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

by

RELIANCE BONGANI MOKOMANE

submitted in accordance with the requirements for the degree of

MASTER OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROF SS TERBLANCHE

OCTOBER 2019

Table of contents

DECLARATION i

ABSTRACT ii

ABREVIATIONS AND ACRONYMS iii

ACKNOWLDGEMENTS iv

CHAPTER ONE 1

INTRODUCTION 1

1.1 Introduction 1

1.2 Shortcomings in the current criminal justice system 1

1.3 What does restorative justice entail? 4

1.4 Objectives of the study 6

1.5 Research questions 6

1.6 The research methodology 7

1.7 The structure of the study 7

CHAPTER TWO 9

A CRITICAL OVERVIEW OF THE SENTENCING PRINCIPLES IN SOUTH AFRICA 9

2.1 Introduction 9

2.2 The triad: the principles of sentencing 10

2.2.1 Introduction 10

2.2.2 The crime 10

2.2.3 The criminal 11

2.2.4 The interests of society 12

2.3 The minimum sentences legislation 13

2.4 The purposes of punishment 15

2.4.1 Introduction 15

2.4.2 Deterrence 15

2.4.2.1 Individual deterrence 15

2.4.2.2 General deterrence 16

2.4.3 Prevention 17

2.4.3.1 Individual Prevention..17

2.4.3.2 General Prevention 18

2.4.4 Rehabilitation..18

2.4.5 Retribution 19

2.5 Some of the criticisms against the sentencing system 20

2.6 Conclusion 29

CHAPTER THREE 31

RESTORATIVE JUSTICE AS AN ALTERNATIVE SENTENCING OPTION 31

3.1 Introduction 31

3.2 The meaning of restorative justice..33

3.3 The general principles of restorative justice..38

3.3.1 Justice should focus on repairing the harm caused by crime...39

3.3.2 All parties affected by crime should actively participate in its resolution 44

3.3.3 Transforming the roles and responsibilities of government and community in responding to crime 45

3.4 Restorative justice practices..48

3.4.1 Introduction 48

3.4.2 Victim-offender mediation 49

3.4.3 Family group conferencing 51

3.4.4 Circles 53

3.4.5 Panels 56

3.4.6 Some differences between restorative justice practices 57

3.5 Restorative justice and the African traditional processes of justice...............................58

3.5.1 Introduction 58

3.5.2 Administration of traditional justice through customary courts 59

3.5.3 **Examples of the traditional dispute resolution methods used in some communities**................60

3.5.4 **The connection between the African traditional processes of justice and restorative justice**...62

3.6 **The potential benefits of restorative justice** 63

3.6.1 **Introduction** 63

3.6.2 **Providing opportunities for victims to receive restitution**..63

3.6.3 **Increasing satisfaction with the justice system** 68

3.6.4 **Reducing reoffending**..71

3.6.4.1 **Introduction** 71

3.6.4.2 **Theoretical explanation why restorative justice might reduce reoffending** 71

3.6.4.3 **An overview of the impact of restorative justice on reoffending**..75

3.6.4.4 **Some reasons why restorative justice might help to rehabilitate offenders** 76

3.6.5 **Reducing the costs of criminal justice**..78

3.7 **Some of the criticisms against restorative justice** 80

3.7.1 **Introduction** 80

3.7.2 **Lack of procedural safeguards**..80

3.7.3 **Compromises the principle of proportionality** 83

3.7.4 **Leads to inconsistent outcomes (sentences)** 84

3.7.5 **Soft option**...85

3.8 **Conclusion** 87

CHAPTER FOUR 89

RESTORATIVE JUSTICE PRACTICE IN SOUTH AFRICA: LEGISLATIVE FRAMEWORK AND SENTENCING JURISPRUDENCE...89

4.1 **Introduction** 89

4.2 **The legislative framework for restorative justice**..90

4.2.1 **Introduction** 90

4.2.2 **The Probation Services Amendment Act** 90

4.2.3 **The Correctional Services Act**..91

4.2.4 The Criminal Procedure Act 92
4.2.5 The Child Justice Act 94
4.2.5.1 Introduction 94
4.2.5.2 An overview of restorative justice sentences 95
4.3 Sentencing Jurisprudence 97
4.3.1 Introduction 97
4.3.2 Principles of restorative justice from the case law 97
4.3.2.1 The involvement of the affected parties in resolving the conflict of crime 97
4.3.2.2 Compensation as form of reparation 101
4.3.2.3 Emphasis on the restoration of relationships 103
4.3.2.4 The importance of the community involvement in dealing with crime 107
4.4 Conclusion 109
CHAPTER FIVE 110
RESEARCH CONCLUSIONS AND RECOMMENDATIONS 110
5.1 Introduction 110
5.2 Summary of the research conclusions 110
5.3 Recommendations 111
BIBLIOGRAPHY 114

DECLARATION

Name: Reliance Bongani Mokomane

Student number: 40790320

Degree: Master of Laws

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.

____________________ ____________________

SIGNATURE DATE

(Reliance Mokomane)

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

ABREVIATIONS 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

ACKNOWLDGEMENTS

Firstly, I would like to thank God for giving me the strength throughout the period of writing my dissertation.

Secondly, I would like to express my deepest gratitude to my supervisor Prof Stephan Terblanche. His guidance, words of encouragement, quality comments made during the writing of my dissertation, and suggestions made it possible to complete this study.

Thirdly, I would like to thank my colleagues in the Department of Public, Constitutional and International Law, University of South Africa, especially Prof Dial Ndima, Dr Isabel Moodley and Ms Lindelwa Mhlongo for their valuable professional advice, and Prof Nina Mollema in the Department of Criminal and Procedural Law, for her support and willingness to always be of assistance.

Fourthly, I would like to thank my family. My Mother, Evah Phaahla and my younger sister, Adelaide More, for their support and encouragement.

Lastly, I would like to dedicate this dissertation to Laura Mchaisa. Your support has been instrumental during this long journey.

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 been 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 Cameron[18] 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; Kgosimore 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; Kgosimore 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 supervision[36] 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 Neser 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 Ngcongo* 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 Act[41] 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).

41 Act 105 of 1997 (hereafter the minimum sentences legislation).

42 Proc R43 *GG* 6175 of 1 May 1998.

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

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

45 See sections 51 of the minimum sentences legislation.

46 *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.

47 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 para15.

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] Terblanche[69] 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 deserved[95] 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] Snyman[113] 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 state[128] 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 unique[153] 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, Nairn[161] 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, Fagan[176] 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-Nielson 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-Nielson 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-Nielson 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-Nielson 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-Nielson 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 impression[3] 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; Neser 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, Doolin[31] 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 definition[32] 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] Daly[37] 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] Daly[39] 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 needs[44] 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 heal[91] 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 Christie[95] 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 Strong[96] 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 victims[97] and members of the community[98] 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 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 dialogue[133] 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 speak[188] 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 pipe[190] 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 Frank[226] 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 headman[248] 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; Tshehla 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, Skelton[263] 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 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; Dhami 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; Dhami 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 Dhami 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 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]

Barton[340] 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 Braithwaite[347] 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 *VUWLR* at 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] Braithwaite[351] 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 expected[367] 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 enforce 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 prions.[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 members[411] 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 *News*24; 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 crime[447] 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 helpful[452] 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 victims[457] 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 see restorative justice as more painful and burdensome.[460] Research shows that offenders find facing the victim as 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 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 on 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 approach[31] 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 process[33] 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, Skelton[47] 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 footnote182.
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 Velthuizen 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 should 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] Skelton[147] 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.*

BIBLIOGRAPHY

BOOKS

Armour and Umbreit *The Paradox of Forgiveness*

Armour MP and Umbreit MS "The Paradox of Forgiveness in Restorative Justice" in Worthington, Jr EL (ed) *Handbook of Forgiveness* (Routledge, New York 2005) 491-504

Ashworth *Sentencing*

Ashworth A *Sentencing and Criminal Justice* 6th ed (Cambridge University Press, United Kingdom 2015)

Barnett *Restitution*

Barnett RE "Restitution: A New Paradigm of Criminal Justice" in Johnstone G (ed) *A Restorative Justice Reader* 2nd ed (Routledge, New York 2013) 47-56

Batley *South African Context*

Batley M "Restorative Justice in the South African Context" in Maepa T (ed) *Beyond Retribution: Prospects for Restorative Justice in South Africa* (ISS Monograph. Pretoria, South Africa: Institute for Security Studies 2005) 21-32

Batley *Relevant Policies*

Batley M "Outline of Relevant Policies" in Maepa T (ed) *Beyond Retribution: Prospects for Restorative Justice in South Africa* (ISS Monograph. Pretoria, South Africa: Institute for Security Studies 2005) 120-126

Batley *Restorative Justice*

Batley M "Restorative Justice" in Davis L and Snyman R (eds) *Victimology in South Africa* 1st ed (Van Schaik Publishers, Pretoria 2005) 117-130

Batley *Restorative Justice in South Africa*

Batley M "Restorative Justice in South Africa" in Peacock R (ed) *Victimology in South Africa* 2nd ed (Van Schaik Publishers, Pretoria 2013) 115-128

Batley and Maepa *Introduction*

Batley M and Maepa T "Introduction" in Maepa T (ed) *Beyond Retribution: Prospects for Restorative Justice in South Africa* (ISS Monograph. Pretoria, South Africa: Institute for Security Studies 2005) 15-20

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

Bazemore G and O'Brien S "The Quest for A Restorative Model of Rehabilitation: Theory-for-Practice and Practice-for-Theory" in Walgrave L (ed) *Restorative Justice and the Law* (Willan Publishing, Devon 2002) 31-67

Bazemore and Walgrave *introduction*

Bazemore G and Walgrave L "Introduction: Restorative Justice and the International Juvenile Crisis" in *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (Criminal Justice Press, Monsey New York USA 1999) 1-14

Bazemore and Bell *Relationship between Restorative Justice and Treatment*

Bazemore G and Bell D "What is the Appropriate Relationship between Restorative Justice and Treatment?" in Zehr H and Toews B (eds) *Critical Issues in Restorative Justice* (Willan Publishing, Devon 2004) 119-132

Bazemore and Schiff *Juvenile Justice Reform and Restorative Justice*

Bazemore G and Schiff M *Juvenile Justice Reform and Restorative Justice*: *Building Theory and Policy from Practice* (Willan Publishing, Devon 2005)

Bazemore and Umbreit *Restorative Conferencing Models*

Bazemore G and Umbreit M "A Comparison of Four Restorative Conferencing Models" in Johnstone G (ed) *A Restorative Justice Reader: Texts, Sources, Context* (Willan Publishing, Devon 2003) 225-243

Beccaria *Crimes and Punishments*

Beccaria C *An Essay on Crimes and Punishments* (Philip H. Nicklin, Philadelphia 1819)

Bonta *et al Restorative Justice and Recidivism*

Bonta J, Jesseman R, Rugge T and Cormier R "Restorative Justice and Recidivism: Promises Made, Promises Kept?" in Sullivan D and Tifft L (eds) *Handbook of Restorative Justice: A Global Perspective* (Routledge, New York 2006) 108-120

Braithwaite *Restorative Justice*

Braithwaite J "Restorative Justice and a Better Future" in Johnstone G (ed) *A Restorative Justice Reader* 2nd ed (Routledge, New York 2013) 57-69

Braithwaite *Does Restorative Justice Work*

Braithwaite J "Does Restorative Justice Work?" in Johnstone G (ed) *A Restorative Justice Reader* 2nd ed (Routledge, New York 2013) 264-291

Braithwaite *Shame and Reintegration*

Braithwaite J *Crime, Shame and Reintegration* (Cambridge University Press, New York 1989)

Cameron and Thorsborne *Restorative and School Discipline*

Cameron L and Thorsborne M "Restorative Justice and School Discipline: Mutually Exclusive? in Strang H and Braithwaite J (eds) *Restorative Justice and Civil Society* (University Press, Cambridge 2001) 180-194

Christie *Conflicts*

Christie N "Conflicts as Property" in Johnstone G (ed) *A Restorative Justice Reader* 2nd ed (Routledge, New York 2013) 36-46

Crawford *The State, Community and Restorative Justice*

Crawford A "The State, Community and Restorative Justice: Heresy, Nostalgia and Butterfly Collecting" in Walgrave L (ed) *Restorative Justice and the Law* (Willan Publishing, Devon 2002) 101-129

Daly *The Limits*

Daly K "The Limits of Restorative Justice" in Sullivan D and Tifft L (eds) *Handbook of Restorative Justice: A Global Perspective* (Routledge, New York 2006) 134-146

Daly *Mind the Gap*

Daly K "Mind the Gap: Restorative Justice in Theory and Practice" in von Hirsch A, Roberts JV, Bottoms A, Roach K and Schiff M (eds) *Restorative Justice & Criminal Justice*: *Competing or Reconcilable Paradigms?* (Hart Publishing, Portland 2003) 219-236

Daly *Retributive and Restorative Justice*

Daly k "Revisiting the Relationship between Retributive and Restorative Justice" in Strang H and Braithwaite J (eds) *Restorative Justice*: *Philosophy to Practice* (Ashgate, Aldrershot, 2000) 33-54

Dignan *Restorative Justice and the Law*

Dignan J "Restorative Justice and the Law: The Case for an Integrated, Systemic Approach" in Walgrave L (ed) *Restorative Justice and the Law* (Willan Publishing, Devon 2002) 168-190

Dignan *Victims and Restorative Justice*

Dignan J *Understanding Victims and Restorative Justice* (Open University Press, England 2005)

Dignan and Marsh *Family Group Conferences*

Dignan J and Marsh P "Restorative Justice and Family Group Conferences in England: Current State and Future Prospects" in Morris A and Maxwell G (eds) *Restorative Justice for Juveniles*: *Conferencing, Mediation and Circles* (Hart Publishing, Oxford 2001) 85-101

Dissel *Victim-Offender Conferencing*

Dissel A "Piloting Victim-Offender Conferencing in South Africa" in Maepa T (ed) *Beyond Retribution: Prospects for Restorative Justice in South Africa* (ISS Monograph. Pretoria, South Africa: Institute for Security Studies 2005) 89-103

Edgar and Newell *Prisons*

Edgar K and Newell T "Restorative Justice and Prisons" in Johnstone G (ed) *A Restorative Justice Reader* 2nd ed (Routledge, New York 2013) 129-133

Eriksson *Justice in Transition*

Eriksson A *Justice in Transition*: *Community Restorative Justice in Northern Ireland* (Willan Publishing, Devon 2009)

Gavrielides *Restorative Justice Theory and Practice*

Gavrielides T *Restorative Justice Theory and Practice*: *Addressing the Discrepancy* (European Institute for Crime Prevention and Control, Helsinki 2007)

Immarigeon *Punishment and Imprisonment in Restorative Justice*

Immarigeon R "What is the Place of Punishment and Imprisonment in Restorative Justice?" in Zehr H and Toews B (eds) *Critical Issues in Restorative justice* (Willan Publishing, Devon 2004) 143-154

Johnstone *Ideas, Values, Debates*

Johnstone G *Restorative Justice*: *Ideas, Values, Debates* (Willan Publishing, Devon 2002)

Johnstone *Introduction*

Johnstone G "Introduction: Restorative Approaches to Criminal Justice" in *A Restorative Justice Reader: Texts, Sources, Context* (Willan Publishing, Devon 2003) 1-18

Johnstone and Van Ness *Restorative Justice*

Johnstone G and Van Ness DW "The Meaning of Restorative Justice" in Johnstone G (ed) *A Restorative Justice Reader* 2nd ed (Routledge, New York 2013) 12-22

Kurki *Restorative Justice Practices*

Kurki L "Evaluating Restorative Justice Practices" in von Hirsch A, Roberts JV, Bottoms A, Roach K and Schiff M (eds) *Restorative Justice & Criminal Justice*: *Competing or Reconcilable Paradigms?* (Hart Publishing, Portland 2003) 293-314

Liebmann *Restorative Justice*

Liebmann M *Restorative Justice: How it Works* (Jessica Kingsley Publishers, London 2007)

Lilles *Circle Sentencing*

Lilles H "Circle Sentencing: Part of the Restorative Justice Continuum" in Morris A and Maxwell G (eds) *Restorative Justice for Juveniles*: *Conferencing, Mediation and Circles* (Hart Publishing, Oxford 2001) 161-179

London *From the Margins to the Mainstream*

London R *Crime, Punishment, and Restorative Justice: From the Margins to the Mainstream* (First Forum Press, London 2011)

Maepa *The Truth and Reconciliation Commission*

Maepa T "The Truth and Reconciliation as a Model of Restorative Justice" in *Beyond Retribution: Prospects for Restorative Justice in South Africa* (ISS Monograph. Pretoria, South Africa: Institute for Security Studies 2005) 66-75

Mason *Researching*

Mason J *Qualitative Researching* 2nd ed (SAGE Publications London 2002)

Maxwell and Morris *The Place of Shame*

Maxwell G and Morris A "What is the Place of Shame in Restorative Justice?" in Zehr H and Toews B (eds) *Critical Issues in Restorative Justice* (Willan Publishing, Devon 2004) 133-142

McCold *The Role of Community in Restorative Justice*

McCold P "What is the Role of Community in Restorative Justice Theory and Practice? in Zehr H and Toews B (eds) *Critical Issues in Restorative Justice* (Willan Publishing, Devon 2004) 155-172

Ministry of Justice *Best Practice Framework*

Ministry of Justice *Restorative Justice*: *Best Practice Framework* (Ministry of Justice, Wellington 2017)

Morris and Maxwell *Restorative Justice*

Morris A and Maxwell G "Restorative Justice in New Zealand" in von Hirsch A, Roberts JV, Bottoms A, Roach K and Schiff M (eds) *Restorative Justice & Criminal Justice*: *Competing or Reconcilable Paradigms?* (Hart Publishing, Portland 2003) 257-272

Muntingh *Sentencing*

Muntingh L "Sentencing" in Gould C (ed) *Criminal (In) Justice in South Africa*: *A Civil Society Perspective* (Institute for Security Studies, Pretoria 2009) 178-195

National Research Council *The Growth of Incarceration in the United States*

National Research Council *The Growth of Incarceration in the United States*: *Exploring causes and consequences* (The National Academic Press, Washington 2014)

Naudé and Prinsloo *Views of Restorative Justice*

Naudé B and Prinsloo J "Magistrates' and Prosecutors' Views of Restorative Justice" in Maepa T (ed) *Beyond Retribution: Prospects for Restorative Justice in South Africa* (ISS Monograph. Pretoria, South Africa: Institute for Security Studies 2005) 53-65

Omale *Restorative Justice and Victimology*

Omale D J O *Restorative Justice and Victimology*: *Euro-Africa Perspectives* (Wolf Legal Publishers, The Netherlands, 2012)

Pavlich *The Promise of Restorative Justice*

Pavlich G "Deconstructing Restoration: The Promise of Restorative Justice" in Johnstone G (ed) *A Restorative Justice Reader: Texts, Sources, Context* (Willan Publishing, Devon 2003) 451-460

Pranis *Circles*

Pranis K "Peacemaking Circles" in Johnstone G (ed) *A Restorative Justice Reader* 2nd ed (Routledge, New York 2013) 117-121

Pranis *et al From Crime to Community*

Pranis K, Stuart B, and Wedge M *Peacemaking Circles*: *From Crime to Community* (Living Justice Press, Minnesota 2003)

Rabie *et al Punishment*

Rabie MA, Strauss SA, Maré MC *Punishment: An Introduction to Principles* 5th ed (Lex Patria Publishers, Johannesburg 1994)

Rautenbach and Bekker *Legal Pluralism*

Rautenbach C and Bekker JC *Introduction to Legal Pluralism in South Africa* (LexisNexis, Durban 2014)

Retzinger and Scheff *Emotions and Social Bonds*

Retzinger SM and Scheff TJ "Strategy for Community Conferences: Emotions and Social Bonds" in Johnstone G (ed) *A Restorative Justice Reader* 2nd ed (Routledge, New York 2013) 103-116

Robinson and Shapland *Reducing Recidivism*

Robinson G and Shapland J "Reducing Recidivism: A task for Restorative Justice?" in Johnstone G (ed) *A Restorative Justice Reader* 2nd ed (Routledge, New York 2013) 320-339

Roche *Accountability*

Roche D *Accountability in Restorative Justice* (Oxford University Press, New York 2003)

Schafer *Compensation and Restitution*

Schafer S *Compensation and Restitution to Victims of Crime* (Patterson Smith Publishing Corporation, New Jersey 1970)

Schiff *Restorative Conferencing Strategies*

Schiff M "Models, Challenges and The Promise of Restorative Conferencing Strategies" in von Hirsch A, Roberts JV, Bottoms A, Roach K and Schiff M (eds)

Restorative Justice & Criminal Justice: *Competing or Reconcilable Paradigms?* (Hart Publishing, Portland 2003) 315-338

Sharpe *Restorative Justice*

Sharpe S "How Large Should the Restorative Justice "Tent" Be?" in Zehr H and Toews B (eds) *Critical Issues in Restorative Justice* (Willan Publishing, Devon 2004) 17-32

Sharpe *Reparation*

Sharpe S "The Idea of Reparation" in Johnstone G and Van Ness DW (eds) *Handbook of Restorative Justice* (Willan Publishing, Devon 2007) 24-40

Siegel and Bartollas *Corrections*

Siegel L and Bartollas C *Corrections Today* 4th ed (Cengage Learning, Boston 2016)

Skelton *The Child Justice Bill*

Skelton A "The Child Justice Bill from A Restorative Justice Perspective" in Maepa T (ed) *Beyond Retribution: Prospects for Restorative Justice in South Africa* (ISS Monograph. Pretoria, South Africa: Institute for Security Studies 2005) 127-135

Skelton and Batley *Mapping Progress, Charting the Future*

Skelton A and Batley M *Mapping Progress, Charting the Future*: *Restorative Justice in South Africa* (Pretoria, South Africa: Restorative Justice Centre 2006)

Skelton and Frank *Conferencing in South Africa*

Skelton A and Frank C "Conferencing in South Africa: Returning to Our Future" in Morris A and Maxwell G (eds) *Restorative Justice for Juveniles*: *Conferencing, Mediation and Circles* (Hart Publishing, Oxford 2001) 103-119

Stayt *Bavenda*

Stayt HA *The Bavenda* (Oxford University Press, London 1931)

Strang *Agenda on Victims*

Strang H "Is Restorative Justice Imposing its Agenda on Victims?" in Zehr H and Toews B (eds) *Critical Issues in Restorative Justice* (Willan Publishing, Devon 2004) 95-106

Strang *Repair or Revenge*

Strang H *Repair or Revenge*: *Victims and Restorative Justice* (Oxford University Press Inc., New York 2002)

Strang *Justice for Victims*

Strang H "Justice for Victims of Young Offenders: The Centrality of Emotional Harm and Restoration" in Morris A and Maxwell G (eds) *Restorative Justice for Juveniles*: *Conferencing, Mediation and Circles* (Hart Publishing, Oxford 2001) 183-193

Stuart and Pranis *Peacemaking Circles*

Stuart B and Pranis K "Peacemaking Circles: Reflections on Principal Features and Primary Outcomes" in Sullivan D and Tifft L (eds) *Handbook of Restorative Justice: A Global Perspective* (Routledge, New York 2006) 121-133

Snyman *Criminal Law*

Snyman CR *Criminal Law* 6th ed (LexisNexis, Durban 2014)

Terblanche *Sentencing*

Terblanche SS *A Guide to Sentencing in South Africa* 3rd ed (LexisNexis, Durban 2016)

Tshehla *Traditional Justice*

Tshehla B *Traditional Justice in Practice*: *A Limpopo Case Study* (ISS Monograph.

Pretoria, South Africa: Institute for Security Studies 2005)

Umbreit and Armour *Restorative Justice Dialogue*

Umbreit MS and Armour MP *Restorative Justice Dialogue*: *An Essential Guide for Research and Practice* (Springer Publishing Company, New York 2011)

Umbreit *et al Victims of Severe Violence*

Umbreit MS, Bradshaw W and Coates RB "Victims of Severe Violence in Dialogue with the Offender: Key Principles, Practices, Outcomes and Implications" in Weitekamp EGM and Kerner H (eds) *Restorative Justice in Context*: *International Practice and Directions* (Willan Publishing, Devon 2003) 123-144

Umbreit *Victim Offender Mediation*

Umbreit MS *The Handbook of Victim Offender Mediation*: *An Essential Guide to Practice and Research* (Jossey-Bass, San Francisco CA 2001)

United Nations Office on Drugs and Crime *Restorative Justice Programmes*

United Nations Office on Drugs and Crime *Handbook on Restorative justice Programmes* (United Nations, New York 2006)

Van der Merwe *Sentencing*

Van der Merwe DP *Sentencing* (Juta, Cape Town 1991 updated to 1998)

Van Dijk *Ideological Trends*

Van Dijk J "Ideological Trends within the Victims Movements: An International Perspective" in Maguire M and Pointing J (eds) *Victims of Crime: A new Deal?* (Open University Press, Philadelphia 1988) 115-126

Van Ness and Strong *Restoring Justice*

Van Ness DW and Strong KH *Restoring Justice* 2nd ed (Anderson Publishing, Cincinnati 2002)

Van Ness and Strong *Restoring Justice*

Van Ness DW and Strong KH *Restoring Justice: An Introduction to Restorative Justice* 3rd ed (Anderson Publishing, Cincinnati 2006)

Van Ness *Restorative Systems*

Van Ness DW "Creating Restorative Systems" in Walgrave L (ed) *Restorative Justice and the Law* (Willan Publishing, Devon 2002) 130-149

Van Ness *Crime and Its Victims*

Van Ness DW *Crime and Its Victims*: (Intervarsity Press, Downers Grove 1986)

Vynckier *Restorative Practices in Flanders*

Vynckier G "A Comparative View on the Role of the Police in Different Restorative Practices in Flanders" in Moor LG, Peters T, Ponsaers P, Shapland J and van Stokkom B (eds) *Restorative Policing* (Maklu-Publishers, Portland 2009) 19-38

Walgrave *Responsible Citizenship*

Walgrave L *Restorative Justice, Self-interest and Responsible Citizenship* (Willan Publishing, Devon 2008)

Walgrave *Retribution Theory and Impulses*

Walgrave L "Has Restorative Justice Appropriately Responded to Retribution Theory and Impulses? in Zehr H and Toews B (eds) *Critical Issues in Restorative Justice* (Willan Publishing, Devon 2004) 47-60

Walgrave *Juridical Foundations for a Systemic Approach*

Walgrave L "Restorative Justice and the Law: Socio-ethical and Juridical Foundations for a Systemic Approach" in *Restorative Justice and the Law* (Willan Publishing, Devon 2002) 191-218

Welsh and Harris *Criminal Justice Policy*

Welsh WN and Harris PW *Criminal Justice Policy & Planning* 3rd ed (Mathew Blender & Company, Inc. New Jersey 2008)

Wright *Making Good*

Wright M *Making Good*: *Prisons, Punishment and Beyond* (Waterside Press, Sherfield 2008)

Wright *The Concept of Punishment*

Wright M "Is It Time to Question the Concept of Punishment?" in Walgrave L (ed) *Repositioning Restorative Justice* (Willan Publishing, Devon 2003) 3-23

Wright and Masters *Justified Criticism*

Wright M and Masters G "Justified Criticism, Misunderstanding, or Important Steps on the Road to Acceptance?" in Weitekamp EMG and Kerner H (eds) *Restorative Justice*: *Theoretical Foundations* (Willan Publishing, Devon 2002) 50-70

Zehr *The Little Book*

Zehr H *The little Book of Restorative Justice* (Good Books, Intercourse PA 2002)

Zehr *Changing Lenses*

Zehr H *Changing Lenses*: *A New Focus for Crime and Justice* (Herald Press, Scottsdale PA 1990)

Zehr *Retributive Justice*

Zehr H "Retributive Justice, Restorative Justice" in Johnstone G (ed) *A Restorative Justice Reader* 2nd ed (Routledge, New York 2013) 23-35

Zehr and Toews *Principles and Concepts*

Zehr H and Toews B "Principles and Concepts of Restorative Justice" in *Critical Issues in Restorative Justice* (Willan Publishing, Devon 2004) 1-4

JOURNAL ARTICLES

Aiyedun and Ordor 2016 *Law, Democracy & Development* 154

Aiyedun A and Ordor A "Integrating the traditional with the contemporary in dispute resolution in Africa" 2016 20 *Law, Democracy & Development* 154-173

Allan *et al* 2014 *Psychiatry, Psychology* and *Law* 176

Allan A, Beesley SM, Attwood B and Mckillop D "Apology in restorative and juvenile justice" 2014 21(2) *Psychiatry, Psychology* and *Law* 176-190

Anderson 2017 *SACJ* 162

Anderson A "Disposal of criminal disputes by informal mediation: A critical analysis" 2017 (30) *SACJ* 162-178

Ashworth 2002 *British Journal of Criminology* 578

Ashworth A "Responsibilities, rights and restorative justice" 2002 42 *British Journal of Criminology* 578-595

Barton 2000 *Australian Journal of Professional and Applied Ethics* 41

Barton C "Theories of restorative justice" 2000 2(1) *Australian Journal of Professional and Applied Ethics* 41-53

Batley 2008 *SA Crime Quarterly* at 27

Batley M "Ngwana phosha dira ga a bolawe: The value of restorative justice to the reintegration of offenders" 2008 26 *SA Crime Quarterly* 27-34

Bazemore and Griffiths 1997 *Federal Probation* 25

Bazemore G and Griffiths CT "Conferences, circles, boards, and mediations: The new wave of community Justice decisionmaking" 1997 61(2) *Federal Probation* 25-37

Bekker and Van der Merwe 2009 *De Jure* 239

Bekker JC and Van der Merwe A "Indigenous legal systems and sentencing: *S v Maluleke* 2008 1 SACR 49 (T)" 2009 *De Jure* 239-250

Bezuidenhout 2007 *Acta Criminologica* 43

Bezuidenhout C "Restorative justice with an explicit rehabilitative ethos: Is this the resolve to change criminality?" 2007 20(2) *Acta Criminologica* 43-60

Bidois 2016 *Commonwealth Law Bulletin* 596

Bidois LM "The value of restorative justice" 2016 42(4) *Commonwealth Law Bulletin* 596-613

Bradshaw and Roseborough 2005 *Federal Probation* 15

Bradshaw W and Roseborough D "Restorative justice dialogue: The impact of mediation and conferencing on juvenile recidivism" 2005 69(2) *Federal Probation* 15-21

Braithwaite 1999 *Crime and Justice* 1

Braithwaite J "Restorative justice: Assessing optimistic and pessimistic accounts" 1999 25 *Crime and Justice* 1-127

Braithwaite 2000 *Canadian Journal of Criminology* 281

Braithwaite J "Shame and criminal justice" 2000 42(3) *Canadian Journal of Criminology* 281-298

Brown 1994 *Emory Law Journal* 1247

Brown JG "The use of mediation to resolve criminal cases: A procedural critique" 1994 43 *Emory Law Journal* 1247-1309

Bruyns and Cilliers 2009 *Acta Criminologica* 81

Bruyns HJ and Cilliers CH "A review of imprisonment and deterrence programmes as a strategy to reduce prison populations" 2009 22(1) *Acta Criminologica* 81-101

Carreira Da Cruz 2010 *Effectius Newsletter* 1

Carreira Da Cruz M "A potential use of crime statistics – measuring cost effectiveness of restorative justice programmes: A cross eye on the British and Canadian debate" 2010 10 *Effectius Newsletter* 1-4

Chikadzi 2017 *Social Work* 287

Chikadzi V "Challenges facing ex-offenders when reintegrating into mainstream society in Gauteng, South Africa" 2017 53(2) *Social Work* 287-300

Cilliers and Smith 2007 *Acta Criminologica* 83

Cilliers C and Smith J "Offender rehabilitation in the South African correctional system: Myth or realty?" 2007 20(2) *Acta Criminologica* 83-101

Clear 2008 *SA Crime Quarterly* 1

Clear TR "Mindful punishment: What to do about the South African penal system, and why" 2008 23 *SA Crime Quarterly* 1-6

Coates *et al* 2003 *Contemporary Justice Review* 265

Coates R, Umbreit M and Vos B "Restorative justice circles: An explanatory study" 2003 6(3) 265-278

Daly 2016 *Victims & Offenders* 9

Daly K "What is restorative justice? Fresh answers to a vexed question" 2016 11(1) *Victims & Offenders* 9-29

Dhami 2016 *Contemporary Justice Review* 31

Dhami MK "Apology in victim-offender mediation" 2016 19(1) *Contemporary Justice Review* 31-42

Dhami 2012 *Critical Criminology* 45

Dhami MK "Offer and acceptance of apology in victim-offender mediation" 2012 20 *Critical Criminology* 45-60

Doolin 2007 *The Journal of Criminal Law* 427

Doolin K "But what does it mean? Seeking definitional clarity in restorative justice" 2007 71(5) *The Journal of Criminal Law* 427-440

Du Toit and Nkomo 2014 *HTS Theological Studies* 1

Du Toit NFB and Nkomo G "The ongoing challenge of restorative justice in South Africa: How and why wealthy suburban congregations are responding to poverty and inequality" 2014 70(2) *HTS Theological Studies* 1-8

Dzur and Olson 2004 *Journal of Social Philosophy* 91

Dzur AW and Olson SM "The value of community participation in restorative justice" 2004 35(1) *Journal of Social Philosophy* 91-107

Elechi *et al* 2010 *International Criminal Justice Review* 73

Elechi OO, Morris SVC and Schauer EJ "Restoring justice (Ubuntu): An African perspective" 2010 20(1) *International Criminal Justice Review* 73-85

Fagan 2004 *SA Crime Quarterly* 1

Fagan H "Curb the vengeance: Laws on minimum sentencing and parole spell worsening prison conditions" 2004 10 *SA Crime Quarterly* 1-5

Fagan 2005 *Advocate* 33

Fagan H "Our bursting prisons" 2005 *Advocate* 33-35

Freiberg 2010 *Federal Sentencing Reporter* 204

Freiberg A "Australia: Exercising discretion in sentencing policy and practice" 2010 22(4) *Federal Sentencing Reporter* 204-212

Garbett 2016 *Contemporary Justice Review* 307

Garbett C "'And focused upon victims' needs': Towards an assessment of the victim-friendly principles of restorative justice practice" 2016 19(3) *Contemporary Justice Review* 307-324

Gavrielides 2008 *Criminology & Criminal Justice* 165

Gavrielides T "Restorative justice – the perplexing concept: Conceptual fault-lines and power battles within the restorative justice movement" 2008 8(2) *Criminology & Criminal Justice* 165-183

Gavrielides 2014 *The Prison Journal* 479

Gavrielides T "Reconciling the notions of restorative justice and imprisonment" 2014 94(4) *The Prison Journal* 479-505

Gavrielides 2014 *Journal of Black Studies* 216

Gavrielides T "Bringing race relations into the restorative justice debate: An alternative and personalized vision of 'the other'" 2014 45(3) *Journal of Black Studies* 216-246

Gavrielides 2016 *Victims & Offenders* 71

Gavrielides T "Repositioning restorative justice in Europe" 2016 11(1) *Victims & Offenders* 71-86

Gavrielides 2017 *Restorative Justice: An International Journal* 382

Gavrielides T "Restorative justice for victims: Inherent limits?" 2017 5(3) *Restorative Justice: An International Journal* 382-395

Greenawalt 1983 *Journal of Criminal Law & Criminology* 343

Greenawalt K "Punishment" 1983 74(2) *Journal of Criminal Law & Criminology* 343-362

Gxubane 2014 *The Social Work Practitioner-Researcher* 241

Gxubane T "Restorative justice with youth sex offenders: Issues for practice" 2014 26(2) *The Social Work Practitioner-Researcher* 241-259

Hargovan 2007 *Acta Criminologica* 79

Hargovan H "Restorative justice: Yesterday, today and tomorrow – making sense of shifting perspectives in crime control and criminal justice in South Africa" 2007 20(1) *Acta Criminologica* 79-90

Hargovan 2015 *SA Crime Quarterly* 55

Hargovan H "Violence, victimisation and parole: Reconciling restorative justice and victim participation" 2015 54 *SA Crime Quarterly* 55-64

Hargovan 2012 *SA Crime Quarterly* 13

Hargovan H "A balancing act for the prosecutor: Restorative justice, criminal justice and access to justice" 2012 42 *SA Crime Quarterly* 13-20

Harris 2006 *Journal of Social Issues* 327

Harris N "Reintegrative shaming, shame and criminal justice" 2006 62(2) *Journal of Social Issues* 327-346

Hayes 2006 *Contemporary Justice Review* 369

Hayes H "Apologies and accounts in youth justice conferencing: Reinterpreting research outcomes" 2006 9(4) *Contemporary Justice Review* 369-385

Ikpa 2007 *Washington University Journal of Law & Policy* 301

Ikpa TS "Balancing restorative justice principles and due process rights in order to reform the criminal justice system" 2007 24 *Washington University Journal of Law & Policy* 301-325

Johnstone 2017 *Restorative Justice: An International Journal* 382

Johnstone G "Restorative justice for victims: Inherent limits?" 2017 5(3) *Restorative Justice: An International Journal* 382-395

Kgosimore 2002 *Acta Criminologica* 69

Kgosimore DL "Restorative justice as an alternative way of dealing with crime" 2002 15(2) *Acta Criminologica* 69-76

Khwela 2014 *Athens Journal of Social Sciences* 145

Khwela MN "A need to re-integrate prisoners to the community: A case of Polokwane medium B prison, South Africa" 2014 1(2) *Athens Journal of Social Sciences* 145-155

Kilekamajenga 2018 *SA Crime Quarterly* 17

Kilekamajenga NN "Learning from contemporary examples in Africa: Referral mechanisms for restorative justice in Tanzania" 2018 63 *SA Crime Quarterly* 17-26

Kim and Gerber 2010 *Asia Pacific Journal of Police & Criminal Justice* 1

Kim HJ and Gerber J "Evaluating the process of a restorative justice conference: An examination of factors that lead to reintegrative shaming" 2010 8(2) *Asia Pacific Journal of Police & Criminal Justice* 1-20

Kim and Gerber 2012 *International Journal of Offender Therapy and Comparative Criminology* 1063

Kim HJ and Gerber J "The effectiveness of reintegrative shaming and restorative justice conferences: Focusing on juvenile offenders' perceptions in Australian reintegrative shaming experiments" 2012 56(7) *International Journal of Offender Therapy and Comparative Criminology* 1063-1079

Koska 2016 *Restorative Justice*: *An International Journal* 41

Koska G "Corporate accountability in times of transition: The role of restorative justice in the South African Truth and Reconciliation Commission" 2016 4(1) *Restorative Justice*: *An International Journal* 41-67

Kurki 2000 *Crime & Justice* 235

Kurki L "Restorative and community justice in the United States" 2000 27 *Crime & Justice* 235-303

Latimer *et al* 2005 *The Prison Journal* 127

Latimer J, Dowden C and Muise D "The effectiveness of restorative justice practices: A meta-analysis" 2005 85(2) *The Prison Journal* 127-144

Levrant *et al* 1999 *Crime & Delinquency* 3

Levrant S, Cullen FT, Fulton B and Wozniak JF "Reconsidering restorative justice: The corruption of benevolence revisited?" 1999 45(1) *Crime & Delinquency* 3-27

Louw and van Wyk 2016 *Social Work* 489

Louw D and van Wyk L "The perspectives of South African legal professionals on restorative justice: An explorative qualitative study" 2016 52(4) *Social Work* 489-510

Lubaale 2017 *SA Crime Quarterly* 31

Lubaale EC "Concessions on custodial sentences: Learning from the New Zealand approach to restorative justice" 2017 61 *SA Crime Quarterly* 31-39

Makiwane 2015 *Obiter* 79

Makiwane PN "Restorative justice: Bringing justice for crime victims?" 2015 *Obiter* 79-94

Mangena 2015 *South African Journal of Philosophy* 1

Mangena F "Restorative justice's deep roots in Africa" 2015 34(1) *South African Journal of Philosophy* 1-12

McCold 2000 *Contemporary Justice Review* 357

McCold P "Toward a holistic vision of restorative juvenile justice: A reply to the Maximalist model" 2000 3(4) *Contemporary Justice Review* 357-414

Meintjies-Van der Walt 1998 *SACJ* 157

Meintjies-Van der Walt L "Towards victims' empowerment strategies in the criminal justice process" 1998 (11) *SACJ* 157-172

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

Meyer J "Reflections on some theories of punishment" 1968 59(4) *Journal of Criminal Law, Criminology & Police Science* 595-598

Mollema and Naidoo 2011 *Journal for Juridical Science* 49

Mollema N and Naidoo K "Incorporating Africanness into the legal curricula: The case for criminal and procedural law" 2011 36(1) *Journal for Juridical Science* 49-66

Morris 2002 *British Journal of Criminology* 596

Morris A "Critiquing the critics: A brief response to critics of restorative justice" 2002 42 *British Journal of Criminology* 596-615

Morris and Maxwell 1997 *The Prison Journal* 125

Morris A and Maxwell G "Re-forming juvenile justice: The New Zealand experiment" 1997 77(2) *The Prison Journal* 125-134

Moss 2013 *Contemporary Justice Review* 214

Moss A "Responding to retributivists: A restorative justice rejoinder to the big three desert theories" 2013 16(2) *Contemporary Justice Review* 214-227

Moss *et al* 2018 *Victims & Offenders* 1

Moss SA, Lee E, Berman A and Rung D "When do people value rehabilitation and restorative justice over the punishment of offenders?" 2018 *Victims & Offenders* 1-20

Mousourakis 2003 *Tilburg Foreign Law Review* 626

Mousourakis G "Understanding and implementing restorative justice" 2003 11 *Tilburg Foreign Law Review* 626-652

Mujuzi 2011 *SACJ* 164

Mujuzi JD "Punishment in the eyes of the Constitutional Court of South Africa: The relationship between punishment and the rights of an offender in the sentencing of primary caregivers of children" 2011 (24) *SACJ* 164-177

Mujuzi 2016 *SA Crime Quarterly* 37

Mujuzi JD "Private prosecutions in Zimbabwe: Victim participation in the criminal justice system" 2016 56 *SA Crime Quarterly* 37-45

Nairn 1977 *SACC* 189

Nairn RG "Sentencing S v Young 1977 1 SA 602 (A)" 1977 1 *SACC* 189-191

Naudé 2006 *Journal for Juridical Science* 101

Naudé B "An international perspective of restorative justice practices and research outcomes" 2006 31(1) *Journal for Juridical Science* 101-120

Naudé 1997 *Consultus* 57

Naudé B "Dealing with the victims of crime – the role of the legal profession" 1997 *Consultus* 57-59

Naudé *et al* 2003 *Acta Criminologica* 1

Naudé B, Prinsloo J & Ladikos A "Restorative justice: A global overview of its functioning and effectiveness" 2003 16(5) *Acta Criminologica* 1-9

Naudé and Nation 2007 *Acta Criminologica* 138

Naudé B and Nation D "An analysis of cases referred to restorative justice in the Tshwane Metropolitan Area" 2007 20(2) *Acta Criminologica* 138-153

Neser 2001 *Acta Criminologica* 46

Neser J "Restorative justice – a new dimension of sentencing in South African courts" 2001 14(3) *Acta Criminologica* 46-51

Nugent *et al* 2001 *Research on Social Work Practice* 5

Nugent WR, Umbreit MS, Wiinamaki L and Paddock J "Participation in victim-offender mediation and reoffense: Successful replications? 2001 11(1) *Research on Social Work Practice* 5-23

Nugent *et al* 2003 *Utah Law Review* 137

Nugent WR, Williams M and Umbreit MS "Participation in victim-offender mediation and the prevalence and severity of subsequent delinquent behavior: A meta – analysis" 2003 1 *Utah Law Review* 137-166

Omale 2016 *Global Journal of Advanced Research* 128

Omale DJO "Toward restorative justice in Africa: A review of selected restorative justice practices" 2016 3(2) *Global Journal of Advanced Research* 128-134

Ornellas and Engelbrecht 2018 *Social Work* 295

Ornellas A and Engelbrecht LK "The life esidimeni crisis: Why a neoliberal agenda leaves no room for the mentally ill" 2018 54(3) *Social Work* 295-308

Paternoster 2010 *Journal of Criminal Law & Criminology* 765

Paternoster R "How much do we really know about criminal deterrence" 2010 100 (3) *Journal of Criminal Law & Criminology* 765-824

Potgieter *et al* 2005 *Acta Criminologica* 40

Potgieter PJ, Michell LJ, Khoza VI and Cilliers CH "Correctional officers' perceptions of restorative justice" 2005 18(1) *Acta Criminologica* 40-53

Presser and Van Voorhis 2002 *Crime and Delinquency* 162

Presser L and Van Voorhis P "Values and evaluation: Assessing processes and outcomes of restorative justice programs" 2002 48(1) *Crime and Delinquency* 162-188

Prinsloo 1998 *Acta Criminologica* 72

Prinsloo J "Crime prevention in South Africa utilising indigenous practices" 1998 11(2) *Acta Criminologica* 72-79

Rautenbach 2015 *Journal of International and Comparative Law* 275

Rautenbach C "Legal reform of traditional courts in South Africa: Exploring the links between *Ubuntu,* restorative justice and therapeutic jurisprudence 2015 2(2) *Journal of International and Comparative Law* 275-304

Roth 2008 *Minnesota Journal of International Law* 155

Roth SM "South African mandatory minimum sentencing: Reform required" 2008 17(1) *Minnesota Journal of International Law* 155-182

Schiff *et al* 2011 *Washington University Journal of Law & Policy* 17

Schiff M, Bazemore G and Brown M "Neighborhood accountability boards: The strength of weak practices and prospects for a "community building" restorative model" 2011 36 *Washington University Journal of Law & Policy* 17-46

Schmid 2002 *VUWLR* 91

Schmid DJ "Restorative justice: A new paradigm for criminal justice policy" 2002 34 *VUWLR* 91-134

Shapland 2016 *Oxford Journal of Law and Religion* 94

Shapland J "Forgiveness and restorative justice: Is it necessary? Is it helpful?" 2016 5(1) *Oxford Journal of Law and Religion* 94-112

Shen 2016 *International Journal for Crime, Justice and Social Democracy* 76

Shen Y "Development of restorative justice in China: Theory and practice" 2016 5(4) *International Journal for Crime, Justice and Social Democracy* 76-86

Sherman and Strang 2009 *Acta Criminologica* 1

Sherman LW and Strang H "Crime and reconciliation: Experimental criminology and the future of restorative justice" 2009 22(1) *Acta Criminologica* 1-14

Sherman *et al* 2015 *Journal of Quantitative Criminology* 1

Sherman LW, Strang H, Mayo-Wilson E, Woods DJ and Ariel B "Are restorative justice conferences effective in reducing repeat offending? Findings from a Campbell systematic review" 2015 31 *Journal of Quantitative Criminology* 1-24

Singh 2007 *New Contree* 147

Singh S "Alternatives to imprisonment in South Africa: A historical perspective, 1980's to present" 2007 53 *New Contree* 147-170

Singh 2008 *Acta Criminologica* 59

Singh S "Towards conceptual clarity of incarceration and rehabilitation within the South African criminal justice system" 2008 (2) *Acta Criminologica* CRIMSA Conference Special Edition 59-77

Singh 2016 *Journal of Social Sciences* 1

Singh SB "Offender rehabilitation and reintegration: A South African perspective" 2016 46(1) *Journal of Social Sciences* 1-10

Skelton 2007 *Acta Juridica* 228

Skelton A "Tapping indigenous knowledge: Traditional conflict resolution, restorative justice and the denunciation of crime in South Africa" 2007 *Acta Juridica* 228-246

Skelton 2013 *Restorative Justice: An International Journal* 122

Skelton A "The South African Constitutional Court's restorative justice jurisprudence" 2013 1(1) *Restorative Justice: An International Journal* 122-145

Skelton 2002 *British Journal of Criminology* 496

Skelton A "Restorative justice as a framework for juvenile justice reform" 2002 42 *British Journal of Criminology* 496-513

Skelton and Batley 2008 *Acta Criminologica* 37

Skelton A and Batley M "Restorative justice: A contemporary South African review" 2008 21(3) *Acta Criminologica* 37-51

Slocum *et al* 2011 *Australian Journal of Psychology* 83

Slocum D, Allan A and Allan MM "An emerging theory of apology" 2011 63(2) *Australian Journal of Psychology* 83-92

Sloth-Nielsen and Ehlers 2005 *SA Crime Quarterly* 15

Sloth-Nielson J and Ehlers L "Assessing the impact: Mandatory and minimum sentences in South Africa" 2005 14 *SA Crime Quarterly* 15-22

Sloth-Nielsen and Gallinetti 2011 *PELJ* 63

Sloth-Nielsen J and Gallinetti J "Just say sorry?" *Ubuntu*, Africanisation and the child justice system in the Child Justice Act 75 of 2008" 2011 14(4) *PELJ* 63-90

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

Solomon OJ and Nwankwoala R "The role of restorative justice in contemplating the justice system and restoring community values in Nigeria" 2014 2(3) *Asian Journal of Humanities and Social Sciences* 126-137

Spies 2016 *SACJ* 273

Spies A "Substantive equality, restorative justice and the sentencing of rape offenders" 2016 (29) *SACJ* 273-291

Stamatakis and Van der Beken 2011 *Acta Criminologica* 44

Stamatakis N and Van der Beken T "Restorative justice in custodial settings: Altering the focus of imprisonment" 2011 24(1) *Acta Criminologica* 44-66

Stockdale 2015 *Restorative Justice*: *An International Journal* 212

Stockdale KJ "Police understandings of restorative justice – the impact of rank and role" 2015 3(2) *Restorative Justice*: *An International Journal* 212-232

Strang and Sherman 2003 *Utah Law Review* 15

Strang H and Sherman LW "Repairing the harm: Victims and restorative justice" 2003 15(1) *Utah Law Review* 15-42

Suzuki and Hayes 2016 *Prison Service Journal* 4

Suzuki M and Hayes H "Current debates over restorative justice: Concept, definition and practice" 2016 228 *Prison Service Journal* 4-8

Terblanche 2013 *THRHR* 95

Terblanche SS "Judgments on sentencing: Leaving a lasting legacy" 2013 (76) *THRHR* 95-106

Terblanche 2003 *South African Law Journal* 858

Terblanche SS "Sentencing guidelines for South Africa: Lessons from elsewhere" 2003 120 *South African Law Journal* 858-882

Terblanche 2018 *ECAN Bulletin* 3

Terblanche SS "Restorative and retributive justice: Could they be parallel streams?" 2018 37 *ECAN Bulletin* 3-8

Terblanche 2012 *PELJ* 436

Terblanche SS "The Child Justice Act: A detailed consideration of section 68 as a point of departure with respect to the sentencing of young offenders" 2012 15(5) *PELJ* 436-475

Terblanche 2003 *Acta Juridica* 194

Terblanche SS "Mandatory and minimum sentences: Considering s 51 of the Criminal Law Amendment Act 1997: Sentencing" 2003 *Acta Juridica* 194-220

Terblanche and Roberts 2005 *SACJ* 187

Terblanche SS and Roberts JV "Sentencing in South Africa: Lacking in principle but delivering justice?" 2005 2 *SACJ* 187-202

Tshehla 2004 *SACJ* 1

Tshehla B "The restorative justice bug bites the South African criminal justice system" 2004 (17) *SACJ* 1-16

Umbreit 1988 *Journal of Dispute Resolution* 85

Umbreit MS "Mediation of victim offender conflict" 1988 *Journal of Dispute Resolution* 85-105

Umbreit *et al* 2001 *Federal Probation* 29

Umbreit MS, Coates RB and Vos B "The impact of victim-offender mediation: Two decades of research" 2001 65(3) *Federal Probation* 29-35

Van Camp and Wemmers 2013 *International Review of Victimology* 117

Van Camp T and Wemmers J "Victim satisfaction with restorative justice: More than simply procedural justice" 2013 19(2) *International Review of Victimology* 117-143

Van der Merwe 1996 *Ethical Perspectives* 76

Van der Merwe WL "Philosophy and the multi-cultural context of (post) apartheid South Africa" 1996 3(2) *Ethical Perspectives* 76-90

Van der Merwe 2015 *SACJ* 415

Van der Merwe A "Recent cases: Sentencing" 2015 (28) *SACJ* 415-429

Van der Merwe and Skelton 2015 *Oxford Journal of Legal Studies* 355

Van der Merwe A and Skelton A "Victims' mitigating views in sentencing decisions: A comparative analysis" 2015 35(2) *Oxford Journal of Legal Studies* 355-372

Van Niekerk 2013 *Fundamina* 397

Van Niekerk GJ "*Amende honorable* and *ubuntu*: An intersection of *ars boni et aequi* in African and Roman-Dutch jurisprudence?" 2013 19(2) *Fundamina* 397-412

Van Rooyen 1980 *SACC* 228

Van Rooyen JH "The decision to imprison – the courts' need for guidance" 1980 4 *SACC* 228-235

Vermaak 2007 *Advocate* 50

Vermaak L "Crime and sentencing in the 'new' South Africa: A brief perspective" 2007 *Advocate* 50-53

Vermaak 2009 *Advocate* 28

Vermaak L "Crime and punishment in present-day South Africa: A cryptic look at restorative justice" 2009 *Advocate* 28-30

Watney 2015 *TSAR* 844

Watney M "The role of restorative justice in the sentencing of adult offenders convicted of rape" 2015 (4) *TSAR* 844-855

Whitear-Nel 2012 *De Jure* 585

Whitear-Nel N "*S v Matyityi* 2011 1 SACR 40 (SCA): Compliance with mandatory sentencing, and placing the victim at the centre of the criminal justice system" 2012 45(3) *De Jure* 585-596

Zernova 2007 *British Journal of Criminology* 491

Zernova M "Aspirations of restorative justice proponents and experiences of participants in family group conferences" 2007 (47) *British Journal of Criminology* 491-509

REPORTS

Batley *Change in the Justice System*

Batley M *A Call to Agents of Change in the Justice System*: *Guidelines in the Use of Restorative Justice in Sentencing for Magistrates, Judges, Prosecutors and Probation Officers* (2014) Pretoria: Restorative Justice Centre

Berkley Center for Religion, Peace & World Affairs *Foundations of the Truth and Reconciliation Commission*

Berkley Center for Religion, Peace & World Affairs *South Africa: The Religious Foundations of the Truth and Reconciliation Commission* Religion and Conflict Case Study Series (August 2013) Georgetown University: Berkley Center for Religion, Peace & World Affairs

Department of Justice Canada *Aboriginal Justice Strategy*

Department of Justice Canada *Evaluation of the Aboriginal Justice Strategy* (December 2016) Department of Justice Canada

Jacobson *et al Prison*

Jacobson J, Heard C and Fair H *Prison*: *Evidence of its Use and Over-use from Around the World* (March 2017) London: Institute for Criminal Policy Research and the authors

Marshall *Restorative Justice*

Marshall TF *Restorative Justice: An overview* (1999) London: Home Office Research Development and Statistics Directorate

Matrix Evidence *Economic Analysis of Interventions*

Matrix Evidence *Economic Analysis of Interventions for Young Adult Offenders* (November 2009) Matrix Evidence

NICRO *South African Prisons*

NICRO *The state of South African Prisons* (2014)

Rossetti *et al Victims' Justice*

Rossetti P, Cumbo E, Forbes A and Bell L *Victims' Justice? What Victims and Witnesses really want from Sentencing* (November 2010) London: Victim Support

Shapland *et al The Second Report from the Evaluation of Three Schemes*

Shapland J, Atkinson A, Atkinson H, Chapman B, Colledge E, Dignan J, Howes M, Johnstone J, Robinson G and Sorsby A *Restorative Justice in Practice*: *The Second Report from the Evaluation of Three Schemes* (July 2006) The University of Sheffield: Centre for Criminological Research

Shapland *et al The Third Report from the Evaluation of Three Schemes*

Shapland J, Atkinson A, Atkinson H, Chapman B, Dignan J, Howes M, Johnstone J, Robinson G and Sorsby A Restorative *Justice: The Views of Victims and Offenders: The Third Report from the Evaluation of Three Schemes* (June 2007) Ministry of Justice Research Series

Sloth-Nielsen and Ehlers *Mandatory and Minimum Sentences*

Sloth-Nielsen J and Ehlers L *A Pyrrhic victory*? *Mandatory and Minimum Sentences in South Africa* ISS Paper 111 (July 2005) Pretoria

South African Law Commission *Sentencing Report*

South African Law Commission *Report*: *Sentencing (A New Sentencing Framework)* Project 82 (November 2000) Pretoria

South African Law Commission *Mandatory Minimum Sentences*

South African Law Commission *Issue Paper 11*: *Sentencing Mandatory Minimum Sentences* Project 82 (August 1997) Pretoria

South African Law Commission *Restorative Justice*

South African Law Commission *Issue Paper 7*: *Sentencing Restorative Justice* (*Compensation for Victims of Crime and Victim Empowerment*) Project 82 (June 1997) Pretoria

South African Law Commission *Community Dispute Resolution Structures*

South African Law Commission *Discussion Paper 87*: *Community Dispute Resolution Structures* Project 94 (October 1999) Pretoria

South African Law Commission *Common Law and Indigenous Law*

South African Law Commission *Discussion Paper 82*: *The Harmonisation of the Common Law and Indigenous Law*: *Traditional Courts and the Judicial Function of Traditional Leaders* Project 90 (May 1999) Pretoria

Terblanche *Research on the Sentencing*

Terblanche SS *Research on the Sentencing Framework Bill* Report 4 (2008) Cape Town: Open Society Foundation

Wright *Deterrence in Criminal Justice*

Wright V *Deterrence in Criminal Justice*: *Evaluating Certainty vs. Severity of Punishment* (November 2010) Washington, D.C: The Sentencing Project

THESES AND DISSERTATIONS

Bizana-Tutu *Traditional Leaders in South Africa*

Bizana-Tutu D *Traditional Leaders in South Africa*: *Yesterday, Today and Tomorrow* (M Phil Degree mini-thesis University of the Western Cape 2008)

Delomoney *Restorative Justice Approach to Sentencing*

Delomoney D *Will A Restorative Justice Approach to Sentencing Improve the Efficacy and Functioning of the Criminal Justice System?* (Masters in Advanced Criminal Justice Mini-dissertation University of Kwa-Zulu Natal 2015)

Gerkin *A Needs-Based Approach to Justice*

Gerkin PM *Seeking Justice for Victims and Offenders: A Needs-Based Approach to Justice* (Doctor of Philosophy dissertation Western Michigan University 2006)

Larkins *Apology Effectiveness*

Larkins I *Apology Effectiveness*: *The Impact of Prior Wrongful Behaviour and Voluntariness of Apologies within Juvenile Justice* (Bachelor of Arts (Psychology) Honours Thesis Edith Cowan University 2018)

Singh *Community Based Sentences*

Singh S *Community Based Sentences*: *An Alternative to Short-term Imprisonment* (Master of Arts dissertation University of South Africa 2002)

van Wyk *Restorative Justice in South Africa*

van Wyk L *Restorative Justice in South Africa: An Attitude Survey Among Legal Professionals* (MA mini-dissertation University of the Free State 2015)

CONFERENCE AND UNPUBLISHED PAPERS

Cameron "Imprisoning the Nation"

Cameron E "Imprisoning the Nation: Minimum Sentences in South Africa" (Paper presented at the Dean's Distinguished Lecture (Faculty of Law) on 19 October 2017, University of the Western Cape)

Cormier "Directions and Principles"

Cormier RB "Restorative Justice: Directions and Principles – Developments in Canada" (Paper presented at the 11th Session of the Commission on Crime Prevention and Criminal Justice 16-25 April 2002, Vienna)

McElrea "Sentencing"

McElrea FWM "Sentencing – the new dimensions" (paper presented at New Zealand Law Society Seminar March 2003, New Zealand)

Van Ness "An Overview of Restorative Justice"

Van Ness DW "An Overview of Restorative Justice Around the World" (Paper presented at 11th United Nations Congress on Crime Prevention and Criminal Justice 18-22 April 2005 Bangkok, Thailand)

Walgrave "Advancing restorative justice"

Walgrave L "Advancing Restorative Justice as the Ground for Youth Justice" (Paper presented at the First World Congress on Restorative Juvenile Justice 4-7 November Lima, Peru)

INTERNET/WEBSITE ARTICLES

Abramson A "Moving restorative justice into the mainstream" 2018-05-11 *Policy Options Politiques* http://policyoptions.irpp.org/magazines/may-2018/moving-restorative-justice-into-the-mainstream/ (accessed 15-05-2018)

Baliga S "A different path for confronting sexual assault" https://www.vox.com/first-person/2018/10/10/17953016/what-is-restorative-justice-definition-questions-circle (accessed 13/10/2018)

Bauer N "The cost of justice: Was Bees Roux let off lightly? 2011-09-13 *Mail & Guardian* https://mg.co.za/article/2011-09-13-the-cost-of-justice-was-bees-roux-let-off-lightly (26/03/2019)

Bright C "Lesson 3: Programmes – Restitution'' 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)

Cherry K "How the need to belong influences human behavior and motivation" https://www.verywellmind.com/what-is-the-need-to-belong-2795393 (accessed on 03/09/2018)

Correctional Service Canada "CSC statistics – key facts and figures" http://www.csc-scc.gc.ca/publications/005007-3024-eng.shtml (accessed on 31/07/2018)

Council of Europe Committee of Ministers "Concerning Consistency in Sentencing: Recommendation No R (92) 17 (1992)" https://rm.coe.int/16804d6ac8 (accessed 16/09/2018)

Davis G "SA prisons under pressure as number of long-term sentences surge" 2017-05-17 *Eyewitness News* http://ewn.co.za/2017/05/17/sa-prisons-under-pressure-as-long-term-sentence-servers-surge (accessed 18/05/2017)

Department of Justice & Constitutional Development "Restorative justice: The road to healing" www.justice.gov.za/rj/2011rj-booklet-a5-eng.pdf (accessed on 25/10/2016)

De Wet P "Jail can make offenders more violent" 2014-10-16 *Mail & Guardian* https://mg.co.za/article/2014-10-16-jail-can-make-offenders-more-violent (accessed 24/05/2017)

Hamman A and Nortje W "Compensation orders in criminal proceedings – A fresh perspective" 2017-01-23 *Academic Research* https://www.litnet.co.za/compensation-orders-criminal-proceedings-fresh-perspective/ (accessed 26/03/2019)

Harris M "How bad is Canada's recidivism problem? Nobody knows 2016-12-22 *iPolitics* https://ipolitics.ca/2016/12/22/how-bad-is-canadas-recidivism-problem-nobody-knows/ (accessed 08/09/2019)

Holinger PC "Physical punishment – and violence" 2015-08-31 *Psychology Today* https://www.psychologytoday.com/intl/blog/great-kids-great-parents/201508/physical-punishment-and-violence (accessed 29/11/2018)

Jordaan N "Public apology for racist rant will deter others, court told" 2018-07-03 *Timeslive* https://www.timeslive.co.za/news/south-africa/2018-07-03-public-apology-for-racist-rant-will-deter-others-court-told/ (accessed 07/04/2018)

Jordaan N "NPA to set up inquest into the Life Esidimeni tragedy" 2019-09-17 *Businesslive* https://www.businesslive.co.za/bd/national/2019-09-17-npa-to-set-up-inquest-into-the-life-esidimeni-tragedy (accessed 20/09/2019)

Karrim A "NPA to establish formal inquest into Life Esidimeni deaths" 2019/09/17 *News*24 https://www.news24.com/SouthAfrica/News/npa-to-establish-formal-inquest-into-life-esidimeni-deaths-20190917 (accessed 20/09/2019)

Khoza A "I dip my head in shame – Makhura on Life Esidimeni tragedy" 2018-02-26 *News24* https://www.news24.com/SouthAfrica/News/i-dip-my-head-in-shame-makhura-on-life-esidimeni-tragedy-20180226 (accessed 07/08/2018)

Kloppers D and Kloppers H "Restorative justice in cases of sexual offences and the judgments of the Supreme Court of Appeal in *DPP v Thabethe* and *Seedat v S*" 2017-02-17 *Academic Research* https://www.litnet.co.za/restorative-justice-cases-sexual-offences-judgments-supreme-court-appeal-dpp-v-thabethe-seedat-v-s/ (accessed 26/10/2018)

Llewellyn J "Realizing the full potential of restorative justice" 2018-05-02 *Policy Options Politiques* http://policyoptions.irpp.org/magazines/may-2018/realizing-the-full-potential-of-restorative-justice/ (accessed 2018/05/03)

Lotter C "Why a resettlement grant for ex-offenders in SA is a really good idea" 2018-09-18 *IOL News* https://www.iol.co.za/news/opinion/why-a-resettlement-grant-for-ex-offenders-in-sa-is-a-really-good-idea-17128366 (accessed 19/09/2018)

Makoni M "Repeat offenders filling up jails" 2013-08-02 *Free State Times* http://fstimes.co.za/?p=1105 (accessed 19-07-2017)

Maravanyika E O "Understanding overcrowding in South African prisons" 2016-12-05 *SABC News* www.sabc.co.za/news/a/b7d0fd004f36e769aed37832bbf1/understanding-overcrowding-in-South-African-prisons (accessed 18-07-2017)

Muntingh L "Op-Ed: Rethinking life imprisonment" 2017-03-02 *Daily Maverick* www.dailymaverick.co.za/article/2017-03-02-op-ed-rethinking-life-imprisonment/#.WTZOy-uGPIU (accessed 06-06-2017)

Nevin A "Prison overcrowding: No more band-aid solutions" 2017-03-13 *Mail & Guardian* https://m.g.co.za/article/2017-03-13-prison-overcrowding-no-more-band-aid-solutions (accessed 22/05/2017)

Nicolson G "Life Esidimeni: Former MEC Qedani Mahlangu needs to be put on the stand to tell us why" 2017-10-16 *Daily Maverick* https://www.dailymaverick.co.za/article/2017-10-16-life-esidimeni-former-mec-qedani-mahlangu-needs-to-be-put-on-the-stand-to-tell-us-why/ (accessed 06/08/2018)

Phakathi B "Bheki Cele: We are close to war zone" 2018-09-11 *Businesslive* https://www.businesslive.co.za/bd/national/2018-09-11-dire-crime-statistics-are-nothing-to-write-home-about-bheki-cele-says/ (accessed 29/06/2019)

Phakgadi P "Esidimeni: Motsoaledi believes prosecution process could offer closure" 2018-02-17 *Eyewitness News* http://ewn.co.za/2018/02/17/esidimeni-motsoaledi-believes-prosecution-process-could-offer-closure (accessed 07/08/2018)

Pointer L "How effective is restorative justice when followed by a punitive sentence? https://lindseypointer.com/2016/07/06/how-effective-is-restorative-justice-when-followed-by-a-punitive-sentence/ (accessed 13/07/2018)

Pointer L "Restorative justice facilitates effective apologies" https://lindseypointer.com/2016/05/30/restorative-justice-facilitates-effective-apologies/ (accessed 13/07/2018)

Presence C "Masutha says South African prisons at 137% occupancy" 2018-05-17 *IOL News* https://www.iol.co.za/news/south-africa/masutha-says-south-african-prisons-at-137-occupancy-15026418 (accessed 22/05/2018)

Rahlaga M "Esidimeni hearing: 'Health officials should be criminally charged'" 2017-11-22 *Eyewitness News* http://ewn.co.za/2017/11/22/esidimeni-hearing-officials-should-be-criminally-charged (06/08/2018)

Statement by the Life Esidimeni Family Committee "The Life Esidimeni 94+'s search for restorative justice" http://section27.org.za/2017/10/statement-by-the-life-esidimeni-family-committee/ (accessed 06/08/2018)

Toxopeüs M "Life Esidimeni arbitration: The legal basis for granting the award" 2018-05-09 *Politics Web* http://www.politicsweb.co.za/opinion/life-esidimeni-arbitration-the-legal-basis-for-gra (accessed 06/08/2018)

Velthuizen D "Why South Africa's tentative moves toward restorative justice need support" 2016-01-14 *The Conversation* http://theconversation.com/why-south-africas-tentative-moves-toward-restorative-justice-need-support-51286 (accessed 22/05/2017)

Venter Z "Restorative justice: ruling with a heart" 2011-04-11 *IOL News* https://www.iol.co.za/news/restorative-justice-ruling-with-a-heart-1055234 (accessed 04/10/2018)

LIST OF LEGISLATION

The Child Justice Act 75 of 2008

The Correctional Services Act 111 of 1998

The Criminal Law (sentencing) Amendment Act 38 of 2007

The Criminal Law Amendment Act 105 of 1997

The Criminal Procedure Act 51 of 1977

The Probation Services Amendment Act 35 of 2002

The Traditional Courts Bill of 2017 [B1-2017]

The Traditional Leadership and Governance Framework Act 41 of 2003

POLICY DOCUMENTS

Department of Correctional Services *Corrections*

Department of Correctional Services *White Paper on Corrections in South Africa* (2005, Pretoria)

Department of Justice & Constitutional Development *National Policy Framework*

Department of Justice & Constitutional Development *Restorative Justice National Policy Framework* (2015, Pretoria)

GOVERNMENT GAZETTES

Proc R43 *GG* 6175 of 1 May 1998

Proclamation R43 *Government Gazette* 6175 of 1 May 1998

CASES

Attorney-General, Eastern Cape v D 1997(1) SACR 473(E)

Centre for Child Law v Minister of Justice and Constitutional Development 2009 (2) SACR 477 (CC)

Director of Public Prosecutions, Gauteng v Tsotetsi 2017 (2) SACR 233 (SCA)

Director of Public Prosecutions, KwaZulu-Natal v P 2006 (1) SACR 243 (SCA)

Director of Public Prosecutions, Transvaal v Venter 2009 (1) SACR 165 (SCA)

DPP, North Gauteng v Thabethe 2011 (2) SACR 567 (SCA)

R v Mapumulo 1920 AD 56

R v Swanepoel 1945 AD 444

S v B 1985 (2) SA 120 (A)

S v Baartman 1997 (1) SACR 304 (E)

S v Banda 1991 (2) SA 352 (B)

S v Benneti 1975 (3) SA 603 (T)

S v Bezuidenhout 1991 (1) SACR 43 (A)

S v Birkenfield 2000 (1) SACR 325 (SCA)

S v Blaauw 2001 (2) SACR 255 (C)

S v Brand 1998 (1) SACR 296 (C)

S v Brown 2015 (1) SACR 211 (SCA)

S v C 1996 (2) SACR 181 (C)

S v Chabalala 2014 (1) SACR 458 (GNP)

S v Coales 1995 (1) SACR 33 (A)

S v Collett 1990 (1) SACR 465 (A)

S v De Kock 1997 (2) SACR 171 (T)

S v De Villiers 2016 (1) SACR 148 (SCA)

S v Dlamini 1991 (2) SACR 655 (A)

S v Dodo 2001 (1) SACR 594 (CC)

S v Eadie 2001 (1) SACR 185 (C)

S v EN 2014 (1) SACR 198 (SCA)

S v F 1992 (2) SACR 13 (A)

S v Fhetani 2007 (2) SACR 590 (SCA)

S v Flanagan 1995 (1) SACR 13 (A)

S v Fraser 1987 (2) SA 859 (A)

S v FV 2014 (1) SACR 42 (GNP)

S v Hermanus 1995 (1) SACR 10 (A)

S v Hewitt 2017 (1) SACR 309 (SCA)

S v Holder 1979 (2) SA 70 (A)

S v Homareda 1999 (2) SACR 319 (W)

S v Ingram 1995 (1) SACR 1 (A)

S v Isaacs 2002 (1) SACR 176 (C)

S v Jibiliza 1995 (2) SACR 677 (A)

S v Jimenez 2003 (1) SACR 507 (SCA)

S v Karg 1961 (1) SA 231 (A)

S v Kgafela 2001 (2) SACR 207 (B)

S v Khulu 1975 (2) SA 518 (N)

S v Khumalo 1984 (3) SA 327 (A)

S v Kok 1998 (1) SACR 532 (N)

S v Koopman 1993 (1) SACR 379 (A)

S v M 2007 (2) SACR 539 (CC)

S v Mafu 1992 (2) SACR 494 (A)

S v Maki 1994 (2) SACR 414 (E)

S v Makwanyane 1995 (2) SACR 1 (CC)

S v Malgas 2001 (1) SACR 469 (SCA)

S v Maluleke 2008 (1) SACR 49 (T)

S v Martin 1996 (2) SACR 378 (W)

S v Maseko 1982 (1) SA 99 (A)

S v Matyityi 2011 (1) SACR 40 (SCA)

S v Metu 1995 (2) SACR 681 (A)

S v Mhlakaza 1997 (1) SACR 515 (SCA)

S v MM 2010 (2) SACR 543 (GNP)

S v Mofokeng 1999 (1) SACR 502 (W)

S v Montgomery 2000 (2) SACR 318 (N)

S v Ndwalane 1995 (2) SACR 697 (A)

S v Ngcongo 1996 (1) SACR 577 (N)

S v Nkambule 1993 (1) SACR 136 (A)

S v Nkwanyana 1990 (4) SA 735 (A)

S v PB 2013 (2) SACR 533 (SCA)

S v Pillay 2018 (2) SACR 192 (KZD)

S v Price 2003 (2) SACR 551 (SCA)

S v Rabie 1975 (4) SA 855 (A)

S v Radebe 2013 (2) SACR 165 (SCA)

S v Reay 1987 (1) SA 873 (A)

S v RO 2010 (2) SACR 248 (SCA)

S v S 1995 (1) SACR 267 (A)

S v *Saayman* 2008 (1) SACR 393 (E)

S v Samuels 2011 (1) SACR 9 (SCA)

S v Scheepers 1977 (2) SA 154 (A)

S v Scheepers 2006 (1) SACR 72 (SCA)

S v Scott-Crossley 2008 (1) SACR 223 (SCA)

S v Sebata 1994 (2) SACR 319 (C)

S v Seedat 2015 (2) SACR 612 (GP)

S v Seedat 2017 (1) SACR 141 (SCA)

S v *Shilubane* 2008 (1) SACR 295 (T)

S v Sinden 1995 (2) SACR 704 (A)

S v Skenjana 1985 (3) SA 51 (A)

S v Smith 1996 (1) SACR 250 (E)

S v Sobandla 1992 (2) SACR 613 (A)

S v Swartz 1999 (2) SACR 380 (C)

S v Tabethe 2009 (2) SACR 62 (T)

S v Toms; S v Bruce 1990 (2) SA 802 (A)

S v Van Deventer 2011 (1) SACR 238 (SCA)

S v van Wyk 2000 (1) SACR 45 (C)

S v Vilakazi 2009 (1) SACR 552 (SCA)

S v Willemse 1999 (1) SACR 450 (C)

S v Williams 1995 (2) SACR 251 (CC)

S v Xaba 2005 (1) SACR 435 (SCA)

S v Young 1977 (1) SA 602 (A).

S v Zinn 1969 (2) SA 537 (A)