 251 (CC) at para 65.

¹⁰³ *S v De Kock* 1997 (2) SACR 171 (T) at 192E; *S v Smith* 1996 (1) SACR 250 (E) at 253B-C.

¹⁰⁴ *S v B* 1985 (2) SA 120 (A) at 125A-B; *S v Nkwanyana* 1990 (4) SA 735 (A) at 749C-D; *S v Mafu* 1992 (2) SACR 494 (A) at 497A-B (where the offence was horrendous); *S v Jibiliza* 1995 (2) SACR 677 (A) at 680I-J.

¹⁰⁵ Rabie *et al Punishment* at 46-47.

imprisonment for serious offences. However, this approach, as already noted, has proven only to serve retributive and community protective functions.¹⁰⁶

Based on the notion of deterrence as described above, imposing harsher punishment on offenders is predicated upon the idea that punishment will deter the offender from reoffending and also demonstrate to other potential offenders what will happen to them should they commit the same crime. The assumption is that man, as a rational human being, would refrain from the commission of crimes if he knows that the unpleasant consequences will ensue from the commission of certain acts.¹⁰⁷ However, this is not often the case in practice. As noted before, imposing harsher punishment on offenders has been shown internationally to have little success in crime prevention. The use of imprisonment has no marked impact on reoffending. This resonates with the shared view among researchers that prisons have little or no deterrent effect on criminal behaviour. Most prisoners are repeat offenders with previous experience with the criminal justice system. Many of them went to prison as petty criminals and returned as hardened criminals. Estimates are that 80 percent of sentenced offenders are repeat offenders and a substantial number of them are hard-core offenders, while a quarter of sentenced offenders would reoffend within five years of release.¹⁰⁸

At the same time, research shows that most offenders who commit crimes do not weigh their decision against the possible punishments they might get for their crimes. Harsh sentences will have little impact, if any at all, on these offenders since they do not consider the severity of what punishment they may get before committing the crime.¹⁰⁹ The widely held view is that only certainty of being caught and ultimately convicted would deter potential offenders.¹¹⁰ In other words, a person is more likely to refrain from committing crime if he knows there is a good possibility of being arrested and punished.

¹⁰⁶ See discussion above at 1.2.

¹⁰⁷ See discussion above at 2.4.2.

¹⁰⁸ See discussion above at 1.2.

¹⁰⁹ *Ibid.*

¹¹⁰ Rabie *et al Punishment* at 41; Snyman *Criminal Law* at 16; Terblanche *Sentencing* at 176; Muntingh 2017-03-02 *Daily Maverick*; Muntingh *Sentencing* at 192; Meyer 1968 *Journal of Criminal Law, Criminology & Police Science* at 597; Wright *Deterrence in Criminal Justice* at 2; Jacobson *et al Prison* at 28; Van Ness *Crime and Its Victims* at 89; Fagan 2004 *SA Crime Quarterly* at 4; Fagan 2005 *Advocate* at 35; Cameron "Imprisoning the Nation" at 14.

Accordingly, general deterrence is more of a police responsibility than it is of sentencing.¹¹¹ However, the reality is that only few offenders are arrested and ultimately convicted.¹¹² Snyman¹¹³ postulates that the lack of required skills in some police officials and prosecutors in ensuring that real offenders are caught and punished is the biggest problem currently facing the criminal justice system in South Africa. Therefore, potential offenders might be more tempted to commit crime since the chances of being caught and punished are slim.¹¹⁴ Snyman thus concludes that general deterrence is of a limited value in South Africa.¹¹⁵

Apart from deterrence, the frequency with which people reoffend confirms that harsh punishment does not serve a rehabilitative purpose.¹¹⁶ Indeed, imprisonment is seen as generally incompatible with the notion of rehabilitation.¹¹⁷ Besides this, the current situation in our prisons is seen as not assisting rehabilitation. Our prisons remain overcrowded. By 2018, the South African prison population was 163 140,¹¹⁸ with the total prison capacity of 120 000.¹¹⁹ Many commentators hold the view that overcrowded prisons impede successful rehabilitation of offenders.¹²⁰ This puts enormous strain on prison infrastructure,¹²¹ resulting in less space to accommodate offenders in the humane, safe and secure conditions that are conducive to effective rehabilitation and other aspects of their personal development.¹²² Furthermore, many rehabilitation programmes cannot be implemented due to shortage of key personnel staff, such

¹¹¹ Rabie *et al Punishment* at 41.

¹¹² Snyman *Criminal Law* at 16; Terblanche *Sentencing* at 176; Rabie *et al Punishment* at 23. See also Muntingh 2017-03-02 *Daily Maverick*; Muntingh *Sentencing* at 190.

¹¹³ Snyman *Criminal Law* at 16.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ See discussion above at 1.2.

¹¹⁷ Terblanche *Sentencing* at 179. The author highlights that “whereas deterrence and retribution often tend to pull the severity of the sentence into one direction, this is often not the case with rehabilitation. Some examples of such situations come to mind. One is where a specific measure is ideal for achieving the rehabilitation of the offender (eg, supervision by a probation officer), but totally inadequate when the other sentencing considerations are brought into question”. Cf judgments where rehabilitation was found to be of a lesser consideration when a lengthy sentence of imprisonment is imposed, see *S v Mhlakaza* 1997 (1) SACR 515 (SCA) at 519H-I; *S v Nkambule* 1993 (1) SACR 136 (A) at 147F. See also Clear 2008 *SA Crime Quarterly* at 2.

¹¹⁸ Presence 2018-05-17 *IOL News*.

¹¹⁹ Jacobson *et al Prison* at 8.

¹²⁰ Fagan 2005 *Advocate* at 35; Singh 2007 *New Contree* at 148; Kgosimore 2002 *Acta Criminologica* at 69; Khwela 2014 *Athens Journal of Social Sciences* at 153; Singh 2008 *Acta Criminologica* at 66; Mujuzi 2011 *SACJ* at 174; Cilliers and Smith 2007 *Acta Criminologica* at 98; Davis 2017-05-17 *Eyewitness News*; Cameron “Imprisoning the Nation” at 19; Louw and van Wyk 2016 *Social Work* at 496.

¹²¹ Singh 2007 *New Contree* at 148.

¹²² Maravanyika 2016-12-05 *SABC News*. See also Singh 2007 *New Contree* at 153-154.

as psychologists and educators.¹²³ These conditions render rehabilitation a difficult, if not impossible, purpose to achieve.¹²⁴

Another major concern with the current criminal justice system is that it focuses on the offender.¹²⁵ As Kgosimore states,

“...when a crime is committed, the question is not who the victim is but rather, what law was broken, who broke it and how he/she should be punished. This insular approach to crime demonstrates a fixation to the premise that crime disturbs the balance of the legal order and that the only way to restore that balance is by punishing the offender. Since the restoration of the disturbed balance is the cornerstone of the criminal justice system, justice is seen to be delivered when the offender is punished (or acquitted)”.¹²⁶

The underlying argument is that the interests of victims are not sufficiently taken into account by the current criminal justice system.¹²⁷ There are several reasons for this. One is that crime is considered as an act that injures the interests of state¹²⁸ as opposed to those of victims. Based on this view, crime is regarded as an encounter between the state and the offender.¹²⁹ Thus, the focus of the criminal justice process is establishing the guilt of the offender and then impose punishment.¹³⁰ Accordingly, justice is seen to be achieved when the offender receives punishment.¹³¹

Secondly, and closely related to the above, is the fact that the government is expected to act against those who commit crimes. As Mujuzi states, “one feature of an effective government is its ability to enforce the law and have those who break it prosecuted and sanctioned”.¹³² Indeed, the public expects actions against perpetrators of crime, and often calls for punishments that “give expression to the desire for retribution”.¹³³ This often puts pressure on the government to resort to tougher measures in response to crime. The rapid increase in the level of crime in the 1990s raised the levels of fear among the public. Negative perceptions

¹²³ Cf Cilliers and Smith 2007 *Acta Criminologica* at 83.

¹²⁴ Singh 2007 *New Contree* at 155.

¹²⁵ See discussion above at 1.2.

¹²⁶ Kgosimore 2002 *Acta Criminologica* at 70.

¹²⁷ See discussion above at 1.2.

¹²⁸ Kgosimore 2002 *Acta Criminologica* at 70.

¹²⁹ Makiwane 20015 *Obiter* at 79; Tshehla 2004 *SACJ* at 3.

¹³⁰ Kgosimore 2002 *Acta Criminologica* at 70; Batley *Restorative Justice in South Africa* at 119; Tshehla 2004 *SACJ* at 3.

¹³¹ Kgosimore 2002 *Acta Criminologica* at 70.

¹³² Mujuzi 2016 *SA Crime Quarterly* at 37.

¹³³ South African Law Commission *Mandatory Minimum Sentences* at para 1.2.

about crime and the public feelings of unsafety have influenced government policy as much as the actual crime statistics. Hence, the government's response to crime has been to adopt a tough stance on crime by focusing on more arrests and prosecutions, as well as prescribing harsher punishments for convicted offenders.¹³⁴

South Africa is not the only country whose criminal justice system's focus on punishment and the need to satisfy the public demand (interests) have rendered victims of crime almost completely forgotten in the justice process. This is a global phenomenon. One of the prominent international scholars, Johnstone, has explained how this is inherent in the justice system as follows:

...our criminal justice system has traditionally been guided by what it assumes to be the general public interest in punishing crime rather than by a concern to meet the more particular needs of victims".¹³⁵

It therefore comes as no surprise that the interests of victims are not listed as one of the factors to be considered in determining an appropriate sentence. As noted above, as part of the *Zinn* triad, the court should also consider the interests of society.¹³⁶ The interests of victims are not the same as those of broader society.¹³⁷ The individual needs of the victim go far beyond those of members of the public, who are indirectly affected by crime.¹³⁸ Thus, the *Zinn* triad has not been unfairly criticised for failing to consider the interests of victims in the sentencing process.¹³⁹

The above argument finds support in a number of cases where the interests of the victim have emerged as an important consideration in determining an appropriate sentence.¹⁴⁰ In *S v*

¹³⁴ See discussion above at 1.2.

¹³⁵ Johnstone *Ideas, Values, Debates* at 67.

¹³⁶ See discussion above at 2.2.

¹³⁷ *S v Isaacs* 2002 (1) SACR 176 (C) at 178B.

¹³⁸ Johnstone *Ideas, Values, Debates* at 67.

¹³⁹ *S v Isaacs* 2002 (1) SACR 176 (C) at 178B; Meintjies-Van der Walt 1998 SACJ at 169. Cf Sloth-Nielsen and Ehlers *Mandatory and Minimum Sentences* at 3; South African Law Commission *Mandatory Minimum Sentences* at para 2.44; Lubaale 2017 *SA Crime Quarterly* at 32.

¹⁴⁰ *S v Blaauw* 2001 (2) SACR 255 (C) at 257 D-E; *S v F* 1992 (2) SACR 13 (A) at 18H (in determining an appropriate sentence, not only the interests of the offender but also of the victim and community should be considered); *Attorney-General, Eastern Cape v D* 1997(1) SACR 473 (E) at 477J-478A (in appeal, the court held that in imposing a sentence, the regional Magistrate "overlooked the fact that punishment should also fit the crime and that the nature of the crime, as well as the interests of society at large and those of the victim of the crime, should also be taken into account when sentence is passed"); *S v van Wyk* 2000 (1) SACR 45 (C) at 47J; *S v Swartz* 1999 (2) SACR 380 (C) at 388B (in passing a sentence, a balance needs to be struck between the needs of society, the interests of the victim and the treatment of offenders); *S v Seedat* 2015 (2) SACR 612 (GP) at para 47.

Matyityi,¹⁴¹ the appeal court held that a sound penal policy should also be victim-centred. This indicates that the interests of the victim should be put at the centre of the criminal justice process. According to commentators on these cases, they serve to highlight that the interests of the victim constitute a fourth factor that should be duly considered in the sentencing process.¹⁴²

Several other concerns have been raised about the *Zinn* triad. Thus, it is not surprising that our courts have cautioned against using the triad as judicial incantation.¹⁴³ The triad has been variously criticised as elementary, ambiguous and even unsophisticated.¹⁴⁴ Van der Merwe's observations are enlightening in this regard. He points out that one of the flaws of the triad is that its principles tend to overlap with one another to such an extent that it becomes almost inevitable to discuss one principle without also referring to others, yet the triad does not provide any guidance to the sentencer in this regard.¹⁴⁵ Hence, some of the aspects of sentencing are more relevant when discussed under a different leg of the triad than they are traditionally considered.¹⁴⁶ For example, he asserts that previous convictions tend to show the mind-set of an offender or danger he poses to society and as such, it is more appropriate to deal with them under society as opposed to crime leg of the triad.¹⁴⁷ And yet, they are more commonly dealt with under the person of the offender.¹⁴⁸

A further flaw, according to Van der Merwe, emanates from the fact that there are certain factors in sentencing, which may be viewed to have an aggravating effect in some situations but a mitigating one in others, for example intoxication. He argues that this is because one endeavours to achieve different aims in different cases, depending on whether the interests of the community or of the offender should prevail.¹⁴⁹ He notes that though the triad properly identifies two of the parties involved in the dispute of crime (the community and the offender),

¹⁴¹ *S v Matyityi* 2011 (1) SACR 40 (SCA) at para 16. See also [all the cases in footnote 140].

¹⁴² Snyman *Criminal Law* at 19; Van der Merwe 2015 *SACJ* at 416; Whitear-Nel 2012 *De Jure* at 595.

¹⁴³ *S v Banda* 1991 (2) SA 352 (B) at 355A-B; *S v M* 2007 (2) SACR 539 (CC) at footnote 4.

¹⁴⁴ Van Rooyen 1980 *SACC* at 231; South African Law Commission *Mandatory Minimum Sentences* at para 2.44; Sloth-Nielsen and Ehlers *Mandatory and Minimum Sentences* at 3; Van der Merwe *Sentencing* at 5-2.

¹⁴⁵ Van der Merwe *Sentencing* at 5-2.

¹⁴⁶ At 11-10.

¹⁴⁷ At 5-4D, 11-10.

¹⁴⁸ *S v Scheepers* 2006 (1) SACR 72 (SCA) at para 11; *S v Metu* 1995 (2) SACR 681 (A) at 684I-J; *S v Ndwalane* 1995 (2) SACR 697 (A) at 703B-G; *S v Flanagan* 1995 (1) SACR 13 (A) at 17C; *S v Coales* 1995 (1) SACR 33 (A) at 34E.

¹⁴⁹ Van der Merwe *Sentencing* at 5-2.

it fails to provide a guidance regarding whose interests should take precedence, and in which cases.¹⁵⁰

The other prominent concern with the current criminal justice system relates to the issue of inconsistency in sentencing.¹⁵¹ Generally, the court exercise a discretion when determining an appropriate sentence.¹⁵² It is widely agreed that some discretion is needed for sentencing, because every case is unique¹⁵³ and that each case should be dealt with on its own facts.¹⁵⁴ In essence, there are widely differing considerations in different cases.¹⁵⁵ However, discretion is a problematic issue in any given situation. The extent of discretion left to judicial officers when sentencing often results in claims that it leads to inconsistent sentences. Although the courts are guided by the *Zinn* triad when determining an appropriate sentence,¹⁵⁶ this sentencing criterion does not provide a guidance to ensure consistency in sentencing.¹⁵⁷

This problem of inconsistency in sentencing was highlighted by the facts in *S v Young*¹⁵⁸ and the comment thereupon by Nairn.¹⁵⁹ Young, a man aged 57 with a clean record, was convicted by a regional court magistrate on 9 counts of contravening the Prevention of Corruption Act 6 of 1958. His crime was soliciting and accepting bribes in relation to the award of contracts by the petrol company for whom he worked. He was sentenced to a total of 90 months' imprisonment, of which half was conditionally suspended. The sentence was confirmed on

¹⁵⁰ *Ibid.*

¹⁵¹ South African Law Commission *Mandatory Minimum Sentences* at para 2.46; South African Law Commission *Sentencing Report* at paras 3.1.4; Sloth-Nielsen and Ehlers *Mandatory and Minimum Sentences* at 2; Terblanche *Sentencing* at 129.

¹⁵² See discussion above at para 2.1.

¹⁵³ Cf *S v PB* 2013 (2) SACR 533 (SCA) at para 18; *S v S* 1995 (1) SACR 267 (A) at 272G-H; *S v Jimenez* 2003 (1) SACR 507 (SCA) at para 6; *S v M* 2007 (2) SACR 539 (CC) at para 94 (the court referred to the view of the trial court).

¹⁵⁴ *R v Karg* 1961 (1) SA 231 (A) at 236G ; *S v Fraser* 1987 (2) SA 859 (A) at 863C-D; *S v Sinden* 1995 (2) SACR 704 (A) at 708A-B; *S v Sebata* 1994 (2) SACR 319 (C) at 325C-D; *S v Chabalala* 2014 (1) SACR 458 (GNP) at para 8; *S v FV* 2014 (1) SACR 42 (GNP) at para 9.

¹⁵⁵ Cf *S v Jimenez* 2003 (1) SACR 507 (SCA) at para 6; *S v Xaba* 2005 (1) SACR 435 (SCA) at para 15; Terblanche *Sentencing* at 143-144.

¹⁵⁶ See discussion above at 2.2.

¹⁵⁷ Meintjies-Van der Walt 1998 *SACJ* at 169.

¹⁵⁸ *S v Young* 1977 (1) SA 602 (A). See also South African Law Commission *Mandatory Minimum Sentences* at para 2.2; Sloth-Nielsen and Ehlers *Mandatory and Minimum Sentences* at 2.

¹⁵⁹ Nairn 1977 *SACC* at 189-191. See also South African Law Commission *Mandatory Minimum Sentences* at para 2.2; Sloth-Nielsen and Ehlers *Mandatory and Minimum Sentences* at 2.

appeal to the then Transvaal Provincial Division, but the then Appellate Division replaced it with 64 months' imprisonment of which half was suspended.¹⁶⁰

Commenting on these facts and criticising the current sentencing approach, Nairn¹⁶¹ begun by highlighting that two judges who have considered similar issues flowing from a set of agreed facts had arrived at different conclusions. He argued that the nature of the sentencing procedure made this type of outcome virtually inescapable.¹⁶² This is because although the course of the trial is determined by clearly defined rules of law, the approach to sentencing is largely left to chance.¹⁶³ Nairn was of the view that in the absence of clearly articulated guidelines, consistency in sentencing remain impossible to achieve.¹⁶⁴ Nairn's view resonates closely with the findings of the South African Law Commission, which established that,

“failure by the legislature to provide a clear and unambiguous legislative framework for the exercise of the sentencing discretion, failure by the courts to develop firm rules for the exercise of the sentencing discretion and failure by the courts and the legislature to give firm guidance as to which sentencing theories or aims carry the most weight, brought much uncertainty and inconsistency into the sentencing process in South Africa”.¹⁶⁵

The above articulates the need for consistency in sentencing. According to the Council of Europe's Committee of Ministers, “it is one of the fundamental principles of justice that like cases should be should be treated alike”.¹⁶⁶ Consistency in sentencing requires that similar sentences be imposed when similarly placed offenders commit similar crimes.¹⁶⁷ This does not mean that exactly the same sentence should be imposed in a similar case. It simply means that there should not be any wide divergence in the sentences imposed in such cases.¹⁶⁸ One of the advantages of consistency in sentencing is that it leads to guidelines, which could assist the

¹⁶⁰ Nairn 1977 SACC at 189; South African Law Commission *Mandatory Minimum Sentences* at para 2.2
¹⁶¹ Nairn 1977 SACC at 189. See also South African Law Commission *Mandatory Minimum Sentences* at para 2.2; Sloth-Nielsen and Ehlers *Mandatory and Minimum Sentences* at 2.
¹⁶² *Ibid.*
¹⁶³ Nairn 1977 SACC at 189-190. See also South African Law Commission *Mandatory Minimum Sentences* at para 2.2; Sloth-Nielsen and Ehlers *Mandatory and Minimum Sentences* at 2.
¹⁶⁴ Nairn 1977 SACC at 190. See also South African Law Commission *Mandatory Minimum Sentences* at para 2.2; Sloth-Nielsen and Ehlers *Mandatory and Minimum Sentences* at 2.
¹⁶⁵ South African Law Commission *Mandatory Minimum Sentences* at para 2.45. See also Sloth-Nielsen and Ehlers *Mandatory and Minimum Sentences* at 3.
¹⁶⁶ Council of Europe Committee of Ministers concerning consistency in sentencing available at <https://rm.coe.int/16804d6ac8> (accessed 16/09/2018). See also Terblanche *Sentencing* at 140.
¹⁶⁷ Terblanche *Sentencing* at 139.
¹⁶⁸ *Ibid.*

courts in the imposition of sentences in subsequent cases.¹⁶⁹ Furthermore, it promotes legal certainty, which in turn improves respect for and confidence in the justice system.¹⁷⁰

Apart from the criticism of the *Zinn* triad, concerns have also been raised about the minimum sentences legislation. As previously mentioned, this legislation prescribes the minimum sentences that the court should impose in respect of the specified offences, unless there are substantial and compelling circumstances, which justify the imposition of a lesser sentence.¹⁷¹ The introduction of this legislation has been widely seen as a measure aimed at achieving consistency in sentencing (in respect of the specified offences).¹⁷² This perspective is not without merit. As noted above, it was highlighted in *Malgas* that the aim of the legislature was to elicit a severe, standardised and consistent response from courts when imposing sentence unless there were truly convincing reasons for a different response.¹⁷³ Instead, this legislation has exacerbated the existing sentencing disparities in respect of offences targeted by the legislation.¹⁷⁴

A further concern with the minimum sentences legislation is that it has resulted in more offenders receiving long-sentences of imprisonment.¹⁷⁵ For example, Fagan¹⁷⁶ reported that immediately before the implementation of the minimum sentences legislation only 18,644 (19%) of offenders sentenced to imprisonment were serving a term of longer than 10 years' imprisonment. By 2005, this number had increased to 49,094 (36%).¹⁷⁷ In 2017, it was reported that sentences between 10 and 15 years have increased by 77 percent over the past 13 years, while the number of offenders sentenced to 20 years and above increased by a staggering 439

¹⁶⁹ Du Toit as cited by Terblanche *Sentencing* at 140.

¹⁷⁰ *Ibid.* Cf Freiberg 2010 *Federal Sentencing Reporter* at 206 (the lack of consistency in sentencing could lead to an erosion of public confidence in the integrity of the administration of justice).

¹⁷¹ See discussion above at para 2.3.

¹⁷² Sloth-Nielsen and Ehlers *Mandatory and Minimum Sentences* at 12; Sloth-Nielsen and Ehlers 2005 *SA Crime Quarterly* at 17; Roth 2008 *Minnesota Journal of International Law* at 160; South African Law Commission *Sentencing Report* (Executive Summary) at para 2; *S v Eadie* 2001 (1) SACR 185 (C) at 186J-187A; *S v Montgomery* 2000 (2) SACR 318 (N) at 322H-I.

¹⁷³ See discussion above at 2.3.

¹⁷⁴ Terblanche 2003 *South African Law Journal* at 880-881; Sloth-Nielsen and Ehlers *Mandatory and Minimum Sentences* at 12; Sloth-Nielsen and Ehlers 2005 *SA Crime Quarterly* at 17.

¹⁷⁵ Fagan 2005 *Advocate* at 33; Fagan 2004 *SA Crime Quarterly* at 2; Sloth-Nielsen and Ehlers *Mandatory and Minimum Sentences* at 8; Sloth-Nielsen and Ehlers 2005 *SA Crime Quarterly* at 20; Hargovan 2015 *SA Crime Quarterly* at 55; Cameron "Imprisoning the Nation" at 22.

¹⁷⁶ Fagan 2005 *Advocate* at 33. See also Sloth-Nielsen and Ehlers *Mandatory and Minimum Sentences* at 9; Sloth-Nielsen and Ehlers 2005 *SA Crime Quarterly* at 18.

¹⁷⁷ *Ibid.*

percent.¹⁷⁸ Hence, this legislation has been criticised as having worsened the existing problem of overcrowding in prisons,¹⁷⁹ which has been shown above to constitute a serious impediment in achieving successful rehabilitation of offenders.

The resultant increase in the level of incarceration has been lamented by Cameron,¹⁸⁰ who suggested the scrapping of the minimum sentences for certain offences. However, this might not be a solution to the problem of overcrowding. According to Sloth-Nielsen and Ehlers,¹⁸¹ there is no guarantee that the abolition of the minimum sentences will result in the sentencing tariff being reduced. They suggest that a more comprehensive sentencing reform is needed.¹⁸²

Indeed, in response to concerns with the current criminal justice system, it has been suggested that there is a need for a different method of dispensing justice. One such different method can be found in the philosophy of restorative justice.¹⁸³

2.6 Conclusion

This chapter provided an overview of the sentencing principles in South Africa. As can be seen from the discussion, there are three principles that the sentencing court needs to consider in determining an appropriate sentence and these are the crime, the personal circumstances of the offender, and the interests of society. Furthermore, in assessing the appropriateness of a sentence, consideration should be given the purposes of punishment, which are rehabilitation, prevention, deterrence, and retribution. Although the court exercises a discretion when determining an appropriate sentence, it should be noted that there are prescribed minimum sentences for certain category of crimes. Thus, when determining an appropriate sentence for offenders who have been found guilty of such crimes, the court is required to consider the prescribed sentence, unless there are substantial and compelling reasons that justify the imposition of a lesser sentence other than the prescribed.

¹⁷⁸ Davis 2017-05-17 *Eyewitness News*.

¹⁷⁹ Fagan 2005 *Advocate* at 35; Fagan 2004 *SA Crime Quarterly* at 4; Sloth-Nielsen and Ehlers *Mandatory and Minimum Sentences* at 8; Muntingh 2017-03-02 *Daily Maverick*; Bruyns and Cilliers 2009 *Acta Criminologica* at 87.

¹⁸⁰ Cameron "Imprisoning the Nation" at 31.

¹⁸¹ Sloth-Nielsen and Ehlers *Mandatory and Minimum Sentences* at 17; Sloth-Nielsen and Ehlers 2005 *SA Crime Quarterly* at 20.

¹⁸² *Ibid.*

¹⁸³ See discussion above at 1.2.

Despite the above guiding principles, sentencing is by no means an easy task. There has been a lot criticism against the current sentencing system. The chapter looked at some of the concerns with the current system. Hence, in response to such concerns, the view is that there is a need for alternative method of dispensing justice. It is believed that restorative justice could provide a solution to some of the shortcomings of the current criminal justice system. This chapter has thus provided the foundation for the next chapter, which examines restorative justice as an alternative sentencing option.

CHAPTER THREE

RESTORATIVE JUSTICE AS AN ALTERNATIVE SENTENCING OPTION

3.1 Introduction

One of the exciting developments in the field of criminal justice has been the emergence of restorative justice. Since its emergence, restorative justice has been the much talked about crime intervention strategy globally, dominating many discussions at both the government and academic level.¹ As previously indicated, the interest in restorative justice has been triggered by shortcomings in the current criminal justice system. As put by Mousourakis,

“the growing interest in restorative justice around the world in recent years and the related movement for criminal justice reform reflect a dissatisfaction with mainstream criminal justice theory and practice and a reaction to what is perceived as a failure of our systems to significantly reduce crime and to meet the needs of the individuals and communities affected by it”.²

Over the years, restorative justice has become the dominant form of justice outside the traditional criminal justice system and is increasingly making an impression³ as an alternative option of dealing with crime. Currently, more than 80 countries use restorative interventions to deal with crime.⁴ The paradox though is that despite the interest in restorative justice and being widely seen as an alternative to the current criminal justice system, there is no consensus on what precisely constitutes restorative justice.

One of the functions of this chapter is to discuss the myriad definitions of restorative justice. At this point it is sufficient to state that three principles are suggested as key to understanding restorative justice. The first principle is that crime is an act that causes harm to victims, offenders and community and as such, justice should focus

¹ Van Camp and Wemmers 2013 *International Review of Victimology* at 118; Gavrielides 2014 *Journal of Black Studies* at 217.

² Mousourakis 2003 *Tilburg Foreign Law Review* at 626.

³ Roche *Accountability* at 25.

⁴ Van Ness “An Overview of Restorative Justice” at 1; Shen 2016 *International Journal for Crime, Justice and Social Democracy* at 78.

on repairing the harm suffered. The second principle is that the above-mentioned parties should participate in determining appropriate responses. Thirdly, there should be transformation in the relative roles and responsibilities of the government and community in responding to crime.⁵

Restorative justice practices include victim-offender mediation, family group conferencing, circles, and panels. Although restorative justice is a novel concept outside the conventional criminal justice system, it is not new in the history of resolving disputes. Its underlying principles and values resonate well with processes of conflict resolution found in pre-modern societies.⁶ For example, the claim is often made that restorative justice is similar to African traditional processes of justice.⁷ Accordingly, the emergence of restorative justice has been seen as a process of rediscovery rather than a new idea of justice.⁸

This chapter examines restorative justice as an alternative sentencing option. It begins by looking at some of the definitions of restorative justice and also reflect briefly on the debates over the manner in which restorative justice should be understood. Thereafter, the chapter discusses the principles of restorative justice and its practices. This will assist in an understanding of how restorative justice deals with crime and its aftermath. Thereafter, the chapter evaluates the claim that restorative justice is similar to African traditional processes of justice. Such evaluation focuses on the South African context. The last section of this chapter looks at some of the potential benefits of restorative justice as well as the criticisms against it.

⁵ Van Ness and Strong *Restoring Justice* 3rd ed at 43-48; Bazemore and O'Brien *The Quest for A Restorative Model of Rehabilitation* at 42-43; Bazemore and Schiff *Juvenile Justice Reform and Restorative Justice* at 32-33. Cf South African Law Commission *Restorative Justice* at para 2.5; Potgieter *et al* 2005 *Acta Criminologica* at 41; Nesor 2001 *Acta Criminologica* at 47; Batley *South African Context* at 21.

⁶ Van Ness "An Overview of Restorative justice" at 1.

⁷ See discussion above at 1.3.

⁸ McCold 2000 *Contemporary Justice Review* at 359; Van Ness *Restorative Systems* at 130; Batley *Restorative Justice in South Africa* at 118; Department of Justice & Constitutional Development *National Policy Framework* at 9-10.

3.2 The meaning of restorative justice

The term restorative justice has been the subject of various interpretations in literature, which has culminated into different meanings attached to it. As such,

“There is no single, universally accepted definition of restorative justice, although a central feature of any definition would include some notion of repairing the harm caused by crime and restoring the parties to a state of wellness or wholeness which was disturbed by the criminal act”.⁹

Generally its meaning “can be seen in the word ‘restorative’ which comes from the verb ‘restore’”.¹⁰ The phrase essentially denotes the process of restoring the injustice caused by the crime.¹¹ The following paragraphs illustrate the various interpretations of the concept of restorative justice. The discussion commences with the international perspectives on restorative justice and move to more local interpretations thereof.

The United Nations (UN) defines restorative justice as

“any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles”.¹²

This description has been duplicated by many jurisdictions, however, domestically, the definitions of restorative justice differ amongst the various jurisdictions. The main differences in the definitions are found in diverse focal points, such as who the stakeholders in the restorative justice process are, why this process should be undertaken, what the needs of these stakeholders are, whose obligation it is to fulfil these needs, and what the appropriate way to restore justice is. Restorative justice may also be viewed from a Western, Eastern and African perspective. The South African Department of Justice sees restorative justice as

⁹ Cormier “Directions and Principles” at 1.

¹⁰ Tshehla 2004 *SACJ* at 6.

¹¹ Terblanche *Sentencing* at 191.

¹² United Nations Office on Drugs and Crime *Restorative Justice Programmes* at 100; Makiwane 2015 *Obiter* at 81.

“an approach to justice that aims to involve the parties to a dispute and others affected by the harm (victims, offenders, families concerned and community members) in collectively identifying harms, needs and obligations through accepting responsibilities, making restitution, and taking measures to prevent a recurrence of the incident and promoting reconciliation.”¹³

This definition narrowly follows the international approach. In the UK, Marshall’s definition of restorative justice is terser, as it eliminates much of the UN’s definitional elements. He describes it as,

“a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future”.¹⁴

Zehr has adapted Marshall’s definition of restorative justice to,

“a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible”.¹⁵

Zehr has specifically elaborated on Marshall’s ‘aftermath of the offence’ as identifying, and addressing the harms, needs and obligations of stakeholders. These expressions are also present in the South African description.

A more comprehensive definition is offered by the Ministerial Committee on Inquiry into the Prisons System in New Zealand:

“Restorative justice is a community-based process that offers an inclusive way of dealing with offenders and victims of crime through a facilitated conference. Restorative conferencing brings victims into the heart of the criminal justice process, and provides encouragement for offenders to take personal responsibility for their offending, the opportunity for the healing of victims and offenders to commence, and where appropriate, the application of more practical and helpful sanctions. It is a procedure (that) focuses on accountability and repairing the damage done by crime rather than on retribution and punishment. Restorative justice

¹³ Department of Justice & Constitutional Development available at www.justice.gov.za/rj/2011rj-booklet-a5-eng.pdf (accessed on 25/10/2016).

¹⁴ Marshall *Restorative Justice* at 5.

¹⁵ Zehr *The Little Book* at 37.

processes create the possibility of reconciliation through the practice of compassion, healing, mercy and forgiveness”.¹⁶

In Australia, restorative justice is succinctly described by Braithwaite as meaning,

“restoring victims, a more victim-centred criminal justice system, as well as restoring offenders and restoring community”.¹⁷

Braithwaite has not elaborated on the process of restoring justice nor explained why this process should be undertaken. Similarly, in his definition of restorative justice, Walgrave does not exactly explain how justice will be done. He describes restorative justice as,

“an option for doing justice after the occurrence of an offence that is primarily oriented towards repairing the individual, relational and social harm caused by that offence”.¹⁸

Another frequently cited definition of restorative justice in literature is by the Canadian Cormier, who states that,

“Restorative justice is an approach to justice that focuses on repairing the harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by a crime – victim(s), offender and community – to identify and address their needs in the aftermath of a crime, and seek a resolution that affords healing, reparation and reintegration, and prevents future harm”.¹⁹

In noting these divergent views on what constitutes restorative justice, Doolin’s observations in this regard are worth repeating. She states that “while there are some generally agreed principles of restorative justice, there is much less agreement about the meanings to be associated with these principles”.²⁰ The bone of contention is whether restorative justice should be defined in a manner that stresses the processes

¹⁶ Immarigeon *Punishment and Imprisonment in Restorative Justice* at 149-150.

¹⁷ Braithwaite *Restorative Justice* at 60.

¹⁸ Walgrave *Responsible Citizenship* at 21.

¹⁹ Cormier “Directions and Principles” at 1. See also *S v Maluleke* 2008 (1) SACR 49 (T) at para 28; Tshehla 2004 SACJ at 7; Bekker and Van der Merwe 2009 *De Jure* at 244-245; Vermaak 2009 *Advocate* at 29.

²⁰ Doolin 2007 *The Journal of Criminal Law* at 427. See also van Wyk *Restorative justice in South Africa* at 4-5.

to be followed, or rather the outcomes it aims to achieve.²¹ This is evident from the above definitions.

A process-based definition of restorative justice emphasises the processes to be followed in restoring the harm caused by crime. Although it appears to be the most preferred definition in the field,²² concerns have been raised about it. This approach has been seen as less ambitious and as providing a simplistic standard of determining whether a particular intervention is restorative.²³ For example, an intervention will be viewed as restorative simply because it emphasises a participatory process by those who are affected by a crime. There is less emphasis on the outcomes of restorative interventions.²⁴

It is argued that restorative justice could still be achieved in the absence of an offender or a victim participation in the process.²⁵ Therefore, by only defining restorative justice as a process confuses the means with the aims of restorative justice.²⁶ Restorative justice values the importance of a process, not because of the process as such, but because it helps to achieve restorative outcomes.²⁷ Therefore, restorative justice cannot be described as simply a process without emphasising the outcome it seeks to achieve.²⁸ As put by Doolin,

“even if all the elements of the restorative justice process are present, for example, participation by offenders, victims and community, collaborative and consensus decision-making, unless the outcome of that collaborative and consensus decision-making involves attempts at restoration, then the process is wrongly labelled”.²⁹

²¹ Doolin 2007 *The Journal of Criminal Law* at 428; Daly *The Limits* at 135; van Wyk *Restorative justice in South Africa* at 5; Stockdale 2015 *Restorative Justice: An International Journal* at 213; Van Camp and Wemmers 2013 *International Review of Victimology* at 118.

²² Walgrave “Advancing restorative justice” at 5.

²³ Van Ness “An Overview of Restorative Justice” at 4.

²⁴ Dignan *Restorative Justice and the Law* at 174; Gavrielides *Restorative Justice Theory and Practice* at 40.

²⁵ Doolin 2007 *The Journal of Criminal Law* at 429. See also Stockdale 2015 *Restorative Justice: An International Journal* at 214.

²⁶ Walgrave “Advancing Restorative justice” at 5.

²⁷ Walgrave “Advancing Restorative justice” at 5; Walgrave *Juridical Foundations for a Systemic Approach* at 193.

²⁸ Walgrave *Juridical Foundations for a Systemic Approach* at 193; Doolin 2007 *The Journal of Criminal Law* at 431; Suzuki and Hayes 2016 *Prison Service Journal* at 6.

²⁹ Doolin 2007 *The Journal of Criminal Law* at 431.

Similarly, concerns have been raised against an outcome-based definition. An outcome-based definition of restorative justice describes restorative justice with reference to its intended results. One of the prominent concerns is that foreign concepts will be subsumed into the philosophy of restorative justice. It is argued that those who prefer an outcome-based definition run the risk of including interventions that are not restorative in nature, but which might have the end result with restorative outcomes such as compensation and community service.³⁰ In essence, an intervention will be considered as restorative simply because it somehow achieves what restorative justice is acclaimed for.

In capturing the above dichotomy, Doolin³¹ believes that this tension can be resolved by striving towards an approach that does not only emphasise the principles of the process but also recognises the outcome of restoration as a determining factor. This seems to suggest a definition of restorative justice that incorporates both the process and outcomes. An example of such a definition³² is offered by Van Ness and Strong, who describe restorative justice as,

“a theory of justice that emphasizes repairing the harm caused or revealed by criminal behavior. It is best accomplished through cooperative processes that include all stakeholders”.³³

It is argued that a combined definition captures the essential features of both restorative justice definitions, while also addressing the flaws of each.³⁴ Moreover, it provides a robust criticism of the current criminal justice system, with its narrow conceptual focus on criminal behaviour.³⁵

It is interesting to note that disagreements and conflicting definitions are not unique to restorative justice. It is postulated that there are also conflicting views on what

³⁰ Gavrielides *Restorative Justice Theory and Practice* at 40.

³¹ Doolin 2007 *The Journal of Criminal Law* at 431. See also Stockdale 2015 *Restorative Justice: An International Journal* at 214.

³² See Daly 2016 *Victims & Offenders* at 10.

³³ Van Ness and Strong *Restoring Justice* 3rd ed at 43.

³⁴ van Wyk *Restorative justice in South Africa* at 5.

³⁵ Van Ness “An Overview of Restorative Justice” at 4.

constitutes criminal law, criminology or even crime.³⁶ Daly³⁷ thus argues that the disagreements over the meaning of restorative justice should not be seen as fatal. Rather, they should be seen in a positive way. Proponents of restorative justice claim that a variety of definitions contributes to the richness of the field of restorative justice.³⁸ Daly³⁹ further contends that varied definitions can be justified on the basis that there is no “fixed definition of justice”. In essence, justice can mean different things to different people. Hence, failure to agree on a common definition of restorative justice has been attributed to a diversity of views and ideas that people have when discussing the concept “justice”.⁴⁰

Although the above discussion raises an important question as to which of the foregoing approaches to the definition of restorative justice should be preferred as correct, such topic is beyond the scope of the current study.

3.3 The general principles of restorative justice

As illustrated above, there is no consensus among proponents of restorative justice regarding its definition. However, there seems to be consensus about its fundamental principles. Restorative justice is seen as generally based on three principles, namely:

- Crime is an act that causes harm to victims, offenders, and communities and justice should focus on repairing that harm.
- In repairing the harm, all the above-mentioned parties should actively participate in the justice process.
- We must reconsider the relative roles and responsibilities of government and community in responding to crime.⁴¹

³⁶ See Gavrielides 2008 *Criminology & Criminal Justice* at 166.

³⁷ Daly *The Limits* at 135; Daly 2016 *Victims & Offenders* at 13. See also Suzuki and Hayes 2016 *Prison Service Journal* at 7.

³⁸ Daly *The Limits* at 135; Daly 2016 *Victims & Offenders* at 13; Zehr and Toews *Principles and Concepts* at 1.

³⁹ Daly *The Limits* at 135.

⁴⁰ Daly *The Limits* at 135; Daly 2016 *Victims & Offenders* at 13; Suzuki and Hayes 2016 *Prison Service Journal* at 7.

⁴¹ See discussion above at 3.1.

According to Bazemore and O'Brien, "these core principles provide the basis for determining the 'restorativeness' of intervention and therefore, in evaluating restorative programmes and interventions for gauging the integrity and strength of the intervention".⁴² The following discussion looks at each of these principles.

3.3.1 Justice should focus on repairing the harm caused by crime

The first principle of restorative justice stems from the premise that crime is more than just a violation of the law. Crime is also seen as causing harm to people and their relationships. If crime does indeed result in harm, then justice cannot be achieved by simply imposing punishment on offenders. Restorative justice emphasises that the focus should be on repairing the harm caused by crime.⁴³ A focus on the harm implies a central concern for victims and their needs⁴⁴ and, also implies an emphasis on the harm experienced by offenders and communities.⁴⁵ Accordingly, the process of achieving justice starts with identifying harms and meeting the needs of those who have been affected by crime, namely, victims, offenders and communities.⁴⁶

From a victims' perspective, crime may result in multiple harms. Besides sustaining physical injuries and suffering material losses, victims may also suffer emotional and psychological loss.⁴⁷ The most common emotional reactions by victims include anxiety, anger, depression, physical distress, resentment and hostility.⁴⁸ Psychological harm includes loss of faith, loss of control, a sense of isolation, shock, enmity, self-blame, and denigration.⁴⁹

Victims thus need to recover from these experiences. In order to do so, they need forums to express their emotions.⁵⁰ Victims also need to tell their own stories about the impact of the crime and to have their stories accepted and acknowledged by others.⁵¹ Victims also need

⁴² Bazemore and O'Brien *The Quest for A Restorative Model of Rehabilitation* at 42.

⁴³ See discussion above at 1.3.

⁴⁴ Zehr *The Little Book* at 22.

⁴⁵ *Ibid* at 23.

⁴⁶ Zehr *Changing Lenses* at 191.

⁴⁷ London *From the Margins to the Mainstream* at 94; Strang and Sherman 2003 *Utah Law Review* at 22.

⁴⁸ London *From the Margins to the Mainstream* at 94.

⁴⁹ McCold 2000 *Contemporary Justice Review* at 366; London *From the Margins to the Mainstream* at 94.

⁵⁰ Zehr *Changing Lenses* at 27; Johnstone *Ideas, Values, Debates* at 66; McCold *The Role of Community in Restorative Justice* at 168.

⁵¹ Zehr *Changing Lenses* at 27-28; McCold 2000 *Contemporary Justice Review* at 367; Umbreit and Armour *Restorative Justice Dialogue* at 91.

answers to questions such as why they become victims, why the crime happened and why they responded in the manner they did.⁵² Another significant need for victims is the assurance that what happened was not their fault and that steps are being taken to prevent the recurrence of the incident.⁵³ Victims also need opportunities to receive restitution.⁵⁴ Finally, they need to be empowered.⁵⁵ In essence, victims need to be involved in the disposition of their own cases.⁵⁶

Offenders are also believed to be harmed by their own criminal behaviour, whether as a cause for the crime or an effect thereof.⁵⁷ Contributing harms are those existed before the crime and that induced the criminal behaviour of the offender.⁵⁸ For instance, it has been shown that some victims of child abuse tend to become abusers themselves and that some substance abusers also tend to commit crimes to support their habit.⁵⁹ Similarly, research shows that adults who have been physically abused as children are more likely to abuse their own child or spouse and to manifest criminal behaviour.⁶⁰ Indeed, the abuse that one endures as a child often happens to be the root cause of some of crimes being committed today so is the failure to deal with the trauma resulting from such abuse. Baliga explains that in her experience as a facilitator, many offenders she met during restorative justice meetings with prisoners “speak about the sexual abuse they endured as children and how that unresolved trauma gave rise to their offending”.⁶¹

On the other hand, harm may also result from the crime itself or its consequences.⁶² These may be physical, emotional or moral harm.⁶³ Physical harm refers to the offender being wounded during the commission of the crime or imprisoned as result thereof, whereas emotional harm refers to the offender experiencing shame.⁶⁴ Indeed, offenders experience

⁵² Zehr *Changing Lenses* at 26-27. Cf Johnstone *Ideas, Values, Debates* at 66; McCold 2000 *Contemporary Justice Review* at 367; Umbreit and Armour *Restorative Justice Dialogue* at 90-91.

⁵³ Zehr *Changing Lenses* at 28. Cf Umbreit and Armour *Restorative Justice Dialogue* at 91; McCold *The Role of Community in Restorative Justice* at 168.

⁵⁴ Zehr *The Little Book* at 15.

⁵⁵ Zehr *Changing Lenses* at 27; Johnstone *Ideas, Values, Debates* at 66; McCold 2000 *Contemporary Justice Review* at 367.

⁵⁶ Zehr *Changing Lenses* at 28; McCold 2000 *Contemporary Justice Review* at 367; Johnstone and Van Ness *Restorative Justice* at 13.

⁵⁷ Van Ness and Strong *Restoring Justice* 3rd at 45.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Holinger 2015-08-31 *Psychology Today*.

⁶¹ Baliga available at <https://www.vox.com/first-person/2018/10/10/17953016/what-is-restorative-justice-definition-questions-circle> (accessed 13/10/2018).

⁶² Van Ness and Strong *Restoring Justice* 3rd at 45.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

shame from facing the consequences of their wrongful conduct “and may suffer socially through diminished personal and social prospects”.⁶⁵ As far as the moral harm is concerned, offenders in this sense harm themselves by incurring a moral debt to those harmed by their conduct.⁶⁶ In addition, offenders are harmed by the way the criminal justice system responds to wrongdoing, which further isolates them from the community, putting a strain on family relationships and thus making it impossible for them to make amends to victims.⁶⁷

Obviously, the fact that offenders are victimised by their own conduct does not excuse their criminal behaviour.⁶⁸ However, neither can we expect offenders to change their behaviour without addressing their harms,⁶⁹ and the associated needs. Accordingly, offenders need encouragement to experience personal transformation, including healing for the harms that contributed to criminal behaviour, opportunities to receive treatment for addictions or other problems and improvement of personal capabilities.⁷⁰ Offenders need to regain their self-worth, to re-establish connection with their family group and to rectify the wrong by behaving in a responsible manner towards the victim and their community.⁷¹ Certainly, offenders need support for integration into the community.⁷² Finally, and most importantly, offenders need to be held accountable.⁷³ Accountability in this sense differs from the one emphasised by the current criminal justice system, which is defined when the offender is punished.⁷⁴ Accountability in this sense “means encouraging offenders to understand the impact of their behavior – the harms they have done – and urging them to take steps to put things right as much as possible”.⁷⁵ This form of accountability is perceived as not only beneficial to victims, but also to society and offenders.⁷⁶

⁶⁵ McCold 2000 *Contemporary Justice Review* at 367.

⁶⁶ Van Ness and Strong *Restoring Justice* 3rd ed at 45; McCold 2000 *Contemporary Justice Review* at 367.

⁶⁷ Van Ness and Strong *Restoring Justice* 3rd ed at 45.

⁶⁸ Zehr *The Little Book* at 31; Van Ness and Strong *Restoring Justice* 3rd ed at 45.

⁶⁹ Zehr *The Little Book* at 31.

⁷⁰ *Ibid* at 17.

⁷¹ McCold 2000 *Contemporary Justice Review* at 367.

⁷² Zehr *The Little Book* at 17.

⁷³ Zehr *Changing Lenses* at 40; Zehr *The Little Book* at 16; McCold 2000 *Contemporary Justice Review* at 367.

⁷⁴ Zehr *Changing Lenses* at 40; Zehr *The Little Book* at 16. Cf discussion above at 2.5.

⁷⁵ Zehr *The Little Book* at 16.

⁷⁶ *Ibid*.

Lastly, it is important to consider the harms and related needs of the community. While it is agreed that communities have the needs that arise from crime,⁷⁷ there has not been consensus on how a community should be defined. One of the difficulties in defining community is that it may include members of the community residing in the local area or in the neighbourhood, or it may be explained by the geographical area whose members share a common interest or occupation.⁷⁸ In principle, there are two types of communities that are impacted by crime, namely, the micro-communities and the macro-communities. The former also known as communities of care, comprise of family members, friends and others who share meaningful personal relationship.⁷⁹ These are people, whose opinions and concerns are most likely to influence our behaviour. They provide all sorts of care and support we need to confront challenges and make difficult decisions in our lives. The actions of each member in this community have direct impact on others.⁸⁰

Macro-communities on the other hand, are groups, which do not share a personal relationship, but are delineated by geographical area or membership.⁸¹ An example of a macro-community is the neighbourhood in which one resides, the state, city, and members of church, club or professional associations. Except for those who may be part of a victim's or offender's micro-community, most members in this community are less or little emotionally connected to any specific crime. Hence, when a crime is committed against someone within this community, its direct impact will vary considerably among the members of the community.⁸²

From the micro-community perspective, crime harms relationships between victims, offenders and their respective families and friends (community of care).⁸³ Often the emotional pain experienced by family and friends can be greater than that of the victim. Crime also diminishes the trust between offenders and their families and are most likely to experience a sense of

⁷⁷ Zehr *The Little Book* at 17; McCold *The Role of Community in Restorative Justice* at 155; Gerkin *A Needs-Based Approach to Justice* at 66.

⁷⁸ McCold *The Role of Community in Restorative Justice* at 155.

⁷⁹ McCold *The Role of Community in Restorative Justice* at 156; Naudé 2006 *Journal for Juridical Science* at 116. Cf Eriksson *Justice in Transition* at 15.

⁸⁰ McCold *The Role of Community in Restorative Justice* at 156. Cf Gerkin *A Needs-Based Approach to Justice* at 66.

⁸¹ McCold *The Role of Community in Restorative Justice* at 156; Naudé 2006 *Journal for Juridical Science* at 116; Gerkin *A Needs-Based Approach to Justice* at 67. Cf Eriksson *Justice in Transition* at 15.

⁸² McCold *The Role of Community in Restorative Justice* at 156. Cf Gerkin *A Needs-Based Approach to Justice* at 67.

⁸³ McCold *The Role of Community in Restorative Justice* at 156; Eriksson *Justice in Transition* at 15.

shame. Moreover, family members of the victim usually blame themselves for not been able to protect their loved one and may harbour anger towards the offender. Although, the extent of harms vary, crime affects all of the members of each victim's and offender's micro-community in unimaginable way.⁸⁴

From respective communities of care, family members need to tell their own stories about how they were affected. They need offenders to acknowledge the wrong, as well as assurance that something will be done about it, that steps will be taken to prevent future offending, and that offenders will have opportunities to be reintegrated into their communities. Moreover, families need chances to encourage responsible behaviour on offenders, listen to the victim, and support the role of victims and offenders in restoring the harm of crime.⁸⁵

On the other hand, macro-communities suffer what McCold describes as an aggregate harm. He states that,

“the macro-community view is more concerned with the cumulative effect of crime on neighborhoods or society, and the resulting loss of a sense of public safety. From a neighborhood perspective, crime results in public fear of certain places which, in turn, reduces the public guardianship of those areas. This situation, then, further encourages crime and eventually leads to general neighborhood decay”.⁸⁶

From the macro-community perspective, since crime affects the broader community, it is suggested that for justice to be fully achieved, the reparation should not be limited to the specific harm done to specific individuals and their relationships. In essence, reparation of harms to individuals and relationships is secondary to the goal of the macro-community. As such, actions to be taken needs to protect the neighbourhood and society as a whole.⁸⁷

However, in practice, restorative justice tends to focus on the harms and needs of micro-communities or communities of care.⁸⁸ This could be attributed to the fact that the macro-

⁸⁴ McCold *The Role of Community in Restorative Justice* at 156-157.

⁸⁵ *Ibid* at 168.

⁸⁶ McCold *The Role of Community in Restorative Justice* at 157. See also Gerkin *A Needs-Based Approach to Justice* at 67.

⁸⁷ McCold *The Role of Community in Restorative Justice* at 157.

⁸⁸ Zehr *The Little Book* at 27.

community perspective tends to contradict (to some extent) the essence of restorative justice.⁸⁹ Nevertheless, it is submitted that both the communities have a role to play in restorative justice.

It is thus argued that the needs created by crime must be met if one is to experience a full sense of justice.⁹⁰ Without such experience, it would be difficult if not impossible to heal⁹¹ from the harm inflicted by crime. The needs that arise from crime are more likely to be met with restorative justice than with the current criminal justice system. This is because the needs of victims, offenders and community members are not sufficiently considered if they are by the current criminal justice system.⁹²

3.3.2 All parties affected by crime should actively participate in its resolution

The idea is that the best way of meeting the individual needs of those affected by crime is for them to participate in deciding what should happen next.⁹³ In other words, restorative justice emphasises that those who are affected by crime should decide themselves how to deal with it.⁹⁴ As Christie⁹⁵ suggests, this means returning the conflict of crime to where it belongs. This very notion of participation challenges what seems to be the state monopoly over how conflicts of crime should be resolved. As Van Ness and Strong⁹⁶ argue, victims, offenders and communities have been excluded from the meaningful participation in the criminal justice process because the state is considered to be primarily injured by crime (crime is viewed as committed against the state), thus having the monopoly over the prosecution and punishment of offenders. As a result, participation of victims⁹⁷ and members of the community⁹⁸ in the justice

⁸⁹ McCold *The Role of Community in Restorative Justice* at 169 (“The future of restorative justice hinges on involving the micro-community directly in those restorative processes that provide healing. Reparation decided by a judge or a community panel actually interferes healing as it deprives primary stakeholders of the opportunity to express their feelings, tell their story and collectively identify and address harms, needs, and responses. Such macro-community interference, although currently in vogue, is inconsistent with the essence of restorative justice”).

⁹⁰ McCold 2000 *Contemporary Justice Review* at 360.

⁹¹ Zehr *Changing Lenses* at 188.

⁹² See also Zehr *The Little Book* at 3.

⁹³ McCold *The Role of Community in Restorative Justice* at 168.

⁹⁴ See discussion above at 1.3.

⁹⁵ Christie *Conflicts* 36-41. See also McCold *The Role of Community in Restorative Justice* at 168; Roche *Accountability* at 9; Van Ness and Strong *Restoring Justice* 3rd ed at 13; Johnstone 2017 *Restorative Justice: An International Journal* at 384.

⁹⁶ Van Ness and Strong *Restoring Justice* 3rd ed at 46. Cf Zehr *Retributive Justice* at 25.

⁹⁷ See discussion above at 1.2.

⁹⁸ Van Ness and Strong *Restoring Justice* 3rd ed at 46; Dzur and Olson 2004 *Journal of Social Philosophy* at 93.

process has been (only and when needed) limited to giving evidence on behalf of the state, that is, to help the state in its case against the offender.⁹⁹ Similarly, offenders have been nothing more than passive participants in the justice process, with less encouragement to assume responsibility for their actions.¹⁰⁰

As indicated above, restorative justice emphasises direct participation by the affected parties in the justice process. Research indicates that the very act of participating in the resolution of the conflict of crime is what mostly brings the healing for the parties, which often leads to achieving a sense of satisfaction with the justice system.¹⁰¹

3.3.3 Transforming the roles and responsibilities of government and community in responding to crime

The third principle of restorative justice stems from the notion that there are limitations on the role of the government in responding to crime.¹⁰² Central to this notion is the claim that communities have a crucial role to play in this response.¹⁰³ According to Bazemore and Schiff, “if we wish to repair the harm of crime by utilizing an inclusive decision-making process, we must change the role of justice professionals and the mandate of the justice system to ensure that communities are encouraged to assume greater responsibility”.¹⁰⁴ Hence, there are two related agendas associated with the transformation of the community versus government role.¹⁰⁵ The first one is transforming the role of criminal justice professionals and the mission of justice systems and agencies to support community participation in the justice process.¹⁰⁶ The second is strengthening the capacity of the community to address crime more effectively.¹⁰⁷

⁹⁹ See discussion above at 1.2.

¹⁰⁰ See discussion above at 3.3.1.

¹⁰¹ See discussion below at 3.6.3.

¹⁰² Bazemore and O'Brien *The Quest for A Restorative Model of Rehabilitation* at 43; Bazemore and Schiff *Juvenile Justice Reform and Restorative Justice* at 68.

¹⁰³ *Ibid.*

¹⁰⁴ Bazemore and Schiff *Juvenile Justice Reform and Restorative Justice* at 68. Cf Bazemore and O'Brien *The Quest for A Restorative Model of Rehabilitation* at 43.

¹⁰⁵ Bazemore and Schiff *Juvenile Justice Reform and Restorative Justice* at 68; Bazemore and O'Brien *The Quest for A Restorative Model of Rehabilitation* at 43.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

For communities to assume a greater role and responsibility in responding to crimes, it is argued that the government should relinquish monopoly over such process.¹⁰⁸ This is based on the belief that communities will be strengthened if local members participate in responding to crime, and this response is designed to address the needs of victims, offenders and communities.¹⁰⁹ Implicit in restorative justice practice is the notion that communities are better equipped to deal with crime and its consequences. Hence, often argued in this regard is that “central to the notion of restorative justice is the recognition of the community rather than the criminal justice agencies as the prime site of crime control”.¹¹⁰

The claim is that there are number of advantages that community members have over the criminal justice agencies. One is that communities hold significant power to change the minds and hearts of offenders.¹¹¹ Although the current criminal justice system can apply power on the bodies of offenders, it is relatively powerless in terms of effecting the necessary change in the heart and minds of offenders.¹¹² Research indicates that long-term chronic offenders who have gone through restorative justice process consistently report that the support they received from the community made the difference.¹¹³ Indeed, there is a widespread agreement that community can change offenders’ attitude better than the criminal justice system. The view is that community members represent social mores violated by offenders – they “speak the same language” as the offender and are therefore seen to express disapproval better than criminal justice professionals, who might be seen as “part of the system”.¹¹⁴ It is argued that “it is not the shame of police or judges or newspapers that is most able to get through to us; it is shame in the eyes of those we respect and trust”.¹¹⁵

Another argument is that no one has better knowledge than the community does about the root causes of crime committed within it. Community members are thus seen as better positioned

¹⁰⁸ Siegel and Bartollas *Corrections* at 24; Vynckier *Restorative Practices in Flanders* at 23; Kurki 2000 *Crime & Justice* at 236; Schmid 2002 *VUWLR* at 125.

¹⁰⁹ Siegel and Bartollas *Corrections* at 24.

¹¹⁰ South African Law Commission *Sentencing Report* at para 3.3.34; *S v M* 2007 (2) SACR 539 (CC) at para 62. See also Pavlich *The Promise of Restorative Justice* at 455.

¹¹¹ Pranis *Circles* at 120.

¹¹² *Ibid.*

¹¹³ *Ibid* at 120-121.

¹¹⁴ Dzur and Olson 2004 *Journal of Social Philosophy* at 95.

¹¹⁵ Braithwaite 1999 *Crime and Justice* at 39-40. See also Dzur and Olson 2004 *Journal of Social Philosophy* at 95. This is discussed in more detail below at 3.6.4.2.

to know what is happening in the life of the offender,¹¹⁶ and to break the cycle of crime because they have a better understanding of what could have led to the offender's criminal behaviour.¹¹⁷ Yet "criminal courts may not have advantage of such knowledge, or may not be interested in [it]".¹¹⁸

One other notable advantage is that community involvement in criminal justice could facilitate reintegration of offenders. This is so because restorative justice emphasises the need to strengthen the relationship between the offender and his community.¹¹⁹ Hence, the ultimate goal of sentencing in restorative justice is to reintegrate offenders into the community.¹²⁰ This is contrary to the conventional criminal justice system, which seems to hinder the process of reintegration.¹²¹ As Roche succinctly puts it,

"Prison is most obviously the antithesis of reintegrative strategies, isolating and alienating the offender from society, but even alternatives which are not as utterly punitive and confining give little consideration to rebuilding an offender's ties with his or her community. An offender can perform community service, pay a fine or attend probation, but is offered few opportunities to convey his or her repentance, and the community largely is denied the chance to demonstrate its acceptance of, or understanding towards, the offender".¹²²

In essence, offenders are deprived of the opportunity to acknowledge their wrongdoing and to prove that they remain part of the law-abiding community and are acquainted with its acceptable standards of behaviour.¹²³ It is argued that offenders need to feel a sense of belonging.¹²⁴ This need to belong to the community can lead to changes in behaviour and attitude as people (offenders) strive to conform to the standards and norms of the community.¹²⁵ As the research suggests, ex-offenders are desirous of re-joining society as responsible citizens.¹²⁶ Hence, greater community involvement in dispensing justice would not only facilitate successful

¹¹⁶ Pranis *Circles* at 121.

¹¹⁷ Kgosimore 2002 *Acta Criminologica* at 73.

¹¹⁸ *Ibid.*

¹¹⁹ Roche *Accountability* at 29.

¹²⁰ Siegel and Bartollas *Corrections* at 24.

¹²¹ Roche *Accountability* at 28-29.

¹²² *Ibid* at 29.

¹²³ *Ibid.*

¹²⁴ Dzur and Olson 2004 *Journal of Social Philosophy* at 95-96.

¹²⁵ Cherry available at <https://www.verywellmind.com/what-is-the-need-to-belong-2795393> (accessed on 03/09/2018).

¹²⁶ Lotter 2018-09-18 *IOL News*.

reintegration of offenders, but would also reduce the chances of reoffending.¹²⁷ According to Dzur and Olson,¹²⁸ it is thus important for community members when expressing their disapproval to always keep in mind that offenders need to be treated as members of the community who violated its norms only temporarily. Although this is not an easy thing to do, it is postulated that members of the community are better able to achieve it than the criminal justice professionals.¹²⁹

Lastly, community involvement in responding to crime has the potential to reduce the costs of administering justice by drawing on the untapped resource of 'voluntary collective action'.¹³⁰ This is based on the fact that members of the community usually participate in the justice process on a voluntary basis (without being paid) as opposed to their professional counterparts. Other proponents of restorative justice also perceive community as a resource for reconciling victims and offenders and as a resource for overseeing and enforcing compliance with the community norms of behaviour.¹³¹

3.4 Restorative justice practices

3.4.1 Introduction

Various practices of restorative justice are used throughout the world as a means of dealing with crime. The most frequently used practices are victim-offender mediation, family group conferencing, circles and panels.¹³² Because of similarities in their focus, these practices are often grouped together as types of restorative justice dialogue¹³³ or forms of restorative conferences.¹³⁴ In each practice, the focus is on discussing the incident of crime, identifying its impact and coming to some common understanding as to how the harm that is caused by crime will be repaired.¹³⁵ All have in common the transfer of the decision-making authority from criminal justice agencies to victims, offenders, their families, and community members.¹³⁶

¹²⁷ Batley *South African Context* at 29.

¹²⁸ Dzur and Olson 2004 *Journal of Social Philosophy* at 96.

¹²⁹ *Ibid.*

¹³⁰ Crawford *The State, Community and Restorative Justice* at 120.

¹³¹ *Ibid.* See also Eriksson *Justice in Transition* at 14.

¹³² See discussion above at 3.1.

¹³³ Umbreit and Armour *Restorative Justice Dialogue* at 19.

¹³⁴ Zehr *The Little Book* at 44.

¹³⁵ Umbreit and Armour *Restorative Justice Dialogue* at 19.

¹³⁶ Kurki *Restorative Justice Practices* at 293.

These practices can be used at any stage in the criminal justice process.¹³⁷ What follows is a brief description of each practice.

3.4.2 Victim-offender mediation

Victim-offender mediation (VOM), also called victim-offender reconciliation, victim-offender conferencing, or victim-offender dialogue is the oldest and most widely used form of restorative justice practice.¹³⁸ VOM has been in existence for more than 40 years in the United States, Canada and for over 30 years in Europe,¹³⁹ making it the longest of any restorative intervention strategy.¹⁴⁰ From its marginal beginnings as predominantly a faith-based justice process, VOM has grown into a staple justice system resource in most countries around the world.¹⁴¹ Today, there are more than 300 programs in the United States and more than 1200 programs in other parts of the world, including in Canada, Europe, Israel, Japan, Russia, South Korea, South Africa, South America, and the South Pacific.¹⁴² VOM has been used predominantly in less serious cases involving juvenile offenders, although the process is also used for handling serious and violent crimes committed by both juveniles and adults.¹⁴³

VOM is described as a process “designed to bring victims and offenders together face-to-face in a safe, structured, facilitated dialogue that typically occurs in a community-based setting.”¹⁴⁴ With the guidance of a trained mediator, the victim is afforded an opportunity to express the impact of the crime on him or her.¹⁴⁵ Furthermore, the process enables the offender to account for his or her behaviour, and the victim gets to receive answers to questions they may have regarding the incident.¹⁴⁶ Subsequent to this sharing of information, both the victim and the

¹³⁷ Umbreit and Armour *Restorative Justice Dialogue* at 19; United Nations Office on Drugs and Crime *Restorative Justice Programmes* at 13; Department of Justice & Constitutional Development available at www.justice.gov.za/rj/2011rj-booklet-a5-eng.pdf (accessed on 25/10/2016); Kilekamajenga 2018 *SA Crime Quarterly* at 20; Naudé and Nation 2007 *Acta Criminologica* at 142.

¹³⁸ Umbreit *et al* *Victims of Severe Violence* at 123; Umbreit and Armour *Restorative Justice Dialogue* at 111.

¹³⁹ Umbreit and Armour *Restorative Justice Dialogue* at 113-115.

¹⁴⁰ Schiff *Restorative Conferencing Strategies* at 317-318.

¹⁴¹ *Ibid* at 118.

¹⁴² See Umbreit and Armour *Restorative Justice Dialogue* at 112.

¹⁴³ Bazemore and Umbreit *Restorative Conferencing Models* at 225; Schiff *Restorative Conferencing Strategies* at 318. See also Umbreit and Armour *Restorative Justice Dialogue* at 115.

¹⁴⁴ Schiff *Restorative Conferencing Strategies* at 318. See also Omale *Restorative Justice and Victimology* at 57.

¹⁴⁵ Umbreit *Victim Offender Mediation* at xxxviii; Bazemore and Umbreit *Restorative Conferencing Models* at 225; Schiff *Restorative Conferencing Strategies* at 318; Omale *Restorative Justice and Victimology* at 57.

¹⁴⁶ *Ibid*.

offender would determine an appropriate plan to repair the harm to the victim, which may include material and/or non-material restitution.¹⁴⁷

The primary goal of VOM is “to provide a conflict resolution process which is perceived as fair by both the victim and the offender”.¹⁴⁸ Goals for victims might include their direct involvement in the process, making the offender aware of the effects of the crime on their lives, getting answers to the questions that plague them, and influencing how the offender is to be held responsible.¹⁴⁹ For offenders, their goals might include the opportunity to repair the harm caused by crime, to accept responsibility for their behaviour, to show a more humane side to their character, and to apologise directly to the person they wronged.¹⁵⁰ Secondary aims of VOM might be offender rehabilitation and prevention of crime.¹⁵¹

Mediation in the context of restorative justice is distinguished from mediation as practised in commercial and civil disputes. Although mediation in these settings is mainly focused on reaching a settlement, with a lesser concern on a discussion of the impact of the conflict on the lives of participants, VOM is primarily a “dialogue driven” process with emphasis on the victim healing, offender accountability, and restoration of losses.¹⁵² VOM is thus not primarily driven by the need to reach a settlement agreement, although in most cases, it does result in restitution agreement.¹⁵³

VOM can be used as a complement or alternative to the criminal justice system. For example, cases may be referred to mediation as diversion from prosecution, or as post-adjudication sentencing option, with mediation as a condition of disposition.¹⁵⁴ VOM can also be used with offenders serving prison sentences and can form part of their rehabilitation process even where offenders are serving long sentences.¹⁵⁵

¹⁴⁷ Schiff *Restorative Conferencing Strategies* at 318; Omale *Restorative Justice and Victimology* at 57.

¹⁴⁸ Umbreit 1988 *Journal of Dispute Resolution* at 87; Van Ness and Strong *Restoring Justice* 3rd ed at 64. Cf Umbreit and Armour *Restorative Justice Dialogue* at 118.

¹⁴⁹ Umbreit and Armour *Restorative Justice Dialogue* at 118-119.

¹⁵⁰ *Ibid* at 119.

¹⁵¹ *Ibid*.

¹⁵² Umbreit *Victim Offender Mediation* at xl. See also Bazemore and Umbreit *Restorative Conferencing Models* at 225.

¹⁵³ *Ibid*.

¹⁵⁴ Umbreit *Victim Offender Mediation* at xxxix; Bazemore and Umbreit *Restorative Conferencing Models* at 226; Schiff *Restorative Conferencing Strategies* at 318.

¹⁵⁵ United Nations Office on Drugs and Crime *Restorative Justice Programmes* at 17.

In South Africa, for instance, the Child Justice Act 75 of 2008 makes provision for VOM as a diversion option and is further listed as part of appropriate sentencing options.¹⁵⁶ Moreover, VOM is listed as one of the conditions for correctional supervision in terms of the Correctional Services Act 111 of 1998.¹⁵⁷

3.4.3 Family group conferencing

One other prominent form of restorative justice practice is family group conferencing (FGC). FGC is originally based on ancient dispute resolution methods of the Maori people of New Zealand.¹⁵⁸ The modern model of family group conferencing was adopted into national legislation in New Zealand in 1988,¹⁵⁹ making it the first country to officially adopt restorative justice mechanism for the handling of youth offenders.¹⁶⁰ South Australia also begun to use FGC in the early 1990s as a police-initiated diversion programme for youth offenders.¹⁶¹ FGC is currently also being used in the United States, Europe, Canada, and in South Africa.¹⁶² A range of crimes have been disposed of through FGC, including theft, arson, minor assaults, drug related offences, damage to property, child abuse cases.¹⁶³ In New Zealand, FGC is typically used for all but most serious and violent crimes committed by juveniles,¹⁶⁴ although the process is also used with adult offenders for medium to serious crimes as a pre-trial diversionary effort.¹⁶⁵

Compared to VOM, FGC involves a larger group of participants by including family members and supporters of both the victim and the offender. FGC emphasises supporting of offenders in taking ownership and responsibility for their actions and in changing their behaviour.¹⁶⁶ Thus, the involvement of the offender's family is important because family members play a crucial

¹⁵⁶ See discussion below at 4.2.5. For diversion, see section 53(7) of the Act.

¹⁵⁷ See discussion below at 4.2.3.

¹⁵⁸ Bazemore and Umbreit *Restorative Conferencing Models* at 230; Umbreit and Armour *Restorative Justice Dialogue* at 85; Schiff *Restorative Conferencing Strategies* 319.

¹⁵⁹ Bazemore and Umbreit *Restorative Conferencing Models* at 230.

¹⁶⁰ Schiff *Restorative Conferencing Strategies* at 319.

¹⁶¹ *Ibid.*

¹⁶² Bradshaw and Roseborough 2005 *Federal Probation* at 16.

¹⁶³ Bazemore and Umbreit *Restorative Conferencing Models* at 231; Schiff *Restorative Conferencing Strategies* at 319.

¹⁶⁴ Bazemore and Walgrave *Introduction* at 1; Bazemore and Umbreit *Restorative Conferencing Models* at 231; Cf Morris and Maxwell *Restorative Justice* at 258.

¹⁶⁵ Umbreit and Armour *Restorative Justice Dialogue* at 154.

¹⁶⁶ *Ibid* at 85.

role in addressing the harms already done and minimising future harm.¹⁶⁷ It is believed that the condemnation of the criminal conduct by the whole family group has more weight and authority than that of an individual judge.¹⁶⁸ This stems from the basic principle of social psychology that social pressure emanating from groups is more likely to result in conformity than social pressure coming from the individual.¹⁶⁹

At the conference, the affected parties are given the opportunity to discuss the impact of crime and to determine the appropriate resolution. The conference usually begins with the offender recounting the incident of crime and thereafter the victim and other participants are afforded the opportunity to describe the impact of the incident on their lives.¹⁷⁰ However, sometimes the victim may address the conference first or be given the choice of deciding who they would like to hear from first.¹⁷¹ Thus, this process will most certainly vary from one jurisdiction to another.

The objective of FGC is to sensitise the offender to the impact of his or her behaviour on the victim and others, and to afford the victim the opportunity to ask questions, to express feelings and talk about the incident.¹⁷² After a discussion of the impact of crime, the victim is asked to indicate his or her preferred outcomes from the conference and is then involved in shaping the obligations that will be placed on the offender.¹⁷³ Importantly, all participants in the conference contribute in the process of determining how the offender should repair the harm.¹⁷⁴ For example, in the New Zealand model of FGC, conferences would take regular breaks to allow the offender and his or her family to have a private caucus to discuss what has happened in the larger conference and to develop a proposal to bring back to the victim and the rest of the conference.¹⁷⁵ Of significance about FGC is that not only do family members participate in finding solutions to the problem of crime, they also take collective responsibility in ensuring that the offender fulfils his or her reparative obligations.¹⁷⁶

¹⁶⁷ *Ibid.*

¹⁶⁸ Moss 2013 *Contemporary Justice Review* at 221. Cf Morris 2002 *British Journal of Criminology* at 603.

¹⁶⁹ Moss 2013 *Contemporary Justice Review* at 221.

¹⁷⁰ Bazemore and Umbreit *Restorative Conferencing Models* at 231; Schiff *Restorative Conferencing Strategies* at 320; Omale *Restorative Justice and Victimology* at 59.

¹⁷¹ Schiff *Restorative Conferencing Strategies* at 320; Omale *Restorative Justice and Victimology* at 59.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ Schiff *Restorative Conferencing Strategies* at 320; Morris and Maxwell *Restorative Justice* at 258.

¹⁷⁵ Zehr *The Little Book* at 49; Umbreit and Armour *Restorative Justice Dialogue* at 85.

¹⁷⁶ Kurki *Restorative Justice Practices* at 297.

FGC is most frequently used as diversion from prosecution for juveniles but can also be used as a post-trial sentencing option.¹⁷⁷ In New Zealand, FGC is typically used either as a means of cautioning offenders or as a complement to a court process.¹⁷⁸ In the latter instance, the offender and his or her family are tasked with proposing a package of measures to compensate the victim and steps that will be taken to ensure non-repetition of the behaviour. If found acceptable by the victim, the package is then placed before the court for ratification as a sentence.¹⁷⁹

As with VOM, in South Africa, juveniles maybe ordered to participate in FGC as a form of diversion from prosecution in terms of the Child Justice Act 75 of 2008. The Act further lists FGC as one of sentencing options for child offenders.¹⁸⁰ Apart from child offenders, FGC can be imposed as one of the conditions for correctional supervision in terms of the Correctional Services Act 111 of 1998.¹⁸¹

3.4.4 Circles

Another interesting example of a practice that embraces a restorative approach are circles (also known as peace-making circles or sentencing circles). Circles emerged initially from traditional Native American and Canadian First Nations disputes resolution processes.¹⁸² They were first introduced into the formal criminal justice system in 1982 in Canada, as an alternative sentencing option.¹⁸³ This practice became popular in 1992 when Judge Barry Stuart of the Yukon territorial court convened a circle as part of the criminal case trial.¹⁸⁴ The use of circles spread to the United States in 1996, when a pilot project was introduced in Minnesota.¹⁸⁵

¹⁷⁷ Bazemore and Umbreit *Restorative Conferencing Models* at 232. Cf Walgrave *Responsible Citizenship* at 35.

¹⁷⁸ Marshall *Restorative Justice* at 14.

¹⁷⁹ *Ibid.*

¹⁸⁰ See discussion below at 4.2.5. For diversion, see section 53(7) of the Act.

¹⁸¹ See discussion below at 4.2.3.

¹⁸² Coates *et al* 2003 *Contemporary Justice Review* at 265; Schiff *Restorative Conferencing Strategies* at 321; Bazemore and Umbreit *Restorative Conferencing Models* at 232; Umbreit and Armour *Restorative Justice Dialogue* at 182.

¹⁸³ Stuart and Pranis *Peacemaking Circles* at 121; Umbreit and Armour *Restorative Justice Dialogue* at 183.

¹⁸⁴ Umbreit and Armour *Restorative Justice Dialogue* at 183. Cf Zehr *The Little Book* at 50.

¹⁸⁵ Bazemore and Umbreit *Restorative Conferencing Models* at 233. Cf Schiff *Restorative Conferencing Strategies* at 322.

Circles have been used in dealing with a variety of crimes committed by both juvenile and adult offenders, and in both rural and urban settings.¹⁸⁶ Today, circles are being utilised for many purposes, including resolving conflicts in schools, families, workplaces, and communities.¹⁸⁷

In the criminal context, circles involve victims, offenders, their family members and supporters, members of the community and justice officials. Participants are arranged in a circle and “a talking piece” is passed from one person to another to ensure that every participant has an opportunity to speak¹⁸⁸ about the event of crime and its impact in an effort to find appropriate ways of healing all the affected parties and preventing future crimes.¹⁸⁹ The talking piece could be a feather, walking stick, a rock, braid of sweet grass, a pipe¹⁹⁰ or any other article that signifies respect and wisdom.¹⁹¹ The use of a talking piece is believed to cultivate listening skills because participants can only speak once the talking piece comes to them.¹⁹² Moreover, it slows down the pace of the dialogue, which in turn relaxes the participants so that they become more thoughtful.¹⁹³ The slower the pace, the more time for participants “to modulate the expression of deep emotions”.¹⁹⁴

In contrast to the two forms of restorative justice practice described above, circles are largely focused on the harm done to the community and its responsibility for supporting and holding members of the community accountable.¹⁹⁵ Circles are based on the idea that people are interconnected and everything we do affect others and come back to us.¹⁹⁶ An example of this can be seen from a decision to send someone to prison as a way to get rid of a problem. Rather than addressing the problem, this action comes back in the form of increased violence among offenders because of aversive conditioning in prison, high reoffending rates, and public monies being allocated to maintain overcrowded prisons instead of being used for other important things.¹⁹⁷ Hence, our connectedness means that as a community, we share some responsibility

¹⁸⁶ Bazemore and Umbreit *Restorative Conferencing Models* at 233.

¹⁸⁷ Umbreit and Armour *Restorative Justice Dialogue* at 183.

¹⁸⁸ Umbreit and Armour *Restorative Justice Dialogue* at 191; Zehr *The Little Book* at 51.

¹⁸⁹ Bazemore and Umbreit *Restorative Conferencing Models* at 233.

¹⁹⁰ Umbreit and Armour *Restorative Justice Dialogue* at 191.

¹⁹¹ Pranis *Circles* at 119.

¹⁹² Pranis *et al From Crime to Community* at 101; Umbreit and Armour *Restorative Justice Dialogue* at 191.

¹⁹³ Pranis *et al From Crime to Community* at 100; Umbreit and Armour *Restorative Justice Dialogue* at 191.

¹⁹⁴ Umbreit and Armour *Restorative Justice Dialogue* at 192.

¹⁹⁵ *Ibid* at 86.

¹⁹⁶ Pranis *et al From Crime to Community* at 68. See also Umbreit and Armour *Restorative Justice Dialogue* at 180.

¹⁹⁷ Umbreit and Armour *Restorative Justice Dialogue* at 180.

for the harm when a crime has been committed.¹⁹⁸ As such, it is incumbent on us to make things right, including assisting those who caused the harm to take responsibility for their actions.¹⁹⁹ According to the United Nations Handbook,²⁰⁰ circles are the best example of participatory justice in that they directly involve the members of the community in responding to incidents of crime and social disorder.

Goals of circles include promoting healing for all affected parties; giving the offender the opportunity to make amends; empowering victims, community members, families and offenders by giving them a voice and a role in devising constructive resolutions; addressing the root causes of criminal behaviour; and building a sense of community and its capacity to deal with conflicts.²⁰¹

When used in the formal setting, circles form an integral part of the court process, which results in convictions and criminal records for offenders.²⁰² As part of a court process, circles require the involvement of the judge together with support staff.²⁰³ As such, circles cannot be fully delegated to other people, as can be done with VOM and FGC, when used as conditions for diversion.²⁰⁴ Since circles are a court hearing, members of the public are allowed to attend the hearing and its proceedings are thus recorded.²⁰⁵ The decisions taken by the circle are based on consensus among participants.²⁰⁶ Such decisions are then sentencing recommendations for the judge (who may or may not have participated directly in the circle process, and are not binding on the court).²⁰⁷

¹⁹⁸ Umbreit and Armour *Restorative Justice Dialogue* at 180; Pranis *et al From Crime to Community* at 68.
¹⁹⁹ Umbreit and Armour *Restorative Justice Dialogue* at 180.
²⁰⁰ United Nations Office on Drugs and Crime *Restorative Justice Programmes* at 23.
²⁰¹ Bazemore and Umbreit *Restorative Conferencing Models* at 233; Schiff *Restorative Conferencing Strategies* at 322.
²⁰² Lilles *Circle Sentencing* at 163.
²⁰³ Lilles *Circle Sentencing* at 169; United Nations Office on Drugs and Crime *Restorative Justice Programmes* at 22.
²⁰⁴ Lilles *Circle Sentencing* at 169.
²⁰⁵ Umbreit and Armour *Restorative Justice Dialogue* at 200.
²⁰⁶ Lilles *Circle Sentencing* at 176; United Nations Office on Drugs and Crime *Restorative Justice Programmes* at 24.
²⁰⁷ United Nations Office on Drugs and Crime *Restorative Justice Programmes* at 23. Cf Lilles *Circle Sentencing* at 164.

The circle process can be lengthy and time-consuming. As highlighted by Bazemore and Umbreit,²⁰⁸ this process typically involves a multi-step procedure that includes (1) a circle to hear the offender's application to participate in the circle; (2) a healing circle for the victim; (3) a healing circle for the offender; (4) a sentencing circle to develop consensus on how to repair the harm; (5) a series of follow-up circles to monitor the offender's compliance with a sentence agreement. Because of the lengthy nature of the process and its demand for utmost commitment from all participants, circles are mostly used informally for less serious cases.

3.4.5 Panels

This form of restorative justice practice is variously referred to as youth panels, neighbourhood boards, diversion boards, reparative boards, or community boards (among others). Panels have been in existence in the United States as early as in the 1920s as a means of ensuring the community involvement in the sanctioning of crimes committed by juveniles.²⁰⁹ Although the early examples of this practice were probably not informed by a restorative approach, the aim was to provide courts with an alternative that would encourage community support for youth "at risk".²¹⁰ The first restorative panels in the United States began in 1994 in Montana, Great Falls, Idaho, Boise followed shortly thereafter by panels in California.²¹¹ In the early 1990s, Vermont also began laying the foundation for what was probably the first nationwide use of panels for adult offenders – a probation-based approach known as "reparative boards" intended to serve as an alternative to imprisonment.²¹² In 2000, Vermont initiated a youth-focused reparative panel model for juvenile offenders.²¹³ Other countries with the most experience in panels are Canada and the United Kingdom.²¹⁴

Panels comprise of a small group of citizens who come together to determine what should be done primarily in respect of offenders convicted of non-violent and minor offences and who have been ordered by the court to participate in the process.²¹⁵ Panel members meet face-to-

²⁰⁸ Bazemore and Umbreit *Restorative Conferencing Models* at 233. See also Schiff *Restorative Conferencing Strategies* at 322; Dignan *Victims and Restorative Justice* at 125; Pranis *Circles* at 118.

²⁰⁹ Bazemore and Umbreit *Restorative Conferencing Models* at 228; Schiff *Restorative Conferencing Strategies* at 323; Dignan *Victims and Restorative Justice* at 121.

²¹⁰ Schiff *et al* 2011 *Washington University Journal of Law & Policy* at 19.

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ *Ibid* at 28.

²¹⁵ Bazemore and Umbreit *Restorative Conferencing Models* at 228; Schiff *et al* 2011 *Washington University Journal of Law & Policy* at 25. Cf Omale *Restorative Justice and Victimology* at 61.

face with offenders in an effort to discuss the nature of the offence, its consequences and the appropriate reparative action.²¹⁶ Panel members typically determine the reparative outcomes although offenders might be involved in generating the conditions of the reparative agreement as well as the time frame for completion.²¹⁷ Panel members also monitor the progress and may upon the completion of the agreement report the same to the court to indicate the conclusion of the matter.²¹⁸

This process seeks to promote citizens' involvement and ownership of the criminal justice process; provide the offender and the community a chance to come together to constructively deal with the offending behaviour; provide offenders with the opportunity to take responsibility for their behaviour and to be held accountable for the harm caused; forge community-government partnerships to deal with crime, thereby reducing dependence on the formal justice system intervention.²¹⁹

3.4.6 Some differences between restorative justice practices

As highlighted above, the common goal of restorative justice practices is to discuss the crime committed, its consequences and coming to some form of a decision on how to repair the harm caused by crime.²²⁰ Although similar in focus, there are some notable differences. With VOM, the dialogue is between the victim and the offender under the guidance of a mediator.²²¹ There is a larger group of participants in FGC, as it involves family members and supporters.²²² Circles include more group of participants than VOM and FGC. They also involve members of the community and justice officials. Another distinct feature about circles relates to the style of facilitation. Participants are arranged in a circle and one speak as they pass a "talking piece" around the circle.²²³

²¹⁶ Bazemore and Umbreit *Restorative Conferencing Models* at 228; Schiff *Restorative Conferencing Strategies* at 323; Omale *Restorative Justice and Victimology* at 61.

²¹⁷ Bazemore and Umbreit *Restorative Conferencing Models* at 228; Schiff *Restorative Conferencing Strategies* at 324; Omale *Restorative Justice and Victimology* at 61.

²¹⁸ *Ibid.*

²¹⁹ Bazemore and Umbreit *Restorative Conferencing Models* at 228; Schiff *Restorative Conferencing Strategies* at 324. Cf Omale *Restorative Justice and Victimology* at 61.

²²⁰ See discussion above at 3.4.1.

²²¹ See discussion above at 3.4.2.

²²² See discussion above at 3.4.3.

²²³ See discussion above at 3.4.4.

3.5 Restorative justice and the African traditional processes of justice

3.5.1 Introduction

Although the concept of restorative justice may be new outside the conventional criminal justice system, it is definitely not new in the history of resolving disputes.²²⁴ It is widely claimed that restorative justice mirrors the African traditional processes of justice.²²⁵ As Skelton and Frank²²⁶ assert, African communities have always had traditional mechanisms for handling disputes arising in communities and justice has been seen through a restorative lens. Indeed, underpinning the African traditional notion of justice is the concept of *Ubuntu*, which resonates with the philosophy of restorative justice.²²⁷ The concept of *Ubuntu* proceeds on the basis that *umuntu ngu muntu ngabantu*, which literally translated means that “a human being is a human being through (the otherness of) other human beings”.²²⁸ As it has been described by the Constitutional Court in *S v Makwanyane*,²²⁹

“Generally, *ubuntu* translates as ‘humaneness’. In its most fundamental sense it translates as personhood and ‘morality’. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation”.

In essence, *Ubuntu* emphasises the interconnectedness of people and the importance of the family group over the individual.²³⁰ It is grounded “in the belief that the welfare of the individual and of the community is inextricably linked — the one cannot exist without the other”.²³¹ Thus, our interconnectedness means that when the individual suffers, the community suffers too.²³² As such, when a dispute arises between individuals, the community would become involved in

²²⁴ See discussions above at 1.3 and 3.1.

²²⁵ *Ibid.*

²²⁶ Skelton and Frank *Conferencing in South Africa* at 104.

²²⁷ Louw and van Wyk 2015 *Social Work* at 492; Van Niekerk 2013 *Fundamina* at 412; Mangena 2015 *South African Journal of Philosophy* at 1.

²²⁸ Van der Merwe 1996 *Ethical Perspectives* at 76. See also Elechi *et al* 2010 *International Criminal Justice Review* at 75.

²²⁹ *S v Makwanyane* 1995 (2) SACR 1 (CC) at para 308.

²³⁰ Skelton and Frank *Conferencing in South Africa* at 104.

²³¹ Rautenbach 2015 *Journal of International and Comparative Law* at 291.

²³² Elechi *et al* 2010 *International Criminal Justice Review* at 75.

resolving the dispute, the reason being that a conflict between the parties automatically affects the community.²³³

This section examines the claim that restorative justice is similar to African traditional processes of justice. This examination focuses on the South African context. The section begins by describing how traditional justice is administered in communities. This is followed by a discussion that looks at some of the traditional dispute resolution methods used by some communities. The last part of this section highlights the link between the African traditional processes of justice and restorative justice.

3.5.2 Administration of traditional justice through customary courts

In South Africa, traditional justice in communities is administered by customary courts. These courts are presided over by traditional leaders who are assisted by members of the tribal council. These are people with whom the victim, the offender and the community are familiar with. They are likely to comply with the rulings of these courts, because they came from highly respected people within that community.²³⁴ The aim of customary courts is to hear disputes between people and decide on an appropriate resolution of the problems that were presented before them.²³⁵ Since the focus is on the resolution of problems rather than on punishment, the goal is to heal relationships and to ensure that victims receive restitution.²³⁶ These courts are generally seen as informal, speedy, cheap, accessible, and less intimidating than the formal courts.²³⁷

Among customary courts that exist in South Africa are community courts (also known as *Makgotla*), which are found mostly in rural areas and townships.²³⁸ The procedure in these courts is fairly simple. Those who wish to have their problems resolved would lodge these issues and the case would be entertained at the next court sitting.²³⁹ The parties appear before the court voluntarily.²⁴⁰ The court will listen to both stories and thereafter allow the questioning

²³³ Aiyedun and Ordor 2016 *Law, Democracy & Development* at 157-158.

²³⁴ Kgosimore 2002 *Acta Criminologica* at 71.

²³⁵ Skelton and Frank *Conferencing in South Africa* at 105.

²³⁶ *Ibid* at 104-105.

²³⁷ Kgosimore 2002 *Acta Criminologica* at 71.

²³⁸ Skelton and Frank *Conferencing in South Africa* at 104-105.

²³⁹ *Ibid* at 105.

²⁴⁰ *Ibid*.

of the parties.²⁴¹ Questions may come from anyone present on the day.²⁴² Based on the information received, a decision will be made on how to resolve the problem and the manner in which reparation could be made.²⁴³ Although these courts do not practically distinguish between civil and criminal law,²⁴⁴ they do recognise that certain problems (serious offences such as rape and murder) are beyond their scope and problem-solving competencies and these are resolved through the formal court process.²⁴⁵ The procedure in these forums mirrors the dispute resolution mechanisms found in the traditional African societies.²⁴⁶

3.5.3 Examples of the traditional dispute resolution methods used in some communities

This segment provides examples of the traditional dispute resolution methods used by some communities in parts of the Limpopo province. One such communities is in the area of Mamone under Sekhukhune District Municipality. In this village, the traditional court convenes under a tree, nearby the Kings' palace. The traditional leader and a council of men hear disputes on Wednesdays. Although there are more women than men, they only participate as complainants or witnesses in disputes involving land or family issues. Male elders deliberate on disputes between the parties before the traditional leader delivers a summary of consensual judgment. A consensus judgment is ideal in the sense that "dispute processes usually allow flexible debates, and lengthy discussions within a communal atmosphere, leading to acceptable decisions and restored relationships".²⁴⁷

²⁴¹ *Ibid.*

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ Rautenbach and Bekker *Legal Pluralism* at 246; Rautenbach 2015 *Journal of International and Comparative Law* at 283-284.

²⁴⁵ Skelton and Frank *Conferencing in South Africa* at 105. Maintenance cases are also mentioned as cases that are beyond the scope and competencies of customary courts. According to some traditional leaders, "it is not for lack of jurisdiction that traditional leaders do not deal with maintenance cases, but due to practical constraints. For example, as the traditional councillors of Mokopane stated, the traditional court does not have the capacity to make sure that maintenance orders are enforced. On the contrary, they reason, the magistrate's court has the necessary resources, as evident in that court's ability to get maintenance money directly from the employer of the parent" – see Tshehla *Traditional Justice* at 19. It is also interesting to note that it is not uncommon for these courts to deal with matters that are considered to be beyond their jurisdiction. For example, in one case from the Qumbu District, the offence was recorded as, "Beating a girl and sleeping with her by force'. The accused pleaded guilty and was sentenced to a fine of a beast and 10 lashes with a whip." This was clearly a case of rape, see South African Law Commission *Common Law and Indigenous Law* at para 6.5.2.

²⁴⁶ Skelton and Frank *Conferencing in South Africa* at 105.

²⁴⁷ See Aiyedun and Ordor 2016 *Law, Democracy & Development* at 171.

In the communities of Mokopane, Moletji and Ramokgopa, traditional leaders mediate all disputes except serious offences such as murder, rape, serious assault, and maintenance cases. In cases such as dissolution of customary marriages, the parties usually attempt to resolve the issue through the family structure, before referring it to the headman²⁴⁸ or the chief.²⁴⁹ However, where there is no headman, the parties directly approach the chief. The court allows men and women to describe their own versions of a dispute, and thereafter they will be cross-examined. The procedure in these forums is flexible, extensive and open for participation by other members of the community. Together, they come up with solutions that are acceptable to both parties. If the matter cannot be resolved, it may be sent back to the family structure.²⁵⁰

Another interesting method of dispute resolution is the practice of medicine and sacrifice that is followed by Ba-Venda people, which in crimes of less serious nature, could be used to cleanse and heal the offender. In other instances, the offender was required to compensate the victim and then share in a ritual meal, in which all the people present would eat one of the animals ordered as a fine on the offender.²⁵¹ The sharing of a meal symbolises that the crime is expiated and the offender is reaccepted into the community.²⁵² According to some researchers, the meal shared at the court also symbolise the restoration of relationships and the reconciliation between the disputants.²⁵³

Although these courts as indicated above are informal mechanisms of justice, they still operate in rural communities. They serve a valuable purpose in providing people access to justice in communities in which they operate.²⁵⁴ Although it may be true that traditional justice has lost its

²⁴⁸ Section 1 of the Traditional Leadership and Governance Framework Act 41 of 2003 defines a headman “as a traditional leader who is under the authority of, or exercises authority within the area of jurisdiction of, a senior traditional leader in accordance with customary law”.

²⁴⁹ See Bizana-Tutu *Traditional Leaders in South Africa* at 6, where a chief is defined as “a traditional leader of a specific traditional community who exercises authority over a number of headmen in accordance with customary law, or within whose area of jurisdiction a number of headmen exercise authority”.

²⁵⁰ Aiyedun and Ordor 2016 *Law, Democracy & Development* at 170-171.

²⁵¹ Stayt *Bavenda* at 221; Kgosimore 2002 *Acta Criminologica* at 72; Tshela 2004 *SACJ* at 13.

²⁵² Stayt *Bavenda* at 221; Kgosimore 2002 *Acta Criminologica* at 72; Naudé *et al* 2003 *Acta Criminologica* at 1; Skelton 2002 *British Journal of Criminology* at 499.

²⁵³ Prinsloo 1998 *Acta Criminologica* at 76; Aiyedun and Ordor 2016 *Law, Democracy & Development* at 168; Kgosimore 2002 *Acta Criminologica* at 72. The idea of sharing a meal is similar to the process observed in sentencing circles (one of restorative justice practices discussed above), see Pranis *Circles* at 119; United Nations Office on Drugs and Crime *Restorative Justice Programmes* at 25; Bazemore and Griffiths 1997 *Federal Probation* at 25.

²⁵⁴ See discussion above at 3.5.2. See also South African Law Commission *Community Dispute Resolution Structures* at iv; Skelton and Frank *Conferencing in South Africa* at 106.

meaning for some young black people who are urbanised, the vast majority of black people still live in rural areas and follow the practice (traditional justice system) as stated. That is why there is a process underway to regulate these dynamic institutions.²⁵⁵

3.5.4 The connection between the African traditional processes of justice and restorative justice

Notwithstanding the informal nature of community-based dispute resolution forums, researchers assert that there is a “resounding resonance between restorative justice and justice as practiced by Africans through community courts and chiefs’ courts”.²⁵⁶ This assertion is confirmed by Skelton,²⁵⁷ who identifies some common features between restorative justice and the African traditional processes of justice. As it has also been evident from the discussion above, one of the similarities between restorative justice and the African traditional processes of justice is that both approaches seek to achieve reconciliation, restoration and harmony. Another similarity is that they both emphasise the rights and duties of the parties in restoring the harm caused by crime.²⁵⁸ The third element common to both restorative justice and the African traditional processes of justice is the simplicity and informality of procedure.²⁵⁹ The fourth common feature is that they both encourage participation in, and ownership of, the conflict.²⁶⁰ The fifth point is that both have a powerful process that is likely to bring healing.²⁶¹ A sixth element that is common to both is the emphasis on restitution.²⁶² One other notable similarity is that their decisions are based on consensus.

Despite the similarities, Skelton²⁶³ notes that there are some elements of the traditional justice processes, which are inconsistent with restorative justice practice in a modern constitutional society. One is the dominance of males and adults, and tendency to favour corporal punishment. However, she argues that “to draw from the past processes does not mean that the injustices of the past need to be taken along with the wisdom from the past”. Hence,

²⁵⁵ The introduction of the Traditional Courts Bill as referred to in the discussion that follows, is an indication that traditional justice still plays a significant role in African traditional communities.

²⁵⁶ Tshehla 2004 SACJ at 1. See also Skelton 2007 *Acta Juridica* at 231; Hargovan 2012 *SA Crime Quarterly* at 14.

²⁵⁷ Skelton 2007 *Acta Juridica* at 231.

²⁵⁸ At 232.

²⁵⁹ At 234.

²⁶⁰ At 236.

²⁶¹ *Ibid.*

²⁶² At 237.

²⁶³ At 238.

rediscovery of the African traditional processes of justice means, “using the praxis and wisdom of our foreparents as interpretive tools to enlighten present generations of Africans”.²⁶⁴

Interestingly, the link between restorative justice and the African traditional processes of justice is also emphasised in the Traditional Courts Bill 2017 [B1-2017],²⁶⁵ which provides that one of its objectives is to “affirm the values of the traditional justice system, based on restorative justice and reconciliation”. However, despite this noble aim, the Bill has received much criticism from various quarters.²⁶⁶ Criticism relevant to the current discussion is that the Bill fails to recognise all the different traditional courts, and that the traditional courts established in terms of the Bill would be professional institutions, and not in line with the traditional “community-based discussions forums” where everyone present can participate in the hearing and be involved in determining the appropriate solution, and the fact that it makes provision for legal representation (which was traditionally not allowed in customary courts).²⁶⁷

3.6 The potential benefits of restorative justice

3.6.1 Introduction

The use of restorative justice have many potential benefits. Among them are providing opportunities for victims to receive restitution, increasing satisfaction with the justice system, and reducing reoffending as well as the costs of criminal justice. The following discussion looks at each of these benefits.

3.6.2 Providing opportunities for victims to receive restitution

One of the important advantages of restorative justice is that it provides opportunities for victims to receive restitution. This is in sharp contrast to the conventional criminal justice system. As mentioned elsewhere, “if one looks at the legal systems of different countries, one seeks in vain a country where a victim of crime enjoys a certain expectation of full restitution for his injury”.²⁶⁸ Restitution can take different forms. Apart from its narrow meaning as payment for damages suffered (material restitution), it can also take the form of symbolic restitution, such as apology

²⁶⁴ Makang as cited by Skelton 2007 *Acta Juridica* at 238.

²⁶⁵ See the Preamble of the Traditional Courts Bill. See also Bekker and Van der Merwe 2009 *De Jure* at 246; Rautenbach and Bekker *Legal Pluralism* at 228.

²⁶⁶ Rautenbach and Bekker *Legal Pluralism* at 228.

²⁶⁷ *Ibid.*

²⁶⁸ Schafer *Compensation and Restitution* at 117. See also Gavrielides 2016 *Victims & Offenders* at 72.

or community service. Indeed, studies found that the majority of restorative justice meetings have resulted in restitution agreements and most of these agreements are complied with.²⁶⁹ Notably, apology was included as one of the conditions in most agreements.²⁷⁰ Indeed, apart from being the common outcome of the restorative justice process, apology is seen as an important component of restitution. From a restorative justice point of view, material restitution alone is seen as not sufficient to heal the harm of crime;²⁷¹ apology is an essential component of this objective.

As far as material restitution is concerned, payment of restitution has been described as providing both a material and non-material benefit to the victim.²⁷² Restitution is said to provide a sanction that is more clearly related to the harm caused by crime than punitive measures, and can help to restore the victim to the position he or she occupied before the crime.²⁷³ For proponents of restorative justice, such restitution is important for its symbolic value (the fact the offender has wronged the victim and therefore owes a debt) rather than for its material value.²⁷⁴ It is accepted that in some cases, the offender will not be able to make adequate compensation for all the material harm he caused. The value is not placed on how much compensation offenders can pay, but rather on what they can do to repair the harm.²⁷⁵ Research shows that victims see restitution as important because it is a gesture of taking responsibility for the harm caused by crime.²⁷⁶

Apart from helping victims to manage their material loss, payment of restitution can also help to restore the victims' shattered sense of justice.²⁷⁷ Experience shows that victims who do not receive compensation for their harm suffered as result of crime are more likely to feel

²⁶⁹ Umbreit and Armour *Restorative Justice Dialogue* at 131,165.

²⁷⁰ Umbreit and Armour *Restorative Justice Dialogue* at 100,131; Shapland 2016 *Oxford Journal of Law and Religion* at 103; Shapland *et al The Second Report from the Evaluation of Three Schemes* at 66; Dhimi 2016 *Contemporary Justice Review* at 36.

²⁷¹ Johnstone *Ideas, Values, Debates* at 77; London *From the Margins to the Mainstream* at 117.

²⁷² London *From the Margins to the Mainstream* at 95.

²⁷³ Bright available <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-3-programs/restitution/#sthash.XeGmCqP5.dpbs> (accessed on 23/01/2019). Cf Barnett *Restitution* at 53.

²⁷⁴ Johnstone *Ideas, Values, Debates* at 77. Cf Zehr *The Little Book* at 15.

²⁷⁵ Cf Hayes 2006 *Contemporary Justice Review* at 373; Strang *Agenda on Victims* at 98; Braithwaite *Does Restorative Justice Work* at 269-270; Bidois 2016 *Commonwealth Law Bulletin* at 609; Shapland 2016 *Oxford Journal of Law and Religion* at 102.

²⁷⁶ Strang *Justice for Victims* at 184-185.

²⁷⁷ Cf Van Dijk *Ideological Trends* at 125; London *From the Margins to the Mainstream* at 95; Johnstone *Ideas, Values, Debates* at 66.

dissatisfied with the justice system. According to research, most victims in the case of court-ordered compensations (as opposed to restitution as an outcome of a restorative justice process) either receive their compensation after a long delay if not being paid at all.²⁷⁸ Hence, the non-payment of compensation has not only been seen as a source of real dissatisfaction for victims, but also a reminder of the crime committed against them.²⁷⁹ This dovetails with “a general sense of being forgotten by the system once the case has been heard, which can leave victims feeling that they are lacking ‘closure’”.²⁸⁰ In contrast and as highlighted above, research in the field of restorative justice shows a high rate of compliance with restitution agreements (assuming that they included the payment of compensation).

Besides compensation, as mentioned above, another important component of restitution is apology. According to proponents of restorative justice, payment of compensation on its own is not sufficient to repair the harm suffered by the victim. It is argued that although payment of compensation may mitigate some of the harm associated with victimisation, it does not redress the degradation suffered at the hands of the offender.²⁸¹ It needs to be corroborated by a sincere apology.²⁸² The claim is that the offering of apology by the offender and the communication of denunciation by society can restore the loss of self-worth and denigrated status of the victim.²⁸³ It is believed that it is through expressive acts rather physical punishment that the victim can be vindicated and the psychological harm of the crime repaired.²⁸⁴

The evidence shows that victims want apologies,²⁸⁵ and often report to have forgiven offenders who apologised during restorative justice meetings.²⁸⁶ A forgiving disposition may be due to the fact that victims often reported that wanting to help offenders was an important reason for their

²⁷⁸ Rossetti *et al* *Victims' Justice* at 23. Cf Wright *Making Good* at 243.

²⁷⁹ Rossetti *et al* *Victims' Justice* at 23.

²⁸⁰ *Ibid.*

²⁸¹ London *From the Margins to the Mainstream* at 95-96.

²⁸² London *From the Margins to the Mainstream* at 96; Johnstone *Ideas, Values, Debates* at 77.

²⁸³ London *From the Margins to the Mainstream* at 96.

²⁸⁴ *Ibid.*

²⁸⁵ Strang *Repair or Revenge* at 20; Strang and Sherman 2003 *Utah Law Review* at 22; Armour and Umbreit *The Paradox of Forgiveness* at 497; Allan *et al* 2014 *Psychiatry, Psychology and Law* at 177; Dhimi 2016 *Contemporary Justice Review* at 32; Larkins *Apology Effectiveness* at 2.

²⁸⁶ Armour and Umbreit *The Paradox of Forgiveness* at 495; Hayes 2006 *Contemporary Justice Review* at 377; Strang and Sherman 2003 *Utah Law Review* at 28; Shapland *et al* *The Second Report from the Evaluation of Three Schemes* at 67.

participation in the meetings.²⁸⁷ Yet, on some occasions, the opportunity to offer and receive apology appeared to be the main reason why victims and offenders decided to participate in restorative justice meetings.²⁸⁸ Hence, apology may at times be the only and main outcome of the restorative justice process.²⁸⁹

There are strong indications that a sincere apology is more important to victims than material restitution.²⁹⁰ However, this does not suggest that material restitution should be discounted. As indicated above, payment of compensation can ameliorate some of the damage suffered by the victim. Nevertheless, apologies are regarded as “central to the process of restoration”.²⁹¹ Several authors point out that a sign of repentance is a precondition for any interaction between the offender and the victim.²⁹² In essence, “one cannot begin a restorative justice process by announcing ‘let’s reconcile’, ‘let’s negotiate’, or ‘let’s reintegrate’”²⁹³ without first apologising for the harm caused.

When offenders are encouraged to accept responsibility for their actions and able to offer a sincere apology, forgiveness and reconciliation are more likely.²⁹⁴ Such a forgiveness may lead to the victim almost achieving full emotional restoration.²⁹⁵ Indeed, evidence shows that victims see emotional restoration as more important than financial compensation.²⁹⁶ As victims themselves say, “emotional harm is healed, as opposed to compensated for, only by an act of emotional repair”.²⁹⁷

²⁸⁷ Armour and Umbreit *The Paradox of Forgiveness* at 495. See also Shapland 2016 *Oxford Journal of Law and Religion* at 102.

²⁸⁸ Dhami 2016 *Contemporary Justice Review* at 32.

²⁸⁹ *Ibid* at 39.

²⁹⁰ Hayes 2006 *Contemporary Justice Review* at 373; Strang *Agenda on Victims* at 98; Braithwaite *Does Restorative Justice Work* at 269-270; Bidois 2016 *Commonwealth Law Bulletin* at 609; Shapland 2016 *Oxford Journal of Law and Religion* at 102 (“Though offenders often wanted to apologize *and* to repay the harm done, only a few victims wanted such repayment (meaning compensation)”).

²⁹¹ Strang and Sherman 2003 *Utah Law Review* at 28; Strang *Justice for Victims* at 186; Hayes 2006 *Contemporary Justice Review* at 374; Allan *et al* 2014 *Psychiatry, Psychology and Law* at 177.

²⁹² Daly *Retributive and Restorative Justice* at 45; Retzinger and Scheff *Emotions and Social Bonds* at 103-104; Strang *Justice for Victims* at 187.

²⁹³ Daly *Retributive and Restorative Justice* at 45. See also Strang *Justice for Victims* at 187.

²⁹⁴ Hayes 2006 *Contemporary Justice Review* at 375.

²⁹⁵ Hayes 2006 *Contemporary Justice Review* at 374; Strang and Sherman 2003 *Utah Law Review* at 28; Larkins *Apology Effectiveness* at 2.

²⁹⁶ Strang *Repair or Revenge* at 18; Strang and Sherman 2003 *Utah Law Review* at 22.

²⁹⁷ Strang and Sherman 2003 *Utah Law Review* at 22.

However, it should be noted that although apology can lead to beneficial outcomes to victims, research indicates that it “may not always make victims ‘feel better’ or help ‘repair the harm’”.²⁹⁸ Nevertheless, while apology may not be relevant in all restorative situations, there is no doubt that it plays an important role in the appropriate situations.²⁹⁹

As with compensation, apology can serve a variety of important functions. Apart from restoration, another benefit of apology is that it can have positive long-term effects on offenders.³⁰⁰ There is a good reason to believe that when the offender genuinely regrets his actions, he will try to do better in the future. In other words, he will avoid repeating the wrong.³⁰¹ This notion is supported by research, which demonstrates that offenders who fail to apologise to victims are more likely to reoffend than those who apologised.³⁰² Therefore, the positive outcomes of offering apologies can help to reduce the likelihood of reoffending among offenders and further contact with the criminal justice system, thus benefitting both offenders and society.³⁰³ More interestingly, it is reported that apology can also function as deterrence to potential offenders. It is asserted that a public apology can discourage others from committing a similar crime.³⁰⁴

However, for apology to elicit positive outcomes, it needs to be effective.³⁰⁵ An effective apology consists of three components, namely affirmation, affect and action.³⁰⁶ The affirmation component of apology requires offenders to admit responsibility and explain their behaviour. The second component, affect, requires offenders to show that they are also distressed by their own behaviour. Lastly, action requires offenders to take steps to redress the harm caused by their behaviour, including reassurance to victims that they will not commit the offence again.³⁰⁷

²⁹⁸ Dhimi 2012 *Critical Criminology* at 56.

²⁹⁹ Allan *et al* 2014 *Psychiatry, Psychology and Law* at 177.

³⁰⁰ Hayes 2006 *Contemporary Justice Review* at 373.

³⁰¹ Allan *et al* 2014 *Psychiatry, Psychology and Law* at 177.

³⁰² Morris and Maxwell 1997 *The Prison Journal* at 131; Allan *et al* 2014 *Psychiatry, Psychology and Law* at 177; Hayes 2006 *Contemporary Justice Review* at 373; Umbreit and Armour *Restorative Justice Dialogue* at 153; Larkins *Apology Effectiveness* at 3; Dissel *Victim-Offender Conferencing* at 98-99.

³⁰³ Larkins *Apology Effectiveness* at 3.

³⁰⁴ Jordaan 2018-07-03 *Timeslive*.

³⁰⁵ Larkins *Apology Effectiveness* at 3.

³⁰⁶ Slocum *et al* 2011 *Australian Journal of Psychology* at 86. See also Larkins *Apology Effectiveness* at 4; Allan *et al* 2014 *Psychiatry, Psychology and Law* at 178.

³⁰⁷ Slocum *et al* 2011 *Australian Journal of Psychology* at 87-90.

Arguably, restorative justice provides a setting within which the positive outcomes of apology can emerge. When examined in contrast to the traditional court process which encourages offenders to deny responsibility and prescribes punishments that are often not related to the reparation (restitution) of harm,³⁰⁸ restorative justice processes encourage telling of the truth and making of reparation,³⁰⁹ which is often accompanied by apology.³¹⁰ Yet apology “is a component that is most often completely absent from conventional criminal justice processes, even when an offender decides to plead guilty”.³¹¹ Notably, a research from three schemes has found that offenders were more likely to apologise to victims if their cases were to be handled through restorative justice process as opposed to the traditional court process.³¹²

3.6.3 Increasing satisfaction with the justice system

One of the prominent concerns with the conventional criminal justice system has been the low levels of satisfaction experienced by victims.³¹³ This has largely to do with the nature of the justice system. As Umbreit *et al* put it,

“Traditionally, victims have been left out of the justice process. Neither victim nor offender have had opportunities to tell their stories and to be heard. The state has somehow stood in for the victim, and the offender has seldom noticed how his or her actions have affected real, live people. Victims, too, have been left with stereotypes to fill their thoughts about offenders”.³¹⁴

Put differently, those who are most affected by crime have been excluded from the justice process,³¹⁵ which is largely run by professionals. Indeed, the state (prosecutors) and lawyers have been particularly good at stealing the conflict from the parties who are directly affected by crime.³¹⁶ No matter how competent these professionals may be in their respective roles, they do not possess the necessary knowledge for successfully addressing the needs of the victim

³⁰⁸ Pointer available at <https://lindseypointer.com/2016/05/30/restorative-justice-facilitates-effective-apologies/> (accessed on 13/07/2018).

³⁰⁹ Umbreit and Armour *Restorative Justice Dialogue* at 55.

³¹⁰ See footnote 270 above.

³¹¹ Schmid 2002 *VUWLR* at 116.

³¹² Shapland *et al The Second Report from the Evaluation of Three Schemes* at 34. See also Dhami 2016 *Contemporary Justice Review* at 32.

³¹³ Cf Schmid 2002 *VUWLR* at 117; Barton 2000 *Australian Journal of Professional and Applied Ethics* at 1.

³¹⁴ Umbreit *et al* 2001 *Federal Probation* at 30.

³¹⁵ See discussion above at 3.3.2.

³¹⁶ Christie *Conflicts* at 38-41; Roche *Accountability* at 31; McCold *The Role of Community in Restorative Justice* at 168; Johnstone 2017 *Restorative Justice: An International Journal* at 384. Cf discussion above at 3.3.2.

and offender in the criminal justice conflict. Only parties themselves and their close community of care (family members and friends) have the required knowledge of their personal needs and able to come up with adequate responses.³¹⁷ Hence, outcomes and decisions imposed by professionals tend to prove unhelpful and often results in less satisfaction from the affected parties.³¹⁸

In contrast and as previously shown, restorative justice offers victims, offenders and other interested stakeholders the opportunity to participate in the justice process, which enables the parties to talk about the crime, its impact and solutions.³¹⁹ And this often translates into increased satisfaction with the justice system.³²⁰ Indeed, victims often see the opportunity to talk about the crime and express emotions as the most satisfying part of the restorative justice process.³²¹ Victims' experience of satisfaction is well illustrated by the following comments:³²²

"I got to see the individual in a different light, when he wasn't as hostile as he was at the time of the offense. We were able to speak one on one".

"It was helpful to look at his face and tell him how I felt".

"We worked things out because we got to sit down and talk together, which we had never done before. We resolved it".

Similarly, offenders often appreciate the opportunity to explain to victims what actually happened and consider this to be the most satisfying part of the process.³²³ Offenders' experience of satisfaction is evident in the following comments:³²⁴

"[The process] lifted the weight off my back. I was able to apologize and talk and have my story heard".

³¹⁷ Barton 2000 *Australian Journal of Professional and Applied Ethics* at 1.

³¹⁸ *Ibid.*

³¹⁹ See discussion above at 3.4.

³²⁰ Rossetti *et al Victims' Justice* at 27.

³²¹ Umbreit *Victim Offender Mediation* at 228-229; Umbreit and Armour *Restorative Justice Dialogue* at 130; Kurki *Restorative Justice Practices* at 295.

³²² Umbreit *Victim Offender Mediation* at 228.

³²³ Kurki *Restorative Justice Practices* at 295; Umbreit *Victim Offender Mediation* at 228-229.

³²⁴ Umbreit *Victim Offender Mediation* at 229.

“[The victim] turned out to be very nice person, far more reasonable than had appeared at the time of the incident”.

“[In restorative justice process] you can express yourself. It’s more private and more informal than the court”.

Indeed, restorative justice has been remarkable in terms of providing both emotional and psychological healing for the parties. Besides being finally listened to, victims expressed that due to their participation in restorative justice encounters, offenders no longer have control over them, they are no longer preoccupied with offenders, they no longer see offenders as monsters, they felt more trusting in their relationships with others, they are less fearful, they no longer feel suicidal, and they become less angry.³²⁵

For offenders, the overall effects included discovering emotions, feelings of empathy, increasing realisation of the impact of their acts, increasing self-awareness, opening their eyes to the outside world, as opposed to closed institutional thinking, feeling good for having tried the process, and achieving peace of mind in knowing one has helped a former victim.³²⁶

More interestingly, the healing impact of restorative justice has not gone unnoticed by the judiciary. Abramson has shared how she witnessed the judges being moved by the impact of restorative justice as follows:

“I have sat in court and watched judges be moved after learning about the outcomes of restorative justice processes that those in court had participated in. One judge said, ‘You and your restorative justice program brought about the healing outcomes that I never could’”.³²⁷

Among the reasons for high levels of satisfaction with restorative justice are that victims and offenders feel being treated fairly and in a respectful manner by the facilitator; victims feel that they have a say in what should happen next (decisions are not imposed on them) and they are pleased with restitution agreements.³²⁸

³²⁵ Umbreit *et al Victims of Severe Violence* at 139. See also Umbreit and Armour *Restorative Justice Dialogue* at 215.

³²⁶ *Ibid.*

³²⁷ Abramson 2018-05-11 *Policy Options Politiques*.

³²⁸ Daly *Mind the Gap* at 225-226; Kurki *Restorative Justice Practices* at 298-300. Cf Cameron and Thorsborne *Restorative and School Discipline* at 182.

Consistent with high levels of satisfaction, victims and offenders frequently report that they would recommend the process to others in the same situation.³²⁹ Notably, there has been an increasing number of victims requesting the opportunity to meet offenders in a restorative justice setting.³³⁰

3.6.4 Reducing reoffending

3.6.4.1 Introduction

As discussed in chapter two, the other foremost concern with the current criminal justice system is that it does not reduce reoffending, either because it fails to deter offenders, or to rehabilitate them. This section examines the claim that restorative justice has the potential to reduce reoffending.³³¹ It begins by providing a theoretical explanation why restorative justice might reduce reoffending. This is followed by an overview of studies on the impact of restorative justice on reoffending. The last part of this section provides some reasons why restorative justice might help to rehabilitate offenders.

3.6.4.2 Theoretical explanation why restorative justice might reduce reoffending

As indicated above, the claim about restorative justice is that it could lead to reduction in reoffending. Barton provides some theoretical explanations why restorative justice might be more effective in reducing reoffending than the current criminal justice system. They are:³³²

- Reversal of moral disengagement
- Social and moral development
- Emotional and moral psychological healing
- Reintegrative shaming

³²⁹ Shapland *et al* *The Third Report from the Evaluation of Three Schemes* at 4; Umbreit *et al* *Victims of Severe Violence* at 139; Umbreit *et al* 2001 *Federal Probation* at 31; Kurki *Restorative Justice Practices* at 299. Cf Naudé 2006 *Journal for Juridical Science* at 101.

³³⁰ Umbreit *et al* *Victims of Severe Violence* at 125.

³³¹ See discussion above at 1.3.

³³² Barton 2000 *Australian Journal of Professional and Applied Ethics* at 3. See also Schmid 2002 *VUWLR* at 121.

It is believed that when people engage in actions that are harmful to another person, they silence their conscience by various means of moral disengagement, which include blaming or dehumanising the victim, lessening their personal responsibility for the wrongful conduct, and denying the seriousness of the harmful effects on others.³³³ A well-run restorative justice process where affected people meet face to face with offenders to talk about the harm their actions caused seriously challenge and often successfully reverses internal mechanism of disengagement.³³⁴ In essence, restorative justice engages “the offender at a moral psychological level with the consequences of their behaviour”.³³⁵

Closely linked to the above is the theory of social and moral development. This theory stems from the premise that “learning from one’s own and other people’s mistakes and misdeeds forms an important part of an individual’s social and moral development”.³³⁶ This is based on the belief is that in a well-run restorative justice process, there is going to be a thorough exploration of the details of the crime and its impact to people, including the offender.³³⁷ Even more significantly, participants will express their views about why they consider the offender’s behaviour as unacceptable and why it will not be tolerated, after which the focus will turn to finding appropriate ways of repairing the harm caused by such behaviour. After having repaired the harm appropriately, the offender is welcomed back into the moral fold with an expectation that he has learned his lesson and that he will behave properly in the future.³³⁸ This supports the premise that the moral education function of punishment is more effective than the deterrent function.³³⁹

Barton³⁴⁰ therefore believes that restorative justice programmes, such as a circle or conference where important people in the offender’s life are active participants could have a significant impact to the offender’s moral development. He points out that,

³³³ Barton 2000 *Australian Journal of Professional and Applied Ethics* at 3. See also Schmid 2002 *VUWLR* at 122.

³³⁴ Barton 2000 *Australian Journal of Professional and Applied Ethics* at 3-4. See also Schmid 2002 *VUWLR* at 122.

³³⁵ Schmid 2002 *VUWLR* at 121.

³³⁶ Barton 2000 *Australian Journal of Professional and Applied Ethics* at 5.

³³⁷ *Ibid.*

³³⁸ *Ibid.*

³³⁹ Braithwaite *Shame and Reintegration* at 141.

³⁴⁰ Barton 2000 *Australian Journal of Professional and Applied Ethics* at 7. See also Schmid 2002 *VUWLR* at 122.

“When, in addition to the victim and their supporters, the most important people in the offender’s life confront the offender with their unacceptable behaviour and make it clear that they are shocked, hurt, and ashamed by it, and that is intolerable, there is tremendous pressure on the offender to re-examine their moral outlook and the kind of the person they want to be”.³⁴¹

“In effect, restorative justice meetings confront recidivist offenders with a most critical choice. They can either choose to persist in their predatory ways and endure the pain of disapproval from their loved ones, or they can take a good hard look at the current course of their lives and ask themselves whether it really is worth it, considering all the pain and hardship it causes for everybody, not least of all themselves. Recognizably, this is a confronting and significant existential and moral life decision that a recidivist offender is pressed to make, but the key to its success lies in that the decision is socially forced on the offender by their own loved ones in an overall supportive and caring environment”.³⁴²

The idea being articulated is that restorative justice processes can bring about a positive change in the moral outlook of the offender. Thus, the assumption is that this moral transformation will at least leads the offender to develop feelings of empathy for others and attempt to change his or her behaviour. The belief is that when this happen, the offender will be more likely to refrain from behaving in a manner that continues to cause harm to people. This is supported by Pointer,³⁴³ who asserts that people desist from committing further crimes not because of a fear of punishment but because of having developed empathy. She believes that empathy is something that is capable of being developed in people and that restorative justice processes create a conducive space for the development of empathy in the community.³⁴⁴

The other interesting notion linked with crime reduction is the theory of reintegrative shaming.³⁴⁵ The claim is that restorative justice processes place more emphasis on reintegrative as opposed to disintegrative shaming.³⁴⁶ According to Braithwaite³⁴⁷ who draws a distinction

³⁴¹ Barton 2000 *Australian Journal of Professional and Applied Ethics* at 7-8.

³⁴² *Ibid* at 8.

³⁴³ Pointer available at <https://lindseypointer.com/2016/07/06/how-effective-is-restorative-justice-when-followed-by-a-punitive-sentence/> (accessed 13/07/2018).

³⁴⁴ *Ibid*.

³⁴⁵ This is based on Braithwaite’s theory of reintegrative shaming. See Braithwaite *Shame and Reintegration*.

³⁴⁶ Kim and Gerber 2010 *Asia Pacific Journal of Police & Criminal Justice* at 3; Schmid 2002 *VUWLRat* 122; Harris 2006 *Journal of Social Issues* at 333.

³⁴⁷ Braithwaite *Shame and Reintegration* at 12,15; Kim and Gerber 2010 *Asia Pacific Journal of Police & Criminal Justice* at 3-4; Kim and Gerber 2012 *International Journal of Offender Therapy and Comparative Criminology* at 1065.

between the two kinds of shame, disintegrative (stigmatisation) shaming creates a class of outcast and thus prevents reacceptance of offenders into society, while reintegrative shaming maintains bonds of love and respect, and sharply terminates disapproval with forgiveness, rather than amplifying deviance through stigmatisation. In essence, reintegrative shaming basically means that offenders are also shamed but once they have served their sentences, they are accepted back as members of that society.³⁴⁸ In his view, this form of shaming can lead to a more effective way of controlling crime.³⁴⁹ Of course, this depends on society creating an environment in which accepting offenders back into society becomes the primary objective, rather than isolating offenders through shaming.³⁵⁰ Braithwaite³⁵¹ claims that societies that are more forgiving and respectful while taking crime seriously tend to have lower crime rates than societies that shame and humiliate offenders, citing Japan as the prime example.

Ideally, “the best place to see reintegrative shaming at work is”³⁵² in restorative justice. This is particularly true in restorative justice programmes such as conferences and circles, where important people in the life of the offender are actively involved in the process. When such people denounce the offender’s behaviour while at the same time showing respect and acceptance towards the offender as a person, the larger the impact on the offender.³⁵³ It is under such circumstances that it becomes more likely that the offender will deeply reflect about what he has done and who he really is. When this occurs, it is almost certain that the offender will side with his family and community and will therefore not hesitate to reject his own conduct as totally wrong.³⁵⁴

In terms of the theory of reintegrative shaming as explained above, reintegrative element of restorative justice thus reduces reoffending by allowing the offender to remain part of society and avoiding disintegrative shaming that perpetuates criminal behaviour.³⁵⁵ According to Harris, reintegrative shaming reduces reoffending “not because it results in shame, but because

³⁴⁸ Lotter 2018-09-18 *IOL News*.

³⁴⁹ Braithwaite *Shame and Reintegration* at 4; Braithwaite 2000 *Canadian Journal of Criminology* at 281. See also Maxwell and Morris *The Place of Shame* at 134.

³⁵⁰ See Gerber 2012 *International Journal of Offender Therapy and Comparative Criminology* at 1065; Kim and Gerber 2010 *Asia Pacific Journal of Police and Criminal Justice* at 3. Cf discussion above at 3.3.3.

³⁵¹ Braithwaite 2000 *Canadian Journal of Criminology* at 282-283. Cf Lotter 2018-09-18 *IOL News*.

³⁵² Braithwaite *Shame and Reintegration* at 56; Barton 2000 *Australian Journal of Professional and Applied Ethics* at 10.

³⁵³ Barton 2000 *Australian Journal of Professional and Applied Ethics* at 10.

³⁵⁴ *Ibid.*

³⁵⁵ See Levrant *et al* 1999 *Crime & Delinquency* at 17.

it provides a mechanism that assists offenders to manage their feelings of shame in more constructive ways”.³⁵⁶

Although restorative justice is considered as having the potential to reduce reoffending, it should be noted that reducing reoffending is not its primary objective.³⁵⁷ Therefore, if restorative interventions do prevent future offending, it is supplementary to the outcome of restorative justice processes.³⁵⁸

3.6.4.3 An overview of the impact of restorative justice on reoffending

Research conducted over the past years shows restorative justice as a possible catalyst for reducing reoffending. This is evident from the results of several meta-analysis studies, which examined reoffending patterns. Nugent *et al*³⁵⁹ conducted an in-depth reanalyses of reoffending data reported in four previous studies with a total sample of 1,298 juvenile offenders. Using logistical regression measures, the authors found that young offenders who participated in VOM reoffended at a significant 32 percent lower rate than the youth who did not participate in VOM.³⁶⁰ In a subsequent report, Nugent *et al*³⁶¹ expanded their analysis to include 15 studies, with a combined sample of 9,037 juveniles. The results found that young offenders who participated in VOM committed fewer and less serious crimes as compared to their counterparts.³⁶²

Another study by Bradshaw and Roseborough,³⁶³ relying upon a sample comprised of 11,950 juveniles from VOM and FGC programmes at 25 different service sites and 4 countries, determined that, taken together, the programmes contributed to a 26 percent reduction in reoffending. In a recent study by Sherman *et al*,³⁶⁴ the authors used a random assignment of

³⁵⁶ Harris 2006 *Journal of Social Issues* at 343. See also Robison and Shapland *Reducing Recidivism* at 330.

³⁵⁷ Bazemore and O'Brien *The Quest for A Restorative Model of Rehabilitation* at 32; Robinson and Shapland *Reducing Recidivism* at 322.

³⁵⁸ Bezuidenhout 2007 *Acta Criminologica* at 44; Robinson and Shapland *Reducing Recidivism* at 322; Zehr *The Little Book* at 10; Doolin 2007 *The Journal of Criminal Law* at 432.

³⁵⁹ Nugent *et al* 2001 *Research on Social Work Practice* at 5. See also Bradshaw and Roseborough 2005 *Federal Probation* at 17; Umbreit and Armour *Restorative Justice Dialogue* at 132.

³⁶⁰ Nugent *et al* 2001 *Research on Social Work Practice* at 16.

³⁶¹ Nugent *et al* 2003 *Utah Law Review* at 140. See also Umbreit and Armour *Restorative Justice Dialogue* at 132-133.

³⁶² Nugent *et al* 2003 *Utah Law Review* at 163-164.

³⁶³ Bradshaw and Roseborough 2005 *Federal Probation* at 18. See also Umbreit and Armour *Restorative Justice Dialogue* at 133.

³⁶⁴ Sherman *et al* 2015 *Journal of Quantitative Criminology* at 1.

1880 accused or convicted offenders from ten studies who had consented to meet their consenting victims prior to random assignment, based on “intention-to-treat” analysis. The results found restorative justice conferences to be effective means of reducing the future offending among the kinds of offenders who were willing to give consent to participate in conferences, and when victims were also willing to give consent to the process.³⁶⁵

While efforts have been made to examine as much as possible the empirical evidence on reoffending, it should be noted that it is not the purpose of this section to examine all the available data on reoffending dimension nor claims to have done so. Rather the purpose is to highlight the potential of restorative justice to reduce reoffending. Therefore, there is considerable authority that restorative justice results in some reduction in reoffending. However, it is not strong to justify restorative justice, by itself.

3.6.4.4 Some reasons why restorative justice might help to rehabilitate offenders

As with reducing reoffending, restorative justice is not primarily designed to rehabilitate offenders.³⁶⁶ Nevertheless, if a particular process reflects restorative values and achieves restorative outcomes, it can reasonably be expected³⁶⁷ that the offender will reflect on his or her behaviour.³⁶⁸ One of the reasons why restorative justice might help to rehabilitate offenders is because of the manner it enforces offender accountability. As previously explained, holding offenders accountable in restorative justice includes sensitising them about the consequences of their actions and encouraging them to take responsibility thereof.³⁶⁹ It is believed that if offenders were to realise the impact and consequences of their actions and take responsibility, this would lead to change and a reduction of their criminal behaviour.³⁷⁰ This is based on the assumption that “an offender who has taken responsibility for repairing the harm done, and now

³⁶⁵ *Ibid.*

³⁶⁶ Braithwaite 1999 *Crime and Justice* at 68; Bezuidenhout 2007 *Acta Criminologica* at 44; Robinson and Shapland *Reducing Recidivism* at 322; Bazemore and O’Brien *The Quest for A Restorative Model of Rehabilitation* at 32; Bazemore and Bell *Relationship between Restorative Justice and Treatment* at 119.

³⁶⁷ Morris 2002 *British Journal of Criminology* at 606; Bidois 2017 *Commonwealth Law Bulletin* at 602.

³⁶⁸ See discussion above at 3.6.4.2.

³⁶⁹ See discussion above at 3.3.1.

³⁷⁰ Louw and van Wyk 2016 *Social Work* at 503; Bidois 2016 *Commonwealth Law Bulletin* at 604; Johnstone *Ideas, Values, Debates* at 13.

has restored the trust and confidence of the community is 'rehabilitated' in a far broader sense than can be said of individualised therapeutic measures".³⁷¹

Besides as a mechanism with the potential to rehabilitate offenders, restorative justice might also help to achieve rehabilitation because of its potential to ease the problem of overcrowding in prisons.³⁷² As stated before, overcrowding in prisons is one of the major factors that impede successful rehabilitation of offenders. Because of overcrowding, there is less space to accommodate offenders in humane, safe and secure conditions that are conducive to effective rehabilitation and other aspects of their personal development.³⁷³ This is less likely to be the case with restorative justice. The reason is that restorative justice will permit the use of imprisonment as a last resort and only in circumstances where the offender poses a danger to society.³⁷⁴ This is in contrast to the current criminal justice system, which use imprisonment as the primary form of justice.³⁷⁵ Given the potential of restorative justice to reduce overcrowding in prisons, such reduction would result in more resources becoming available, which may facilitate proper and effective rehabilitation of offenders.³⁷⁶

Lastly and closely related to the above, restorative justice might help to rehabilitate offenders because it provides a sanction that is less stigmatising than imprisonment, and ultimately facilitates reintegration of offenders into their communities.³⁷⁷

³⁷¹ Batley *South African Context* at 27. See also Gxubane 2014 *The Social Work Practitioner-Researcher* at 252.

³⁷² See also Louw and van Wyk 2016 *Social Work* at 496.

³⁷³ See discussion above at 2.5.

³⁷⁴ Skelton 2007 *Acta Juridica* at 241; Van Ness and Strong *Restoring Justice* 2nd ed at 190; Morris 2002 *British Journal of Criminology* at 599.

³⁷⁵ Singh *Community Based Sentences* at 1; Singh 2016 *Journal of Social Sciences* at 4; Jacobson *et al Prison* at 1; Louw and van Wyk 2016 *Social Work* at 494; Clear 2008 *SA Crime Quarterly* at 3.

³⁷⁶ Louw and van Wyk 2016 *Social Work* at 496.

³⁷⁷ Bright available at <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-3-programs/restitution/#sthash.XeGmCqP5.dpbs> (accessed on 23/01/2019). See also discussions above at 3.3.3 and 3.6.4.2.

3.6.5 Reducing the costs of criminal justice

As noted in the foregoing discussion, one of the prominent features of the current criminal justice system is its prominent use of imprisonment. Imprisonment is a costly form of controlling crime.³⁷⁸

In South Africa, the cost of incarceration per offender was at R9 876.00 per month in 2013.³⁷⁹ With the total figure of 163 140 prisoners as reported in 2018,³⁸⁰ this means that it costs South Africa more than 19 billion rand annually to maintain prisoners. Similar numbers for Canada are that, during the 2015-6 financial year, the average cost of maintaining an offender per annum was reported to be CAD116 000 for prisoners in correctional facilities and CAD31 000 in the community (supervised by the correctional services authority) respectively.³⁸¹ With the total number of 22,872 offenders (14,639 in custody and 8,233 in the community), the expenditure totaled approximately CAD2.4 billion.³⁸² However, the cost does not translate into effective crime reduction, based on the fact that most prisoners are repeat offenders.³⁸³

While there is no denying that the cost of maintaining our prisons is extremely high and needs to be reduced, this would be difficult if not impossible to achieve unless we change the way we respond to crime and offenders. The reason for this is that apart from people reoffending, there are also new offenders who are taken into custody daily. Research shows that in South Africa approximately 30 000 offenders are released from prisons every month, yet almost the same number of offenders is incarcerated during the same period.³⁸⁴ This implies that the levels of incarceration will remain the same even if some prisoners are released. In fact, a 2017 report found that there were already more than ten million prisoners worldwide and that this number was increasing.³⁸⁵

³⁷⁸ Jacobson *et al Prison* at 2; NICRO *South African Prisons* at 19; Correctional Service Canada available at <http://www.csc-scc.gc.ca/publications/005007-3024-eng.shtml> (accessed on 31/07/2018); Moss *et al 2018 Victims & Offenders* at 1.

³⁷⁹ NICRO *South African Prisons* at 19.

³⁸⁰ See discussion above at 2.5.

³⁸¹ Correctional Service Canada available at <http://www.csc-scc.gc.ca/publications/005007-3024-eng.shtml> (accessed on 31/07/2018).

³⁸² *Ibid.*

³⁸³ See discussions above at 1.2 and 2.5. See also Harris 2016-12-22 *iPolitics*.

³⁸⁴ Singh 2016 *Journal of Social Sciences* at 4.

³⁸⁵ Jacobson *et al Prison* at 1.

In contrast, restorative justice has the potential to reduce the costs of criminal justice. Research shows that diverting offenders from the mainstream criminal justice system to community-based justice (restorative justice) programs saves CAD1604 per offender.³⁸⁶ Similarly, another study shows that diverting cases to restorative justice schemes results in cost savings of £7,050 per offender, and could save society up to £1 billion over a decade.³⁸⁷ If the level of reoffending is also reduced, which is indicated by several studies,³⁸⁸ then there is an obvious reduction in the cost. This has been claimed to be as much as £185 million for over a period of two years.³⁸⁹

Other reasons why restorative justice is less costly than the current criminal justice system is because its sessions are usually mediated by volunteers.³⁹⁰ Moreover, less serious cases can often be handled in a few hours (saves time). Also, its sessions do not require legal representation, which means the cost impact of stress for victims and offenders is better managed.³⁹¹

Some studies found that victims consider restorative justice as better than the current criminal justice system in terms of saving costs and time.³⁹² One victim believed that to avenge a crime through criminal prosecution cost more money and time than reconciliation and compensation, which are more likely in an alternative method of resolving disputes such as restorative justice.³⁹³ This is exemplified in the quote below by the victim:

“Personally, I do believe that it cost more to avenge a wrong than to reconcile. Moreover, allowing the offender to face up to his sins is the first step to his rehabilitation. So I will want apology and if he has the means of paying for the damage, I would request compensation”.³⁹⁴

In another instance, a secondary victim of death due to a car accident noted that dealing with such a serious offence through restorative justice (particularly when the offender is repentant as he was in this case) is better because it saves time, money and other secondary pains

³⁸⁶ Department of justice Canada *Aboriginal Justice strategy* at 57.

³⁸⁷ Matrix Evidence *Economic Analysis of Interventions* at 3.

³⁸⁸ See discussion above at 3.6.4.3.

³⁸⁹ Rossetti *et al Victims' Justice* at 29.

³⁹⁰ Carreira Da Cruz 2010 *Effectius Newsletter* at 3.

³⁹¹ *Ibid.*

³⁹² Omale *Restorative Justice and Victimology* at 148.

³⁹³ *Ibid.*

³⁹⁴ *Ibid.*

associated with traditional criminal justice.³⁹⁵ This is expressed in the following (verbatim) quote:

“If a matter can be resolve amicably why wasting time and money going to court, anything that gets to the police becomes law. In my own case, the driver was very remorseful. He did not run away from the corpse (accident scene). Others would have done that. He knelt there with his hands in blood up begging ‘it is my fault, please do not kill me’. We were tempted to hit him, but voluntarily we went with him and the corpse to the hospital. When my father was confirmed dead, he wept. He paid the mortuary bill, bought the casket and assisted in giving the old man a befitting burial (which is what my father would have wanted). What else would you have done to such a man? If you kill him in retaliation, you will carry double loads: your own sins and his own sins. So when the police came for prosecution we said, *ba lofi, lokochi yayi* (no case, it was his time)”.³⁹⁶

3.7 Some of the criticisms against restorative justice

3.7.1 Introduction

Following the discussion of some of the potential benefits of restorative justice above, it is necessary to highlight some of the criticisms against it. As Llewellyn puts it, “to see clearly the potential of restorative justice for the transformation of the criminal justice system, we must pay attention to the ideal of justice it offers, as well as the challenge it represents to the logic of the current system”.³⁹⁷

3.7.2 Lack of procedural safeguards

One of the prominent concerns with restorative justice is that it fails to provide procedural safeguards or to protect the rights of offenders.³⁹⁸ It is of considerable importance that those who are suspected of crime are provided with protection from undeserved conviction and punishment.³⁹⁹ Hence, the concern is that in many schemes, cases are referred to restorative justice programmes not after conviction in court, but after the offender has admitted to have committed a crime to the police.⁴⁰⁰ And such admission may take place without the presence

³⁹⁵ *Ibid* at 149.

³⁹⁶ *Ibid*.

³⁹⁷ Llewellyn 2018-05-02 *Policy Options Politiques*.

³⁹⁸ Morris 2002 *British Journal of Criminology* at 601; Marshall *Restorative justice* at 23; Ikpa 2007 *Washington University Journal of Law & Policy* at 311; Levrant *et al* 1999 *Crime & Delinquency* at 7; Brown 1994 *Emory Law Journal* at 1281; Johnstone *Ideas, Values, Debates* at 30-31; Van Ness and Strong *Restoring Justice* 2nd ed at 168; Naudé 2006 *Journal for Juridical Science* at 116.

³⁹⁹ Johnstone *Ideas, Values, Debates* at 30; Marshall *Restorative justice* at 23.

⁴⁰⁰ Johnstone *Ideas, Values, Debates* at 30.

of a lawyer.⁴⁰¹ Furthermore, what the offender admits may fall short of the standard required to convict them of a criminal offence.⁴⁰²

The problem with admission of responsibility is its tendency to infringe the due process right against self-incrimination.⁴⁰³ This is because once offenders are diverted to a restorative justice programme, they are dealt with on the assumption that they are guilty of crime.⁴⁰⁴ Yet offenders might have admitted to wrongdoing because they want to avoid criminal prosecution.⁴⁰⁵ Hence, there is a possibility that the restorative justice process may be unsuccessful and that what the offender has admitted during the process can be used against him at later criminal proceedings.⁴⁰⁶ Even if the offence in question is resolved through a restorative justice process, admissions made during the proceedings could be used against the offender for other crimes.⁴⁰⁷

An example of these possibilities can be seen from the Life Esidimeni arbitration hearing, which was widely seen as an initiative associated with restorative justice philosophy.⁴⁰⁸ The hearing looked into the death of more than 94 mental health patients who were supposed to be in the care of the Gauteng Department of Health.⁴⁰⁹ This process sought to provide family members

⁴⁰¹ *Ibid.*

⁴⁰² *Ibid.*

⁴⁰³ Ikpa 2007 *Washington University Journal of Law & Policy* at 312. Cf Naudé 2006 *Journal for Juridical Science* at 116.

⁴⁰⁴ Johnstone *Ideas, Values, Debates* at 30.

⁴⁰⁵ Marshall *Restorative justice* at 23; Ikpa 2007 *Washington University Journal of Law & Policy* at 315. Cf Naudé 2006 *Journal for Juridical Science* at 116.

⁴⁰⁶ Ikpa 2007 *Washington University Journal of Law & Policy* at 312; Levrant *et al* 1999 *Crime & Delinquency* at 7-8; Brown 1994 *Emory Law Journal* at 1266-1269.

⁴⁰⁷ Ikpa 2007 *Washington University Journal of Law & Policy* at 312.

⁴⁰⁸ Statement by the Life Esidimeni Family Committee available at <http://section27.org.za/2017/10/statement-by-the-life-esidimeni-family-committee/> (“The process that starts today must have real meaning. The hearings must provide information, redress and closure to the affected mental health care users and their families. That means the final chapter can only be written once there is true restorative justice for all the relatives of those who died, and a meaningful and sincere solution to the plight of those who are still in managed care. So what do we believe ‘restorative justice’ represents for the Life Esidimeni 94+”) (accessed on 06/08/2018); Nicolson 2017-10-16 *Daily Maverick* (“The Life Esidimeni arbitration, aimed at promoting restorative justice for relatives of ... mentally ill patients who died”); Toxopeüs 2018-05-09 *Politics Web* (“The Award, together with the hearings, has brought the claimants a measure of restorative justice and closure”).

⁴⁰⁹ Statement by the Life Esidimeni Family Committee available at <http://section27.org.za/2017/10/statement-by-the-life-esidimeni-family-committee/> (accessed on 06/08/2018). This happened after the mentally ill patients were moved from esidimeni health centres to 27 different non-governmental organisations centres, many of which were later found to be operating under invalid licenses, see Ornellas and Engelbrecht 2018 *Social Work* at 298; Phakgadi 2018-02-17 *Eyewitness News*.

with closure and restitution.⁴¹⁰ Interestingly and most probably because of admissions made and the truth uncovered, there are calls from victims' family members⁴¹¹ and government officials,⁴¹² that those who are implicated be criminally prosecuted. This confirms the concern that offenders might end up participating in both processes (restorative justice and criminal prosecution), thereby being punished twice for one offence.⁴¹³

On the other hand, proponents of restorative justice tend not only to be less insistent on procedural safeguards for offenders, but they also often see procedural rules as a barrier to achieving settlements and reconciliation.⁴¹⁴ They argue that restorative justice provides a different protection of offenders' rights by not allowing the offenders' lawyers to become the mouthpiece, while it is the lawyers main objective to minimise the offenders' responsibility or to ensure that they get the most lenient sentences.⁴¹⁵ It is asserted that most lawyers do recognise that their clients' interests lie in achieving the best outcome, and are prepared to advise their clients that they set aside procedural protection to attain such an outcome, and the best example of this are negotiated plea bargains.⁴¹⁶ They therefore believe that it would be in the best interests of restorative justice practitioners and advocates to educate lawyers about their programs. This will increase the likelihood of informed consent by offenders who decide to participate in a restorative process.⁴¹⁷ After all, once that decision is made, it is the offender and not the lawyer who should be the key participant.⁴¹⁸

⁴¹⁰ Statement by the Life Esidimeni Family Committee available at <http://section27.org.za/2017/10/statement-by-the-life-esidimeni-family-committee/> (accessed on 06/08/2018). Cf Toxopeüs 2018-05-09 *Politics Web*.

⁴¹¹ Rahlaga 2017-11-22 *Eyewitness News* (the victim, whose sister is one of the patients died, has called for those who were involved in the project to be criminally charged).

⁴¹² Phakgadi 2018-02-17 *Eyewitness News* (the Minister of Health, Aaron Motsoaledi indicated that criminal prosecution for those liable would be bring a proper closure for the families); Khoza 2018-02-26 *News24* (the premier of Gauteng, David Makhura, said that "he had made a commitment to work with the families to ensure that those who are criminally liable are prosecuted").

⁴¹³ It is reported that the National Prosecuting Authority intends to establish a formal inquest into life esidimeni deaths, with a view to finding evidence that will enable it to successfully prosecute those who are found to be responsible for the deaths, see Karrim 2019-09-17 *News24*; Jordaan 2019-09-17 *Businesslive*.

⁴¹⁴ Johnstone *Ideas, Values, Debates* at 30.

⁴¹⁵ Morris 2002 *British Journal of Criminology* at 602.

⁴¹⁶ Van Ness and Strong *Restoring Justice* 2nd ed at 172.

⁴¹⁷ *Ibid.*

⁴¹⁸ *Ibid.*

3.7.3 Compromises the principle of proportionality

Another important criticism of restorative justice is that it compromises the principle that the punishment should be proportionate to the crime committed.⁴¹⁹ It is often mentioned that public interest should be reflected in the type of sentences imposed upon offenders. According to critics, it is not for the victim to decide how the offender should be dealt with, but a matter of public interest in ensuring that those who commit crimes are punished.⁴²⁰ It is argued that by allowing victims to be part of the decision on how offenders should be punished compromises the principle of proportionality.⁴²¹ This is because victims react differently, and thus tend to have different views on how the matter should be dealt with. Some will be forgiving and others will not, some will be interested in other options of punishment and others will not.⁴²² Therefore, restorative sanctions will not necessarily be proportionate to the seriousness of the crime, but rather a reflection of what the victim feels is necessary.⁴²³

Proponents of restorative justice have responded to the concern regarding disproportionate sentences. Firstly, they argue that a restorative outcome is not the same as punishment in the traditional sense that requires the infliction of pain for its sake, but requires reparation, which seeks the offender to make efforts to repair the harm caused.⁴²⁴ As such, the notion that reparations and responses should be proportionate to the offence is inconsistent with the nature of restorative justice.⁴²⁵ Secondly, while not denying the need for proportionate outcomes, they indicate that the manner in which proportionality in punishment is constructed is in itself problematic. It is argued that there is no reason to assume that only retributive punishment can provide a measure for determining proportionality.⁴²⁶ Thus, instead of linking punishment to the seriousness of the offence, the seriousness of the offence should be linked to the intensity of reparative effort required.⁴²⁷ They therefore believe that deliberative processes (such as in restorative justice)

⁴¹⁹ Doolin 2007 *The Journal of Criminal Law* at 434; Terblanche *Sentencing* at 193; Johnstone *Ideas, Values, Debates* at 31; Cormier "Directions and Principles" at 14; Walgrave *Retribution and Theory Impulses* at 52; Ashworth 2002 *British Journal of Criminology* at 610.

⁴²⁰ Ashworth 2002 *British Journal of Criminology* at 579. See also Doolin 2007 *The Journal of Criminal Law* at 434.

⁴²¹ Ashworth 2002 *British Journal of Criminology* at 586. See also Doolin 2007 *The Journal of Criminal Law* at 434.

⁴²² Ashworth 2002 *British Journal of Criminology* at 586.

⁴²³ Wright *The Concept of Punishment* at 11; Sharpe *Reparation* at 34.

⁴²⁴ Wright and Masters *Justified Criticism* at 55.

⁴²⁵ *Ibid.*

⁴²⁶ Walgrave *Retribution Theory and Impulses* at 53.

⁴²⁷ Walgrave *Retribution Theory and Impulses* at 53. See also Sharpe *Reparation* at 35.

might provide a better way to assess a reasonable and just balance than the current criminal justice system.⁴²⁸

Nevertheless, critics are adamant that the principles of sentencing should also apply even when punishment is called something else.⁴²⁹ They argue that reparation from offenders to victims when accompanied by any amount of coercion (a subtle form of threat of criminal prosecution should the offender refuse to participate in restorative process) constitutes punishment since it complies with the definitional characteristics of punishment, which is deliberate imposition of measures that are unpleasant and burdensome on the person in response to a crime.⁴³⁰

3.7.4 Leads to inconsistent outcomes (sentences)

Closely linked to the foregoing concern is the claim that restorative justice interventions lead to inconsistent outcomes.⁴³¹ As previously highlighted, it is considered a fundamental principle of justice that similar cases should be treated alike.⁴³² Yet this principle would seem not only contrary to what restorative justice would allow but also encourage.⁴³³ Restorative justice involves “individualized responses to crimes”.⁴³⁴ It does not follow the precedent system.⁴³⁵ The crime is therefore resolved when the needs of the parties have been identified and a reparative agreement has been reached.⁴³⁶ As such, there are no uniform outcomes of restorative justice processes.⁴³⁷ Considering what it has been said regarding the fact that victims tend to have different views on how the offender should be dealt with (because they react differently),⁴³⁸ Terblanche highlights the danger of such fact in relation to the principle of consistency as follows:

⁴²⁸ Walgrave *Retribution Theory and Impulses* at 53.

⁴²⁹ Johnstone *Ideas, Values, Debates* at 32.

⁴³⁰ *Ibid.*

⁴³¹ Johnstone *Ideas, Values, Debates* at 31; Terblanche *Sentencing* at 193; Van Ness and Strong *Restoring Justice* 2nd ed at 176; Ashworth 2002 *British Journal of Criminology* at 610; Schmid 2002 *VUWLR* at 130; Kilekamajenga 2018 *SA Crime Quarterly* at 20.

⁴³² See discussion above at 2.5.

⁴³³ Johnstone *Ideas, Values, Debates* at 31.

⁴³⁴ Welsh and Harris *Criminal Justice Policy* at 86.

⁴³⁵ Kilekamajenga 2018 *SA Crime Quarterly* at 20; Skelton 2007 *Acta Juridica* at 235.

⁴³⁶ See discussion above at 3.4. Cf Skelton 2007 *Acta Juridica* at 236; Kilekamajenga 2018 *SA Crime Quarterly* at 20

⁴³⁷ Kilekamajenga 2018 *SA Crime Quarterly* at 20; Wright and Masters *Justified Criticism* at 55.

⁴³⁸ See discussion above at 3.7.3.

“it would be totally unacceptable for one rapist to get off with a sentence characterised by restorative-justice conditions because his victim happens to have the capacity to forgive him, while another, who committed an act of similar heinousness, gets a long prison sentences because his victim cries for revenge”.⁴³⁹

According to proponents of restorative justice, although consistency in punishment is often understood narrowly as requiring similar sentences for people who have committed similar offences, it could as well be interpreted as requiring comparable sentences for comparable offences. This would mean the outcomes or responses may vary as long as they are meaningfully related to the nature and impact of the crime.⁴⁴⁰ Their argument is that this narrow approach to consistency in punishment may lead to gross inconsistencies for victims, since it requires that all similar offences be treated in similar ways, irrespective of the “differential impact of the offence on different victims”.⁴⁴¹ The basis for this argument is that if each offender is punished according to the type of the offence alone, the restitution order may fail to reflect the actual seriousness of the crime, since similar offenders committing similar crimes can bring about different impact.⁴⁴² Although proponents of restorative justice agree that cases should be treated consistently,⁴⁴³ they believe that consistency of approach as opposed to consistency in outcomes is what is needed and this is achieved by always considering the needs and wishes of those who are most affected by crime (victims, offenders and members of the community).⁴⁴⁴ Thus, from a restorative point of view, desert theory fails to provide outcomes that are meaningful to them.⁴⁴⁵ In fact, it is silent on “why equal justice for offenders should be a higher value than equal justice (or, indeed, any kind of justice at all) for victims”.⁴⁴⁶

3.7.5 Soft option

Linked to concerns of proportionality and consistency in punishment, is the claim that restorative justice presents a soft option of dealing with crime⁴⁴⁷ that undermines the need for

⁴³⁹ Terblanche *Sentencing* at 193.

⁴⁴⁰ Welsh and Harris *Criminal Justice Policy* at 86.

⁴⁴¹ Strang and Sherman 2003 *Utah Law Review* at 22.

⁴⁴² Van Ness and Strong *Restoring Justice* 2nd ed at 176.

⁴⁴³ *Ibid* at 177.

⁴⁴⁴ Morris 2002 *British Journal of Criminology* at 610.

⁴⁴⁵ *Ibid*.

⁴⁴⁶ *Ibid*.

⁴⁴⁷ Batley and Maepa *Introduction* at 24; Johnstone *Ideas, Values, Debates* at 13; Marshall *Restorative justice* at 26; Schmid 2002 *VUWLR* at 128; Edgar and Newell *Prisons* at 129; Gavrielides 2014 *The Prison Journal* at 488; Naudé 2006 *Journal for Juridical Science* at 117.

punishment.⁴⁴⁸ The perception is that restorative justice is only suitable for less serious crimes.⁴⁴⁹ However, we need to ask what the value of a harder option is when it achieves nothing more than being harder.⁴⁵⁰ On the other hand, restorative justice provides an additional value (mentioned below). Notably and contrary to the claim that it is only appropriate for minor crimes, research shows that restorative justice is more effective when applied in severe cases. Victims in crimes of severe violence report being highly satisfied from participating in restorative justice.⁴⁵¹ Many feel that the process was helpful⁴⁵² and had a profound effect on their lives (in terms of personal growth and healing, changed feelings about the offender for the better, new outlook on life for the better).⁴⁵³ When asked about the reasons for these outcomes, victims mentioned letting go of hate, receiving answers, putting the anger where it belongs, coming face-to-face with offenders, and seeing offenders taking ownership of their actions and showing remorse, as having been important factors.⁴⁵⁴

The above experience is quite contrary to the perception that victims who are involved in serious crimes may have greater emotional and material needs that can be addressed through restorative justice.⁴⁵⁵ The view is that “if the victim of a serious crime can benefit from a restorative justice process, then the process should be made available”.⁴⁵⁶ After all, restorative justice is primarily intended to benefit victims⁴⁵⁷ and as such, if it cannot be applied because of the seriousness of the crime, you deny victims the benefits of restorative justice.⁴⁵⁸ Interestingly, research indicates that victims of violent crimes are increasingly seeking the opportunity to meet with offenders.⁴⁵⁹

⁴⁴⁸ Batley and Maepa *Introduction* at 24; Naudé 2006 *Journal for Juridical Science* at 117.

⁴⁴⁹ Skelton and Batley 2008 *Acta Criminologica* at 43; Batley *South African Context* at 30; Gavrielides 2014 *The Prison Journal* at 488; Marshall *Restorative justice* at 8.

⁴⁵⁰ See discussions above at 1.2 and 2.5.

⁴⁵¹ Umbreit *et al Victims of Severe Violence* at 138; Umbreit and Armour *Restorative Justice Dialogue* at 234.

⁴⁵² *Ibid.*

⁴⁵³ Umbreit and Armour *Restorative Justice Dialogue* at 234.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ Umbreit and Armour *Restorative Justice Dialogue* at 119.

⁴⁵⁶ Skelton 2007 *Acta Juridica* at 239.

⁴⁵⁷ See discussion above at 3.3.1. See also Venter 2011-04-11 *IOL News*.

⁴⁵⁸ Venter 2011-04-11 *IOL News*.

⁴⁵⁹ Umbreit *et al Victims of Severe Violence* at 125.

Similarly, experience indicates that restorative justice is not necessarily a soft option. Offenders tend to see restorative justice as more painful and burdensome.⁴⁶⁰ Research shows that offenders find facing the victim as the most difficult and emotional experience.⁴⁶¹ This is because when they face victims they have caused harm (and realise the suffering they have caused), they are less able to come up with excuses to explain or justify their behaviour.⁴⁶² In addition, restorative justice is tougher on offenders because of the active responsibility expected from them to put things right.⁴⁶³ Therefore, it is misleading to suggest that offenders are not being punished when they are subjected to restorative justice processes (regardless of the fact that restorative justice is seen as not the same as punishment in the traditional sense).⁴⁶⁴

3.8 Conclusion

This chapter examined restorative justice as an alternative sentencing option. From attempts to offer a definition of restorative justice, it was clear that there is no consensus on what precisely constitutes restorative justice. There are many definitions (and descriptions) of restorative justice in literature. However, there is consensus regarding its general principles. Restorative justice is premised on the notion that crime is a conduct that causes harm to individuals and their relationships. Based on this, restorative justice focuses on repairing the harm caused by crime rather than the punishment of offenders. In other words, it is primarily concerned with meeting the needs that arise from crime. Restorative justice argues that the best way of meeting the needs of those affected by crime is for them to participate in deciding what should happen next.

Various practices of restorative justice are used throughout the world as a means of dealing with crime and its consequences. The most frequently used practices are victim-offender mediation, family group conferencing, circles and panels. As shown in the discussion above, although restorative justice is a novel concept outside the conventional criminal justice system,

⁴⁶⁰ Johnstone *Ideas, Values, Debates* at 2; Zernova 2007 *British Journal of criminology* at 494. Cf Marshall *Restorative justice* at 18; Schmid 2002 *VUWLR* at 128.

⁴⁶¹ Marshall *Restorative justice* at 18; Schmid 2002 *VUWLR* at 128.

⁴⁶² Marshall *Restorative justice* at 18; Schmid 2002 *VUWLR* at 128; Doolin 2007 *The Journal of Criminal Law* at 433.

⁴⁶³ Marshall *Restorative justice* at 26; Naudé 2006 *Journal for Juridical Science* at 117; Schmid 2002 *VUWLR* at 129. Cf Batley *Restorative justice* at 127; discussion above at 3.3.1.

⁴⁶⁴ Zernova 2007 *British Journal of criminology* at 494.

it is not new in the history of dealing with conflicts of crime in some communities. It similar to African traditional processes of justice.

As highlighted, the interest in restorative justice came as a result of the shortcomings in the current criminal justice system. Hence, the review of literature shows that restorative justice provides a solution for many of these problems. Given victims' low levels of satisfaction with the current criminal justice system, research demonstrates that victims who participate in restorative justice consistently report to be highly satisfied with its process and outcomes. This is particularly true when victims are afforded the opportunity to talk about the crime, its impact and solutions. Other benefits of restorative justice include that it provides opportunities for victims to receive restitution; results in some reduction in reoffending; and reduces the costs of criminal justice. Although restorative justice could be praised on many accounts, it is not immune to criticism. Several concerns have been raised about it. These concerns relate to the challenges that restorative justice presents to the "logic" of the current criminal justice system given its different approach to dealing with crime. Nevertheless, as some have already argued, restorative justice has a lot to share with the western traditions of justice much as it has a lot to learn from the latter.⁴⁶⁵ As such, it should be given a chance, even if the change that it brings to the current criminal justice system is sometimes unfamiliar and not always welcome by proponents of retributive justice.⁴⁶⁶

⁴⁶⁵ Omale 2016 *Global Journal of Advanced Research* at 128. Cf Skelton 2007 *Acta Juridica* at 238.

⁴⁶⁶ Omale 2016 *Global Journal of Advanced Research* at 134. Cf Terblanche 2018 *ECAN Bulletin* at 3.

CHAPTER FOUR

RESTORATIVE JUSTICE PRACTICE IN SOUTH AFRICA: LEGISLATIVE FRAMEWORK AND SENTENCING JURISPRUDENCE

4.1 Introduction

In the recent past, South Africa has experienced much of the philosophy behind restorative justice through the operation of the Truth and Reconciliation Commission (TRC).¹ As explained by Maepa, the TRC “...was an attempt to deal with the victims and offenders of the conflict by focusing not only on the settlement, but also on the root causes to ensure non-repetition”.² This form of restorative justice is also often described as ‘transitional justice’, as a mechanism for societies to deal with large-scale abuses in the past.³ It is in this context that South Africa has gained international recognition as a country at the forefront in the field of restorative justice, in the broader sense of the word.⁴

However, restorative justice has not permeated our criminal justice system. As previously mentioned, the government’s response to crime has been to adopt a tough stance by calling for more arrests and prosecutions, as well as prescribing harsher punishments for offenders.⁵ This approach is not consistent with the values and practices of restorative justice.⁶ Although the greater emphasis has been and is still on punitive justice, there are indications of increased interest in restorative justice within the criminal justice domain.

¹ Maepa *The Truth and Reconciliation Commission* at 66; Liebmann *Restorative justice* at 275; van Wyk *Restorative Justice in South Africa* at 9; Van Ness and Strong *Restoring Justice* 3rd ed at 32; Garbett 2016 *Contemporary Justice Review* at 315; Daly 2016 *Victims & Offenders* at 16; Walgrave *Responsible Citizenship* at 40; Skelton and Frank *Conferencing in South Africa* at 106; Department of Justice & Constitutional Development available at www.justice.gov.za/rj/2011rj-booklet-a5-eng.pdf (accessed on 25/10/2016).

² Maepa *The Truth and Reconciliation Commission* at 67.

³ Berkley Center for Religion, Peace & World Affairs *Foundations of the Truth and Reconciliation Commission* at 4; Koska 2016 *Restorative Justice: An International Journal* at 41. Cf Du Toit and Nkomo 2014 *HTS Theological Studies* at 3.

⁴ Sherman and Strang 2009 *Acta Criminologica* at 3; Skelton 2007 *Acta Juridica* at 241. See also van Wyk *Restorative Justice in South Africa* at 9.

⁵ See discussions above at 1.2 and 2.5.

⁶ *S v Maluleke* 2008 (1) SACR 49 (T) at para 26 (“It [restorative justice] emphasises the need for reparation, healing and rehabilitation rather than harsher sentences, longer terms of imprisonment”). See also *S v Seedat* 2015 (2) SACR 612 (GP) at para 44.

The purpose of this chapter is to examine the current legislative framework for restorative justice practice in South Africa, as well as judgments where the courts introduced the principles of restorative justice into the sentencing process. This examination shows the extent to which restorative justice is recognised and embraced as an alternative method of dealing with crime. Moreover, it highlights the challenges that need to be considered.

4.2 The legislative framework for restorative justice

4.2.1 Introduction

Quite a number of pieces of legislation recognise restorative justice as an alternative option of dealing with crime. These include the Probation Services Amendment Act, the Correctional Services Act, the Criminal Procedure Act, and the Child Justice Act.⁷ The following discussion examines the legislative framework for restorative justice.

4.2.2 The Probation Services Amendment Act

The Probation Services Amendment Act 35 of 2002 was the first to make reference to restorative justice specifically.⁸ The Act makes provision for restorative justice as part of appropriate sentencing options, and empowers probation officers to initiate programmes in this regard.⁹ Restorative justice programmes include mediation and family group conferencing.¹⁰

It should be noted that the success of a restorative justice approach in this context depends largely on the availability of probation officers, yet there is a shortage of probation officers.¹¹ For this reason, Batley argues that the above provisions could be seen as simply adding duties to already overburdened probation officers. However, he

⁷ Although this study focuses on the existing legislative framework for restorative justice practice, another development in the South African criminal justice system also signifies restorative justice values and principles. This refers to informal mediation as an alternative dispute resolution mechanism. It is, for example, provided for in the policy directives of the National Prosecuting Authority. Almost a quarter of all cases finalised in 2015/16 were disposed of through informal mediation – see Anderson 2017 SACJ at 162, 166.

⁸ Batley *Relevant Policies* at 120; Batley *Restorative Justice in South Africa* at 116; Delomoney *Restorative Justice Approach to Sentencing* at 47.

⁹ Section 2. See also Batley *Relevant Policies* at 120; Batley *Restorative Justice in South Africa* at 116.

¹⁰ Section 2.

¹¹ Terblanche *Sentencing* at 117.

states that it is worth looking at this legislation and its philosophy in the broader context of the process of establishing probation work as a profession independent from social work.¹² Thus in this context, not only would it be essential to have sufficient number of probation officers to carry out the duties in terms of the Act, they would also need to have a comprehensive knowledge in restorative justice. The good thing is that capacity-building process had been undertaken in the past, which saw a significant increase in the number of probation vacancies created, with 450 probation officers said to have been expected to receive training in the theory of restorative justice between August 2003 and March 2005.¹³

As mentioned before, pre-sentence reports have been found to be of vital importance in assisting the courts to determine appropriate sentences,¹⁴ and the fact that probation officers are responsible for preparing such reports has been seen as something that could make it easier to introduce restorative justice-based methods of dealing with crime. As Batley puts it, “if these reports can be written from the perspective of restorative justice, and opportunities for applying restorative options are actively explored by informed probation officers, then these officials will constitute a key occupational group for implementing restorative justice”.¹⁵

4.2.3 The Correctional Services Act

The other legislative scheme that espouses a restorative justice approach, is the Correctional Services Act 111 of 1998. The Act lists restorative justice practices as one of the conditions of correctional supervision. Without providing much information, it states that the offender may be required to “participate(s) in mediation between victim and offender or in family group conferencing”.¹⁶ Since the Act provides no further details regarding the process, it is submitted that it would be up to the Department of Correctional Services to develop the necessary guidelines for the implementation of these measures.¹⁷ However, an example of how mediation between the victim and the

¹² Batley *Relevant Policies* at 120.

¹³ *Ibid.* By 2014, some probation officers had received training in restorative justice. In this regard, see Batley *Change in the Justice System* at 19.

¹⁴ See discussion above at 2.2.3. See also Batley *Relevant Policies* at 120.

¹⁵ Batley *Relevant Policies* at 120-121.

¹⁶ Section 52(1)(g). See also Terblanche *Sentencing* at 335.

¹⁷ Terblanche *Sentencing* at 335.

offender may function as part of a condition of correctional supervision can be seen from the approach followed in the case of *S v Tabethe*,¹⁸ which is examined later.

One of the purposes of correctional supervision in terms of the Act is to enable offenders to “lead a socially responsible and crime-free life during the period of their sentence and in future”.¹⁹ One other purpose of significance is to enable offenders to be fully reintegrated into society after serving their sentences.²⁰ Restorative justice meets the needs of the occasion. As mentioned before, restorative interventions have the potential to rehabilitate offenders. Apart from encouraging a change in offenders’ behaviour, restorative justice will permit the use of imprisonment only as a last resort,²¹ which is widely considered ineffective in terms of rehabilitating offenders.²²

4.2.4 The Criminal Procedure Act

Section 299A of the Criminal Procedure Act 51 of 1977 is also seen as one of the legislative provisions that promote restorative justice.²³ Section 299A affords victims the right to make representations in respect of certain category of offenders to the relevant authorities that determine whether they can be placed on parole or correctional supervision.²⁴ It is postulated that “victims must be told when and how they may be involved in the eventual release of sentenced offenders from prison”.²⁵ Section 299A thus ensures that victims are informed about their rights and involved in the process. This provision could be seen as intended to promote the interests of victims in the justice process, which is one of the reasons restorative justice is widely supported in South Africa.²⁶

Another provision of the Act that promotes restorative justice is section 105A.²⁷ In terms of this provision, an accused who is legally represented and the prosecution may enter

¹⁸ *S v Tabethe* 2009 (2) SACR 62 (T) (hereafter *Tabethe*) at para 26. See also Terblanche *Sentencing* at 335.

¹⁹ Section 50(1)(a)(ii).

²⁰ Section 50(1)(a)(iv).

²¹ See discussion above at 3.6.4.4.

²² See discussion above at 2.5.

²³ See discussion above at 1.3.

²⁴ See section 299A of the Criminal Procedure Act 51 of 1977 (hereafter CPA).

²⁵ South African Law Commission *Sentencing Report* at para 2.15.

²⁶ Terblanche *Sentencing* at 191.

²⁷ See discussion above at 1.3.

into a plea and sentence agreement. This means that the parties may enter into an agreement in terms of which the accused pleads guilty to the offence charged or to an offence in respect of which he or she may be convicted of and if ultimately convicted, the court may impose the sentence agreed upon if it deems it to be a just sentence.²⁸ The prosecutor is required to consult with the victim before entering into the agreement and payment of compensation to the victim is listed as one of the conditions that may be set.²⁹ In essence, a sentence imposed by the court may be suspended subject to the condition that the accused pays compensation to the victim subject to section 279(1)(b) of the Act.³⁰ This has been seen as consistent with the efforts to integrate a restorative justice approach³¹ into the sentencing process. Indeed, compensation orders are considered to be in line with the principles of restorative justice.³² Moreover, as with section 299A, disposing of cases in this way allows direct participation of victims in the justice process³³ as opposed to being reduced to passive participants in their own cases.³⁴

However, despite the Act making provision for compensation to be ordered as part of a suspended sentence, and the courts sometimes being strongly urged to make use of this sentencing tool,³⁵ compensation remains an underutilised sentencing option.³⁶ This has been attributed to the fact that the justice system is more focused on the offender and the interests of the broader society rather than on victims.³⁷

²⁸ Section 105A (1) (a) (i) and (ii).

²⁹ Section 105A (1) (b) provides that “the prosecutor may enter into an agreement contemplated in paragraph (a)

(i)...

(ii)...

(iii) after affording the complainant or his or her representative, where it is reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant, the opportunity to make representations to the prosecutor regarding-

(aa) the contents of the agreement; and

(bb) the inclusion in the agreement of a condition relating to compensation...”.

³⁰ Section 105A (1) (ii) (cc). See also Skelton and Batley 2008 *Acta Criminologica* at 44.

³¹ Skelton and Batley 2008 *Acta Criminologica* at 44.

³² Naudé and Prinsloo *Views of Restorative Justice* at 63.

³³ Skelton and Batley 2008 *Acta Criminologica* at 44.

³⁴ See discussion above at 3.3.2.

³⁵ Terblanche *Sentencing* at 416.

³⁶ Terblanche *Sentencing* at 416. Cf Hamman and Nortje 2017-01-23 *Academic Research*.

³⁷ Hamman and Nortje 2017-01-23 *Academic Research*.

4.2.5 The Child Justice Act

4.2.5.1 Introduction

The latest legislation to embrace a restorative justice approach in criminal matters is the Child Justice Act 75 of 2008, which came into operation in April 2010. This Act introduced a specific justice system for child offenders, which is aimed among others to entrench the principles of restorative justice in criminal proceedings involving children.³⁸ In terms of this new system, children in conflict with the law should as far as possible be diverted from the traditional criminal prosecution subject to the provisions of chapter 8 of the Act.³⁹ Diversion means that “an accused person is not put through formal criminal proceedings but is subjected to an alternative process that does not involve a formal trial, conviction and a criminal record”.⁴⁰ Consequently, no sentence is imposed, subject to certain conditions, some of which might be of a punitive nature, such as requiring the child to perform tasks or services, or to undergo training, and so on.⁴¹ In cases where diversion is not possible, the Act provides that child offenders may be tried and sentenced in child justice courts.⁴²

As far as the sentencing of child offenders is concerned, there are specific principles in the Act that clearly focus on restorative justice. One such principles is to “encourage the child to understand the implications of and be accountable for the harm caused”.⁴³ Another sentencing principle is to “promote the integration of the child into the family and community”.⁴⁴ Furthermore, it is stipulated that in order to encourage a restorative justice approach, sentences may be used in combination.⁴⁵

Chapter 10 of the Act lists the following sentences available to child offenders: community-based sentences, restorative justice sentences, a fine, correctional supervision, residence in a child and youth care centre, and imprisonment. Apart from

³⁸ See the Preamble.

³⁹ See the Preamble; section 2(d). See also Terblanche *Sentencing* at 351.

⁴⁰ Terblanche 2012 *PELJ* at 446.

⁴¹ *Ibid.*

⁴² See the Preamble; section 63(1)(b).

⁴³ Section 69(1)(a).

⁴⁴ Section 69(1)(c).

⁴⁵ Section 69(2).

including restorative justice sentences as part of sentencing options the court may consider, the order in which the available sentences appear in the Act is indicative of the sentencing approach that is less retributive. Unlike in the CPA, where sentences are arranged from the most to the least severe, in the Child Justice Act, the least severe sentences appear first in the list and the most severe last. It could be argued that the focus is on less severe sentences for child offenders.⁴⁶ Similarly, Skelton⁴⁷ argues that the support for a restorative justice approach in dealing with child offenders shows that criminal justice personnel are prepared to suspend their commitment to the standard retributive process when it comes to children, thereby allowing new approaches to be applied. This could be attributed to the fact that “many people are more prepared to ‘forgive’ children when they commit offences, believing that they can still get back on the right path”.⁴⁸

Here follows an overview of the restorative justice sentences in terms of the Act.

4.2.5.2 An overview of restorative justice sentences

As far as restorative justice sentences are concerned, section 73 (1) of the Act provides as follows:

- “(1) A child justice court that convicts a child of an offence may refer the matter-
- (a) to a family group conference in terms of section 61;
 - (b) for victim-offender mediation in terms of section 62; or
 - (c) to any other restorative justice process which is in accordance with the definition of restorative justice”.

In terms of this provision, the court should first refer the matter to some form of restorative justice process. Such referral can only take place with the consent of both the victim and the child offender.⁴⁹ The Act suggests two processes, namely a family group conference (FGC) and victim-offender mediation (VOM), but also allows for any other process that complies with the definition of restorative justice. It should be clear that the aim is not to confine restorative justice to a particular process, but to

⁴⁶ Terblanche *Sentencing* at 370.

⁴⁷ Skelton *The Child Justice Bill* at 127.

⁴⁸ *Ibid.*

⁴⁹ See sections 61(1)(b) and 62(1)(b).

accommodate as much as possible the other forms of restorative interventions. This accords with the notion that restorative justice is an evolving concept that is beyond any particular practice.⁵⁰ Indeed, Skelton has argued that “the idea behind the wording ‘other restorative justice process’ is to allow for creative or indigenous models of restorative justice procedures to be developed or to re-emerge”.⁵¹ The understanding is that the model of FGC outlined in the Act is largely a borrowed model, based on the experiences of other countries, in particular New Zealand. Hence, the idea is to provide room for the emergence of a locally developed model.⁵²

The practical operation of these restorative justice processes is explained in sections 61 and 62 of the Act. The purpose of the restorative justice process is to provide the opportunity to meet and develop a plan on how the child offender will “redress the effects of the offence”. After the plan has been developed, it is then submitted to the court as sentencing recommendations. In terms of section 73(2), upon receipt of the recommendations from the FGC, VOM or other restorative justice process, the court may impose a sentence by confirming, amending or replacing the recommendations. In essence, the court is free to decide whether to abide by the recommendations or not.⁵³ Section 73(3) emphasises that the court may, when not in agreement with the terms of the plan, impose any other sentence, provided that the reasons for substituting the plan of the FGC, VOM or any other similar process are recorded. It could be argued that this provision offends against the fundamental principle of restorative justice that those who are affected by crime should decide themselves how to deal with it.⁵⁴ According to some commentators, this provision could be challenged for its potential to displace the “development of a plan” to another setting.⁵⁵ They argue that the court is free to reject whatever it is suggested in the form of a plan, even if restorative outcomes are achieved.⁵⁶ Proponents of restorative justice could view this approach as undermining the restorative ideal. Other commentators hold the view that “as long as the

⁵⁰ Cf Skelton and Batley *Mapping Progress, Charting the Future* at 9; Sharpe *Restorative Justice* at 19; Van Ness *Restorative Systems* at 131.

⁵¹ Skelton 2002 *British Journal of Criminology* at 503.

⁵² *Ibid.*

⁵³ See Sloth-Nielsen and Gallinetti 2011 *PELJ* at 80.

⁵⁴ See discussion above at 3.3.2.

⁵⁵ Sloth-Nielsen and Gallinetti 2011 *PELJ* at 79.

⁵⁶ *Ibid.*

recommended plan or the court's amended or substituted sentence complies with all the basic requirements [relating to FGC, VOM or similar process]..., and required by the general principles and objective of the Act, just about any measure can be imposed by the child justice court".⁵⁷

4.3 Sentencing Jurisprudence

4.3.1 Introduction

Apart from the existing legislative framework for restorative justice as discussed above, restorative justice has also received judicial recognition in the past when courts introduced its principles into the sentencing process. The following sections examine the principles of restorative justice as identified from the case law. In order to do this, it is worth briefly repeating some of the general principles of restorative justice. One of these principles is that crime is more than just a violation of legal rules, but also results in harm to people (victims, offenders and members of the community) and their relationships. Such harm needs to be repaired, ideally through the justice process.⁵⁸ Another closely related principle is that those who are affected by crime should actively participate in repairing the resultant harm. In essence, those who are affected by crime should decide themselves how to deal with it (to decide what should happen next).⁵⁹ The other principle of restorative justice is that communities have a crucial role to play in responding to crime.⁶⁰

4.3.2 Principles of restorative justice from the case law

4.3.2.1 The involvement of the affected parties in resolving the conflict of crime

Consistent with the principle that those who are affected by crime should decide what should happen next, our courts have in several cases recognised the restorative justice value of a face-to-face encounter between the offender and the victim (analogous to victim-offender mediation)⁶¹ in determining how the conflict of crime should be

⁵⁷ Terblanche *Sentencing* at 373.

⁵⁸ See discussion above at 3.3.1.

⁵⁹ See discussion above at 3.3.2.

⁶⁰ See discussion above at 3.3.3.

⁶¹ *S v M* 2007 (2) SACR 539 (CC) at para 72; *S v Saayman* 2008 (1) SACR 393 (E) at 403G; *S v Tabethe* 2009 (2) SACR 62 (T) at para 26.

resolved.⁶² This is what happened in the *Tabethe* case,⁶³ where the court convicted the accused of rape. Before deciding on an appropriate sentence,⁶⁴ the court requested the launch of victim-offender mediation, involving the offender and the victim, under the guidance of the probation officer.⁶⁵ In this process, the offender and the victim had an opportunity to discuss “the crime that the former had committed”.⁶⁶ The probation officer thereafter gave evidence that the parties have reconciled.⁶⁷

This notion of enabling the affected parties to decide themselves how to deal with crime can be linked to the previously made argument that victims need to be empowered in order to recover from the harm caused by crime, that is, the need to be involved in the disposition of their own cases.⁶⁸ Hence, in the *Tabethe* case, the views of the victim on how the offender should be dealt with were taken into account in determining an appropriate sentence.⁶⁹ The victim testified that although she was deeply hurt by the offender’s conduct, she did not wish for him to be sent to prison.⁷⁰ She repeated this during the victim-offender mediation.⁷¹ Consistent with the victim’s wish, the court sentenced the offender to ten years’ imprisonment, fully suspended on conditions such as that he devotes 80 percent of his income to the support of the victim and her family and performs 800 hours of community service.⁷² The court considered this case as one in which restorative justice could be applied in full measure and held that if restorative justice is to be recognised in South Africa, then it must find its application not only in respect of minor offences but also in serious offences in appropriate circumstances. And that in this case restorative justice would provide a just and appropriate sentence.⁷³

⁶² As discussed above at 3.4.2, victim-offender mediation is a dialogue-driven process designed to bring victims and offenders together to talk about the incident of crime and determine its solutions, under the guidance of a trained mediator.

⁶³ *Tabethe* at para 1.

⁶⁴ At paras 27-28.

⁶⁵ At para 26.

⁶⁶ At para 33.

⁶⁷ *DPP, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) at para 8. See also Terblanche *Sentencing* at 335.

⁶⁸ See discussion above at 3.3.1.

⁶⁹ At para 28. See also Batley *Change in the Justice System* at 12.

⁷⁰ At para 20.

⁷¹ At para 33.

⁷² At para 41.

⁷³ At paras 36-40.

Similarly, in *S v Seedat*,⁷⁴ a case that concerned an accused who had been convicted of rape, the victim testified that she did not want the accused sent to prison, but instead preferred that she be compensated. Accordingly, the accused was sentenced to five years' imprisonment, which was suspended subject to the condition that he pays R100 000 to the victim.⁷⁵ This sentence was seen as being consistent with the notion of restorative justice.⁷⁶

However, both sentences were set aside on appeal.⁷⁷ In *DPP, North Gauteng v Thabethe*,⁷⁸ the Supreme Court Appeal (SCA) found restorative justice to be a viable sentencing option in appropriate cases but held that in this case the sentence failed to "reflect the seriousness of the offence and the natural indignation and outrage of the public". The court went on to "caution seriously against the use of restorative justice as a sentence for serious offences which evoke profound feelings of outrage and revulsion amongst law-abiding and right-thinking members of society".⁷⁹ It saw imprisonment as adequately reflecting society's outrage at the crime,⁸⁰ and substituted the non-custodial sentence with one of ten years' direct imprisonment.⁸¹ A similar approach was followed by the SCA in *S v Seedat*.⁸² In this case, the court did not determine the appropriateness of restorative justice but merely drew from its earlier judgment in the *Thabethe*, where it cautioned against the use of restorative justice in serious cases.⁸³ Hence, for similar reasons relating to the view of a sentence based on restorative justice as failing to reflect the seriousness of the crime of rape and society's indignation at the crime, the non-custodial sentence was replaced with a sentence of four years' imprisonment.⁸⁴

It is argued that in both judgments, the SCA failed to give due consideration to the views of victims in the sentencing process, thus negating the principle that they should be

⁷⁴ *S v Seedat* 2015 (2) SACR 612 (GP) (hereafter *Seedat*) at paras 1 and 31.

⁷⁵ At para 50.

⁷⁶ At para 48.

⁷⁷ It is submitted that the fact that sentences were set aside on appeal does not affect the validity of the restorative justice process (nor the principles) followed. See Terblanche *Sentencing* at 335 footnote 182.

⁷⁸ *DPP, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) (hereafter *Thabethe*) at para 20.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.* See also Terblanche *Sentencing* at 192.

⁸¹ At paras 30-31.

⁸² *S v Seedat* 2017 (1) SACR 141 (SCA) (hereafter *Seedat appeal*).

⁸³ At para 38.

⁸⁴ At para 43.

empowered.⁸⁵ In essence, “the effect of both judgments is that the victim is reduced to just one of the factors to be taken into account during sentencing, seeing that in both cases the court found that other considerations were more important than the victim’s views”.⁸⁶ The court held that, while the views of victims should be considered in the determination of an appropriate sentence, this does not mean that they are decisive.⁸⁷ The court stressed that the sentence of the accused should also send a clear message to potential rapists and the public that such crimes will not be tolerated.⁸⁸ But as Spies correctly points out,

“Whilst it is absolutely correct to state that a victim’s views are but one of the factors that should be considered in sentencing an accused, it has become a practice of our courts to pay lip service to these needs and completely ignore any consideration or implementation of alternative methods of justice other than justice that is retributive in nature, even if this may be to the benefit of the victim and society if properly applied”.⁸⁹

Indeed, this tendency often results in the views of victims not playing any significant role in the sentence imposed, even when victims are clear of what they need from the justice process. As it happened in both cases, the court negated the wishes of the victim, thus holding the view that restorative justice was inappropriate because of the serious nature of offences. This is despite the fact that restorative justice could have benefited the victim.⁹⁰ As previously argued, the view is that if victims of serious offences could benefit from a restorative justice process, then the process should be made available.⁹¹ In essence, if victims of serious offences could benefit from a sentence based on restorative justice, then the sentence should be considered.

What then should the response be to the demand that sentences should be proportional to the seriousness of the offence, as stressed in both judgments above? Proponents of restorative justice reject the notion that only retributive punishment can provide a

⁸⁵ Kloppers and Kloppers 2017-02-17 *Academic Research*.

⁸⁶ *Ibid.*

⁸⁷ *Thabethe* at para 21; *Seedat* appeal at para 38.

⁸⁸ *Seedat* appeal at para 39.

⁸⁹ Spies 2016 *SACJ* at 284.

⁹⁰ *Seedat Appeal* at para 12 (The victim made it clear to the court that she would benefit from receiving compensation from the accused as she was in a dire financial strait at the time of the trial). See also Hamman and Nortje 2017-01-23 *Academic Research*.

⁹¹ See discussion above at 3.7.5.

standard for determining proportionality. They argue that, instead of linking punishment to the seriousness of the offence, the seriousness of the offence should be linked to the intensity of reparative effort required. They believe that this approach provides a better means towards a reasonable and just balance than is provided by retributive punishment.⁹²

4.3.2.2 Compensation as form of reparation

Another principle of restorative justice that can be identified from case law is the issue of compensation as form of reparation for the harm suffered as a result of crime. Although the court in *Seedat*⁹³ held that an order of compensation, coupled with a suspended sentence of imprisonment, was not an appropriate sanction in serious offences, this does not necessarily suggest that compensation can never be appropriate. Nothing prevents the courts from imposing compensation orders coupled with a suspended sentence in serious cases and this has been done in the past.⁹⁴ As evident from the previous discussion, naturally in serious cases the call would be for imposition of a harsh sentence, in particular, imprisonment. However, from a restorative justice perspective, the understanding is that justice is not about punishment but about making things right.⁹⁵ This “includes making sure that both parties have reached a mutual understanding through which all respective needs have been fulfilled”.⁹⁶ Arguably, this is similar to what happened in *Seedat* case as referred to above. Both parties had a common understanding regarding how to make things right, which involved the accused paying compensation to the victim for the harm suffered as a result of crime.⁹⁷

There are some notable cases where an order of compensation was found to be an appropriate sentence and thus important for purposes of restoration. For example, in *S v Shilubane*,⁹⁸ the court found the accused guilty of theft of seven fowls, valued at just

⁹² See discussion above at 3.7.3.

⁹³ *Seedat* appeal.

⁹⁴ Bauer 2011-09-13 *Mail & Guardian*.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.* Cf discussion above at 3.7.4.

⁹⁷ *Seedat* at para 31. Although the victim did not personally discuss the issue of compensation with the accused, the accused was willing to compensate her the amount she requires.

⁹⁸ *S v Shilubane* 2008 (1) SACR 295 (T) at paras 2-7.

over R200, was ordered to pay compensation of R500. Considering the value involved, the judge mentioned that he has a little doubt that “in line with the new philosophy of restorative justice, the complainant would have been more pleased to receive compensation for his loss”.⁹⁹ In his view, an order of compensation coupled with a suspended sentence would satisfy the basic sentencing principles and the primary purposes of punishment.¹⁰⁰

As some authors argue, restorative justice should not be placed beyond reach in serious offences.¹⁰¹ Instead, a balance should be struck between restorative justice and punishment.¹⁰² In essence, without necessarily excluding serious offences from the realm of restorative justice, it could be used to justify a reduction of sentences,¹⁰³ or even suspension thereof. This can be seen from the judgment in *S v Hewitt*,¹⁰⁴ where the court partially suspended the accused’s sentence conditional upon payment of compensation. The trial court found the accused guilty on two counts of rape and one count of indecent assault and sentenced him to eight years’ imprisonment in respect of each of the rape counts and two years’ imprisonment in respect of indecent assault.¹⁰⁵ His sentence on the counts of rape was partially suspended on condition that he pays R100 000 to a fund aimed at combatting the abuse of women and children.¹⁰⁶ Although the elements of restorative justice were not present in this case, the payment of compensation for the benefit of society can be seen as a positive step towards restoration.¹⁰⁷ Indeed, as previously highlighted, compensation orders are seen as consistent with the principles of restorative justice.¹⁰⁸

The argument that there should be a balance between restorative justice and punishment is in alignment with the SALC’s recommendation that all sentences, including imprisonment, should be implemented in ways that allow opportunities for

⁹⁹ At para 4.

¹⁰⁰ *Ibid.*

¹⁰¹ See discussion above at 3.7.5. See also Lubaale 2017 *SA Crime Quarterly* at 32.

¹⁰² Lubaale 2017 *SA Crime Quarterly* at 32.

¹⁰³ Lubaale 2017 *SA Crime Quarterly* at 35-37; Van der Merwe and Skelton 2015 *Oxford Journal of Legal Studies* at 367-372; Batley *Change in the Justice System* at 13.

¹⁰⁴ *S v Hewitt* 2017 (1) SACR 309 (SCA) (hereafter *Hewitt*).

¹⁰⁵ At para 1.

¹⁰⁶ *Ibid.*

¹⁰⁷ Velthuisen 2016-01-14 *The Conversation*.

¹⁰⁸ See discussion above at 4.2.4.

restorative interventions.¹⁰⁹ In other words, restorative justice measures may be ordered as part of such a sentence. Thus, for example, an order of compensation can play a part as long as this result “can be achieved by imposing a sentence that still has the appropriate penal element required by the principle of proportionality”.¹¹⁰ It could thus be argued that this is what has been achieved in the *Hewitt* case, even though it is debatable whether the sentence did meet the required proportionality and how this should be measured. After all, this will depend on the circumstances of each case.

The above discussion raises an important question of whether imprisonment can be compatible with restorative justice. This is precisely because restorative justice has often been contrasted to the current criminal justice system, which is seen as being retributive, and the view has been that restoration is the polar opposite of retributive justice.¹¹¹ Of course, this is how the restorative justice movement came to be known in its early years. This view has now changed.¹¹² In fact, they are seen as having much in common.¹¹³ Both are aimed at restoring the balance that has been disturbed by the commission of crime although they differ on how the balance should be restored.¹¹⁴ While punishment is the overriding objective of retributive justice, the objective of restorative justice is “putting right the wrong, encouraging accountability, acknowledging the harm done to (and the needs of) victims, and finding positive solutions that will make the community safer”.¹¹⁵ Despite this difference, proponents of restorative justice see no reason why its approaches should not be used in conjunction with imprisonment, where there is a need to impose a custodial sentence.¹¹⁶

4.3.2.3 Emphasis on the restoration of relationships

As stated above, restorative justice sees crime as an act that causes harm to people (victims, offenders and community) and their relationships. Thus, it is held that the significance of a face-to-face encounter between the offender and the victim is that

¹⁰⁹ South African Law Commission *Sentencing Report* at para 3.1.8.

¹¹⁰ *Ibid.*

¹¹¹ Zehr *The Little Book* at 13; McElrea “Sentencing” at 11.

¹¹² Zehr *The Little Book* at 13, 58; McElrea “Sentencing” at 11.

¹¹³ Zehr *The Little Book* at 58.

¹¹⁴ *Ibid* at 59.

¹¹⁵ McElrea “Sentencing” at 11. Cf Zehr *The Little Book* at 59.

¹¹⁶ See discussion above at 3.6.4.4.

“restorative justice ideally requires looking the victim in the eye and acknowledging wrongdoing”.¹¹⁷ As such, the offender begins the process of restoring a relationship that is broken as a result of crime.¹¹⁸ As far as the acknowledgement of responsibility is concerned, there is general consensus that the offender is primarily responsible for restoring the relationship and the most practical way of achieving this is by apologising to those harmed by his or her conduct.¹¹⁹ This principle has been recognised in several cases.

For example, in *S v Saayman*,¹²⁰ the case dealt with an accused who had been found guilty of six counts of fraud amounting to R13 387. The accused was sentenced to two years’ imprisonment, which was suspended for five years on conditions among others that she should apologise to victims, by standing in the foyer of the court for fifteen minutes while holding a poster bearing her name, the fact of her conviction and apology to certain victims.¹²¹ The trial court held that this condition was aimed at trying to restore the relations between the parties by assisting the accused to apologise to victims.¹²²

However, this condition was set aside on review.¹²³ The review court found that it infringed the accused’s rights to human dignity and not to be subjected to a cruel, inhuman or degrading punishment.¹²⁴ Moreover, it was found to be inconsistent with the principles of restorative justice.¹²⁵ The court acknowledged that while it was necessary for the purposes of restorative justice that where possible, there should be a face-to-face encounter between the offender and the victim, thereby allowing the former to apologise personally to the latter, this clearly cannot be achieved by requiring the accused to stand carrying a poster publicly bearing the fact of her conviction.¹²⁶ Furthermore, while the process of restorative justice clearly requires the active and willing participation of the victim, the magistrate has failed to involve victims in the

¹¹⁷ *S v M* 2007 (2) SACR 539 (CC) at para 72.

¹¹⁸ *Ibid.*

¹¹⁹ Allan *et al* 2014 *Psychiatry, Psychology and Law* at 177. Cf discussion above at 3.6.2.

¹²⁰ *S v Saayman* 2008 (1) SACR 393 (E) (hereafter *Saayman*) at 395 I.

¹²¹ At 396B-D.

¹²² At 396F.

¹²³ At 404B.

¹²⁴ At 401E-F.

¹²⁵ At 404A.

¹²⁶ At 403G.

process and their attitude to this is therefore unknown. Moreover, it did not appear that victims were made aware of the condition, and there is no reason to assume that they would have been present on the set date to note the apology.¹²⁷ Pickering J concluded that it is “difficult to understand how the relationship between the accused and the victims could be ‘restored’ by an apology tendered in the absence of and without the knowledge of the victims”.¹²⁸

Indeed, there is more reason to insist on the need for a face-to-face apology given the different ways in which victims choose to convey their acceptance of apology from offenders. Research shows that in some of restorative justice meetings where forgiveness was achieved (or assumed to have been achieved judging by the statements from victims), victims did not utter the word “forgive” but rather used gestures and words of equivalent meaning. For example, victims would smile and nod, shake the offender’s hand, hug the offender, wish the offender well, or say that they appreciated the courage the offender had in facing them and apologising.¹²⁹ Therefore, it is difficult to see how any of these would happen in a situation where apology is given in the absence of victims.

Nonetheless, what is notable from this judgment is that despite the condition of the sentence being set aside, the court did acknowledge that apology could help to restore the relationship between the parties if tendered in the correct manner.

While the emphasis on this judgment was on the restoration of the relationship between the victim and the offender, more emphasis was placed on the restoration of the relationship between the offender and the community in *S v Maluleke*.¹³⁰ This case concerned an accused found guilty of murder.¹³¹ During the proceedings, it became clear that the accused regretted causing the death of the victim.¹³² The defence adduced evidence that the traditional custom prevailing in the accused’s community requires that she apologise for taking the deceased’s life by sending a senior representative to the

¹²⁷ At 403H-I.

¹²⁸ At 403J.

¹²⁹ Shapland 2016 *Oxford Journal of Law and Religion* at 103-104.

¹³⁰ *S v Maluleke* 2008 (1) SACR 49 (T) (hereafter *Maluleke*).

¹³¹ At paras 1-4.

¹³² At para 10.

deceased's family.¹³³ Neither the court nor the prosecution challenged the existence of this custom.¹³⁴ The deceased's mother testified about the loss and hurt the family had suffered. When asked whether she would be prepared to receive an elder member from the accused's family in order to attempt to mend the relationship between the families, she indicated that she would welcome such interaction.¹³⁵ The accused was sentenced to 8 years' imprisonment, which was suspended on conditions among others that she apologise in accordance with the custom to the victim's family.¹³⁶

According to the court, a sentence such as this creates an opportunity to heal the wounds that the crime has caused to the deceased's family and to the community at large.¹³⁷ Indeed, the accused and the deceased's mother were seen talking to each other before the court had formally adjourned.¹³⁸ In the court's view, the recognition of the custom and willingness of the parties to observe it has created the opportunity to introduce the principles of restorative justice into the sentencing process.¹³⁹ Thus, offering an apology with the aim of reconciling the parties and restoring harmonious relations in the community can be seen as part of victim-offender mediation and possibly family group conferencing, both recognised as prominent practices of restorative justice.¹⁴⁰ The belief is that the acknowledgement of responsibility and reconciliation that may result from meeting face-to-face would facilitate restoration of trust and the offender's reintegration into the community.¹⁴¹ This affirms the restorative justice value that offenders can be reaccepted into society if they correct the wrongs they have done.¹⁴²

However, despite what apology can help to achieve, courts should guard against placing exclusive emphasis on apologies. The danger of placing exclusive emphasis on apologies is that it might undermine the broader perspective through which restorative

¹³³ At para 13.

¹³⁴ At para 14.

¹³⁵ At para 19-20. See also Skelton and Batley 2008 *Acta Criminologica* at 41.

¹³⁶ At para 22.

¹³⁷ At para 24.

¹³⁸ *Ibid.*

¹³⁹ At para 25. See also Bekker and Van der Merwe 2009 *De Jure* at 244.

¹⁴⁰ Bekker and Van der Merwe 2009 *De Jure* at 245.

¹⁴¹ *S v M* 2007 (2) SACR 539 (CC) at para 72.

¹⁴² See discussion above at 3.3.3. See also Skelton 2013 *Restorative Justice: An International Journal* at 129.

justice can be understood.¹⁴³ Although in the case of *Maluleke* the court was correct not to consider the issue of compensation because the accused would not have been able to compensate the victim,¹⁴⁴ it has nevertheless been argued that the court should have considered adding a condition that the accused perform some work to the deceased's family.¹⁴⁵ Such a condition would not only have satisfied both restorative and retributive values, but would also contribute to achieving a greater balance between the crime, the criminal and the interests of society.¹⁴⁶ Skelton¹⁴⁷ argues that, when the accused is unable to pay compensation to the victim, he or she should perform some community work for the victim. Nevertheless, the condition of the sentence that requires the accused to apologise with a view to restoring relationships in the circumstances of *Maluleke*, would according to the notion of reparation, be seen as reasonable. Although the seriousness of the offence needs to be acknowledged, the notion of reparation recognises that compensation cannot make up for losses such as a death of a family member, but suggests it is rather a symbolic gesture (apology) and acknowledgement of wrongdoing that should be the starting point in the process of reconciliation.¹⁴⁸

4.3.2.4 The importance of the community involvement in dealing with crime

Consistent with the principle that communities have a crucial role to play in responding to crime, our courts have recognised the value of the community-based sentences in this response. This can be seen from the judgment of the Constitutional Court in *S v M*.¹⁴⁹ The case involved an accused who had been convicted of multiple counts of fraud and theft.¹⁵⁰ The Constitutional Court set aside the sentence of imprisonment. Sachs J concluded that, in light of the circumstances of this case, correctional supervision was preferable than imprisonment.¹⁵¹ The judge described correctional supervision as “a multifaceted approach to sentencing comprising elements of rehabilitation, reparation

¹⁴³ Lubaale 2017 *SA Crime Quarterly* at 32.

¹⁴⁴ *Maluleke* at para 7 (the court established that the accused is unemployed and the only income she receives is a child grant).

¹⁴⁵ Bekker and Van der Merwe 2009 *De Jure* at 246.

¹⁴⁶ *Ibid.*

¹⁴⁷ Skelton 2007 *Acta Juridica* at 237. See also Bekker and Van der Merwe 2009 *De Jure* at 246.

¹⁴⁸ Du Toit and Nkomo 2014 *HTS Theological Studies* at 4; Lubaale 2017 *SA Crime Quarterly* at 32.

¹⁴⁹ *S v M* 2007 (2) SACR 539 (CC).

¹⁵⁰ At para 2.

¹⁵¹ At para 76.

and restorative justice”.¹⁵² He held that it created a better chance for rehabilitation than imprisonment, given the conditions in our overpopulated prisons.¹⁵³ It is geared to rehabilitate the offender within the community without the negative influences of prison.¹⁵⁴ Thus, the court reasoned that sending the accused to prison (a suitable candidate for correctional supervision) would indicate that community resources are incapable of dealing with her immoral behaviour, a situation which the court would not accept.¹⁵⁵ The community should be seen as more than just a crowd of vengeful people who want to see the casting out of those who commit crimes but, rather as people who are also interested in the moral restoration of one of its members.¹⁵⁶ In essence, apart from wanting to see offenders being punished for their crimes, community members are also interested in seeing offenders changing their behaviour. Hence, as previously argued, communities hold significant power to change the minds and hearts of offenders.¹⁵⁷

What could be noted from this judgment is that not only did the court recognise the community-based sentences as capable of rehabilitating offenders but also, by implication, the vital role of members of the community in achieving this goal. Indeed, the community has a greater role to play in ensuring that offenders are rehabilitated.¹⁵⁸ Thus, as stated above, just as members of the community are desirous of seeing offenders being rehabilitated, so is the desire of offenders to become responsible citizens.¹⁵⁹ Research further indicates that the support that offenders receive from the community do contribute significantly to their change of behaviour.¹⁶⁰ Therefore, the support from the community and the creation of an enabling environment for the rehabilitation of offenders would be crucially important during the period of serving their sentences in the community. As far as the enabling environment is concerned, this

¹⁵² At para 59.

¹⁵³ At para 61.

¹⁵⁴ At para 62.

¹⁵⁵ At para 75.

¹⁵⁶ *Ibid.*

¹⁵⁷ See discussion above at 3.3.3.

¹⁵⁸ Department of Correctional Services *Corrections* at para 5.2.10. Cf Batley 2008 *SA Crime Quarterly* at 29.

¹⁵⁹ See discussion above at 3.3.3.

¹⁶⁰ *Ibid.*

means creating an understanding and caring environment in the community.¹⁶¹ Thus when expressing disapproval, it is important to treat offenders as members of the community who violated its norms only temporarily.¹⁶² As previously indicated, offenders need to feel a sense of belonging. This feeling of belonging to the community can lead to changes in behaviour as offenders strive to conform to the standards and norms of the community.¹⁶³

In view of the above, the success of correctional supervision in rehabilitating offenders will not only depend on the commitment from the officials who are responsible for overseeing the progress of offenders and their compliance with the conditions of the sentence, but also on the involvement of community members with a shared interest in the rehabilitation of offenders.

4.4 Conclusion

This chapter examined the current legislative framework for restorative justice practice in South Africa, as well as judgments where the courts have introduced the principles of restorative justice into the sentencing process. This examination showed the extent to which restorative justice is embraced and recognised as an alternative option in dealing with crime, as well as the challenges that need to be considered. The biggest challenge is that our law does not provide a fixed position for restorative justice in our justice system. As shown from the discussion above, restorative justice is briefly mentioned here and there in legislation, and noted in a small number of judgments. Restorative justice is little more than a footnote in the current criminal justice system. Yet, it has been shown that the current system is broken and that restorative justice provides a solution for many of these problems.

The next chapter contains a summary of the conclusions reached, as well as the recommendations towards ensuring greater recognition and application of restorative justice in dealing with crime.

¹⁶¹ See discussion above at 3.6.4.2.

¹⁶² See discussion above at 3.3.3.

¹⁶³ *Ibid.*

CHAPTER FIVE

RESEARCH CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This study sought to examine restorative justice as an alternative sentencing option in South Africa. It was an additional aim of the study to examine the claim that restorative justice is similar to African traditional methods of justice. The study also sought to examine the current legislative framework for restorative justice practice.¹ Here follows a summary of the research conclusions.

5.2 Summary of the research conclusions

The study established that restorative justice provides a different conceptual approach to crime and its aftermath. It sees crime as more than just a violation of the law, but as also causing harm to people (victims, offenders and members of the community) and their relationships. Based on this, restorative justice focuses on repairing the harm caused by crime rather than on the punishment of offenders. In essence, it is primarily focused on meeting the needs that arise from crime. Restorative justice emphasises that the best way of meeting the needs of those affected by crime is for them to participate in deciding what should happen next.²

The study also established that restorative justice provides a solution for many of the shortcomings in the current criminal justice system. Given victims' low levels of satisfaction with the current criminal justice system, the study has found that victims who participate in restorative justice consistently report to be highly satisfied with its process and outcomes. This is particularly the case when victims are afforded the opportunity to talk about the crime, its impact and solutions.³ As a need-based approach to justice, it has been found that restorative justice provides opportunities for victims to receive

¹ See discussion above at 1.4.

² See discussion above at 3.8.

³ *Ibid.*

restitution.⁴ Other benefits of restorative justice include that it reduces the costs of criminal justice and probably results in some reduction in reoffending.⁵

It is further established that although restorative justice is a new concept outside the conventional criminal justice system, it is not new in the history of resolving disputes in some communities in South Africa. It resonates well with traditional African methods of dispensing justice.⁶

The study also found that a legislative framework for restorative justice practice already exists in South Africa. Several pieces of legislation promote the use of restorative justice as an alternative option of dealing with crime.⁷ The study further established that restorative justice has also received judicial recognition in the past when courts introduced its principles into the sentencing process.⁸ Nevertheless, although restorative justice is referred to in legislation and noted in several judgments, it has not taken root in the current criminal justice system. The biggest challenge that the study has identified is that our law does not provide a fixed position for restorative justice in our justice system.⁹

5.3 Recommendations

In order to ensure that there is greater recognition and application of restorative justice in dealing with crime, there is a need for an improved legislative framework for restorative justice practice in South Africa. It has been suggested that if restorative justice is to become a major factor in determining an appropriate sentence for offenders, it needs to become part of a new thinking about the whole criminal justice system.¹⁰ Indeed, experience in other jurisdictions, most notably in New Zealand, suggests that the implementation of a restorative justice approach is most likely to be successful when restorative justice is established as a mainstream response that operates at the heart of the criminal justice system. And this requires the enactment of an appropriate legislative

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ See discussion above at 4.4.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Terblanche *Sentencing* at 193.

framework.¹¹ In New Zealand, restorative justice is given recognition in the formal criminal justice system by the Sentencing Act 2002, the Parole Act 2002, and the Victims' Rights Act 2002 among others.¹² Collectively, these acts afford greater recognition and legitimacy to restorative justice processes; encourage the use of restorative justice processes where appropriate; and allow (require) restorative justice processes to be considered in the sentencing and parole of offenders.¹³ Since 2014, following an amendment to the Sentencing Act, in all cases that meet certain criteria, courts must adjourn the proceedings prior to sentencing for enquiries to be made as to whether restorative justice might be appropriate.¹⁴ It is therefore suggested that consideration be given to a similar approach by New Zealand that will ensure that restorative justice receives greater recognition and application in criminal proceedings in South Africa.

Another suggestion is to consider the possibility of amending the Criminal Procedure Act 51 of 1977 to include a direct reference to restorative justice options in its list of sentences in section 276, following the example already available for child offenders in the Child Justice Act 75 of 2008.¹⁵ This might be useful in providing the impetus for more frequent use of restorative justice in sentencing.

Perhaps it is time for another look at the proposed sentencing reforms by the South African Law Commission. The Criminal Procedure Act contains no provisions regarding what an appropriate sentence should be; general principles are from case law;¹⁶ and few courts have been prepared to place restorative justice at a level anywhere near the current criminal justice and its demand for proportionate sentences.¹⁷ Therefore, some legislation is needed. The main principle of sentencing, in terms of these proposals, is that sentences need to be proportionate to the seriousness of the offence committed, relative to other offences. Subject to the proportionality principle, the Commission recommended that sentences need to achieve the optimal combination of restoration, the

¹¹ Dignan and Marsh *Family Group Conferences* at 86-87.

¹² Ministry of Justice *Best Practice Framework* at 4.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ See discussion above at 4.2.5.

¹⁶ See discussion above at 2.2.

¹⁷ See discussion above at 4.3.2.1.

protection of society and the opportunity for the offender to lead a crime-free life. This shows that the ideal sentencing system should allow for restorative interventions. Although, no further action has been taken regarding the Commission's proposals,¹⁸ it is postulated that the concept of an optimal combination presents an innovative approach to address some of the shortcomings in the current criminal justice system, and that it creates a platform for increased implementation of restorative justice.¹⁹ Although it is recommended that the Commission's proposals be reconsidered, if they are ever put in place, there will be a need for a different approach when it comes to restorative justice. As previously noted, the proportionality principle does not fit neatly with a restorative justice approach.²⁰

Lastly, South Africa as a member of the United Nations (UN) can learn from what works in fellow countries. The UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters encourage Member States to develop a legislative framework, where necessary, to govern the use of restorative justice programmes.²¹ It is acknowledged that in the absence of statutory requirements, it may be difficult for restorative justice to find its way into the daily routine of the criminal justice system.²² In other jurisdictions such as Australia, Belgium, Chile, Ghana, Columbia, Uganda, Finland, the Philippines, Russian Federation, France and the Netherlands, where the legislative framework provides for the use of restorative justice, the law gives criminal justice officials the discretion to divert certain offenders, under certain conditions, from the conventional justice system to a restorative justice process.²³ Similarly, in countries such as Austria, Czech Republic, Denmark, Germany, Norway, Slovenia and Portugal, where the law requires that restorative justice options be considered, criminal justice officials are required to consider the potential for diverting offenders to a restorative justice process.²⁴

¹⁸ See discussion above at 1.3.

¹⁹ Skelton and Batley 2008 *Acta Criminologica* at 46.

²⁰ See discussions above at 3.7.3 and 4.3.2.1.

²¹ United Nations Office on Drugs and Crime *Restorative Justice Programmes* at 101.

²² *Ibid* at 51.

²³ *Ibid* at 52.

²⁴ *Ibid*.

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