

**WILL A RESTORATIVE JUSTICE APPROACH TO SENTENCING IMPROVE
THE EFFICACY AND FUNCTIONING OF THE CRIMINAL JUSTICE SYSTEM?**

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This Research Project is submitted in partial fulfilment of the regulations for the LLM Degree
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DECLARATION

This research has not been previously accepted for any degree and is not being currently considered for any other degree at any other university.

I declare that this dissertation contains my own work except where specifically acknowledged. I further declare that I have obtained the necessary authorisation and consent to carry out this research. This work may be made available for photocopying and for inter-library loan.

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CHAPTER 1: INTRODUCTION

1.1 Background

An eye for an eye is one of the strongest human reactions. However, the reciprocation of harm is not the ideal for a fair, just and equitable society. This ancient principle is expressed succinctly in several old religious texts.¹ The reality for many people, particularly South Africans, is a high crime rate, poor policing, unemployment and several other related social aspects. So generally, when a criminal commits a crime, he or she needs to be punished and the South African criminal justice system, more particularly, the judicial officer fulfils this role.

However, punishment, or sentencing, as it is correctly referred to, is not implemented in a vacuum and is imposed against the four purposes of punishment applicable in our legal system, namely deterrence, prevention, rehabilitation and retribution.² Despite the numerous guidelines and statutory impositions it is apparent from the various case judgments that sentencing is not an easy, nor a straightforward process; if anything sentencing is innately controversial.³ In the important judgment of *S v Ro*,⁴ the following sentencing principle was outlined by the court:⁵

Sentencing is about achieving the right balance (or, in more high flown terms proportionality). The elements at play are the crime, offender and the interests of society or, with different nuance, prevention, retribution, reformation and deterrence. Invariably there are overlaps that render the process unscientific; even a proper exercise of the judicial function allows different people to arrive at different conclusions.

Despite the numerous guidelines and statutory impositions it is apparent from the various case judgments that sentencing is a particularly difficult part of the criminal justice process⁶. In the case of *S v Ro*,⁷ the court stated that sentencing, whilst dependent on judicial

¹ R Deem 'Eye for an Eye or Love Thy Neighbour? Are the messages of the old and New Testament Different?' available at <http://www.godandscience.org>, accessed on 2 November 2015.

² *S v M (Center for Child Law as Amicus Curiae)* 2007 (2) SACR 539 CC para 109.

³ *Ibid* para 10.

⁴ *S v Ro* 2010 (2) SACR 248 SCA.

⁵ SS Terblanche 'Sentencing' (2010) 3 *SACJ* 427, 427.

⁶ SS Terblanche 'Judgements on sentencing' (2013) 76 *THRHR* 95.

⁷ *Ro* (note 4 above) 248.

discretion,⁸ is about achieving the right balance while allowing a judicial officer to utilise his or her discretion. Section 3(3) of the Draft Sentencing Framework Bill⁹ takes this a step further, and proposes that sentences must aim to restore the rights of victims, protect society from the offender and give the offender an opportunity to lead a crime-free life.¹⁰

As at March 2014, the Department of Correctional Services had 243 correctional centres in South Africa.¹¹ The White Paper on Corrections in South Africa¹² acknowledges that the department itself faces many critical challenges and indicates overcrowding as a major problem. This carries the further infringement of basic human rights if left unattended. It must also be remembered that the right to dignity of a person is inviolable and is enshrined in Section 10 of the South African Constitution.¹³ This guarantees that the intrinsic worth of a person is to be protected at all costs and that the moral demand for respect is met. Those responsible for wrongdoing must be appropriately brought to justice and punished in accordance with the sound theoretical underpinnings of punishment which ideally should be absent of degradation and humiliation.

Crime in South Africa still remains high and this has resulted in the public having a low opinion of the criminal justice system. The high crime rates, overcrowding and recidivism and rising caseloads¹⁴ are indications of the system's failure to develop and align with international trends. Local research highlights the possibility of innovative solutions and restorative mechanisms which have as yet remained unexplored in South Africa.¹⁵ The National Crime Prevention Strategy¹⁶ recognises that the escalating crime in South Africa is a serious threat to the country's growing democracy.¹⁷ Commission of a crime involves an infringement of every citizen's constitutional right which is guaranteed by the Constitution of the country.

⁸ Terblanche (note 6 above) 95.

⁹ South African Law Commission Project 82 *Sentencing (A New Sentencing Framework)* (November 2000).

¹⁰ Ibid 100.

¹¹ Department of Correctional Services Annual Report 2013-2014, 27.

¹² South Africa (2005) Department of Correctional Services. *White Paper on Corrections in South Africa*, Pretoria: Government Printer (hereafter referred to as the White Paper on corrections).

¹³ Constitution of the Republic of South Africa, 1996 (hereafter referred to as the 1996 Constitution).

¹⁴ PN Makiwane 'Restorative Justice: Bringing Justice for Victims of Crime' (2015) *Obiter* (36) 79.

¹⁵ *S v Shilubane* 2008 (1) SACR 295 (T).

¹⁶ L Davis & R Snyman *Victimology in South Africa* 1st ed (2005) 118.

¹⁷ DL Kgosimore 'Restorative Justice As An Alternative Way of Dealing with Crime' 2002 15(2) *Acta Criminologica* 69.

The justice system's current approach to dealing with crime includes defining crime solely as an offence against the state and is not about the needs of victims of crime.¹⁸ It focuses on retaliation and punishment – a punitive,¹⁹ retributive²⁰ approach which has been accepted as the norm for punishment. This is the perception and view of millions of South Africans – an ongoing belief that *punishment* is an appropriate and necessary response to wrongdoing. Section 276 (1) of the Criminal Procedure Act,²¹ states that punishment can take many forms²² including imprisonment, fines, suspended sentences, forfeiture, compensation orders and community service. However, this approach fails to address or even take cognisance of the effects that the criminal behaviour has on the victim, the offender and members of the community. Van Ness clearly explains that crime is an encounter between the offender and the victim and not an incident that begins a contest between the state and the offender.²³ Kgosimore clarifies the position between the victim and offender very differently from the prevailing approach and states as follows:

Crime violates meaningful relationships between the offender and the victim, their next of kin and their communities. It is these relationships that need to be mended if order and peace are to prevail in any society. Restorative justice is well positioned to attain this goal.²⁴

Restorative justice an alternative approach is receiving increased national and international²⁵ attention. Quite specifically, restorative justice focuses on repairing the harm that was caused by the wrongdoing.²⁶ It aims to do so by taking into account not only the offender but also the victim and the community itself. The United Nations Handbook on Restorative Justice Programmes defines restorative justice as:

¹⁸ Makiwane (note 14 above) 79.

¹⁹ Kgosimore (note 17 above) 70.

²⁰ B Tshela 'The restorative justice bug bites the South African criminal justice system' (2004) 17 *SACJ* 16, 17.

²¹ Act 51 of 1977 (Hereafter referred to as 'the Criminal Procedure Act').

²² SS Terblanche *Guide to Sentencing in South Africa* 2ed (2007) 4.

²³ D Van Ness 'As cited in Kgosimore' (note 17 above) 70.

²⁴ *Ibid* 70.

²⁵ A Skelton & M Batley 'Restorative Justice: A contemporary South African Review' (2008) 21(3) *Acta Criminologica* 37.

²⁶ J Braithwaite 'Restorative Justice: Theories and Worries' available at <http://www.unafei.or.jp>, accessed on 27 June 2015.

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.²⁷

The fundamental premise of the restorative justice paradigm is that crime is a violation of people and their relationships, rather than merely a violation of law.²⁸ In the traditional justice system crime is seen as a violation against the state and the state is then responsible for carrying out justice. This removes the victim further from the case and the victim not the state requires closure and reparation. Despite international trends and domestic guidelines that victims' rights should be taken seriously the country's justice system has been slow in prioritising the rights of victims.²⁹

Certain cases have in fact received attention at an appeal court and Constitutional Court level which has allowed for the expansion of the concept within South African jurisprudence.³⁰ Its significant inroads into criminal justice policy, legislation and practices highlight that this concept has value. Our system needs to move from its fledgling stage³¹ to confidently entrench and implement restorative principles. The questions that require closer scrutiny, which the writer will explore, are firstly to define what restorative justice is, and secondly, to assess whether current practices and engagements with the concept meet the criteria when evaluated against the principles of restorative justice. These answers have two very significant meanings in terms of the future development of restorative options which the paper will highlight.

1.2 Aim of the study

There are several new legislative developments which have specific reference to restorative justice. One such example is the Child Justice Act.³² The fledgling jurisprudence³³ dealing with this concept will be explored to evaluate this new pattern of thinking and its relevance to

²⁷United Nations Handbook on Restorative Justice available at <http://www.unodc.org>, accessed on 25 August 2014.

²⁸ H Zehr *Changing Lenses : A New Focus for Crime and Justice* 1sted (1990) 24.

²⁹ H Hargovan 'Restorative Approaches to Justice: "Compulsory Compassion" or Victim Empowerment' (2007) 20(3) *Acta Criminologica* 113.

³⁰ *S v Saayman* 2008 (1) SACR 393 (E).

³¹ H Hargovan 'Knocking and Entering: Restorative Justice arrives at the courts' (2008) 1 *Acta Criminologica* 31, 40.

³² The Child Justice Act 75 of 2008 (hereafter referred to as the Child Justice Act).

³³ Hargovan, (note 31 above) 31.

creating a criminal justice system with a strong restorative justice ethos, specifically within the sentencing framework.

There is also the perception that restorative justice is ‘a new approach to dealing with crime, victims and offenders’.³⁴ However, this paper will show that while restorative justice is a new term, the principles of restorative justice are concepts that South Africans are quite familiar with.³⁵ The discussion will question whether the translation of restorative justice from paper to practice is taking place effectively. The paper will consider critically the advantages and shortcomings of current restorative justice practices and highlight some of the critical issues surrounding restorative justice in future.

1.3 Objectives

The objective of this paper is to understand the meaning of restorative justice and its application in the sentencing process. The paper will explore whether the current implementations are truly restorative justice approaches or merely an injudicious response as a result of the demands facing the justice system. The study embraces the problems with inconsistencies and recommendations for possible solutions.

1.4 Synopsis of chapters

The study has been developed through seven chapters. Chapter 1 sets out the background and clarifies the aims and objectives of the paper. Chapter 2 deals with what exactly restorative justice is and how it is evolving. Chapter 3 is a discussion of the reasons for punishment and highlights some of the disparities between them and restorative justice. Chapter 4 deals with the practice of restorative justice in South Africa: how it has evolved over the years, through various legislation and the concept of *ubuntu*. Chapter 5 explores the emerging jurisprudence and policies and legislation dealing with restorative justice in the South Africa context. It will highlight what has worked and what needs to be revisited. Chapter 6 outlines a concrete analysis of some of the challenges and advantages associated with restorative justice practices. Chapter 7 considers the practical implementation of the concept of restorative justice within the criminal justice system.

³⁴ *S v Maluleke* 2008 (1) SACR 49 (T) para 26.

³⁵ A Skelton ‘Restorative Justice As A Framework for Juvenile Justice Reform’ (2002) 42 *BRIT.J.CRIMINOL.* 507.

CHAPTER 2: WHAT IS RESTORATIVE JUSTICE?

RJ, RJ, RJ!³⁶ This is the new³⁷ buzzword in the criminal justice sector and with civil society organisations. As much as this theory of justice is very much in its developing phase and cannot as yet be considered a complete theory of justice,³⁸ it is rapidly expanding nationally and internationally. Eschholz explains this as follows:

[R]estorative justice theory and its practical implications are having a world-wide impact on the way justice is intellectualized and practised. Although the restorative justice movement is a relatively new phenomenon, its philosophical roots can be traced to many religious and spiritual traditions and to aboriginal practices and customs around the world.³⁹

This is reinforced by Skelton's view that 'modern restorative justice theory and practice has been enriched through learning from indigenous justice practices'.⁴⁰ It is indeed these indigenous practices which drove the process to formulate the Truth and Reconciliation Commission (TRC)⁴¹ so that restorative concepts such as reconciliation and forgiveness could begin to heal the damage caused by apartheid. Sherman and Strang share the following commendable sentiments on the TRC process in South Africa:

Yet whether or not South Africans approve of the work of the TRC, it has been an inspiration to the movement for restorative justice around the world. That movement has probably been inspired more by Archbishop Desmond Tutu than by anyone else, even before he wrote in this his own memoir.⁴²

A 1984 Nobel Prize winner, Archbishop Desmond Tutu articulates the meaning between retributive justice and restorative justice as follows:

Retributive justice – in which an impersonal state hands down punishment with little consideration for victims and hardly any for the perpetrator – is not the only form of justice. I

³⁶ H Hargovan 'Doing Justice Differently: Prosecutors as 'Gate-Keepers' Of Justice (2008) 21(3) *Acta Criminologica* 18.

³⁷ Kgosimore (note 17 above) 72.

³⁸ J Consedine 'Restorative Justice: A Discussion Paper' available at <http://www.md-justice-policy-inst/org>, accessed on 14 October 2015.

³⁹ S Eschholz 'Book Review Essay: Restorative Justice, Social Movement, Theory and Practice' (2003) 28 *Criminal Justice Review* 146, 147.

⁴⁰ A Skelton 'Tapping indigenous knowledge: traditional conflict resolution, restorative justice and the denunciation of crime in South Africa' (2007) 13 *Acta Juridica* 228, 229.

⁴¹ Promotion of National Unity and Reconciliation, Act 34 of 1995.

⁴² LW Sherman & H Strang 'Crime and Reconciliation: Experimental Criminology and the Future of Restorative Justice' (2009) 22(1) *Acta Criminologica* 3.

contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern is not retribution or punishment but, in the spirit of *ubuntu*, the healing of breaches, the redressing of imbalances, the restoration of broken relationships. This kind of justice seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he or she has injured by his or her offence. This is a far more personal approach, which sees the offence as something that has happened to people and whose consequence is a rupture in relationships. Thus we would claim that justice, restorative justice, is being served when efforts are being made to work for healing, for forgiveness and for reconciliation.⁴³

South Africa's rich indigenous history, cultures and practices make it fertile ground for the nurturing and development of restorative justice. The paradox though is that despite the vast amount of literature, theoretical and research based, and the inheritance of indigenous history there is not a universally sanctioned definition for restorative justice. Further, it appears the challenges with defining restorative justice⁴⁴ in a manner that would suit all is not only a challenge on a national level but internationally too. Gavrielides points out:

The irony is that even on this matter the restorative justice movement does not seem to agree whether a definition is in fact desirable or not. The views are again divided into two groups: those who believe that a definition for restorative justice is imperative if we are to avoid confusion and those who claim that it will expose the concept to great danger. To give an example Zehr and Mika said: "We do not believe that any single decision will ever be likely or even particularly useful." David Miers, on the other hand claimed that without a clear and comprehensive understanding of RJ, evaluation is hampered.⁴⁵

There are many varied definitions of restorative justice⁴⁶ which creates confusion as when to use which definition. Braithewaite correctly states that 'it is impossible to articulate a definition on restorative justice that would satisfy all practitioners and theorists'.⁴⁷ Whilst, Zehr states compellingly that:

⁴³ D Tutu *No Future Without Forgiveness* 1st ed (1999) 51.

⁴⁴ T Gavrielides *Restorative Justice Theory and Practice: Addressing the Discrepancy* 1st ed (2007) 37.

⁴⁵ Ibid 44.

⁴⁶ H Hargovan (note 36 above) 22.

⁴⁷ FD Hill 'Restorative Justice: Sketching a New Legal Discourse' (2008) 4 *IJPS* 1,3.

Restorative justice practice has led theory in many ways and the goals and values of restorative justice are not universal, in the sense that restorative justice is practised differently in different places, but there are some fundamental commonalities which can be identified.⁴⁸

The writer submits that this is an accurate reflection of where we find ourselves with restorative justice in that what we have to work with currently are agreed fundamental common principles which should be included in deciphering restorative justice. Justice Sachs indicates the following as elements of restorative justice: encounter, reparation, reintegration and participation.⁴⁹ Van Ness and Strong suggest that restorative justice, generally, is based on three principles:

- Crime is injurious to victims, communities and even offenders themselves. Based on the spirit of ubuntu, the healing and restoration of desecrated interpersonal relationships should be initiated within the framework of the criminal justice process.
- All the afore-mentioned role-players should, at the earliest point in time and to their fullest capacity, be actively involved in the process of restorative justice, including government.
- Government should respect its delegated responsibility to preserve peace and order in society and should be supported in this endeavour by the public.

South Africa has various policies and two pieces of legislation which specifically deal with restorative justice. The Probation Services Act No 116 of 1991 (as amended by Act 35 of 2002) defines restorative justice as follows:

The promotion of reconciliation, restitution and responsibility through the involvement of a child, and the child's parents, family members, victims and the communities concerned.

The other relevant piece of legislation is the Child Justice Act. The Act is applicable to children under the age of 18 years of age and who are in conflict with the law. It regulates restorative justice in terms of diversion and in section 1 offers the following definition:

⁴⁸ Ibid 4.

⁴⁹ A Skelton 'Face to Face: Sachs on Restorative Justice' (2010) *SAPR* 25 96.

'restorative justice' means an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation.

While the Act's primary objective is the protection of the rights of children in conflict with the law, its restorative focus is also apparent in that it 'aims to hold them accountable for their actions to the victims, the families of the child and victims, and the community as a whole'. This is applicable in terms of children in conflict with the law. What of the rest of society wherein restorative justice is practised – how and against what is that evaluated?

In 2005 Batley explained restorative justice as follows:

Restorative justice is a way of dealing with victims and offenders by focusing on the settlements of conflicts arising from crime and resolving the underlying problems that cause it. It is also more widely a way of dealing with crime generally in a rational problem-solving way. Central to restorative justice is the recognition of the community, rather than the criminal justice agencies, as the prime sites of crime control.

In 2010 the Department of Justice and Constitutional Development issued the Restorative National Policy Framework. It is important to note that the state is in the process of reforming its approach, which is why government is looking at dealing with crime in a more focused and co-ordinated manner; there is a need to increase community participation in the criminal justice system, both to provide better support for victims and to support offender reintegration'. Further, the policy outlines the inter-sectoral roles that different government departments will play in restorative justice and defines it as

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; this may be applied at any appropriate stage after the incident.

This is clearly a departure from existing practice and is certainly progressive if government remains committed and is successful in transferring policy to practice. This is affirmed by Cavanagh who states:

[F]or collaborative action to yield success, those who participate in it must learn to repair the harm of crime by concentrating on the core values of restorative justice. These include personal responsibility, apology, healing, mercy, forgiveness and reconciliation. The value of this process is that it is transformative in nature, gives hope to those affected by crime, honours their dignity and treats them with respect.

In *S v M*, Justice Sachs aptly highlights the roles played by the community in restorative justice as follows:

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. One of its strengths is that it rehabilitates the offender within the community, without the negative impact of prison and the damaging disruption of the family.

Traditionally, the justice system deals with crime in a manner that excludes participation from the very people who are affected by the crime— the victims. It comes as no surprise then that locally as well as internationally there is a call for the expansion and improvement of services offered to victims. Hargovan has observed that ‘while a number of important international treaties have revealed a broad international trend towards prioritising victims in the criminal justice process, South Africa has only now come on board with policy development with regard to victims’. As much as community participation is necessary in restorative processes victim participation is critical and Hargovan emphasises that ‘the needs of victims must be prioritised above all else’. South Africa has an Integrated Victim Empowerment Policy which is a multifaceted, inter-sectoral programme explicitly founded on restorative justice principles. There are two documents, according to Artz and Smythe, which are central to this policy, namely the Victims Charter of Rights and the Minimum Standards of Service for Victims of Crime. Despite us being several years into implementation of these policies we are still engaging on how to improve victims’ rights. Is South Africa, despite this advantage, inadvertently in its restorative justice implementation still fulfilling the aims of the traditional justice system? Are victims genuinely at the centre of the restorative justice process or are they a means to an end?

The following important points need to be taken note of as part of a restorative justice development strategy - Potgieter et al state that:

The application of restorative justice in South Africa by some nongovernmental practitioners has seemingly been more offender-biased than victim orientated. Subsequently, the implementation of some restorative processes by courts has put victims at risk, safety and coercion being the most likely problems, apparently because the majority of crime victims in South Africa are poor and often agree to participate in the restoration process ‘enticed mainly by restitution’.

These comments are worrying and plans of action need to be put in place to deal with such teething issues before it impacts on large scale restorative justice. It is evident that the country is in the midst of its development with restorative justice and has developed useful theory; restorative justice has received sound attention in several court judgments and significantly there has been international acclaim as well which all bode well for the future. Herman and Strang indicate as follows:

Our reading of the literature suggests that South Africa has progressed as far if not further than most of the UK and Australia in applying the principles of reconciliation to everyday criminal justice. Since the early 1990s South Africa has been exploring the potential of restorative justice in the resolution of criminal matters.

CHAPTER 3: REASONS FOR PUNISHMENT

3.1 Introduction

Crime has been identified as one of the major problems confronting the new democracy in post-apartheid South Africa. Consequently the approach of government has been to get tougher on crime and impose harsher punishments on criminals. The Oxford English Dictionary defines punishment as ‘the infliction or imposition of a penalty as retribution for an offence’.

Historically, punishment, depending on the country or the transgression, could mean death, slavery or even amputation of body parts. However, as legislation and awareness of human rights evolved, these degrading and inhumane punishments fell away. There was, hence, a need to understand specifically why punishment is imposed and what forms of punishment are acceptable.

A criminal trial is focused on proving the legal components of the specific violated norm. If these legal components are proven beyond a reasonable doubt, the discussion moves to the appropriate sanctions or sentencing of the offender. The entire focus is on the offender and the protected interests behind the offence are those of the state rather than those of the particular victim.

A sentence affects an individual's basic right to freedom as guaranteed in terms of the 1996 Constitution and has to be approached with prudence. Kgosimore succinctly explains the process as follows:

The criminal justice system also remains offender focused. Therefore, 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).

However, neither heavier fines nor longer sentences have managed to have an impact on the offenders or crime itself. Batley and Maepa observe that:

While improving the efficiency of the criminal justice system is necessary, applying harsher punishment to offenders has been shown internationally to have little success in preventing crime. Moreover, both these approaches are flawed in that they overlook important requirements for the delivery of justice, namely:

- considering the needs of victims;
- helping offenders to take responsibility on an individual level; and
- fostering a culture that values personal morality and encourages people to take responsibility for their behaviour.

The reality is that the old approaches are no longer effective in this modern-day, post-apartheid environment that South Africa finds itself in. The infliction of punishment needs to

be replaced with a restorative, participatory approach that involves not only the participants involved by the crime but the community too.

3.2 The differing theories of punishment

Theories of punishment not only look at the nature of punishment but also include the rationale and justification for the imposition of punishment. Terblanche has added that theoretically the 'purposes of punishment should be dealt with as part of the interests of society component of the Zinn triad'. However, a major flaw with the Zinn triad approach is that it fails to take into account the victim and this results in sentences that are not inclusive and further do not leave room for community participation or offender accountability.

The Zinn triad is equated with the purposes of punishment being prevention, retribution, reformation and deterrence. While there are a number of theories of punishment, in principle they belong to one of three groups, the absolute theory, the relative theory and the unitary theory (a combination of the two). Retribution falls under the umbrella of absolute theory while the preventative, deterrent and restitution approaches are in the relative theory category.

3.2.1 The utilitarian deterrence approach

The deterrent theory is generally sub-categorised into general and specific or individual deterrence. The principal aim of this theory is to protect society by punishing the offender as well as to deter society from committing further crime, as wrongdoing will be dealt with. Both concepts are aimed at reducing recidivism and do not focus much on the actual participants of the crime. Further, Batley states that 'there is an inherent injustice' involved in punishing an individual offender so as to send a strong deterrent message to society. Restorative justice has an inclusive approach and would be more effective in respect of sending messages about criminal behaviour. Also, the fact that the community is part of the restorative process would serve to discourage society from such actions. The theory of general deterrence is mainly concerned with the threat of punishment and the basic underlying idea that offenders should become and citizens generally, should remain law-abiding.

One major difference between this theory and the restorative justice approach is that the deterrence sanction only becomes operable upon sentence while a restorative justice process can take place prior to sentencing and as part of sentencing during the course of a criminal trial. Hargovan clarifies this as follows:

There are four main points at which restorative justice processes can be initiated: i) Pre-charge; ii) Prosecution level (post charge but before trial); at the court level (either at the pre-trial or sentencing stage); iii) corrections (as an alternative to incarceration); and iv) as part of or in addition to a non-custodial sentence, during incarceration or upon release from prison.

The other difference is that this approach is focused only on the offender and the victim is left out of the entire process, whereas the primary objective of the restorative sanction is to restore the status quo ante for the victim.

3.2.2 The rehabilitation approach

In terms of the rehabilitation approach Batley states that ‘the offender tends to be viewed either as a patient or a victim or both’. This approach does not allow for the offender to assume any accountability. Rabie et al, explain this as follows:

The theory rests upon the belief that human behaviour is the product of antecedent causes, that these causes can be identified and that on this basis therapeutic measures can be employed to effect positive changes.

However, Batley states that the rehabilitation theory has been subject to a great amount of criticism and this can be understood, as from a restorative justice perspective this approach is flawed in that the offender is not held responsible for his actions. Batley and Skelton add that ‘the terms “rehabilitate” and “treat” are based on a medical model, suggesting that offenders have a certain “illness” that needs to be cured. Further, Brunk (2001) is highly critical of a therapeutic approach to punishment as it denies the need, even the possibility, of taking personal responsibility for one’s actions.’

A requirement of restorative justice is that the offender must acknowledge accountability and Batley maintains that ‘an offender who has taken responsibility of repairing the harm done and now has restored the trust and confidence of the community is “rehabilitated” in a far broader sense than can be said of individualised therapeutic measures.’

3.2.3 The restitution approach

It is stated that this is the newest theory to join the utilitarian category. Batley offers the following explanation:

This approach is far more recent than the preceding three. It has its roots in economic and political schools of thought that are committed to a strong view of the minimalist state – that government should intervene as little as possible in society. It essentially reduces criminal law to civil law and removes the moral concept of wrong. Criminal offences are not really wrongs against a victim but simply the cost of doing business in society. Every harm or loss is compensable; if compensated adequately, the wrong is removed.

While it is conceded that with this approach it may appear that victims would receive compensation, the underlying ethos is not morally sound and not in keeping with the principles of restorative justice. Firstly, there needs to be accountability: why would an offender acknowledge guilt if you could just pay the other party and move on? Secondly, restorative justice also includes the community in its process and this approach is not only exclusionary but does nothing to repair the relationships harmed.

3.2.4. The retributive approach

In terms of this approach offenders are punished for their criminal behaviour because they deserve punishment. Criminal behaviour upsets the peaceful balance of society, and punishment helps to restore the balance. Batley states that ‘the point of punishment is to right the wrong done in the criminal offence. The offenders’ suffering or loss is what constitutes the “pay back” to society and the victims.’ It is based on the notion that for inflicting harm, the punishment received must be ‘just what you deserve’.

Interestingly, there are often references to the differences between restorative justice and retributive justice. While restorative justice is positioned to be progressive and healing, retributive justice is seen to be harsh and extremely negative. Despite this apparent dichotomy, it is evident that South Africa’s high crime rate still needs a strong penal system which can expand and consider critically the needs of not only the victims and offenders but also the needs and interests of the community.

In 2005 in the case of *S v Shilubane* the accused, a first offender, had pleaded guilty and was convicted in a magistrate's court of the theft of seven fowls to the value of R216.16. The magistrate sentenced the accused to nine months' imprisonment and on review it was stated that it is apparent that retributive justice has failed to stem the ever-increasing wave of crime. It is apparent from this case that the theories of punishment contain advantages and disadvantages and cases have to be weighed in terms of the relevant facts of that case. This is positive as it allows the judiciary to individualise sentences and by so doing it would provide ideal opportunities for integrating restorative justice into sentencing practices.

Victims need to be a part of the process of achieving justice as they have not only been directly harmed by the crime but affected psychologically as well. This is affirmed by Batley who states that the needs of those who have suffered harm, whether emotional or material, are not really a matter for our criminal justice system. This is where restorative justice differs significantly in that it takes into account the needs of the victim and places the victim in the centre of the process. Kgosimore draws the following comparisons between retributive and restorative justice as follows:

Whereas in retributive justice offenders rarely have to face their victims and the impact of their crimes, in restorative justice each party is given an opportunity to tell the other the story of the crime from their own perspective and to talk about their fears, concerns and feelings.

Even in the case of *S v Makwanyane* where the Constitutional Court dealt with the issue of the death penalty, it was stated again that retribution should not be given undue importance as it is not only contrary to the human rights ethos but also the spirit of ubuntu which is underpinned by the Constitution. However, criminal law derives its core existence in respect of punishment from the retributive theory and the retributive theory despite its many shortcomings is the only theory in the realm of criminal law that links punishment to the act of the crime. Since crime remains an ongoing feature in our lives, so too will the retributive approach. Hargovan, who conducted an empirical research study which sought to establish a useful estimate of the nature and extent of restorative justice activity in the criminal justice system, specifically states 'that the extraordinarily high rates of violent crimes in South Africa clearly suggest that restorative justice should not replace current penal law and procedure' .

Another important distinction between retributive justice and restorative justice is that with retribution, the victim and offender are limited to their interactions with one another only in the court room or via the justice system. Restorative justice, on the other hand, offers private interactions between the parties away from the public eye. In this manner parties feel more comfortable to express their feelings and needs. The court room is intimidating and generally does not allow for the type of discussions which restorative justice does.

Retributive justice is adversarial, offender-focused and ignores the voice of the victim, while restorative justice places the victim at the centre of the process. A restorative approach was supported in the case of *S v Matiyityi* where the court stated that in achieving an effective sentence, courts should not only take into account the Zinn triad but also the needs of the victim. The United Nations Basic Principles on the Use of Restorative Justice Programmes emphasise that restorative justice programmes complement rather than replace the existing criminal justice system. There are also certain instances when the victim and offender may not be in agreement on a restorative justice option and in these situations it is important that the case then be diverted back into the justice system for the prosecutor to continue with the matter. Retributive justice has a necessary place in imposing sentences but perhaps restorative justice can be utilized to enhance the effectiveness of these sentences by focusing on core restorative principles.

RJ, RJ, RJ!⁵⁰ This is the new⁵¹ buzzword in the criminal justice sector and with civil society organisations. As much as this theory of justice is very much in its developing phase and cannot as yet be considered a complete theory of justice,⁵² it is rapidly expanding nationally and internationally. Eschholz explains this as follows:

[R]estorative justice theory and its practical implications are having a world-wide impact on the way justice is intellectualized and practised. Although the restorative justice movement is a relatively new phenomenon, its philosophical roots can be traced to many religious and spiritual traditions and to aboriginal practices and customs around the world.⁵³

⁵⁰ H Hargovan 'Doing Justice Differently: Prosecutors as 'Gate-Keepers' Of Justice (2008) 21(3) *Acta Criminologica* 18.

⁵¹ Kgosimore (note 17 above) 72.

⁵² J Consedine 'Restorative Justice: A Discussion Paper' available at <http://www.md-justice-policy-inst/org>, accessed on 14 October 2015.

⁵³ S Eschholz 'Book Review Essay: Restorative Justice, Social Movement, Theory and Practice' (2003) 28 *Criminal Justice Review* 146, 147.

This is reinforced by Skelton's view that 'modern restorative justice theory and practice has been enriched through learning from indigenous justice practices'.⁵⁴ It is indeed these indigenous practices which drove the process to formulate the Truth and Reconciliation Commission (TRC)⁵⁵ so that restorative concepts such as reconciliation and forgiveness could begin to heal the damage caused by apartheid. Sherman and Strang share the following commendable sentiments on the TRC process in South Africa:

Yet whether or not South Africans approve of the work of the TRC, it has been an inspiration to the movement for restorative justice around the world. That movement has probably been inspired more by Archbishop Desmond Tutu than by anyone else, even before he wrote in this his own memoir.⁵⁶

A 1984 Nobel Prize winner, Archbishop Desmond Tutu articulates the meaning between retributive justice and restorative justice as follows:

Retributive justice – in which an impersonal state hands down punishment with little consideration for victims and hardly any for the perpetrator – is not the only form of justice. I contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern is not retribution or punishment but, in the spirit of *ubuntu*, the healing of breaches, the redressing of imbalances, the restoration of broken relationships. This kind of justice seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he or she has injured by his or her offence. This is a far more personal approach, which sees the offence as something that has happened to people and whose consequence is a rupture in relationships. Thus we would claim that justice, restorative justice, is being served when efforts are being made to work for healing, for forgiveness and for reconciliation.⁵⁷

South Africa's rich indigenous history, cultures and practices make it fertile ground for the nurturing and development of restorative justice. The paradox though is that despite the vast amount of literature, theoretical and research based, and the inheritance of indigenous history there is not a universally sanctioned definition for restorative justice. Further, it appears the

⁵⁴ A Skelton 'Tapping indigenous knowledge: traditional conflict resolution, restorative justice and the denunciation of crime in South Africa' (2007) 13 *Acta Juridica* 228, 229.

⁵⁵ Promotion of National Unity and Reconciliation, Act 34 of 1995.

⁵⁶ LW Sherman & H Strang 'Crime and Reconciliation: Experimental Criminology and the Future of Restorative Justice' (2009) 22(1) *Acta Criminologica* 3.

⁵⁷ D Tutu *No Future Without Forgiveness* 1st ed (1999) 51.

challenges with defining restorative justice⁵⁸ in a manner that would suit all is not only a challenge on a national level but internationally too. Gavrielides points out:

The irony is that even on this matter the restorative justice movement does not seem to agree whether a definition is in fact desirable or not. The views are again divided into two groups: those who believe that a definition for restorative justice is imperative if we are to avoid confusion and those who claim that it will expose the concept to great danger. To give an example Zehr and Mika said: “We do not believe that any single decision will ever be likely or even particularly useful.” David Miers, on the other hand claimed that without a clear and comprehensive understanding of RJ, evaluation is hampered.⁵⁹

There are many varied definitions of restorative justice⁶⁰ which creates confusion as when to use which definition. Braithewaite correctly states that ‘it is impossible to articulate a definition on restorative justice that would satisfy all practitioners and theorists’.⁶¹ Whilst, Zehr states compellingly that:

Restorative justice practice has led theory in many ways and the goals and values of restorative justice are not universal, in the sense that restorative justice is practised differently in different places, but there are some fundamental commonalities which can be identified.⁶²

The writer submits that this is an accurate reflection of where we find ourselves with restorative justice in that what we have to work with currently are agreed fundamental common principles which should be included in deciphering restorative justice. Justice Sachs indicates the following as elements of restorative justice: encounter, reparation, reintegration and participation.⁶³ Van Ness and Strong suggest that restorative justice, generally, is based on three principles:

- Crime is injurious to victims, communities and even offenders themselves. Based on the spirit of ubuntu, the healing and restoration of desecrated interpersonal relationships should be initiated within the framework of the criminal justice process.

⁵⁸ T Gavrielides *Restorative Justice Theory and Practice: Addressing the Discrepancy* 1st ed (2007) 37.

⁵⁹ Ibid 44.

⁶⁰ H Hargovan (note 36 above) 22.

⁶¹ FD Hill ‘Restorative Justice: Sketching a New Legal Discourse’ (2008) 4 *IJPS* 1,3.

⁶² Ibid 4.

⁶³ A Skelton ‘Face to Face: Sachs on Restorative Justice’ (2010) *SAPR* 25 96.

- All the afore-mentioned role-players should, at the earliest point in time and to their fullest capacity, be actively involved in the process of restorative justice, including government.
- Government should respect its delegated responsibility to preserve peace and order in society and should be supported in this endeavour by the public.⁶⁴

South Africa has various policies and two pieces of legislation⁶⁵ which specifically deal with restorative justice. The Probation Services Act No 116 of 1991 (as amended by Act 35 of 2002) defines restorative justice as follows:

The promotion of reconciliation, restitution and responsibility through the involvement of a child, and the child's parents, family members, victims and the communities concerned.⁶⁶

The other relevant piece of legislation is the Child Justice Act. The Act is applicable to children under the age of 18 years of age and who are in conflict with the law. It regulates restorative justice in terms of diversion and in section 1 offers the following definition:

'restorative justice' means an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation.⁶⁷

While the Act's primary objective is the protection of the rights of children in conflict with the law, its restorative focus is also apparent in that it 'aims to hold them accountable for their actions to the victims, the families of the child and victims, and the community as a whole'.⁶⁸ This is applicable in terms of children in conflict with the law. What of the rest of society wherein restorative justice is practised – how and against what is that evaluated?

In 2005 Batley explained restorative justice as follows:

Restorative justice is a way of dealing with victims and offenders by focusing on the settlements of conflicts arising from crime and resolving the underlying problems that cause it.

⁶⁴ DW Van Ness and KH Strong 'As cited in PJ Potgieter *et al* "Correctional Officer's perceptions of restorative justice" (2005) *Acta Criminologica* 18(1) 40'.

⁶⁵ A Skelton & M Batley (note 25 above) 38.

⁶⁶ *Ibid* 38.

⁶⁷ Note 32 above 8, 89.

⁶⁸ J Gallinetti 'Getting to know the Child Justice Act' available at <http://www.childjustice.org.za>, accessed on the 2 November 2015.

It is also more widely a way of dealing with crime generally in a rational problem-solving way. Central to restorative justice is the recognition of the community, rather than the criminal justice agencies, as the prime sites of crime control.⁶⁹

In 2010 the Department of Justice and Constitutional Development issued the Restorative National Policy Framework.⁷⁰ It is important to note that the state is in the process of reforming its approach, which is why government is looking at dealing with crime in a more focused and co-ordinated manner; there is a need to increase community participation in the criminal justice system, both to provide better support for victims and to support offender reintegration'.⁷¹ Further, the policy outlines the inter-sectoral roles that different government departments will play in restorative justice and defines it as

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; this may be applied at any appropriate stage after the incident.⁷²

This is clearly a departure from existing practice and is certainly progressive if government remains committed and is successful in transferring policy to practice. This is affirmed by Cavanagh who states:

[F]or collaborative action to yield success, those who participate in it must learn to repair the harm of crime by concentrating on the core values of restorative justice. These include personal responsibility, apology, healing, mercy, forgiveness and reconciliation. The value of this process is that it is transformative in nature, gives hope to those affected by crime, honours their dignity and treats them with respect.⁷³

In *S v M*,⁷⁴ Justice Sachs aptly highlights the roles played by the community in restorative justice as follows:

⁶⁹ M Batley 'Restorative Justice', in L Davis & R Snyman *Victimology in South Africa* (2005) 117, 123.

⁷⁰ The 'Restorative Justice National Policy Framework' (published in May 2010)3 (hereafter referred to as the National Policy Framework).

⁷¹ *Ibid* 4.

⁷² *Ibid*, 3.

⁷³ T Cavanagh 'Restorative Justice and the Common Good: Creating a culture of Forgiveness and Reconciliation' Available at <http://www.loyno.edu>, accessed on 2 November 2014.

⁷⁴ *S v M* 2007 (2) SACR 539 (CC); 2007 (12) BCLR 1312 CC (hereafter *S v M*).

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. One of its strengths is that it rehabilitates the offender within the community, without the negative impact of prison and the damaging disruption of the family.⁷⁵

Traditionally, the justice system deals with crime in a manner that excludes participation from the very people who are affected by the crime– the victims.⁷⁶ It comes as no surprise then that locally as well as internationally there is a call for the expansion and improvement of services offered to victims.⁷⁷ Hargovan has observed that ‘while a number of important international treaties have revealed a broad international trend towards prioritising victims in the criminal justice process, South Africa has only now come on board with policy development with regard to victims’.⁷⁸ As much as community participation is necessary in restorative processes victim participation is critical and Hargovan emphasises that ‘the needs of victims must be prioritised above all else’.⁷⁹ South Africa has an Integrated Victim Empowerment Policy which is a multifaceted, inter-sectoral programme explicitly founded on restorative justice principles.⁸⁰ There are two documents, according to Artz and Smythe, which are central to this policy, namely the Victims Charter of Rights⁸¹ and the Minimum Standards of Service for Victims of Crime.⁸² Despite us being several years into implementation of these policies we are still engaging on how to improve victims’ rights. Is South Africa, despite this advantage, inadvertently in its restorative justice implementation still fulfilling the aims of the traditional justice system? Are victims genuinely at the centre of the restorative justice process⁸³ or are they a means to an end?

The following important points need to be taken note of as part of a restorative justice development strategy - Potgieter *et al* state that:

The application of restorative justice in South Africa by some nongovernmental practitioners has seemingly been more offender-biased than victim orientated. Subsequently, the

⁷⁵ Ibid para 62.

⁷⁶ Hargovan (note 29 above) 114.

⁷⁷ PJ Potgieter *et al* “Correctional Officer’s perceptions of restorative justice” (2005) *Acta Criminologica* 18(1) 40, 41.

⁷⁸ Hargovan (note 29 above) 116.

⁷⁹ Ibid (note 29 above) 113.

⁸⁰ L Artz & D Smythe ‘South African legislation supporting victim’s rights’ in L Davis & R Snyman (ed) *Victimology in South Africa* (2005) 131, 137.

⁸¹ Signed and accepted by parliament in November 2004.

⁸² Artz & Smythe (note 65 above) 137.

⁸³ Hill (note 46 above) 7.

implementation of some restorative processes by courts has put victims at risk, safety and coercion being the most likely problems, apparently because the majority of crime victims in South Africa are poor and often agree to participate in the restoration process ‘enticed mainly by restitution’.⁸⁴

These comments are worrying and plans of action need to be put in place to deal with such teething issues before it impacts on large scale restorative justice. It is evident that the country is in the midst of its development with restorative justice and has developed useful theory; restorative justice has received sound attention in several court judgments⁸⁵ and significantly there has been international acclaim as well which all bode well for the future. Herman and Strang indicate as follows:

Our reading of the literature suggests that South Africa has progressed as far if not further than most of the UK and Australia in applying the principles of reconciliation to everyday criminal justice. Since the early 1990s South Africa has been exploring the potential of restorative justice in the resolution of criminal matters.⁸⁶

⁸⁴ D Setlatjile ‘As cited in PJ Potgieter *et al* “Correctional Officer’s perceptions of restorative justice” (2005) *Acta Criminologica* 18(1) 40’.

⁸⁵ Skelton & Batley (note 25 above) 41.

⁸⁶ Sherman & Strang (note 42 above) 5.

- Crime is injurious to victims, communities and even offenders themselves. Based on the spirit of ubuntu, the healing and restoration of desecrated interpersonal relationships should be initiated within the framework of the criminal justice process.
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⁹² M Batley 'Restorative Justice', in L Davis & R Snyman *Victimology in South Africa* (2005) 117, 123.

⁹³ The 'Restorative Justice National Policy Framework' (published in May 2010)³ (hereafter referred to as the National Policy Framework).

⁹⁴ *Ibid* 4.

⁹⁵ *Ibid*, 3.

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Traditionally, the justice system deals with crime in a manner that excludes participation from the very people who are affected by the crime– the victims.⁹⁹ It comes as no surprise then that locally as well as internationally there is a call for the expansion and improvement of services offered to victims.¹⁰⁰ Hargovan has observed that ‘while a number of important international treaties have revealed a broad international trend towards prioritising victims in the criminal justice process, South Africa has only now come on board with policy development with regard to victims’.¹⁰¹ As much as community participation is necessary in restorative processes victim participation is critical and Hargovan emphasises that ‘the needs of victims must be prioritised above all else’.¹⁰² South Africa has an Integrated Victim Empowerment Policy which is a multifaceted, inter-sectoral programme explicitly founded on restorative justice principles.¹⁰³ There are two documents, according to Artz and Smythe, which are central to this policy, namely the Victims Charter of Rights¹⁰⁴ and the Minimum Standards of Service for Victims of Crime.¹⁰⁵ Despite us being several years into implementation of these policies we are still engaging on how to improve victims’ rights. Is South Africa, despite this advantage, inadvertently in its restorative justice implementation still fulfilling the aims of the traditional justice system? Are victims genuinely at the centre of the restorative justice process¹⁰⁶ or are they a means to an end?

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¹⁰¹ Hargovan (note 29 above) 116.

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The application of restorative justice in South Africa by some nongovernmental practitioners has seemingly been more offender-biased than victim orientated. Subsequently, the implementation of some restorative processes by courts has put victims at risk, safety and coercion being the most likely problems, apparently because the majority of crime victims in South Africa are poor and often agree to participate in the restoration process ‘enticed mainly by restitution’.¹⁰⁷

These comments are worrying and plans of action need to be put in place to deal with such teething issues before it impacts on large scale restorative justice. It is evident that the country is in the midst of its development with restorative justice and has developed useful theory; restorative justice has received sound attention in several court judgments¹⁰⁸ and significantly there has been international acclaim as well which all bode well for the future. Herman and Strang indicate as follows:

Our reading of the literature suggests that South Africa has progressed as far if not further than most of the UK and Australia in applying the principles of reconciliation to everyday criminal justice. Since the early 1990s South Africa has been exploring the potential of restorative justice in the resolution of criminal matters.¹⁰⁹

¹⁰⁷ D Setlatjile ‘As cited in PJ Potgieter *et al* “Correctional Officer’s perceptions of restorative justice” (2005) *Acta Criminologica* 18(1) 40’.

¹⁰⁸ Skelton & Batley (note 25 above) 41.

¹⁰⁹ Sherman & Strang (note 42 above) 5.

CHAPTER 3: REASONS FOR PUNISHMENT

3.1 Introduction

Crime has been identified as one of the major problems confronting the new democracy in post-apartheid South Africa.¹¹⁰ Consequently the approach of government has been to get tougher on crime and impose harsher punishments on criminals. The Oxford English Dictionary defines punishment as 'the infliction or imposition of a penalty as retribution for an offence'.¹¹¹

Historically, punishment, depending on the country or the transgression, could mean death, slavery or even amputation of body parts. However, as legislation and awareness of human rights evolved, these degrading and inhumane punishments fell away. There was, hence, a need to understand specifically why punishment is imposed and what forms of punishment are acceptable.

A criminal trial is focused on proving the legal components of the specific violated norm. If these legal components are proven beyond a reasonable doubt, the discussion moves to the appropriate sanctions or sentencing of the offender. The entire focus is on the offender¹¹² and the protected interests behind the offence are those of the state rather than those of the particular victim.

A sentence affects an individual's basic right to freedom as guaranteed in terms of the 1996 Constitution and has to be approached with prudence. Kgosimore succinctly explains the process as follows:

The criminal justice system also remains offender focused. Therefore, 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

¹¹⁰ Kgosimore (note 17 above) 69.

¹¹¹ Terblanche (note 22 above) 3.

¹¹² Kgosimore (note 17 above) 70.

cornerstone of the criminal justice system, justice is seen to be delivered when the offender is punished (or acquitted).¹¹³

However, neither heavier fines nor longer sentences have managed to have an impact on the offenders or crime itself. Batley and Maepa observe that:

While improving the efficiency of the criminal justice system is necessary, applying harsher punishment to offenders has been shown internationally to have little success in preventing crime. Moreover, both these approaches are flawed in that they overlook important requirements for the delivery of justice, namely:

- considering the needs of victims;
- helping offenders to take responsibility on an individual level; and
- fostering a culture that values personal morality and encourages people to take responsibility for their behaviour.¹¹⁴

The reality is that the old approaches are no longer effective in this modern-day, post-apartheid environment that South Africa finds itself in. The infliction of punishment needs to be replaced with a restorative, participatory approach that involves not only the participants involved by the crime but the community too.

3.2 The differing theories of punishment

Theories of punishment not only look at the nature of punishment but also include the rationale and justification for the imposition of punishment. Terblanche has added that theoretically the ‘purposes of punishment should be dealt with as part of the interests of society component of the *Zinn* triad’.¹¹⁵ However, a major flaw with the *Zinn* triad approach is that it fails to take into account the victim and this results in sentences that are not inclusive and further do not leave room for community participation or offender accountability.

¹¹³ Ibid 70.

¹¹⁴ M Batley & T Maepa ‘Introduction’ in T Maepa (ed) *Beyond Retribution Prospects for Restorative Justice in South Africa* (2005) 15, 16.

¹¹⁵ Terblanche (note 22 above) 155.

The *Zinn* triad is equated with the purposes of punishment being prevention, retribution, reformation and deterrence.¹¹⁶ While there are a number of theories of punishment, in principle they belong to one of three groups, the absolute theory, the relative theory and the unitary theory (a combination of the two).¹¹⁷ Retribution falls under the umbrella of absolute theory while the preventative, deterrent and restitution approaches are in the relative theory category.

3.2.1 The utilitarian deterrence approach¹¹⁸

The deterrent theory is generally sub-categorised into general and specific or individual deterrence. The principal aim of this theory is to protect society by punishing the offender as well as to deter society from committing further crime, as wrongdoing will be dealt with. Both concepts are aimed at reducing recidivism and do not focus much on the actual participants of the crime. Further, Batley states that ‘there is an inherent injustice’¹¹⁹ involved in punishing an individual offender so as to send a strong deterrent message to society. Restorative justice has an inclusive approach and would be more effective in respect of sending messages about criminal behaviour. Also, the fact that the community is part of the restorative process would serve to discourage society from such actions. The theory of general deterrence is mainly concerned with the threat of punishment and the basic underlying idea that offenders should become and citizens generally, should remain law-abiding.¹²⁰

One major difference between this theory and the restorative justice approach is that the deterrence sanction only becomes operable upon sentence while a restorative justice process can take place prior to sentencing and as part of sentencing during the course of a criminal trial. Hargovan clarifies this as follows:

There are four main points at which restorative justice processes can be initiated: i) Pre-charge; ii) Prosecution level(post charge but before trial); at the court level (either at the pre-trial or

¹¹⁶ Terblance (note 22 above) 155.

¹¹⁷ CR Snyman Criminal Law 5ed 2008 10.

¹¹⁸ Batley (note 54 above) 124.

¹¹⁹ Ibid 124.

¹²⁰ MA Rabie, et al, ‘Philosophical perspectives on punishment’ *Punishment: an introduction to principles* (2000) 19, 19.

sentencing stage); iii) corrections (as an alternative to incarceration); and iv) as part of or in addition to a non-custodial sentence, during incarceration or upon release from prison.¹²¹

The other difference is that this approach is focused only on the offender and the victim is left out of the entire process, whereas the primary objective of the restorative sanction is to restore the *status quo ante* for the victim.¹²²

3.2.2 The rehabilitation approach¹²³

In terms of the rehabilitation approach Batley states that ‘the offender tends to be viewed either as a patient or a victim or both’.¹²⁴ This approach does not allow for the offender to assume any accountability. Rabie *et al*, explain this as follows:

The theory rests upon the belief that human behaviour is the product of antecedent causes, that these causes can be identified and that on this basis therapeutic measures can be employed to effect positive changes.¹²⁵

However, Batley states that the rehabilitation theory has been subject to a great amount of criticism¹²⁶ and this can be understood, as from a restorative justice perspective this approach is flawed in that the offender is not held responsible for his actions. Batley and Skelton¹²⁷ add that ‘the terms “rehabilitate” and “treat” are based on a medical model, suggesting that offenders have a certain “illness” that needs to be cured. Further, Brunk (2001) is highly critical of a therapeutic approach to punishment as it denies the need, even the possibility, of taking personal responsibility for one’s actions.’¹²⁸

A requirement of restorative justice is that the offender must acknowledge accountability and Batley maintains that ‘an offender who has taken responsibility of repairing the harm done

¹²¹ Hargovan (note 31 above) 30.

¹²² R Koen ‘The Antinomies of Restorative Justice’ (2007) 15 *JU JUR* 248.

¹²³ Batley (note 54 above) 124.

¹²⁴ *Ibid* 124.

¹²⁵ Rabie *et al* (note 82 above) 29.

¹²⁶ Batley (note 54 above) 124.

¹²⁷ Batley & Skelton (note 25 above) 47.

¹²⁸ C Brunk ‘Restorative justice and the Philosophical Theories of Criminal Punishment’ available at <http://mereps.forsee.hu>, accessed on 18 October 2015.

and now has restored the trust and confidence of the community is “rehabilitated” in a far broader sense than can be said of individualised therapeutic measures.’¹²⁹

3.2.3 *The restitution approach*¹³⁰

It is stated that this is the newest theory to join the utilitarian category. Batley offers the following explanation:

This approach is far more recent than the preceding three. It has its roots in economic and political schools of thought that are committed to a strong view of the minimalist state – that government should intervene as little as possible in society. It essentially reduces criminal law to civil law and removes the moral concept of wrong. Criminal offences are not really wrongs against a victim but simply the cost of doing business in society. Every harm or loss is compensable; if compensated adequately, the wrong is removed.¹³¹

While it is conceded that with this approach it may appear that victims would receive compensation, the underlying ethos is not morally sound and not in keeping with the principles of restorative justice. Firstly, there needs to be accountability: why would an offender acknowledge guilt if you could just pay the other party and move on? Secondly, restorative justice also includes the community in its process and this approach is not only exclusionary but does nothing to repair the relationships harmed.

3.2.4. *The retributive approach*

In terms of this approach offenders are punished for their criminal behaviour because they deserve punishment. Criminal behaviour upsets the peaceful balance of society, and punishment helps to restore the balance. Batley states that ‘the point of punishment is to right the wrong done in the criminal offence. The offenders’ suffering or loss is what constitutes the “pay back” to society and the victims.’¹³² It is based on the notion that for inflicting harm, the punishment received must be ‘just what you deserve’.

¹²⁹ Batley (note 54 above) 125.

¹³⁰ Ibid 125.

¹³¹ Ibid 125.

¹³² Ibid 123.

Interestingly, there are often references to the differences between restorative justice and retributive justice.¹³³ While restorative justice is positioned to be progressive and healing, retributive justice is seen to be harsh and extremely negative. Despite this apparent dichotomy, it is evident that South Africa's high crime rate still needs a strong penal system which can expand and consider critically the needs of not only the victims and offenders but also the needs and interests of the community.¹³⁴

In 2005 in the case of *S v Shilubane*¹³⁵ the accused, a first offender, had pleaded guilty and was convicted in a magistrate's court of the theft of seven fowls to the value of R216.16. The magistrate sentenced the accused to nine months' imprisonment and on review it was stated that it is apparent that *retributive* justice has failed to stem the ever-increasing wave of crime.¹³⁶ It is apparent from this case that the theories of punishment contain advantages and disadvantages and cases have to be weighed in terms of the relevant facts of that case. This is positive as it allows the judiciary to individualise sentences and by so doing it would provide ideal opportunities for integrating restorative justice into sentencing practices.

Victims need to be a part of the process of achieving justice as they have not only been directly harmed by the crime but affected psychologically as well. This is affirmed by Batley who states that the needs of those who have suffered harm, whether emotional or material, are not really a matter for our criminal justice system.¹³⁷ This is where restorative justice differs significantly in that it takes into account the needs of the victim and places the victim in the centre of the process. Kgosimore draws the following comparisons between retributive and restorative justice as follows:

Whereas in retributive justice offenders rarely have to face their victims and the impact of their crimes, in restorative justice each party is given an opportunity to tell the other the story of the crime from their own perspective and to talk about their fears, concerns and feelings.¹³⁸

Even in the case of *S v Makwanyane*¹³⁹ where the Constitutional Court dealt with the issue of the death penalty, it was stated again that retribution should not be given undue importance as

¹³³ Tshela (note 20 above) 5.

¹³⁴ Hargovan (note 29 above) 114.

¹³⁵ *Ro* above at 4.

¹³⁶ *Shilubane* (note 15 above, 297

¹³⁷ Batley (note 55 above) 120.

¹³⁸ Kgosimore (note 17 above) 72.

¹³⁹ *S v Makwanyane and Another* 1995 (2) SACR 1(CC) at para 130.

it is not only contrary to the human rights ethos but also the spirit of *ubuntu* which is underpinned by the Constitution. However, criminal law derives its core existence in respect of punishment from the retributive theory and the retributive theory despite its many shortcomings is the only theory in the realm of criminal law that links punishment to the act of the crime.¹⁴⁰ Since crime remains an ongoing feature in our lives, so too will the retributive approach. Hargovan, who conducted an empirical research study which sought to establish a useful estimate of the nature and extent of restorative justice activity in the criminal justice system, specifically states ‘that the extraordinarily high rates of violent crimes in South Africa clearly suggest that restorative justice should not replace current penal law and procedure’,¹⁴¹.

Another important distinction between retributive justice and restorative justice is that with retribution, the victim and offender are limited to their interactions with one another only in the court room or via the justice system. Restorative justice, on the other hand, offers private interactions between the parties away from the public eye. In this manner parties feel more comfortable to express their feelings and needs. The court room is intimidating and generally does not allow for the type of discussions which restorative justice does.

Retributive justice is adversarial, offender-focused and ignores the voice of the victim,¹⁴² while restorative justice places the victim at the centre of the process.¹⁴³ A restorative approach was supported in the case of *S v Matiyityi*¹⁴⁴ where the court stated that in achieving an effective sentence, courts should not only take into account the Zinn triad but also the needs of the victim. The United Nations Basic Principles on the Use of Restorative Justice Programmes emphasise that restorative justice programmes complement rather than replace the existing criminal justice system.¹⁴⁵ There are also certain instances when the victim and offender may not be in agreement on a restorative justice option and in these situations it is important that the case then be diverted back into the justice system for the prosecutor to continue with the matter. Retributive justice has a necessary place in imposing sentences but

¹⁴⁰ Rabie et al (note 82 above) 47.

¹⁴¹ Hargovan (note 36 above) 18.

¹⁴² Kgosimore (note 17 above) 70.

¹⁴³ Batley (note 54 above) 123.

¹⁴⁴ *S v Matiyityi* 2011 (1) SACR 40 (SCA) para 16.

¹⁴⁵ Note 27 above.

perhaps restorative justice can be utilized to enhance the effectiveness of these sentences by focusing on core restorative principles.

CHAPTER 4: RESTORATIVE JUSTICE: THE SOUTH AFRICAN EXPERIENCE

4.1 Introduction

The broad function of the criminal justice system is in many ways to ensure that victims, and society broadly, are protected from violence and crime.¹⁴⁶ This has not occurred and Kgosimore adds as follows:

Crime has been identified as one of the major problems confronting the new democracy in post-apartheid South Africa ... The overall intention of the government was to create a society in which individuals could live in peace and safety, free from fear of crime and violence ... To all intents and purposes, however, our criminal justice system remains ineffective in dealing with crime.¹⁴⁷

The concept of restorative justice is influencing laws and policies to the extent that in many countries it has impacted on recidivism rates, crime statistics and court backlogs.¹⁴⁸ Restorative justice is impacting and re-shaping the criminal justice system.

4.2 Impact of customary law within this framework

There are many discussions on specifically where and how restorative justice has originated. Many believe that the concept itself has been in existence for some time and that it has been noticed for its successes and phrased in modern terms as restorative justice.¹⁴⁹ In South Africa, this type of resolving conflict has been a well-accepted, historical tradition in the African culture.¹⁵⁰

The government specifically included customary law in the Constitution so that it became a part of the criminal justice system. In the past when the word 'ubuntu' was mentioned many reactions were of loss and confusion as people did not understand this indigenous concept. However since then it has emerged frequently¹⁵¹ with various definitions while still

¹⁴⁶ D Bruce 'Challenges of the criminal justice system in addressing the needs of victims and witnesses.' L Davis et al (eds) *Victimology in South Africa* (2005) 100, 100.

¹⁴⁷ Kgosimore (note 17 above) 69.

¹⁴⁸ Hargovan (note 36 above) 18-19.

¹⁴⁹ J Braithwaite 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' (1999) 25 *Crime & Just.* 1, 2-3; Skelton & Batley (note 25 above) 37.

¹⁵⁰ Skelton (note 40 above) 228.

¹⁵¹ JY Mokgoro 'Ubuntu and the Law In South Africa' (1998) *Buffalo Human Rights Law Review* 1.

highlighting its core importance – humanity. Very eloquently, Bishop Desmond Tutu explains *ubuntu* as follows:

Ubuntu is very difficult to render into western language. It speaks of the very essence of being human. When we want to give high praise to someone, we say ‘*yu, u nobuntu*’; ‘hey he or she has *ubuntu*.’ This means they are generous, hospitable, compatible and caring. They share what they have. It also means my humanity is caught up, is inextricably bound up in theirs. We belong to a bundle of life. We say ‘a person is a person through another’.¹⁵²

In terms of section 7(2) of the 1996 Constitution¹⁵³ the state must respect, protect and promote and fulfil the rights in the Bill of Rights. This has significant bearing on section 39(2)¹⁵⁴ which states that that upon the interpretation of any legislation and when developing the common law or *customary law*, every court, tribunal or forum must promote the object and spirit of the Bill of Rights. This section strategically elevates customary law into the main body of law within a constitutional framework.

The Child Justice Act as well as various case law bears specific reference to *ubuntu*. While this term is now a familiar word within the criminal legal system many still struggle to understand its meaning. The essence of the word seems to embrace humanity and that people’s actions towards one another should be respectful and caring. It appears to be an emotive notion that seeks to bring out compassion, human dignity and basic human goodness. Traditional African societies strove to live their lives by the concept of *ubuntu* and the common thread which is starting to emerge within the criminal justice system is that *ubuntu* and customary law and restorative justice share a very close link.¹⁵⁵

Further, it is common knowledge that in many of the different cultures in South Africa, restorative practices have not only been implemented but practised too.¹⁵⁶ It is quite well known that part of the African culture in resolving disputes involved the aggrieved parties sitting under a tree with the elders¹⁵⁷ to discuss the issues, concerns and solutions so that the parties could move forward together. This approach included the concept of *ubuntu* and sought to restore relationships so that the community cohesiveness was preserved.

¹⁵² Tutu (note 43 above) 34.

¹⁵³ Note 13 above, 5.

¹⁵⁴ Ibid 20.

¹⁵⁵ Tshela (note 20 above) 13.

¹⁵⁶ Skelton (note 40 above) 228.

¹⁵⁷ Ibid 499.

The case of *S v Maluleke*¹⁵⁸ exemplifies this, while highlighting the importance of customary practices. It is interesting to note that when the shift takes place from punitive to restorative, the judicial officer, Judge Bertelsmann, not only focused on healing but also on the needs of the deceased's family¹⁵⁹. In considering a suitable sentence Judge Bertelsmann took a holistic approach in sentencing and incorporated principles of restorative justice. His judgment took cognisance of customary practices and that in this particular case, was welcomed by the deceased's family. The accused, on a murder charge, was sentenced to eight years imprisonment, fully suspended for a period of three years on condition that the accused "apologised according to the custom of the mother of the deceased and her family within a month after the sentence had been imposed"¹⁶⁰. It is therefore not surprising that Judge Bertelsmann's innovative sentence was met with scepticism and outrage by the public and government and the wider legal fraternity as well. A fully suspended sentence for a charge of murder was not considered or deemed to be retributive at all and indicates a definite move to embrace restorative justice in appropriate situations.

South Africa's rich, indigenous heritage has clearly laid the foundation for restorative justice and jointly these approaches could very well be the beginnings of dynamic yet innovative solution which the criminal justice system needs. It would also mean an easier acceptance of restorative justice¹⁶¹ as even though communities may not be familiar with the term 'restorative justice' they are nonetheless familiar with the principles.

4.3 Restorative justice projects in South Africa

A study conducted by Skelton and Batley¹⁶² in 2006 reveals that restorative justice projects were implemented in all nine provinces of the country. In certain instances partnerships emerged between government and civil society with government providing funding so that these types of projects could continue. These instances are, however, notably few. Lack of funding¹⁶³ is a serious challenge in the field of restorative justice. The Department of

¹⁵⁸*Maluleke* (note 34 above) para 26.

¹⁵⁹ *Ibid* para 19.

¹⁶⁰ *Ibid* 12, para 22.

¹⁶¹ Skelton (note 40 above) 230.

¹⁶² Skelton & Batley (note 25 above) 40.

¹⁶³ Hargovan (note 36 above) 32.

Correctional Services has also implemented restorative justice projects at correctional facilities¹⁶⁴ and findings of a specific research project will be briefly discussed.

The organisations reflected below are derived from internet research as well as the writer's professional knowledge. Four nongovernmental organisations (NGOs) are at the forefront with their work in restorative justice and working with victims and offenders:

a) Restorative Justice Centre¹⁶⁵

The Restorative Justice Centre is a restorative justice service provider which offers a range of services to victims, offenders and the court. It is based in Pretoria and was established in 1998. Over the years they have assisted in many cases utilising restorative processes and offer adult restorative justice services. They have also intervened as amicus curiae in *DPP and Paulus Kam Thabethe*.¹⁶⁶

b) Khulisa Social Solutions¹⁶⁷

Khulisa Social Solutions run various projects with a strong restorative justice focus. Its flagship project was the Phoenix Justice and Reconciliation Project(JARP) which was funded by the Danish Embassy. A goal of the project was to create a best practices model for restorative justice in Phoenix, KwaZulu-Natal. Hargovan has also identified this organisation as a service provider for restorative justice services.¹⁶⁸ This project was a community-based model with mediators who were selected from and trained by the Phoenix Community. The project was successful not only in achieving its goals and objectives but more importantly in obtaining the community's approval and support for restorative processes. A 2007 research report¹⁶⁹ aimed at ascertaining the level of acceptance of restorative justice in the community revealed some of the following results:

- a) 95,3% of victims indicated that they were willing to participate in the mediation whilst 3,5% indicated that they were unwilling to do so.

¹⁶⁴ WFM Luyt & TD Matshaba 'The Application of Restorative Justice Amongst Sentenced Offenders In an Eastern Cape Correctional Center : A South African Case Study' (2014) 27(2) *Acta Criminologica* 82.

¹⁶⁵ Restorative Justice Center available at <http://www.rjc.org.za>, accessed on the 15 September 2015.

¹⁶⁶ *DPP and Paulus Kam Thabethe* (Submissions of the Amicus Curiae) Appeal Case no: 619/2010 186; *S v Thabethe* 2009 (2) SACR T.

¹⁶⁷ Khulisa Social Solutions <http://www.khulisaservices.co.za>, accessed on 15 August 2015.

¹⁶⁸ Hargovan (note 36 above) 32.

¹⁶⁹ V Chetty & Hargovan H 'JARP Evaluation Report' available at <http://Khulisaservices.co.za/downloads>, accessed on 27 August 2015.

- b) The majority of respondents (84.7%) believed that the offender had gained an understanding through the mediation process of the harm he/she had caused. However, 14.1% indicated that the offender had not gained this understanding.
- c) While the majority of respondents (90.6%) expressed satisfaction with the agreement that was reached during the mediation process, only 7.1% were dissatisfied.
- d) Of the 7.1% who expressed dissatisfaction with the agreement the following reasons were indicated. The majority (4.7%) indicated that they would have preferred financial compensation from the offender, for the offender to appear in court and for the offender to do community service. Respondents (2.4%) would have liked to personally appear in court and for the offender to be convicted. An insignificant number (1.2%) indicated that they would have liked the offender to be imprisoned.
- e) Respondents viewed mediation positively and indicated that it is more valuable than appearing in court (69.4%), deals effectively with the problem (56.5%), and deals with the problem speedily (49.4%). Other responses were that it less embarrassing than appearing in court (18.8%), it is 'soft' option for the offender (16.5%) and that it is less valuable than appearing in court (3.5%)
- f) Most respondents (90.6%) confirmed that the agreement reached at the end of mediation did take into consideration their version of events. While slightly fewer offenders (86.8%) were satisfied with the agreements reached, some respondents would have preferred to appear in court to prove their innocence (26.4%); pay a lower amount in compensation to the victim, and for the mediator to side with them (5.7%) each respectively.¹⁷⁰

Over a four-month period the project revealed findings that were very much in keeping with restorative justice principles and victims felt an overwhelming willingness to participate in the process. Bazemore explains this uniqueness as a value base and states that what is 'most difficult for many criminal justice professionals to accept, is its expansion of the role of crime victims in the justice process.'¹⁷¹ This project was subsequently rolled out to six sites in KwaZulu-Natal and was implemented in collaboration with the Department of Justice.¹⁷² These were positives for the development of restorative justice and indicated a willingness

¹⁷⁰ Ibid 16-25.

¹⁷¹ G Bazemore 'Restorative Justice, Earned Redemption and a Communitarian Response to Crime' available at <http://www.gwu.edu/>, accessed on 15 August 2015.

¹⁷² H Hargovan 'A Balancing act for the Prosecutor' (2012) 42 *SA Crime Quarterly* 13.

from the communities to explore this new approach.¹⁷³ However, at the same time the question arises again as to what the primary of the project was – to increase rights of victims or to deal with the many issues facing the justice system – and Hargovan answers this by stating that:

Prosecutors were extremely positive about the programme's impact on the functioning of the court, with nearly all citing the 'reduction of court rolls' and 'clearing of backlogs' as the most positive impact; allowing them time to focus on more serious cases.¹⁷⁴

Khulisa did not implement any further JARP due to funding challenges. This is concerning and the state needs to deal carefully with the community's expectations and willingness to explore new alternatives as future projects may not be so well received.

c) National Institution of Crime Prevention and Offender Reintegration¹⁷⁵

NICRO was first established in 1910 as the Prisoner's Aid Association and has a rich history in human rights, prison and criminal justice reform. They offer diversion programmes, non-custodial sentences and offender reintegration programmes. Within each of these programmes, restorative justice is implemented. Hargovan has also referred to NICRO as an organisation providing restorative justice services in Durban.¹⁷⁶ Organisations such as NICRO and Khulisa receive funding from the Department of Social Development in order to provide support services at strategic points throughout South Africa with Diversion Programmes being a top priority.

d) Phoenix Zululand¹⁷⁷

Phoenix Zululand runs restorative justice programmes in the ten prisons in Zululand.¹⁷⁸ The organisation has a strong team of facilitators who are experts in terms of dealing with the prisoners and in involving them in the restorative processes so that there is true compassion and a burning need to change.⁷⁷

¹⁷³ Ibid 16.

¹⁷⁴ Ibid 17.

¹⁷⁵ NICRO <http://www.nicro.org.za> accessed on 26 August 2015.

¹⁷⁶ Hargovan (note 36 above) 13.

¹⁷⁷ National Institution of Crime Prevention and Offender Reintegration (hereinafter referred to as NICRO)

¹⁷⁸ Phoenix Zululand <http://www.nicro.org.za> accessed on 26 August 2015.

It should also be added that there are several other institutions that also run projects under the restorative justice umbrella on varying scales. Not all of the projects are subject to monitoring and evaluation, which is unfortunate as the work is not recorded. However, how, what and where questions become extremely important as there are no *prescribed* minimum norms and standards to guide the implementation of restorative justice and this raises serious concerns. Skelton and Batley refer to a set of norms and guidelines which have been developed by a network of civil society organisations to guide the implementation of restorative justice practices.¹⁷⁹ However, whether or not this has received government's endorsement is not clear and should these norms and guidelines receive government's endorsement it would have to be used as a yardstick against which all restorative processes in the country would be measured against.

e) The Department of Correctional Services

The White Paper¹⁸⁰ for Correctional Services has a definite restorative justice focus. The Department views 'restorative justice as a restorative response to crime, recognising the crucial role of the victim, families of both victim and offender and members of the community in the criminal justice process and offenders are held directly accountable to those whom they have violated.'¹⁸¹ Importantly the research revealed the following:

Approaching all victims about the restorative justice programme was the beginning of the real healing of their wounds. The majority of them were crying when telling their stories and all of them were still suffering from the aftermath of the crime committed against them. It was clearly stated that they did not receive any psychological, emotional or financial support from the community or the criminal justice system to help them cope after they had become victims of crime.¹⁸²

With this type of approach victims were not only empowered but also a part of the process. Offenders acknowledged their accountability and took responsibility for their actions. With this transformation came the true 'values of restorative justice: these include personal responsibility, apology, healing, mercy forgiveness and reconciliation.'¹⁸³ Cavanagh states

¹⁷⁹ Skelton & Batley (note 25 above) 39.

¹⁸⁰ Note 12 above.

¹⁸¹ Luyt & Matshaba (note 126 above)87.

¹⁸² Ibid 94.

¹⁸³ Kgosimore (note 17 above) 73.

that ‘the value of this process is that it gives hope to those affected by crime, honours their dignity and treats them with respect.’¹⁸⁴

Although this study was fraught with several challenges regarding the lack of knowledge on restorative justice practices, inmates and correctional staff lacked information on what the process was about and what it would entail and the social workers who carried out the processes did not have adequate training,¹⁸⁵ the project was successful in that 50 cases were mediated and led to long-awaited healing for those participants. This study should show the Department that restorative justice when correctly implemented does change lives and that it has a vital role in reintegrating offenders back into society.

f) The National Prosecuting Authority

Skelton and Batley¹⁸⁶ refer to a 2008 research report by the National Prosecuting Authority which details the numbers of cases and types of offences at three pilot sites in Atteridgeville, Mitchell’s Plain and Phoenix. The roll-out of these projects involved a prosecution level¹⁸⁷ referral – in other words once an offender’s case is placed on the court roll the prosecutor then discusses with the victim and offender the options and benefits of restorative justice and if the parties are amenable to attempting to resolve their differences in this way, the case is then referred to either a local service provider (NGO providing restorative justice services) or the Department of Social Development for six to eight weeks for a restorative justice outcome. Skelton and Batley state further that ‘although such matters require an “acknowledgement of responsibility” on the part of the offender, no formal plea is entered, the charge is withdrawn and there is no criminal record’.¹⁸⁸ Firstly, there is no mention of the victim’s rights; secondly, the focus is still on the offender: the minute an offender notes that he/she will not have a criminal record, there is a definite willingness to try the process. This would be for the wrong reasons and would not be authentic restorative justice. The greatest weakness with the practice of restorative justice in this context is that it

¹⁸⁴ Cavanagh (note 59 above).

¹⁸⁵ Luyt & Matshaba (note 126) 99.

¹⁸⁶ Skelton & Batley (note 25 above) 43.

¹⁸⁷ Hargovan (note 31 above) 30.

¹⁸⁸ Skelton & Batley (note 25 above) 44.

is still under the will of a retributive justice system and focused on the offender. Is this approach then not ‘compulsory compassion’?¹⁸⁹ It is definitely not ‘victim empowerment’.¹⁹⁰

4.4 Successes and notable challenges

One of the most important facts that can be drawn from the above restorative justice practices is that the justice system is definitely engaging with the concept. The practice affirms Skelton and Batley’s claim that ‘restorative justice has emerged clearly in South African writing, practice and jurisprudence’.¹⁹¹ However, whilst legislation, policies and guidelines can look wonderful on paper, the true challenge, it is submitted, is in transferring that to practice accurately. That practice then would have to be evaluated against the theoretical understanding of restorative justice to gauge whether approaches hit the nail on the head or strayed. The role players in the implementation of restorative justice is a combination of government and NGOs. The challenges faced by NGOs in terms of lack of funding need to be addressed as they clearly have a central role to full in rolling out restorative justice in the country.¹⁹²

The decision to apply restorative justice in petty cases and not serious offences can also lead to discrimination and this approach should be treated with caution. This not only weakens the process but also undermines what the principle itself essentially stands for. Makiwane cautions that ‘this lukewarm reception of restorative processes is detrimental to the administration of justice’.¹⁹³ It is also very limiting and damaging not to allow serious cases the benefit of restorative justice. Internationally, it has been shown how effective restorative justice is with these types of offences.

Some of the early restorative justice projects operated on a purely separate track from traditional justice. Reasons for this vary from a lack of support from government to scepticism from the public. However, the many legislative and jurisprudence developments are clearly indicative of an interlinking of the two tracks. While restorative justice has been

¹⁸⁹ Hargovan (note 29 above) 113.

¹⁹⁰ Ibid 113.

¹⁹¹ Skelton & Batley (note 25 above) 49.

¹⁹² Hargovan (note 31 above) 32.

¹⁹³ Makiwane (note 14 above) 79.

very effective in dealing with domestic violence cases, there are concerns that this could lead to challenges with the implementation of the Domestic Violence Act.¹⁹⁴

¹⁹⁴ The Domestic Violence Act 116 of 1998.

CHAPTER 5: SOUTH AFRICAN LEGISLATION AND JURISPRUDENCE

5.1 Introduction

In 1994, after the country's first democratic election, significant attention was paid to legislation, as the new government's priority was to establish a country that would be fair and democratic to all South Africans. It sought to achieve this by developing a sound constitution entrenching *justifiable* human rights. Simultaneously, the development and amendment of various legislation followed to ensure that the South African government could never undermine nor undervalue the people of the country and could never be subjected to a harsh criminal justice system.

Importantly though, South Africa is also a co-signatory to the 1999 United Nations ECOSOC resolution on restorative justice.¹⁹⁵ In as much as there is no single piece of legislation which exclusively deals with restorative justice, there are several pieces of legislation which either directly or indirectly refer to it. Historically, South Africa as far back as the advent of the Truth and Reconciliation Commission has engaged with the notion of restorative justice. While the concept can be difficult to comprehend, especially to adversarial minded individuals, its results when achieved are extremely cogent and could lead to solutions to most if not all of the problems in the criminal justice sector.

While initially South Africa has been very hesitant in taking steps to integrate restorative justice,¹⁹⁶ the last few years have seen quite a few positive developments in legislation, case law and academic articles – an emerging jurisprudence.

The following pieces of legislation have particular reference to the restorative justice paradigm:

1. The Child Justice Act
2. The Probation Services Act 197
3. The DCS White Paper
4. The Restorative Justice National Policy Framework

¹⁹⁵ Skelton (note 35 above) 507.

¹⁹⁶ Makiwane (note 14 above) 79.

¹⁹⁷ The Probation Services Act 116 of 1991 as amended by Act 35 of 2002.

5. The Sentencing Framework Bill

It is apparent that government recognises the possibilities of what restorative justice has to offer in terms of solutions and innovation.

5.2 *Legislation with a restorative focus*

5.2.1 *The Child Justice Act*

On 1 April 2010, after extensive research, the Child Justice Act was eventually implemented in South Africa. The Act deals with children who come into conflict with the law with a strong focus on restorative justice. It goes further to define restorative justice ‘as an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation’.

The Child Justice Act offers three levels of diversion options¹⁹⁸. It is apparent that these options can be offered in serious and not so serious cases as well. It caters for victim and offender mediation services and family group conferences. All options carry the element of restoration with the aim of uniting the child into the family unit. The Act aims to focus restorative justice on young offenders as it is believed that they are more responsive to rehabilitation and reformation.

5.2.2 *The Probation Services Amendment Act*¹⁹⁹

This Act²⁰⁰ is the first to specifically mention restorative justice and provides a legislative framework for the various projects and innovative service delivery that the department puts together. The Amendment Act introduces restorative justice approaches in that mediation services should be offered to victims of crime and that restorative justice programmes should be established as part of appropriate sentencing and diversion options.

¹⁹⁸ Note 32 above, section 2 & section 8.

¹⁹⁹ The Probation Services Amendment Act 35 of 2002.

²⁰⁰ Skelton & Batley (note 25 above) 38.

5.2.3 *The Victim Services Charter*

This Charter²⁰¹ provides for the empowerment of victims specifically and identifies that victims need to have a central focus in the criminal justice system. There is the perception that the criminal justice sector is too offender focused, hence the various strategies to ensure that victims do not experience secondary victimisation. Unfortunately, government has been unable to give effect to the policy appropriately and the system still does not protect and uphold the rights of victims.²⁰² Restorative justice does offer possible solutions, although there is the notion that while restorative justice promotes the rights of victims, is it not using the process still to focus rather on reintegrating the offender back into society?²⁰³ The Charter also recognises the importance of restorative justice in instilling a strong human rights culture so that people themselves can play an active role in resolving conflict and building their communities.

5.2.4 *Restorative Justice National Policy Framework*

The National Policy aims to look at crime and crime prevention in an integrated manner and to increase community participation by using the principles of restorative justice. It provides guidelines to all relevant government departments and each department's role and responsibility is clearly outlined. Departments would have the responsibility to create budget allocations as per their roles in terms of the policy framework.

5.2.5 *The Sentencing Framework Bill*

The South African sentencing system is in a process of evolving. Its challenges are many and the demands to meet the needs of modern society greater. It was against this backdrop that the South African Law Commission's Report formulated and proposed the Sentencing Framework Bill after intense research with the relevant role players in the criminal justice system. The Bill is very clear that restorative justice has a role to play in improving sentencing in future. Terblanche²⁰⁴ points out in the Research Report on the Sentencing Framework Bill that 'restorative justice is included in the list of effects that a sentence should

²⁰¹ The Service Charter for Victims of Crime in South Africa, 2004

²⁰² Kgosimore (note 17 above) 79.

²⁰³ Hargovan (note 29 above) 113, 118.

²⁰⁴ S Terblanche 'Research on the Sentencing Framework Bill' available at <http://www.osf.org.za>, accessed on 16 July 2015.

achieve.’ Critically and of significance the Report states that instead of considering the four purposes of punishment: deterrence, rehabilitation, restitution and retribution, every sentence should attempt to find an optimal combination of restorative justice, the interests of society and a crime-free life for the offender²⁰⁵.

5.3 Sentencing legislation

5.3.1 Introduction

Punishment restores collective confidence in the integrity of the moral social order²⁰⁶ by ensuring that the wrongdoer is adequately dealt with. Thus the aim of sentencing and punishment is to achieve justice for all members of society especially the victims and offenders directly affected by the commission of the crime. Since South Africa is a democratic society this then becomes the constitutional basis for imposing punishment. While a national priority in any country is to create a society where there is law and order and general peace, the reality is that public confidence in the existing criminal justice system is extremely low as crime rates still continue to increase despite government’s efforts.

More specifically, the current sentencing process in South Africa has resulted in a lack of faith in the criminal justice system and the judiciary.²⁰⁷ To society it appears that court judgments lack consistency and that the punishments never fit the crime. This is exacerbated by the ongoing increase of crime and the perception that offenders are not punished effectively. However, this presents part of the problem which calls for an innovative manner in dealing with offenders and where society’s perceptions of punishment would also have to be radically overhauled to create space for a new way of thinking about punishment and rehabilitating offenders.

5.3.2 Sentencing overview

Since 1997, sentencing has fallen within the ambit of the Criminal Procedure Act which allows judicial officers a great deal of discretion in terms of the sentencing. In addition, the Criminal Law Amendment Act²⁰⁸ also known as the Minimum Sentences Legislation and the

²⁰⁵ Ibid 22.

²⁰⁶ D Garland ‘Sociological Perspectives on Punishment’ (1991) 14 *Crime and Justice* 115, 123.

²⁰⁷ National Crime Prevention Strategy 1996, 43.

²⁰⁸ Criminal Law Amendment Act 105 of 1977.

Correctional Services Act²⁰⁹ has attempted to transform the sentencing process. The Criminal Law Amendment Act has the effect of ensuring that the sentences carried out in terms of the Act receive relevant attention in that such offences receive appropriate sentences unless there are substantial and compelling reasons which point otherwise.

Of major relevance is that both the Executive Summary of the Law Commission's Report²¹⁰ and the report's recommendations itself, succinctly indicate that restorative justice has a major role to play in the sentencing framework. This bodes well not only for the future development of restorative justice but also for the sentencing stage which is clearly calling out for policy alignment and innovative strategies.

In terms of section 276 of the Criminal Procedure Act²¹¹ the following punishments or sentences are imposed within the criminal trial parameters and are complementary to other penal provisions and guidelines:

- a) Imprisonment
- b) Periodical imprisonment
- c) Declaration as a habitual criminal
- d) Committal to any institution established by the law
- e) Fines
- f) Correctional supervision
- g) Imprisonment from which a person may be released into correctional supervision at the discretion of the Commissioner or the parole board

The sentencing process in the criminal justice system clearly faces many challenges and loopholes which are among the many reasons that government requested the Law Commission to conduct an investigation into the entire sentencing system. The South African Law Commission New Sentencing Framework Bill emphasises the need for innovative sentencing²¹² with inclusive reference to restorative justice. Terblanche states the Commission's central findings as follows:

²⁰⁹ Correctional Services Act 111 of 1998.

²¹⁰ Terblanche (note 167 above).

²¹¹ Note 112 above.

²¹² Note 170 above, 10.

An ideal system should be seen to promote consistency in sentencing, deal appropriately with concerns that particular offences are not being regarded with an appropriate degree of seriousness, allow for victim participation and restorative initiatives and, at the same time, produce sentencing outcomes that are within the capacity of the State to enforce in the long term.²¹³

Of major relevance is that both the Executive Summary of the Law Commission's Report²¹⁴ and the Report's recommendations themselves, succinctly indicate that restorative justice has a major role to play in the sentencing framework. This bodes well not only for the future development of restorative justice but also for sentencing which is clearly calling out for policy alignment and innovative strategies. Further, in order to increase access to justice and to deal with cases faster, courts could use restorative justice as an option at different stages throughout the trial.²¹⁵

Significantly, the Draft Sentencing Framework Bill²¹⁶ indicates that the purpose of sentencing is 'to punish convicted offenders for the offences of which they have been convicted'. While this is very much in keeping with the theoretical underpinnings of punishment, mere imposition of sentences has not served as a sufficient deterrent nor has it effectively reduced the crime rate in the country. 'The experience of punishment and of imprisonment is deeply damaging, often encouraging rather than discouraging criminal behaviour'²¹⁷. But a positive development is stated by Brunk as follows:

The important issue is that restorative justice has taken its place along competing theories of approaches to crime and punishment: retributive, utilitarian, rehabilitative and restitutive.²¹⁸

The psychological and emotional damage on a victim is serious and in many instances victims are not even 'seen', still less 'heard'. Offenders are also emotionally affected and need therapeutic intervention so that there is no repeat offending. The focus needs to move to what can be done to assist *all* the participants in a case so that there is no secondary

²¹³ Terblanche (note 167 above) 10.

²¹⁴ Ibid 10-11.

²¹⁵ Hargovan (note 31 above) 30.

²¹⁶ The South African Law Commission Report, Project 82 *Sentencing (A new sentencing framework)*, November 2000.

²¹⁷ Howard Zehr "Retributive Justice, Restorative Justice" (1985) *New Perspectives on Crime and Justice: Occasional Papers of the MCC Canada Victim Offender Ministries Paper Issue No.4*.

²¹⁸ C Brunk 'as cited in Skelton & Batley, "Restorative Justice: A contemporary South African Review" (2008) 21(3) *Acta Criminologica* 40'.

victimisation nor repeat offending nor a dysfunctional community. Rather, a shift in approaches needs to occur so that victims feel a part of the process and offenders need to accept accountability and communities need to be a part of the entire process. It has been suggested ‘that victims need to experience forgiveness and offenders too need such an experience – how else are they to put their pasts behind them?’²¹⁹ If one had to follow the path of the Truth and Reconciliation Commission in dealing with the atrocities of apartheid it would reveal that it took a peace- making, restorative approach. The similarities between the two approaches are not different at all except in terms of the scale of the offences.

Bazemore states as follows:

What is new in restorative justice is the agenda for systemic reform in the response to crime. It is based on the priority given to repairing the harm caused by crime through involving the victim, the community and the offender in a face to face meeting. In this regard, restorative justice advocates propose broad changes in the justice process, which will ultimately shift the focus more towards community rather than criminal justice solutions. These changes seek to build capacity in communities to sanction crime, reintegrate offenders, repair the harm to victims and promote genuine public safety.²²⁰

Important sentencing principles have long since been laid down in *S v Zinn*²²¹ where it was stated that every effective sentence should have taken cognisance of the ‘Zinn Triad’ and take the following into account:

- a) The crime
- b) The offender
- c) The interests of society

While this approach is supposed to ensure that sentences are fair, balanced and appropriate it has a major flaw in that there is clearly no reference to the victim, which is contrary to the country’s Victim Empowerment Policy.²²² The criminal justice system does not support the victim or the victim’s rights at all. It is more offender focused and this type of culture and behaviour has contributed to the secondary victimisation of victims. However, in the case of

²¹⁹ Note 36 above, 3.

²²⁰ Note 133 above 12-13.

²²¹ *S v Zinn* 1969 (2) SA 537 A.

²²² National Policy Guidelines on Victim Empowerment, Department of Social Development, available at <http://www.gov.za>. Accessed on 13 March 2015.

S v Matiyityi,²²³ the appeal court dealt with this aspect by stating that courts should not only refer to the *Zinn* triad but also take into account the needs of the victim. Van der Merwe states that it was further held in *Matiyityi* that the constitutional value of human dignity is reaffirmed when victims are accommodated more effectively within the criminal justice system.²²⁴

The Sentencing Framework Bill specifically outlines the following challenges with the current sentencing system:²²⁵

1. Similar cases are dealt with differently, in that there is no consistency;
2. Disproportionate sentences are given in terms of the nature of the case;
3. Petty, minor crimes receive unnecessary sentences of imprisonment; and
4. Offenders are released from prison without service of a significant portion of their sentence.

The Bill also suggests two legislative responses to the above shortcomings:²²⁶

1. Mandatory minimum sentences
2. New release procedures

Mandatory minimum sentences were introduced by the Criminal Law Amendment Act²²⁷ and came into operation in 1998. Government implemented mandatory sentences for specific offences in response to the demands of the public that criminals be dealt with more strictly with the hope that crime would drop. It was also envisaged that mandatory minimum sentences would assist in developing consistent sentencing practices. However, the implementation of this Act has evidently not met its intended objectives and, if anything, has resulted in further challenges.²²⁸ It has worsened the issue of crowded prisons and thereby potentially the infringement of constitutional rights as well.

²²³Note 107 above.

²²⁴ A Van der Merwe 'Sentencing' (2012) 1 *SACJ* 151,153.

²²⁵ The New Sentencing Framework Bill, 3.

²²⁶ Ibid 4.

²²⁷ The Criminal Law Amendment Act, 105 of 1997.

²²⁸ SS Terblanche, 'Sentencing guidelines for South Africa: Lessons from elsewhere' (2003) 120(4) *SALJ*, 858.

It is also clear that the criminal justice system is overburdened and faces numerous challenges.²²⁹ While many sentences are delivered purely as a punitive measure due to the high crime rate and the call for harsher sentencing this has failed to deal with the problem facing the system, and harsher sentences do not appear to have had the envisaged impact. So the question then is whether restorative justice can solve the problems of sentencing as well as other challenges of the justice system. Restorative justice does have all the principles and values²³⁰ but its successful integration is dependent on its proper implementation. However, transferring the policy from paper to practice is full of challenges and implementation issues and dependent on the transformation of the justice system.

Restorative justice processes can significantly improve the functioning of the justice system. However, improving the functioning of the justice system is not the primary objective of restorative justice. The core essence of restorative justice is in upholding the rights of victims. In achieving that as its primary aim, perhaps the effective implementation of restorative justice could lead to other advantages for the justice system. But as succinctly stated by Skelton and Batley, ‘restorative justice is clear on this: the victim is at the centre of the process, and the offender must be held accountable’.²³¹ Hargovan cautions as follows:

Although attractive to governments, from a victim’s perspective there are clear limitations and dangers inherent with this process. The incorporation of restorative justice ideas and techniques into the criminal justice process may not turn out to be in any broader sense about restorative justice. For example the idea of victim offender mediation may be taken up, but without any emphasis on achieving restorative outcomes, but rather a source of useful ideas and techniques in the fight against crime, especially youth crime, with no fundamental change in the character or focus of the criminal justice system.²³²

5.4 Restorative justice jurisprudence in SA

This section provides a summary of current restorative practices in the South African environment. It also includes an analytical assessment of cases where judicial officers have considered restorative justice or options. The overview will highlight the different legislation and policies which have a restorative influence. The country has clearly moved from its

²²⁹ Makiwane (note 14 above)79.

²³⁰ Skelton (note 32 above) 228.

²³¹ Skelton & Batley (note 25 above)49.

²³² Hargovan (note 29 above) 113.

infant fumbling with restorative justice to nurturing and developing this philosophical approach such that it has resulted in a positive emerging jurisprudence which augurs very well for the future development of this type of justice.

One of the very first cases where restorative justice was mentioned was in 2006 in the constitutional court case of *S v Dikoko*,²³³ where Justice Sachs encouraged the view that the law of defamation move towards apology and a more restorative outcome as opposed to punishment. This is significant in that restorative justice is mostly used in criminal matters while here in a civil case a restorative approach was emphasised, clearly indicating that the judiciary understands that the criminal landscape has changed and as such innovative alternatives need to be utilised for the criminal justice system to progress. The concurring minority judgments of both Justices Sachs and Mokgoro, while focusing on a restorative justice approach, went further and made the point that dignity could not be restored through disproportionate punitive monetary claims and that apology would have been a more powerful tool, more in keeping with African notions of *ubuntu* and our constitutional commitment to dignity.²³⁴

In 2008 in the case of *S v Shilubane*,²³⁵ the court voiced its opinion that it is apparent and clear that retributive justice is not successfully dealing with crime rates in the country and it was stated that innovative and different approaches should be utilised to enhance the deteriorating state of sentencing approaches. In *Shilubane's* case, a first offender received nine months of direct imprisonment for the theft of seven fowls. On review the sentence was amended to R500 with a suspended sentence. The court accurately referred to major challenges in the criminal justice system such as overcrowding and reiterated that while restorative justice may not reduce crime it can nonetheless be creatively integrated into current sentencing options.

In the same year in *S v Maluleke*²³⁶ a woman was sentenced to eight years' imprisonment of which three of the eight years were suspended on specific conditions including an apology to the victim's mother. The accused and her husband had beaten the deceased to death when they found him breaking into their home with the apparent intent to steal. This particular case

²³³*Dikoko v Mokhatla* 2006 (6) SA 235 CC.

²³⁴ Skelton & Batley, 41.

²³⁵ Note 21 above.

²³⁶*Maluleke*(note 34 above).

relied on the decision of *S v Potgieter*²³⁷ where the accused charged with murder was sentenced within a correctional supervision framework. The case received a great deal of attention and the court's decision was met with criticism and misgivings. Judge Bertelsmann acknowledged and utilised the philosophy of restorative justice as he deemed this a suitable case for its application. However, a suspended sentence for a murder charge was considered by many to be inappropriate. Relying on the principles of restorative justice and greatly led by the demands of the case, in particular the deceased's mother, Judge Bertelsmann satisfactorily not only endorsed the usage of restorative justice but implemented it as well in his decision, despite the uproar it caused in the legal environment.

Further, in the case of *S v M* (Centre for Child Law Amicus Curiae),²³⁸ the court in a majority judgment in considering the best interest of children when sentencing the primary caregiver took cognisance of the restorative justice approach, as this type of justice would keep the family unit together and meet all constitutional obligations created by section 28 of the Constitution. It also highlighted that correctional supervision allowed for innovative use of restorative justice and the fact that the accused was willing to meet the people she had defrauded and pay back the money meant that the objectives of restorative justice would be met.²³⁹ Restorative justice focuses on healing the harm caused by allowing the offender to take accountability for his or her actions and for the victim and the community to be a part of the process. This particular case is an exemplary application of core restorative justice principles.

It must also be acknowledged that when a country or a system attempts to deal with new concepts there are bound to be teething issues. It has been no different with the restorative justice concept. In the unreported case of *DPP v Thabethe*²⁴⁰ the trial court had incorrectly applied the restorative justice approach to a rape charge involving a child under the age of sixteen years of age. It was stated that as much as the victim's voice is important, it must also be accorded appropriate weight in the determination of an appropriate sentence.²⁴¹ Even though the magistrate indicated that based on the mitigating factors there was substantial and compelling evidence for a restorative justice approach on appeal the accused was sentenced to

²³⁷ *S v Potgieter* 1994 (1) SACR 61 A.

²³⁸ *S v M*, note 2 above.

²³⁹ *Ibid*, para 65-para 72.

²⁴⁰ *DPP v Thabethe* (619/10) [2011] ZASCA 186 (30 September 2011) para 14, 15 and 21.

²⁴¹ *Ibid* 9.

10 years' imprisonment. It should be noted that especially when dealing with restorative justice there has to be a balance between the needs of the victim, the needs of the offender and the needs of the community. If there is an overemphasis of one at the expense of the other two, it will be very unlikely that justice would be served. These are part of the lessons learnt and are aspects that the players in the criminal justice system would have to acknowledge and put guidelines in place to ensure that the integration of restorative justice into our justice system is as smooth as possible.

In *S v Saayman*²⁴² the court sentenced the accused on fraud charges to two years' imprisonment suspended for five years on condition that the accused undergo 18 months of correctional supervision. However, the magistrate went further to add that the accused must ask for forgiveness from the victims by standing outside court with a police official on a specific day for 15 minutes with an apology placard. The magistrate indicated that this was not at odds with restorative justice²⁴³ because the accused had caused undue shame and inconvenience to the complainants when, as a result of her actions, they had been reported to the Credit Bureau. A certain amount of shaming, 're-integrative shaming',²⁴⁴ is said to be important in a restorative justice case as it assists the offender in not only accepting accountability but in also acknowledging the harm done. But this process has to be carried out in a dignified manner or it will be counter-productive and unconstitutional. Counter-productivity takes place when stigmatisation occurs and this is where the wrongdoer is shamed and treated disrespectfully as an outcast.²⁴⁵ This type of action would have undermined the accused and instead of integrating the accused into the community would have pushed her further away. An underlying principle of restorative justice is that it seeks to repair relationships not break them.

It is crucially important moving forward that a framework and guidelines be put in place that would prevent these types of misunderstandings from occurring. This should also be accompanied by training for all role-players in the criminal justice sector. Significantly though, it is very clear that the judiciary has accepted that there is room for restorative justice in the justice system and have clearly begun to engage with it. While this is promising, it also

²⁴² *S v Saayman* 2008 (1) SACR 393 (E).

²⁴³ *Ibid* 403.

²⁴⁴ J Braithwaite, E Ahmed, V Braithwaite 'Shame, Restorative Justice and Crime' available at <http://www.anu.edu.au/fellows/jbraithwaite>, accessed on 28 October 2015.

²⁴⁵ *Ibid* 397.

points to a need for greater policy development which would provide guidance to decision makers and other role-players. In order to effectively entrench the concept of restorative justice it needs institutional approval and a clearly outlined policy and procedural guideline such as the 'Practice Standards for Restorative Justice: A Practitioner's Toolkit'.²⁴⁶ This comprehensive document provides the necessary guidelines on how to effectively implement and monitor restorative justice projects.

5.5 *Current approaches to practising restorative justice*

A justice system can have the most clearly outlined policy but failure to effectively transfer from paper to practice could render its implementation problematic and ineffective. Currently South Africa lacks an institutional body which ideally should be spearheading the development of restorative justice in the country. Within the South African criminal justice system the following restorative justice processes are carried out:

- a) Victim and offender mediation – This occurs more often than not at either at a South African Police Services (SAPS) referral level or pre-trial stage where the case is referred to mediation by the prosecutor. A report is then furnished to court to indicate whether or not the outcomes of mediation were successful. Both processes are voluntary and allow for the participants to stop mediation and opt for the formal justice route should they wish to.
- b) Family Group Conferencing – This is an informal meeting between all the interested and related parties to the conflict. This can occur at any stage of the trial, i.e. at a SAPS level, pre-trial stage or pre-sentencing and as part of sentencing itself.
- c) Victim Impact Panels – This process invites the victims to share with the offender and other offenders their perspectives and feelings in terms of how they have been wronged and how the commission of the offence has changed their lives.

It is also not accurate to assume that all restorative justice processes yield positive results. If there is disagreement or if the offender fails to take accountability for his/her actions – restorative justice will not apply and the case should be referred back to the criminal justice system. If the rules and processes are not clearly outlined from the outset, if projects are not

²⁴⁶ C Frank 'Practice Standards for Restorative Justice A Practitioner's Toolkit' available at <http://www.restorativejustice.org/10fulltext/frankcheryl>, accessed on 28 October 2015.

aligned with the National Policy guidelines this will lead to conceptual challenges and since this approach engages with the public, government has to tread cautiously.

It has been proposed²⁴⁷ that a restorative system might take one of four forms in the way it could relate to the conventional criminal justice system:

1. A unitary model in which the restorative system is the only one available;
2. A dual track model or parallel but interlinked model in which both systems stand side by side with designated passages between them for parties to move back and forth, where a separate restorative justice track is created but is linked to and interdependent with the formal criminal justice system;
3. The safety-net model in which the restorative system is the basic response to crime, but conventional processes are available when needed (e.g. for determining guilt when contested); and
4. The final model – a hybrid in which both approaches are linked in a single system where conventional processes are followed until guilt is ascertained, at which point it shifts to restorative processes.

A unitary model where restorative justice replaces the conventional justice system will not work in the socio-political environment of this country. Further, the theoretical underpinnings of punishment, specifically retribution, have a necessary role to fill. The safety-net model is where restorative processes are the first response to any crime and traditional justice is incorporated when necessary. This type of approach would result in chaos and not function in an environment where there is still a need for the potential infliction of punishment if there are penal transgressions. The dual-track model is more or less where South Africa currently is with regard to its implementation of restorative justice. The justice system functions independently, but whenever it is deemed necessary then the option of restorative justice, which is always there, is used. However, it is believed that ‘the dual track model’ would be disadvantageous as this would not allow for the total reintegration of restorative justice but still leave it on the borders of the criminal justice system.²⁴⁸ The country’s criminal justice system needs to move from the dual-track approach, where restorative justice is interlinked,

²⁴⁷ DW Van Ness “Creating Restorative Systems” (2002) *Prison Fellowship International*, 20.

²⁴⁸ Hargovan (note 31 above) 25.

to a fully integrated restorative criminal justice system. This is something far larger than envisaged by the models above.

Generally, restorative justice has been limited to petty and minor cases. Perhaps this is because government is reluctant to embrace the new concept as this has huge financial implications in terms of the integration thereof. It is far safer and strategic to allow for it to loiter at the edges of the justice system where institutions interface with the concept at their own cost.

However, a notable concern with the implementation of restorative justice in the South African context is whether the implementation is focused on the empowerment of victims or whether it serves a dual purpose of utilising the victims to ensure that offenders are reintegrated into society.²⁴⁹ The victim is central in restorative justice and drives the process towards a successful outcome. Traditionally, the criminal justice system is offender focused and this challenge needs to be overcome if there is to be appropriate adherence to the rights of the Victims Charter. Theoretically there is no denying that restorative justice has a lot to offer the justice system but as Braithwaite accurately points out ‘there are also grounds for worry that restorative justice can trample the rights of offenders and victims, dominate them, lack procedural protections and can give police, families or welfare professionals too much un-accountable power.’²⁵⁰

A further concern is the involvement of prosecutors as mediators in the mediation of cases. Magistrate’s courts have a target number of cases where alternative dispute mediation by way of mediation has to be conducted. Due to the lack of service providers and government’s slow and laborious steps, prosecutors ‘mediate’ cases. This approach to mediation is questionable. It diminishes the full effect of restorative processes as prosecutors are viewed as state representatives and their approach is offender focused. Victims need to be an integral part of restorative justice or it is not restorative justice but rather a forced decision by the state to attempt to deal with some of its many challenges.

²⁴⁹ Hargovan (note 29 above) 119.

²⁵⁰ Note 26 above.

CHAPTER 6: CHALLENGES AND ADVANTAGES OF RESTORATIVE JUSTICE

6.1 *Challenges with restorative justice*

While restorative justice does offer short- and long-term solutions in improving the justice system, a successful integration of the project is required at all levels. A successful integration would mean an assessment of the positives and negatives and how best to strengthen and address the shortcomings within the sector. As most of the role-players are familiar with the concept it does become easier for a transparent discussion. A critical component of any restorative justice process is that it must be focused on the victim. Skelton and Batley conclusively state: 'Restorative justice is clear on this: the victim is at the centre of the process, and the offender must be held accountable.'²⁵¹

6.1.1 *Restorative justice is soft on crime*

A major challenge is the perception that restorative justice is a soft option and that it ignores the need for punishment.²⁵² Here South Africa is in the midst of its democracy and confronted with an innovative concept which has achieved ground-breaking success not only locally but internationally as well. Yet society's perceptions have become so clouded by what they understand to be punitive justice²⁵³ that they cannot conceive that this type of restorative justice could be effective or even fair. South Africans have become hard and tough and view punishment as some form of hardship which must be imposed on the wrongdoer.

The more uninhabitable prisons become the happier society becomes as this is how criminals should suffer. While it can be acknowledged that the increasing crime rate in the country has disillusioned society, such that people believe that to stop crime, punishments should be heavier and harsher, what of *ubuntu* and what the Constitution sought to achieve with this specific inclusion? The concept of *ubuntu* lends itself to the ideology that people should be given second chances and the opportunity to reform their behaviours.

Flowing from this, it is necessary that society understand the challenges and plight of many that come before the justice system. Apartheid has left many scars, some physical and many psychological, and coupled with the anger and pain that many carry, it becomes clear why

²⁵¹ Skelton & Batley (note 25 above) 49.

²⁵² Batley (note 54 above) 126.

²⁵³ Kgosimore, 70.

there is no forgiveness or empathy. This challenges and undermines *ubuntu*. Further, it affects the assessment of restorative justice and contributes to the notion that ‘restorative justice is soft on crime’²⁵⁴ and hence is not suitable for the South African punitive justice system.

Flowing from suggestions that the Department of Justice and Constitutional Development develop a strategy document in terms of how each government department would interplay with restorative justice, the department has produced the National Policy Framework for Restorative Justice. While the document outlines the relevant roles that the different government departments should play, there are without a doubt follow-up steps which departments would now have to make in terms of formulating their own policies and mandate and vision for restorative justice. The respective departments would have their own vision for restorative justice which would have to be aligned with their departmental objectives and strategy. Numerous empirical research studies have been conducted on certain restorative justice projects which clearly indicate an overall positive message for the concept while recognising due limitation and or challenges that do arise.

6.1.2 Prosecutors as mediators

Court backlogs, high caseloads, delays in processing huge numbers of remands and overcrowded correctional facilities plague the criminal justice system.²⁵⁵ Currently in South Africa the National Prosecuting Authority has adopted the restorative justice approach to innovatively deal with some of these aspects. One such approach is that each court has a target of the number of cases that need to be resolved by alternative dispute resolution or mediation, as it is referred to. The prosecutors operate as gatekeepers for restorative justice in this instance – they identify which cases would be suitable for mediation and mediate these cases themselves unless there are service providers in the areas where the courts are operating. If there are suitable service providers then in most instances the cases are referred to those institutions. This type of approach poses the following problems:

- a) Prosecutors are seen as state representatives to carry out justice. Participants may sometimes feel that as a prosecutor can never represent their interest, with the exception of the victim, so the mediation process will not be fair.

²⁵⁴ Batley (note 54 above) 126.

²⁵⁵ Hargovan (note 134 above) 13.

- b) The lack of training for prosecutors who carry out mediation is concerning. Most prosecutors do not receive any training. Some are fortunate if the state has budgetary allocations which permit this. Prosecutors have a huge responsibility in terms of managing their court loads and mediating cases. Over and above that the challenges they face daily in respect of mediation is also concerning.²⁵⁶ Most prosecutors are dependent on other organisations to provide such training. A further complexity reveals itself in certain courts where sometimes at the start of a year, a prosecutor is identified and trained to implement alternative dispute resolution. However, in a month's time the prosecutor is relocated or promoted and the court then places an inexperienced prosecutor in this role. This is concerning for many reasons, but most importantly if a mediation process is not handled appropriately it could not only lead to secondary victimisation of the victim²⁵⁷ but also an unsuccessful integration back into society for the offender which would signify a potential to re-offend.
- c) Thirdly, this type of alternative dispute resolution/mediation approach is not consistently²⁵⁸ applied throughout the courts in South Africa. So yet again, in a country fraught with a history of inequality, some courts (mostly in urban areas) would be the main users of this innovative tool while people in rural areas would not even have heard of the concept.

A further concern with this approach is in instances when the prosecutors themselves draft the mediation agreement concluded between the victim and the offender. This is prejudicial and inconsistent with fair and just principles that restorative justice is associated with. While the National Prosecuting Authority can be applauded for developing its own guidelines in terms of the roll-out and implementation of restorative justice it has not been assessed against any minimum norms and standards for restorative justice. This is because from a policy perspective government needs to take the lead role and develop practice standards against which all organisations will be evaluated. It is agreed that while prosecutors should be the gatekeepers of this philosophy they should remain separate from the mediation process.

²⁵⁶ Hargovan (note 31 above) 34. Reference is made to a National Prosecuting report where shortcomings were tabled.

²⁵⁷ Note 26 above, 51.

²⁵⁸ Ibid 34.

6.1.3 Level of cases

Currently, restorative justice is considered an option mostly with petty and minor offences²⁵⁹ or where a prosecutor was going to withdraw the case in any event, for example due to non-appearance of a witness. In these cases the benefit of restorative justice would be considered. In terms of the Child Justice Act as a policy directive, restorative options are now utilised in respect of children in conflict with the law.

This type of approach is limiting²⁶⁰ in that it denies the justice system the full impact of what a total integration of the concept in the justice system would mean and it also conveys the incorrect message to the public – that restorative justice is not serious as it is only used in minor offences and in respect of child offenders. Further, this selective approach of using restorative justice in certain types of cases could mean that certain victims and offenders in serious and violent crimes would not get the benefit of this approach. They could also be suitable candidates for wanting to change their lives and could very well be just waiting for this restorative opportunity. In a research aimed at evaluating prosecutors as implementers of restorative justice it was indicated that the Department of Justice has to take a strong lead in developing and steering restorative justice, in particular meeting the training needs of prosecutors.²⁶¹

6.1.4 Lack of policy directives

In order for full-scale integration of restorative justice to take place in the justice system there has to be a policy/guideline in place which would guide this. The National Policy Framework is limiting in that it only deals with what each government department's role and responsibility towards restorative justice is. Since civil society appears to be the main driver behind restorative approaches there needs to be clear policy and guidelines in place. Further practice standards for the implementation of restorative justice need to be outlined so that there is consistency and fairness.

²⁵⁹ Makiwane (note 14 above) 79.

²⁶⁰ Hargovan (note 214 above) 14.

²⁶¹ Hargovan (note 36 above) 26.

6.2 Advantages of restorative justice for the South African justice system

6.2.1 Access to justice²⁶²

Rural areas lack proper court facilities and support services provided by the different government sectors, for example diversion and legal aid services. Government is in the process of closing the gaps but the lack of adequate budgets to initiate change as fast as possible remains a limiting factor. Now restorative justice innovatively creates the opportunity to provide access to justice in an alternative manner. At the same time though this would require a commitment and funding²⁶³ to ensuring that all citizens benefitted equally.

6.2.2 The Services Charter for Victims

Perhaps, if appropriately applied, restorative justice could very well promote and support the empowerment of victims, which remains a serious issue in the criminal justice sector. The restorative approach ensures that the victim has a central role in the resolution of the crime. Despite several developments, upholding the rights of victims still remains a challenge. Kgosimore states that ‘crime violates the relationships between the victim, offenders and communities and that the problem with our criminal justice system is that it cannot consider the interests and concerns of victims’.²⁶⁴ By effectively utilising policy guidelines for victims it goes without saying that victims will be placed at the forefront of a crime and once the justice system starts to look at crime holistically it would understand that crime resolution involves mending those very relationships which were damaged by the commission of the offence in the first place. A holistic approach would also enable the state to understand that the community is extremely valuable in not only supporting the victim and offender but in also ensuring that these type of offences do not occur again. This approach of resolving the crime would be shared with the community as well as that of crime prevention. This approach in summary is a restorative approach and is what restorative justice is about.

²⁶² Hargovan (note 214 above) 13. It is stated here that providing access to justice to all of South Africa’s citizens remains one of the country’s major challenges.

²⁶³ Skelton & Batley (note 25 above).

²⁶⁴ Kgosimore (note 17 above) 70.

6.2.3 Legislative developments

Restorative justice has made significant inroads with several pieces of legislation and policies and its specific inclusion in some flags that the concept is foundationally entrenched. Some examples are the Child Justice Act, the Correctional Services White Paper, the Probation Services Act and the Sentencing Framework Bill. Quite correctly Skelton and Batley²⁶⁵ state that restorative justice has emerged clearly in South African writing, practice and jurisprudence and that restorative justice is here to stay. Restorative justice as a new way of thinking and doing justice has also influenced several members of the judiciary in that it has encouraged them to look at justice and sentencing differently. It has also impacted and is slowly attempting to reform the justice system even if it is from the boundary line.

6.2.4 International Benchmarking

Internationally, restorative justice is fully implemented in many justice systems and works extremely well.²⁶⁶

This knowledge and these skills can be shared and learnt so that the goal of creating an effective criminal justice system is realised earlier. In the United Kingdom and Australia²⁶⁷ as early as 1995 there has been increased research into this philosophy of justice. There are many projects implemented and driven by NGOs. There are also quite a few restorative justice training institutions which offer mediation training and services. New Zealand²⁶⁸ with its indigenous practices has seen excellent progress. The concept of restorative justice has greatly influenced the legal system. The cultural acceptance by the Maoris²⁶⁹ clearly inspired and fast tracked the infiltration of restorative practices into the country's legislation. Canada appears to have successfully integrated restorative justice into their criminal justice system.

6.2.5 Traditional courts

Traditional courts are an advantage in South Africa which should be explored further. Not only do they meet the demand of access to justice but they can and could also provide

²⁶⁵ Skelton & Batley (note 41 above) 49.

²⁶⁶ Note 133 above, 9; Batley & Skeleton (note 25 above) 37; Gavrielides (note 43 above) 25, 48-50.

²⁶⁷ Sherman & Strang (note 42 above) 4.

²⁶⁸ K Daly & R Immerigeon 'The past, The Present and the Future of Restorative Justice' available at <http://www.griffith.edu.au>, accessed on 18 October 2015.

²⁶⁹ Ibid 8-9.

restorative options. However, a fundamental challenge dealing with the Traditional Courts Bill is the protection and recognition of the rights of women, particularly in rural areas, and whether or not this will be integrated into the Bill itself. It is suggested that this area would have to be closely monitored.

6.2.6 *Reparation*

Victims of crime can claim for restitution but under a separate section of the Criminal Procedure Act.²⁷⁰ It has been pointed out that this section is not as effectively utilised as it should be but a probable reason is that most offenders are not in a financial position to pay the victims. However, reparation in restorative justice is far more innovative and allows for creativity in forging resolutions for the victim and the offender. For example, an offender in a domestic violence case could agree to cook a meal or wash dishes for a week for the victim. This may seem little but in such a relationship and with restorative justice it has the effect of balancing the power relations which was upset by the crime.

6.2.7 *Greater restorative awareness*

This would mean that the integration of the concept with the public has already begun and would not be a completely new process. The wheels of restorative justice have clearly begun to turn. We should aid that process by having clear road maps, proper guidelines and expert training and development in this regard.

6.2.8 *Implementation points:*

It has been pointed out that a restorative justice process can take place at the following points: It has been pointed out that a restorative justice process can take places at the following poinpre-trial stage, pre-sentence and sentencing stage and post sentence stage.²⁷¹ Innovative use of this type of approach would assist the courts with overburdened court backlogs, allow for community participation, uphold victims' rights and lead to improved public confidence in the justice system.

²⁷⁰ Section 300 of Act 51 of 1977.

²⁷¹ Hargovan (note 31above) 30.

CHAPTER 7: CONCLUSION

The criminal justice system has slowly taken great strides towards the integration of restorative justice into the criminal justice sector, whether wittingly or unwittingly. This progress has received attention nationally²⁷² and internationally.²⁷³ It is now evidently the time for all sectors of the government, civil society and the citizens of the country, to move forward together to embrace an innovative system of justice which would not only reduce recidivism and overcrowding in prisons but also the escalating crime rates. In terms of the National Policy Framework, the government intends through an integrated approach to increase community participation in the criminal justice sector. This cohesive approach will improve the waning public confidence in the current criminal justice system.²⁷⁴ Government is clearly committed to the inclusion of restorative justice principles but it needs to move from the boundary line and take up a central position from where it can guide and steer the process.²⁷⁵

Its legislative reference in many pieces of legislation is a positive sign that allows for further development within particular frameworks. Pilot projects which have been and are still being run in the country show immense potential and recommend that government institutionalise²⁷⁶ the concept. However, it must be understood that whilst restorative justice is aligned with policy development, practice in the South African context, falls far from the finish line. Practice, currently, is not restorative justice but rather an integrated processes where restorative approaches are utilised to enable the justice system to recover from its setbacks and focus on getting things right. The country has an expanding restorative justice jurisprudence and whilst the judiciary must be commended for breaking out of the retributive mind set they need to be capacitated so that the primary aim of restorative justice is understood. For current practices to equate to restorative justice, victims have to be included in the process.²⁷⁷ Skelton reinforces that restorative justice emphasises the harm done to the victim and the accountability of the offender for repairing that harm.²⁷⁸ The conceptual nature

²⁷² Skelton & Batley (note 25 above) 37-40.

²⁷³ Sherman & Strang (note 42 above) 1.

²⁷⁴ Kgosimore (note 17 above) 69.

²⁷⁵ Tshehela (note 20 above) 16.

²⁷⁶ Hargovan (note 31 above) 24.

²⁷⁷ DJ Schmid 'Restorative Justice: A New Paradigm for Criminal Justice' (2002) 34 *VUWLR* 91-92.

²⁷⁸ Skelton & Batley (note 25 above) 48. Thus the offender is held responsible, and the aim is to restore him to the status of a moral being who can make and act on choices, although he or she may need assistance to do so.

of restorative justice focuses on making citizens better people and building peaceful communities. Nonetheless, the challenges are realities and have to be dealt with if we wish to continue with the restorative justice conversation. Fragmented practices and approaches, a lack of understanding, perceptions, failure to highlight victims in its approach and practice and a speedy need to solve the problems of a burdened justice system are strong issues that will impede the development and growth of restorative justice in the country. The paper has also highlighted the value that restorative justice has for the participants involved in crime, for communities, for sentencing and for the overall justice system too. However there has to be a committed, concerted effort in transferring the theory from paper to practice, because a disregard of the aforementioned issues could potentially mean that the practice may not be restorative justice after all but rather a broader attempt to restoratively solve many of the problems facing the country and within the justice system itself.

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10 March 2016

Mrs Devani Delomoney (9143774)
School of Law
Howard Colelge Campus

Dear Mrs Delomoney,

Protocol reference number: HSS/1256/014M

Project title: Will a restorative justice approach to sentencing improve the efficacy and functioning of the criminal justice system?

Approval Notification – Amendment Application

This letter serves to notify you that your application and request for an amendment received on 09 December 2015 has now been approved as follows:

- Change in Title

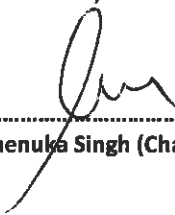
Any alterations to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form; Title of the Project, Location of the Study must be reviewed and approved through an amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

Best wishes for the successful completion of your research protocol.

Yours faithfully



.....
Dr Shenuka Singh (Chair)
/ms

Cc Supervisor: Professor Shannon Hctor
Cc Academic Leader Research: Dr Shannon Bosch
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